

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

**KENNETH J. SERNIAC AND
CONRAD M. BUECKERT**

Grievors

and

**TREASURY BOARD
(Solicitor General - Correctional Service Canada)**

Employer

Before: Joseph W. Potter, Board Member

For the Grievors: David Landry, Public Service Alliance of Canada

For the Employer: Ursula M. Tauscher, Counsel, and Bonnie G. Davenport

Heard at Edmonton, Alberta,
February 10 to 12, 1998.

DECISION

At the outset of the hearing, the representative of the grievors informed me that the grievances referred to adjudication in Board files 166-2-26708, 166-2-26710, 166-2-26715 and 166-2-26717 were being withdrawn as they were redundant and simply restated what was contained in the grievances referred to adjudication in Board files 166-2-26709 and 166-2-26716. Therefore, Board files 166-2-26708, 166-2-26710, 166-2-26715 and 166-2-26717 are closed.

Due to the similar nature of the grievances referred to adjudication in Board files 166-2-26709 and 166-2-26716, they were heard together. Each grievance concerns a denial by management of a request for sick leave with pay, the duration of which is approximately three months. Each grievor states this denial contravenes Article M-22 of the Master Agreement between the Treasury Board and the Public Service Alliance of Canada which was signed by them on May 17, 1989. The requested corrective action in each grievance is identical and reads as follows:

1. *Management adhere to the Master Agreement.*
2. *My sick leave credits be accepted and used.*
3. *Return of all monies taken from me plus interest.*
4. *A written apology be submitted to myself and my doctor for all the false accusations and suffering.*
5. *All documents, reference and recording of any type regarding this incident be removed from all files.*
6. *Return of the "loss of interest" incurred as a result of using savings money to live off of.*
7. *Management request a police investigation be conducted.*
8. *Financial payment to cover the anguish, suffering and loss of reputation resulting from this insult.*

A request was made and granted for the exclusion of witnesses. I received 25 exhibits from the bargaining agent and six from the employer. Each of the grievors testified on their own behalf and one witness testified on behalf of the employer.

Evidence

Both Mr. Serniak and Mr. Bueckert are correctional officers classified at the CX-2 level at Edmonton Institution. On January 25, 1994, they each applied for three months of leave without pay for personal needs for the period from March 8 to June 6, 1994 (Exhibits G-1 and G-9, respectively). This was sought pursuant to clause M-21.07(a) of the Master Agreement. On February 15, 1994, this request was denied by the Deputy Warden, Mr. W. Headrick, on the ground that operational requirements did not permit the granting of such leave. Both grievors testified they were “stressed out” on the job but did not want to apply, initially, for sick leave as they believed there was some stigma that would befall them were they to do so.

When the leave without pay was denied, each grievor went to see a medical doctor about feeling stressed at work. Mr. Serniak saw a Dr. Zirk on March 10, discussed his symptoms and obtained a signed Physician’s Certificate of Disability for Duty (Exhibit G-2) (hereinafter referred to as a Physician’s Certificate). Under the heading “Estimated Date of Return to Duty”, the doctor wrote “Unsure at this time”. Also on March 10, Mr. Bueckert visited a Dr. Gault and he too discussed his symptoms and also obtained a signed Physician’s Certificate (Exhibit G-10). Under the same date of return heading, Dr. Gault wrote “Approx. 3/12” and Mr. Bueckert testified this meant approximately three of 12 months.

The following day, March 11, Mr. Serniak called in to work and spoke to Correctional Supervisor Kubin, who was the Duty Supervisor that day, and stated he was booking off on indefinite sick leave. Mr. Serniak testified he told Ms. Kubin that the reason for his sick leave was “stress related”.

On March 12, Mr. Bueckert called in to work and spoke to the Duty Supervisor, Correctional Supervisor Stipchick, saying that he would be off on indefinite sick leave, but Mr. Bueckert did not offer a reason.

Mr. Serniak testified he visited Dr. Zirk again sometime between March 17 and 20 at which time a complete physical examination was conducted, including blood tests. Ultimately, the doctor put Mr. Serniak on LUBOX which, the grievor stated, was a mild anti-depressant. Each of the grievors stated they discussed the possibility of travel with their doctors and neither doctor, they stated, saw anything wrong with this

idea. There is some dispute as to whether in fact Mr. Bueckert and Dr. Gault discussed travel at all, but ultimately I find nothing of significance is attached to this disputed fact.

On March 22, each of the grievors spoke to Correctional Supervisor Wog indicating they were off on indefinite sick leave. A Physician's Certificate was not requested at that time.

The grievors then left together on March 26 and travelled to Cuba. On April 23, they flew back to Toronto and Mr. Bueckert called his parents and discovered the employer had sent him a letter (Exhibit G-11) instructing him to provide a Physician's Certificate for the absence. In addition, he was told to contact Mr. Michayluk, the Chief of Personnel, by April 28, failing which the Department "will proceed with termination for cause (Abandonment of Position)." Mr. Serniak had a similar letter delivered to his house as well (Exhibit G-3).

As the grievors had already planned to depart from Toronto on April 24 to travel to Antigua, they did not call their employer until April 25. Unable to make contact with the Chief of Personnel, the grievors' telephone call was transferred to Deputy Warden Headrick. Each grievor testified they told Mr. Headrick they were on sick leave for an indefinite period of time; they indicated to Mr. Headrick as well that they could not be reached by telephone as they were out of the country. They agreed to provide Physician's Certificates upon their return to work as none had been submitted up to the time the telephone call was made. In addition, they each agreed to call in to work regularly to update their employer with respect to their status. Each testified this arrangement was satisfactory to Mr. Headrick.

The grievors continued to travel and did call in to work as agreed. Contact was made on May 3, 13, 29 and June 6 and 11. On each occasion, each of the grievors spoke to the Duty Correctional Supervisor on duty informing the individual that they were still off on sick leave.

Mr. Serniak returned to work on June 13, 1994 and met with Deputy Warden Headrick, Mr. Michayluk, as well as Mr. Romaine, who was the bargaining agent representative at that time. Mr. Serniak produced his Physician's Certificate (which now contained a return to duty date of June 12, 1994) and Mr. Headrick rejected it.

In addition, Mr. Headrick informed the grievor that a disciplinary investigation would be commenced, and this was confirmed by way of memorandum dated July 7, 1994 (Exhibit G-6).

The disciplinary hearing was on July 15 and in attendance with the grievor were his bargaining agent representative, Mr. Allenburg, and the Acting Deputy Warden, Mr. Arthur Ding. During the course of the meeting, Mr. Ding stated he wanted to speak to Dr. Zirk about the grievor's sick leave request. Mr. Ding's notes of the meeting were introduced as Exhibit G-7 and substantiate the fact that Mr. Serniak gave verbal approval for Mr. Ding to contact Dr. Zirk regarding the grievor's illness.

Mr. Arthur Ding testified that he attempted many times to speak to Dr. Zirk and when he finally made contact, Dr. Zirk refused to discuss the case of Mr. Serniak without written consent.

In cross-examination, the grievor acknowledged that he was aware Dr. Zirk had told Mr. Ding that no medical information would be released without a written medical consent form. The grievor admitted he ultimately denied Mr. Ding's request for written authorization to contact his doctor. He stated he received advice from his bargaining agent representative to the effect that the employer had no right to speak to his doctor about the grievor's sick leave. By withholding his written consent, he acknowledged the doctor would not release any information to his employer. The grievor stated to the employer that, if management was not satisfied with this, they could send him to National Health and Welfare who could get the medical information from his doctor. The grievor stated he felt this was all his employer was entitled to do.

Mr. Bueckert's situation was somewhat different. He revisited Dr. Gault on June 10 and a return to work date of June 23 was established. He too was asked to attend a meeting with Deputy Warden Headrick, Mr. Michayluk and his bargaining agent representative, Mr. Matt Holtzer, upon his return to work. This he did. He provided the employer with a Physician's Certificate and Certificate of Absence completed by Dr. Gault (Exhibits G-10 and G-12) dated March 11 and June 10, 1994, respectively. They were rejected by Mr. Headrick. The following day, June 24, the

grievor received Exhibit G-14, a memorandum from Mr. Headrick informing him he too was under investigation for misuse of leave.

On June 27, Mr. Bueckert wrote to Mr. Headrick (Exhibit G-15) explaining his reason for booking off sick was due to stress and this had been verified by his doctor. He presented this letter to Mr. Arthur Ding who was heading up the disciplinary investigation. At the disciplinary hearing, Mr. Ding sought permission to speak to Mr. Bueckert's doctor about his illness and Mr. Bueckert agreed to this request. On June 28, the grievor sent a fax to his doctor authorizing the release of the necessary information to his employer (Exhibit G-16). As the grievor heard nothing from the employer, he followed up with Mr. Ding on July 7 and August 3, at which time he was told another written release consent form would be required. He complied with this request, getting Correctional Supervisor Sinclair to sign it as a Commissioner of Oaths.

Mr. Ding testified that with the written consent form provided by Mr. Bueckert, it was possible to converse with the doctor. The gist of this discussion is found in Mr. Ding's investigation report (Exhibit E-6, at page 3). It states that Dr. Gault had diagnosed that the grievor "... was suffering from a depressive illness based on the symptoms of severe anxiety." Furthermore, Dr. Gault opined that "... Bueckert's illness was job related." The report also states that "Dr. Gault recommended and supported CO-II Bueckert to take one (1) to three (3) months off on sick leave to relax himself." What was of concern, however, was the fact that Dr. Gault said "[he] did not know or discuss any out of country travelling plan" However, Dr. Gault did consider "staying home to relax or traveling out of Canada both as appropriate relaxation treatment for stress related depressive illness."

In cross-examination, Mr. Ding said he denied the sick leave to Mr. Bueckert because, in the main, Dr. Gault did not recall discussing any travel plans with Mr. Bueckert; yet the grievor claimed he did indeed discuss the possibility of travel with his doctor. This is confirmed in the investigation report (Exhibit E-6) at finding number 5 (page 4), which states:

This investigation team, however, finds inappropriateness on the part of CO-II C. Bueckert of utilizing most of his certified sick leave to travel outside the country without prior consultation with his doctor and knowledge of his employer.

In cross-examination, Mr. Bueckert stated he discussed the idea of travel with Dr. Gault during his initial visit to him.

In both of the grievors' cases, the disciplinary investigation concluded with the finding that no disciplinary action would be taken, but their requests for sick leave with pay were denied (Exhibits G-14 and G-18).

The parties agreed that each of the grievors had sufficient sick leave credits to cover the period in question.

Arguments

The grievors' representative argued that initially the employees complied with all of the employer's requests for information. The employer's decision to deny their requests for sick leave with pay was made in June and the investigation was merely a vehicle by which the initial decision could be supported. There was no real intent to reverse the decision to deny the grievors' requests for sick leave.

Both the grievors submitted completed Physician's Certificates and as such the collective agreement benefit under clause M-22.03, Granting of Sick Leave, should be granted. In Mr. Serniak's case, he did not want management to discuss his medical condition with his doctor, but he was prepared to go to National Health and Welfare for an examination and/or have the two doctors talk to each other. The grievor received advice from the bargaining agent that he did not have to consent to the employer's request to speak directly to his doctor.

The situation with Mr. Bueckert is, to some extent, simpler. Everything he was asked to do, he did. Furthermore, the grievor stated he recalled talking with his doctor not about a travel plan as Mr. Ding wrote in Exhibit E-6, but rather a travel idea. In any event, the representative argued, the doctor did support the idea. It is only reasonable to conclude that the doctor still stands by the certificate he issued according to Mr. Ding's own notes; therefore sick leave should be granted.

The following cases were presented in support of the grievors' position: *Poulin* (Board file 166-2-15354); *Kuderian* (Board file 166-2-18982); *Roberge* (Board file 166-2-15444); *Arnfinson* (Board files 166-2-13519 and 13522); *Guilbault* (Board file 166-2-22037); *Noel* (Board file 166-2-18733) and *Coupal* (Board file 166-2-10555).

The employer's counsel stated the cases are similar and the question is simply one of deciding whether sick leave with pay should be granted given all the surrounding circumstances.

Both the grievors worked the same rotation and were friends. Both asked for the same period of leave without pay and both requested certified sick leave upon denial of their leave request. Neither grievor sought follow-up treatment during his absence. These add up to ample reasons for the employer to question their Physician's Certificates.

Mr. Serniak refused to consent to have his employer contact his doctor. The Master Agreement says the employees must satisfy the employer that they could not perform their duties and this onus has not been met.

In Mr. Bueckert's case, when Mr. Ding discovered that the grievor had not been entirely truthful with respect to his discussions with his doctor about his travel plans, it led the employer to doubt the information provided. These discrepancies should be enough to show Mr. Bueckert too has not met the onus required.

Counsel for the employer referred me to the following cases: *Collinge* (Board file 166-2-20861); *Addley and Brason* (Board files 166-2-19895 to 97 and 166-2-19898 and 99) and page 8-74 of *Canadian Labour Arbitration*, by Messrs. Brown and Beatty.

Decision

Many of the cases referred to by the representative of the grievors and counsel for the employer concern issues of a disciplinary nature or a known pre-existing medical condition and therefore do not apply to this case.

Here we have two grievors requesting leave without pay for identical periods of time, namely March 8 to June 6, 1994 (see Exhibits G-1 and G-9). Their requests were denied based on operational reasons. There was no issue with respect to the right of the employer to do so.

Both grievors testified they knew they needed time away from work as they felt they were "stressed out", to use their own words. They each sought medical opinions and each got a signed Physician's Certificate indicating he should remain away from

work. The employer questioned these certificates under the provisions of clause M-22.03. Ultimately, Mr. Serniak did not allow the employer to question the certificate with the doctor. Mr. Bueckert, on the other hand, did provide written consent for the employer to consult his doctor and the employer followed up on this.

The Master Agreement, at clause M-22.03, states:

Granting of Sick Leave

M-22.03 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 satisfies the Employer of this condition in such manner and at such time as may be determined by the Employer,

and

(b) he has the necessary sick leave credits.

First of all, I find that the employer had justification to question the Physician's Certificates at the outset. The denial of leave without pay coupled with the request for sick leave with pay for an overlapping period gave rise to legitimate concern. This does not mean that the sick leave was not justified, but merely that further investigation was necessary.

This issue was canvassed in *Trépanier* (Board file 166-2-16082) where then Vice-Chairman J. Maurice Cantin stated, at page 7, in dealing with identical language:

... The onus is on the employee to satisfy the employer and, under the collective agreement, it is the employer who decides the manner in which he must do so.

In the instant case, the employer was unwilling to accept the report of the attending physician and required the grievor to undergo another medical examination. The employer had the right to proceed in this manner. The grievor had merely to comply with the employer's request. ...

Once the employer laid a proper foundation to challenge the Physician's Certificates, it sought to clarify matters by speaking to the doctors directly. Mr. Bueckert did not object to this at any time. His case is somewhat easier to deal with and I will do so first.

According to Mr. Ding, when he spoke to Dr. Gault it was confirmed that Mr. Bueckert was suffering from, to quote Mr. Ding's investigation report, "... depressive illness based on the symptoms of severe anxiety" and his "... illness was job related." Furthermore, Dr. Gault recommended one to three months sick leave.

Based on the questions Mr. Ding asked, and the response of Dr. Gault, it would seem appropriate at this point to grant the request for sick leave with pay. However, Mr. Ding felt it should still be denied because Dr. Gault did not know of any travel plans being contemplated by Mr. Bueckert. Mr. Bueckert stated he did discuss the subject of travel in general with Dr. Gault, but did not discuss any specific plans.

In any event, Dr. Gault did state to Mr. Ding that travelling outside Canada was an appropriate relaxation treatment for stress related illness. I find, therefore, nothing of significance turns on the issue of whether or not travel was discussed by the grievor and his doctor. In the end, the doctor stated Mr. Bueckert was sick; he should take from one to three months off work and travel was not inappropriate. Mr. Bueckert has cooperated in the fullest fashion possible and the information I have been provided with is, in this instance, sufficient to meet the requirements of the collective agreement.

Accordingly, Mr. Bueckert's grievance is sustained to the extent that his request for sick leave with pay for the period in question is granted and the employer is directed to utilize his sick leave credits to cover the period of his absence. I have no jurisdiction to award interest on his lost income. Also, even if I had the requisite jurisdiction, I do not believe it would be appropriate for me to comply with the grievor's request that a written apology be submitted, that a police investigation be conducted or the awarding of damages. However, I do order that all documents currently on Mr. Bueckert's file regarding the incident be removed where they are in conflict with my determination.

The case of Mr. Serniak is not so simple. He was asked to consent to have management contact his doctor to verify his entitlement to sick leave with pay. While he verbally consented, he ultimately refused to provide the necessary written consent and this prevented his employer from verifying the veracity of his sick leave application. I find he did so at his peril.

The employer laid a justifiable foundation for questioning the Physician's Certificate and I see no reason why Mr. Serniak should not have complied. He testified he told Correctional Supervisor Kubin at the outset that he was going to be off on certified sick leave due to stress. Therefore, I simply do not find it credible for him to say that he withheld his written consent because he did not want his doctor discussing his medical condition with his supervisor. As I said, the reason for his leave was not at that point a secret. Under the provisions of the Master Agreement, the employer determines the manner in which the employee's condition can be verified. In this case that manner was determined to be a discussion with the physician and Mr. Ding. Under these circumstances, I find this to be a reasonable request and the withholding of consent was, as stated earlier, done at the grievor's peril.

For the above-noted reasons, the grievance of Mr. Serniak is dismissed.

**Joseph W. Potter,
Board Member**

OTTAWA, March 3, 1998.