

Public Service Staff
Relations Act



Before the Public Service
Staff Relations Board

BETWEEN

REGINALD L. SPARKS

Grievor

and

**TREASURY BOARD
(National Defence)**

Employer

Before: J. Barry Turner, Board Member

For the Grievor: Michael Tynes, Public Service Alliance of Canada

For the Employer: Harvey Newman, Counsel

Heard at Halifax, Nova Scotia,
October 30, 1996.

DECISION

Reginald Sparks, a former Housekeeper, HS-HDO-02 classification, Canadian Forces Hospital (Stadacona), Department of National Defence, Halifax, Nova Scotia, is grieving a thirty day suspension imposed by the employer in June, 1995.

His grievance reads:

I grieve the decision of letter dated 27 Jun 95 (6007-3) (CO)

The grievor was sent a Notice of Investigation - Alleged Misconduct (Exhibit E-1) dated March 1, 1995 and a second letter regarding a Disciplinary Decision - Pending Approval of Sanction from Higher Authority (Exhibit E-2) dated March 24, 1995. Exhibit E-1 reads:

- 1. This is to inform you that you are alleged to have misconducted yourself in that at approx 0930 hrs on 25 Feb 95 you were under the influence of an intoxicant or drug and behaved inappropriately toward hospital staff and a patient.*
- 2. An investigation will be conducted into this matter to determine whether or not this allegation is substantiated and whether or not disciplinary action should be taken.*
- 3. As part of this investigation, a meeting will be arranged with you to discuss your point of view in this matter. You will be contacted to arrange a suitable date and time for this meeting. You have the right to have a representative present at the time of your meeting.*

Exhibit E-2 reads:

As a result of my investigation into the incident of 25 February 1995 concerning your alleged drunkenness on duty and intimidation of a patient and staff, I have determined, based on the evidence, that you did misconduct yourself. I have decided to refer this decision to higher authority for determination of an appropriate penalty. You will be notified of the outcome in writing as soon as a decision is reached.

The letter of suspension (Exhibit E-3) dated 27 June 1995 and signed by V.H. Logan, Lieutenant-Colonel, Acting Commanding Officer, reads:

As a result of an investigation into an incident on 25 February 1995, the Commander, Canadian Forces Medical Group Headquarters, has decided to award you a 30 day

suspension from the Public Service. You have the right to grieve the decision of the Commander CFMGMHQ in accordance with the Collective Agreement and existing policies.

The Commander has asked me to make it clear that further misconduct will result in his recommendation for your release from the Public Service. It is hoped that this suspension will deter any further misconduct but I will also stress that further infractions will not be tolerated.

This 30 day suspension begins at 0700 hrs Wednesday 28 June 1995 until 1530 hrs Tuesday 08 August 1995. Your date of return to duty will be Wednesday 09 August 1995 at 0700 hrs. A copy of this letter will be placed on your personnel file. After your return to work you will be interviewed by LCdr M.C. Duda, the Administration Officer, who will ensure that you fully understand what will be expected of you.

Mr. Sparks is requesting the following corrective action:

That:

- 1. Suspension be rescinded*
- 2. All benefits and pay be re-instated*
- 3. All records of this be removed from my personal file*
- 4. Any other redress as may be granted.*

I am being asked to decide if the employer's action was justified under the circumstances.

The hearing lasted one day with eight witnesses testifying and twelve exhibits were submitted into evidence.

A request for the exclusion of witnesses was made and granted.

Summary of Evidence

Mr. Newman entered a Notice of Investigation for Alleged Misconduct from Lieutenant-Commander M.C. Duda to the grievor dated March 1, 1995 (Exhibit E-1); a Disciplinary Decision letter from Colonel C.D. Simpson to the grievor dated March 24, 1995 (Exhibit E-2); the letter of suspension from Lieutenant-Colonel V.H. Logan to the grievor dated June 27, 1995 (Exhibit E-3).

Mr. Tynes asked me to note that he may have some concerns with these three exhibits if the three persons who wrote them are not called to testify. He did not, however, pursue this matter further. I wish to point out that these documents are required to establish what misconduct the employer alleges against the grievor. The burden of proving these allegations, of course, rests with the employer.

1. Sergeant Phillip Bowser, was a fifth floor patient at the Stadacona Hospital on Saturday, February 25, 1995. He said when the grievor entered his room around 0930 hours he smelled of alcohol. He noticed when Mr. Sparks picked up the garbage that: "he had to support himself against the wall, was unsteady, and could have been impaired". Sergeant Bowser did not report this to anyone. Later on when he went to do his personal laundry, the green garbage bag that it had been in on the bedroom floor was gone. It dawned on him that Mr. Sparks might have picked it up by mistake. He could not find Mr. Sparks so he reported the problem to nurse Judith Duncan. Mr. Sparks was soon located. When Sergeant Bowser got to where the garbage and hamper were on the grievor's cart, Ms. Duncan was already there. He and an orderly looked for his bag. Mr. Sparks said that he did not take Sergeant Bowser's clothes. The witness said the grievor seemed defensive, annoyed, and had words with Ms. Duncan. Sergeant Bowser found his clothes bag in the hamper and returned to his room.

During cross-examination, he said that he and Mr. Sparks did not speak when the grievor entered his hospital room. He did not see Mr. Sparks' eyes. He never heard any accusations of theft regarding the incident. He said that, when they were all around the cart later on in the morning, he could not have known Mr. Sparks' normal manner of speaking when he heard him talking since this was the first time he had heard him speak.

2. Judith Duncan works as a civilian Registered Nurse at the Stadacona Hospital. On February 25, 1995 she was the Nursing Coordinator. She knew Mr. Sparks and saw him around 0830 hours emptying baskets. She did not speak to him then and did not notice anything odd about him. She said around noon, Lieut. Nursing Officer McCarthy told her about the problem of Sergeant Bowser's missing laundry, that it had been found, but that Mr. Sparks had been rude to staff, had raised his voice and she was concerned for her safety because of the grievor's behaviour. Ms. Duncan

called the Duty NCO Sergeant Stobie since she thought she had a disciplinary problem. He said he would call the Military Police (MP). At this point she had no reports that Mr. Sparks had been drinking. Around 1300 hours she was paged to go to the second floor staff locker room where she saw Mr. Sparks, Sergeant Stobie and two MP's. She said she told Mr. Sparks that he had not come to do his work that day because of all the fuss he caused over the lost clothes. She told him to go home. She did not recall what he said to her in response. She added that he had not wet-mopped the intensive care unit on February 25 and that he did not finish emptying the laundry hampers either. She called Mr. Sparks' supervisor at his home to tell him what had happened. She did not recommend any discipline for the grievor.

During cross-examination, Ms. Duncan said on Saturdays there is only one cleaner, whereas during the week there are five or six. She did not detect alcohol on the grievor but said she noticed that his speech was slurred around 1300 hours when she met with him and with the MP's. She had never had a dialogue with Mr. Sparks. She said when the missing clothing was found, Mr. Sparks was there, Lieut. Nursing Officer McCarthy and Leading Seaman Parker. She did not hear Mr. Parker and Mr. Sparks speaking, nor had she ever heard anyone suggest the grievor was a dangerous person, even though she said Lieut. Nursing Officer McCarthy said she was concerned about the grievor's behaviour. She never suspected that Mr. Sparks was under the influence of alcohol on February 25. She had never seen the MP's remove anyone before. She was not interviewed by anyone about the February 25 incident.

During re-examination, Ms. Duncan said she wrote an account of the incident that she gave to her Supervisor, Major Robinson. She added that she was not in the cart/bin area when Sergeant Bowser was there to retrieve his laundry bag.

The parties reviewed Exhibits E-1, E-2 and E-3 and concluded that Mr. Sparks' behaviour towards a patient was not improper as Exhibit E-1 states. On consent, Ms. Duncan's report was entered as Exhibit E-4. She confirmed that she did not smell alcohol on Mr. Sparks and that she did not see if he was belligerent. She added that she was concerned on February 25 because she was not comfortable with someone being angry with staff. She was not aware of any threats.

3. Lieut. Nursing Officer Marylouise McCarthy was the Ward Nurse on the medicine ward of Stadacona Hospital on February 25. She worked from 0700 to 1900 hours and reported to Judith Duncan that day. Around 0800-0815 hours while she and Leading Seaman Parker were reviewing work for the day, she was sitting in a chair when Mr. Sparks pulled her back by her left epaulet and then reached for the garbage under her desk. She said to him "excuse me" as she was a little shocked. She did not notice anything more unusual and did not smell alcohol at the time. Later in the morning she was told by Sergeant Bowser that his laundry bag had disappeared. She said she would find it. Around noon she found Mr. Sparks near the fifth floor elevators and explained to him that he might have inadvertently picked up Sergeant Bowser's laundry. She testified that he became angry and he said that in his thirteen years there he had never done anything wrong. The witness had not accused Mr. Sparks of anything. She added when he stepped close to her she felt intimidated and smelled a strong odour of alcohol. He raised his slurred voice and said he was not drunk. She added that they had never conversed a lot. She reported the incident to Ms. Duncan because she wanted to maintain safe conditions in the hospital. She saw the MP's later with Mr. Sparks; the witness had never had prior trouble with him.

During cross-examination, Lieut. Nursing Officer McCarthy did not know what Mr. Parker and Mr. Sparks were talking about around the cart. She did not know what the drinking rules were for civilians before reporting for duty and she did not notice that Mr. Sparks was impaired. Prior to February 25, 1995, she had no reason to ever be fearful of the grievor. She had never seen the MP's remove an employee before. The witness said that she wrote a report about the incident (Exhibit E-5) including the pulling of her epaulet. She added that Lt.-Cmdr. Duda and Sharon O'Brien interviewed her regarding the matter but she was not called to a disciplinary hearing and did not recommend any discipline against the grievor.

During re-examination, Lieut. Nursing Officer McCarthy indicated that she was not aware of anyone who accused Mr. Sparks of stealing.

4. Corporal Mae Clowe, a Junior Medical Assistant at Stadacona Hospital, was working in the emergency department screening patients on February 25. Around 1250 hours Mr. Sparks came by her counter window. She was aware from Sergeant Stobie that Mr. Sparks had been asked to leave the hospital so she went out

of her office to speak to him and smelled alcohol on him. She said his speech was a little slurred and he spoke more slowly than he normally did, and when he signed for some keys his hand was shaking.

During cross-examination, Cpl. Clowe said that she had spoken with Mr. Sparks before February 25. When asked if it was clearly visible that he was impaired, she responded: "I think so". She was not aware of anyone who was fearful of him before. She identified her written report of the incident (Exhibit E-6). and added that she was interviewed a week or so after the incident by Lt.-Cmdr. Duda and Sharon O'Brien.

5. Sergeant Bernard Stobie was the senior NCO on duty at the hospital on February 25, 1995. He said around noon Ms. Duncan called him to remove a cleaner who was causing a disturbance. He called the MP's because the cleaner was a civilian. When they arrived, he escorted them to the fourth floor where Mr. Sparks was in the emergency area. He could not recall ever seeing the grievor before but when he approached him he said that: "Mr. Sparks had classic symptoms of someone under the influence of ETOL (alcohol)."

During cross-examination, Sergeant Stobie said the grievor had the smell of fresh alcohol on him.

6. Leading Seaman, Alain Gravel, a Military Policeman, identified his daily occurrence report of the incident (Exhibit E-7). He said, when Sergeant Stobie pointed out the grievor to him in the hospital, he observed the usual signs of impairment in Mr. Sparks. Mr. Sparks told him that he had been drinking the night before at a party. The witness said the grievor delayed in his answers, had slurred speech and smelled of alcohol but that he was polite and did not cause a disturbance

During cross-examination Mr. Gravel said that he was not asked to conduct any further investigation. He said he searched Mr. Sparks' locker but found no alcohol. He added that for alcohol related incidents the MP's do not charge persons unless drinking and driving is involved.

7. Ms. Sharon O'Brien was the Senior Personnel Officer at the time of the incident. On February 27, 1995 someone from the hospital called her regarding the February 25 incident. She identified her handwritten notes from a March 10, 1995 meeting with

the grievor, his union representative Mr. Bishop, Lt.-Cmdr. Duda, PO McGuire and herself (Exhibit E-8). It appeared the grievor was confused between Ms. Duncan and Lieut. Nursing Officer McCarthy when explaining himself. The witness identified three previous letters of discipline regarding the grievor: Exhibit E-9, dated 11 December, 1990, 20 day suspension; Exhibit E-10, dated 5 August, 1992, 30 day suspension; Exhibit E-11, dated 27 July, 1993, recommendation for discharge later reduced to a 30 day suspension (Exhibit E-12). Ms. O'Brien testified that Col. Simpson, Commanding Officer, wanted to recommend discharge for the February 25 incident but headquarters advised a 30 day suspension because "the incident itself was not that serious" but formed one more link in a series of discipline for Mr. Sparks.

During cross-examination regarding the June 1995 letter of 30 day suspension from Lt.-Col. Logan (Exhibit E-3), Ms. O'Brien said that she and Lt.-Cmdr. Duda conducted the investigation into the February 25 incident. She added that none of the witness statements put before me were shown to the grievor and his representative during the investigation, nor did they have a chance to hear any of the witnesses talk about the incident during the investigation. She was not aware of any specific rules or policy for civilians regarding drinking on the job other than the Code of Conduct. She added: "you can not come to work impaired". Mr. Sparks did not have any prior discipline that related to alcohol abuse.

8. Reginald Sparks worked as a cleaner at the Stadacona Hospital for thirteen years ten months before taking a cash buy-out package in March, 1996. He said during a normal work week there are six to seven cleaners and a supervisor. Duties included garbage pick-up, take laundry to laundry room, clean up spills, clean showers, bath tubs and the intensive care unit. He said an extra ward opened in February 1995. Working alone on a Saturday, he had a lot to do with garbage being the priority, dry mopping, basins, spills and laundry following.

Mr. Sparks admitted that on February 25 he: "had a bit of a hangover from a house party the night before. I drank three to four beers, some rum, some alcoholic punch, and left the party around 2300 hours. I was not in the best of shape but I could do my job." He added it would have been impossible for patient Sergeant Bowser to have smelled his breath because he was too far away from him and that you cannot pull out the plastic bag from the garbage pail with one hand. He said

he was not unsteady on his feet. The first time he heard about the missing clothes was around noon near the nursing station with Ms. Duncan, Lieut. Nursing Officer McCarthy and Mr. Parker. He did not know that he had taken the laundry bag from Sergeant Bowser's room. Mr. Parker made him angry while they looked for the missing laundry especially when Mr. Parker said he could smell the grievor. After Ms. Duncan told him to leave, he went to the fourth floor to sign out and saw MP's arriving. When they spoke to him he took them to his second floor locker. They searched it. He called his brother to come and collect him even though he had driven himself to work that morning.

Mr. Sparks said he did not threaten to harm anyone and that he may have tapped Lieut. Nursing Officer McCarthy and said excuse me when he reached for her garbage. Mr. Sparks said he had no prior record relating to alcohol problems. He felt that he had been picked on for years. He grieved his 20 day suspension (Exhibit E-9). Nothing changed. He grieved his 30 day suspension (Exhibit E-10). Nothing changed. He grieved his recommendation for discharge (Exhibit E-11) and it was reduced to a 30 day suspension. He added he never knew until this hearing that anyone was afraid that he might harm them on February 25.

During cross-examination, the grievor said he went to the party in his neighbourhood about 2100 hours with one friend and left around 2300 hours. He did not drink before the party and did not drink when he got home. He said in the morning he was not as alert as normal but he drove to work. He added that, even though some of the witnesses said he was impaired, no one tested him. He only knew Lieut. Nursing Officer McCarthy and Cpl. Clowe beforehand and had never had a problem with them. When asked if Sergeant Bowser could have had anything against him, he said: "He went with the crowd. He was part of the gang." Mr. Sparks added that when Ms. Duncan met him: "How come she smelt nothing?" He added: "How could I drink around the place so much if they all saw me?" He denied ever grabbing Lieut. Nursing Officer McCarthy's shoulder and said: "That's not my way. She knows that's not true." Mr. Sparks felt that he approached Ms. Duncan at the cart area "right off the bat" not Lieut. Nursing Officer McCarthy. He added that he was not drunk and did not raise his voice to Lieut. Nursing Officer McCarthy or threaten her in any way.

Mr. Sparks said he took the buy-out because he was told he would be gone anyway. He said he could not see Sergeant Bowser's clothes in the bag because it was green not clear as are the normal hospital bags. He added that he has seen a psychiatrist recently. He has a wife and five children.

Argument for the Employer

Mr. Newman reminded me that he is not relying on any allegation of improper behavior towards a patient as Exhibit E-1 reads. He also agreed that Mr. Sparks inadvertently took Sergeant Bowser's personal laundry from his hospital room. He argued however that the evidence is overwhelming from a number of witnesses, none of whom had any personal animosity towards him, that Mr. Sparks was not acting as a sober person would act. He concluded that the grievor was not in a fit state to do his job and that to some witnesses he smelled of alcohol. The grievor had been at a party the night before and had a hangover. Even the MP's said he was impaired in the afternoon of February 25. Mr. Newman said Mr. Sparks may not remember what he drank and how long he drank or he may not have been candid with us.

He argued that the reason the grievor could not remember pulling Lieut. Nursing Officer McCarthy's epaulet and later intimidating her is because his faculties were impaired. He also reminded me that Mr. Sparks confused Ms. Duncan with Lieut. Nursing Officer McCarthy at the cart when the clothes bag was found. He added that if the grievor had been more alert he would not have taken the bag with the clothes in it in the first place. He reminded me that the grievor became argumentative when the clothing bag was found and that Sergeant Stobie used his discretion to call in the MP's and not become personally involved.

Mr. Newman argued that I should take Lieut. Nursing Officer McCarthy's word regarding the epaulet pulling incident. Based on the grievor's troubled past, a thirty day suspension is within reason.

Argument for the Grievor

Mr. Tynes argued that the grievor got caught up in a sequence of events that should never have occurred. He reminded me that Saturday, February 25 was not a normal work day and was basically without supervision, but the grievor was not unfit for duty even though he admitted he had been drinking at a party the night before. Mr. Sparks said that Sergeant Bowser was not close enough to him to smell alcohol and that he needed two hands to remove a garbage bag so he could not have had one hand on the wall. He reminded me that Ms. Duncan and Lieut. Nursing Officer McCarthy did not notice anything unusual about the grievor. He added that the green bag pick-up with the personal laundry in it was a natural thing to do, and that Mr. Sparks became agitated with Mr. Parker because Mr. Parker said: "Look at you, I can smell you from here". (Exhibit E-8)

Mr. Tynes said the degree of fitness of Mr. Sparks had varying descriptions: Sgt. Bowser said he could smell alcohol; Ms. Duncan said that she did not smell anything but that the grievor raised his voice; Lieut. Nursing Officer McCarthy said he pushed her chair; there was no smell; the grievor was not unsteady but he was angry and upset; Cpl. Clowe smelled the grievor; he was unsteady and shaky even though she saw him after Ms. Duncan and Lieut. Nursing Officer McCarthy saw him; MP Gravel said the grievor had signs of impairment and Mr. Parker's actions were wrong because he did not have supervisory responsibility over the grievor.

Mr. Tynes argued that the past excessive discipline of the grievor should not be looked at in this case since it had nothing to do with alcohol. He concluded that there is therefore a lot of room for me to intervene in this matter since there was so much over-reaction to an inadvertent situation. He added Mr. Sparks is not a violent person and has been dealt with too severely and unfairly in this matter.

In rebuttal, Mr. Newman argued that nothing turns on the Parker/Sparks voice raising incident and that the discussion Lieut. Nursing Officer McCarthy had with the grievor (Exhibit E-5) took place before Mr. Parker arrived. Mr. Newman also agreed that there was no attempt by Mr. Sparks to assault Lieut. Nursing Officer McCarthy during the epaulet incident, and that even though the MP's told Ms. Duncan that

Mr. Sparks was very angry with her (Exhibit E-4), there were never any threats made towards her.

Decision

After reviewing all of the evidence and carefully assessing the testimony of the witnesses, I am of the opinion that Mr. Sparks was dealt with unfairly in this case. I also believe that, even though he had a past disciplinary history, the circumstances surrounding this inadvertent clothes taking incident are not that serious in themselves. One could easily argue that to separate this wrong doing from the grievor's previous history is incorrect. Under normal circumstances I would agree. In this case I do not, particularly since his previous discipline did not involve alcohol.

I am convinced that Mr. Sparks had been drinking, probably excessively, the night before February 25, 1995, but he did his job alone on the day in question, did not fall asleep or break anything, and left the hospital at the end of his shift when told to do so. He was never violent and may have been provoked to anger by Mr. Parker around the cart when the missing clothes were found.

I believe that a sledge hammer was used in this case rather than a lesser carpenter's tool. I find it rather ineffective procedure on the part of Ms. O'Brien and Lt.-Cmdr. Duda whereby they did not show any witness statements to Mr. Sparks or to Mr. Bishop his representative before reaching a conclusion in this matter. I believe however that Mr. Sparks displayed signs of impairment as MP Gravel said, but I am confused why these same signs were not much more visible to Lieut. Nursing Officer McCarthy or Ms. Duncan much earlier in the day. Am I to conclude that Mr. Sparks was drinking during his shift? There was absolutely no evidence to this effect. However, the fact remains that he inadvertently took Sergeant Bowser's personal laundry that was in a green bag that the grievor thought was garbage. By doing so, he precipitated the situation that later on in the day involved a number of persons and his response to the situation intimidated certain hospital staff members. Although the epaulet incident probably occurred, I do not believe that it was serious enough to be given the weight required for me to uphold the fullness of the employer's disciplinary decision. Mr. Sparks must however accept some culpability

for his actions on February 25 resulting from a party the night before. However, I believe that the penalty imposed by the employer is excessive in light of all the circumstances.

I am therefore reducing Mr. Sparks' 30 day suspension to a five day suspension and order the employer to compensate him accordingly. For all these reasons, the grievance is allowed to the extent indicated.

**J. Barry Turner,
Board Member.**

OTTAWA, December 17, 1996.