IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF A GRIEVANCE FILED BY D. GRZYBOWSKI

BETWEEN:

KELSEY SCHOOL DIVISION NO.45

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1596

****

AWARD

****

BOARD OF ARBITRATION

WILLIAM D. HAMILTON	CHAIRPERSON
GERALD D. PARKINSON	EMPLOYER NOMINEE
BRUCE BUCKLEY	UNION NOMINEE

APPEARANCES

ROBERT SIMPSON	COUNSEL FOR THE DIVISION
MARK KERNAHAN	COUNSEL FOR THE UNION
PATRICIA PROFIT	PRESIDENT, CUPE LOCAL 1618
DERRICK WAINIO	SUPERINTENDENT OF THE DIVISION
JOE TRUBYK	M.A.S.T. REPRESENTATIVE
DONALD GRZYBOWSKI	GRIEVOR

(I) GENERAL COMMENTS AND IDENTIFICATION OF ISSUES

This Grievance came before the Arbitration Board (the "Board") under the provisions of the 1999-2001 collective agreement (the "Agreement") (Ex.1) between the Division and the Union.

The hearing was held in The Pas, Manitoba, on September 12, 2002. The parties were advised that all Board members had taken their Oaths of Office. Exclusion of witnesses was sought and ordered.

The parties agreed that the Board had been properly constituted under the Agreement and had jurisdiction to determine the matters at issue.

By letter dated July 4, 2001 (Ex.4) from **Ms. Jeannette Freese** ("Freese") the Secretary-Treasurer of the Division, **Mr. Don Grzybowski, (**the "Grievor"), was dismissed from his employment. This letter states as follows:

> "Further to our meetings of February 19, February 22nd, June 1st and June 22, 2001 and matters discussed, we have decided to terminate your employment with Kelsey School Division No.45.
>
> Based upon discussions with you, we have no reason to believe that your behaviour and performance will improve. Furthermore, your failure to be forthright throughout these discussions has prompted us to lose confidence in your ability to carry out your duties."

On July 13, 2001, the Grievor filed the Grievance (Ex.2) claiming that he had been unjustly terminated and he sought "…immediate re-instatement with all retroactive pay and benefits". The Division's Board of Trustees denied the Grievance in October 2001 (Ex.3).

In her testimony, Freese clarified certain errors regarding the dates listed in the July 4th letter. The reference to February 19th was really a meeting when Freese and the Superintendent of the Division met alone to speak of issues regarding the Grievor. The Grievor was not present at that meeting. The reference to the meeting held on February 22nd was really a reference to a meeting held on February 26th when the Grievor attended at the Division's offices. Finally, the reference to June 1st ought to have been a reference to June 4th because it was on this date that the Grievor attended at the Division's offices and met with the Superintendent and Freese. We are satisfied that these discrepancies in dates were known to the Grievor and the Union well prior to the hearing and that nothing material turns on these particular inadvertent errors. The Union did not allege that the Grievor suffered any prejudice as a result of these erroneous and unfortunate errors. This observation does not otherwise detract from the Union's position that there were other deficiencies revealed in the July 4th letter.

The Division's position is that there were 4 distinct but inter-related grounds upon which the Division relied in making its decision to dismiss the Grievor. All of these events, said Mr. Simpson, were discussed in considerable detail with the Grievor at the various meetings referred to in Ex.4 (as clarified, *supra*). In summary form, the Division says that these distinct causes for discipline were as follows:

(a) **from January, 2000 to the end of June, 2001 the Grievor was absent from work for some 158.7 days and this represented an unacceptable level of absenteeism, well beyond the average or norm for this bargaining unit. The Division asserts that the principles underlying the doctrine of "innocent absenteeism" are revealed by this pattern of absences and the Grievor has not met the onus which rests on him to provide the Division or this Board with independent evidence that his attendance will likely improve in the future. The Division asserts that it was entitled to assume the past pattern of absenteeism would likely continue into the future;**

(b) **on January 21, 2002 the Grievor was convicted of the offence of possessing a weapon for a purpose dangerous to the public peace,**

contrary to Section 88(1) of the *Criminal Code* (the "Code"). The Grievor received a suspended sentence and was placed on probation for a period of 2 years. Further, the Court exercised its discretion under Section 110(1)(d) of the Code and issued an order prohibiting the Grievor "from possessing any firearm…prohibited weapon, restricted weapon…for a period of 5 years". Although there is no dispute that this offence occurred "off duty", the Division asserts that, when considered in the context of the nature of the Grievor's employment with a school division, this type of offence invited a disciplinary response, which was exacerbated by the Grievor's failure to tell the Division that he had been convicted of this offence when confronted with the Division's suspicions;

(c) **On certain occasions during the winter and spring of 2001, the Grievor intentionally misled the Division regarding reasons for requesting time off and his "misleading" of the Division is intertwined with the criminal conviction itself; and**

(d) **In early June of 2001 the Grievor, having been validly denied a request for vacation leave from June 4 to June 22, 2001, falsified a sick leave certificate in order to take this time off, when the Grievor was not ill or sick at all.**

All of these issues were considered by the Division and were reviewed with the Grievor at a meeting on June 22, 2002 following which the Grievor was dismissed.

For its part, the Union asserts that the Division has not established a *prima facie* case under its July 4th termination letter. In particular, the Union asserts that:

? **The Division cannot rely on the doctrine of innocent absenteeism because a critical element is missing, namely, that its concerns with the level of the Grievor's absenteeism rate were never brought to his attention in a specific manner and he was never told that his job was in jeopardy if improvement was not made;**

? **The Division cannot rely on the fact that the Grievor was convicted of the dangerous weapons offence because it was aware of the Grievor's conviction and accompanying prohibitory order in February, 2001 but took no action against the Grievor, in any disciplinary sense, until the meeting of June 22, 2001. During the intervening period, the Division allowed the Grievor to return to work without any conditions. The doctrines of "delay" and "condonation" are applicable;**

? **The Division's assertions regarding the Grievor having obtained leaves of absence through misrepresentation or fraudulent by means was not established on the evidence. In particular, if the Division questioned the medical certificate given by the Grievor on June 4, 2001 then it had an obligation to conduct an investigation under Article 14.08 of the Agreement and it did not do so; and**

? **The Division has not established any valid performance problems or deficiencies in the Grievor's behaviour that would warrant discharge.**

The foregoing is only a distillation of each party's position. We have briefly reviewed the divergent positions of the parties because these events are not specifically enumerated in Ex.4 itself.

(II) THE WITNESSES

The Division called:

1. **Freese, who has been with the Division for some 22 years and has been the Secretary/Treasurer for the last 14 years. Her job description was filed (Ex.5). The Secretary/Treasurer is essentially the fiscal and business manager of the Division. She reports to the Superintendent. However, Freese directly supervises the Director of Maintenance and Transportation, Mr. Edward Antonio ("Antonio"). So, the Maintenance Department, where the Grievor worked, falls within the ambit of Freese's direct responsibility; and**

2. **Mr. Derrick Wainio ("Wainio") who has been the Superintendent of the Division since 1998. He reports directly to the Board of Trustees.**

The Union called the Grievor who, at the time of his dismissal, was the Painter in the Maintenance Department. The Grievor started with the Division as a term employee in 1992 and moved to permanent status in 1994 as a Custodian. In 1995, he became the Painter which falls within the classification Maintenance Person in the Wage Schedule. Throughout his tenure with the Division, the Grievor has always worked in the Maintenance Department. He is currently 40 years of age and has lived in this region all of his life.

(III) THE EVIDENCE

Arising out of the testimony of all witnesses and the Exhibits filed there are some material facts which are not in dispute. Before turning to the evidence of the individual witnesses on more contested issues, these material facts may be summarized as follows:

1. **Within the geographic confines of the Division, there are 6 schools, a Division Office and a Garage, the latter of which houses school buses and is also used as the maintenance facility. The Division has an enrolment of approximately 2,000 students. There are approximately 120 teachers and 80 support staff, the latter falling within the bargaining unit covered by the Agreement.**

2. **There are 4 trades classifications covered by the Maintenance Person classification, namely, a plumber, a carpenter, an electrician and a painter. The Grievor has been the only painter with the Division since 1995. The Grievor worked Monday to Friday from 8 a.m. to 5 p.m. and was required to attend at the Garage each morning to either pick up a vehicle and move on to a pre-existing assignment or obtain (a) new assignment(s). The Grievor's responsibilities included general painting, dry walling, plastering, sanding and related repair work. These duties are outlined in the Painter's Job Description (Ex.7).**

3. **The Grievor's immediate supervisor was Antonio from whom the Grievor would have received direct assignments.**

4. **The Grievor, like other trades personnel, was required to drive a school bus as circumstances might dictate due to the absence of regular bus drivers. It is a legal requirement for a person who drives a school bus to undergo and pass a yearly medical examination, the purpose of which is to certify that a driver is fit to operate a Class II bus. The Griever underwent such examinations in 2000 and 2001 and Medical Examination Reports dated April 24, 2000 and April 20, 2001 were filed**

as Exs. 10 and 11 respectively. These reports and accompanying examinations were completed by a Dr. Olivier who is not the Grievor's regular physician. In both cases, the Grievor was certified as fit to be a bus driver and neither Report revealed any medical problems.

5. **Any member of the support staff unit who requests a leave of absence from work, with or without pay, must complete a Leave Request Form in which the type of leave (e.g. bereavement leave, jury and witness duty, holidays, union leave, maternity leave, etc.) must be checked off. If the leave falls into the "Other" category then reasons must be specified. These forms contain a space for the "Supervisor's approval" as well as the approval of the Secretary/Treasurer. As to annual vacations, employees must submit their vacation preferences to the Secretary/Treasurer prior to April 1 in each year and approval must be granted prior to May 1, with the normal vacation period being July and August (Article 13.05 of the Agreement). Vacation requests for times outside of the normal vacation period, (i.e. falling during the school year itself), are subject to mutual agreement between the employee and the Division.**

6. **A number of performance evaluations regarding the Grievor were filed as Exs. 27(a) to (d). These evaluations are dated March 8, 1993, October 19, 1994, October 4, 1995 and May 16, 1995 respectively. The latter two were completed after the Grievor had assumed the position of Painter. All of these evaluations were favourable and disclose no performance or attitudinal problems. In fact, there is no dispute that from 1995 to the latter part of 1999 the Division considered the Grievor to be a satisfactory employee (evid. of Freese). Aside from what transpired at the meetings during the first half of 2001, the Grievor had a clean disciplinary record.**

7. **A summary of the Grievor's absenteeism record from January 1, 2000 to June 22, 2001 was filed as Ex.9. This Exhibit revealed the following:**

Don Grzybowski	
	Sick Days
January-00	3.5
February-00	5.5
March-00	5
April-00	1
May-00	2
June-00	0
July-00	0
August-00	12
September-00	20
October-00	4.5
November-00	5.5
December-00	18
January-01	22
February-01	20

March-01	22
April-01	0.7
May-01	2
June-01	15
TOTAL	158.7

8. **In her testimony, Freese said that the average number of sick days per year in the support staff bargaining unit approximated "…10 days per year" but this figure included 2 employees who were currently on long-term disability. Excluding the employees on LTD she said "…the norm would be 6 or 7 days a year".**

On her direct examination, **Freese** said that concerns regarding the Grievor's attendance record first arose in late 1999 and early 2000. On December 24, 1999, the Grievor did not attend at work nor did he call in to one of the two available answering machines. Upon his return in the New Year, Freese inquired of the Grievor where he had been on that day but received no answer. In the result, she sent the Grievor a letter dated January 4, 2000 (Ex.8) which stated:

> "Because you were on December 24, 1999 and did not inform your supervisor of the circumstances resulting in your absence, you will not be paid for this day.
>
> Be advised that your supervisor must be made aware of any days that you will not be attending work and the reason(s) for being absent."

Freese said that the Grievor started to miss days in each month ranging from 3.5 days in January 2000 to 5.5 days in February, 2000. She said "…this was getting us behind in our painting". Some jobs were not being completed and she was getting pressure from the administration. During the spring of 2000, the Division was experiencing a "mold crisis" in the schools. This was not unique to the Division and reflected broader environmental concerns in the Province. The mold issue was coming to a head in the spring of 2000 when concerns were being raised by parents and trustees. The painter had an important role to play because the painter is responsible for replacing gyproc, sanding, filling and then repainting it. Following the summer holidays in 2000, Freese said that the Division was continuing to get pressure because necessary painting work was not being completed and "…everything was behind". The Parents Council had sent a letter to Workplace, Health and Safety regarding the "mold issue" in the schools. She said that she could not assign these painting tasks to another person because no-one else was qualified and, in any case, "…everyone had their job to do on this mold issue". As she put it, in the fall of 2000 "…everyone was in an uproar" including principals and assistant principals.

As Ex.9 discloses, the Grievor was absent for some 32 days in August and September of 2000. Freese said that the Division received a doctor's slip once every two weeks during this period of absence. She said the Division expected the Grievor to return after each two-week period but the Division would receive another certificate stating that the Grievor would be away for a further two weeks. This caused

the work to fall further behind. The Grievor was away all of September 2000. In October, 2000, the Grievor was absent for 4.5 days and he missed 5.5 days in November of that year, meaning "…he could never catch up". Freese said that "…we never knew" that the Grievor was going to be absent on any of these days.

The Grievor was absent from the beginning of December 2000 to the end of March, 2001. Freese said that "…all we got was certificates for two weeks at a time". After each two week period, she said the Division expected the Grievor to return but "…we would then get another slip". When asked what was wrong with the Grievor, Freese said "…I don't know". The work was falling further behind which resulted in continuing concerns from the community and the Parents' Council. Freese believed that Antonio met with the Grievor in November of 2000 and had talked to him about his absences but there was "…no indication there would be any improvement". During this period, Freese said she tried to find other persons to do the painting work but only no-one was willing to work for 2-week periods. Although the policy of the Division is that a doctor's certificate must be given to the Supervisor, she said that "…during these early months of 2001, the Grievor would simply drop them off at the Office or the Garage when Antonio was not there". As this time period moved on, Freese said that "…we were almost in a crisis situation".

The Grievor returned to work for April and May, 2001 (Ex.9). During these months he was absent for 2.7 days. He was absent for 15 days in June of 2001 (this absence will be discussed in detail, *infra*). In June of 2001, Freese said that the painting tasks were "…extremely behind". She said that Workplace, Health and Safety inspectors had been in The Pas in May and the media had been calling regarding the mold issue. All of this created, a "…huge pressure point", with concerns again being expressed by parents, the Superintendent and the media.

As to the Grievor's conviction for a weapons offence, Freese said she first learned of this matter from a person who spoke to her at a Blizzard Hockey Game. This person asked her whether she knew " if your painter had pulled a gun on someone and had been charged". She said she heard this "rumour" on other occasions, particularly from other Division employees. She and Wainio decided to call the Grievor to a meeting to discuss these rumours. She tried to reach the Grievor at home by phone on a number of occasions but was unable to make contact, which led to her sending a registered letter to the Grievor on February 21, 2001, (Ex.12) as follows:

> "Several attempts have been made to contact you at your home, however these were unsuccessful. Please contact myself to arrange a meeting at your earliest convenience with Mr. Derrick Wainio and myself.
>
> You may wish to request the attendance of a Union officer for this meeting."

The Grievor showed up unexpectedly at the Division's Office on February 26, 2001, and asked to meet with Freese and the Superintendent. Freese asked the Grievor if he wanted to wait for a Union representative but the Grievor declined. During this meeting, Freese said she asked the Grievor if he had been convicted of a gun charge. She said the Grievor responded with words to the effect "…no,

I'm not convicted - I'm just prohibited". Freese asked the Grievor if he would sign an authorization to allow the Division to do a Criminal Records Check and the Grievor did so. The form used was a "Self-Declaration", usually used for new hires and volunteers. The body of this form (Ex.13) states, in part, as follows:

> "1. Have you ever been charged with a criminal or other offence?
> Yes "v" No___
>
> If so, give particulars of the charge, date and result in each case:
>
> "PROHIBITED"
>
> 2. I understand that the information provided by me in this application for employment or my request to volunteer for the Kelsey School Division constitutes material and important representations by me intended to induce the Division to enter into a contract of employment with me or accept me as a volunteer. I, therefore, understand and agree that the giving by me of false, misleading, or incomplete information in this declaration will constitute just cause for my dismissal. This will also fully justify the Division in treating any contract entered into with me to be null and void.
>
> 3. I hereby authorize the release to the Kelsey School Division No.45, or its representative, any or all information which may be requested by them regarding my past or present mental, physical, or other condition, history or treatment, and to furnish them with any records in respect of the same."

After this form was completed, Freese said the meeting just ended. The Grievor provided no explanation of what "Prohibited" meant.

Freese received the Grievor's criminal record information within a day or two from the R.C.M.P. (Ex.14), as follows:

> "*CRIMINAL CONVICTIONS CONDITIONS AND ABSOLUTE DISCHARGES
> * AND RELATED INFORMATION
>
> | | | |
> |---|---|---|
> | 1992-06-29
THE PAS
MAN | ASSAULT A PEACE OFFICER
SEC 270(1)(a) CC
(RCMP THE PAS 92-3549LRR) | $300 |
> | 2001-01-22

THE PAS
MAN | POSS OF A WEAPON

SEC 88 CC

(RCMP THE PAS 00-4605) | SUSP SENT &
PROBATION 2 YRS

& DISCRETIONARY
PROHIBITION ORDER
SEC 110 CC FOR 5
YEARS |
>
> *END OF CONVICTIONS AND DISCHARGES"

Freese said that she was extremely disappointed when she received Ex.14 because "…Don had lied to me". She had asked the Grievor if he had a criminal record or if he had been convicted of a criminal offence and he had told her "no". Her concerns with his weapons record was that the Grievor was an unsupervised employee working in the schools or driving a bus with students present. She and Wainio resolved to convene another meeting. She tried to contact the Grievor by phone on numerous occasions in March, 2001 both during the afternoons and at nights but was unable to reach him. So, she sent another registered letter to the Grievor on March 20, 2001 (Ex.15) which stated:

> "At your earliest convenience, please contact me to arrange a meeting with Mr. Wainio and myself. Please ensure that you contact me prior to coming in, to arrange a meeting date."

This meeting was arranged for April 2, 2001. Freese, Wainio, the Grievor and **Ms. Patricia Profit** ("Profit"), the President of the Local, were present at this meeting. Freese said she told the Grievor she had, received notice that the Grievor had, in fact, been convicted of a criminal offence. Freese said she received no reaction from the Grievor. She told the Grievor that she was disappointed in him because he had not told her the truth at their previous meeting. She said that the Grievor responded with words to the effect "…my time is my time and I can do what I want and it had nothing to do with anything". She said she received no explanation of the circumstances surrounding either the offence or the conviction and has never received any explanation from the Grievor. There was no resolution reached at this meeting. It simply ended.

By this time, Freese said she "understood" that the Grievor was attending counseling sessions and "…I thought he was attending the Employee and Family Assistance Program ("EFAP") which was available to employees of the Division". She said that she never knew he had been required to attend meetings with a Probation Officer. Freese identified a Leave Request Form signed by the Grievor on April 12, 2001 (Ex.16) which related to an absence on Friday, April 6th from 3 p.m. to 5 p.m. The request was identified under "Other" for "Personal" reasons (without pay). Freese's understanding was that the Grievor went to counseling on this day for the hours requested. She had asked the Grievor to fill out this form after the fact but advised him that Request forms must thereafter be filled out in advance. She also told the Grievor that she wanted his counsellor to call her in advance of any meetings so the Division would know when he would be away.

A Leave Request Form for "Personal" reasons was signed by the Grievor on April 27th for a 2 hour meeting from 3 - 5 p.m. on that same day. Freese approved this request and said that this form came in on the same day and she understood it related to a counseling session. Freese said she repeated her request that the Grievor provide a letter from his counsellor in advance of any absence.

On May 24, 2001, the Grievor filled out a Leave Request Form for "Holidays". He requested a vacation leave of 7 hours (with pay) for May 25th. This leave was approved by the Grievor's Supervisor who

noted at the bottom of the form. "…Asked for personal leave to attend an all day session, same as the one and one-half hour ones he was taking". Freese said she understood this request was for an all day counseling session and that the Grievor had asked for a day of his holidays for this purpose. She said the leave had been approved on this basis. Freese said she had not received any letter from the Grievor's counsellor by May 24th which led her to write the Grievor on May 28th, 2001 (Ex.19) as follows:

> "As per our discussion, I am awaiting the verification of your attendance with your EFAP Counsellor. When you attend these sessions during working hours, I require verification from your Counsellor that you were in attendance.
>
> Please provide this information to me by June 6th, 2001…"

Freese received a response to this letter from **Ms. Elsie Moar** ("Moar") on May 31, 2001 (Ex.20). Moar is a Probation Officer with Probation Services of the Department of Justice. Moar wrote:

> "Please be advised that I have been providing counseling services to Mr. Don Grzybowski on a monthly basis since January, 2001. However, I have also indicated to Mr. Grzybowski that should he need to, I can be available for counseling more often than once per month.
>
> Mr. Grzybowski's appointments are usually scheduled for the afternoon as I am available only until 4:30 p.m...."

Freese said that she could not believe that she received a letter from a Probation Officer because, in February, the Grievor had told her that he had never been convicted of an offence and he never told her he was seeing a Probation Officer. He had always used the term "counsellor".

A series of letters were then exchanged between Moar and Freese. There was some confusion regarding the May 25, 2001 date, when the Grievor had received a leave for 7 hours but this confession was finally resolved in a letter from Moar to Freese on June 18, 2001 (Ex.24), as follows:

> "This letter is a follow-up to the previous letter I sent to you regarding Mr. Don Grzybowski. I believe the correct date that I met with him was Friday, May 25, 2001, as his spouse, Ms. Bernice Cartwright had mentioned that it was her last day of work then she was beginning her holidays.
>
> I did not meet Mr. Grzybowski for 7 hours. I have met with him for approximately 1.5 - 2 hours per monthly session other than our first session in January which was approximately 3 hours in length."

When she received this letter, Freese said she formed the view that the Division had given the Grievor time off under false pretences and that he had again been not telling her the truth again.

On May 15, 2001, the Grievor submitted a request for 15 vacation days (with pay) from June 4, 2001 to June 22, 2001 (Ex.25). Freese said she first became aware of this request on Friday, June 1, when she spoke to Antonio. The decision was that "…we just couldn't let him go" because the painting work was behind and other tasks had to be completed. On June 1st, the Grievor was advised that his vacation request was denied and, on this form, Antonio notes - "refused due to painting being behind. Needs to prepare and be ready for summer work".

Following this denial, the Grievor attended at the Division's Offices on the morning of Monday, June 4, 2001at approximately 8:30 a.m. and asked to speak to Wainio. Freese and Wainio met with the Grievor. Freese said "…Don asked us to reconsider his request for holidays". Freese told the Grievor that the Division needed him because it was behind in its work and said "…I'm sorry, I can't let you go". She said the Grievor responded by saying "…I want my holidays, I need my holidays". After saying this, the Grievor reached into his pocket and pulled out a piece of paper and said words to the effect - "…well, I guess I'll be on sick leave then" and he gave a doctor's certificate (Ex.26) to Freese and Wainio. This slip states as follows:

THE PAS HEALTH COMPLEX

THE PAS, MB.

623-6431

DATE: "04-6-01"
RE: "Donald Grzybowski"

To whom it may concern:

This is to certify that the above named patient has been off work/ school, because of medical reasons.

From: "04-6-01"
To: "25-6-01"

Signed: "A…." (*illegible*)"

Freese said that she was totally shocked when the Grievor produced this certificate and said "…I couldn't believe it". She simply said "thank you". The Grievor left immediately.

Freese said that "…I almost didn't know what to do". She talked to Wainio, complaining of the number of times the Grievor had lied to her. The Grievor did not attend at work during this period. With the

help of Profit, a meeting was arranged for June 22, 2001, at which the Grievor, Profit, Wainio and Freese were present. The Division had resolved to review the Grievor's entire work history, particularly the events since February of 2001 and to give the Grievor an opportunity to "…tell me anything he wanted". It was during this period that the correspondence with Moar had been exchanged, *supra*. Freese said she reviewed all of the events with the Grievor. He never said anything in response. He never apologized. Freese said that the Grievor only expressed the concern that he was not being paid for his holiday time from June 4 to 22nd. She said she told the Grievor that this had been sick time and he could not be paid, as he was out of sick leave credits.

Freese said the Greivor gave them no reason to believe that he would improve or attend at work regularly. The Grievor was relieved of his duties pending further consideration by the Division. The decision made was to terminate his employment. Freese said there were a number of reasons for this decision. First, she said the Grievor had lied to her in February, 2001 regarding his criminal record and he had lied to her regarding attending at "…counselling sessions". She said he had also lied in respect of the holiday and sick leave situation(s) and "…we felt we couldn't trust him any more" and "…we wondered whether he was ever going to tell us the truth". Freese said she did not think the Grievor wanted to work for the Division. He never provided any satisfactory explanation nor said he was sorry. There was no indication that the Grievor's attendance problems would resolve or improve. Freese said that the Grievor never expressed any concern for the Division's backlog of work problem at the June 4th meeting.

On cross-examination, Freese agreed that she would have received the criminal record information (Ex.14) shortly after February 26th. After the April 2nd meeting, she said it would be correct to say that nothing more was said of the criminal conviction issue until the June 22nd meeting. She agreed the Grievor had returned to work in April and had worked until June 4th, continuing with his normal duties during that period. He was not subject to any directive regarding school property or contact with students. She agreed no discipline was imposed after the April 2nd meeting because "…I didn't think the one incident was enough on its own" and she confirmed there was no discipline imposed for that event at that time. She said she was not present when Antonio met with the Grievor in November of 200 to discuss any absentee problems.

As to the June 4th certificate of (Ex.26), Freese said she never asked the Grievor to clarify the nature of his illness on that day but added that she gave him ample opportunity to explain. She never asked for any further information but added that she was not sure what further information she could ask for, given that it was a doctor's certificate and "…we had to accept it at face value". Other than the one occasion covered by Ex.8 (relating to the December 24, 1999 absence) Freese confirmed that the Grievor had always provided medical certificates when he had been absent. When asked whether she had ever told the Grievor (prior to June 22 meeting), that she had concerns with his absenteeism Freese said "…no, I did not".

To her knowledge, no one approached the Grievor in April of 2001 to ask him for his vacation preferences. She agreed Ex.18 was paid holiday time and was approved as such. When asked whether she had discussed any behavioural issues with the Grievor prior to June 22, 2001, Freese said that she discussed the Grievor's "lying" to her on February 26th. However, aside from February 26th and April

2nd, there were no other meetings with the Grievor when his behaviour was discussed with him. She confirmed that the Grievor never refused to sign the Release Form (Ex.13).

Freese was asked why she felt the Grievor had lied to her regarding the holidays/sick leave issue. She answered "…I feel he lied to me because he came in asking for a change of our decision - he wanted holidays and I explained why we couldn't grant them - he never said he was sick". It was only after the initial exchange that he produced the certificate. She agreed that the Grievor had no sick leave credits left but he did have outstanding vacation days for which he would receive full pay.

Freese said she felt misled by the manner in which the Grievor had obtained the leave on May 25, 2002. The first time she made this known to him was at the June 22nd meeting. She said she did ask the Grievor for an explanation. Freese could not recall his exact response but, after she went through the event, she said the Grievor told her that "…that's my holiday time and I can do with it what I like".

In answer to a Board member's questions, Freese said that the Division accepted the Medical Examination Report (Ex.11). She said she never directly asked the Grievor if he was attending EFAP but she assumed that it was EFAP because he consistently referred to "counselling". She had assumed Ex.17 related to a counselling session. By reason of Ex.14, Freese said she was aware of the fact that the Grievor was on "probation" in February of 2001 but was very surprised when he told her that he had not been convicted. As to Ex.13, Freese said that she never asked the Grievor if he had been convicted and that the manner in which the form itself was filled out was not misleading. In answer to questions from another Board Member, Freese said that she had been writing the Grievor prior to June 18th requesting letters from his counsellor. When the Grievor attended at the office on June 4th, she said the Grievor displayed no apparent medical problem or disability to her.

In his direct examination, **Wainio** also addressed the nature of the maintenance work which was being done in the Division's schools during the 2000-2001 school year. He said that extensive repairs were being done to the walls. He characterized the Painter as "…our point man". The manner in which the Painter performs his job affects the outward image of the Division. Wainio also addressed the mold issue and said that other administrators and parents were complaining to him that the schools were looking shabby. He said Workplace, Safety and Health were involved, doing remedial testing for mold. Wainio said that the Painter's absence resulted in the schools looking shabby and the work remaining incomplete. Throughout the months in question, Freese kept him apprised of the developments with the Grievor. By the spring of 2001, Wainio had received no indication that the Grievor's situation would improve and "…I didn't know how to improve it". At the meetings which he attended, Wainio said the Grievor never gave any indication that there would be any improvement and he (Wainio) felt that the Grievor's behaviour would not change in terms of his availability to work on a regular basis.

Wainio said that he, too, heard rumours in late February about the Grievor's criminal conviction. Wainio said he immediately thought of Columbine and other similar situations. This led to the February 26th meeting where direct inquiries were made of the Grievor as to whether the rumours he and Freese had heard were true, namely, had he been convicted of an offence. Wainio said that "…he told me he

was not convicted, only prohibited". Wainio said that he did not know what the Grievor meant by this term. He agreed the Grievor filled out Ex.13 but Wainio expressed "…surprise that he filled it out in the way he did".

At the April 2nd meeting, Wainio said the Division was well aware of the fact the Grievor had been convicted but "…he was still denying it and saying he was only prohibited". Wainio said there was not much precedent in the Division concerning such matters. Wainio was happy to have the Grievor back at work in early April. He said he wanted to make further inquiries regarding the firearms' offence. He said the Grievor was not disciplined at that time.

Wainio met with the Grievor and Freese on June 4th, at which time the Grievor appealed the denial of his vacation leave. Wainio knew the holidays had not been approved and he also knew of the reasons for the denial. Wainio said that "…Don wanted his holidays" and Freese told him that due to the volume of back logged work he could not have his holidays at that time. He said the Grievor did not accept this explanation. Wainio said that the Grievor gave no indication that he could not work that day or on any day during the next two weeks. However, after his request was denied, the Grievor took a certificate out of his pocket and said "…if I can't have holidays then I'm going on sick leave". Wainio said he asked himself "…what is he thinking because the Grievor had never said that he could not work during this time period". Wainio said he asked himself "…does he really want to work here". Wainio said that, in his view, the Grievor has no commitment to the Division or to the students. Based on other conversations with Freese regarding the probation officer issue, he said that "…I had lost total confidence in Don".

At the June 22nd meeting Wainio said Freese went through the entire history of all of the Division's concerns and that the Grievor's only response was words to the effect "…how do I get my holiday pay". Wainio said the Grievor never indicated that he had been unable to work in June.

Following the June 22nd meeting Wainio said he did not see how things would change or what he viewed as the Grievor's lack of commitment. He said the Grievor knew the Division needed him and, given he lied to obtain a holiday, "…I lost confidence in him as an employee and could not rely on him".

On cross-examination, Wainio agreed the Division was a member of MAST and had access to human resource assistance and advice. He said he sought advice from MAST on the criminal conviction issue after the April 2nd meeting. Wainio said that it was made clear to the Grievor that the Division needed him at both the June 4 and June 22nd meetings.

In his testimony, the **Grievor** said he obtained the June 4 certificate (Ex.26) that same morning before he attended at the Division office. He said the reason was "…for stress". After providing the certificate to the Freese, he said he was never asked for additional information. The Grievor agreed that he had submitted a vacation request on May 15th (Ex.25) He could not provide a vacation request prior to April

1 because he had not been working from January to April of that year and the employer never asked him for a request. He agreed that he received no pay from June 4 to June 22, 2001 because he had no sick leave credits left.

As to his request for 7 hours holiday (with pay) on May 25 (Ex.18) the Grievor said that this reflected the remainder of his holidays for that year. He said he was never asked to address any concerns the Division had regarding Ex.18 at the meeting of June 22nd, 2001. When he signed the Release Form (Ex.13) the Grievor said the information he recorded on it fulfilled all requirements, as he understood them. When he was confronted with the criminal conviction on April 2, 2001, he said the Division never raised this issue again until the meeting on June 22nd. The Grievor said he never thought of that issue again and "…I didn't know if it had been dealt with".

The Grievor said he was absent from December, 2000 to March, 2001 because "…I broke my wrist in November at home". This injury required a cast. He said he provided the Division with doctors' slips. When he brought the slips to the Office, he said "…I believe they saw the cast". As to his absence during August and September of 2000, the Grievor said that his father had passed away on August 15th and that he provided medical certificates for that period of time. The Grievor acknowledged that he usually provided certificates once every two weeks during these two periods. The Grievor said his wrist was not healing properly and it was being checked by his physician once every two weeks. He said neither his physician nor he knew when the wrist would heal properly. The Grievor said it has healed properly now.

The Grievor said that he has looked for employment since his dismissal on July, 2001. He filed resumes with Tolko, Super 8, HBR Railroad and Manitoba Hydro. He has had no interviews. He received 2 "no's" and no response from the other two prospective employers. He said he has done a few odd repair jobs out of his home worth about $1,000. He has received no EI. The Grievor said that he wanted his job back.

The Grievor said he did not believe that he knowingly misled the Division on any of the events discussed during the hearing. When asked whether he recalled telling the Division that he needed 7 hours off (May 25) for counselling the Grievor said "…part of it was for counselling but the rest was for my holidays". The Grievor said he requested vacation time for June 4 to June 22 because he had taken his holidays in June in prior years.

On cross-examination, the Grievor said he submitted his vacation request dated May 15th through the inter-departmental mail. He acknowledged that this request was denied on June 1st for the reason that the work was backed up. The Grievor acknowledged that Antonio made the reasons for the denial very clear. The Grievor went to the Superintendent on June 4th to appeal this denial but, prior to doing so, he obtained a doctor's slip. When asked whether Freese and Wainio made the reasons for the denial of his vacation request very clear to him on June 4, the Grievor said "…that's not my recollection". When asked whether he was saying their recollections were inaccurate the Grievor said "yes" and added "…what I'm saying, that conversation was not about my holidays". The Grievor then added "…I went

there to tell him of the stress I was under in the workplace". The Grievor said he made this information known to his counsel. The Grievor acknowledged that the evidence of Freese and Wainio during the hearing was consistent and he agreed that neither of them had been challenged on their versions of the June 22nd events. He agreed Freese had testified that she provided him with detailed reasons for the denial of the vacation and that when he knew of the denial it was only then he produced the certificate. The Grievor was again asked whether he was saying the other witnesses were lying, to which the Grievor responded "…I see it differently". When pressed further, the Grievor said "…parts of it were said and some was omitted". When asked whether he would agree that the testimony of these other two witnesses represented the gist of what was said at the June 22nd meeting the Grievor answered "…yes". When asked directly whether the meeting was about "holidays" the Grievor said "…yes". He acknowledged that his partner had holidays at that same time and that he wanted to join her.

The Grievor acknowledged that he was convicted of a criminal offence in January of 2001. He said he knew he was "…prohibited from having firearms". He said he knew that he received a suspended sentence and that he had been ordered to see a Probation Officer, of whom he said "…I thought was a counsellor". The Grievor said he entered a guilty plea to the offence.

When he was off work in the first few months of 2001 the Grievor said he was carrying on with various other activities. When he attended at the Division's office to discuss the criminal offence, he said he did not see the point of having anyone else present. He acknowledged that he was asked if he had been convicted of a criminal offence and that he said "no" at the February 26th meeting. When it was put to him that he had made no effort to divulge any information the Grievor said "…I was embarrassed and did not want to give them details". After the Division received the information regarding his conviction, the Grievor said he then acknowledged that he had been convicted.

The Grievor said he never told Freese that he was seeing a counsellor through the EFAP program. He denied knowing that Freese thought that this was the situation. He said Ex.19 (*supra*) did not tell him that Freese thought he was seeing an EFAP counsellor and added "…I don't know what she believed". The Grievor acknowledged that he knew Freese wanted the Leave Absence Requests filled out in advance.

The Grievor denied knowing that there was any pressure on the Division regarding maintenance work that needed to be done. He said he was unaware of the mold issue because "…I wasn't there". He agreed that, by April 27, 2001, he had been back at work for almost one month. He said it was not apparent to him that his work was behind when he returned in April and it was not evident to him that there were any problems or concerns with mold. The Grievor said there was no issue of the maintenance work being behind until this matter was raised in June. When it was put to the Grievor that he did not accept the validity of the reasons given to him for the denial of the vacation, he answered "…I don't know how to answer that question".

When it was put to the Grievor that he had asked for 7 hours with pay to attend the May 25 all day counselling session the Grievor said "…I went to counselling". When it was put to him that he knew the

Division would not give him a holiday for that period of time the Grievor said "…yes". He denied he used counselling as an excuse.

The Grievor confirmed that he had Moar write to Freese after he received a written request from Freese to have his counsellor write to the Division.

The Grievor confirmed that he, Profit, Freese and Wainio were present at the June 22nd meeting. When asked whether Freese went through the history of events with him in considerable detail, the Grievor said "…I don't remember what happened". He said he had no recollection of the December 24, 1999 absence or his attendance record being discussed but he did remember that the criminal conviction was discussed. However, the Grievor said that he did not remember Freese raising the fact that he had not been forthright regarding the criminal conviction matter. When asked whether he accepted what Wainio and Freese had said in their testimony regarding this meeting the Grievor said "…I do not recall". When it was put to the Grievor that he provided no explanation or excuse for lying to or manipulating Freese and Wainio the Grievor said "…I really don't know what I was to provide". The Grievor was asked whether he requested his holiday pay at that meeting and he said "…I don't recall that either".

The Grievor confirmed that he provided certificates on a bi-monthly basis for his major absences. When it was put to him that the Division never knew his medical situation, except for two weeks at a time, the Grievor said "…neither did I". He agreed that when he drove a school bus it was to cover for the absence(s) of regular bus drivers. He did not know whether he gave any indication when he would be returning to work during the times he was absent. The Grievor said did not know medical certificates were to be given to a Supervisor and he agreed that he dropped them off at the main office. He said he was surprised that the Division was not aware of the reason for his absence and he said"…I must have told somebody". The Grievor was asked whether he provided certificates every two weeks when he was absent due to the death of his father and he added "…I don't remember exactly".

The Greivor acknowledged that, since he has been off work following his dismissal in July of 2001, he has only submitted four applications for employment, two of which had been rejected and two of which simply remained on file.

In answer to a question from a Board Member, the Grievor said that when he returned to work in April, 2001 he had received a clean bill of health from his doctor because his wrist had healed.

(IV) POSITIONS OF THE PARTIES

(a) The Division

Mr. Simpson submitted that the Division's decision to terminate the Grievor's employment was based on three distinct ingredients, namely, his attendance record; the criminal conviction in January, 2001; and his misleading of the Division regarding obtaining time off at various times. Mr. Simpson addressed each of these ingredients in turn.

It was submitted that concerns relating to the Grievor's attendance record arose in December, 1999 when he took December 24 off without providing any reasons. According to Ex.9, the Grievor was absent for some 160 days during the 18 month period from January, 2000 to June, 2001. Although Mr. Simpson noted that we have now received explanations for some of these absences, no explanations were offered for the absences in January, February, March of 2000 or for the 4.5 and 5.5 days in October and November of 2000. For the other absences, the Division only received certificates two weeks' at a time and no explanation was ever offered by the Grievor (eg. the wrist). It was submitted that Ex.9 reveals an unacceptable level of absenteeism, well beyond the average or norm for the bargaining unit. In accordance with accepted arbitral tests, the Division was entitled to draw the reasonable inference that this pattern of unacceptable attendance would not likely improve in the future and the Division was entitled to expect such an improvement. It was submitted the Grievor bears the onus to adduce independent evidence, beyond his own self-serving statements, that his attendance will improve. This absenteeism record must also be examined in the context of the business of the Division. The Grievor was the only Painter on staff and, during this 18-month period, the Division needed his services. There were significant requirements and the Division's evidence of a "backlog of work" was not contested. The position of Painter was a key one and the Grievor did not seem to care of the Division's needs . This was true at the time, during the hearing, and it was particularly true in June of 2001. On the basis of the principles relating to the doctrine of "innocent absenteeism" alone, it was submitted that cause for dismissal was established on this ground alone. Mr. Simpson filed the following authorities on this point:

(i) Excerpts from **Brown and Beatty, Canadian Labour Arbitration (3rd ed)**, particularly Para.7:3210;

(ii) **Re Regional Municipality of Hamilton - Wentworth and Canadian Union of Public Employees, Local 167 (1996) 52 LAC (4th) 141 (Sargeant)** where the arbitrator applied the principle that the grievor there had not met her onus of showing that she was capable of regular attendance in the future. The arbitrator relied on the well known principle from **Re Niagara Structural Steel Ltd. and USW, Local 7012 (1978) 18 LAC (2nd) 385 (O'Shea)** where, at p.392:

> "While we are of the view that the company must establish the repetitive and consistent absenteeism which has precipitated its decision to terminate the grievor, the company is entitled to rely on the assumption that such repetitive and irregular absenteeism is likely to continue unless other evidence to the contrary is available. Once such a record is established by the company, the onus shifts to the grievor to establish that the conditions which caused his absences of which the company complains, no longer exist and therefore there is substantial evidence which tends to indicate that there is good reason to believe that the grievor will be able to provide regular and consistent attendance to his duties in the immediate and foreseeable future. In the instant case, apart from the grievor's

assertion in this regard, the grievor offered no medical evidence or other substantial evidence to support his assertion."

In the **Wentworth** case, the arbitrator noted (p.152) that that grievor conceded some of the reasons she had given for her absenteeism were not true. This only exacerbated the onus on her. The arbitrator was also concerned with the fact that the post-termination evidence on the "…reasonable likelihood branch of the test" was given entirely by the grievor herself and, in the factual situation prevailing, he found that it was not enough to rely on "self-say" evidence to find that the problems were solved and their "…present new evidence for the first time relating to a medical problem". The employer had no chance to test the grievor's assertions of any alleged medical problem through its own expert evidence. The arbitrator said he was "…unable to conclude on the evidence presented that there is a reasonable prognosis that this grievor is capable of regular attendance in the future";

(iii) **Re Pasteur Merieux Connaught Canada and Communications, Energy and Paperworkers Union of Canada, Local 1701 (1998) 75 LAC (4th) 235 (P. Knopf)**. A useful distillation of the salient principles were outlined by Arbitrator Knopf at p.251. On the facts of that case, she concluded that the employer had made many attempts to accommodate that grievor's numerous ailments, including offering repeated counselling and also putting that grievor "…in a situation of clear notice that his absenteeism was jeopardizing his employment" (p.253). In fact, we note that the employer spelled out the "…expected attendance levels and gave the grievor an explicit target in October 1997 at a final warning meeting. The grievor knew he had six months to reach that target" (p.253). In the result, Arbitrator Knoph found that the past pattern of the grievor's absences seemed to be entrenched and that it "…has been too destructive of the employment relationship". Many of the underlying problems which had contributed to his poor health and his problems still persisted resulting in the conclusion that that employer fulfilled its onus of establishing that the grievor was incapable of regular attendance in the future; and

(iv) **Re Community Unemployed Help Centre and Canadian Union of Public Employees, Local 2348 (1997) 67 LAC (4th) 33 (Freedman) where, on the facts prevailing, Arbitrator Freedman dismissed a grievance contesting the dismissal of an employee due to her absenteeism record. One of the issues was whether the employer had failed in its duty to "accommodate" the grievor, based on her handicap. Arbitrator Freedman found that sufficient accommodation had been made up to the point of undue hardship. On the issue of absenteeism, the arbitrator noted at p.36:**

> **"Looking at the grievor's attendance record, it is to me clear that her continued absences, with no satisfactory indication that the situation would improve, created a situation that the Employer did not have to tolerate. Given the particular circumstances of the Employer's operation and staffing situation, the disruption and difficulties caused by the continued absences created a situation where the Employer was entitled to terminate the grievor's employment because of her unsatisfactory attendance."**

Based on information she received from third parties, Freese decided to meet with the Grievor to discuss his *criminal conviction*. After sending the Grievor a registered letter (Ex.12) the Grievor met with Wainio and Freese on February 26th, 2001. At that meeting, he was confronted with the rumors and is specifically asked whether he had been convicted of a criminal offence and his answer was that he was only subject to a "prohibition". However, the fact is that the Grievor had been convicted and sentenced in January, 2001. It was submitted the Grievor was simply not prepared to admit to this fact. To his credit, said Mr. Simpson, the Grievor did fill out the Release Form (Ex.13) following which the Division was furnished with Ex.14. The Division again attempted to arrange a meeting with the Grievor but a meeting would not be arranged until April 2, 2001. Profit attended this meeting. Although Wainio knew this criminal conviction (a weapons offence) presented a serious issue, no drastic action was taken at that time because the Superintendent was not sure what to do about it. Nevertheless, said Mr. Simpson, "off duty" criminal conduct is subject to a disciplinary response at the hand of an employer when there is a proper nexus to the employment relationship. Here, argued Mr. Simpson, the weapons' conviction was of legitimate concern to a school division. In assessing this ground, it was submitted the Board must bear in mind the nature of the Division's enterprise and its public responsibilities. Further, the lack of candor on the Grievor's part regarding making known these circumstances must also be a consideration. On this issue, Mr. Simpson filed the following authorities:

(v) Excerpts from **Brown and Beatty**, *supra*, particularly para.7:3422 where the following appears:

> It is now generally accepted that an employee who is convicted of a criminal offence during the course of his employment, which jeopardizes the employer's property and security, its public reputation or the interests of other employees, maybe disciplined and even discharged. Similarly, an employee who is convicted of a criminal offence during his off-duty hours, which prejudices any of those interests, may also be terminated by his employer. By contrast, where an employee is convicted of a criminal offence which is unrelated to the employment relationship and which does not affect his employer's legitimate interests, he cannot be disciplined or discharged for that misconduct alone. Which of these resolutions will ultimately prevail necessarily depends upon the nature of the offence, the employment duties of the grievor and the nature of the employer's business." (our emphasis);

(vi) **Re Wellington Board of Education and Ontario Secondary School Teachers' Federation (1991) 24 LAC (4th) 110 (Shime)** where a school teacher was discharged, following a conviction for indecent exposure. In this case, the grievor claimed that personal circumstances (relating to the recent deaths of his mother and wife) had led to this Code conviction. It was otherwise accepted the grievor was a role model in the community. The offence had occurred off-duty and involved an innocent third party. It was an incident that was publicized, meaning that the community was aware of the incident. Given the position of the teacher in that case (and Mr. Simpson conceded this was a distinguishing fact) and the fact a teacher occupies a position of trust, the issue of public confidence and respect from students, parents and the community at large was relevant. The arbitrator upheld the board's decision to dismiss the employee because it determined that this disciplinary response fell within the range of reasonableness; and

(vii) **Re Interlake School Division No.21 and Canadian Union of Public Employees, Local 2972 (1993) 32 LAC (4th) 417 (Chapman)** where a school custodian was discharged for the physical abuse of a student. This incident occurred while the custodian was on duty in a school and the assault involved a 7-year old student. The custodian convicted of assault. The school's policy against abuse of students was well known. The student involved was the daughter of the grievor's common law spouse but the claim that the grievor was acting in the capacity of a parent of the child was rejected. The discharge was found to be justified. Again, Mr. Simpson conceded these facts were distinguishable but he relied on the principle expressed at p.430 where one of the factors considered was that the events took place in a small community and were well known. Similarly, in the case before us, it was submitted that the Grievor's criminal conviction was known in the community because it was information received fro m others, (including fellow employees) that led to Freese's investigation. The Grievor was less than honest in his dealings with the Division relating to this offence. This dovetails with the other reasons for the decision to terminate his employment.

Mr. Simpson then addressed the Division's position that the Grievor had misled the Division regarding taking time off. He submitted that the only conclusion which can be reached is that the Grievor allowed Freese to believe that he was seeing an EFAP counsellor and not a Probation Officer. Mr. Simpson said the Division does not take issue with the fact that he was receiving counseling but the counsellor was a probation officer. The real issue is why it took so long for the Grievor to disclose this fact.

The Grievor sought 7 hours of holidays on May 25, 2001 on the basis he had to attend a counseling session. He knew that if he had simply requested time off for "a holiday" then he would not have been granted the leave. It was submitted that he misrepresented the reason for asking for this time off. That the counseling session did not take 7 hours was only revealed in June, 2001 (see Exs. 23 and 24). In point of fact, the counseling session on May 25 only involved 1½ hours.

This issue overlaps with the Grievor's vacation request of May 15 (Ex.25) which Freese became aware of on June 1, 2001. The Grievor was told his requested vacation leave was not granted. His vacation request coincided with his partner's vacation. However, the Grievor approaches the Superintendent on June 4th seeking to have this denial overturned. But, on his way to the Office, the Grievor obtains Ex.26. The Grievor pleads his case on the vacation issue but when the denial of his request is re-confirmed, he simply announces he is taking sick leave and leaves the meeting. The Grievor, on cross-examination, was most reluctant to accept the evidence of Freese and Wainio. Their testimony ought to be accepted. There was absolutely no evidence, said Mr. Simpson, to suggest that there was anything wrong with the Grievor on June 4, 2001, and he attempted to use this purported certificate (Ex.26) to cover for a legitimate denial of vacation leave. It was submitted that the dishonesty which the Grievor demonstrated on June 4th was of the same character as that demonstrated on May 24 and 25, 2001. There is no indication this type of behaviour will improve in the future.

Mr. Simpson submitted that, even without the Grievor's attendance record, his behaviour in the Spring of 2001 irreparably destroyed the element of trust which is essential to the employment relationship. It was also submitted we should be concerned with the Grievor's testimony because he demonstrated a lack of concern for the Division's legitimate concerns. The Grievor was, in fact, absent from June 4 to June 22, 2001. When he could not have his vacation he then "…falsified and provided a document to say he was sick". It was submitted the fact the Grievor was not entitled to any further sick leave with pay is not a relevant factor because the Grievor did not have the Division's permission to be away at all. His actions were premeditated and misleading.

The following authorities were filed on this ground for discipline:

(i) **Excerpts from para.7:3120 of Brown and Beatty, *supra*, addressing Leaves of Absence, particularly the remarks at p.7-49:**

> **"Similarly, if an employee takes a leave in the face of his employer's refusal of his request or deliberately or negligently overstays a leave of absence originally given for vacation purposes, simply to extend his vacation or because of his failure to make the necessary arrangements to ensure that he would be able to return on time, it has been held that the employer is entitled to strip the grievor of his seniority or even discharge him. Likewise, if an employee is granted a leave of absence for one purpose but uses it for another may properly be disciplined. Indeed, where an employee absents himself from work in the face of the employer's refusal of his application for leave, some arbitrators have concluded that, unless there are extenuating circumstances, the employer may properly discipline him for insubordination even though the leave may have been unreasonably withheld or may deem him to have quit."**

(ix) **Re Delta Faucet Canada and United Steelworkers of America, Local 2699 (1993) 36 LAC (4th) 254 (Brandt) where, in the circumstances prevailing, an employee was discharged for being absent without permission and for attempting to falsify a reason by fraudulent means. In upholding the discharge, the Board stated at p.264:**

> **"…it is generally well established that the employment relationship must be characterized by honesty and good faith between the parties and that where that element of trust has gone from the relationship it is severely impaired… In Re *Creative Machining Systems Inc. and UAW Local 251 unreported (Williamson)* the grievor was discharged for falsification of his reasons for absence and, alternatively, under a deemed termination clause when he was absent from work while in jail serving a short sentence. Although the company's action under the deemed termination clause was not upheld, the Board upheld discharge for cause on the basis that the grievor, through having his mother call the company, and falsely report that he was ill, deliberately attempted to mislead the employer with the result that there was a loss of trust in the grievor." and**

Re Canada Post Corp. and Canadian Union of Postal Workers (Harrison) (1990) 17 LAC (4th) 67 (Blasina) particularly the

comments at p.72.

For all of the foregoing reasons, it was submitted that the Division has met its onus to establish that there was just cause for dismissal.

(b) The Union

Mr. Kernahan submitted that the Division has not established a *prima facie* case for dismissal in accordance with the July 4th letter (Ex.4).

As to "innocent absenteeism", it was submitted that this doctrine was not mentioned in the July 4th letter at all. It was argued that the Division was changing its grounds for termination. The July 4th letter only refers (and then erroneously) to a number of meetings. Mr. Kernahan said that even if innocent absenteeism had been mentioned as a ground in Ex.4, the facts in this case do not meet the relevant arbitral tests. The Division must establish that it brought its concerns with the Grievor's absenteeism to his attention and that it clearly advised him that his employment was in jeopardy unless improvement was made. Mr. Kernahan said there was no evidence that the Division had any concerns with the level of the Grievor's absenteeism. While Freese said she understood the Supervisor spoke to the Grievor in November, 2000 there was no evidence regarding the substance of this conversation.

As to the Divisions' reliance on the *criminal conviction*, it was submitted the Division was aware not only of the charges but also of the fact of the conviction itself in February, 2001. No discipline was imposed at the time. Yet, the Division purports to rely on this conviction some 5 months later as a ground for the Grievor's dismissal. It was submitted that the Grievor filled out Ex.13 to the best of his ability. If there was any basis for the Division being misled by the manner in which the Grievor filled out this form then he ought to have been disciplined at the time the Division became aware of this fact to allow the Grievor to challenge the decision through the grievance procedure. In fact, when the Grievor met with Division representatives on April 2, 2001, Wainio testified that the Division was happy to have the Grievor back at work. The Division also sought advice from MAST. No conditions were imposed on the Grievor on his return to work. There was not even a letter of warning issued. It was argued that the Division was trying to revisit a stale issue which it did not address at the time. The Grievor drove a school bus during this period. If there were concerns with its image or the well-being of students, then these concerns have been developed in hindsight because the Division allowed the Grievor to continue to work throughout April and May. There was an unreasonable delay here and the offence, if any, has been condoned.

Mr. Kernahan referred to the Chairperson's decision in **Re City of Winnipeg and Canadian Union of Public Employees, Local 500 (Grievance of Norman Norris) [2001] MGAD No.44** where a 1-day suspension issued by the City to Mr. Norris was overturned on account of the unreasonable "delay" in the imposition of the discipline itself. This action arose from a discrete incident which occurred on July 21, 1999, when it was alleged that Norris wilfully refused to follow his supervisor's instruction to carry out an assigned task and, hence, was insubordinate. Discipline was not imposed on the Grievor until December 9, 1999, and in the discipline letter itself, the City stated that the appropriate penalty would otherwise have been a 3-day suspension but "…since the Department failed to deal with the infraction in

a timely manner the penalty is therefore reduced to 1-day suspension without pay". The Union contested the suspension on a number of grounds, including "delay" and, the fact that the City offered no (reasonable) explanation for the delay from July 21st to December 9, 1999. At p.23 of the Norris decision the board stated that it had to determine whether the delay (i) vitiated the penalty in its entirety; (ii) operated as a mitigating factor to reduce an otherwise valid penalty (which the City claimed had been done); or (iii) was relevant at all. On the facts prevailing, it was determined that the delay did vitiate the discipline. A number of authorities, including two of the Chairperson's previous decisions on this issue, were reviewed at pages 25 to 29. The doctrine of delay must be applied in the context of the criteria that an employer is entitled to a reasonable time to investigate misconduct and that, in some situations, this may realistically take a lengthy period of time; that an employer is entitled to a reasonable time to determine and then impose a penalty following an investigation; and more particularly, an employer is entitled to impose discipline for past misconduct only discovered at a "…(much) later time on account of concealment or other similar activity by a particular employee". It was determined that none of these criteria existed in the **Norris** case.

In the **Norris** case, the City was aware of all circumstances relating to the event within two days of the incident itself but no discipline was imposed for 5 months. At page 31, the Chairperson quoted from a previous award that: "…at some point the generally accepted principle that discipline must be imposed in a reasonably expeditious fashion must become operative. Once all of the relevant facts are known to the employer (as they were here) [and here] then timely discipline, as a matter of fundamental principle, becomes an overriding requirement". Further, at page 31:

> "…acceptance of the Department's position would be tantamount to saying that an employer could (i) unreasonably delay the imposition of discipline on an employee when it is in possession of all material facts at or near the time of the incident itself (as here); (ii) fail to provide a satisfactory or any explanation for the delay (here the third period); and (iii) when discipline is finally imposed unilaterally reduce what it otherwise contends is a an appropriate penalty on account of an admittedly unreasonable but unexplained delay. I reiterate that the absence of any evidence (explanation) from the Department as to what transpired between September 17th and December 9th was critical to me."

On the issues relating to *sick leave*, Mr. Kernahan referred to Articles 14.06 and 14.08 of the Agreement, which provide:

> "14.06 The Board may require an employee, who claims that he or she has been absent because of sickness to furnish a certificate from a duly qualified medical practitioner, certifying that said employee was unable to perform his/her duties due to illness. A request for such a medical certificate may be made during the period of sickness or, if there are repeated absences, prior to the next absence. A reasonable amount of time will be allowed for the employee to comply with the request.
>
> 14.08 The School Division and the Union agree that suspected abuses of sick leave will be investigated and proven instances of abuse will result in

disciplinary action being taken against the employee."

In the circumstances at hand, Mr. Kernahan submitted that there was an onus on the Division to undertake "…some sort of due process investigation" and such an investigation was not conducted. It was submitted that there was no evidence that Ex.26 was other than a legitimate certificate. The Grievor anticipated a problem in obtaining a leave; he went to a doctor, and obtained a sick leave certificate. The Grievor had no sick leave credits remaining but he did have vacation entitlement (with pay) and it was obviously more desirable to take time off with pay. There was no evidence that surgery (for example) was not scheduled during this period. There was no evidence the Division requested any further information, inquiring into the circumstances. Under Article 14.08 *supra*, the onus rests with the Division to conduct an investigation. In effect, the Grievor was simply suspended after the Division raised some of its concerns but this cannot be equated with an investigation.

Mr. Kernahan referred to **Re Strathcona County and Alberta Union of Provincial Employees (2000) 92 LAC (4th) 1 (Sims)** particularly the principles outlined at p.12. There, an employee was denied a vacation leave request but he claimed illness for the same period. The employee was discharged and the board overturned the discharge on the basis that, on the facts prevailing, the employer had failed to request additional proof of illness to meet some of its concerns. In the *Strathcona* case, the grievor did provide "…required proof of illness" and if the employer had other concerns then it ought to have made further inquiries. That grievor was employed as a foreman in an urban maintenance department. The medical note in *Strathcona* simply stated that "…on medical grounds the above requires medical leave of absence from work for the period August 6th to August 23, 1999". The employer did ask a number of questions of the employer's physician and this information was provided in a lengthy letter (see p.7). After reviewing the physician's initial response, the board noted:

> "the Employer says this letter answered some of its questions, but others remain. However, the Employer never spoke further with either Mr. Gartner or his doctor over these remaining questions, deciding instead to terminate him without further inquiry. The County had facilities to obtain its own medical review but never expressly required Mr Gartner to submit to such a review."

We note there were specific provisions in the Strathcona collective agreement which addressed the type of proof which could be submitted by an employee to satisfy a claim of absence for illness and the employer was given the right to require an employee to submit proof of attendance at a medical, dental or similar appointment. In the result, the grievance was allowed and the dismissal overturned.

As to the Leave Request Forms (e.g. Ex.19), Mr. Kernahan submitted that, while the Division had asked the Grievor to submit these Forms in advance, this was not an issue raised by the July 4th letter. This, too, had been condoned. As to Ex.18, Mr. Kernahan submitted that the 7 hours claimed in the Request Form was on account of earned vacation entitlement. There is no dispute that the Grievor took that time as a vacation. The Grievor testified that he was using this as a day of vacation. There was no evidence to suggest or dispute the Grievor's version.

The second paragraph in the dismissal letter refers to a "performance" issues or problems with the Grievor's "behaviour". There was no evidence of any previous performance concerns being brought to the Grievor's attention. The Grievor has no prior disciplinary record and there is no evidence that he could not carry out his duties. As to the first 2 dates meeting dates mentioned in the first paragraph of Ex.4, there was no discipline imposed on those dates (even as revised). While the 3rd date is June 4th (not June 1) the fact remains that a sick leave certificate was provided to the Grievor and it was accepted by the Division. Therefore, said Mr. Kernahan, the only relevant date is June 22 when the prior events were reviewed. It was submitted that the Decision has not met its onus and the grievance ought to be allowed with full reinstatement. Mr. Kernahan said that if we found there was cause for some discipline then the facts did not support the penalty of discharge.

(a) **Division Reply**

Mr. Simpson submitted that the Division was not changing its grounds at the hearing. Nothing new was raised because all matters had been discussed at the prior meetings and the Grievor had been given opportunities to provide whatever explanation(s) he wanted. As to the May 25th, 7-hour (vacation) issue the critical question is not that he had vacation owing but, rather, knowing that vacation leave would not have been allowed if that had been the only basis for his claim, the Grievor sought counseling leave. The real issue (as disclosed at the bottom of Ex.18) is that the Grievor sought this leave on the basis of a counseling session.

With respect to the "bogus" sick leave form (Ex.26) the Division's position is that the Grievor was not sick at all. Mr. Simpson said there was no basis for the Union to argue that the Division had failed to comply with any pre-requisite in the Agreement. Two senior management officials attended the meeting of June 4th and, on the facts as they unfolded at that meeting, there was no need for a further investigation. The Division did not accept this certificate and the Grievor simply left the meeting, took his vacation and he never came back to work. There is no evidence, said Mr. Simpson, that the Division accepted this certificate as valid.

(V) DECISION

In any dismissal case, two basic questions must be answered. The first is whether the Division has established cause for discipline. Arbitrators often require that a related question be answered here, namely, whether the penalty of discharge is *prima facie* appropriate, taking into account the nature of the offence(s) involved. If this or these question(s) are answered in the affirmative then the second of next question is to determine whether the dismissal ought to be upheld of whether grounds exists whereby an arbitrator ought to exercise his/her discretion and substitute some lesser penalty. It is not disputed that we have the jurisdiction to ameliorate the penalty in this case assuming, of course, that we find there are proper grounds for doing so. While the Division bear-s the onus to establish that there is cause for discipline and that discharge is *prima facie* appropriate, the onus shifts to the Grievor to establish mitigating factors.

(a) **Cause for Discipline**

The Division identified 3 separate ingredients which it maintained constituted *prima facie* cause for discharge, when taken either in isolation or in combination. We will address each of these assigned causes in sequential order, bearing in mind the fact that a number of events were happening at the same time and that the Division was being apprised of certain facts when the Grievor was absent from work. We adopt this sequential approach because the Union asserts that the Division has failed to establish a *prima facie* case in each instance.

Innocent Absenteeism

The Division asserts that the doctrine of "innocent absenteeism" applies to the facts at hand and that this ground is sufficient, in and of itself, to mandate termination. The Union asserts that the Division cannot rely on this doctrine not only because it failed to mention this specific ground in the dismissal letter but also because the Division's failed to establish that it brought its concerns to the Grievor's by advising him that his job was in jeopardy if attendance did not improve.

In **Re Burns Meats and United Food and Commercial Workers Union, Local 832 (Swidinsky) (unreported September 13, 1996, Hamilton)** the Chairperson addressed the salient principles of "innocent absenteeism at pps. 28 to 32, as follows:

> "The rationale underlying the right of an employer to terminate the employment relationship for innocent absenteeism was succinctly expressed by Mr. Weiler in **Re United Automobile Workers and Massey-Ferguson Ltd. (1969) 20 LAC 370** AT P.371 as follows:
>
> > "…arbitrators have agreed that, in very serious situations, extremely excessive absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. Because the relationship is contractual, the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on the job, notwithstanding the blamelessness of the latter. If an employee cannot report to work for reasons which are not his fault, he imposes losses on an employer who is also not at fault. To a certain extent, these kinds of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached, the accommodation of the legitimate interests of both the employer and the employee require a power of justifiable termination in the former."
>
> See also **Re Automatic Energy of Canada Ltd. (Chalk River Nuclear Laboratories) and Office and Professional Employees' International Union, Local 404 (1982) 5 LAC (3d) 248 (Saltman)** at p.250.
>
> It is well-accepted that an employer's right to terminate an employee who is incapable of regular attendance is subject to two tests. **The first test** is that the employee's past attendance record must disclose excessive absenteeism. This is accomplished by comparing the record of the employee involved to some objective standard, the standard usually being the average absenteeism rate in the plant or unit over a reasonably representative period of time. **The**

second test is that there must be no reasonable basis to conclude that the employee's attendance record will likely improve in the future. Arbitral authority is replete with statements setting forth these two tests. One example is **Re City of Sudbury and Canadian Union of Public Employees, Local 207 (1981) 2 LAC (3d) 161 (Picher)** at p.171:…*(quote omitted here)*

Other cases state that, even though the reasons for absences may be blameless, there is a requirement that the employer must give some advance warning or notice to an employee that his rate of absenteeism jeopardizes the employment relationship. (our italics)

The first test, as to whether the absences are excessive or not, is a retrospective test. As Arbitrator Steel noted in **Burns Foods Limited and United Food & Commercial Workers International Union, Local 111 [June 3, 1998, unreported (the "Ingleben Award")]** at page 8:

> "In this determination a number of factors are relevant:
>
> 'It is important to consider the nature and duration of the absenteeism, whether it is a single extended absence which may be less disruptive to an employer or whether it is sporadic and unpredictable. It is also relevant to consider the nature of the work performed by the employee and the impact that his or her absence may have on production methods. Finally it is necessary to consider the extent to which the particular grievor's record deviates from that of other employees. It is not sufficient for the emp loyer to prove the grievor's statistical record in isolation as this would not necessarily establish that the absenteeism was 'excessive'. See **Re International Association of Machinists Lodge 1703 and Perfect Circle - Victor Davidson, V.N.G. Auto Parts Ltd. (1972) 24 LAC 380 (Weiler).**

As to which party bears the onus in respect of the second test that authorities appear to be somewhat divided. In my view, the onus always remains with the employer but if the employer introduces prima facie evidence of an unsatisfactory past record from which a negative inference of future prognosis can be drawn then, practically speaking, the onus can shift to the Grievor. I share the views expressed by Arbitrator Steel in the **Ingelben Award** at pages 15 and 16 where she states:

> "However, after further analysis, it would appear that the difference of opinion focuses more on shifting evidentiary burdens rather than on an actual change in the onus. In certain cases, the employer will be justified in drawing inferences of inability of future regular attendance based on the past record of absenteeism. A particular pattern of absenteeism can raise a prima facie case alone and shift the onus onto an employee to explain a pattern in terms of which will defeat the inference of a continuing inability to attend work on a regular basis. This does not displace the basic onus which continues to rest on the employer.
>
> > 'We do not see the problem as one of a shifting in the burden of proof. The burden of proof upon the employer is to adduce the evidence that supports, on a balance of probabilities, a positive finding that the employee is unlikely to attend at work on a regular basis in the future. All we are saying, and all the authorities we have reviewed seem to say, is that when the employer has adduced a prima facie case which sustains that essential finding, the onus will shift to the employee to meet that prima facie case and if the employee fails to meet it, the dismissal must be upheld. It is a routine application of the fundamental adjudicative principles governing onus

> and burden of proof in an arbitration. **Labatt's Brewing Company Ltd. and Brewery, Winery and Distillery Workers, Local 30 (1984) 4 W.L.A.C. 309** at 319. As see to the same effect **Re Molson's Brewery and United Brewery Workers (1984) 13 L.A.C. (3d) 112** at 125 and **Atomic Energy of Canada Ltd., *supra*.'**
>
> Whether or not an inference can be drawn from the past record of absenteeism alone will often depend on the pattern of absences coupled with the nature of the disability. For example, a chronic sinus condition necessitating many short absences is more likely to give rise to an inference of continued inability as opposed to injuries arising out of a motor vehicle accident requiring one long absence."

This approach was also adopted by Arbitrator Teskey in **Re Boeing of Canada Ltd. and Canadian Automobile Workers, Local 2169 (1989) 5 L.A.C. (4th) 358** at page 380…" .

We accept Freese's evidence that the norm or average rate of absenteeism (leaving aside LTD claims) is approximately 6 or 7 days a year and, when LTD absences are included, the average is approximately 10 days per year. Using this objective standard, the Grievor's absenteeism was excessive during the period January 2000 to June 22, 2001. There was no concern with the Grievor's attendance record prior to this time because the issues which we are addressing started to emerge in December of 1999 (evid. of Freese).

Aside from the manner in which the Division characterized the Grievor's absence on May 25, 2001 and its position on the Grievor's "unauthorized" absence from June 4 to June 22, 2001, the Division never took issue with the legitimacy of the Grievor's other absences during this 18 month period. There was no contention that any of the these absences reflected either lateness or a simple failure to report to work thereby colouring the absence with a disciplinary hue. The Grievor provided a medical certificate or slip for all absences after January, 2000, particularly the 32 days' absence in August and September of 2000 and the 82 days from December, 2000 to the end of March, 2001. The Division accepted the certificates submitted by the Grievor. Where an employer has reasonable and probable grounds to suspect the legitimacy of a certificate then it is entitled to take steps and seek additional information from the employee's own physician or, where appropriate, from a physician of its choosing. See the discussion of principles in **Re Thompson General Hospital and Thompson Nurses M.O.N.A. Local 6 (1991) 20 LAC (4th) 129 (Steel)** particularly at pp.134 and 135 and in the Chairperson's decision in **Winnipeg Free Press and Media Union of Manitoba, Local 191 (unreported, December 5, 2001) at pp. 47 to 56.**.

So, while Freese said that the Division did not know the reason(s) for the Grievor's absences during these two time frames, the fact is the Division never pressed the Grievor to provide any reasons or further explanation(s). The Grievor only offered his explanations for these absences during his testimony before this Board. He said that his absence in August/September of 2000 was on account of his father's death. Interestingly, there is no evidence that the Grievor asked for the 5 days of paid bereavement leave to which he was entitled under Article 15.06(a) of the Agreement and we can only conclude that he took sick leave during this time period and provided medical certifications on a bi-

weekly basis. The Grievor said that his continuous absence from December, 2000 to April, 2002 resulted from breaking his wrist at home and that his providing certificates on a bi-weekly basis reflected the slow and uncertain healing of his wrist. Given the length of these two discrete absences and what we accept were the justifiable concerns of the Division in respect of having the maintenance/painting work completed, we find it surprising that there was no communication between the Grievor and the Division regarding the reasons for his absence. The Grievor appears to have assumed that the Division knew he had broken his wrist (a fact which we would think would be rather evident if he had a cast on his wrist when he met with Freese and Wianio on February 26, 2001). Yet, neither Freese nor Wainio asked the Grievor any questions about his absence from work at that meeting nor did they ask him when they could expect his return. All of this reveals that these two periods (accounting for 114 days of the 158.7 referred to in Ex.9) do not reflect a pattern of absences for unrelated maladies. Arbitrators often rely on the fact that frequent absences of short term durations for unrelated reasons can cause more dislocation to an employer's enterprise than an absence for a lengthy period of time caused by a known malady such as a broken leg from which an employee will recover. We were not impressed with the lack of meaningful communication from the Grievor to the Division during this period but this is counter-balanced by the lack of inquiries made by the Division; its acceptance of the certificates which were provided; and the fact it did not expressly bring its concerns to the Grievor's attention.

We pause to add that we find it somewhat surprising the 15 days which the Grievor took as "vacation" in June of 2001 was listed under the heading "Sick Days" in Ex.9. While it is true the Grievor was not at work during this time period, the evidence is that the Division was not satisfied with the legitimacy of this absence. However, we accept that the inclusion of these 15 days in Ex.9 was simply to complete the record of the Grievor's pattern of "absences" from work. These 15 days would be relevant to the second branch of the innocent absenteeism test, namely, whether the record allowed Freese and Wainio to reasonably infer this pattern of absence would not likely improve in the future.

However, regardless of the Division's concerns, we agree with the Union's position that the Division cannot rely on innocent absenteeism because it never communicated any standards to the Grievor nor did it advise the Grievor that his employment was in jeopardy unless his attendance improved. The concern which Freese expressed in the letter of January 4, 2000 (Ex.8) was that the Grievor had failed to inform his Supervisor of his absence on December 24th and that letter advised him to provide advance notification of any absence. This appears to have been done and the Grievor's level of absenteeism until August of 2000 was not excessive.(Ex.9) For the two periods we have discussed at some length, *supra*, the Division never put the Grievor on specific verbal or written notice that it had concerns with his level of absenteeism.

The Chairperson decided two cases involving the City of Winnipeg. They were the **City of Winnipeg and Amalgamated Transit Union Local 1505, Grievance of J. Harmer (unreported, January 15, 1992)** and **The City of Winnipeg and Canadian Union of Public Employees, Grievance of R. Christie (unreported, January 22, 1992)**. In the **Harmer** case the City had specifically given that grievor specific goals to reach and had made a conditional re-instatement on terms which where based on the then existing absenteeism rate for bus drivers generally. These conditions were breached. At pp.32 and 33 the board commented:

> "On April 3, 1989, (Ex.9) the City made known specific attendance expectations which the Grievor was to meet. In some respects, it might be said that the City took in hand what arbitration boards often do, i.e. reconfirm the employment relationship but on a conditional basis where the condition is that any future absences must reflect the average absenteeism rate…"

In the **Christie** case (a "hybrid" situation), the employee was continued in employment by the City on a number of conditions, one of which was "…contingent upon an attendance record that falls within the normal range of other employees…". In both the **Harmer** and **Christie** cases, it was determined that the City was entitled to infer that there was no reasonable likelihood of future improvement, one of the critical factors supporting the City's inference being the failure of those two grievors to fulfill the specific expectations which had been made known to them by the City and to heed the specific warnings each had received that their jobs were in jeopardy should these expectations not be met. The failure to establish a goal or set a standard for an employee's absenteeism has been fatal to an employer's ability to terminate the employment relationship in many cases. See, for example, **Re Maritime Beverages Ltd. and Teamsters Union, Local 927 (1990) 12 LAC (4th) 38 (Darby)** where this principle was the subject of specific comment at p.52. In our view, the Division did not follow these pre-requisites in this case. The Division neither questioned the legitimacy of the Grievor's absences until June 22, 2001 nor did it advise the Grievor that his job was in jeopardy.

In the result, while the Division was rightly concerned with the Grievor's absenteeism rate, its acceptance of the medical certificates without questioning them or raising concerns with the Grievor himself and its failure to advise him that his employment was in jeopardy if explanations were not provided and/or his attendance did not improve, leads us to conclude that the Division cannot rely on the doctrine of "innocent absenteeism" as an independent cause for the Grievor's discharge in these circumstances. There are indeed missing elements. Therefore, if innocent absenteeism had been the only ground for the Division's decision then we may have fashioned some form of conditional re-instatement, particularly taking into account the lack of explanations offered by the Grievor on June 22nd, 2001, but the dismissal itself would not have been sustained on this ground alone.

The Criminal Conviction

There are two elements to be considered concerning this issue. The first is whether the conviction itself is cause for discipline. The second relates to the assertion that the Grievor was less than forthright in his dealings with the Division and that he attempted to mislead Freese by hiding the fact he was seeing a probation officer for his counseling and not EFAP.

As to the criminal conviction itself, there is no doubt that being convicted of a serious criminal offence (even if it occurred off duty) can result in an employee being subject to the disciplinary reach of his employer up to and including discharge. The result will depend on the seriousness of the offence and the nature of the employer's enterprise. The relevant tests were summarized in **Re Air Canada and International Association of Machinists, Lodge 148 (1973) 5 LAC (2nd) 7** in which the well-known **Millhaven Fibres** tests were quoted, namely:

> "…if the discharge is to be sustained on the basis of a justifiable reason arising out of conduct away from the place of work, there is an onus on the company to show that:-
>
> (i) the conduct of the grievor harms the Company's reputation or product;
>
> (ii) the grievor's behaviour renders the employee unable to perform his duties satisfactorily;
>
> (iii) the grievor's behaviour leads to refusal, reluctance or inability of other employees to work with him;
>
> (iv) the grievor has been guilty of a serious breach of the Criminal Code and thus rendering his conduct injurious to the general reputation of the Company and its employees;
>
> (v) places difficulty in the way of the Company properly carrying out its function of officially managing its works and officially directing its working forces."

It is generally accepted that only one of these criteria must be established in order to justify a disciplinary response by an employer.

The Grievor's conviction under Section 88(1) of the Code was known to the Division within a few days (at most) following Freese and Wainio meeting with the Grievor on February 26, 2001. It was at that meeting the Grievor filled out Ex.13 in which he acknowledged he had been "charged" with a criminal offence. His use of the word "prohibited" (when particulars of the charge, date and result were required) was incomplete (at best) but the fact is that the Grievor did authorize the Division to do a criminal records search. Upon receipt of Ex.14, the Division not only knew of the charge but also of the precise offence and the terms of the sentence. That the Division sought to make inquiries of the Grievor relating to this off-duty criminal conviction was a reasonable step for it to take. When Wainio and Freese met with the Grievor (in Profit's presence) on April 2, 2001 the conviction was put to the Grievor directly. We accept Freese's evidence that she received no reaction from the Grievor to her expressing disappointment that the Grievor had not told her the truth at the previous meeting, other than his assertion that his time was "…my time and I can do what I want". There was obviously no resolution at this meeting and we accept Freese's evidence that the Grievor simply left. But, the Grievor was actually returning to work as a Painter at the beginning of April, 2001 and, as Mr. Kernahan pointed out, Wainio was more than pleased to have the Grievor return and attend to his regular duties. By that time, the Division knew that the Grievor had received a suspended sentence; that he had been placed on probation for two years; and that he had received a discretionary order under Section 110 of the *Code*. While Freese may have believed the Grievor was attending EFAD counseling sessions, the Division knew that the Grievor had been placed on probation. No discipline was imposed at that time and the matter was not raised again until June 22, 2001. So, the Grievor returned to work for a period of some 2 months without the Division taking any further action *on account of the criminal conviction itself.* Neither did the Division ask for any details respecting the circumstances surrounding the offence. *To raise the fact of the conviction itself as a ground for discharge in June and July, 2002 was not reasonable. In our view, the doctrine of delay does apply because, like the* ***Norris*** *case, the Division was in possession of all material facts relating to the conviction shortly after February 26th and, vested with this knowledge, it allowed the Grievor to return to his normal duties. The time which elapsed after April 2 constituted*

an unreasonable delay in the circumstances and, in effect, amounted to condonation of this "off duty" conduct.

It is our conclusion that the Division cannot rely on the fact of the criminal conviction itself as an independent ground constituting cause for either discipline or discharge. In reaching this conclusion, we have not addressed the Division's assertion that the Grievor misled Freese into believing that he was seeing an EFAP counsellor and not a probation officer. In our view, this question is intertwined with the next issue.

Misleading the Division re Time Off (unauthorized absences)

In our view, the Grievor *did not willfully mislead* the Division when he said he was attending counseling sessions. He did not knowingly mislead Freese into believing that he was seeing an EFAP counsellor rather than a probation officer. We have reached this conclusion because Freese candidly acknowledged that she never asked the Grievor directly whether he was seeing an EFAP counsellor. As she put it "…he said he was taking counseling and *I assumed it was EFAP*" (p.14, *supra*) (our italics). It is clear Moar was providing "counselling" services to the Grievor on a monthly basis (Ex.20) and we accept "counselling" is one of the purposes of probation. Freese's reaction that she could not believe she was receiving a letter from a probation officer is understandable in the context of the Grievor's minimal disclosures to that point but, at the same time, we must say that it equally reflects Freese's own assumption rather than a direct misleading of her by the Grievor.

As to the other Leave Request Forms which identified "Personal" as the reason for an absence of some 2 hours (Exs. 16 and 17) the Division accepted that these were for counseling sessions and this was factually correct at least in terms of the amount of time off requested in these Request Forms to visit Moar for counseling sessions. In fact, a review of the correspondence sent to the Grievor reveals that Freese's letter of May 28, 2001 (Ex.19) was the first time she told him in writing that she assumed he was attending at an "EFAP counsellor". It was in response to this written request that the Grievor had Moar write the letter of May 31st. Given this factual context, it is difficult to sustain a finding that the Grievor was intentionally misleading Freese particularly when he knew the Division was aware of his conviction and its terms after the meeting of April 2, 2001. Could the disclosure made by the Grievor have been more complete? The answer is obviously "yes" but, in our view, this does not translate into a finding of deceit or willful misleading on this discrete issue.

However, in our view, the leave the Grievor requested for May 25, 2001 is subject to a different characterization. While the Grievor was entitled to 7 hours of holiday time and marked the Leave Request Form as "Holidays", the notation on the form that the Grievor had asked for a personal leave to attend an "all day session, the same as the 1½ hour ones he was taking" is critical. The Grievor did not dispute that he told Antonio that he was going for an all day counselling session. The Grievor knew this session was to be a normal counselling session in length. On cross-examination, the Grievor acknowledged that he knew he would not receive a holiday at that time if that characterization had been the only basis for his request (p.26, *supra*). This evidence corroborates the "note" made by the Supervisor (who was not called) at the bottom of Ex.18. While the Grievor had 7 hours of vacation entitlement in the bank we are satisfied that he obtained this time (with pay) on the pretext that he

needed it for an all day counselling session which he knew was not true. While this one event, standing alone, subjected the Grievor to some discipline (well short of discharge) it nevertheless forms part of the context for his absence from June 4th to June 22nd, 2001 and it to this period that we now turn.

The Grievor knew that his May 15th request for vacation leave had been denied. We do not intend to revisit the evidence of Freese and Wainio regarding the backlog of work in the Division or the need to have the Grievor present at work due to the "mold issue". Neither witness was challenged on cross-examination concerning this testimony and we accept their evidence that the needs of the Division were critical and, as a result, the Division was acting within its rights to deny the Grievor this vacation request. The Grievor maintained that he was not aware of the Division's needs or the fact that maintenance tasks were falling behind. Having returned to work at the beginning of April, 2001, the Grievor's professed lack of knowledge of these needs was not credible.

The critical event is the meeting of June 4, 2001 when the Grievor went to the Division's offices to see Wainio for the purpose of pleading his case that the June 1st denial of vacation leave ought to be reversed. Having considered the evidence of the witnesses who were called, our material findings of fact can be distilled as follows:

- The Grievor's sole purpose for attending at the Division's offices was to plead his case that the decision to deny him vacation leave for June 4 to June 22 ought to be reversed;

- The reason this reversal was important to the Grievor was that his companion had her vacation scheduled for the same time. When pressed on cross-examination, the Grievor (reluctantly) agreed that this meeting was about "holidays" and that he wanted to join his partner on her holidays (p.24, *supra*). This is corroborated by the June 18th letter (Ex.24) which Moar sent to Freese when Moar addressed her counselling session with the Grievor on May 25, 2001 and noted that "…his spouse, Ms. Bernice Cartwright, had mentioned that it was her last day of work then she was beginning her holidays";

- We are satisfied that this meeting commenced with the Grievor's plea that the previous denial be reversed, followed by Freese re-emphasizing, in some detail, the reasons why the vacation could not be allowed. To the extent the Grievor attempted to say that Freese's and Wianio's recollections of this meeting were inaccurate or that he went to the Division office to tell the Division "of the stress I'm under in the workplace", we do not accept his evidence. While the Grievor may now see this meeting "differently" he had to agree, when pressed, that their testimony represented "the gist" of what was said at the meeting;

- It was only when the Grievor realized that his vacation appeal was being denied that he produced the certificate (Ex.26) from his pocket and said words to the effect that if the Division was not going to allow him to take holidays "…then I'm going on sick leave";

- We do not accept that Ex.26 is a valid medical certificate, notwithstanding the fact that it appears to be signed by a physician (illegible) from The Pas Health Complex. The Grievor attended at The Complex in the early morning on June 4, just prior to arriving at the Division's offices. The dates recorded on this incomplete "certificate" coincide precisely with the vacation dates initially sought by the Grievor. We accept the evidence of Wainio and Freese that the Grievor did not look ill at all, exhibited no symptoms of illness, and provided no details about any illness on June 4th. After he produced the "certificate" we accept that the Grievor left the meeting and then went on his vacation. We do not accept that the Grievor was sick or ill during this two week period at all. He simply took his vacation. So, he was absent without leave for 2 weeks;

- This is a circumstance where a brief medical note simply does not "cut it". We do not know how long the Grievor attended at the Complex; what he said to the person who signed the certificate; and why the individual who signed the certificate did so. This is a situation where such explanations are required and, in these factual circumstances, the onus of explanation rests with the Grievor.. And then, the certificate is designed to be a certification that a patient "…has been off work/school because of medical reasons" (see Ex.26). The Grievor obtained this certificate somehow but we give it no credence. He really treated it as an insurance policy which he (erroneously) thought would justify his absence from work; and

- The Union argued that the Grievor "anticipated a problem" and therefore went to a doctor and obtained a sick leave certificate. It was further argued that there was no evidence Ex.26 was other than a legitimate certificate. With respect, we disagree. If the Grievor needed medical leave for this particular two week period then, given the past history and the requests of the Division, there was a much higher onus on him to produce a more detailed certificate and there was certainly an onus on the Grievor to call whoever signed that certificate at this hearing to provide some legitimacy or validity to it. In all of the surrounding circumstances, we do not accept there was any onus on the Division under Article 14.08 to conduct an investigation regarding a suspected abuse of sick leave because, in our view, this was a self-evident fact. Neither can the Grievor rely on the wording in Article 14.06 of the Agreement because not only is that clause drafted in the past tense (i.e. to substantiate a claim of a prior absence) but the entry point to the application of Article 14.06 (however interpreted) is that there must be an absence on account of at least a claimed illness or sickness and the evidence here simply does not support such a conclusion.

In light of our findings, the Grievor was absent from work without any justification from June 4 to 22, 2001 and his attempt to characterize it as sick leave is a most serious matter. It represents a complete lack of respect for the needs of the Division as they were known to exist. In our view, the Grievor's obtaining of this certificate reflected not only a poor attitude but a dishonesty of purpose and it was an attempt to mislead the Division. The fact the Grievor had used up his accumulated sick leave credits is not relevant to this characterization of his conduct because the Division had legitimately denied him permission to be away. The Grievor's actions were premeditated. *So, the events of June 4th and the conduct of the Grievor over the next ensuing two weeks represents a most serious breach of the employment relationship for which the Division is entitled to impose discipline.*

This brings us to the meeting of June 22nd. We accept the evidence of both Wainio and Freese as to what transpired at that meeting. The Grievor had an opportunity to say whatever he wanted and we accept that the Grievor's only response was an inquiry about "how do I get my holiday pay" and no other explanation was offered. We also accept the Division's evidence that the Grievor gave no indication that he was unable to work during the preceding two weeks due to illness or for any other reason. The Grievor offered no apology or explanation. We have reached these conclusions not only because Freese and Wainio were not cross-examined on their evidence, but also because Profit was in attendance at that meeting and, having sat through the hearing, she was not called to address any of the meetings at which she was present as the Grievor's representative, including the June 22nd meeting. In accordance with accepted arbitral law, we reasonably conclude that Profit would neither contradict the evidence of the Division's witnesses nor would she have supported the Grievor's versions.

In assessing the credibility of the witnesses we have borne in mind the tests from **Faryna v. Chorney (1952) 2 DLR 254 (B.C.C.A.)** where O'Halloran J. A. stated, in part, p.256:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carries the conviction of truth. *The test must reasonably subject a story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and well informed person would readily recognize as reasonable in that place and in those conditions."* (Our italics)

In our view, the Grievor's assertion that he had a legitimate illness for the 2 weeks in June is not a conclusion "…which a practical and well informed person would readily recognize as reasonable <u>in that place and in those conditions</u>". Quite frankly, the Grievor was very brazen and his production of Ex.26 was not a surreptitious attempt at concealment after the fact. But, however brazen his action may have been, it does not detract from the fact that the certificate does not reflect the real reason for his absence and, in all of the surrounding circumstances, we give no weight to Ex.26.

In our view, the Grievor's unauthorized absence from June 4th to June 22nd and his conduct at both the June 4th and 22nd meetings constituted prima facie cause for discharge.

(b) Appropriateness of Penalty

Under this branch of our inquiry we considered the Grievor's attitude to his work. While we have found certain of the employment offences relied upon by the Division have not been established, the manner in which the Grievor dealt with his superiors and his obvious lack of interest in the needs of the Division did give the Division a legitimate basis to question the Grievor's commitment to his employment. All of this came to a head at the June 4th meeting. The Grievor, knowing he had been legitimately denied a leave, attempted to mislead his employer and then intentionally and wrongfully absented himself from work for 2 weeks. This is clearly insubordinate conduct of a serious nature. In our view, this is not a

situation where we ought to exercise our equitable jurisdiction and substitute some lesser penalty. Honesty and trustworthiness are the cornerstones of the employment relationship.

Under Articles 703 and 704 of the Agreement the test which these parties have adopted is whether the dismissal of an employee has been imposed "unjustly" or "unreasonably". We have concluded that the ultimate decision of the Division to dismiss the Grievor does not violate either criterion. The Division's conclusion that the Grievor could not be trusted and had irreparably damaged the employment relationship was reasonable. Wainio's conclusion that the Grievor "…was not an employee whom I felt had any commitment to the job whatsoever" is understandable.

Had the Division not established the serious employment offences in June of 2001 (exacerbated, as they were, by the Grievor's attitude and lack of explanation on June 22 and his evidence before us) then we would have re-instated the Grievor based upon our findings that the Division did not establish the other separate grounds for "cause" upon which it relied. But, there is no onus on the Division to prove each and every one of its grounds and if one or more of them are sufficient to meet the applicable standard then the dismissal will be upheld in the absence of the Grievor providing us with legitimate reasons for mitigating the penalty imposed. In our view, the Grievor failed to meet his onus in this regard.

For all of the reasons given, the Grievance is dismissed.

We express our sincere appreciation to Messrs. Simpson and Kernahan for the manner in which this case was distilled, presented and argued.

Issued this 8th day of October 2002.

_____
William D. Hamilton
Chairperson

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Gerald D. Parkinson
Nominee of the Division

___Partial Dissent Attached____
Bruce Buckley
Nominee of the Union

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In the matter of an arbitration and in the mater of a grievance filed by D. Grzybowski

Between:

Kelsey School Division No. 45

- and –

Canadian Union of Public Employees, Local 1596

Partial Dissent of Union Nominee
Bruce Buckley

In writing this dissent, I take issue with the majority in one area which is the appropriateness of penalty. I agree with the majority that some discipline is warranted with respect to the May 25th leave request in that the evidence was clear that the request was granted for a day long counselling session, and it was clear from the evidence that the grievor's counselling session was for only the usual time and that the balance of the day was used as a vacation.

The employer would have been entitled to discipline the employee when they became aware in May that the leave had been acquired dishonestly, but the employer did not.

The employer was also entitled to discipline with respect to the criminal charge and conviction which the employer became aware of in February and which they perceived to potentially damage their reputation in the community (evidence of Wainio), but they did not exercise their power to discipline over that behaviour in a timely way, instead they welcomed the grievor back to work in April.

The grievor's conduct at the June 4th meeting, where he produced a sick slip when it became clear he was unsuccessful in changing management's decision on granting his vacation is, in my view, a serious matter. His behaviour was insubordinate and a direct challenge to management's decision to deny his vacation request. The employer chose to deal with it on June 22nd at another meeting. On June 22nd, the grievor was asked to give an explanation for his actions to date and give the employer any information which would justify his absence from June 4 to 22, 2002. His reply was, could he be paid for the absence out of his vacation entitlement since his sick leave bank was empty?

The employer's response, based on his attitude and lack of commitment to the Division, was that the employee/employer relationship was broken beyond repair and terminated his employment.

This was the first time that the employer had resorted to discipline with respect to the grievor over his attitude and actions towards management. The employer decided to discharge the grievor.

The whole foundation of the theory of progressive discipline is meant to correct behaviour. The employer clearly had issues with the grievor's attitude and lack of communication long before the June 4th meeting and chose not to use corrective discipline to send the grievor a message that his behaviour was a problem and should it continue, his employment would be in jeopardy.

In my view, it is not surprising that the grievor's behaviour on June 4th got to the point where he produced a sick slip when he could not change management's decision to grant his vacation request. He had been allowed to get away without disciplinary consequences on the criminal conviction issue and on the May 25th counselling/vacation request issue. He had also provided sick slips to cover time off when his father passed away and when he had broken his arm, unchallenged by management.

The grievor is the creator of his own destiny. I am not taking the position that the employer is responsible for the grievor's actions on June 4th and 22nd, the grievor must take responsibility for those actions.

However, the employer bears some responsibility in managing the problem in the way that they did. Had the employer followed the progressive discipline model and the grievor continued on the path that lead to the June 4th incident, I would not be taking the position that he should be reinstated. However, they did not, the first time that the employer disciplined the grievor was when they discharged him.

While I agree with the majority that the incident on June 4th was most serious behaviour warranting discharge, I would exercise the Board's authority to substitute a lesser penalty upon just and equitable grounds to reinstate the grievor to his position without back pay, on a last chance basis. The grievor would have to maintain regular attendance within Division average and follow all Division policies and procedures for eighteen (18) months. Failure to do so, would entitle the employer to terminate within the eighteen month period upon proof of the breach.

October 8, 2002
Bruce Buckely

Union Nominee