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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**MEICHLAND BLACKBURN**

Grievor

and

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

Employer

***Before:*** Evelyne Henry, Deputy Chairperson

***For the Grievor:*** Himself

***For the Employer:*** John Jaworski, Counsel

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Heard at Kingston, Ontario,  
October 17 and 18, 2002,  
March 3 to 6 and May 5, 2003.

## DECISION

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[1] Meichland Oliver Blackburn, a Correctional Officer (CX-1) grieves his indefinite suspension as of May 25, 1998, and his termination of employment pursuant to section 11(2)(f) of the *Financial Administration Act (FAA)* effective February 11, 2002.

[2] At the time the suspension was imposed, Mr. Blackburn was on leave without pay from Correctional Service Canada (CSC) to work as a police officer with the Niagara Police Service. While on leave without pay, Mr. Blackburn was charged in October 1997 with dangerous driving and in April 1998 with a number of criminal offences.

[3] At the outset, in order to expedite the proceedings, the grievor agreed that if a witness from the Niagara Police Service testified, his evidence would reveal that Mr. Blackburn was paid on a full-time basis by the Niagara Police Service from June 1, 1997, to July 9, 2002. At no time did Mr. Blackburn lose any pay while employed by the Niagara Police Service.

[4] Mr. Blackburn's gross salary as a policeman was as follows:

1998	-	\$54,140.19
1999		\$56,035.10
2000		an amount between 1999 and 2001 rates
2001		\$59,370.98
2002		\$61,000.00

[5] Mr. Blackburn was ordered off duty on medical leave without pay from July 9, 2002, to December 5, 2002.

[6] The annual salary range in CSC for a CX-1 was \$33,798 in May of 1997.

[7] The following are the salary ranges for a CX-1 in the years indicated.

1999	\$39,625. to \$41,548.
2000	\$44,347. to \$46,590.
2001	\$44,434. to \$47,755.
2002	\$45,545. to \$50,071.

[8] Mr. Blackburn agreed that the benefits were relatively the same with the medical, dental and life insurance benefits being slightly better with the Niagara Police Service.

[9] Mr. Blackburn admitted that the sick leave benefit was the same with the exception that the Niagara Police Service plan had a pay-out provision. Vacation leave benefits were either the same or better.

[10] As a police officer, Mr. Blackburn's attendance at work was scheduled and Exhibit E-1 represents the duty roster for the Niagara Police Service from February 1 to Sunday, February 17, 2002.

[11] With respect to criminal proceedings, Mr. Blackburn was convicted in June 2002 by Justice Morgan on charges of dangerous driving, pursuant to section 249(1)(a) of the *Criminal Code of Canada* with respect to an incident which occurred on October 27, 1997, in Hamilton Township, County Northumberland. The sentencing took place on November 4, 2002. Mr. Blackburn was sentenced to 30 days in jail (of which he served one day and a half before he was released on bail) and was prohibited from driving for one year. The sentence has been stayed as Mr. Blackburn is appealing this conviction. No date has yet been set for the appeal.

[12] Mr. Blackburn's employment with the Niagara Police Force was terminated on December 5, 2002. This termination is under appeal with the Ontario Civilian Commission on Police Services.

[13] The employer presented two witnesses: Assistant Deputy Commissioner Louis Kelly and Deputy Warden Catherine Marie Gainer.

[14] Mr. Louis Kelly has been Assistant Deputy Commissioner for Ontario Region at Corrections Canada for approximately three years. Prior to that, he was Warden at Millhaven Institution for four years. Mr. Kelly is in his 29<sup>th</sup> year with CSC.

[15] As Warden, Mr. Kelly was responsible for the general management of Millhaven Institution with a staff of 356 permanent positions and some 30 contracts. Mr. Kelly was responsible for the inmates' programs. There are two inmate populations: an Assessment Unit with around 180 inmates and a Maximum Security Unit, which includes segregation, of approximately 150 inmates. Mr. Kelly was responsible for staff training and discipline.

[16] Mr. Kelly introduced *A Guide to Staff Discipline And Non Disciplinary Demotion or Termination of Employment for Cause* for supervisory and managerial personnel as Exhibit E-2. Mr. Kelly had reviewed and used this Guide.

[17] Mr. Kelly introduced as Exhibit E-3 the Standards of Professional Conduct and as Exhibit E-4, the Code of Discipline.

[18] Mr. Kelly introduced a CSC document where Mr. Blackburn acknowledged receipt of the Code of Discipline (Exhibit E-5). The generic work description of a Correctional Officer I was introduced as Exhibit E-6. The Peace Officer Designations, Exhibit E-7, is the CSC policy pertaining to peace officers.

[19] On May 9, 1997, Mr. Blackburn wrote a letter to Mr. Kelly seeking a leave of absence in order to take a position with the Niagara Regional Police Service (Exhibit E-8). A memorandum from J. Hudacin with an amended leave application for one year signed by Mr. Blackburn was introduced as Exhibit E-9. Leave without pay was approved as it is normally done for such leave.

[20] Mr. Kelly introduced a newspaper clipping from The Hamilton Spectator (Exhibit E-10). The Institutional Preventative Security Office (IPSO) had brought to him the newspaper clipping which had been posted on the staff bulletin board at the end of April 1998. Mr. Blackburn objected to the hearsay nature of its content.

[21] Mr. Kelly asked the IPSO to conduct a "CPIC" search. He received a report (Exhibit E-13). This report showed that Meichland Oliver Blackburn was accused, on April 10, 1998, of assault, assault with a weapon, uttering threats and dangerous driving. The report also showed another charge of dangerous driving awaiting disposition for an incident on October 27, 1997.

[22] After learning of the newspaper clipping, Mr. Kelly wrote a letter to Chief Grant Waddell of the Niagara Police on April 30, 1998 (Exhibit E-11). On May 14, 1998, Deputy Chief of Police Gary E. Nicholls replied to Mr. Kelly (Exhibit E-12).

[23] On May 25, 1998, following his letter to Chief Grant Waddell, Mr. Kelly was contacted by Mr. Blackburn from the Amherstview OPP police station. The caller identified himself as Greg Lackie and stated that he had Mr. Blackburn in his office. Mr. Kelly stated that Constable Lackie had no knowledge of Mr. Blackburn. Mr. Kelly made no notes at the time of the call, his notes are in his letter (Exhibit E-14) and the notes he drafted in August or September 1998 (Exhibit E-19). At no time between May 25 and July 10, 1998, did Mr. Blackburn tell Mr. Kelly that he was still gainfully employed by the Niagara Police Force.

[24] On May 25, 1998, Mr. Kelly wrote the following letter to Mr. Blackburn (Exhibit E-14):

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*This letter will confirm our conversation of May 25, 1998, which was initiated through Constable Greg Lackie of the Amherstview Ontario Provincial Police.*

*During my conversation with you, I made you aware that it had come to my attention that you have a number of outstanding charges that fall under the Criminal Code of Canada. Specifically, you have been charged with dangerous driving, assault, assault with a weapon and uttering a threat.*

*I note that these charges occurred during the period of your one-year leave of absence from the Correctional Service, which ends on May 30, 1998.*

*I consider the criminal charges to be very serious, to the extent they could affect your continued employment with the Correctional Service of Canada. I will be examining the situation further with a view to obtaining the necessary information in order to make an informed decision. Until such time as that determination has been made, you will not be permitted to return to work at Millhaven Institution.*

*Since your leave of absence was to pursue reinstatement with the Niagara Regional Police Service please advise of your intentions at the end of your period of leave of absence.*

[25] Mr. Kelly does not recall anything else except what is written in his letters and his notes (Exhibit E-19).

[26] On June 4, 1998, Mr. Kelly wrote a follow-up letter to Mr. Blackburn asking again that he clarify his intentions with regard to his leave of absence by June 12, 1998 (Exhibit E-15).

[27] On June 25, 1998, Mr. Blackburn wrote a response (Exhibit E-16) as follows:

*On June 24, 1998, I received your Registered letter dated June 4, 1998 addressed to me regarding your interest in learning whether or not it is my intention to return to the Correctional Service of Canada.*

*First, I never left the Service, I only took Authorized Leave of Absence, to which you authorized back in May 1997, and said leave was only for a period of one year. That leave was granted in order to give me an opportunity to pursue and determine whether or not I wish to make policing a career.*

*In any event, in my telephone conversation on May 25, 1998, which originated from the Ontario Provincial Police South Frontenac detachment in the presence of Constable*

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*Greg Lackie, I nformed you that I was here in Kingston to personally and physically report to you my return from said leave from Millhaven Institution, and that I am ready to return to work immediately following the conclusion of said leave which expired May 30, 1998. Your response to that was 'given the fact that your facing several criminal charges the CSC and I have decided that you should not return to work until those charges have been dealt with in a court of law, and that when those charges are dealt with, the CSC and I will then determine whether or not you should return to work'. I then asked you what are the legal basis, precedents, policies, directives, and Acts etc that governs the CSC to which you both relied upon in coming to this decision. You replied "the criminal charges your presently facing is justifiable cause to ban you from work and from the property of Millhaven Institution". In a written letter to me dated May 25, 1998 you echoed those same sentiments.*

*I reiterate that it is my intention to return to work in the capacity I held prior to my leave of absence, subject to the repercussions of said leave under the Collective Bargaining Agreement.*

*To deny me this opportunity based on allegations without a finding of guilt makes a mockery of Due Process and it is clearly an infringement on my Charter rights, namely and not limited to section 6(2), 7, 11, 12 and 15(1).*

*I am ready to return to work and earn my income. If it is the CSC and your continued intention to ban me from returning to work, then please address your reasons to me and to my Union president at Millhaven in writing including the evidence relied upon in coming to this decision.*

*May I suggest that the right and proper thing to do is to put me on Authorized Leave with Pay until such time the matters that gave rise to your concern are adjudicated and or disposed of. It as been the practice that employees facing disciplinary actions as a result of on and or off duty conduct, whether criminal or not, the employer, CSC, suspends that employee with pay or orders leave with pay until the matter is dealt with. I don't forsee this happening however, given my history with the CSC, which will no doubt create a grievance and/or legal avenues to remedy this matter.*

*Thank you and in anticipation of your response.*

*[sic throughout]*

[28] Mr. Kelly replied to Mr. Blackburn's letter on July 10, 1998 (Exhibit E-17), as follows:

*I acknowledge receipt of your letter dated June 25<sup>th</sup>, 1998, wherein you indicate your interest in returning to work at Millhaven Institution as a Correctional Officer.*

*As a matter of clarification, it was not my understanding from our telephone conversation on May 25, 1998 that you indicated your intent to return to the Correctional Service of Canada. Consequently, I wrote you on May 25<sup>th</sup>, 1998 to clarify that matter.*

*As stated during my conversation with you, and in my follow up letter to you on May 25<sup>th</sup>, 1998, I consider the criminal charges that have been laid against you to be very serious, to the extent that they could affect your continued employment with the Correctional Service of Canada. Consequently, I have determined that it is necessary to keep you on leave without pay pending the resolution of the Criminal Charges. At that time, we will determine if you can continue to be employed with CSC which will include a review of your Enhanced Reliability Status.*

*In addition, I note that you took the one year leave of absence to pursue a career with the Niagara Region Police and the most recent information I have is that you remain as an active serving member of that force. Please clarify your status with that organization.*

*When the above noted Criminal Charges are resolved, please advise my office.*

[29] On July 13, 1998, Mr. Kelly obtained another "CPIC" report (Exhibit E-18) confirming that Mr. Blackburn was released on his own recognizance and that a court date of August 12, 1998, was set for the incident of October 27, 1997.

[30] Mr. Blackburn grieved his suspension on July 15, 1998, and a grievance hearing occurred between July 29 and September 22, 1998. Mr. Kelly does not recall the date. Mr. Kelly made some handwritten notes a day or so after the grievance meeting, which he entered as Exhibit E-19.

[31] Mr. Kelly received by fax a copy of the Warrant of Committal on Conviction on September 27, 1999, which showed Mr. Blackburn was convicted on April 30, 1999, and had been sentenced to thirty days of imprisonment for the offence of October 27,

1997. Exhibit E-20 is the partial document he received. Mr. Kelly had learned that Mr. Blackburn remained an employee of the Niagara Police.

[32] Mr. Kelly also saw a newspaper article (Exhibit E-21) from “The Examiner” entitled “Officer jailed for road rage”. Mr. Kelly cannot recall the actual date he saw it; it was while he was Warden. Mr. Kelly learned subsequently that the conviction was overturned on appeal.

[33] On February 16, 2001, Mr. Blackburn faxed a letter to Mr. Kelly and Paul Snyder, the Warden of Millhaven Institution (Exhibit E-22). There had been no contact with Mr. Blackburn between the grievance hearing and this letter. To this letter was attached an order allowing the appeal of Mr. Blackburn against his conviction dated July 17, 2000, and documents showing that Mr. Blackburn was found not guilty of the charges of assault, assault with a weapon, utter a threat and dangerous driving. Also attached was a newspaper clipping entitled “Niagara cop acquitted of assaulting Hamilton bike courier”.

[34] Missing from Exhibit E-22 is the Judicial Interim Release Order (Exhibit E-29), which was attached to Mr. Blackburn’s letter of February 16, 2001.

[35] When Exhibit E-22 was received, Mr. Kelly discussed the matter with Acting Warden Snyder and once again they tried to determine Mr. Blackburn’s status with the Niagara Police. A shift in the grievance procedure was occurring and CSC was moving towards mediation.

[36] On May 2, 2001, Mr. Paul Snyder, Acting Warden at Millhaven Institution, wrote a letter to Chief Gary Nicholls of the Niagara Police (Exhibit E-23), of which he gave a copy to Mr. Kelly. On May 10, 2001, Mr. Snyder received a reply (Exhibit E-24), which stated that: “Meichland Blackburn is a member of the Niagara Regional Police Service and holds the rank of second class constable.”

[37] On November 26, 2001, after a request from CSC, the Niagara Regional Police Service faxed a letter to Gary Cornett, the Area Manager for CSC in St. Catharines, who in turn faxed it to Mr. Kelly (Exhibit E-30). In this letter, the Superintendent of Field Services of the Niagara Regional Police Service states that: “Meichland Blackburn is a member of the Niagara Regional Police Service in current full time employment and holds the rank of 2<sup>nd</sup> class constable.”

[38] Around the same time, at a staff relations meeting, Mr. Kelly saw a “CPIC” report (Exhibit E-25) dated October 25, 2001. It indicates that a new trial was ordered when the dangerous driving conviction was overturned. It confirmed that Mr. Blackburn had been acquitted of the other charges.

[39] On January 10, 2002, Mr. Kelly wrote a letter to Mr. Blackburn (Exhibit E-26). Mr. Kelly had learned from the mediation process that Mr. Blackburn was interested in returning to work at CSC. At different points, Mr. Kelly had heard indications of Mr. Blackburn’s desire to return to work. In a previous letter he wanted to be reinstated with pay, at mediation he wanted to be reinstated and return to duty.

[40] Mr. Kelly thought that given the fact that Mr. Blackburn was interested in returning and the criminal charges were still not settled, the fairest way to proceed would be to bring him back to duty and await the outcome of the criminal proceedings.

[41] Exhibit E-26 reads:

*On or about May 25, 1997, you requested a one (1) year leave of absence from work without pay to pursue reinstatement with the Niagara Regional Police Service commencing June 2, 1997. You were granted this leave of absence.*

*On or about May 28, 1998, during the course of your leave of absence, you were indefinitely suspended from your position as a Correctional Officer 1 (CX-1) at Millhaven Institution after it came to our attention that you had been charged under the Criminal Code of Canada with respect to two separate incidents, one in Hamilton Ontario and one in Cobourg Ontario.*

*Notwithstanding your suspension from work, and notwithstanding that the fact-finding into your behaviour with respect to these two incidents is ongoing, effective Monday February 11, 2002, 6:45 a.m. you are to report for work at Millhaven Institution, Bath, Ontario, for the 07:00 hrs to 15:00 hrs shift.*

*You are to report to Brian Schwehr, Correctional Supervisor upon arrival to the institution, who shall instruct you as to the commencement of your re-orientation for a two weeks (sic) period. You will receive weapons training according to CSC Standards, along with O/C spray. You will also need to bring with you your current CPR re-certification and a valid driver’s license. Your work placement as a CX-01*

*will be in J Unit, the Maximum Security Unit, unless otherwise notified.*

*If it is not your intention to report for duty, I would appreciate a call from you confirming that you shall not report. I can be reached at (613) 545-8134.*

[42] Mr. Kelly explains that paragraph 3 makes clear that he intended to make an assessment of both charges, the incidents in Hamilton and in Cobourg at some point in the future, “when the dust finally settles with the court case”. Mr. Kelly stated he had to make an assessment of Mr. Blackburn’s conduct in both incidents regardless of the outcome in criminal court.

[43] Mr. Blackburn replied to Mr. Kelly on January 21, 2002 (Exhibit E-27). His letter reads:

*I am in receipt of the above letter and please address/forward all future correspondence to the above address.*

*Am I to understand that notwithstanding my suspension from work, which you ordered, and notwithstanding that the fact finding into my behaviour with respect to the incidents in Hamilton and Cobourg is ongoing, my presence is required at Millhaven for only a two-week orientation period?*

*Prior to this change, it was your steadfast position that given the nature of the criminal charges, my return to Millhaven was not possible because of the security risk I posed to staff, inmates and myself. What has changed in my circumstance to warrant this change in position?*

*Your letter is not clear, in that it does not state that the suspension from work and the barring of me from the premises have been revoked. Absent from your correspondence is a notice of suspension revocation. Also, it is not clear whether this is an order ordering me to report for work or just instructions. Please be specific.*

*With respect to being reassigned to J-unit, I strongly object to this reassignment. Prior to my leave of absence I was assigned to E-unit (reception) and that is where I will remain. Any attempts to keep me in J-unit will be met with resistance and a grievance. The prudent thing to do is to allow me to get a working knowledge of the units and then for us to sit down and discuss the unit my talents can best be utilized in once the outstanding criminal charge is litigated.*

*At present I do not possess a current CPR re-certification. As per the normal routine, CSC always provided this training for its staff.*

*Finally, given the ongoing stress the suspension from work has brought on, the ongoing fact finding into my behaviour and the mistreatment the Service and yourself has brought to bear upon me, has finally worn me out mentally and emotionally. Given my present mental and emotional state where CSC is concerned, at this time I am in no way fit to perform my duties as a CX-01 in a penal institution.*

*At 1504hrs today (January 21, 2002) I received a return phone call from your secretary at RHQ while I was in the process of concluding this letter. She informed me that she had spoken with you and that you had informed her to tell me the following, that a) my suspension from work was not revoked since there are still outstanding criminal charges to be dealt with b) that the letter was only an offer to return to work and c) that if it was not my intention to report to work by the offer date, that was okay. Further, the offer to return to work was not an order. Given this disclosure, I will not return to work until the criminal charge of Dangerous Driving in Cobourg, Ontario is litigated in its entirety and I am fit to return to work.*

*Thank you for your offer and future co-operation in resolving this ongoing issue.*

[44] Mr. Kelly was confounded by Mr. Blackburn's letter. Mr. Kelly disputes Mr. Blackburn's interpretation of his letter to him. He felt his letter to Mr. Blackburn could not have been clearer. Mr. Kelly considers that Mr. Blackburn's fourth paragraph is "mumbo jumbo". When he instructed Mr. Blackburn to return to duty, it meant that the suspension had been lifted.

[45] Mr. Kelly described J-Unit as a maximum-security unit; E-Unit is the assessment unit. He added that correctional officers are rostered at any major facilities and while efforts are made to assign staff to units they want to work in, it is a managerial responsibility to assign staff.

[46] Mr. Kelly was surprised by Mr. Blackburn's second paragraph on page 2 of Exhibit E-27. Mr. Kelly was not responsible for Mr. Blackburn's behaviour or the offences for which he was charged.

[47] Mr. Kelly confirmed that he had spoken to his secretary about Mr. Blackburn's call and had asked her to call Mr. Blackburn to confirm what he had written in his third paragraph of Exhibit E-26.

[48] Mr. Kelly stated that the offer to return to work was not an order because he was given to understand that Mr. Blackburn wanted to return to work.

[49] Mr. Kelly did not respond to Exhibit E-27 but, based on a briefing from Acting Warden Paul Snyder and Acting Deputy Warden Cathy Gainer regarding what transpired on February 11, 2002, wrote the termination letter (Exhibit E-28) on February 21, 2002. The letter reads as follows:

*This is further to your letter of January 21, 2002 and your subsequent attendance and meeting with Acting Deputy Warden Gainer at Millhaven Institution on the morning of February 11, 2002.*

*My letter of January 10, 2002 was a very clear instruction to you to report to work at Millhaven Institution. You were to report to work effective the morning shift on February 11, 2002, which shift would commence with your re orientation, which would take approximately two weeks. Re orientation was required as you have not worked as a Corrections Officer since June of 1997. Upon completion of re orientation, you were assigned to J-Unit. There was no limit placed upon you that you were required only for a two-week period.*

*As a Correctional Officer in the employ of the Correctional Service of Canada you are not in a position to determine where your skills and needs are best suited and required. Corrections Canada determines where and how to run its institutions and where to delegate human resources, this is not dictated by its employees.*

*With respect to your suggestion that you are suffering ongoing stress from the suspension and are not fit to work, you have not provided any medical documentation to substantiate this condition. Indeed there was no suggestion that you were unable to work when we met in late November of 2001. In addition I understand you remain fully employed on active service as a Police Officer employed with the Niagara Regional Police Service.*

*Notwithstanding this alleged condition you have indicated quite unequivocally in your correspondence that you are not going to return to work until the criminal charges have been fully dealt with. This is unacceptable. In May of 1997 you*

*requested and were granted a one-year leave of absence effective June 2, 1997 to determine if you wished to pursue your career as a police officer. That leave of absence ended on June 2, 1998. You were suspended during the course of that leave of absence.*

*I understand that you attended at Millhaven Institution on the morning of February 11, 2002. I understand that you attended at the Main entrance (ID Building), at 07:00, not in uniform and insisting that you had a meeting with the Warden. I have spoken to the Warden who informs me that no such meeting had been scheduled. Indeed when the Acting Deputy Warden, Cathy Gainer attended, she enquired of you whether you were reporting for duty as set out in my letter to you of January 10, 2002, and you did not answer her question but instead requested a union representative and a sick leave form.*

*I understand that a union representative was not at the Institution at 07:00 when you arrived with your wife, and after a brief wait, D. Barbosa arrived and attended with Acting Deputy Warden Gainer and a brief meeting was held in the Warden's office. You indicated that you were not going to commence working and filled in the leave form (I understand you have a copy). When the Acting Deputy Warden asked you if you had a medical certificate, you indicated that you did not. I further understand that the Acting Deputy Warden advised you that she did not have the authority to make any determination with respect to your request but that she would forward it on to the Warden and myself. I understand that the meeting then ended.*

*You are now clearly in breach of the Standards of Professional Conduct and the Code of Discipline of a Corrections Officer in refusing to report to work. You are absent from duty without authorization. Your letter to me of the 21<sup>st</sup> of January 2002 makes it clear that you have no intention of returning to work despite my order to you to do so. You have also made it clear that you had no intention to carry out your duties as a Corrections Officer where you were assigned by the Institution.*

*These actions, together with the behaviour that led to the laying of the criminal charges (in both Hamilton and on the 401 between port Hope and Cobourg) leave me no alternative. As stipulated under the Financial Administration Act, and in the exercise of my responsibilities to establish standards of discipline under section 11(2)(f), your employment with Correctional Service of Canada is terminated effective February 11, 2002.*

*In accordance with the collective agreement for Correctional Services group, and subject to and as provided in Section 91*

*of the Public Service Staff Relations Act, you are entitled to present a grievance on the matter of termination of employment.*

[50] Mr. Kelly's letter of February 21, 2002, responds to some of the points raised in Exhibit E-27.

[51] Mr. Kelly was told that Mr. Blackburn did not have a medical certificate. Mr. Kelly stated that it was clear to him that Mr. Blackburn had no intention of returning to duty and that is the reason he terminated his employment.

[52] Mr. Kelly had in mind standard 2, on page 9 of Exhibit E-3, when he made his decision to terminate. No disciplinary hearing had been held over Mr. Blackburn's behaviour in the road rage incident. Mr. Kelly was waiting for the second charge, still outstanding, to be disposed before holding a disciplinary hearing. The primary issue was that Mr. Blackburn was not reporting to duty despite his indication that this was his intention.

[53] In cross-examination, Mr. Kelly stated that he had a good understanding of the Guide to Discipline (Exhibit E-2).

[54] When Mr. Kelly read the newspaper clipping (Exhibit E-10), he "did not interpret it to be misconduct on the part of Mr. Blackburn." The suspension of Mr. Blackburn was an administrative review. He did not allow Mr. Blackburn to return to work until a determination was made.

[55] After reading the "CPIC" report (Exhibit E-13), Mr. Kelly made a conscious decision not to convene a disciplinary hearing at that point. His decision was made in consultation with staff relations officials. Part of the thinking was the issue of Mr. Blackburn's status with the Niagara Regional Police Force. Mr. Kelly needed more information; he needed to know if it was Mr. Blackburn's intention to return to work for CSC.

[56] Mr. Kelly reiterated that during and pursuant to the May 25, 1998, telephone conversation with Mr. Blackburn, he had no understanding of Mr. Blackburn's intention of returning to work. He understood from the conversation that Mr. Blackburn knew Mr. Kelly had knowledge of the charges against him.

[57] To the best of Mr. Kelly's recollection, the notice to the gate of the institution banning Mr. Blackburn from entering the institution went out on May 25, 1998, or shortly thereafter. Mr. Kelly doesn't recall whether he gave notice to the union. He knows he advised Mr. Rod Nellis, President of the USGE Local orally that Mr. Blackburn was suspended. Several conversations took place with Mr. Nellis concerning the newspaper clipping (Exhibit E-10) and its posting on the staff bulletin board.

[58] When asked if he, at any time, considered contacting Mr. Blackburn to get an understanding of his situation and ask him for an explanation of what occurred, Mr. Kelly stated he did not initiate the actual investigation, CSC was gathering information. He never had any intention of not having such a conversation at the appropriate time. The appropriate time was a moving target. He was awaiting the outcome of the criminal charges.

[59] Contacting Mr. Blackburn was difficult. Mr. Kelly had to send his letter by registered mail (Exhibit E-15) before he got a response on June 25, 1998 (Exhibit E-16).

[60] Even during the grievance hearing, Mr. Blackburn was in no way forthcoming with details; he was evasive. He had no interest in talking as is noted in Exhibit E-19. Mr. Blackburn talked of "alleged charges" until asked point-blank if the charges existed; then Mr. Blackburn acknowledged they existed.

[61] Mr. Kelly agreed that at the grievance hearing, Mr. Blackburn, Mr. Nellis, the President of the USGE Local and Mr. Blackburn's sister were present. Mr. Kelly does not recall the name of Mr. Blackburn's sister.

[62] Mr. Kelly did not obtain from the court or the police a copy of the specific charges against Mr. Blackburn. Mr. Kelly did not know the substance of the charges, only that they were serious charges.

[63] Mr. Kelly did not follow page 28 of the Guide to Staff Discipline (Exhibit E-2) and did not assign anyone to do so. Mr. Blackburn did not have a formal disciplinary hearing.

[64] At the time of authorizing leave without pay, Mr. Kelly expected that Mr. Blackburn would never return to CSC. In 1998, Mr. Kelly was more interested in knowing whether Mr. Blackburn was still employed by the Niagara Police than in knowing what he had allegedly done.

[65] Mr. Kelly explained that his third paragraph in Exhibit E-17 meant that the suspension continued and that it was without pay.

[66] Mr. Kelly explained that enhanced reliability status is an internal review of an individual's reliability and suitability for initial or continued employment at CSC. Mr. Kelly understands it is valid for ten years after initial hiring unless something occurs that would cause the conduct of a review, such as criminal charges. There was no enhanced reliability status review conducted on Mr. Blackburn.

[67] Mr. Kelly accepted the acquittal verdict on the charges in Hamilton. He did not return Mr. Blackburn to work because he was awaiting the result of the dangerous driving charges in Cobourg. Mr. Kelly stated that notwithstanding the acquittal, he still needed to make an assessment on whether Mr. Blackburn's conduct brought discredit to CSC.

[68] Mr. Kelly did not get a transcript of the trial. He was given the advice to await the outcome of all criminal charges before making a decision. Mr. Kelly became aware that the Cobourg incident conviction was quashed when he read the October 25, 2001, "CPIC" report (Exhibit E-25). It was at this point that conversations began regarding bringing Mr. Blackburn back to work and making an assessment when the "dust settled". It was felt that Mr. Blackburn could work while awaiting trial.

[69] Mr. Kelly arrived at that conclusion in January 2002. Mr. Kelly ordered Mr. Blackburn to report to work in paragraph 3 of Exhibit E-26. Mr. Kelly fully expected Correctional Supervisor Brian Schwehr to be in attendance at work on February 11, 2002. Mr. Kelly is not aware whether he was present or not.

[70] Mr. Kelly confirmed that his secretary, Kim Smith, had informed him of Mr. Blackburn's call following receipt of Exhibit E-26. Mr. Kelly does not recall that Mr. Blackburn wanted a reply in writing to his questions prior to February 11, 2002. Mr. Kelly instructed his secretary to call Mr. Blackburn back. He did not make a written note of the information the secretary was to pass on to Mr. Blackburn.

[71] Mr. Kelly did not attempt to contact Mr. Blackburn after he received Exhibit E-27.

[72] Mr. Kelly agreed there was a practice in CSC of assigning correctional officers charged criminally to perimeter posts or posts without contacts with offenders

depending on the nature of the cases. Decisions were made on a case-by-case basis. The nature of the offence is considered.

[73] Mr. Kelly was advised on February 11, 2002, that Mr. Blackburn came in and requested a leave form. When asked if he had a medical certificate, he said he didn't. Mr. Kelly did not attempt to verify Mr. Blackburn's condition. His expectation was that if indeed he had a medical condition, he would have a medical certificate. Mr. Kelly's information was that Mr. Blackburn was performing as a police officer and, therefore, he could perform as a correctional officer.

[74] Mr. Kelly made no inquiry to Mr. Blackburn or his Niagara Police employer to ascertain whether Mr. Blackburn was actually at work for the Niagara Police. Nothing prevented Mr. Kelly from inquiring about Mr. Blackburn's physical or mental health, but he felt that this was a matter between Mr. Blackburn and his physician. Mr. Kelly did not see Mr. Blackburn's leave form.

[75] Mr. Kelly interpreted the information that Mr. Blackburn was in active service with the Niagara Police as meaning that he was going to work, not sitting at home on leave, that he was performing some of his duties. Mr. Kelly had no information as to the specific duties Mr. Blackburn was actually performing.

[76] Mr. Kelly stated that Acting Warden Paul Snyder did not have carriage of the Blackburn case for reasons of continuity. Mr. Kelly had authorized the leave without pay and had suspended Mr. Blackburn. When he became Deputy Commissioner for Ontario Region, he took with him Mr. Blackburn's file, along with a few others.

[77] At the time that Mr. Blackburn reported to Millhaven, Mr. Snyder was Acting Warden. Mr. Jim Marshall is now Warden of Millhaven Institution. In normal circumstances, the warden has authority to award leave without pay and correctional supervisors have the authority to deny sick leave. In Mr. Blackburn's case, Mr. Kelly had retained the authority to grant or deny leave because it was a high-profile case.

[78] Mr. Kelly believed that Mr. Blackburn had no intention of returning to work. Mr. Kelly stated "It came as a surprise to us when he showed up at work". Mr. Kelly indicated that people were surprised that Mr. Blackburn arrived but not surprised that he didn't stay or produce a medical certificate.

[79] Mr. Kelly did not know how much leave Mr. Blackburn had requested. He was not aware whether Paul Snyder had been given the request for sick leave. Mr. Kelly is aware that Paul Snyder did not authorize the leave. Mr. Kelly had no personal knowledge if Mr. Snyder had refused the leave. His only information is that the leave slip was given to Ms. Gainer. Mr. Kelly was aware that Mr. Blackburn was at Millhaven on February 11, 2002.

[80] It was Mr. Kelly's intent that the day-to-day supervision of Mr. Blackburn's return to work would be handled by his immediate supervisor and the Acting Warden but that Mr. Kelly would maintain ownership of the file. Mr. Kelly stated that Mr. Snyder would have had discussions at the appropriate times with Mr. Kelly around Mr. Blackburn's return to work.

[81] It was Mr. Kelly's understanding that while on authorized leave without pay, Mr. Blackburn remained an employee subject to the Code of Conduct.

[82] Mr. Kelly stated he did not recall the exact date on which he decided to suspend Mr. Blackburn indefinitely. Mr. Kelly could not recall when notification to the main entrance was given to prohibit Mr. Blackburn from entering the Millhaven Institution; he could not recall whether it was a written instruction or whether a phone call was made.

[83] Only Mr. Kelly had the authority to approve Mr. Blackburn's sick leave request submitted on February 11, 2002. Mr. Kelly was not handed the leave application (Exhibit E-31) form but was aware of its existence. Mr. Kelly did not recall if Paul Snyder signed the leave application to deny approval of it. Mr. Kelly did not ask Mr. Blackburn to provide a medical certificate upon his return to work.

[84] Catherine Marie Gainer has been Deputy Warden at Collins Bay Institution since October 2002. From May to October 2002, she was Acting Deputy Warden at the Regional Treatment Centre. From January 2001 to May 2002, Ms. Gainer was Acting Deputy Warden at the Millhaven Institution. Previously, she held various positions in the Correctional Service. She began to work for CSC in 1996 at the Regional Headquarters. From 1991 to 1995, Ms. Gainer worked with the Ministry of the Solicitor General Secretariat and from 1981 to 1991 she worked with the National Parole Board.

[85] As Acting Deputy Warden at Millhaven Institution, Ms. Gainer was responsible for all issues of safety and security related to correctional operations, from perimeter to inside posts. She was also responsible for psychology and health care and security intelligence. In the absence of the Warden, she assumed responsibility for the entire institution. At that time, Paul Snyder, the Deputy Warden, was acting in the Warden's position.

[86] Ms. Gainer met Mr. Blackburn just before 7:00 a.m. on February 11, 2002. She received a call from the Identification (ID) Building where someone told her that Mr. Blackburn was present with his partner and had a meeting scheduled with the Warden. Ms. Gainer was not aware of a scheduled meeting but was aware that Mr. Blackburn was due to report to work.

[87] Ms. Gainer authorized entry for Mr. Blackburn and his partner and asked the Co-ordinator of Correctional Operations, an excluded manager, to join her to meet with Mr. Blackburn. She attempted to call both Mr. Snyder and Mr. Kelly but could not get a response.

[88] Mr. Blackburn entered the Institution with his partner, whose name Ms. Gainer does not recall. She invited them into the Warden's office. Mr. Blackburn was not in uniform. She asked him if he was reporting to work. Mr. Blackburn indicated he wanted a union representative and a leave slip and that Mr. Kelly was aware of his plans.

[89] At that, Ms. Gainer told Mr. Blackburn that she would find a union representative and obtain a leave slip and asked him to wait at the ID Building with his partner. This exchange took place in the vestibule adjacent to the Warden's office. Mr. Blackburn and his partner returned by themselves to the ID Building.

[90] Ms. Gainer obtained a leave application form and checked the roll call to determine if a union representative was on shift or if one was coming in. Ms. Désirée Barbosa, a union representative, was due to report at 7:30 a.m. Ms. Gainer met her on her way in and told her that Mr. Blackburn had asked for union representation. If she was willing to assist, Ms. Gainer would call Mr. Blackburn in.

[91] Ms. Gainer called the ID Building and asked to have Mr. Blackburn come in but without his partner, which he did. It was between 7:30 a.m. and 7:40 a.m.

[92] At the meeting, there were Mr. Paul Empey, the Co-ordinator of Correctional Operations, Ms. Barbosa, Mr. Blackburn and Ms. Gainer. After introductions, Mr. Blackburn recognized Ms. Barbosa by her former name of McGinn. Ms. Barbosa did not have her union representative identification on her but Mr. Blackburn accepted her representation. Ms. Gainer does not recall Ms. Barbosa's union title.

[93] Ms. Gainer asked Mr. Blackburn if he was reporting to work. Ms. Gainer does not believe there was a direct answer. Mr. Blackburn asked for the leave certificate; Ms. Gainer provided the leave application form. Mr. Blackburn completed it in the presence of the union witness and gave it to Ms. Gainer.

[94] Ms. Gainer indicated "she was receiving the leave application but wasn't approving it" and asked if Mr. Blackburn had a medical certificate. There was no affirmative response. Ms. Gainer believed that Mr. Kelly was aware of Mr. Blackburn's plan. Ms. Gainer simply confirmed he was not reporting to duty and that basically concluded their discussions. Mr. Blackburn asked to meet with Ms. Barbosa and they left Ms. Gainer's office area.

[95] Ms. Gainer does not believe she had any further discussions or contact with Mr. Blackburn until the adjudication hearing. According to Ms. Gainer, Mr. Blackburn did not work that day nor at any time during her tenure at Millhaven Institution. Mr. Blackburn never provided a medical certificate to Ms. Gainer.

[96] Ms. Gainer was not involved with any of the discipline awarded to Mr. Blackburn. She identified the leave application form (Exhibit E-31).

[97] In cross-examination, Ms. Gainer indicated that as Acting Deputy Warden, she had the authority of the Warden in his absence, including approving or refusing the leave application submitted by Mr. Blackburn. Ms. Gainer stated she did not have sufficient information to approve or refuse the leave as there was no medical certificate and she had to consult with Mr. Snyder and the Assistant Deputy Commissioner. Mr. Blackburn had referred Ms. Gainer to Mr. Kelly when he said Mr. Kelly knew all about it.

[98] Ms. Gainer had anticipated that Mr. Blackburn would arrive at the Institution prepared to assume his duties. She had no reason to agree to a sick leave without pay

application without documentation. Ms. Gainer would have had to check with the “Human Relations” to know if she could authorize sick leave without pay.

[99] Ms. Gainer did not recall how or when she was instructed that Mr. Blackburn would be reporting to work on February 11, 2002. Ms. Gainer made the arrangements for Correctional Supervisor Schwehr to be responsible for meeting with Mr. Blackburn to assess the status of his qualifications concerning first aid, scuba air breathing, fire apparatus, firearms and to arrange orientation training.

[100] Ms. Gainer did not recall seeing Exhibit E-26 although she was familiar with some of its content. She was aware of the fact that Mr. Blackburn was due to report to work and the fact he was to report to Correctional Supervisor Schwehr at 0700.

[101] Ms. Gainer was aware that Mr. Blackburn arrived prior to 7:00 a.m., because she received the call from the ID Building at 06:45 a.m.. Ms. Gainer assumed that Mr. Schwehr was present at the Institution at that particular time and date although she did not check for his presence at that time.

[102] Asked if it did not seem prudent to have Mr. Schwehr attend the meeting with Ms. Barbosa, Mr. Empey and Mr. Blackburn, Ms. Gainer replied that she didn’t feel it was important to contact Mr. Schwehr. Ms. Gainer recalled no discussion with Mr. Blackburn regarding Mr. Schwehr.

[103] Mr. Blackburn completed the sick leave application, which was dated 02/02/11, for 7:00 a.m., requesting indefinite leave from that day onward. Ms. Gainer did not direct Mr. Blackburn to stay at work.

[104] Ms. Gainer stated that the officer at the ID Building, whose voice she recognized, indicated that Mr. Blackburn was at the ID Building and was reporting for a meeting. She granted permission to enter at that time with his partner. When Mr. Blackburn asked for a union representative and a leave slip, she had him return to the ID Building and wait there. Ms. Gainer believes she directed ID Building personnel not to let Mr. Blackburn’s partner in to attend the subsequent meeting. She felt it was not necessary for him to have his partner as a witness because he had a union witness.

[105] Ms. Gainer agreed that Mr. Blackburn arrived at the Institution at the prescribed time. He was not in uniform. Correctional officers are required to report to duty and to have with them their full uniform and be in uniform prior to shift unless working in

non-uniformed posts. Officers may change into uniform on site. Mr. Blackburn was not in violation of the code of conduct regarding uniform rules.

[106] Ms. Gainer did not ask Mr. Blackburn to remain at the workplace until he obtained an answer to his leave request. Ms. Gainer accepted the leave application and told Mr. Blackburn that she was neither approving nor refusing it and that she would discuss it with Warden Snyder and Mr. Kelly. She gave the application to the Warden. She believed it was not authorized. Ms. Gainer believed Mr. Snyder signed the form before her as not accepted. Mr. Snyder did not give her the leave application. Ms. Gainer did not have a conversation with Mr. Snyder regarding the reasons why the leave was denied. Ms. Gainer did not inform Mr. Blackburn that the leave was not authorized.

[107] Ms. Gainer had not seen Exhibit E-27 and was not familiar with its content. Ms. Gainer had no information to suggest Mr. Blackburn would not be reporting for work.

[108] Ms. Gainer had no knowledge whether the Correctional Service informed Mr. Blackburn that his leave application was denied.

[109] Ms. Gainer testified that she was not familiar with the policies regarding indefinite leave and would have consulted with the Human Resources Section.

[110] Ms. Gainer did not ask Mr. Blackburn to produce a medical certificate. She had no knowledge whether Paul Snyder or Louis Kelly followed up on the issue of the medical certificate nor whether either had asked Mr. Blackburn to produce one prior to February 21, 2002.

[111] Mr. Devo Jaiikoah Dyette, a CX-02, was called by Mr. Blackburn. Mr. Dyette has worked for the Correctional Service since September 1991. Mr. Dyette was a union steward in Kingston prior to UCCO-SACC-CSN's becoming the bargaining agent for correctional officers.

[112] Mr. Dyette has known Mr. Blackburn since shortly after he started to work in corrections. Mr. Dyette also knows correctional officer Linda MacMillan. In 1997, she was employed at Millhaven Institution. In 1998, Mr. Dyette received a call at home from Ms. MacMillan telling him that Mr. Blackburn was not allowed in Millhaven

Institution and that there was a note at the gate informing staff not to allow Officer Blackburn on the grounds of the Institution.

[113] Mr. Dyette then called Mr. Blackburn at his residence in St. Catharines. Mr. Dyette recalls it was the spring but does not recall the date.

[114] Prior to the cross-examination there was an admission by the employer that an employee can fill out a leave application form before going on leave, and, indeed, that he can fill it out at any time. Mr. Dyette's testimony on this subject was unnecessary.

[115] In cross-examination, Mr. Dyette indicated that Ms. MacMillan had told him Mr. Blackburn was not allowed access to the Institution and that there was speculation that criminal charges were involved. She wanted to clarify whether Mr. Dyette had knowledge of it.

[116] Mr. Dyette contacted Mr. Blackburn shortly afterwards. He is not sure if it was the same day but certainly within a week. Mr. Dyette informed Mr. Blackburn there was speculation regarding criminal charges against him. Mr. Blackburn did not want to discuss the matter on the phone.

[117] Mr. Dyette knew Mr. Blackburn was no longer working at Millhaven, that he had been reinstated to his former police position.

[118] Michelle Louise Blackburn is the grievor's wife. Their relationship started four years ago in July.

[119] Mr. Blackburn went to Kingston in February 2002 because of the letter he had received from his employer and to fill out a sick leave application form. Mrs. Blackburn accompanied her husband, to act as a witness and verify things that were being said.

[120] Mrs. Blackburn described that when they arrived at the security building, her husband stated he had an appointment. According to Mrs. Blackburn, they went to an office building, an administration or a main building. There, they met with a woman; Mrs. Blackburn does not recall her name. Her husband stated why he was there and requested a leave form and told her of his intention of booking off sick. At that time, the woman asked Mrs. Blackburn why she was there. Mrs. Blackburn replied that she was there to be a witness for her husband.

[121] Mrs. Blackburn was told she wasn't allowed in and was asked to return to the security building and to remain there until the grievor was finished with his meeting. She waited a good 45 minutes in the security building.

[122] Mrs. Blackburn met her husband in February 1998; he was working for the Niagara Police Service. She started living with him in January or February 1999 or possibly December 1998.

[123] Mrs. Blackburn stated that her husband was suffering from mental stress while working for the Niagara Police Service. He attended doctor's appointments and took some sick leave for parts of his shifts and sometimes whole shifts. Mrs. Blackburn is aware that the grievor sought sick leave from the Niagara Police but had to go to work for the Alternative Response Unit (ARU).

[124] Mrs. Blackburn was aware that Dr. Teodorini had provided a medical certificate to her husband (Exhibit G-2) because she saw it when he received it. She also saw a psychiatrist's certificate (Exhibit G-3), and a letter from Dr. Shuka (Exhibit G-4).

[125] In cross-examination, Mrs. Blackburn indicated that she did not attend the medical appointments listed in Exhibits G-2, G-3 and G-4, with her husband.

[126] At the time of the hearing, Mrs. Blackburn was not working because she was on maternity leave; her last contract had finished at the end of November 2002. Between July 1999 and November 2002, Mrs. Blackburn had worked, sometimes full time, sometimes on contract.

[127] Mrs. Blackburn agreed that on February 11, 2002, her husband did ask for a union representative when he asked for a sick leave form. When she returned to the security area, her husband did accompany her. After she got settled, he went back in.

[128] Mrs. Blackburn indicated that she returned to St. Catharines with her husband that same day. After they returned from Kingston in February 2002, Mr. Blackburn was still employed with the Niagara Police Service. Mrs. Blackburn does not recall what her husband's schedule was but he worked shifts, sometimes on weekends.

[129] Mrs. Blackburn was aware that her husband stopped working in July 2002 but that his employment with Niagara Police continued until about December 2002.

[130] Mrs. Blackburn was aware that there were criminal charges filed against her husband. She was also aware that other complaints were filed against him, mainly by his Chief of Police.

[131] Meichland Oliver Blackburn started employment with CSC in September 1992 as a CX-01. Previously, he had been employed as a police officer with the Niagara Regional Police Force (NRP). He was dismissed without cause during probation and filed a complaint with the Ontario Human Rights Commission. Around April 1997, the NRP and its Police Board agreed to reinstate Mr. Blackburn to the position he held prior to termination and he was to report for duty on June 2, 1997.

[132] Mr. Blackburn sought and obtained leave to pursue his police career. He introduced a copy of his original leave application as Exhibit G-5. He was asked to put in an amended leave application, which he did by way of Exhibit G-6.

[133] In late April or early May 1998, Mr. Blackburn was contacted by a CX friend, Devo Dyette. Mr. Dyette advised that Linda MacMillan had told him that Mr. Blackburn was suspended and barred from Millhaven Institution, that an order to that effect was posted at the ID Building.

[134] With that information and because his leave was due to expire around May 30, 1998, Mr. Blackburn went to Kingston, Ontario, to inform Warden Kelly that he was returning to work at the expiration of his leave. Knowing that he was barred from Millhaven Institution and understanding what that meant, he stopped at the South Frontenac OPP detachment in Amherstview on May 25, 1998. His intention was to get the OPP, who has jurisdiction over Millhaven property, to do what policemen call a “keep the peace” transaction, basically to assist him in getting access to Millhaven without being accused of trespassing.

[135] Constable Greg Lackie, upon hearing his request, said it would be prudent for him to call Millhaven and find out if Warden Louis Kelly was present before heading over there. Constable Lackie got hold of Mr. Kelly and informed him that Mr. Blackburn was present in his detachment and wanted to do a “keep the peace” by having him drive to Millhaven Institution and meet with the Warden to advise him of his intention of returning to work and to confirm if he was barred and suspended from Millhaven.

[136] Constable Lackie then handed the phone to Mr. Blackburn; Mr. Kelly was at the other end. Mr. Blackburn informed him of his intention to report to work at the expiration of his leave without pay. Mr. Blackburn asked Mr. Kelly if in fact he was suspended and barred from the property of Millhaven Institution. Mr. Kelly confirmed that Mr. Blackburn was indeed suspended without pay.

[137] Sometime after May 25, 1998, Mr. Blackburn received a letter (Exhibit E-14) confirming that he was not permitted to return to work and was barred from Millhaven Institution. Subsequent to receiving the letter (Exhibit E-14), Mr. Blackburn received a second letter (Exhibit E-15) asking that he respond prior to June 12, 1998. Mr. Blackburn responded on June 25, 1998, by way of Exhibit E-16. Prior to responding, Mr. Blackburn contacted his union (at the time it was USGE/PSAC) and told of the call from Devo Dyette, his attendance in Kingston on May 25, 1998, and his conversation with Mr. Kelly.

[138] As a result, Mr. Blackburn filed two grievances, one against the suspension and one against Mr. Kelly's letter to the Niagara Regional Police Service. Mr. Blackburn introduced as Exhibit G-8 a letter from Linda Mclaughlin, a Service Officer from USGE. Mr. Blackburn filed the level 2 reply to his suspension grievance as Exhibit G-9. Mr. Blackburn's sister, Yvette, was present at the level 2 grievance hearing, along with Mr. Rod Nellis.

[139] The grievance was denied at the final level and was referred to adjudication on June 3, 1999 (Exhibit G-10). The grievance was first scheduled for a hearing from October 18 to 22, 1999 (Exhibit G-11), but Mr. Blackburn's representative Mr. Dagger had the case postponed (Exhibit G-12).

[140] In February 2001, Mr. Blackburn wrote a letter to Mr. Kelly and Paul Snyder after his acquittal (Exhibit E-22). Mr. Blackburn was acquitted on February 8, 2001. On February 19, 2001, PSAC sought to have the case heard as soon as possible (Exhibit G-13).

[141] A hearing was set sometime in November 2001. On November 26, 2001, Mr. Blackburn's new bargaining agent agreed, jointly with the employer, to proceed by way of mediation (Exhibit G-14). The mediation failed and the bargaining agent asked for hearing dates down the road. After January 10, 2002, Mr. Blackburn received a two-page letter from Mr. Kelly (Exhibit E-26). Sometime between

January 10 and 21, 2002, Mr. Blackburn was not clear as to what was expected of him in that letter and started writing a letter to Mr. Kelly on January 21, 2002 (Exhibit E-27). Prior to finishing his letter, Mr. Blackburn telephoned Mr. Kelly at the number noted in Exhibit E-26 (613-545-8134). At that number, the telephone rang at Regional Headquarters in Kingston and was answered by Mr. Kelly's secretary. Mr. Blackburn entered as Exhibit G-15 a telephone company record of long distance calls that shows a two-minute call to 613-545-8134 on January 21, at 1:49 p.m. from his home phone number.

[142] Mr. Blackburn states that at no time after being notified of his call and prior to the February 21, 2002 letter (Exhibit E-28) did Mr. Kelly call Mr. Blackburn. Mr. Blackburn's letter (Exhibit E-27) was received by the employer on January 25, 2002, according to the stamp on that exhibit, yet Mr. Blackburn did not get a phone call from either Mr. Kelly or anyone else at CSC in response.

[143] Mr. Blackburn was cautious, not having heard from Mr. Kelly; he did not want to be accused of not reporting to work and be discharged, so he went to Millhaven in the company of his wife on February 11, 2002.

[144] When Mr. Blackburn arrived at the ID Building with his wife, he advised the officer there that he was reporting for duty and that he was to meet with Correctional Supervisor Schwehr. The ID Officer phoned in to the Institution and he received a call back telling Mr. Blackburn and his partner to come into the Institution.

[145] Once inside, Mr. and Mrs. Blackburn met with Ms. Gainer in the Warden's boardroom. While in the office, Ms. Gainer advised Mr. Blackburn she had to go check the roll call to see if a union representative was available for the day shift. She then told Mrs. Blackburn that she had to go back to the ID Building and wait. Mr. Blackburn asked why she could not stay; he wanted another set of ears and eyes because, as he stated, the union representative still works for the employer. Ms. Gainer told Mr. Blackburn and his wife to go wait for her call at the ID Building since no union representative was in yet.

[146] Mr. and Mrs. Blackburn went back to the ID Building. Mr. Blackburn saw Désirée McGinn (now Barbosa) go in and he greeted her. Ten or fifteen minutes later, a call came in advising him that he could go in but his wife had to stay behind.

[147] Mr. Blackburn met with Ms. Gainer, Mr. Empey and Ms. Barbosa. Mr. Blackburn asked to see her union identification; she did not have it with her. Mr. Blackburn took her word that she was a union representative. Mr. Blackburn did not have Exhibit E-16 with him but assumed they were aware of it.

[148] Mr. Blackburn mentioned he was reporting as instructed by Mr. Kelly; however, he was going to apply for sick leave without pay. He asked for a leave application form to complete. Ms. Gainer and the union representative did not object. Ms. Gainer obtained the form or asked Mr. Empey to get one. Once provided, Mr. Blackburn filled it out requesting sick leave without pay (Exhibit 31). Neither the union representative nor Ms. Gainer objected to his request for indefinite sick leave without pay. Mr. Blackburn wrote on the application "Stress leave", dated it and submitted it to Ms. Gainer.

[149] Ms. Gainer advised Mr. Blackburn that she was not going to sign it. Mr. Blackburn was not sure if she used the words she had no authority; she said she would pass it to Mr. Paul Snyder and he believed she said Mr. Kelly, as well.

[150] Ms. Gainer asked if Mr. Blackburn was reporting for duty. Mr. Blackburn stated he was reporting for duty. Mr. Blackburn stated he was reporting for duty as instructed; however, he was going to be taking sick leave as of 0700, indefinite sick leave. The meeting concluded and Mr. Blackburn left with Ms. McGinn Barbosa. They went to the lobby area of the cafeteria where Ms. Barbosa provided him with a union card to fill out. He filled it out, paid a "toonie" and left. Just prior to leaving, Mr. Blackburn got a photocopy of his leave application (Exhibit E-31) and so did the union representative.

[151] As he was leaving the institution, Mr. Blackburn met the Acting Warden under Tower One just east of the staff parking lot. Mr. Blackburn left with his wife.

[152] Mr. Blackburn went to the UCCO-SACC-CSN office on Gardiner Road in Kingston and met Mr. Michel Bouchard and apprised him of what took place at Millhaven. There was another gentleman, Mr. Bouchard's boss, Mr. Jacques Bazinet, present in the office during the meeting.

[153] Subsequently, Mr. Blackburn received Exhibit E-28, his termination letter. Until then, he had not been contacted by CSC management or anybody at all. Mr. Blackburn

contacted Mr. Mancini and the grievance process started. Mr. Blackburn communicated by fax or mail with UCCO-SACC-CSN who signed and filed grievance 13298 on his behalf. He later filled out and signed forms and sent them back to Ms. Barbosa to sign for the bargaining agent. Mr. Blackburn identified the transmittal form to the 3<sup>rd</sup> level (Exhibit G-16).

[154] After receipt of Exhibit E-28 and prior to the grievance hearing, Mr. Blackburn endeavoured to get a medical certificate. He visited Dr. Irving Teodorini and apprised him of the situation with CSC and his termination. Dr. Teodorini was already aware he was on leave from CSC. He undertook to provide a medical certificate.

[155] In the meantime, Mr. Martel called Mr. Blackburn again and asked if he had secured a medical certificate. Mr. Blackburn said no but his doctor was apprised and would get to it as soon as possible, he had a busy schedule. Mr. Blackburn asked Mr. Martel if a date was set for the 3<sup>rd</sup> level grievance hearing and he said no but that he'd like to have the medical certificate in his hands as soon as possible.

[156] On May 8, 2002, Mr. Blackburn received another call from Mr. Martel. Mr. Blackburn said the securing of the medical certificate was in the works and that he did not understand the urgency as no date was set for the level 3 grievance hearing. On that day, Mr. Martel wrote a letter addressed to Mr. Blackburn (Exhibit G-17). Mr. Blackburn did not receive the letter from the bargaining agent; he got it by fax on May 14, 2002, from the employer, CSC.

[157] On May 13, 2002, Dr. Teodorini completed a medical certificate (Exhibit G-18). There is a handwritten note on the certificate indicating that it was picked up and delivered to the grievor by police colleagues as Mr. Blackburn was working and could not leave to pick it up.

[158] Mr. Blackburn had a discussion with Elaine Mignault from CSC Labour Relations in Ottawa on or around May 14, 2002. They discussed the letter (Exhibit G-17) which Ms. Mignault faxed to him. It was the first time he was aware that UCCO-SACC-CSN was no longer representing him.

[159] The next day, Mr. Blackburn sent a letter to Ms. Mignault confirming their conversation (Exhibit G-19). Mr. Blackburn faxed to Ms. Mignault a medical certificate covering the period December 1997 to May 2002, setting out that he suffered from

“adjustment disorder”. It was a four-page fax (Exhibit G-20). It contains Exhibits G-18 and G-2.

[160] Mr. Blackburn received a response dated May 16, 2002 (Exhibit G-21, received by Mr. Blackburn on May 28, 2002). Mr. Blackburn communicated by phone with Ms. Mignault and received a letter dated July 2, 2002, from her (Exhibit G-22).

[161] Mr. Blackburn had sought assistance from the Niagara Region Police Association who wrote a letter to Ms. Mignault (Exhibit G-23). In this letter, it is indicated that:

...

*The Niagara Region Police Association has submitted several requests to the Niagara Regional Police Service, on behalf of Cst. Blackburn, indicating that it is his position that he should immediately be suspended with pay, without any further delay. To date, there has been no change in the position of the Niagara Regional Police Service.*

*Cst. Blackburn has advised us that he has been terminated from Corrections Canada because he is on active duty with the Niagara Regional Police Service. You should be aware that Cst. Blackburn is not on regular active patrol duty with the police service, rather he is on restricted desk duty, of which he does not approve.*

...

*The Niagara Region Police Association is now of the understanding that Cst. Blackburn may be leaving the NRPS, on his terms, upon the resolution of his outstanding criminal and police act charges.*

[162] Mr. Blackburn received the final level grievance response (Exhibit G-24). Mr. Blackburn elaborated on the symptoms and stress he suffered from November 1997 and why he consulted Dr. Teodorini and a psychiatrist. Mr. Blackburn is seeing Dr. Teodorini on a regular basis. In 1999, he was referred by Dr. Teodorini to another psychiatrist (Exhibit G-4).

[163] Mr. Blackburn indicated that the trial where he was acquitted took place from February 5 to 8, 2001. The preliminary hearing on the other charges took place on August 20, 1998; it went on “disjointly”. He was convicted on April 30, 1999, and sentenced on August 11, 1999. He appealed and on July 13, 2000, the conviction was overturned. In February 2001, a new trial was ordered and commenced in May 2002.

He was convicted and in November 2002, was sentenced to incarceration but filed an appeal. He was freed on bail after one day and a half in jail. At the time of the hearing, no date had been set for the appeal. The NRP Service terminated his employment on December 5, 2002.

[164] Mr. Blackburn stated that when he reported to work at CSC, he was unfit to work. When he went to work for NRP Service, he was unfit to work; that is why he was reassigned to ARU, taking calls from people reporting crimes and entering “stuff” in the computer.

[165] In cross-examination, Mr. Blackburn confirmed that he received correspondence from Ms. Mignault, a letter dated June 26, 2002 (Exhibit E-32), and a letter dated July 2, 2002 (Exhibit E-33).

[166] Mr. Blackburn agreed that the only difference between the 1997 Leave Application (Exhibit G-5) and the Amended Request for Leave Application (Exhibit E-9) is the period covered.

[167] Mr. Blackburn confirmed that he obtained the medical certificate from Dr. Teodorini and the letter dated January 21, 1998, from John Wright while he was on leave without pay from CSC. Mr. Blackburn did not see Dr. Wright again after January 1998.

[168] Mr. Blackburn saw Dr. Shuka for the first time in 1999 and he saw him again once. Mr. Blackburn was not certain when he saw him for the second time; he does not have a report, but Dr. Teodorini would know. It was definitely after February 2002. Mr. Blackburn had not seen Dr. Shuka between the date of the second appointment and this hearing.

[169] When Mr. Blackburn saw Dr. Shuka in August 1999, he told him of his difficulties. It was after his wedding and before his sentencing.

[170] Mr. Blackburn did not know what “(309)” meant in Adjustment Disorder (309) on Exhibit G-18.

[171] In 1997, there was only one set of criminal charges. In May 2002, they were the charges still unresolved and they relate to the Cobourg incident.

[172] The second trial on the Cobourg charges took place on May 7 and 8, 2002; the decision was not rendered immediately. The conviction was registered after the medical certificate, dated May 13, 2002, from Dr. Teodorini (Exhibit G-18), was issued. The sentencing took place after the letter was issued. Mr. Blackburn agreed that the appeal date is not anticipated prior to October or November 2003. He also agreed that the appeal could be denied and appealed to a higher court or allowed and a new trial ordered.

[173] With respect to Exhibit E-27, Mr. Blackburn agreed that he was in essence telling Mr. Kelly that he felt unfit to return to work until all the criminal charges were litigated.

[174] Mr. Blackburn confirmed he made no further calls to Mr. Kelly's office after the one on January 21, 2002. Mr. Blackburn believes he did not call Millhaven Institution.

[175] Mr. Blackburn confirmed he returned to St. Catharines on February 11, 2002, and that he worked with the NRP Service until July 8, 2002, at which point he was put on sick leave without pay from July 8, 2002, to December 5, 2002. Then, he was terminated and appealed the termination to the Ontario Civilian Commissioner on Police Services. The next level is the Divisional Court.

[176] Mr. Blackburn agreed that Ms. Gainer asked if he had a medical certificate. She did ask if he was reporting to work. Mr. Blackburn disagreed that he answered indirectly. He stated that he told her: "I am reporting for duty as instructed by Assistant Deputy Commissioner Kelly", and was indeed reporting for duty. Mr. Blackburn did fill the Leave Application dated February 11, 2002, seeking indefinite leave and wrote "stress leave".

[177] Mr. Blackburn confirmed that he was not physically present at Millhaven on May 25, 1998, that he spoke on the phone with Mr. Kelly.

[178] Mr. Blackburn did not call CSC and tell them of the two sets of criminal charges when he was charged.

[179] Mr. Blackburn did not address his status with NRP in the letter dated June 25, 1998, to L. Kelly (Exhibit E-16) nor did he mention it in telephone conversations.

[180] Mr. Blackburn was concerned that a page was missing from Exhibit E-22 because he wanted to clarify that his driving licence was indeed valid.

[181] Mr. Blackburn had no face-to-face meeting with CSC in 2001 other than a mediation in November 2001.

[182] Mr. Blackburn did not have discussions with Paul Snyder on February 11, 2002, at Millhaven; they exchanged greetings and went their separate ways.

[183] Mr. Blackburn confirmed there were other charges filed against him as a policeman, other than the criminal charges already described herein. Some charges occurred on June 14, 1997, and July 1997 shortly after his reinstatement. Eight of these charges were dropped.

[184] Mr. Blackburn did not tell CSC of the conviction in 1999 regarding the Cobourg incident because CSC was aware of the charges and trial dates; CSC was following the case. He did not tell "them" and "they" did not ask him.

[185] Mr. Blackburn talked about the Cobourg incident. He was charged 12 or 13 days after he was interviewed and released by OPP in Cobourg the night of the incident. As he was on authorized leave of absence without pay, Mr. Blackburn did not think to inform the employer at the time, as he was not acting in any capacity as a correctional officer. This he admits was an honest mistake on his part.

[186] In re-examination, Mr. Blackburn stated that when he encountered Acting Warden Paul Snyder in February 2002, it was clear that Mr. Snyder was aware of his reporting for duty. Mr. Snyder did not stop him or inquire as to why he was there or as to why he was leaving.

[187] Mr. Blackburn also clarified that in 1997 and 1998 it was his understanding that he only had to tell CSC of his convictions upon returning to duty.

#### Employer arguments

[188] The employer reviewed the following evidence: Mr. Blackburn joined CSC in 1992 after being employed with and discharged from the Niagara Police. During his employment with CSC, human rights proceedings against his former employer were pending. In 1997, events occurred that culminated in an offer of re-employment with

the Niagara Police as of June 2, 1997. In early May 1997, Mr. Blackburn wrote to his warden, Mr. Kelly, and requested leave without pay for one year to pursue his career with the Niagara Police. The leave was granted from May 30, 1997, to May 30, 1998.

[189] In October 1997, while Mr. Blackburn was away from CSC, he was involved in an incident on the 401 around Cobourg and he was charged with dangerous driving. In April 1998, Mr. Blackburn was involved in a second incident in the City of Hamilton and he was charged with a number of Criminal Code offences. It is accepted by the employer that Mr. Blackburn was acquitted of the Hamilton charges in February 2001. The facts surrounding that court proceeding are found in Exhibit E-22.

[190] In 1992, Mr. Blackburn received two booklets: the Standard of Professional Conduct (Exhibit E-3) and the Code of Discipline (Exhibit E-4). He admitted he received these. The employer raised this fact because in October 1997 and April 1998, Mr. Blackburn was charged in Cobourg and in Hamilton and did not notify CSC of either charge.

[191] In April 1998, Mr. Kelly learned from a newspaper article posted on the employees' bulletin board that Mr. Blackburn was involved in an incident. When this came to his attention, Mr. Kelly caused the IPSO to investigate, and corresponded with NRP. When he read the CPIC printout, Mr. Kelly learned of the existence of another charge 6 to 7 months earlier in Cobourg.

[192] On May 25, 1998, there was the first of a number of interactions between Mr. Kelly and Mr. Blackburn. The conversation was described by Mr. Kelly at length in examination in chief and in cross-examination. Granted that the event took place four or almost five years ago, Mr. Kelly wrote a letter at the conclusion of that conversation (Exhibit E-14). This letter is important in that it clearly sets out what was an odd telephone conversation.

[193] It should be recognized that Mr. Blackburn knows all the facts surrounding the charges; he knows all the facts surrounding his employment with the Niagara Police. Mr. Blackburn's leave is coming to an end. Mr. Kelly makes inquiry on the telephone and in a letter as to whether Mr. Blackburn intends to return to CSC and this is a point of contention in the evidence of Mr. Blackburn and of Mr. Kelly.

[194] Mr. Blackburn's evidence is that he was calling ready, willing and able to start work and was in fact reporting for duty. Mr. Blackburn told us he had gone to the Amherstview OPP because he knew he wasn't allowed on the institution property. He was going there using the term to "keep the peace". What is striking, is that he knows his leave is coming to an end, he hasn't contacted anyone from his home, doesn't know if anyone is on shift. Mr. Blackburn comes up to Amherstview to make a phone call, with no earlier telephone or correspondence, nothing.

[195] The evidence of Mr. Kelly was that he told Mr. Blackburn: "I know you have been charged and you are not allowed on the premises". Mr. Kelly wanted to know Mr. Blackburn's intent. It was an odd call and it prompted him to send a letter (Exhibit E-14). On June 4, 1998, hearing nothing from Mr. Blackburn, Mr. Kelly again wrote him a letter (Exhibit E-15). The letter speaks for itself. Mr. Kelly inquired as to Mr. Blackburn's intention and requested an answer by June 12, 1998.

[196] On June 25, 1998, Mr. Blackburn wrote back to Mr. Kelly (Exhibit E-16). His letter said a number of things in a number of ways. On page 1, paragraph 4, Mr. Blackburn wrote: "... it is my intention to return to work in the capacity I held prior to my leave...". But that is not the end of it, on page 2, second paragraph, Mr. Blackburn states: "...the right and proper thing to do is to put me on Authorized Leave with Pay until such time the matters that gave rise to your concern are adjudicated...". This is what Mr. Blackburn asks for in his grievance against his suspension. Leave with pay is what he wants until such time as the matters giving rise to the suspension are concluded.

[197] Mr. Kelly responded on July 10, 1998, and indicated in the second paragraph of that letter that it wasn't his understanding from the telephone conversation on May 25, 1998, that Mr. Blackburn indicated his intent to return to CSC. At paragraph 4, Mr. Kelly asked Mr. Blackburn to clarify his status with the Niagara Police. From Exhibit E-12, the employer's only information on this issue from the Niagara Police "is in essence to talk to their lawyer."

[198] The next contact is subsequent to the grievance.

[199] Mr. Kelly's notes in Exhibit E-19 were written sometime between the grievance meeting in August 1998 and the grievance reply dated September 22, 1998, (Exhibit G-9). These notes reiterate Mr. Kelly's receipt and understanding of the

telephone call on May 25, 1998. These notes reflect what happened. Mr. Blackburn did not return to CSC; he remained employed by the Niagara Police.

[200] The criminal charges proceeded through the system in Cobourg and Hamilton. In Cobourg, Mr. Blackburn was convicted in 1999 and sentenced to 30 days in jail with a licence suspension. The conviction was appealed and in 2000, a new trial was ordered. The acquittal in Hamilton and the appeal results are found in Exhibit E-22, a letter that Mr. Blackburn authored and forwarded on February 16, 2001. It is important to note that this letter talks about the acquittal on the Hamilton charges; it does talk subsequently of the conviction and appeal in the Cobourg incident, except it suggests that the Cobourg incident was not a factor in Mr. Kelly's decision to suspend Mr. Blackburn.

[201] Mr. Kelly has said all along that all charges were a factor in the suspension and his evidence is uncontradicted on that point. That was all Mr. Kelly knew and he stated that Mr. Blackburn was never forthcoming about what had happened. This is a theme that runs through all events in this matter, from the very beginning when charges were laid in October 1997 until the termination of employment in 2002. The employer was operating from limited information provided by Mr. Blackburn.

[202] The employer argued that Mr. Blackburn wants the Board and this hearing to accept that Mr. Kelly did not know about Cobourg because Mr. Blackburn did not tell him about Cobourg and therefore Mr. Kelly must have only meant the Hamilton charges. The fact is, was and continues to be that Mr. Blackburn has known the specifics of all of these serious charges. Mr. Blackburn has been extremely cagey throughout his dealings with Mr. Kelly. Mr. Kelly asked him in the telephone conversation and never got an answer.

[203] Mr. Blackburn wants the Board to accept that till February 2001, he was ready, willing and able to come to work for CSC. The evidence reveals that there was very limited contact by Mr. Blackburn and CSC between May 1998 and February 2001.

[204] Turning to 2002, there is Exhibit E-26, the letter Mr. Kelly wrote on January 10, 2002, indicating when and where Mr. Blackburn was going to be working and whom to report to. One month's notice was given to come back to work.

[205] Mr. Blackburn wrote back on January 21, 2001 (Exhibit E-27). This letter is strangely similar to the letter Mr. Blackburn wrote in June 1998. The most important point is that it reiterates the ongoing theme; Mr. Blackburn indicates he doesn't believe Mr. Kelly's letter. He objects to the reassignment, then comes the telling part "I will not return to work until the criminal charge of Dangerous Driving in Cobourg, Ontario is litigated in its entirety and I am fit to return to work."

[206] There are two points there: first the reiteration of "till the criminal charges are litigated". The evidence reveals that Mr. Blackburn was convicted a second time and launched an appeal for which there is no date set yet. If successful, Mr. Blackburn conceded another trial could be ordered and the end is not in sight. The second point is not being fit to return to work, because of ongoing stress, being worn out mentally and emotionally. In support of this statement, Mr. Blackburn relies on medical documents (Exhibits G-2, G-3 and G-4) and one final medical certificate issued after the events.

[207] Upon examination of this evidence, it is clear that Exhibit G-2, signed by Dr. Teodorini, relies on attendance at his office on two days, December 8, 1997, and February 2, 1998. These dates are important because there was no contact with CSC at the time and only the Cobourg incident had occurred then. It is important to note Dr. Teodorini's comment on the second page.

[208] The second certificate (Exhibit G-3) is important because for similar reasons Mr. Blackburn consulted a psychiatrist on January 5, 1998. This is the report dated January 21, 1998, it was issued from Dr. Wright to Dr. Teodorini. Again, this predates contact with CSC.

[209] The third medical certificate (Exhibit G-4) is a report from Dr. Shuka to Dr. Teodorini on August 4, 1999. It talks of stresses in Mr. Blackburn's life after he is convicted and prior to his sentencing on August 11, 1999. There is no doubt regarding the amount of stress and anxiety that Mr. Blackburn was experiencing when he met with Dr. Shuka. At that point, there was no indication of CSC's being a cause of stress and anxiety for Mr. Blackburn. It is the employer's submission that the reason there is no mention of CSC is that CSC is not causing stress to Mr. Blackburn. In his letter (Exhibit E-27), Mr. Blackburn suggests he is not fit for work because of stress caused by CSC.

[210] The final medical document received (Exhibit G-18) again mentions Mr. Blackburn's adjustment disorder related to criminal charges dating back to 1997. This charge was the only one at the time of the medical certificate and is the one that still exists. The medical evidence indicates that the disorder will be resolved when the criminal charges are resolved. If the appeal is allowed and a new trial is ordered, this disorder will continue. This medical certificate says nothing about CSC's adding to it or whether Mr. Blackburn can or cannot work.

[211] In February 2002, when Mr. Blackburn is ordered back to work and he states he is not fit to work until the charges are litigated entirely, he shows up on February 11, 2002, with his spouse and asks to see the Warden. The acting Deputy Warden Gainer authorized admittance. Her evidence is uncontradicted.

[212] Mr. Blackburn asked for and obtained a sick leave application form. Ms. Gainer inquired if he had a medical certificate. Mr. Blackburn replied that he did not have a medical certificate. Mr. Blackburn departed and left the sick leave application form.

[213] Ms. Gainer informed Mr. Kelly and he wrote the letter at Exhibit E-28, which summarizes the events of February 11, 2002.

[214] What is very important is that Mr. Blackburn never intended to return to work. In the suspension grievance, what he wants is a suspension with pay. When given clear instructions to return to work, he suggests illness caused by CSC. The discharge grievance asks the Board to give him back his job.

[215] It is the employer's submission that what is going on is that Mr. Blackburn has played off or attempted to play off his two jobs in Niagara and in Kingston with the starting point being May 1997, when Mr. Blackburn asked for leave without pay to pursue another career as a policeman.

[216] The employer cited the case of *Larson v. Treasury Board* 2002 PSSRB 9 (Board files 166-2-30267, 30268 and 30269). What is distinct with that case is that Mr. Larson made calls to CSC. He could not go back to work but he was forthright. CSC found out quickly about the charges. Alternate positions could have been found. It took an excessive amount of time for the employer to investigate. In the present case, Mr. Kelly asked right off the bat on May 25, 1998, and again in June 1998 but

Mr. Blackburn never told him about the criminal charges. Mr. Kelly pushed Mr. Blackburn, who “slides around”.

[217] Mr. Larson’s situation is different; he did not have a full-time job. Mr. Blackburn is a full-time policeman with a full paycheque and benefits. There is clear evidence that Mr. Blackburn returned to work for the Niagara Police within days of allegedly reporting to work in Kingston.

[218] In essence, what *Larson (supra)* stands for are the appropriate steps to be taken when faced with a situation of suspension pending criminal charges.

[219] The employer relies on jurisprudence for the proposition that discharge is appropriate when a peace officer is charged with or convicted of criminal charges. The employer cited the following caselaw: *Lynch* (Board file 166-2-27803); *Fauteux* (Board file 166-2-26211); *Boisvert* (Board files 166-2-25435 and 166-2-26200); *Flewwelling* (Board file 166-2-14236); *Fleming* (Board files 166-2-13488 and 166-2-13489); and *Wells* (Board file 166-2-27802).

[220] The employer then argued that there is a duty to mitigate when an employee is suspended or discharged. Where an aggrieved employee earns income, there will be a set-off against loss of income. The employer cited *Brown and Beatty, Canadian Labour Arbitration* Part 2:1412 for the details of that principle.

[221] The employer also cited the Board’s decision in *Priske* (Board file 166-2-4184). The employer also relied on *Re Brotherhood of Maintenance of Way Employees and Canadian Pacific Railway Co.* (1964), 15 L.A.C. 160. The employer then referred to *Turgeon and Love* (Board file 161-2-211).

[222] If an employee mitigates, he is left with the difference in earnings. Mr. Blackburn’s circumstances are unique in that his career with the Niagara Police provided a much higher rate of income. Indeed, there is a difference of fifteen to twenty thousand dollars per annum.

[223] The employer then argued that it is not appropriate for adjudicators to award costs, damages and interest. The adjudicator’s jurisdiction is limited to giving Mr. Blackburn his job back. The employer then relied on the following decisions: *Ogilvie and Treasury Board (Indian and Northern Affairs)* (1984), 15 L.A.C. (3d) 405 (Board file 166-2-14268); *Matthews* (Board file 166-20-27336); *Hester* (Board file

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166-2-26833); *Canada (Attorney General) v. Hester* (T-1532-96) (1997), 126 F.T.R. 308; *Puxley* (Board file 166-2-22284).

[224] As a final point, the employer argued that the employer should not be penalized for the delay involved in the matter coming to adjudication. Back in 1999, the case was postponed at the request of Mr. Blackburn. Between 1999 and 2001, any delay is due to Mr. Blackburn. There was also the difficulty in getting in touch with Mr. Blackburn.

[225] The subsequent delay when the matter started in March 2002 was due to a difference of opinion between Mr. Blackburn and his bargaining agent. That matter was not resolved until May 2002. This is dealt with in Exhibits G-15, G-20 and G-21.

[226] It was only after July 2002 that Mr. Blackburn was no longer receiving a pay cheque from the Niagara Police.

[227] The employer has acted to move this matter along and should not bear the prejudice.

#### Grievor's Arguments

[228] Mr. Blackburn argued that the employer's CPIC report (Exhibit E-13) shows the Cobourg incident; therefore, CSC was aware of that particular charge, as well. When Mr. Kelly became aware of the charges, he did not contact the grievor. CSC did not seek clarification from Mr. Blackburn on the charges or the circumstances that led to the charges.

[229] Mr. Blackburn argues that he was not aware at the times that he had a duty under Exhibits E-3 and E-4 to advise CSC that he was charged criminally. Because of the fact that he was on leave without pay, not acting in any capacity for CSC whatsoever, it was never an issue for the Service that he was charged. They did not raise this issue of neglect. Further, on May 25, 1998, when he contacted Mr. Kelly from the OPP detachment in Amherstview, he did confirm what the charges were in Hamilton when he was asked. Mr. Blackburn had information that the charges were the reason he was suspended and barred from the institution.

[230] At no time on May 25, 1998, was Mr. Blackburn asked why he had not relayed to Mr. Kelly or the CSC the charges in Cobourg in 1997. It was not an issue then. The

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issue was only the Hamilton incident as is exhibited by Mr. Kelly's letter (Exhibit E-14). At no time in the correspondence was the issue of the Cobourg incident raised.

[231] Regarding the issue of unwillingness to return to work, Mr. Blackburn disagrees and states it was always his intention to report to work.

[232] As for the issue of fitness to work, Exhibits G-2, G-3 and G-4 speak for themselves. As for the allegation that Exhibit G-18 does not say CSC contributed to the disorder, Mr. Blackburn points out that from the outset Dr. Teodorini stated he suffered from the disorder. In April 1998, Mr. Blackburn was not facing loss of employment but when CSC became aware of the criminal matter, they decided to contribute to his stress by suspending him without pay pending resolution of the criminal charges.

[233] Mr. Blackburn argues there was no fraud on his part; his letter (Exhibit E-16) to Mr. Kelly is clear on its face.

[234] The employer claims Mr. Blackburn never asked or somehow refused to come back to work prior to acquittal in February 2001, but it was Mr. Kelly and CSC who suspended him and were not going to bring him back until the resolution of the criminal charges. When Mr. Blackburn was acquitted and successful on appeal, CSC did not bring him back until the correspondence in January 2002.

[235] Mr. Blackburn also pointed out that, contrary to statement in Exhibit E-17, there was no review of his enhanced reliability status. None took place.

[236] In *Larson (supra)* it is correct that the grievor made a call but he was not on leave of absence. Mr. Blackburn was not reporting to work until May 30, 1998; he still had five days to advise CSC when he called on May 25, 1998.

[237] With regard to the delay in scheduling, the issue of why the matter was not set for a hearing was with UCCO-SACC-CSN. Mr. Blackburn got the medical certificate on May 13, 2002, but had requested it in February 2002.

[238] As for the suspension, the employer's position did not change until January 2002, yet it never had that grievance scheduled.

[239] Mr. Blackburn's submission falls under six headings.

[240] The first heading is the nature of the proceedings. It is Mr. Blackburn's understanding that under the *PSSRA* it is a two-step process. The first determination is whether misconduct was committed and the second, whether the penalty was appropriate if misconduct was established.

[241] If in fact no misconduct was committed, a remedy is in order. An adjudicator has the authority to impose remedies or determine penalties in keeping with caselaw and legislation.

[242] The second heading is allegations of misconduct. The termination relies on the following: one, refusal to report to work; two, absence from duty without authorization; and three, behaviour leading to laying of criminal charges in Hamilton and Cobourg as breaches of the Code of Discipline and Standards of Professional Conduct.

[243] The third heading is burden of proof. The burden is on the employer to prove the allegations on clear and convincing evidence, i.e. weighty, cogent and reliable evidence upon which the trier of fact, acting with reasonable care and caution, can come to a fair conclusion that the officer is guilty of the misconduct as alleged.

[244] The fourth heading is the findings of facts. It is Mr. Blackburn's respectful submission that the first issue to be decided in these allegations is to determine what happened, if it happened.

[245] In this case, the evidence of the employer and that of the officer are clearly opposite on the allegations. The findings of facts are to be made on a finding of credibility between Mr. Kelly and Mr. Blackburn in whole or in part.

[246] Mr. Blackburn asked that I make an assessment of credibility of each witness and make a finding.

[247] The fifth heading is the summary of evidence. Mr. Blackburn has adduced evidence that shows the allegations in Exhibit E-28 are false. The employer has produced a version of events that is not credible. The employer stated Mr. Blackburn has not reported for duty; that is incorrect. That he was unwilling to report for duty is incorrect. All the allegations in the termination letter are incorrect.

[248] On May 25, 1998, Mr. Blackburn returned to the city of Kingston to report for duty from leave without pay. He reported to Warden Lou Kelly from the Amherstview OPP detachment. When Mr. Blackburn reported for duty, Warden Kelly informed him that he should not report to work because the Warden had suspended him indefinitely and barred him from Millhaven.

[249] Mr. Blackburn inquired as to the reasons and was told it was because he was charged criminally in Hamilton, specifically with assault, assault with a weapon, uttering a threat and dangerous driving. This was confirmed in a letter in the first week of June 1998 (Exhibit E-14).

[250] In mid-July 1998, a letter (Exhibit E-17) stated it was necessary to maintain Mr. Blackburn on leave without pay pending resolution of criminal charges.

[251] Mr. Blackburn filed two grievances against the employer's action and asked to be made whole of all losses resulting from the suspension, i.e., of wages, pay and benefits, and Mr. Blackburn asked that all letters expunged from his file.

[252] From July 1998 to February 2001, neither the employer nor Warden Kelly conducted further review or investigation into the trial of February 5, 2001.

[253] On January 25, 2002, Mr. Blackburn received a letter (Exhibit E-26) instructing him to report to work at Millhaven on February 11, 2002, at 0700 hours; if he chose not to, he should give Mr. Kelly a call. By way of a letter (Exhibit E-27), Mr. Blackburn sought clarification on the content of Exhibit E-26. Mr. Kelly ignored Mr. Blackburn's letter. Mr. Blackburn made a call to Mr. Kelly's office. Mr. Kelly did not speak to Mr. Blackburn.

[254] On February 11, 2002, Mr. Blackburn reported to work as instructed, in the company of his wife. Once there, he relayed his intention and requested union representation and submitted a request for indefinite sick leave without pay. Mr. Paul Empey and acting Deputy Warden Gainer were present when he made the request. On or around February 26, 2002, Mr. Blackburn received the termination letter (Exhibit E-28), terminating him for not reporting to work.

[255] Mr. Blackburn grieved the termination and sought corrective action, reinstatement and restoration of wages and benefits.

[256] The sixth point is summary and conclusion. Mr. Kelly informed Mr. Blackburn that he would remain on leave without pay pending the resolution of the criminal charges in Hamilton and at that time Mr. Kelly would determine or review his continued employment with CSC under the enhanced reliability status. It is to be noted that when Mr. Blackburn was acquitted, Mr. Kelly did not return Mr. Blackburn to duty or suspend him with pay. At no time after the acquittal was Mr. Blackburn informed that a review of the enhanced reliability status was under way or completed.

[257] Mr. Blackburn cited the case of *Scott* (Board file 166-2-26426) for the principle that the mere fact that an employee has criminal charges pending against him is not grounds for discharge from employment.

[258] At no time after April 3, 1997, was Mr. Blackburn informed that a determination was made on his case. Prior to the decision of January 10, 2002, did Mr. Kelly ever consider substituting the suspension without pay with one with pay? What is more troubling is that he never investigated the circumstances that led to the laying of criminal charges, nor did he contact Mr. Blackburn. This is in contravention of CSC directives as contained in Exhibit E-2, specifically section VI of "A Guide to Staff Discipline".

[259] In addition, Mr. Kelly, upon confirming that Mr. Blackburn was the person criminally charged, did not investigate or produce evidence that the presence of Mr. Blackburn would be a risk to the employer or the employees of the institution. Mr. Kelly did not take reasonable steps to ascertain whether Mr. Blackburn could be assigned alternative duties. Therefore, it is reasonable to conclude that the indefinite suspension is unwarranted.

[260] Mr. Blackburn refers on the *Larson (supra)* decision to have his suspension grievance upheld.

[261] Mr. Blackburn responded to the letter of January 10, 2002, by a telephone call to Mr. Kelly and the letter of January 21, 2002. Mr. Blackburn was seeking clarification of Mr. Kelly's letter (Exhibit E-26). Not hearing from Mr. Kelly, Mr. Blackburn reported as instructed. Mr. Kelly did not have just cause to discharge Mr. Blackburn as he reported as instructed and submitted a request for indefinite sick leave.

[262] Mr. Kelly, under cross-examination, could not cite an applicable policy or section of the collective agreement that prevented the granting of indefinite sick leave without pay. In fact, he attempted to find a section and was unable to find one.

[263] The employer was aware of the decisions and caselaw concerning the issue of an employee refusing to report to work as instructed and the criteria to be met before disciplinary action could be taken. The grievor submits that the employer failed to follow these without regard for Mr. Blackburn and his rights.

[264] There is no evidence that the leave slip signed by acting Warden Snyder was ever given to Mr. Blackburn or that a copy was ever given to him prior to his termination. Mr. Kelly's assertion that Mr. Blackburn failed to report for work is false. Once Mr. Blackburn reported for work, he met his obligation. If Mr. Kelly was not satisfied with Mr. Blackburn leaving the institution on February 11, 2002, he should have contacted Mr. Blackburn and directed him to return to work, failing which his employment would be terminated. No such warning was given.

[265] Mr. Blackburn referred me to *Pachowski* (Board file 166-2-28543); *Petrovic* (Board file 166-2-28216) and *Kwan* (Board file 166-2-27120) as support for his argument.

[266] Given the totality of the evidence, it is Mr. Blackburn's position that reinstatement and compensation in full in all applicable areas, pension, wages, leave credits and all other benefits under the collective agreement are appropriate. Mr. Blackburn wants me to order his reinstatement to the position he would have been appointed to had he not been suspended and terminated. Mr. Blackburn also seeks compensation for lost salary and benefits. He wants the pay increments and employment seniority that he would have earned had he been employed.

[267] Mr. Blackburn also wants the payment of his expenses for travelling to Kingston to represent himself, hotel accommodations, meals and fuel.

[268] Mr. Blackburn has presented a number of alternative remedies; the first is full compensation from June 1, 1998, to the date of decision for full salary except for income earned during that period.

[269] The second alternative is full compensation except from June 1, 1998, until February 8, 2001, the date of acquittal for the charges in the city of Hamilton.

[270] The third alternative is compensation for benefits only from June 1, 1998, to the present; however, for full salary from February 8, 2001 to present.

[271] The fourth alternative is full salary from February 11, 2002, to present.

[272] The fifth alternative is compensation for benefits and full salary from July 8, 2002, and sick leave without pay from May 25, 1998 until July 8, 2002.

[273] In all of these alternatives, Mr. Blackburn wants damages and interest in the amount of \$10,000., his personal file expunged and a written apology.

[274] In support for his arguments on remedies, Mr. Blackburn cited: *Lo* (Board file 166-2-27825); *Deering* (Board file 166-2-26518) and *Saint-Amour* (Board file 166-2-27502).

[275] Mr. Blackburn submitted it is not appropriate to substitute a suspension without pay from February 2002 to the present or from February 8, 2001, to February 11, 2002.

#### Employer Reply

[276] The employer rejects ignorance as a valid excuse for not advising CSC of the criminal charges. The employer also added that the evidence of Mr. Kelly was to the effect that Mr. Blackburn was evasive when asked about the charges on May 25, 1998. When reporting to work on that date, he had the duty to report the charges and Mr. Blackburn never told of the Cobourg charges.

[277] As for the direction to report to work given on January 10, 2002, the issue is whether he can or cannot work. Mr. Blackburn asked for indefinite sick leave but he wasn't sick; he was reporting to work for another employer.

[278] Mr. Blackburn continually referred to his acquittal but in the Cobourg charges, there still exists a conviction. There is an appeal but a conviction exists. The date of second trial and conviction was May 8, 2002.

[279] With regard to the employer's not taking reasonable steps to assign him to alternative duties, this would have been pointless since when the employer told him to return to work, Mr. Blackburn put in for sick leave and went to work at the Niagara Police.

[280] The employer submitted that the cases it cited on remedies provide an answer to Mr. Blackburn's submission.

### Reasons for Decision

[281] There is no great contradiction in the evidence. While there may be some discrepancies due to perspectives and perceptions, in the absence of factual notes taken at the time of the events, I find that the facts are rather uncontradictory.

[282] As Mr. Kelly has no memory of the events except what he has written, I accept that Mr. Blackburn's version of the May 25, 1998, conversation complements Mr. Kelly's, which I take to be incomplete.

[283] This is a unique and unusual situation; Mr. Blackburn was charged with criminal offences while on leave without pay. Contrary to what was argued, the Standards of Professional Conduct (Exhibit E-3) and The Code of Discipline (Exhibit E-4) only require that employees report the fact they are charged "before resumption of duties" or "before resuming his or her duties".

[284] I accept that OPP Constable Lackie did tell Mr. Kelly what Mr. Blackburn asked him to say. I accept that Constable Lackie got hold of Mr. Kelly and informed him that Mr. Blackburn was present in his detachment and wanted to do a "keep the peace" by having him drive to Millhaven Institution and meet with the Warden to advise him of his intention of returning to work and to confirm whether he was barred and suspended from Millhaven.

[285] I can understand that Mr. Kelly was surprised by the call and that all he recalls from Constable Lackie is that he had no knowledge of Mr. Blackburn. This is consistent with his letter of June 4, 1998 and Mr. Kelly's testimony that he was more interested in knowing if Mr. Blackburn was still employed with NRP.

[286] On June 25, 1998, Mr. Blackburn made a description from his point of view of the conversation at a time that was closer in time to its occurrence than the notes written in August or September 1998. I do not give much weight to Mr. Kelly's notes (Exhibit E-19), which he prepared as a draft for the preparation of the grievance reply. The notes are undated and could have been drafted at any time between the grievance meeting in August and the reply issued on September 22, 1998. They are not a record of events but a selection of perceived facts intending to justify Mr. Kelly's decision.

[287] There is no evidence of any other purpose for Mr. Blackburn's visit to the Amherstview OPP detachment and call to Millhaven Institution. I therefore accept Mr. Blackburn's evidence regarding the telephone conversation inasmuch as he indicated his intention to return from leave and report to work. I also accept Mr. Kelly's evidence that Mr. Blackburn was not forthcoming on the issue of criminal charges but that he finally admitted they existed.

[288] From the evidence of Mr. Dyette, it appears that Mr. Kelly had suspended Mr. Blackburn before Mr. Blackburn had indicated he was resuming his duties. He confirmed the suspension in the telephone conversation and in writing on May 25, 1998, after Mr. Blackburn's call. At that point, an indefinite suspension pending investigation would have been an appropriate step to take.

[289] When the letter of June 4, 1998, failed to produce a response by June 12, 1998, the steps in the disciplinary process provided in the Guide to Staff Discipline should have been initiated, especially upon receipt of Mr. Blackburn's letter of June 25, 1998 (Exhibit E-16).

[290] Mr. Kelly stated he did not treat this matter as a disciplinary one but as an administrative one. Mr. Kelly was awaiting the outcome of the final disposition of the criminal proceedings. When he was made aware that trial hearings had occurred, Mr. Kelly made no inquiries of Mr. Blackburn or anywhere else for that matter. Even when he decided to bring Mr. Blackburn back to work, Mr. Kelly did not conduct a proper investigation of the charges but reserved the right to conduct a disciplinary hearing when "the dust finally settles with the court case".

[291] I have dealt with the issue of indefinite suspension pending the outcome of criminal proceedings in *Larson (supra)*. The circumstances here are somewhat different but the applicable principles remain. The employer has an onus to conduct an investigation. It does not suffice to ascertain whether the criminal proceedings are still in progress.

[292] In the employer's own policy, one finds guidelines that are very clear. On page 15 of the Guide to Staff Discipline (Exhibit E-2), it is clearly stated what indefinite suspensions are used for: "Indefinite suspension involves suspending an employee pending an investigation conducted by the supervisor or a designated management representative."

[293] In Part VI, Steps in the Disciplinary Process, of Exhibit E-2, one finds an entire section dealing with “Investigation”. I would like to note here the Purpose of an Investigation:

1. Purpose of an Investigation:

*The purpose of an investigation is to confirm whether or not misconduct occurred and, if so, to collect enough evidence in order to prove it before a third party. An investigation report allows senior managers to observe a clear picture of the situation, upon which they base their decision.*

2. Investigation Process:

*If an investigation is to be conducted, it should be done as quickly as possible after an incident has occurred, because delays usually lead to lost evidence, misinterpretations and neglected details, or give the employee a false impression that the incident has been overlooked.*

...

4. Basic Components/Procedures of an Investigation:

a. *At the beginning of the investigation, the employee must be informed that he/she is under investigation, advised of the exact nature of the allegations which gave rise to the investigation and that he/she could be subject to disciplinary action.*

[294] Mr. Kelly did not comply with the above. He admitted in cross-examination that he was not initiating the actual investigation. He was awaiting the appropriate time, “a moving target” linked to the outcome of the criminal charges.

[295] On January 11, 2002, the employer wrote to Mr. Blackburn telling him the following:

...

*Notwithstanding your suspension from work, and notwithstanding that the fact-finding into your behaviour with respect to these two incidents is ongoing, effective Monday February 11, 2002, 6:45 a.m. you are to report for work at Millhaven Institution, Bath, Ontario, for the 07:00 hrs to 15:00 hrs shift.*

...

[296] Without ever conducting an investigation, the employer had decided to bring Mr. Blackburn back to work, this with the knowledge that Mr. Blackburn was awaiting a second trial on the criminal charge in the Cobourg incident, a charge for which he had previously been convicted in 1999 and which was quashed on appeal in 2000.

[297] The indefinite suspension had become a suspension from May 25, 1998, to February 11, 2002. No evidence of misconduct was ever submitted by the employer to justify such a suspension. While an indefinite suspension pending investigation would have been appropriate for a month or so, this would have required that an investigation take place. None took place after May 25, 1998; therefore, I have to find that the suspension was unwarranted. To that extent, the suspension grievance is allowed. In looking at the remedies requested by Mr. Blackburn, I have to look at the facts of his case, which are quite different from those of the grievor in *Larson (supra)*.

[298] For one thing, Mr. Blackburn was on leave without pay when he was suspended. His leave was ending May 31, 1998. This is the status he should revert to for that period.

[299] From June 1, 1998, to February 11, 2002, Mr. Blackburn was employed by the Niagara Regional Police Service and received salary and benefits superior to that of his position at CSC. The employer is therefore entitled to deduct from the salary it would owe Mr. Blackburn during the period of June 1, 1998, to February 11, 2002, the salary Mr. Blackburn received from the Niagara Regional Police Service during that period.

[300] With regard to benefits such as pension, leave credits and seniority, Mr. Blackburn is entitled to have the period of June 1, 1998, to February 11, 2002, count as pensionable service, earn leave credits and accumulate seniority except for a period from October 18, 1999, to February 19, 2001. October 18, 1999, was the date this suspension grievance was initially scheduled for a hearing according to the grievor's Exhibit G-11; it was postponed at Mr. Blackburn's request pending his court case. February 19, 2001, is the date on which the Board was advised that Mr. Blackburn was requesting the matter be heard as soon as possible (Exhibit G-13).

[301] For more clarity, Mr. Blackburn is entitled to have his pension restored for the period of June 1, 1998, to October 18, 1999, and from February 19, 2001, to February 11, 2002. He is entitled to earn leave credits in accordance with applicable

collective agreements for the same periods and have his years of seniority reflect these periods as if they were periods of full employment with CSC.

[302] With regard to the discharge grievance, we must look at the situation that developed after January 10, 2002.

[303] On January 10, 2002, Mr. Blackburn was told in writing to report to work on February 11, 2002, at 07:00 hours.

[304] On January 21, 2002, he called Mr. Kelly, who did not speak to him. Mr. Blackburn spoke to Mr. Kelly's secretary. He wanted clarification about Mr. Kelly's letter. Mr. Kelly did not call Mr. Blackburn back because he felt his letter "could not have been clearer".

[305] On January 21, 2002, Mr. Blackburn wrote a long letter to Mr. Kelly who received it on or around January 25, 2002. Mr. Kelly was confounded by Mr. Blackburn's letter and considers the fourth paragraph "mumbo jumbo". Mr. Kelly did not respond to Mr. Blackburn's letter before termination of employment on February 21, 2002. Mr. Kelly only responded to some points of that letter in his termination letter.

[306] On February 11, 2002, Mr. Blackburn reported to Millhaven Institution as directed and requested sick leave without pay for an indefinite period.

[307] Based on reports of what occurred, Mr. Kelly terminated Mr. Blackburn's employment on February 21, 2002. Mr. Kelly did not meet or speak with Mr. Blackburn prior to terminating his employment. This is in contravention of the Note on page 27 of Exhibit E-2, "A Guide to Staff Discipline", which states:

NOTE:

*The determination of the appropriate disciplinary measure must not be finalized until the employee has had the opportunity to present his/her version of the incident and explain any mitigating factors.*

[308] Looking at what occurred on February 11, 2002, was there misconduct warranting termination of employment?

[309] Mr. Blackburn was instructed to report to work on February 11, 2002, and he did. He was not in violation of the Code of Discipline in refusing to report to work.

[310] Applying for indefinite sick leave without pay is not in itself misconduct. Had Mr. Blackburn been denied the leave and told to remain at work, the employer may have been justified in disciplining him, but Mr. Blackburn was not told his leave was denied. Mr. Blackburn was asked if he had a medical certificate; he did not, but at no time was he told he had to submit one.

[311] The employer assumed that because Mr. Blackburn remained employed as a Police Officer with the Niagara Regional Police Service, he wasn't sick. This assumption was reached without inquiring from Mr. Blackburn what his duties were at NRP and without consideration for the basis on which Mr. Blackburn claimed to be sick. The employer did not follow its normal procedures for dealing with sick leave requests.

[312] The medical evidence submitted at the hearing indicates that Mr. Blackburn suffers from "Adjustment Disorder (309)". Is that condition sufficient to prevent a correctional officer from performing his duties? Only a doctor can say.

[313] Had the employer followed its own policies in dealing with sick leave and discipline, it would have requested that Mr. Blackburn submit a medical certificate. The employer might have required that Mr. Blackburn's doctors apprise themselves of Mr. Blackburn's job description. The employer would have informed Mr. Blackburn that his leave request was denied until he produced the proper medical documentation.

[314] The employer did not even ask Mr. Blackburn to remain at work and wait for the disposition of his leave request. Mr. Kelly could not tell me whether the leave form had been signed as denying the leave. He had not signed it himself and did not know if Ms. Gainer or Mr. Snyder had. What he knew is that only he had the authority to approve the leave and he didn't. Mr. Kelly never advised Mr. Blackburn that the leave he requested had not been authorized. He terminated his employment instead.

[315] It is important to look at the letter of termination reproduced on pages 10 to 12 of this decision. Mr. Kelly is terminating Mr. Blackburn's employment for refusing to report to work, being absent from duty without authorization and the "behaviour that led to the laying of the criminal charges (in both Hamilton and on the 401 between Port Hope and Cobourg)".

[316] The only evidence the employer submitted with regard to the behaviour that led to the laying of the criminal charges came from press clippings which were objected to by the grievor as to content. I give no weight to these press clippings as proof of the truth of their content. It was incumbent on Mr. Kelly to investigate the criminal charges and he did not.

[317] Looking at each ground for the termination, I find that the employer did not have just cause for terminating Mr. Blackburn's employment when it did so on February 21, 2002.

[318] The corrective actions requested in Mr. Blackburn's grievance read:

1. *Quashing of termination of employment with pay, rights, benefits, privileges, reinstated fully.*
2. *Written apology from A/D Commissioner, Lou Kelly.*
3. *Removal of documents with reference to termination from my employment record.*

[319] The termination of employment is hereby quashed.

[320] What are the rights, benefits and privileges to be reinstated? On February 21, 2002, Mr. Blackburn had the right to have his request for sick leave without pay for an indefinite period dealt with fairly. It was not; therefore, I order that Mr. Blackburn be granted sick leave without pay until he submits to the employer a certificate from his doctor indicating that his doctor, apprised of Mr. Blackburn's work description (Exhibit E-6), confirms that Mr. Blackburn is fit to return to duty.

[321] Mr. Blackburn is entitled to the rights and privileges associated with being on sick leave without pay from February 21, 2002, to the date of receipt of this decision. If Mr. Blackburn has sick leave credits, he may elect to use these credits from the date of receipt of this decision until the date he is declared fit to return to work.

[322] The employer may require that Mr. Blackburn be seen by its own medical advisors if it is challenging Mr. Blackburn's medical certification.

[323] The request for a written apology from Mr. Kelly is denied. There is no evidence that Mr. Kelly deliberately abused his authority or acted with malice. Mr. Kelly believed Mr. Blackburn had no intention of returning to work at CSC. Mr. Kelly hoped for a long

time that he would never have to deal in a disciplinary way with Mr. Blackburn. This was a mistake but not one that is indicative of racist or malicious intent.

[324] Documents pertaining to the suspension and the termination of employment are to be removed from Mr. Blackburn's personal file.

[325] As for the damages and interest requested by Mr. Blackburn, I find that this is not a case that would justify such an order even if I had jurisdiction to make such an award. Mr. Blackburn's expenses from representing himself in Kingston are the result of his having moved to St. Catharines for the purpose of working for the Niagara Regional Police where his additional earnings are greater than these expenses.

[326] With regard to the fact that the second trial produced a second conviction in May 2002 which is under appeal, I must find that this fact occurred after the termination of employment. Furthermore, Mr. Blackburn's status was pretty much the same between August 1999 and July 2000. The employer knew of this status and chose not to terminate Mr. Blackburn's employment then. I take it that this is not grounds for termination of employment. If the conviction and sentence are sustained on appeal, it might be argued that this would constitute new facts upon which the employer could take action in accordance with its policies. However, such a situation is only conjecture on my part and it is not for me to decide here should those issues arise.

[327] In summary, Mr. Blackburn's grievances are allowed. Mr. Blackburn is to be reinstated in his position as Correctional Officer as of June 1, 1998.

[328] Mr. Blackburn is to be compensated for his loss of wages and benefits (as detailed in paragraphs 299 to 301) from June 1, 1998, to February 11, 2002, except for the period from October 18, 1999, to February 19, 2001.

[329] From February 11, 2002, Mr. Blackburn will be granted sick leave without pay status until the date of receipt of this decision, or until declared fit to return to work. Mr. Blackburn will be entitled to use his sick leave with pay credits from the date of receipt of this decision until declared fit to return to work, at which time Mr. Blackburn shall be reinstated in his position.

[330] In conclusion, Mr. Blackburn's grievances are allowed as described above.

**Evelyne Henry,  
Deputy Chairperson.**

OTTAWA, June 20, 2003.