Date: 20121214

Files: 566-02-577, 3081 and 3439

Citation: 2012 PSLRB 130

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARK HALFACREE

Grievor

and

DEPUTY HEAD
(Department of Agriculture and Agri-Food)

Employer

Indexed as
Halfacree v. Deputy Head (Department of Agriculture and Agri-Food)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Grievor: Mary Mackinnon, counsel

For the Employer: Joshua Alcock, counsel

Heard at Toronto, Ontario,
November 21 to 25, 2011 and June 5 to 6, 2012.
Written submissions filed July 11, 2012.

I. Introduction

[1] Before his termination on April 28, 2009, Mark Halfacree ("the grievor") worked as a racetrack officer for the Canadian Pari-Mutuel Agency ("the Agency"), which operates under the purview of the Department of Agriculture and Agri-Food ("the employer"). He worked out of the Agency's site at Woodbine Racetrack in Toronto, Ontario. This decision deals with the following three grievances filed by Mr. Halfacree:

a. PSLRB File No. 566-02-577, about a one-day disciplinary suspension imposed on him on March 2, 2006;

b. PSLRB File No. 566-02-3081, about a five-day disciplinary suspension imposed on him on March 20, 2007; and

c. PSLRB File No. 566-02-3439, about his disciplinary termination on April 28, 2009.

[2] The three grievances were first dealt with by way of mediation before me on May 25 and 26, 2011 in Toronto. Before the mediation began, the parties agreed that it should proceed by way of a med/arb, and if the mediation was unsuccessful, I would then act as the adjudicator.

[3] The mediation proved unsuccessful. Accordingly, I heard evidence on November 21 to 25, 2011 and on June 5, 2012 in Toronto. Oral submissions were heard June 6, and final written submissions were received on July 11, 2012.

II. Preliminary objection by the Agency

[4] At the start of the hearing on November 21, 2011, counsel for the Agency made a preliminary objection as to the scope of the termination grievance in PSLRB File No. 566-02-3439. To understand the objection, it is necessary to briefly summarize the grievance details.

[5] Mr. Halfacree was terminated on April 28, 2009 for insubordination – essentially, for his refusal over two years to respond to the employer's requests that he explain his absence from work over that period.

[6] Mr. Halfacree filed his termination grievance on May 28, 2009. He stated as follows:

> *I grieve the termination of my employment is unjustified and is discriminatory to me.*
>
> *I grieve the abuse of authority, breach of trust, harassment, discrimination and wrongdoing during my employment with the Canadian Pari-Mutuel Agency.*
>
> *I rely on any and all relevant provisions of past and current Program and Administrative Services Table 1 Collective Agreement, NJC directives, employer policies, applicable legislation, regulations and Acts.*
>
> *[Sic throughout]*

[7] By way of remedy, Mr. Halfacree sought the following:

> 1. *That the termination be rescinded and I be reinstated retroactive to the date of my disclosure of wrongdoing, discrimination & harassment to the Minister of Agriculture & Chief of Staff Mr. Chad Seaver on October 17, 2006*
>
> 2. *Any and all benefits, credits, leave, monies, bonuses, salaries lost from October 17, 2006 as a result of the employer's actions & lack of action be reinstated/reimbursed immediately;*
>
> 3. *That I be provided with the accommodation & transfer I requested and acknowledged by the ADM-HR-AAFC Mr. Steve Tierney;*
>
> 4. *That an immediate investigation be conducted, into my employment with the CPMA, with regards to discrimination under the grounds of family status;*
>
> 5. *That an independent investigation be conducted as to the abuse of authority, breach of trust, harassment and wrongdoing in the workplace by Ron Nichol, Bob McReavy, Tim Pettipas, Leslie Smith HR AAFC, and Claudine Séguin;*
>
> 6. *Any & all other remedies deemed just in the circumstances, and, that I be made whole.*
>
> *[Sic throughout]*

[8] The grievance was attached to a Form 21 that was filed with the Public Service Labour Relations Board ("the Board") on February 2, 2010 under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*").

[9] Counsel for the employer understood that counsel for Mr. Halfacree intended to lead evidence about the allegations that the Agency failed to accommodate the grievor

on the grounds of family status. He submitted that I was without jurisdiction to hear such evidence or to consider it as far as the termination grievance was concerned because it was not a disciplinary matter, and it had already been grieved and decided in other proceedings.

[10] Counsel for the grievor objected. She stated that she learned of the objection for the first time on the Friday before the hearing began. She submitted that the evidence was part and parcel of the grievor's history that led to the termination.

[11] I ruled that I would reserve my decision on the accommodation issue, hear all the evidence and then hear further submissions on it at the end.

[12] It was agreed that the employer would call its evidence first since all three grievances were about discipline. Counsel for Mr. Halfacree would then call her evidence. After that, the employer would have the right to call any rebuttal evidence on the accommodation issue that he considered necessary.

III. <u>The hearing</u>

[13] On behalf of the employer, I heard evidence from the following individuals:

a. Claudine Séguin, who between September 2006 and August 2007 was Field Operations Supervisor at Woodbine and thus was responsible for scheduling the racetrack officers, including Mr. Halfacree;

b. Robert McReavy, who until 2008 was the Agency's regional manager for Ontario and so was Mr. Halfacree's direct supervisor (save for those periods when Ms. Séguin acted in that capacity);

c. Ron Nichol, who for a time in late 2005 to early 2006 was Manager, Program Coordination and National Standards with the Agency, whose role was to provide advice and assistance to regional managers about regulatory issues;

d. Tim Pettipas, who from early 2005 until January 2007 was the Agency's executive director;

e. Chantale Courcy, who served as the Agency's executive director after Mr. Pettipas; and

f. Sean Malone, who became the Agency's executive director in April 2009 and who drafted the termination letter signed by Assistant Deputy Minister (ADM) Pierre Corriveau on April 28, 2009.

[14] On behalf of the grievor, I heard evidence from the following individuals:

a. the grievor;

b. John Langs, a regional vice-president of the bargaining agent since August 2005, who became involved with issues about Mr. Halfacree's relationship with management in early 2007;

c. Joe Scatozz, an Agency officer and co-worker of Mr. Halfacree as well as a sometime shop steward for the bargaining agent;

d. Michael Witkowski, another co-worker of Mr. Halfacree; and

e. Gary Dionne, the union local president for periods relevant to these proceedings.

[15] The employer called in rebuttal on the accommodation issue the following witness:

a. Leslie Smith, an Agency labour relations officer from 2005 to 2009.

[16] I should mention that I do not see the need to provide an exhaustive précis of each witness' testimony or of the grievor's. Each (with the exception of the grievor) testified straightforwardly in the absence of the others. Moreover, a substantial part of their evidence was based on a walk-through of the extensive emails, faxes and correspondence exchanged between the employer and Mr. Halfacree over the years. No witnesses challenged the accuracy of the documents they they had sent or received. In the circumstances, I concluded that, in most cases, the most accurate evidence of what happened was contained in or supported by the correspondence placed into evidence by both parties. Accordingly, I based my findings of fact on that testimony and those documents, and I will refer to specific evidence or testimony only when necessary to explain or resolve particular points at issue or to fill in or elaborate the documentary record.

IV. Background

[17] These three grievances were filed in the context of a lengthy and complex back story, which began some years before the events that gave rise to them. However, it provides a context that helps one understand some of the events that led to the grievances.

[18] For the period at issue, Mr. Halfacree worked as a racetrack officer. Those officers visit racetracks and conduct inspections to ensure that betting regulations are being followed. The main track in Ontario is Woodbine. Other, smaller tracks are in southwestern Ontario, in locations such as Hamilton, Woodstock, London and Sarnia. Some televise racing from Hong Kong and Australia (referred to as "Teletheatre"), and officers visit those tracks from time to time, again to ensure compliance with the pari-mutuel regulations. The Agency's Ontario Regional Headquarters is located a block or two from Woodbine ("the Ontario Regional Office").

[19] Mr. Halfacree was first hired as an officer by the Agency in April 1989. He was hired as a part-time, seasonal employee. He worked on that basis until 1991 and then spent a year working for the Manitoba Horse Racing Commission as a senior judge. He then worked as a senior judge for the Ontario Racing Commission part-time from 1992 to 1996.

[20] Mr. Halfacree returned to the Agency, again part-time, in September 1996. At that time, he lived in Ingersoll, Ontario, but worked primarily at Woodbine. He had two young children, a daughter and a son. According to Mr. Halfacree, Woodbine was about an hour and three-quarter's drive from Ingersoll "on a good day."

[21] Mr. Halfacree became a full-time officer effective September 9, 2002, as a result of a mediated settlement of a dispute between Mr. Halfacree and the Agency ("the 2002 settlement"). The 2002 settlement also provided that Mr. Halfacree ". . . decided to re-locate *[sic]* and will be re-imbursed *[sic]* accordingly;" see Exhibit 14. Mr. Halfacree testified that he understood at that time that he was expected to work out of the Agency's Woodbine office. The relocation referred to Mr. Halfacree's consequential desire to move closer to Toronto.

[22] Mr. Halfacree also understood that, as part of the 2002 settlement, he was to be placed immediately in a government relocation program that would cover or at least

contribute to the cost of his move from Ingersoll to a home in or at least nearer to Toronto. However, he was not placed in the program until April 2003. According to him, it meant that he incurred an additional seven months of travel and daycare expenses as a result of living in Ingersoll but working in Toronto. Accordingly, in his words, "[I] deemed myself to be in travel status during that time but the employer refused to pay travel time or travel expenses . . . Mr. McReavy refused to pay."

[23] Mr. McReavy at that time was the Agency's regional manager for Ontario. His responsibilities included overseeing operations in the Ontario region, scheduling officers and dealing with complaints about racetracks. Mr. Halfacree was his direct report. For a time late in 2007, the direct report for officers was Ms. Séguin, but until then, Mr. McReavy had that responsibility. Mr. McReavy testified (and was supported by Mr. Halfacree and Mr. Dionne) that his relationship with Mr. Halfacree became very strained after 2002.

[24] Mr. Halfacree entered the relocation program in April 2003. He was provided with a relocation officer. He made several house-hunting trips (paid for by employer) in or near Toronto. He put an offer on one house. However, he testified as follows: "based on my financial situation I was not able to move." He said that he "made zero" after his travel and daycare expenses (for which the employer refused to reimburse him) were taken into account. No evidence was adduced as to why he made an offer on that home if his financial position was so dire.

A. <u>The one-day suspension</u>

[25] Evidence was adduced that, in 2004 and 2005, Mr. Halfacree was absent from work a number of times. His family physician, Dr. Matsuo, from time to time provided brief notes stating that the grievor had visited her office for different reasons. The grievor often provided the notes after Mr. McReavy asked for medical certificates confirming the reasons for the grievor's absences; see Exhibit U4, Tab 1.

[26] It is clear to me from the correspondence between Mr. Halfacree and Mr. McReavy in 2004 and 2005, that they were at loggerheads as to a reasonable substantiation for the grievor's absences. For example, in March 2005, Mr. Halfacree apparently provided certificates signed by a nurse practitioner. Mr. McReavy questioned the qualifications and ability of a nurse practitioner to provide medical certification and asked why a doctor had not been seen. Mr. Halfacree did not respond

to Mr. McReavy's first email and, when prompted, eventually responded that he had scheduled another doctor's appointment and that, if Mr. McReavy had any questions, he should call the doctor. Mr. McReavy eventually spoke with Dr. Matsuo. On March 25, 2005, Mr. Halfacree wrote to him and stated that he found his ". . . conduct once again both harassing, offensive and without foundation." He added that, for "[a]ny future inquiries as to the validity of [his] sick leave certificates please contact the Physician listed, as this information has been authorized for release to [Mr. McReavy];" see Exhibit U4, Tab 1, pages 34 to 36. Mr. Halfacree confirmed in his testimony that he had authorized Dr. Matsuo to speak with his employer.

[27] Mr. Halfacree submitted a number of medical certificates for sick leave in spring and summer 2005, totalling roughly 20 days by mid-August; see Exhibit U4, Tab 2. On August 10, 2005, Mr. McReavy wrote to him to express concern over his continuing sick-leave absences. He suggested a mediated or facilitated discussion with the grievor once he returned to work. Mr. McReavy obtained two dates, August 17 or 18, from the Agency's Office of Conflict Resolution and suggested them to Mr. Halfacree; see Exhibit U4, Tab 2.

[28] The meeting did not take place. Mr. Halfacree testified that he had medical appointments on August 17 and 18. At the hearing, he denied that his failure to meet constituted a refusal to meet with management and offered that he had had several meetings with management between August 2005 and April 2007 (when he left on sick leave) and that he was "willing to meet with anyone from the employer." However, he stated that his "only preference was not to deal with the Office of Conflict Resolution." Mr. Halfacree testified that his only other experience with the Office of Conflict Resolution resulted in the 2002 settlement. Despite the 2002 settlement, he had not considered that office's involvement a positive experience. I should state that, as will become clear in this decision, it is quite clear that, at least in retrospect, Mr. Halfacree was rarely prepared to meet with any of his superiors.

[29] A meeting was eventually held on September 22, 2005. Mr. Halfacree and his representative, Mr. Dionne, were present, as were Mr. McReavy and Ms. Smith, a human resources consultant with the employer. A number of matters were discussed. One was requests for sick, medical or dental leave. The central point was that the Treasury Board's *Leave With Pay Policy* provided that employees could be granted at most half a day (3.75 hours) to attend medical or dental appointments. They were expected, if

possible, to schedule appointments at the beginning or end of their shifts and to report to work for the rest of their shifts. If that was not possible, they were to provide an explanation from their doctors or dentists as to why the entire day was needed; see Exhibit E2, Tab 5.

[30] On October 6, 2005, Mr. Halfacree faxed Mr. McReavy to inform him that, based on his medical appointment on September 29, he had two appointments on October 25 and that he would not report for duty on that day; see Exhibit U4, Tab 2. On October 25, he submitted a medical certificate that stated that he had a doctor's appointment on that day and that he would return to duty on October 26; see Exhibit U4, Tab 2.

[31] On October 14, 2005, Mr. Halfacree emailed Mr. Pettipas and stated that, ". . . pursuant to [his] terms of settlement for relocation," he was attaching his travel hours "for [Mr. Pettipas'] review and payment;" see Exhibit U8. The claim covered two periods. The first was for April 1, 2002 to September 9, 2002, when he was a part-time employee, and the second was for the period from September 10, 2002 to March 31, 2003, between when he became a full-time employee and when he entered the relocation program. He claimed a travel time of two hours each way between Ingersoll and Woodbine and stated that he would claim most of that time at the overtime rate plus the shift rate. He noted that, under the terms of the 2002 settlement, ". . . as a single parent, all childcare is also to be reimbursed, and will be submitted;" see Exhibit U8.

[32] I note that Mr. Pettipas arrived at the Agency in early 2005. He testified that, soon after his arrival, he became aware of a number of concerns being expressed by employees in the Ontario region, particularly at Woodbine. A workplace assessment, which had been conducted before he arrived, had concluded that a breakdown in communication had occurred between employees and management in the Ontario region. His goal was to follow up on those conclusions and recommendations, to improve workplace communication and morale. Later in 2005, he instituted several measures, which he hoped would improve relations in the region. He testified that there was "a lot of water under the bridge between Mr. McReavy and the staff." Concerns had been expressed that Mr. McReavy's experience as an officer was so far in the past that he had lost touch with the day-to-day life of officers at that time. Mr. Pettipas said that he "tried to get past that." One way was to put Ms. Séguin, who

had worked as an officer much more recently, in place as a supervisor for the officers, including Mr. Halfacree. Another meeting was held with staff in October 2005, which he recalled was a follow-up to the workplace assessment.

[33] Mr. Halfacree testified that he and all the other officers attended the meeting, as well as bargaining agent representatives. Mr. Halfacree was a steward for Woodbine local, but he let Mr. Dionne handle the bargaining agent side of the meeting. Scheduling issues were discussed, as was a variable shift schedule arrangement (VSSA) that was intended to resolve some of the scheduling issues that had developed.

[34] In the meantime, Mr. McReavy developed questions about Mr. Halfacree's October 25 request for sick leave. As he later recorded in a letter dated November 14, the medical form stated that Mr. Halfacree would not be available to report to work either before or after the medical appointment. In other words, Mr. Halfacree sought leave for his entire 10-hour shift that day. As noted, the relevant Treasury Board policy permitted only up to 3.75 hours of paid leave for medical appointments. Mr. McReavy pointed out to Mr. Halfacree that, if he wanted leave with pay for the whole day, he would have to submit a medical certificate explaining why he would not be able to report to work before or after the permitted 3.75 hours of leave or submit a request for leave without pay for the rest of the day; see Exhibit E3, Tab 1.

[35] Mr. Halfacree did not respond, and on November 2, Mr. McReavy called him. He testified that he called "to get some information as to why [the grievor] was not able to come to work after his appointment." The conversation did not go well. According to Mr. McReavy, Mr. Halfacree "didn't want to respond to the follow-up anymore, he just hung up on me." Mr. Halfacree admitted in his testimony that he hung up on Mr. McReavy and that hanging up on a supervisor was "problematic."

[36] Mr. Halfacree next submitted medical certificates for leave for November 2 to 4, 2005, signed by Dr. Matsuo, on November 7, which specified an expected return to duty for him of November 8, 2005; see Exhibit U4, Tab 2. That caused the employer some confusion because Mr. Halfacree had advised it on September 13 that he would not report for work on November 8 due to medical appointments; see Exhibit U4, Tab 2. On November 9, Mr. McReavy emailed him and asked for an explanation. It was not clear on the evidence as to whether one was provided.

[37] However, on November 10, 2005, Mr. Halfacree emailed Mr. Pettipas to inquire about the status of his October 14 request to be reimbursed for travel and daycare expenses. He complained that he had thought that Mr. Pettipas would look after the matter, ". . . only to learn that it has been kicked back down to the local level for review by the people who messed it up in the first place." He noted that Mr. McReavy rejected his original claim and went on to state that, since his return to the Agency, he had ". . . found no honest value in local or senior management." He concluded by requesting a personal meeting with Mr. Pettipas, stating as follows: "Anything else is just plain insulting and offensive, and I have had enough of that since 1996;" see Exhibit U8.

[38] On November 14, 2005, Mr. McReavy wrote to Mr. Halfacree. He recounted his version of the November 2 phone call and stated that Mr. Halfacree's hanging up on him was disrespectful and was a violation of "the principles of a respectful workplace;" see Exhibit E3, Tab 1. He added that any similar incidents in the future could be subject to discipline.

[39] On November 24, 2005, Dr. Matsuo signed a medical certificate covering November 22 to 25, 2005, stating that Mr. Halfacree would return to work on November 29; see Exhibit U4, Tab 2. On November 30, Mr. Halfacree emailed Mr. McReavy and others to note that he would not report for duty on December 1 due to medical testing in London, Ontario, at 14:30. He also advised that he would undergo tests on December 6 and that he would advise them as to the date on which he would return to work; see Exhibit U4, Tab 2.

[40] On December 2, Dr. Matsuo signed a medical certificate for December 1. On December 8, she signed a certificate for December 6 to 8, with a return-to-duty date for the grievor of December 9, and on December 21, she signed a medical certificate for December 21 with a return date of December 22. All were provided to the employer.

[41] Given that background, it is perhaps not surprising that, on December 20, 2005, Mr. McReavy emailed Mr. Halfacree about the amount of sick leave he was taking. He asked him to report to the Ontario Regional Office (near Woodbine) at the start of his shift on December 28, 2005 for a meeting to discuss his sick leave as well as a number of first-level responses to several grievances that Mr. Halfacree had filed; see Exhibit E3, Tab 2.

[42] Mr. Halfacree responded on December 27 at 19:56. He stated that he did not wish to meet with Mr. McReavy because there was ". . . no value in meeting at the local level." He stated that he had ". . . asked for an independent investigation of all outstanding employment issues." He was willing to meet with Mr. Pettipas. He said that he would contact Mr. Pettipas to arrange a meeting; see Exhibit E3, Tab 2. Note that it was not clear to me on the evidence whether Mr. Halfacree ever arranged that meeting.

[43] Mr. Halfacree was asked about that response during his testimony in direct. He stated the following:

> *I did not want any further contact with Mr. McReavy at all . . . I had filed a complaint about his conduct . . . I'd had enough of his conduct and his abuse . . . he was being abusive by not treating me with respect, not in a manner that other officers out of Woodbine or other Ontario locations were being treated . . . I thought that I was the only one having to file for medical certified leave . . . I was constantly having these phone calls with Mr. McReavy that ended up with no constructive resolution . . . it was just a completely poisonous relationship and by this time I had had enough.*

[44] Mr. Halfacree reported for work at Woodbine on December 28, 2005. Mr. McReavy called him to find out why he was not at the Ontario Regional Office, as instructed. Mr. Halfacree said that he would not report to the meeting. When Mr. McReavy told him that he had to comply, he repeated his refusal, stated that the conversation was over and hung up; see Exhibit E3, Tab 14. Mr. Halfacree then emailed Marc Leclaire, Manager, Values and Ethics and Mr. Pettipas, with a copy to Mr. Dionne, stating that he had returned from medical leave and that he had a harassment complaint drafted and ready to file with Mr. Leclaire's office; see Exhibit E3, Tab 3.

[45] On January 4, 2006, Mr. McReavy emailed Mr. Halfacree to inform him that he wished to meet with him on January 11 about his conduct on December 28. Since discipline could ensue, the grievor was advised that he was entitled to have representation if he wished; see Exhibit E3, Tab 4. On January 6, Mr. McReavy changed the meeting to January 12, given that Mr. Halfacree had called in sick and might not have received the earlier email; see Exhibit E3, Tab 5.

[46] On January 10, 2006, Mr. Halfacree filed a harassment complaint against Mr. McReavy; see Exhibit E21. On the same day, Mr. Halfacree emailed Mr. McReavy, stating that he would not attend the meeting scheduled for January 12 because of his

harassment complaint; see Exhibit E3, Tab 3. He repeated that advice on January 11, copying his email to, among others, Mr. Dionne; see Exhibit E3, Tab 5.

[47] The meeting was eventually rescheduled for 18:00 on January 20, 2006. On January 18, Mr. Nichol (at that time Manager, Program Coordination and National Standards) spoke with Mr. Halfacree and told him that, since disciplinary action could potentially be taken against him, he was entitled to have representation. Mr. Nichol advised him in a later email that same day that he was instructed to report to the Ontario Regional Office to start his scheduled shift on January 20; see Exhibit E3, Tab 7. Mr. Halfacree responded that same day, stating that he was "willing to meet with [Mr. Nichols]" but that he wanted his representative (Mr. Dionne) to be present and that Mr. Dionne ". . . will be in touch as to his availability;" see Exhibit E3, Tab 7.

[48] As it turned out, the meeting did not take place on January 20 because Mr. Halfacree called in sick on January 19 and 20; see Exhibit E3, Tabs 8 and 10. Mr. Nichol wrote to him on January 20 seeking to reschedule the meeting and asked the grievor to advise him as to his availability for the weeks of February 6 or 13; see Exhibit E3, Tab 8. Mr. Nichol received no response from Mr. Halfacree.

[49] On February 14, 2006, Mr. Leclaire advised Mr. Halfacree that his harassment complaint of January 10 against Mr. McReavy would not be pursued. He noted that the allegations represented complaints about the exercise of management's right to allocate work schedules or to insist on adherence to job standards or had already been the subject of a grievance. He acknowledged that there was no doubt that Mr. Halfacree and Mr. McReavy had "a conflictual relationship" and recommended that they seek mediation through the Office of Conflict Resolution; see Exhibit E21.

[50] On February 17, Mr. Nichol emailed Mr. Halfacree at 15:34, noted the lack of response to his January 20 letter and advised him that given the lack of a response, he was scheduling a fact-finding meeting with the grievor for February 23 at 13:30 at the Ontario Regional Office. Mr. Halfacree was scheduled to be at Woodbine that day, and Mr. Nichol asked him to report to the Ontario Regional Office at the start of his shift to attend the meeting. Mr. Nichol concluded with the note that Mr. Dionne had ". . . been advised of this meeting and will participate should [the grievor] choose to have him present." Mr. Dionne was copied on the email; see Exhibit E3, Tab 9.

[51] At 20:38 on February 17, Mr. Halfacree responded to Mr. Nichol's email by filing another harassment complaint. He emailed Mr. Leclaire (and copied several people, including Mr. Nichol) to file his ". . . complaint of harassment, retaliation, threats and intimidation received from . . ." Mr. Nichol and Ms. Smith; see Exhibit E3, Tab 10. He stated that, when he spoke with Mr. Nichol on January 18 about the January 20 meeting and advised him that his attendance would be dependent on Mr. Dionne's availability, he was met with ". . . disrespect, offensive remarks and a tone for [him] to report regardless of Mr. Dionne's availability;" see Exhibit E3, Tab 10. He went on to state that Mr. Nichol said that he had been advised by Ms. Smith that Mr. Dionne was available but that, in fact, Mr. Dionne ". . . know [*sic*] nothing of a Friday night disciplinary meeting on January 20/2006;" see Exhibit E3, Tab 10. As corrective action, he sought, among other things, an investigation into what he termed "the harassing and offensive conduct" he received from Mr. Nichol and Ms. Smith on January 18; see Exhibit E3, Tab 10.

[52] I note that, in his testimony, Mr. Halfacree repeated his statement that Mr. Dionne knew nothing about the January 20 meeting. He said that Mr. Dionne told him that he knew nothing about the meeting. On the other hand Ms. Smith, wrote at that time that Mr. Dionne knew on January 18 that there would be a meeting on January 20 and that he was available, albeit reluctantly, to attend; see Exhibit E3, Tab 10. In his direct testimony, Mr. Dionne acknowledged that he knew about the meeting before January 20. Although he said that he had had some concerns about attending an 18:00 meeting in Toronto, he did not say that he could not have attended, had it come to that. However, since Mr. Halfacree ended up calling in sick – which, according to Mr. Dionne, "would not be the first time he did that" – the meeting did not got ahead. I am satisfied on that evidence that Mr. Halfacree's suggestion that Mr. Dionne had not been advised of and did not agree to attend the meeting is incorrect. Ms. Smith was an experienced labour relations officer. She had copied Mr. Dionne on emails in the past. Mr. Dionne had attended meetings in the past. It strikes me as extremely unlikely that Ms. Smith would not have contacted Mr. Dionne to ensure his availability for the meeting. The fact that Mr. Dionne's evidence supports her leads me to conclude that Mr. Halfacree knew both that a meeting was called for Friday, January 20, and that his representative was available to attend. Unfortunately, Mr. Halfacree fell ill again on that day and so was not able to attend.

[53] In any event, on February 22, 2006, Mr. Nichol emailed Mr. Halfacree to confirm that the fact-finding meeting would take place on February 23 at 13:30 at the Ontario Regional Office. He noted that Mr. Dionne had been contacted and that he would be available because of the potential for discipline; see Exhibit E3, Tab 11.

[54] The meeting took place as scheduled on that day. Mr. Halfacree's refusal to meet with Mr. McReavy on December 28, his hanging up on him and his refusal to meet on January 12 were discussed. Mr. Nichol testified that he was impressed with the grievor's demeanour. He was civil and expressed no animosity. Mr. Halfacree admitted that he had lost his temper with Mr. McReavy during the phone call and that he had hung up on him. He did not apologize, but Mr. Nichol had not expected him to. His sense was that Mr. Halfacree did not understand the concept of insubordination and, in particular, the fact that a direct order of a superior was to be obeyed in most circumstances. Taking all those factors into account, including the fact that it was the first time discipline was being imposed on the grievor, Mr. Nichol decided that a one-day suspension was an appropriate penalty.

[55] Mr. Nichol issued the disciplinary action report on March 2, 2006; see Exhibit E3, Tab 14. Before then, on February 24, Mr. Leclaire dismissed Mr. Halfacree's harassment complaint against Mr. Nichol and Ms. Smith. Mr. Leclaire advised that the complaint would not be pursued for a number of reasons, including that the incidents related to labour-management issues governed by the collective agreement; and that disciplinary measures taken in good faith do not constitute harassment; see Exhibit E3, Tab 13.

[56] On February 27, 2006, Dr. Matsuo wrote to Ms. Smith. In an unsigned letter, she advised that she had filled out a form at Ms. Smith's request about Mr. Halfacree's appointments. She wrote the following (Exhibit U4, Tab 2, page 30):

. . .

> *This seems to me to be a duplication of information and of my efforts as this is the information that was filled in on each form that Mark gets filled out each and every time that he has an appointment or illness. Your medical forms do not have any flexibility and if they are causing you to request the same information in a different format then perhaps they should be reviewed as they do not appear to be giving you the information that you require. There has been no inappropriate use of medical leave time as far as I am concerned, by Mr. Halfacree.*

. . .

[57] On March 4, shortly after receiving the disciplinary action report, Mr. Halfacree emailed Mr. Dionne to request that a grievance be filed about the issues and alleged incidents that he noted in his harassment complaint of February 17; see Exhibit E3, Tab 15.

[58] On April 5, 2006, Mr. Halfacree grieved the one-day suspension. Although he recognized that hanging up on a manager was problematic, he thought that the discipline was wrong. He explained as follows in his testimony before me:

> *Based on the fact that I told Mr. McReavy I did not wish to meet with him by reason of his conduct . . . and his conduct became worse after that by trying to force the issue . . . and also because I had been trying to meet with other management to resolve this conflict with Mr. McReavy only to be ignored.*

B. Background to the five-day suspension

[59] On March 24, 2006, Mr. McReavy wrote to Dr. Chernin of the Health Canada Workplace Health and Public Safety Program and requested a fitness-for-work assessment of Mr. Halfacree. Mr. McReavy noted that Mr. Halfacree had advised him that he was commuting to work approximately 1.5 hours each way. He was working a VSSA and was scheduled to work 10 hours each Tuesday, Wednesday and Thursday, and 7.5 hours on Fridays. He noted that, over the previous fiscal year (April 2005 to March 2006), Mr. Halfacree had used 433 hours of sick leave. That was why Mr. McReavy requested a fitness-for-work evaluation; see Exhibit E2, Tab 9.

[60] On April 26, 2006, Mr. Halfacree emailed Mr. McReavy, stating that his tooth had become painful and that he had an emergency dental appointment scheduled for the next day. He believed that he would return to work after that. However, on April 27, 2006, Mr. Halfacree emailed Mr. McReavy that his tooth was bothering him so much that he could not finish his shift. He faxed medical certificates that initially stated that he would return to work on April 27, which was later extended to May 4; see Exhibit U4, Tab 3.

[61] The Agency appears to have had some concern about the dentist's certificates since, on May 17, 2006, Mr. Halfacree was advised by his dentist's office that Ms. Smith had called, seeking information about his past and future dental appointments and the

treatment that he had received. The grievor emailed her on that date, stating the following: "[o]nce again, I find your conduct harassing, offensive and in violation of the Privacy Act." He noted that a certified medical leave request for his dental appointments had been submitted and complained as follows "First it was my family doctor and now my dentist." He reminded her that he had filed an earlier grievance about the Agency's questioning of his doctor's certificates, which was still pending. He asked that she explain her actions; see Exhibit U4, Tab 3.

[62] On May 30, 2006, Mr. Halfacree met with Dr. Goldsand, the consultant appointed to conduct the Health Canada assessment. Mr. Halfacree testified that he was eager to have the chance to tell his side of the story. He also thought that the report would be provided to his employer. Mr. Halfacree also testified as follows that Dr. Goldsand "suggested I was physically fit but that he would send me back to my family doctor." Mr. Halfacree said that Dr. Goldsand "basically was implying that he would leave it up to [the grievor's] family doctor to take action if she thought it was necessary."

[63] I note that Mr. Halfacree's testimony was not entirely supported by Dr. Goldsand's report. The report, dated May 30, 2006, was sent to Dr. Chernin. Dr. Goldsand reported that he had ". . . specifically told [Mr. Halfacree] that medical facts regarding his health conditions would not be passed on to his employer." He noted that Mr. Halfacree had reported to him that he was separated and that he was raising 2 children who were then 17 and 15 years old, that he had a nanny, that his home was in Ingersoll, that he rented a house in Brampton, Ontario, and slept there three nights a week while working at Woodbine, and that he then drove back to Ingersoll to be with his family for weekends and Mondays; see Exhibit U4, Tab 7. After conducting a physical examination and taking a long history from Mr. Halfacree, Dr. Goldsand concluded that he was ". . . physically able to perform all the duties of his substantive position without restriction" and added that, however, ". . . a satisfactory placement in any job is depending *[sic]* on good health, supportive family and friends, and supportive management." That was a reference to his earlier observation that "[c]learly there is significant animosity between Mr. Halfacree and his supervisors"; see Exhibit U4, Tab 7. Mr. Halfacree received the report in April 2007 by way of an application under the *Privacy Act*, R.S.C. 1985, c. P-21, but there was no evidence adduced that he provided it to the employer before his termination; see Exhibit U4, Tab 7.

[64] Dr. Goldsand reported his findings to Dr. Chernin, who in turn on June 21 wrote to Ms. Smith (with a copy to Mr. Halfacree) as follows (Exhibit E2, Tab 10):

> *Based upon our consultant's report, Mr. Halfacree should be considered physically able to perform all the duties of his substantive position without restrictions. We hope the department can work with Mr. Halfacree to develop a mutually acceptable work environment.*

[65] Mr. Halfacree testified that he took the second sentence as recognition that "there was a problem in the workplace between Mr. McReavy and [him]."

[66] Throughout June, July and August 2006, Mr. Halfacree took a few days off here and there for illness or vacation but was otherwise at work; see Exhibit E2, Tab 1, and Exhibit U4, Tab 3.

[67] Mr. Halfacree's workweek, which until September 11, 2006 had been Tuesday to Friday, was changed on that date to Wednesday to Saturday; see Exhibit E2, Tab 8. On September 13 (the first day of his new workweek), he called in sick, and he remained on sick leave for the rest of September; see Exhibit E2, Tab 1.

[68] On September 28, 2006, Mr. McReavy wrote the following to Mr. Halfacree: ". . . to extend my concern hoping that you are making a recovery from whatever health problem you are facing at this time"; see Exhibit E2, Tab 11. He noted that they had spoken on the phone on September 26 and that, at that time, he had told Mr. Halfacree that his sick leave credits were almost depleted. Mr. McReavy asked him which of the following options he preferred:

a. to be temporarily struck-off strength until his expected date of return of October 13, 2006 (as reported by his family doctor);

b. to use vacation leave credits; or

c. to use advanced sick leave credits of 23.08 hours; see Exhibit E2, Tab 11.

[69] Mr. Halfacree responded to the letter by email on October 1. He advised that he wanted to receive advanced sick leave credits for October. He also advised that, upon his return to work, he wanted to meet with Mr. McReavy ". . . to discuss work related matters both as an employee and as the local union steward." He asked Mr. McReavy to

schedule a meeting "with the attendance of Mr. Dionne"; see Exhibit E2, Tab 12, and Exhibit U4, Tab 3, page 21.

[70] On October 11, 2006 Mr. Halfacree called Mr. McReavy and left a voice mail that he was scheduled to return to work on October 18 (rather than October 13, as stated earlier by his doctor). Mr. McReavy wrote that day to request a medical certificate confirming the extension of Mr. Halfacree's absence. He also said that he would like to meet with Mr. Halfacree upon his return to work on October 19 to ". . . follow-up *[sic]* on work related issues previously scheduled with [him] but postponed due to [his] ongoing sick leave absence"; see Exhibit E2, Tab 13.

[71] On the same day, Mr. Halfacree faxed Ms. Séguin and Mr. McReavy about his voice mail. Ms. Séguin testified that she joined the Agency in 2001 and that she became a compliance and training officer. She became a field operations officer in September 2006. That position included the responsibilities of scheduling officers, dealing with their absences and generally ensuring that they did their assigned work. That work brought her into contact with Mr. Halfacree because she was responsible for scheduling and for dealing with absences or requests for leave.

[72] In his voice mail of October 11, Mr. Halfacree requested leave on October 27 to attend a high school awards ceremony for his son. He also advised that he would call on October 12 to discuss his return to work on October 18; see Exhibit U4, Tab 3, page 18.

[73] Mr. Halfacree did not return to work on October 18. Instead, on October 16, he faxed Mr. McReavy and Ms. Séguin a note stating as follows that, due to ". . . a medical appointment today I will be unable to report for duty until November 1, 2006." He also asked to receive advanced sick leave credits ". . . for October 2006 as was proposed by management in September 2006." He added that he had faxed the certified medical leave form; see Exhibit E2, Tab 14 and Exhibit U4, Tab 3, page 20.

[74] On October 20, Mr. Halfacree faxed Mr. McReavy and Ms. Séguin again, stating that he hoped to return to duty in November and again requesting advanced sick leave credits; see Exhibit E2, Tab 15. Mr. McReavy responded on October 27, agreeing to advance sick leave credits pursuant to the Program and Administrative Services collective agreement, to the end of October. He noted that those credits were to be in

addition to the sick leave already advanced and that all the credits had to be reimbursed; see Exhibit E2, Tab 16.

[75] On October 31, Mr. Halfacree faxed Ms. Séguin again. He noted that he had faxed a copy of the certified medical certificate with a new return date of November 16. He noted that his next medical appointment was slated for November 15 and that he hoped to return to duty on November 16. He requested a further advance of sick leave credits; see Exhibit E2, Tab 17.

[76] I note that the medical certificates that Mr. Halfacree provided during almost all the time under consideration in these three grievances were filled out by his family physician, Dr. Matsuo. Each was a standard Health Canada form, titled "Physician's Certificate of Disability for Duty." The form requires a doctor to answer the following three statements with "yes" or "no" answers:

a. "I have been in attendance upon the above named person on or after the date absence began";

b. "I have knowledge, satisfactory to me, of the condition of the above named person on or after the date absence began"; and

c. "In my opinion, the above named person is incapable, by reason of illness or injury, of working at his/her normal occupation."

[77] At the end of the form, the doctor is required to provide an estimated date of return to duty; see Exhibit U4, Tab 3.

[78] From May to November 2006, Dr. Matsuo generally, but not always, answered "yes" to all three statements. On occasion, she left the second statement unanswered. Twice, she scribbled a few barely legible words in the space near the third statement. Finally, she usually provided a new return-to-duty date that was generally roughly two weeks after the date on which she signed the certificate; see Exhibit U4, Tab 3.

[79] Returning to the chronology of events, the medical certificate that Mr. Halfacree referred to in his October 31 fax was from Dr. Matsuo. It was dated October 31. It purported to be for November 1 to 16. She did not answer the second statement. She did not specify what illness or injury prevented him from working during that period; see Exhibit U4, Tab 3, page 24.

[80] On November 1, 2006, Ms. Séguin, then Acting Regional Manager, responded to Mr. Halfacree's October 31 fax. She stated that, absent further information, she was unable to advance sick leave credits for November 1 to 16, 2006. She went on to describe the information she required to assess his request for further sick leave as follows (Exhibit U4, Tab 3):

> *a. Detailed analysis of the Physician's conclusion that you are unable to fulfill your specific job responsibilities.*
>
> *b. A list of physical limitations being experienced by yourself.*
>
> *c. A prognosis for your recovery and return to work.*

[81] Mr. Halfacree testified that, when he received the request, his reaction as follows was that it was "the same old thing . . . they were inquiring for more information to support the leave even though I had supported the leave with a medical certificate." When asked by counsel for the grievor what he meant by that, he went on as follows:

> *It started when they gave me the medical leave forms to get certified medical leave . . . I did what they wanted but then when I did that and went to see a dentist, then they wanted a form for the dentist . . . so I did that too . . . so I was following along with what I was supposed to do by getting the form filled out in accordance with their policy . . . and on top of that, if they had concerns about my leave I gave them authority to call the doctor signing the forms if they thought I was fraudulent.*

[82] On November 3, 2006, Mr. Halfacree faxed Mr. McReavy and copied Mr. Dionne (although he did not copy Ms. Séguin). He acknowledged receiving Mr. McReavy's October 27 letter confirming advanced sick leave credits for October 7 to 31. He also noted that he had sent in a medical certificate for November 1 to 15, 2006 that specified a return date of November 16 and asked to receive advanced sick leave credits or a combination of annual leave credits and advanced sick leave credits for that period. He also asked Mr. McReavy to cancel all annual leave requests that he had made between September 12 and December 31; Exhibit U4, Tab 3, page 23.

[83] By November 2006, Ms. Séguin's concerns about Mr. Halfacree had reached the point that she decided to recommend surveillance. As she explained in a memo of April 2007, and to which she testified at the hearing, she had several reasons for that decision. First, in the three fiscal years starting with 2005-2006, Mr. Halfacree's absences had been significantly higher than other employees, 433, 100 and

117.5 hours respectively, versus average absences for the other employees of 40.81, 46.69 and 54.43 hours respectively; see Exhibit E2, Tab 39, page 2, and Exhibit E2, Tab 2. When Mr. Halfacree was absent, he never answered his phone during normal work hours and generally sent his faxes to the employer around 22:00 to 23:00, which suggested that he might in fact have been working elsewhere; see Exhibit E2, Tab 39, page 1. She also had concerns about the medical certificates, in part because they were often provided for periods before the grievor visited his doctor; see Exhibit E2, Tab 39, page 1. The surveillance was eventually authorized and was conducted in mid-November 2006 but proved unsuccessful, because Mr. Halfacree determined that he was under surveillance almost as soon as it started. Therefore, it was terminated; see Exhibit E28.

[84] In the meantime, Mr. Halfacree did not show up for work on November 16. Instead, he called in on that day and stated that, due to illness, he would not report for work until November 22. He also asked for a further extension of advanced annual leave to cover November 16 to 18. In a letter dated November 16, Mr. McReavy advised that, despite the absence of further medical information that the Agency had requested, he would authorize the advanced leave credits for the two days requested ". . . on compassionate grounds, due to [the grievor's] verbal statement of continuing illness." Mr. McReavy also directed the grievor upon his return to work on November 22 to report to the Ontario Regional Office at the start of his shift at 11:00, to meet with him and Ms. Séguin, Regional Operations Supervisor; see Exhibit E2, Tab 21.

[85] At some point after that letter was sent, Mr. Halfacree provided another certificate, signed by Dr. Matsuo and dated November 21. All three statements were answered "yes," and an expected return-to-work date of November 22 was provided. Mr. Halfacree also provided a short script from Dr. Matsuo that stated, in its entirety, "Mark Halfacree may return to full duties without limitations Nov 22, 2006"; see Exhibit U4, Tab 3, pages 26 and 27.

[86] Mr. Halfacree met with Ms. Séguin on November 22. In a letter dated December 1 (and copied to Mr. Dionne), Ms. Séguin recounted her version of the discussions. Central to her summary was the Agency's concern about the 108.08 hours of advanced sick leave that had been taken that had to be repaid (and that made it difficult for Mr. Halfacree to take new sick leave), the lack of medical information about the

grievor's condition, and the fact that Mr. Halfacree had not consented to Health Canada consulting with Dr. Matsuo. She advised that, in those circumstances, it was unlikely that any further advance of sick or annual leave would be granted; see Exhibit U4, Tab 3.

[87] On November 26, 2006, Mr. Halfacree emailed Mr. McReavy and Mr. Dionne, copying Steve Tierney and Mr. Pettipas. The email was titled, "request for accommodation." He wrote as follows (Exhibit E1, Tab 7):

> *I am requesting accommodation for part of my weekly hours to be worked closer to my residence in South Western Ontario. Possible work sites for a future master schedule would be Western Fair Raceway, Woodstock Raceway, Sarnia and Flamboro. Looking forward to discussing options at our meeting on December 1, 2006.*

[88] Mr. Halfacree testified that he believed that he met with Mr. McReavy, Mr. Dionne and Ms. Smith at about that time. Under extensive prodding by his counsel, he gave the following evidence:

> *Q. Did you explain to Mr. McReavy after you sent this email* [of November 26, 2006] *the basis for your request for accommodation?*
>
> *A. Yes, it was the same request that I had made as far back as 2005 when there was a discussion about my working at Dundas* [racetrack].
>
> *Q. Did you tell him whether it was medical or family accommodation that you were seeking in November 2006?*
>
> *A. Yes.*
>
> *Q. What did you explain was the basis for your request?*
>
> *A. It was for me to work in southwestern Ontario to be closer to my residence or for a transfer to a different department in southwest Ontario.*
>
> *Q. Did you explain why you needed accommodation?*
>
> *A. It was based on family status . . . it was difficult for me to continue working at Woodbine . . . it was also based on my medical needs.*

[89] The grievor also complained that other officers were “driving by [his] door” in Ingersoll on their way to racetracks closer to his home, and he did not see why he could not be transferred into one of those positions.

[90] Ms. Séguin and Mr. Halfacree spoke on December 7, 2006. In a letter of instruction dated December 7, Ms. Séguin outlined what had been discussed. In the vernacular, it would appear that Ms. Séguin read him the riot act. Included in the list of things she required him to do was the following:

a. he was to report to work before and after medical or dental appointments, unless the physician confirmed that he was unable;

b. appointments had to be approved in advance, failing which they would be considered unauthorized leave without pay;

c. since all sick leave credits had been exhausted, he had to request leave without pay when ill or attending a doctor; and

d. medical certificates had to be submitted within seven days of an illness.

[91] The letter was to be placed in his file and it stated that “. . . any breach of these requirements may result in disciplinary action, up to and including termination.” Mr. Halfacree signed the letter, and a copy was sent to Mr. Dionne; see Exhibit U4, Tab 3.

[92] Mr. Halfacree’s request for accommodation was also discussed at the meeting. On December 13, he emailed Ms. Séguin, Mr. McReavy and Mr. Dionne as follows: “From our meeting on December 7, 2006 I am requesting to work closer to my residence. This would be a benefit as a single parent.”

[93] The grievor went on to request that he work Mondays, Tuesdays and Fridays in London at the Western Fair Raceway, and Wednesdays and Thursdays at Woodbine. He asked that the proposed schedule start January 1, 2007. He wanted to discuss this proposal at the meeting scheduled for December 20; see Exhibit E1, Tab 9.

[94] On December 19, Ms. Séguin emailed Mr. Halfacree. She asked for the following “. . . the reasons for your request for accommodation . . . outlining the pros and cons for both the employer and employee.” She added as follows that, although she

"understood that you are a single parent, we understand that your children are becoming of an age where they may be possibly off to College in the near future." She concluded by noting that, for management ". . . to understand and be able to address a request for accommodation it is necessary to be provided with the reasons behind the request before it can be considered"; see Exhibit E1, Tab 9.

[95] Mr. Halfacree responded on December 27. He did not explain why he needed accommodation. Instead, he referred to a final-level grievance meeting the previous August in which he said that Ms. Smith ". . . tabled an offer to Gary Dionne and myself from ADM HR Steve Tierney to explore my hours of work for accommodation to work closer to my residence in South Western Ontario." He went on, stating that he would provide a one-year master schedule for 2007, which he subsequently did the same day; see Exhibit E1, Tab 9.

[96] I note that, although a meeting was held the previous August or September to discuss the possibility of altering Mr. Halfacree's assignment, it never resulted in a formal offer. All that was discussed was the possibility of a part-time assignment to a closer racetrack. That being the case, even had the discussion produced a binding offer (which I find it did not), Mr. Halfacree, who wanted a full-time position, would not have taken it.

[97] Mr. Halfacree continued to submit sick leave certificates for periods during December and for good parts if not most of January, February and March 2007; see Exhibit U4, Tab 3, pages 34 to 38.

C. <u>The five-day suspension</u>

[98] Mr. Halfacree was scheduled to work on December 20 and 21, 2006. In September, he asked to have those days off as annual leave, which was approved. He later asked to work those days, which was again approved. He then once again asked for those days off, which was approved. On December 7, he asked again that the leave request be cancelled, which was granted. He was assigned to work at the Ontario Regional Office on December 20 and 21 and on December 27. However, he missed work on December 20 and 21 and showed up at the wrong work site (Woodbine) on December 27; see Exhibit E3, Tab 20.

[99] With respect to his absence on December 20 and 21, Mr. Halfacree later provided a medical certificate dated December 20 for December 20 to 22, 2006. Dr. Matsuo answered all three statements "yes," but stroked out the words "illness or injury" in the third statement; see Exhibit U4, Tab 3 and Exhibit E3, Tab 20. When questioned about that oddity, Mr. Halfacree submitted a copy of the same certificate but with a couple of words scribbled under the stroked-out words, which Ms. Séguin was unable to read. When that was pointed out to him, he submitted a third certificate from Dr. Matsuo dated January 28 that stated, "Mark was off of work for a medical investigation because of illness"; see Exhibit E3, Tab 20, page 2. Mr. Halfacree also explained that he showed up for his appointment to discover that he was in fact scheduled for a CAT scan, that his doctor advised him to stay off work because of the scan and that he also developed a migraine.

[100] With respect to the December 27 incident, Mr. Halfacree had been scheduled on December 12 to do a Teletheatre inspection at an off-track betting location. Ms. Séguin testified that, instead of doing it, Mr. Halfacree showed up at the Woodbine site. She said that he said that he had forgotten that he was to be at the off-site location until he viewed his email at 15:00. The Ontario Regional Office did not close until 16:00, but Mr. Halfacree did not call before then for authorization to use his car to travel to the off-site location. Instead, he submitted a written request for authorization at 15:19. Agency policy did not require authority to rent a car when appropriate, but Mr. Halfacree claimed that he did not have a credit card (meaning that he needed to rent a car through the Agency rather than seek reimbursement later); see, in part, Exhibit E3, Tab 20.

[101] Ms. Séguin was not satisfied with the explanations that Mr. Halfacree provided for his sick leave on December 20 to 22 and for his failure to appear at his scheduled work site on December 27. She held a fact-finding hearing on January 3, 2007. Mr. Halfacree and his union representative were present. The meeting ended with the plan that Mr. Halfacree was to provide better documentation to substantiate his explanations for the two incidents. She tried to schedule more meetings to receive that information on January 24 and February 1, but on both occasions, Mr. Halfacree did not show up at work.

[102] On February 15, 2007, Ms. Séguin wrote to Mr. Halfacree. She provided a detailed account of the Agency's concerns about the incidents and Mr. Halfacree's

failure to provide detailed support for what had happened. She notified him that a meeting would be held on February 21 to consider any additional information that Mr. Halfacree wished to submit and that he could have union representation if he wished. She noted that, if Mr. Halfacree provided no further information to support his explanations, the Agency would conclude that his absences on December 20 and 21 and 28, and his failure to show up at the correct work site on December 27, were unauthorized, were unjustified and warranted discipline; see Exhibit E3, Tab 20, page 3.

[103] Mr. Halfacree did not attend the meeting on February 21. Accordingly, on March 20, 2007, Mr. Pettipas issued a five-day suspension, effective March 20 to 24, 2007; see Exhibit E3, Tab 21.

[104] Mr. Langs testified that, shortly after the termination letter was received, a decision was made to grieve the five-day suspension. He recalled meeting with Mr. Halfacree at that time and discussing the accommodation issue. According to Mr. Langs, the issue "was touched upon . . . not substantial . . . [the grievor] wanted accommodation by way of being closer to home, but it was more a passing remark."

D. <u>The termination decision</u>

[105] As noted, throughout the period leading to the five-day suspension, Mr. Halfacree continued to submit sick leave certificates. They covered periods during December 2006 and good parts, if not all, of January, February and March 2007; see Exhibit U4, Tab 3, pages 34 to 38.

[106] On or about April 4, Mr. Halfacree's sick leave became–in retrospect–permanent. That absence, and Mr. Halfacree's alleged failure to provide substantive medical support for it, grounded the employer's eventual decision to terminate his employment. It is useful to list the medical information that the employer received from Dr. Matsuo in tabular form.

Date submitted	Period covered	Comments by Mr. Halfacree	Reference by exhibit
Jan. 25, 2007	Jan. 24 to 26, 2007		U4, Tab 3
Jan. 31, 2007	Feb. 1 to 3, 2007		U4, Tab 3

Date submitted	Period covered	Comments by Mr. Halfacree	Reference by exhibit
Feb. 7, 2007	Feb. 7 to 14, 2007		U4, Tab 3
Feb. 16, 2007	Feb. 16 to 21, 2007		U4, Tab 3
March 9, 2007	March 9 and 10, 2007		U4, Tab 3
March 29, 2007	March 29 to 31, 2007		U4, Tab 3
April 3, 2007	April 4 to May 2, 2007	Has more appointments in April	E2, Tab 25
April 30, 2007	April 4 to June 6, 2007	Has more appointments in May	E2, Tab 27
June 4, 2007	April 4 to Sep. 4, 2007	Has more appointments in June, July and August	E2, Tab 29
Sep. 3, 2007	April 4 to Oct. 1, 2007		E2, Tab 31
Sep. 28, 2007	April 4 to Nov. 1, 2007		E2, Tab 32
Oct. 30, 2007	April 4, 2007 to Feb. 1, 2008		E2, Tab 34
Jan. 31, 2008	April 4, 2007 to April 2, 2008		E2, Tab 35
April 14, 2008	April 4, 2007 to May 5, 2008	Remains on medical leave . . . due to the conduct of the employer	E2, Tab 38
May 4, 2008	April 4, 2007 to Aug. 5, 2008		E2, Tab 41
Aug. 1, 2008	April 4, 2007 to Oct. 1, 2008		E2, Tab 46
Sep. 15, 2008	April 4, 2007 to Jan. 07, 2009		E2, Tab 48

Date submitted	Period covered	Comments by Mr. Halfacree	Reference by exhibit
Dec. 4, 2008	April 4, 2007 to April 1, 2009		E2, Tab 52
March 27, 2009	April 4, 2007 to May 4, 2009		E2, Tab 54
April 29, 2009	April 4, 2007 to July 2, 2009		E2, Tab 55

[107] I will make a few comments about the medical certificates signed by Dr. Matsuo during the period at issue. First, starting on April 3, 2007, the certificates all state that the grievor's absence from work dated from April 4, 2007. Second, each provided an estimated date of return to duty supplied by Dr. Matsuo. Third, each certificate was signed by Dr. Matsuo before the return-to-duty date that she had estimated in the previous certificate. Fourth, each certificate purported to certify that Mr. Halfacree was unable to work, "by reason of illness or injury." Despite Dr. Matsuo's earlier complaint about the form, she made no attempt to provide any clarity by, for example, stroking out either the word "illness" or the word "injury" or by writing anything on the form to explain how or in what way the "illness or injury" might be preventing Mr. Halfacree from working. Her omission not surprisingly confused the employer, given Dr. Matsuo's November 2006 statement that he was able to "return to full duties without limitations" as of November 22, 2006; see Exhibit E2, Tab 22. Finally, in most of the certificates, Dr. Matsuo expressly refrained from answering the second statement; that is, that she had ". . . knowledge, satisfactory to [her], of the condition of the above named person on or after the date absence began."

[108] Returning to the chronology, on April 3, 2007, Mr. Halfacree faxed Ms. Séguin and Mr. McReavy a copy of a certificate of medical leave signed by Dr. Matsuo for April 4 to May 2, 2007. He noted that he had more appointments in April; see Exhibit E2, Tab 25.

[109] Mr. Halfacree never returned to work after April 4, 2007. He testified that he went off work on that date. His counsel questioned him about that at the hearing, and he testified as follows:

Q. Why did you go off work on April 4, 2007?

A. *I went back to my family doctor and was removed from the workplace.*

Q. *What do you mean, removed from the workplace?*

A. *I went on certified medical leave for stress.*

Q. *Did you apply for any illness benefits of any kind?*

A. *No . . . not at that time.*

Q. *Did you apply for SunLife LTD benefits or EI?*

A. *No, I didn't have any documentation . . . I don't think that I had any forms to fill out anyway.*

Q. *Did you try to get forms?*

A. *No, not at this time.*

Q. *Why not?*

A. *At this time I didn't think it was necessary.*

Q. *Why wasn't it necessary to apply for benefits at this time?*

A. *Because I was concentrating on getting my health back together.*

[110] Later in his testimony, Mr. Halfacree was asked by his counsel the following obvious question: what has been his income since April 2007? He explained that he had obtained a tractor-trailer driver's licence and that he drove a truck part-time. He claimed that he did that to prepare himself for a position with the Canada Border Services Agency, to where he had wished to transfer from the Agency. He began working, according to him, "sporadically, on my days of rest" in February 2006 and continued doing so up to and after his eventual termination in April 2009.

[111] Returning to the chronology, on April 26, 2007, Mr. Pettipas wrote to Mr. Halfacree. He noted that Health Canada considered the grievor physically fit to perform his job in June 2006 and that Dr. Matsuo wrote the same in November 2006. Despite those two medical assessments, Mr. Halfacree continued to take significant amounts of sick leave. Under the circumstances, the employer could not authorize further leave without pay due to illness on the basis of medical certificates alone. It wanted further confirmation with respect to his April 4 to May 2, 2007, absence. Mr. Pettipas stated that he asked that Mr. Halfacree consent to a follow-up fitness-for-work assessment by Health Canada for the following:

a. his prognosis for recovery, with or without limitations;

b. an opinion as to his fitness to return to work and to perform his job duties; and

c. the expected duration of any physical limitations following his return to work.

[112] Mr. Pettipas also asked that Mr. Halfacree consent to Health Canada conferring with his family doctor. He noted that only with such an assessment could the employer consider Mr. Halfacree's requests for leave without pay and that, pending the receipt of such an assessment, his absences would be recorded as unauthorized. The letter concluded as follows (Exhibit E2, Tab 26):

> *It is important that you recognize that excessive absenteeism from the workplace is a serious matter which may lead to administrative and/or disciplinary action, up to and including termination of your employment. Until such time as your attendance becomes regular at the workplace and/or we receive the clarification being sought through the fitness to work assessment conducted by Health Canada, upon your return to duty, you will be assigned to work in the Regional Office, Monday to Friday from 9 a.m. to 5 p.m.*

[113] Mr. Halfacree did not respond directly to the letter. Instead, on April 30, he faxed Ms. Séguin another medical certificate for leave without pay for April 4 to June 6, 2007. He noted that he had more appointments in May. He added the following: "Due to my medical leave in April, I have mailed my travel expenses for the 2006-2007 fiscal year to your attention and payment"; see Exhibit E2, Tab 27.

[114] Mr. Halfacree was asked by his counsel why he did not respond directly to Mr. Pettipas' request for more medical information. He testified as follows:

> *My position was that I was under the care of my family doctor and if my employer wanted more information they could contact Dr. Matsuo. I had provided a medical leave form for this period of time and the employer fully knew that the working relationship was seriously breached and the transfer to border services* [that Mr. Halfacree wanted and had suggested] *was part of the issue . . . so at this point my position was that I provided certified medical leave and everyone knew what the issues were at the time.*

[115] The grievor was also asked why he did not agree to a Health Canada assessment. He testified as follows: “I didn’t refuse, I just stated that I was under my doctor’s care right now . . . If they wanted to set up an appointment I probably would have gone.”

[116] On June 4, 2007, Mr. Halfacree faxed another medical certificate to Ms. Séguin, this time for medical leave without pay for April 4 to September 4, 2007. He noted that he had more appointments in June, July and August; see Exhibit E2, Tab 29.

[117] On June 19, 2007, Mr. Pettipas wrote to Mr. Halfacree. He stated that Mr. Halfacree’s absences had been and would continue to be treated as unauthorized, subject to the receipt of a satisfactory assessment of his fitness for work from Health Canada. He noted that it was “. . . the fourth and final time Management will request this information.” The assessment would address the same points raised in his letter of April 26. The warning that excessive absenteeism could lead to termination was repeated; see Exhibit E2, Tab 30.

[118] Again, there was no direct response from Mr. Halfacree. On September 3, he faxed Mr. McReavy, stating the following: “I remain on certified medical leave till October 1, 2007.” He also faxed a medical leave certificate from Dr. Matsuo; see Exhibit E2, Tab 31. He did the same thing on September 28; see Exhibit E2, Tab 32.

[119] Mr. McReavy left the position of Regional Director in October 2007. As noted, Ms. Séguin had taken over the Agency officers as direct reports in 2007. For a time, Mr. McReavy’s position was filled by Frank Artuso, then by Silvie Debrile and finally (and currently) by Mark DeLucca.

[120] Interestingly, Mr. Witkowski, a fellow officer at Woodbine, testified that, when Mr. Artuso took over Mr. McReavy’s position, management took a new approach to scheduling. Mr. Witkowski testified that, as a parent, he too had asked Mr. McReavy to schedule him to work at tracks closer to home to increase his family time and decrease wear and tear on his car. He testified that Mr. McReavy had refused on the grounds that it was not his fault that Mr. Witkowski had a long commute and that, had he allowed it, he would have had to allow it for everyone. However, when Mr. Artuso became manager in late 2007, he allowed the officers at Woodbine to cooperate in the arrangement of their own schedules to suit their preferences.

[121] On October 9, 2007, Mr. Pettipas again wrote to Mr. Halfacree. His letter repeated the statements in his earlier correspondence. He stated that Mr. Halfacree's absences would continue to be recorded as unauthorized; see Exhibit E2, Tab 33.

[122] Once again, there was no direct response from Mr. Halfacree or any effort to supply the medical information or Health Canada assessment that the employer requested. Instead, on October 30, 2007 and again on January 31, 2008, he faxed medical certificates about his medical leave; see Exhibit E2, Tabs 34 and 35.

[123] On February 5, 2008, Ms. Courcy, then Acting Executive Director, wrote to Mr. Halfacree. She repeated the concerns of the Agency about the medical information. She mentioned that his absences would continue to be recorded as unauthorized and that he was running the risk that his absenteeism could result in termination; see Exhibit E2, Tab 36. I note that Ms. Courcy testified that, during her time as executive director, she never met Mr. Halfacree. All her dealings with him were by way of letters, faxes or emails.

[124] On March 20, 2008, Mr. Halfacree emailed Ms. Courcy that he had no interest in participating in a conference call that she had requested for March 20. He stated that "[l]egal proceedings have been commenced against the Attorney General of Canada and the CPMA (employer) with regards to the employer's conduct and outstanding compensation owing from the MOA Settlement"; see Exhibit E2, Tab 37. He went on to state the following (Exhibit E2, Tab 37):

> *Based on action taken against the employer and the fact that I remain on certified medical leave from the workplace due to the employer's conduct, failure to accommodate, breach of trust and outstanding payments owed in the way of overtime, child care, etc.*

[125] The grievor attached another medical certificate for the period to April 2; see Exhibit E2, Tab 37. On April 14, he submitted another medical certificate for leave to May 5, together with a change of address; see Exhibit E2, Tab 38.

[126] On April 14, 2008, Ms. Courcy wrote to Mr. Halfacree, repeating what she said in her February 5 letter; see Exhibit E2, Tab 40. Again, Mr. Halfacree ignored it. Again, he submitted another certificate, this one to August 5, 2008; see Exhibit E2, Tab 41. And again, Ms. Courcy wrote on May 5, repeating her earlier correspondence; see Exhibit E2, Tab 42.

[127] On May 8, 2008, Ms. Courcy wrote to Mr. Halfacree (at the correct address). The letter mentioned two issues. One was an interview Mr. Halfacree had given to an Internet-based newsletter. The other was Mr. Halfacree's continued unauthorized and unexplained medical leave and his persistent refusal to provide the requested medical assessment of his condition. On that point, she advised him that she was scheduling a fact-finding meeting for June 6. She gave him the option of having the meeting at the Ontario Regional Office in Toronto or at a location closer to Ingersoll. If the proposed date was not convenient, she asked him to contact her by May 16 to reschedule. She noted that the meeting could result in discipline or termination for him; see Exhibit E2, Tab 43.

[128] Ms. Courcy emailed Mr. Halfacree on June 4, 2008 to confirm the meeting details. She advised him that he was entitled to have union representation. On June 5, Mr. Halfacree responded by email (with copies to several individuals, including Chuck Strahl and Vic Toews) as follows (Exhibit E2, Tab 45):

> *Hello Chantale & Ceci*
>
> *Hope all is well.*
>
> *Based on the discriminating, unethical and illegal conduct, and the damages caused by the employer during my employment with the Canadian Pari-Mutual Agency, my form of choice to meet with the employer is through the Courts and PSLRB.*
>
> *I will not be attending a meeting on June 6, 2008 or any other meetings with the employer in the future.*
>
> *I remain on certified medical leave from the workplace due to the actions and damages caused by the employer.*

[129] Ms. Courcy testified that the email did not evince much interest on Mr. Halfacree's part in meeting with her or with anyone else at the Agency. However, she stated as follows "[I] still wanted to give him a chance to think about it and meet with us . . . I had never met him, I was an objective third party, and I wanted to discuss with him sick leave and other issues."

[130] The impasse between Mr. Halfacree and his employer nevertheless continued. He continued to fax medical certificates signed by Dr. Matsuo about his medical leave, and the employer continued to advise him (on August 18 and October 9, 2008) that his

absences were unauthorized and that they could result in termination; see Exhibit E2, Tabs 46 to 49.

[131] On October 17, 2008, Ms. Courcy wrote to Mr. Halfacree about the same two matters that she raised in her May 8 letter. On his absences, she summarized the history, including the employer's eight requests over time for additional medical information. As for his continued unauthorized medical leave, she advised him that she would schedule a fact-finding discussion with him on October 29. She gave him a choice of meeting locations, advised him of his right to representation and warned that the investigation could result in discipline, including termination. She asked him to contact her by October 27 if the date or time of the proposed meeting was not convenient to him; see Exhibit E2, Tab 50.

[132] Mr. Halfacree did not respond by October 27. The meeting between Ms. Courcy and Ceci O'Flaherty, Principal Labour Relations Officer at the employer, was held on October 29 in the absence of Mr. Halfacree or his representative. On December 2, Ms. Courcy wrote to Mr. Halfacree, advising him that the meeting had taken place and that it could result in his termination. She concluded by stating the following: "[if] at any time before the decision is made you would like to provide me with additional information for consideration, please contact me"; see Exhibit E2, Tab 51.

[133] This time, Mr. Halfacree responded. On December 4, he faxed Ms. Courcy, stating that he ". . . would like to meet with [her] to discuss all outstanding employment issues." He said that he would contact Mr. Langs to arrange the meeting and attached another medical certificate, with a return-to-duty date of April 1, 2009; see Exhibit E2, Tab 52.

[134] Mr. Halfacree testified that he responded so quickly to Ms. Courcy because of the following:

> *I understood she was the new Executive Director and I had received information that she was a person of integrity and it was my understanding that she was someone who could be trusted . . . that a meeting would be worthwhile . . . it was a new management style that was not be [sic] the same old Agency style . . . my fellow officers told me that.*

[135] When his counsel pointed out that he had not responded to earlier correspondence from Ms. Courcy, the grievor replied that that "was before [he] found out she was a person of integrity."

[136] Ms. Courcy received the fax. She testified that she was pleased that Mr. Halfacree wanted to meet. She thought that it was important to follow up with Mr. Halfacree to set up a meeting with him and Mr. Langs. Indeed, on December 5, 2008, Mr. Langs emailed her, noting as follows that Mr. Halfacree had contacted him after receiving Ms. Courcy's letter of December 2 and that ". . . he asked me to arrange a meeting which he has indicated he will attend even though attending would be against the advice of his doctor"; see Exhibit E9. Mr. Halfacree confirmed in his testimony that he had asked Mr. Langs "to explore dates for a meeting."

[137] Ms. Courcy testified that she responded to Mr. Langs' email. She wished to arrange a meeting that was convenient to all. She received a voice mail from Mr. Langs on January 22, but no dates were provided, and he did not follow up. That being the case, Ms. Courcy advised Mr. Halfacree and Mr. Langs by letter dated January 13, 2009 that she was scheduling a meeting for January 27, 2009 at 11:00 at the Ontario Regional Office; see Exhibit E2, Tab 53.

[138] Shortly after that letter, Ms. Courcy received a voice mail from Mr. Langs stating that Mr. Halfacree would not be able to attend the scheduled meeting on January 27 and that he ". . . would continue to be unavailable for 4-6 weeks due to medical reasons"; see Exhibit E10. Accordingly, she wrote to Mr. Halfacree on February 26 (with a copy to Mr. Langs) proposing three possible meeting dates, March 9, 10 or 23; see Exhibit E10. She again asked for confirmation that he would attend and noted the possibility of his termination. The letter – sent by registered mail – was not picked up by Mr. Halfacree until March 13; see Exhibit E11. However, Mr. Halfacree had Elaine Massie, a union representative, call on March 4 to inform Ms. Courcy that he could not attend because he was sick; see Exhibit E11.

[139] When asked about that sequence of events, Mr. Halfacree testified that he called Mr. Langs "and suggested that if [the employer] wanted to set up a meeting they could set up a meeting." His counsel asked him whether he made any effort to set up a meeting; he said the following: "No, I was just talking to Langs at this point." When asked why he did not call personally, he explained as follows: "I had no contact with the employer, and I felt that I would just be the middleman . . . it was all based on

Langs' schedule so he was the best person to set dates, instead of me setting a date and it turning out to be a conflict [with Langs' schedule]."

[140] On that point, Mr. Langs testified that he spoke with Mr. Halfacree and that the response was "more of a wait and see to see if his doctor would say he was healthy enough to attend a meeting."

[141] The employer's patience ran out on April 28, 2009. On that day, Mr. Corriveau, the ADM, wrote to Mr. Halfacree to advise him that he was terminated effective that date. The reason for the termination was the following: ". . . insubordination resulting from nine (9) occasions when the employer has written to you asking for additional medical information related to your absence from the workplace"; see Exhibit E2, Tab 57. Noting as well Mr. Halfacree's steadfast and consistent refusal to meet with management and his email to Ms. Courcy of June 4, 2008 (see earlier in this decision), he concluded that the employment relationship had "completely broken down." Mr. Halfacree's employment was accordingly terminated pursuant to paragraph 12(1)(*c*) of the *Financial Administration Act*, R.S.C. 1985, c. F-11 (*FAA*); see Exhibit E2, Tab 57.

[142] Mr. Malone, who drafted the letter for Mr. Corriveau, was at that time Executive Director of the Agency. He reviewed the correspondence between Mr. Halfacree and the Agency stretching back over the years. He concluded that, based on that evidence, there had been a breakdown in the employer-employee relationship. He explained in his testimony that the employer had made it very clear that it did not accept that the grievor's sick leave over the previous two years had been substantiated. He noted that Ms. Courcy appeared to him to have given Mr. Halfacree "even more chances to substantiate his absences . . . and that they were unauthorized." However, at no point did Mr. Halfacree or his union ever engage with the issue of why he was sick or why he could not attend the meetings that he had been asked to attend.

V. <u>Facts related to the jurisdictional issue</u>

[143] In the years at issue, Mr. Halfacree made a few requests for accommodation because he was a single parent and had a special-needs child. When asked about those issues by his counsel toward the end of his testimony, he explained that, when he looked in April 2003 for a house near Toronto, his son, who was then in grade 3, was in a modified education program. He remained in that program for some time. He testified that that was one of the reasons he asked for accommodation. He also

explained that one of the issues that came up when he was house hunting was that the schools in the areas in which he was looking had similar programs that were full, meaning that his son would not have been able to enrol in them.

[144] I note that there was no evidence either in the extensive documentary record or in the testimony, including that of Mr. Halfacree that the grievor ever provided the employer with that information about his request for accommodation as a single parent.

[145] On November 23, 2009, Mr. Halfacree filed four complaints against his bargaining agent, alleging that it had committed unfair labour practices, essentially because it had failed to refer four of his grievances to adjudication. Those complaints were about the following four grievances:

a. A grievance filed in February 2007 against the employer because it had denied his request to work from home, or close to home, during a snowstorm.

b. A grievance filed in May 2007 against the employer on the grounds that, among other things, it had abused its authority and had failed to accommodate his medical condition.

c. A grievance filed in March 2007 against the employer on the grounds that it violated the paid medical leave and no-discrimination provisions of the collective agreement.

d. A grievance that the employer failed to reimburse him pursuant to the National Joint Council Travel Directive.

[146] The second grievance contained a welter of issues and requested remedies. The primary relief (although many were sought) seemed to be a request for the payment of the grievor's sick leave and travel expenses and an accommodation to work in southwestern Ontario (that is, closer to Ingersoll); see Exhibit E26. The grievance that he eventually filed on May 24, 2007 contained an allegation that there had been a breach of the "duty to accommodate – single parent – undue hardship"; see Exhibit E26.

[147] The bargaining agent's reasons for refusing to send that grievance to adjudication centred on what it said was Mr. Halfacree's continued failure to provide it with information to support his numerous claims. That lassitude on his part was repeated in his claim against the bargaining agent, inasmuch as the Board member observed that Mr. Halfacree failed to present any facts ". . . that could lead [him] to believe that the respondent committed an unfair labour practice"; see *Halfacree v. Public Service Alliance of Canada*, 2010 PSLRB 64, at para 16. Accordingly, Mr. Halfacree's complaint was dismissed. Similar complaints that he made against his bargaining agent met with similar results, and for similar reasons, in *Halfacree v. Public Service Alliance of Canada*, 2009 PSLRB 28.

VI. Submissions

A. For the employer

[148] Counsel for the employer renewed his objection to my jurisdiction to consider the ground of failure to accommodate that had been raised in the termination grievance. He noted the evidence that the accommodation issue had been raised at least tangentially in a number of Mr. Halfacree's complaints and grievances over the years. He submitted that such evidence made it clear that the issue had been dealt with under earlier grievance procedures and that, accordingly, the grievor was barred from raising it again; see *Hamilton Health Sciences v. ONA* (2010), 192 L.A.C. (4th) 332; *Chatham-Kent (Municipality) v. ONA*, 88 CLAS 55; *Howe Sound Pulp and Paper Ltd. v. Communication Energy and Paperworkers' Union, Local 1119,* [2003] B.C.L.R.B.D. No. 408 (QL); and *Child & Youth Wellness Centre of Leeds and Grenville v. Ontario Public Service Employees Union, Local 441,* [2000] O.L.A.A. No. 941 (QL). In the alternative, he submitted that, if the exact issue of accommodation raised in or by the termination grievance had not already been dealt with, it was still close enough to the earlier complaints and grievances that it ought to have been dealt with then. Accordingly, the grievor ought not to be permitted to raise it in this case; see *Weston Bakeries Ltd. v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* (1998), 76 L.A.C. (4th) 258.

[149] Turning to the substantive discipline issues, counsel for the Agency broke his submissions into three parts, one for each grievance.

1. <u>One-day suspension</u>

[150] Counsel for the Agency noted that Mr. Halfacree agreed that he had hung up on Mr. McReavy and that he had refused to meet with him a few days later. Either of those acts was sufficient on its own to support the discipline that was imposed. Accepting that there might have been tension between the two men or that there was some evidence of at least one angry call between them, there was no evidence from either Mr. Halfacree or Mr. McReavy that, on the day in question, anything was abusive about Mr. McReavy's conversation. Since discipline was warranted, an adjudicator ought not to interfere with the penalty as long as it was within a range of reasonableness; see *Sheet Metal Workers' International Association, Local 473 v. Bruce Power LP,* 2009 CanLII 31586 (ONLRB) at para 61; and *Byfield v. Canada Revenue Agency,* 2006 PSLRB 119, at para 26.

2. <u>Five-day suspension</u>

[151] Counsel for the Agency submitted that there were three grounds for discipline; which were Mr. Halfacree's failure to show up to work on December 20 and 21, after the employer had made frequent changes to his schedule for those days at his request; his failure to provide adequate reasons for that failure; and his failure to work at the correct site on December 27. The grievor was not entitled to reassign himself to a schedule different from the one that his employer had set for him. The fact that he might have forgotten where he was to work did not excuse his subsequent refusal to make any effort to go there once he realized his mistake. He was told that he needed medical substantiation for his absences, and he failed to make reasonable efforts to provide anything that made sense. His statement that he had to undergo a CAT scan was not supported by the medical certificates; nor was his explanation that he needed time off because of a migraine. Given the circumstances, the five-day suspension was more than reasonable.

3. <u>Termination</u>

[152] Counsel for the Agency cited *Toronto District School Board v. Canadian Union of Public Employees, Local 4400*, 2009 CanLII 5414 (ON LA), at para 55, to the effect that "[t]he foundation of the employment relationship is a bargain of compensation in exchange for work performed", and the employer was entitled ". . . to establish and

enforce reasonable rules concerning attendance at work, including the requirement for timely notification of absences for legitimate illness. . . .”

[153] Counsel for the Agency submitted that, in this case, the grievor went on leave on April 4, 2007. During the ensuing 2 years, the employer requested additional information about the illness at least 12 times. The grievor never responded. Nothing in the collective agreement required the employer to accept the medical certificates provided over that period as satisfactory evidence of the grievor’s inability to work due to illness or injury. Clause 52.01(b) gives the employer a discretion to grant leave without pay “. . . for purposes other than those specified in this Agreement,” but it was a discretion; employees had no right to it. Medical certificates are not in themselves “Holy Writ”; see *Fontaine v. Canadian Food Inspection Agency,* 2002 PSSRB 33, at para 29. The certificates signed by Dr. Matsuo, despite that they were standard forms supplied by the employer, provided scant and sometimes contradictory information. Indeed, sometimes they were not completed in full. Although one or two such notes might be acceptable, many of them is not. In such circumstances, an employer, absent anything to the contrary in a collective agreement, is entitled to request further or better medical documentation when it feels that the submitted information is inadequate; see *Victoria Times-Colonist v. Victoria Newspaper Guild,* [1986] B.C.D.L.A. 380-02. Despite the testimony from some of the witnesses including Mr. Halfacree that he suffered from stress or hypertension, the clear and considered medical opinion before he left his work was that he was fit for work. Yet, no clear or concise explanation was ever provided to the employer to justify or explain the grievor’s long absence.

[154] Accordingly, counsel for the employer submitted that I should dismiss this grievance. In the alternative, if I were disposed to grant it, I should consider awarding damages in lieu of reinstatement on the basis that the employment relationship is no longer viable; see *Alberta Union of Provincial Employees v. Lethbridge Community College,* 2004 SCC 28, at para 56; and *Lâm v. Deputy Head (Public Health Agency of Canada),* 2011 PSLRB 137, at para 101. He pointed to the grievor’s repeated lack of faith or trust in management and his preference to see the employer in court rather than in person.

B. For the grievor

[155] Dealing with the employer's preliminary objection to jurisdiction, counsel for the grievor conceded that, in ordinary course, a grievance that has been settled or abandoned cannot be reopened. However, if the issues complained of are continuous, finality with respect to one breach does not bar new complaints about repeated breaches.

[156] Counsel for the grievor submitted that, on the evidence, it was clear that accommodation, disability and abuse of authority were ongoing issues for the grievor. The grievor had been targeted by the employer in response to his request for accommodation. Accordingly, I have jurisdiction, either because the issues were ongoing or because the grievor had been the subject of disciplinary action because of his requests for accommodation.

[157] As for the ongoing nature of the grievor's claims for accommodation, his counsel noted that, on the evidence, it had been raised in 2005 if not before. Certainly, by 2006, the employer knew that the grievor was a single parent caring for two children. He asked for accommodation. The employer had a proactive duty to make inquiries at that point and to request the information it needed to accommodate him. That it did not do. The fact that it turned him down once did not relieve it of its ongoing duty to consider accommodation after that point.

[158] Counsel for the grievor submitted that the issue of accommodation tied in with the employer's decision to terminate the grievor. The grievor believed that he had answered the employer's request for information about his request for accommodation. Hence his lack of response, which the employer interpreted as insubordination. Moreover, there was no evidence of prejudice to the employer. Finally, it should have been apparent to the employer that the grievor was seeking an accommodation. He had said as much in the past and had repeated it several times.

[159] In conclusion, counsel for the grievor submitted that, even if I lacked jurisdiction to make a remedial order about the accommodation, I could still hear evidence about discrimination and about the Agency's failure to accommodate as part of the discipline grievances.

[160] Turning to the discipline, counsel for the grievor broke her submissions into three parts.

1. <u>One-day suspension</u>

[161] Counsel for the grievor submitted that, when the employer disciplined the grievor for refusing to meet with Mr. McReavy, it knew that he was willing to meet with the new executive director. Strictly speaking, the grievor might not have been entitled to refuse to meet with his supervisor, but he felt that he was being harassed by Mr. McReavy and did not want to be put in a stressful situation. No other employee was being asked to provide backup or additional support for medical certificates. On the evidence, it was clear that the workplace under Mr. McReavy was poisonous, which added to the grievor's decision to refuse to meet with him.

[162] Counsel for the grievor conceded that some discipline was warranted but submitted that a one-day suspension was too extreme. The grievor was between a rock and a hard place. He felt that, given the tension between him and Mr. McReavy, there was no point meeting with him. He was willing to meet with other management, just not with the manager whom he felt was harassing and abusing him. The grievor was not offered an alternative to meeting with Mr. McReavy. The grievor was not openly defiant. Mr. Nichol found him to be civil and polite in their meeting. The grievor also agreed that it was wrong for him to hang up on Mr. McReavy. Mr. Nichol ought not to have skipped over what is traditionally the first step in progressive discipline, the warning letter. Although an earlier warning was issued, it was for the grievor hanging up on Mr. McReavy, not for refusing to meet with him. In such circumstances, especially given that it was the first discipline imposed on the grievor, a warning letter rather than a one-day suspension should have been the penalty.

2. <u>Five-day suspension</u>

[163] Counsel for the grievor noted that Mr. Halfacree was disciplined for failing to show up to work on December 20 and 21, 2006 and for showing up at the wrong work site on December 27. She submitted that those actions fell short of insubordination. She conceded that some discipline was warranted for the grievor's failure to attend the correct work site on December 27 but not for the December 20 and 21 absence, which was supported by medical notes from Dr. Matsuo.

[164] Counsel for the grievor submitted that the evidence was that the grievor had a regular medical appointment on December 20, and he thought that he could go to work after it. However, at the appointment, he learned that he was being referred to a CAT scan the next day and was told that he should not go into work before then. The grievor contacted both Ms. Smith (whom he had been scheduled to meet) and Ms. Séguin to advise them. The grievor then handed in the certificate signed by Dr. Matsuo on December 20 (with the words "illness or injury" stroked out). Although the employer might not have thought that it was sufficient, from the grievor's standpoint, he gave the employer what it had asked for – medical confirmation of his absence. Moreover, if the employer had questions, it could have called Dr. Matsuo. The grievor had granted the employer the authority to contact his physician. It could have called her to find out why the words "illness or injury" were crossed out. And, if Dr. Matsuo was not able to explain on the form that Mr. Halfacree would be absent because of a CAT scan, as opposed to being ill or injured, it was hardly her fault. She had already complained to the employer a year before that its form was too rigid and that it should be changed. Taking those facts into account, the grievor complied with the employer's request for medical support for his absence on December 20 and 21 and, if it had more questions, the employer should have asked them. That being the case, the grievor should not have been disciplined for his absence on December 20 and 21.

[165] Turning to the December 27 incident, counsel for the grievor conceded that employees have a duty to show up at their scheduled work sites and a duty to review their schedules to know when and where they should work. Hence, there were grounds for discipline but not for a five-day suspension. It was a mistake on the grievor's part; it was not insubordination. In other words, he did not disobey a direct order to work at the correct site. The grievor worked his shift at Woodbine, albeit the wrong site. There was other evidence that, when other employees showed up at a wrong site, they were allowed to work their shifts there rather than travel to the correct site. There were ongoing issues about the grievor's outstanding claims for travel allowances, which made him understandably reluctant to incur an unauthorized travel expense.

[166] Taking those factors into account, the proper discipline ought to have been a one-day suspension; see, for example, *Ontario (Management Board of Cabinet),* [2002] O.L.R.D. No. 1355, in which a one-day suspension was reduced to a written warning.

3. <u>Termination</u>

[167] Counsel for the grievor submitted that the employer's decision to terminate the grievor's employment rested on alleged insubordination based on an alleged refusal to provide medical support for his absence after April 4, 2007 or to meet with management. She submitted that the evidence did not support that conclusion.

[168] With respect to the medical support, counsel for the grievor submitted that the grievor's failure to provide such documentation was not insubordination. The grievor's response (or rather, lack of one) was a function of his state of mind. From his perspective, the grievor was operating in a toxic work environment. He understood that others had been granted accommodations that he had been refused. He did not trust Mr. McReavy. The employer had initiated surveillance on him without admitting to him that it had done so. The grievor did not trust management, which he felt had lied to him. That being the case, he did not believe the employer when it said it lacked supporting information for his medical absence. He believed that it had access to his doctor and that it could have asked her for the information that it required.

[169] When asked about the evidence that the grievor had been driving a truck part-time during much of the time he was off work, counsel for the grievor pointed out that he was disciplined for insubordination, not because he said that he was unable to work or because he was abusing his medical leave.

[170] Counsel for the grievor also submitted that employers no longer have an unbounded right to ask for medical information. That changed due to *Victoria Times-Colonist*.

[171] With respect to meeting with management, the grievor was in the process of trying to meet with the new managers that had been put in place when he was terminated. Similarly, in December 2008, he contacted his union representative to set up a meeting. Along with Ms. Courcy and Mr. Langs, he made an effort to set up a meeting. The grievor's hypertension, according to Mr. Langs, prevented that from happening then and into 2009. When a new executive director arrived, the efforts to set up a meeting were renewed. In short, there was no basis for the conclusion that the grievor was insubordinate. The evidence was that he tried to arrange a meeting. All that was left was the issue of the unauthorized medical absences, which did not relieve the employer from following the elements of progressive discipline; see *Scott v. Deputy*

Head (Department of Human Resources and Skills Development), 2010 PSLRB 42, in which a termination was replaced with a 15-day suspension.

[172] Counsel for the grievor submitted that I could take into account evidence that the grievor was being harassed by management. No investigation or binding decision would bar me from considering that evidence.

[173] Returning to the issue of the medical certificates, counsel for the grievor stressed that I could rely on the notes not with respect to whether the grievor was able to work during the period in question but with respect to whether he was insubordinate. The fact that he submitted medical certificates as per the employer's policy demonstrated that he was not insubordinate. If his later failure to provide more substantial information could be considered insubordinate, the failure did not justify his termination because it was explained by the history of his relationship with the employer. She stressed that the issue was not whether he could work when his medical certificates said that he could not. The employer did not rely on that as a ground for termination. Rather, the issue was whether the grievor was insubordinate and, if so, whether that insubordination was sufficiently grave to warrant termination.

[174] Counsel for the grievor then turned to the issue of accommodation as a remedy. She submitted that, by February 2005, it was clear that the grievor had requested accommodation on the grounds of family status. There was also evidence of hypertension, another disability that could attract the duty to accommodate. On such evidence, the employer had a duty to investigate and to inquire. But no documented written response from the employer indicated any attempt to satisfy its obligation to investigate the grievor's request for accommodation. All that existed was Ms. Séguin's email of December 19, 2006 (Exhibit E1, Tab 9), asking the grievor to provide reasons for his request for accommodation as a single parent that outlined ". . . the pros and cons for both the employer and employee." But the duty to accommodate is not designed to satisfy an employer's interests – it is designed to respond to an employee's disability.

[175] In short, the employer failed to comply with its duty to investigate the grievor's request for accommodation. The only proper remedy in such a case is one designed to uphold the duty to investigate requests for accommodation – which in this case would be a direction that the employer meet with the grievor and his union to investigate the required accommodation.

[176] In this case, the employer knew that the grievor had financial problems, that he was ill, that his son needed special education and that his expenses were excessive because of his distance from work. A long commute can be a factor when considering the duty to accommodate; see *Catholic District School Board of Eastern Ontario v. Ontario English Catholic Teachers' Assn.,* [2008] O.L.A.A. No. 459 (QL) ("*Elderkin*"). The fact that the demands of work have an impact on one's family is sufficient to establish a *prima facie* case of discrimination on the grounds of family status, triggering an employer's duty to accommodate; see *Johnstone v. Canada Border Services Agency*, 2010 CHRT 20. The fact that the issue might now be moot because there may no longer be a need to accommodate the grievor on the basis of family status does not excuse the employer's original failure to make suitable inquiries when it was an issue. Moreover, damages could flow from the failure to accommodate when it was needed.

[177] Counsel for the grievor submitted that, in general, Mr. Halfacree had been discriminated against, had been harassed, and had been the victim of bad faith. His privacy rights had been invaded. He had not been insubordinate and had been more than willing to meet with the employer, and in fact had made efforts to meet. By way of remedy, she submitted the following:

a. the one-day suspension should be replaced with a written warning;

b. the five-day suspension should be replaced with a one-day suspension;

c. the grievor should be reinstated;

d. the termination penalty for failing to communicate or to meet with the employer should be replaced with a 15-day suspension;

e. the grievor should be made whole with respect to benefits and pension; and

f. I should remain seized of the issue of damages, to be visited once an investigation into the grievor's need for accommodation has been conducted.

[178] Turning to the issue of damages in lieu of reinstatement, counsel for the grievor advised that she had been taken by surprise by the employer's submission on this point. Accordingly, she was given leave to file written submissions, which she did on

July 11, 2012. The thrust of her submission was that I lacked jurisdiction to make such an order. The Federal Court of Appeal had ruled that, under the predecessor legislation to the *Public Service Labour Relations Act,* an adjudicator lacked the jurisdiction to make such a remedial award; see *Gannon v. Canada (Treasury Board)*, 2004 FCA 417. She submitted that neither subsection 228(2) of the *Act* nor subsection 12(3) of the *FAA* changed that result, and accordingly, the decision in *Gannon* stood. Finally, she submitted that the Board's jurisprudence was divided on the point and submitted that *Chopra et al. v. Treasury Board (Department of Health)*, 2011 PSLRB 99 (which held that there was no such remedial power), was to be preferred to *Lâm*.

[179] In the alternative, if I concluded that I had the power to award compensation in lieu of reinstatement, counsel for the grievor stressed the extraordinary nature of the remedy. In the normal course, reinstatement should be ordered. The onus was on the employer to establish that the facts were such as to warrant a departure from the grievor's normal right and expectation, in such a case, to be reinstated in his job.

C. <u>Employer's reply</u>

[180] With respect to the five-day suspension, counsel for the Agency submitted that an employee cannot hide behind an inadequate medical certificate. Evidence about an employee's health is in his or her control, and it is the employee's duty to supply acceptable information and not the employer's role to search it out; see *Toronto District School Board*, at para 57.

[181] With respect to the termination, counsel for the employer submitted that there was no evidence of harassment or that the grievor was singled out in some fashion. There was nothing other than the grievor's unsubstantiated belief. Nor was it harassment for the employer to ask the grievor for more information than it might ask of its other employees. The other employees were not sick as often or as long as the grievor was. It is one thing to accept a brief standard-form certificate as proof of illness for an employee absent 10 hours in a year and quite another to do so in the case of an employee absent for 400 hours in a year. In the latter case, the employer was fully entitled to ask for more than a standard form. Doing so in the circumstances could not be construed as harassment.

[182] Counsel for the employer submitted that there was no evidence that the grievor had made any bona fide effort to meet with the employer.

[183] Counsel for the employer also submitted that the grievor's ability to work was in fact an issue before me and one that I had to decide because it went to the credibility of the medical certificates the grievor submitted to justify his absence after April 2007. Mr. Langs' evidence about the grievor's medical condition was hearsay and was unsupported by any medical evidence or opinion.

[184] With respect to the issue of accommodation, there was no evidence that the grievor ever made a clear request for accommodation that was based on a clear explanation of why an accommodation was necessary. He was asked for such an explanation and failed to provide one. Being a single parent, or even having a family, is not in itself enough to trigger the duty to accommodate. Moreover, the grievor's children in 2006 were teenagers. Where was the evidence from the grievor that having teenage children required accommodation for any particular reason? The existence of learning disabilities is so common and the nature of such disabilities so disparate that a statement that a child has a learning disability is not enough to trigger the duty. The burden was on the grievor to establish that he fell within a protected class, which he failed to do.

VII. Analysis and decision

[185] I will deal first with the preliminary objection.

[186] In my opinion, it is not necessary to deal with the question of whether I have jurisdiction to hear a grievance about accommodation on the grounds of family status or medical condition in the circumstances of this case, for two reasons, both based on the assumption for argument's sake that I have jurisdiction.

[187] First, it was clear to me on the evidence that Mr. Halfacree failed to establish at any time either a duty to accommodate on the basis of family status or, if such a duty existed, any failure on the part of the employer to comply with that duty. There is no free-floating duty to accommodate. The duty arises only after a grievor has established a prima facie case of discrimination–in this case, because of family status; see, for example, *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal,* 2007 SCC 4, at para 11 and *Moore v. Canada Post Corp.,* 2007 CHRT 31, at para 86. Although there is a duty to not discriminate on the basis of family status, it is not triggered simply because one has a family or because one is a single parent. Rather, it is triggered when there is a significant impact

on an important aspect of that status; see *Health Sciences Association of British Columbia v. Campbell River and North Island Transition Society*, 2004 BCCA 260; *Canadian Staff Union v. Canadian Union of Public Employees*, [2006] N.S.L.A.A. No. 15 (QL); and *Alberta (Solicitor General) v. Alberta Union of Provincial Employees,* [2010] A.G.A.A. No. 5 (QL).

[188] The mere assertion by the grievor that he had a teenage child with special needs was never in my opinion sufficient to establish a *prima facie* case of discrimination on the basis of family status. Even had such a case been established, the jurisprudence is clear that an employee must explain to the employer the nature of the problem and must co-operate with the employer's attempt to fashion an appropriate accommodation. Mr. Halfacree consistently failed to discharge either obligation. He ignored the employer's request for the type of information it needed to determine whether it should accommodate him and, if so, how. Indeed, he even resisted his counsel's valiant effort to elicit the information necessary to establish a need for accommodation beyond the bald assertion that he was a single parent; see earlier in this decision. He made no effort to explain what about the special needs of his son or the fact that he was a single parent caused a one-and-a-half hour commute either way (as opposed to any shorter commute) to have a discriminatory impact on his family status. Long commutes are a fact of life in the Toronto conurbation, whether by car or by public transit. They do not alone trigger a duty to accommodate, even for those commuters with families.

[189] I do not accept the suggestion by counsel for the grievor that the employer had a duty to investigate in the face of Mr. Halfacree's failure to respond to its initial questioning. Being a single parent is not the kind of disability that carries with it a tendency to deny its existence (such as alcoholism or mental illness). Accordingly, the employer had no reason to discount Mr. Halfacree's failure to be more explicit. It was not obligated to ignore his reticence and hound him for more detail. If he could not explain why being a single parent required an accommodation, the employer had no obligation to pursue the matter.

[190] The *Elderkin* decision does not contradict that conclusion. The grievor in *Elderkin* was a high school teacher who had suffered a physical injury that made commuting for any length of time painful. That injury and disability were supported by clear and detailed medical reports that spoke directly to the injury and to its impact

on the grievor. The employer accepted all that evidence and indeed offered her an accommodation by way of teaching at an elementary school nearby. The grievor wanted to be accommodated by way of a teaching position at a high school equally nearby. Thus, the issue was not whether there was a duty to accommodate but rather whether it was reasonable to accommodate a high school teacher by offering her a position at an elementary school as opposed to a high school.

[191] On the other hand, in this case, there is no recognition on the employer's part that the grievor's family status was such that a long commute had a discriminatory impact on it. And the grievor failed then – and failed before me – to advance evidence sufficient to establish a *prima facie* case of discrimination.

[192] Second, and insofar as the somewhat faint submission concerning a duty to accommodate because of a medical disability is concerned, again there was no evidence of any illness or disease that created a limitation that required accommodation. The grievor's own family physician, and the Health Canada assessment, had both at different times in 2006 stated that he was fit for work without limitation. The long string of medical certificates submitted after April 2007 failed to explain why the grievor could not return to work. The grievor failed to respond to repeated requests to provide further and better medical substantiation for his claim that, as documented in his medical certificates, he was "incapable, by reason of illness or injury" to work at his normal duties. Such certificates are especially troubling given the grievor's admission at the hearing that he was in fact operating a tractor-trailer during that time (although he never told his employer that fact). How then can it be said that the grievor had any limitation by reason of an illness or injury or that any such limitation was severe enough to require an accommodation? For the grievor to say that he was suffering from stress is not, in my view, sufficient. There was no evidence beyond the grievor's own words that he was suffering from stress. Moreover, the only potential source of stress – his relationship with Mr. McReavy – was alleviated when the latter left the workplace and hence cannot explain the grievor's alleged inability to return to work after that point.

[193] I will now consider the three grievances on their merits.

A. <u>One-day suspension</u>

[194] It is important to keep in mind exactly what Mr. Halfacree was disciplined for. He was disciplined for insubordination for the following:

a. failing to report as instructed on December 28, 2005 and then hanging up on his supervisor in the ensuing telephone conversation; and

b. expressly refusing to meet with his manager a second time, on January 11, 2006.

[195] There is no doubt in my mind on the evidence that the relationship between Mr. Halfacree and his supervisor Mr. McReavy was poor. It was marked with distrust on both sides. I am also satisfied that both contributed to that level of distrust. For his part, Mr. McReavy had difficulty dealing with challenges to his authority. It may be understandable, but such challenges are an occupational hazard that managers shoulder as part of their duties. Employees must be free (within appropriate confines) to question the exercise of that authority – particularly if the employee is, as was the case of Mr. Halfacree, a union steward charged with defending the interests of all employees under the manager. Such questions do not in and of themselves represent an attack on managerial authority and ought not to be treated as if they are.

[196] On the other hand, accepting that employees may question a particular managerial decision or order, they nevertheless owe a duty to their managers to obey reasonable commands. They also owe a duty to not belittle or challenge those instructions in public. It is one thing to say “no” to a manager in private and quite another thing to say “no” to that manager and publicize that refusal to his or her own superiors. The latter conduct undermines the manager in the eyes of his or her superiors as well as the chain of command upon which any hierarchal organization must depend.

[197] With those observations in mind, I am of the opinion that, in the particular factual matrix of this case, Mr. Halfacree’s decision to hang up on Mr. McReavy was understandable if not acceptable. Had that been the only ground for discipline, I would have been disposed to think that any discipline – and *a fortiori* a one-day suspension – was too harsh a penalty. However, the insubordination extended beyond that episode. Mr. Halfacree twice refused to attend a meeting with Mr. McReavy. The first time was

before the phone conversation that (according to him) grew heated. On the second occasion, he publicized that refusal to Mr. McReavy's superior. It was not made in the heat of the moment (as was the phone incident). Mr. Halfacree's decision in both instances was reasoned. It was contemptuous of Mr. McReavy and his authority. In my opinion, it warranted discipline, and in the circumstances, I was satisfied that a one-day suspension was a reasonable penalty.

[198] Therefore, this grievance must be dismissed.

B. <u>Five-day suspension</u>

[199] Mr. Halfacree was disciplined for the following reasons:

a. he was scheduled for work on December 20 and 21, 2006; he called in sick instead;

b. he was scheduled to attend an off-site inspection on December 27, 2006; he instead showed up for work at Woodbine despite that it was already fully staffed; and

c. he refused or failed to provide information or to attend meetings requested by the employer to substantiate or corroborate the reasons he offered for the first two events (illness and work site mistake).

[200] However, the underlying and animating reason was his refusal to respond to the employer's requests for additional information. Were the requests reasonable? Was the employer obligated to accept what Mr. Halfacree gave it?

[201] I will deal first with the medical information. Considering only the information provided by Mr. Halfacree and the three notes provided by Dr. Matsuo, I am forced to conclude that Mr. Halfacree in fact provided additional medical information. Dr. Matsuo provided responses that in some small way supported Mr. Halfacree's explanation for why he ended up taking December 20 and 21, 2006 off. Of course, it would have been preferable had Dr. Matsuo actually said (or wrote) that the grievor had been sent for a CAT scan. But Mr. Halfacree responded at least twice to the employer's requests for better medical information.

[202] Turning to Mr. Halfacree's failure to attend his scheduled work site on December 27 and his subsequent failure to make any attempt to go to the correct site once he realized his mistake, I am satisfied that his conduct was deserving of discipline. He was an experienced officer, well accustomed to the employer's scheduling practice. I find his explanation that he forgot impossible to accept. Moreover, even if it was a mistake, his duty upon discovering his mistake was to make his way to the proper work site. His justification that he needed authorization to incur the travel expense skirts the issue that, had he attended the correct site as required, he would not have had that issue to deal with.

[203] Based on those findings, I am satisfied that, although discipline was warranted, a five-day suspension was too harsh a penalty. His last discipline resulted in a one-day suspension. Assuming that he was paid biweekly, a five-day suspension would represent a jump from a 10% pay cut to a 50% pay cut. That is a significant and serious leap in severity and too big a jump to justify under the doctrine of progressive discipline. In my opinion, a penalty of three days would have addressed the employer's concern about Mr. Halfacree's rather cavalier approach to his duties and obligations as an employee.

[204] Accordingly, I allow the grievance in part, substituting a three-day suspension in place of the five-day suspension.

C. Termination

[205] Mr. Halfacree was terminated on April 28, 2009 for the following: ". . . insubordination resulting from nine (9) occasions when the employer has written to you asking for additional information related to your absence from the workplace"; see Exhibit E2, Tab 57. The other perhaps collateral reason was his continuing failure to meet with management to discuss his employment, coupled with his advice on June 5, 2008 that he preferred to meet with the employer "through the Courts and PSLRB," leading the employer to conclude that there had been a complete breakdown in the employment relationship; see Exhibit E2, Tab 57.

[206] When considering this grievance, as with the other two, I have to address three questions: Was discipline warranted? If so, was the penalty imposed reasonable? If not, what penalty would be more appropriate?

[207] In this case, the answer to the first question turns on the answer to several more. First, was the employer entitled to ask the grievor for more medical information than was provided over the two years? If so, did the grievor's failure to provide such information amount to insubordination? And, if so, was the insubordination justified or at least mitigated in some way?

[208] Turning to the first of those questions, one part of the employment relationship is an employee's obligation to show up for work. When an employee fails to show up to work, he or she owes the employer an explanation for that absence. This duty is reflected in clause 35.02 of the collective agreement, as follows:

> ***35.02*** *An employee shall be granted sick leave with pay when he or she is unable to perform his or her duties because of illness or injury provided that:*
>
> *a. he or she satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer;*
> *and*
> *b. he or she has the necessary sick leave credits.*

The evidence necessary to satisfy that obligation may be slight, when the absence is of limited duration. The employer might be satisfied with a verbal excuse or with a short doctor's note. But, as the absences grow in number and duration, the evidence necessary to satisfy that obligation – and the employer – grows more substantial.

[209] What information did the employer have? On one hand, it had the evidence from Health Canada in June 2006, and again in November 2006 from the grievor's physician Dr. Matsuo that he was physically fit to perform the duties of his employment. On the other hand, it had the fact that Dr. Matsuo's subsequent certificates failed to specify whether it was illness or injury that kept the grievor off work. Given that context, I am satisfied that the employer was entitled to expect more – and to ask for more – by way of an explanation for Mr. Halfacree's continued failure to report for duty. The employer did ask, multiple times. It offered to meet with the grievor. He was aware that the employer had asked for the information, was aware of why it had asked for it and was aware that the employer did not consider what it had been provided with acceptable.

[210] The grievor not only ignored the employer's request for over two years, he also continued to submit the very same medical certificates (many of which were not even

complete), which the employer had already said were not acceptable. On the face of it, I am satisfied that such conduct was insubordinate, if not indeed contemptuous of management.

[211] Did the grievor have an explanation for his failure to respond to the employer's requests that might justify, excuse or at least mitigate his insubordination? Several were offered in the evidence and in submissions by his counsel.

[212] It was suggested that the grievor was always ready to meet with his managers (other than Mr. McReavy), both before and after he stopped coming to work in April 2007. No credible support was given for that suggestion. The simple fact is that the grievor did not meet with his managers even once between April 2007 and April 2009. There was no evidence before December 2008 – not even from Mr. Halfacree – that he made any effort to contact his managers to explain his absence or to seek a meeting with them. It is true that Ms. Courcy's stern letter of December 2, 2008 finally evoked a response from Mr. Halfacree. He stated that he wanted to meet with management. But Mr. Halfacree's subsequent actions speak louder than his words. He failed to make any effort to arrange a meeting. He attempted to shift the blame for that lack of effort onto his union representative, ignoring the fact that whenever his union representative managed to arrange a meeting, Mr. Halfacree then called in sick. His basic attitude was that, as he said, "if [the employer] wanted to set up a meeting they could set up a meeting." The grievor left it to his employer to chase him for meeting dates, which he invariably cancelled due to illness. Such facts do not in my opinion evince a bona fide attempt – or even an intent – to meet with the employer or to supply the information it sought. They demonstrate the opposite.

[213] Even had there been credible evidence of any effort by the grievor to arrange a meeting with his employer, there was no evidence of what he would have said had the meeting taken place. He failed throughout the entire hearing to supply any information (other than bland and bald assertions that he was under his doctor's care) that would have answered the central question – which was why he was unable to show up for work.

[214] It was further suggested that the grievor's failure to supply the required information was a function of his belief that he was being harassed or discriminated against or that he was under stress or had high blood pressure that prevented him

from attending meetings. None of those submissions was supported by any credible independent evidence.

[215] Dealing with the first suggestion, the best that could be said on the evidence was that there was one point of friction between the grievor and the employer, which was with Mr. McReavy. In the circumstances of this case, I was not satisfied that the existence of that friction justified the grievor's refusal to meet with either Mr. Pettipas or Ms. Courcy. There was no evidence of any animosity or fractious history between the grievor and them. He had never met the latter, and indeed testified that he thought that she was "a person of integrity." Yet, he steadfastly ignored their requests for information and made no effort to meet with them.

[216] Nor was I satisfied that Mr. McReavy's presence within the management structure in the Ontario Regional Office until 2008 provided a satisfactory answer for the grievor's conduct. A number of avenues were open to the grievor that could have enabled him to provide the information the employer sought while shielding him from any interpersonal conflicts that might have existed. The employer had provided systems and resources to manage workplace conflict, via its Office of Conflict Resolution. There was no evidence that the grievor sought to use it. Indeed, on an earlier occasion, he expressly refused to use it. Another avenue was with union representation under the collective agreement. He also chose to not use it.

[217] I was not satisfied that Mr. Halfacree was easily intimidated or cowed or that he was afraid of Mr. McReavy in any way. The grievor was a union steward. He believed strongly in his rights and showed no reluctance to assert them, either by filing grievances with respect to perceived violations of his rights or by filing harassment complaints against his managers. Nor was he slow to ignore management's requests or orders when he disagreed with them. He complained against his union to the Board, alleging that it had conducted an unfair labour practice by refusing to send some of his grievances to adjudication. Ironically, he lost one of those applications at least in part because of his failure to make any attempt to supply any information or facts to substantiate his allegations. Clearly, the grievor is no shrinking violet. He exhibited before me a strong sense of self and entitlement. He showed no reluctance to assert his rights, whether against his employer or his union. I find it impossible to conclude that such a man was afraid to meet with Mr. McReavy or with management because he feared harassment or discrimination.

[218] Turning to the submission that his reluctance to meet with management could be explained because he had hypertension or suffered from stress, no medical evidence supported a conclusion that he suffered from those conditions. He provided only his word, either directly at the hearing or via the hearsay evidence of Mr. Langs about what the grievor had told him. His word was not enough to satisfy me, on a balance of probabilities, based on all the evidence before me. Moreover, it was not in my view enough for the grievor to say that he has high blood pressure. He also had to demonstrate that that condition prevented him from meeting with the employer, that it at the very least prevented him from requesting his family physician to provide a more detailed explanation for why he could not come to work or that it prevented him from undergoing another Health Canada assessment. No such evidence was provided. In short, nothing showed that the conditions that the grievor allegedly suffered from were severe enough to prevent him from obtaining information to answer the employer's inquiries. Indeed, on the face of it, the fact that he drove a tractor-trailer during his absences suggests otherwise.

[219] I should mention that I accept counsel for the grievor's submission that the issue is not whether the grievor could work (as demonstrated by his working part-time as a tractor-trailer driver) but whether he was insubordinate. But the fact that he could and did drive a truck does go to the issue of whether the reasons he offered for his refusal to provide the information the employer requested were credible. It goes to his ability to satisfy me that, on a balance of probabilities, he had a physical condition (whether it was high blood pressure or stress) that was so severe that it prevented him from responding to the employer's requests. And, on balance, he failed to satisfy me.

[220] One more defence was offered by way of an explanation or mitigation of the grievor's conduct, which was the suggestion that he believed that he had authorized the employer to speak to his family doctor or that he had authorized his doctor to talk to his employer if it called. There were several problems with that submission.

[221] First, it placed the onus in this case in the wrong place. The obligation was on the grievor to provide the information the employer requested. It was not the employer's obligation to act as its own detective. Second, there was no evidence that during April 2007 to April 2009 the grievor expressly authorized the employer and his physician to discuss his medical condition to find out why he could not come to work. The evidence of any authorization at any time was scant and related to an earlier

period. It was the email in March 2005 from the grievor to the employer. Even that was unsupported by evidence of a formal authorization in writing given by the grievor to Dr. Matsuo. Third, there was evidence that, even if authorization had been given in March 2005, it was of limited duration and that the employer would have been foolish to rely upon it. In May 2006, the grievor complained that it was a violation of his rights under the *Privacy Act* for the employer to contact his dentist directly. And the requests by the employer during the period at issue that the grievor submit to a second Health Canada assessment were refused (or at least ignored) by the grievor. Such evidence satisfies me that the employer would have had no credible reason to believe that it could obtain the information it sought by speaking directly with the grievor's family physician. Fourth, in the context of such evidence, and given the employer's repeated express requests for information during the period at issue, it is simply not credible to suggest that the grievor thought or believed that the employer knew that it had been authorized to speak to his doctor. The grievor knew that the employer did not think that it was authorized to speak to his doctor, which was why it asked him for the information that it sought.

[222] Such evidence does not satisfy me that the grievor, from April 2007 to April 2009, had given his family physician full authority to speak to his employer, that he so informed the employer, that he honestly believed that the employer knew that it had any such authority, or that it would have been reasonable for the employer in such circumstances to think that it had that authority. In short, the defence or explanation offered is simply not borne out by the evidence.

[223] Accordingly, I am satisfied that the grievor was insubordinate, that there was no excuse that would justify or at least mitigate such insubordination, and that discipline was warranted.

[224] This brings me to the last question, which is whether termination was too severe or too unreasonable a discipline to impose on the grievor for his insubordination. In my opinion, the employer's decision was reasonable and fully justified in the circumstances of this case. Mr. Halfacree's insubordination was not a singular act. It was not made in the heat of the moment. It was repeated. It was not the result of a misapprehension of what had been required of him. It was persistent, it continued and it was made with full knowledge not only of what he had been instructed to do but

also of the potential consequences of refusing to comply. In my opinion, termination in such circumstances was entirely reasonable.

[225] Given that conclusion, it is not necessary for me to rule on whether an adjudicator has jurisdiction to award damages in lieu of reinstatement.

[226] For all of the above reasons, I make the following order:

(The Order appears on the next page)

VIII. Order

[227] The grievance in PSLRB File No. 566-02-577 is dismissed.

[228] The grievance in PSLRB File No. 566-02-3081 is allowed in part, and the employer is ordered to substitute a three-day suspension in place of the five-day suspension.

[229] The grievance in PSLRB File No. 566-02-3439 is dismissed.

December 14, 2012.

Augustus Richardson,
adjudicator