

Subject - Termination of Employment
(Disciplinary Discharge)

ARBITRATION AWARD

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 2099
(hereinafter called the "Union")

AND:

THE CITY OF MOUNT PEARL
(hereinafter called the "Employer")

GRIEVOR: Sherri Colbert

COUNSEL: For the Union
Corinne Budgell

For the Employer
Harold Smith

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on November 22nd and 29th, 1996. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure had been properly followed or any requirements were waived
4. The Arbitrator would remain seized of the matter for thirty days following publication of the Award in the event that the parties could not agree on the interpretation of the Award or in the event that there was a question of compensation arising from the Award.
5. Witnesses were excluded from the Hearing.
6. The Arbitrator's notes and tapes would prevail in the event of a conflict.

The following documents were entered as exhibits at the hearing:

Consent 1 - Collective Agreement between the parties dated July 1, 1993 to June 30, 1996

(Note - on the date of the grievance, the parties had negotiated a new Collective Agreement that was not signed. The parties agreed that the relevant collective agreement language for the purpose of the award was set out in Consent 1.)

Consent 2 - Grievance Form dated October 17, 1996

Consent 3 - Memo from Sherri Colbert to Judy Guy dated September 30, 1996

Consent 4 - Letter from Judy Guy to Sherri Colbert dated October 1, 1996

Consent 5 - Medical note

Consent 6 - Medical note with additional wording

Consent 7 - Letter from the Employer to Sherri Colbert dated

October 16, 1996

- Consent 8 - Letter from the Employer to Sherri Colbert dated October 18, 1996
- RJ - 1 Employment Record of Sherri Colbert with the Avalon Consolidated School Board for 1996
- SC - 1 Grievance Form regarding the right to change shifts dated October 7, 1996

Nature of the Grievance

The Grievor was terminated from her employment with the City of Mount Pearl on October 16, 1996 for the reason that, while off on sick leave, she worked for another Employer. The Employer viewed the Grievor's actions as an attempt to fraudulently obtain sick leave to carry out her plan to work for another Employer. The Union submits that the Grievor had a legitimate illness that prevented her from performing her duties for the Employer, and there was no just cause for any discipline. The Union requested reinstatement and full compensation, or in the alternative, that a lesser disciplinary penalty be substituted.

Evidence

The witnesses called by the Employer were Ray Osmond, Director of Parks and Recreation, City of Mount Pearl, Robert Johnson, Business Administrator, Avalon Consolidated School Board, Lynn Martin, Acting Principal, Mount Pearl Junior High School, Jim Langor,

Acting Vice Principal, Mount Pearl Junior High School, and Cathy Hickman, Assistant Principal, O'Donel High School.

Witnesses called by the Union were Dr. Karl Misik, Family Physician and Sherri Colbert, the Grievor.

The Grievor was employed as a Lifeguard III at the Mount Pearl Swimming Pool. Her duties included instruction of swimming classes, lifeguarding, cleaning the pool and other areas, adding chemicals to the pool and working as receptionist as required. She has worked for the Employer for various intervals over the last eight years and her status was permanent, part-time since she graduated from University in 1994. She works about 30 to 32 hours per week. The Grievor testified that she considers the City of Mount Pearl to be her primary Employer. She has University degrees in Education and Physical Education. She has a Grade V Teaching Certificate and also works as a substitute teacher for the Avalon Consolidated School Board and the Roman Catholic School Board for St. John's.

The Grievor was asked to work as a substitute teacher on days which she discovered conflicted with her scheduled hours of work at the pool for the City of Mount Pearl. Her days and hours of work at the pool vary from week to week and she frequently has the opportunity to work as a substitute teacher without any conflict with her schedule at the pool. She worked as a substitute teacher

on September 26th and 27th, 1996 at Mount Pearl Junior High School. At around that time it was planned at the school that a group of teachers would attend an in-service training session on the morning of Tuesday, October 8, 1996. The Grievor was asked to work as one of the substitute teachers needed. The Grievor testified that it was likely on September 27th when she was substitute teaching at the school, that she was asked to work on October 8th. The Grievor was later contacted by staff at the school, probably on Saturday, September 28th, and asked to work on Tuesday, October 1st. At that time the Grievor knew that she was expected to work at the pool on both October 1st and October 8th, 1996 although she may not have had the schedule for October 8th until later. The schedule is prepared for one week at a time for the week commencing on Sunday. The schedule was normally posted at the workplace and placed in the employees' pay envelopes on Fridays, more than one week prior to the week on the schedule. However, Ray Osmond testified it was possible the Grievor did not receive her schedule for the week that included October 8th until the previous Wednesday, October 2nd. In her testimony the Grievor did not recall when she received the schedule. However a regular session of Tuesday swimming lessons was starting and the Grievor determined on Monday, September 30th that she would need to change her shifts with another employee to accommodate her substitute teaching on both October 1st and 8th. On that day she presented a memo to her Supervisor, Judy Guy stating as follows:

For Tuesday, October 1st and Tuesday, October 8th,
Stephanie has agreed to work my 10:30 to 3:00 shift.

Thank you
Sherri Colbert

When she submitted the memo, Judy Guy told the Grievor she was concerned about how many times such a request would be made and the Grievor assured her that it would not be frequent. The Grievor did not anticipate any difficulty changing her shifts and she believed that she had the right to do so under Article 18.04 of the Collective Agreement. The Grievor testified that on previous occasions she had been denied a request to change shifts when she had an opportunity to substitute teach. On those occasions she informed the school that she would be unable to teach. However, she testified that following a labour dispute between the Union and the Employer in 1996, she became more familiar with her rights under the Collective Agreement.

In response to the Grievor's memo, the Employer determined it would allow the shift change on October 1st because it was too late to make other arrangements, but the shift change was denied for October 8th. Ray Osmond testified that the Employer wanted to ensure there was continuity of instruction for the children taking swimming lessons. He said it was important for children to feel safe and comfortable in the water and to develop a relationship with the instructor. Granting the shift change would affect the development of such a relationship. The Employer sent a letter

dated October 1, 1996 to the Grievor which stated as follows:

Dear Ms. Colbert,

This is to confirm our conversation of September 30, 1996, in which we discussed your request for a shift change under article 18:05 of the current collective agreement.

Due to the nature of the work at the swimming pool with regards to teaching swimming classes; we endeavour to have the same instructor for each class to ensure continuity of instruction. Our participants expect to see the same instructor each class and not a different one for each lesson in a set of eight.

Article 18:05 stipulates that a shift may be changed with another employee. Your request of September 30, 1996, indicates that another employee is replacing you for your regularly scheduled hours of work. Article 18:05 does not apply with respect to change of regularly scheduled hours of work.

In consultation with Senior Management, it was concluded that a change in regularly scheduled hours of work is not permitted without prior consent from the Department Head. Given the fact that time did not permit other arrangements, your replacement on Tuesday, October 1, 1996, has been agreed to. Your request for Tuesday, October 8, 1996, is denied. You are expected to work your regular hours as scheduled.

If you have any questions or wish to discuss this matter further, please do not hesitate to call.

Yours truly,

Judith Guy
Recreation Supervisor

The Grievor was scheduled to work at the pool on October 7th from 10:30 a.m. to 3:00 p.m. and from 5:00 p.m. to 7:00 p.m., on October 8th from 10:30 a.m. to 7:30 p.m. and on October 9th from 5:00 p.m. to 10:00 p.m. The Grievor filed a separate grievance about the denial of the shift change. The grievance stated "we have been denied the right to change shift - Article 18:04". The grievance

was filed by the Chief Shop Steward on Monday, October 7th, although the Grievor testified she thought that it was filed during the previous week. The Grievor worked as a substitute teacher for a Physical Education teacher at Mount Pearl Junior High School on October 1st, 2nd, and 4th, 1996.

On October 7th, the Grievor called in sick to the City of Mount Pearl at 7:30 a.m. She testified that her skin was irritated by excema and she could no longer control the condition. Between 10:30 a.m. and 11:00 a.m. that day, she received a telephone call from Cathy Hickman, Assistant Principal at O'Donel High School in Mount Pearl. A Physical Education teacher at that school needed to be replaced by a substitute teacher during the afternoon periods for about two hours commencing at 12:15 p.m. The Grievor accepted the request and worked as a substitute teacher at O'Donel High School on October 7th and was paid by the Roman Catholic School Board.

The Grievor attended at the office of her family physician, Dr. Karl Misik on the morning of October 7th before teaching at O'Donel High School. She was unable to see the doctor at that time and she returned to his office in the afternoon after teaching at the school. The Grievor testified that she told Dr. Misik that her excema was bleeding and had spread from her hands to her chest and legs. She did not tell Dr. Misik that she had ever worked as a substitute teacher or that she had worked that day in the school.

Dr. Misik was familiar with her work at the pool. The Grievor testified that she knew her skin condition would not be aggravated by her work at the school. She said she was advised by her doctor to stay out of the pool environment and that she needed time to clear up the excema. The Grievor testified that she was not required to disclose the nature of her illness to her Employer. She had no reason to expect that if she told the Employer about her excema, the Employer might assign her to perform other duties. She received a note from Dr. Misik stating that she was required to be off work from October 7th to October 9th, inclusive, due to illness. The Grievor showed the note to Judy Guy later on the afternoon on October 7th and informed her that she would be unable to work for the Employer until October 10th. Judy Guy kept a photocopy of the note and the Grievor retained the original.

Dr. Karl Misik testified that the Grievor has been his patient since 1985. She attended at his office on October 7, 1996 with two complaints. He did not recall which of the two complaints the Grievor stated first. The first complaint listed in his notes was that she had an upper respiratory illness with flu like symptoms for which he advised her regarding non-prescription medication. The second complaint listed in his notes was that she had a rash and irritation on her hands. He did not recall whether or not she complained about a rash on other parts of her body. He examined her hands but did not conduct an examination of her skin on other parts of her body. He described the Grievor's skin condition as

excema which, in his opinion, was clearly related to her working environment at the pool, which included high humidity and chlorine and other chemicals in the pool. He prescribed cream known as "Wescort" and advised her to take time off work. He gave her a note which stated, according to his standard practice, "to be off work for illness". Dr. Misik described the Grievor's condition as "contact dermatitis", and stated it was not the hereditary, other illness or stress type dermatitis. The purpose of taking time off work was to let the matter resolve itself. He said the only reason for the note was the contact dermatitis on her hands. He said the best approach in such cases is to remove the patient from contact with the aggravating substance. He said that chlorine in the pool environment can be an irritant. If the problem became repetitive, then he would likely do a patch test to identify with more accuracy the source of the irritation. Dr. Misik testified that it was possible to have contact dermatitis from chalk. He did not recall the Grievor telling him that she worked as a teacher. He was under the impression that her only employment was at the pool. He said that if he knew the Grievor had contact with chalk, then it was probable he would have done further testing to determine precisely the source of her skin aggravation. He testified that the Grievor had previous skin problems. In February and April, 1995 she had an allergic type excema that lasted for a few days and settled down with cream. She had a fungal skin infection in April, 1996 that was a type of infection common in the pool environment. He did not make any note that the Grievor was absent from her employment as a

result of the previous skin problems. He saw the Grievor again on October 15, 1996 at which time she asked him to write a specific reason she was off work and he added "excecma/aggravated by water" on the note. He said the second note would not be appropriate if he knew that she was teaching "until the picture became clear".

When asked about contact with chalk while teaching, the Grievor testified that she usually instructed physical education classes in the gym, that in the classroom she frequently used handouts or overheads and that she used a chalk holder when writing on the board and therefore she did not usually have contact with chalk. She testified that if she had not obtained a shift change or a doctor's note on October 7th, then she would have called the school to cancel her substitute teaching on October 8th. She did not believe that her skin condition prevented her from working at the school. She also believed that her grievance concerning the shift change might be successful. However, she spoke to her Chief Shop Steward on October 7th and learned that no progress was being made with the grievance.

The Grievor was originally asked to teach for a half day on the morning of October 8th at Mount Pearl Junior High. However, on the evening of October 7th, it was learned at the school that a Physical Education teacher would be off work on October 8th. The teacher requested that the Grievor replace her because she had replaced her during the previous week and was familiar with her

students. Jim Langor, the Acting Vice Principal, called the Grievor on the evening of October 7th and she agreed to work for the full day on October 8th. The Grievor worked at the school on October 8th and was paid by the Avalon Consolidated School Board for a full teaching day.

Ray Osmond testified that he learned that the Grievor might be teaching at Mount Pearl Junior High School on a day that she was off sick. He visited the school on Thursday, October 10th and spoke to the Acting Principal, Lynn Martin, but she was unable to confirm when the Grievor had been working because Mr. Langor had the substitute teacher records. The Grievor visited the school on Friday, October 11th for the purpose of picking up a fresh turkey from another teacher. The following Monday was Thanksgiving Day. She was informed by Mr. Langor about the inquiry from the City of Mount Pearl and he asked her if the school should have any reason to be concerned about employing her as a substitute teacher. The Grievor testified that she told the Acting Principal that the reason she was off sick at the City of Mount Pearl was for excema which did not affect her ability to teach. She then visited the City management offices with the Chief Shop Steward. She was advised to speak to Mr. Osmond, but he was not available that day. On the next working day, Tuesday, October 15th, the Grievor and the Chief Shop Steward approached Mr. Osmond. She told him that he had no right to ask questions about her at the school. She showed Mr. Osmond the original doctor's note and he told her the note did not

indicate her condition. Ray Osmond's testimony about this meeting was that the Grievor was upset and she was yelling at him. He said the Grievor told him that what she did on her own time was her own business. Mr. Osmond testified that he told the Grievor it was not the Employer's policy to ask the nature of an illness. The Grievor told Mr. Osmond she would get clarification on the note. She went back to Dr. Misik and he wrote on the note "excema/aggravated by water". The Grievor filed a grievance against Mr. Osmond for harassment based on his visit to the school.

Mr. Osmond received confirmation from Mr. Robert Johnson, Business Administrator and from Ms. Lynn Martin, Acting Principal, on October 15th that the Grievor worked at Mount Pearl Junior High School on October 8th. At that time the Employer did not know the reason for her illness. The Grievor and her Shop Steward attended a meeting with Mr. Osmond and City management on October 16th. At the meeting the Grievor explained the reason she was off work was excema. She stated at the meeting she was legitimately off work at the pool, but was able to teach. The Grievor said at the meeting that it was her business what she did when she was off sick. At the end of the Grievor's explanation she was handed a letter of termination dated October 16, 1996 which stated as follows:

Dear Ms. Colbert:

This letter is further to your meeting of October 15, 1996 with the Director of Parks & Recreation concerning your sick leave as certified by your medical doctor on 7

October 1996 as it relates to your employment with the City of Mount Pearl.

In accordance with your medical certificate for the period of October 7 - 9, 1996, sick leave provisions were approved for you under Article 21:01 of the current collective agreement as this certificate stated that you were off work due to illness. It has now come to our attention that on October 8, 1996, while unable to perform your regularly scheduled work duties with the City of Mount Pearl, and while off on sick leave, you did, in fact, report to and work for another employer, the Avalon Consolidated School Board.

After reviewing all of the circumstances of this matter, your conduct cannot be tolerated. Accordingly, you are hereby notified of your termination from employment with the City of Mount Pearl, effective immediately.

Yours truly,

Brian A. McArthur, P. Eng.
City Manager

Ray Osmond testified that the first time he knew her problem was excema was at the meeting on October 16th. He said that if the Grievor's excema kept her out of the pool environment, she could have been assigned other duties at the office. He said that pursuant to the Collective Agreement, if an employee has a disability, the Employer will try to accommodate. There was no previous occasion when the Employer had requested anyone to work a full day on the Reception Desk or to be accommodated in a similar manner. Mr. Osmond testified that at the meeting on October 16th when the Grievor was asked when she worked, she did not disclose that she worked as a substitute teacher at O'Donel High School on October 7th. In the Grievor's testimony about the meeting, she

said that she did not disclose her teaching on October 7th because she was not asked about it.

Mr. Osmond testified that the Grievor did not show any sign of remorse or apologize for her actions. He said she was dismissed for dishonesty because she worked for another public organization when in receipt of sick pay, which he described as "double dipping". Mr. Osmond said that the Grievor had made all the decisions herself about her absence from work and did not discuss her situation with the Employer. He said that the Grievor was not entitled to sick leave if she was receiving the benefits of pay from another public employer and he questioned the validity of the doctor's note because of her employment. The Grievor was not paid for October 7th, 8th and 9th because the Employer was waiting for confirmation on which of those days she worked as a teacher. The Grievor has a bank of sick leave hours from which she can draw for the purpose of sick leave.

The Grievor testified that her career objective is to become a full time teacher. Even if employed as a full time teacher, she would still like to work some hours at the pool for the City of Mount Pearl. She said that she enjoys both jobs. She works as a substitute teacher to build up her confidence. She is used more frequently as a substitute teacher each year. It was confirmed by the Acting Principal, Ms. Martin that the Grievor has a positive reputation as a substitute teacher. The Grievor was concerned that

if she is not available to work as a substitute teacher that it could affect her career. She receives about \$120.00 per day to work as a substitute teacher and about \$75.00 per day to work at the pool. The Grievor testified that she felt strongly that she had the right under the Collective Agreement to have a shift change for October 8th. She agreed that continuity of instruction was important for swimming instruction. She did not think that the shift change at the pool was a problem because it happens often and the swimming group affected in this case was a new group for which instruction had not yet started. She felt that she was legitimately sick and that it was a coincidence that her condition allowed her to be off work at the pool and to work at the school. She said that she could understand why the Employer was asking questions about her employment at the school if they did not know the reason for her illness. She testified that if the Arbitrator finds that her work as a substitute teacher on the days in question was not acceptable, that she would not do it again. She did not think at the time that it was wrong and she did not believe that she was dishonest.

Employer Submission

The Employer submitted that it relies on the trustworthiness of its employees. There is an obligation on the Grievor to disclose any relevant information to her doctor which could affect his assessment of her condition. Dr. Misik was not aware of the

Grievor's work as a teacher and if he had knowledge of it, he may not have concluded that her contact dermatitis was caused by the pool environment. The Employer referred to medical literature and the testimony of Dr. Misik and suggested that if the chemicals in the pool caused the Grievor's contact dermatitis, it would be more likely that the Grievor would have problems with her skin on different parts of her body and not just her hands. However, Dr. Misik did not mention a skin problem on any part of her body other than on her hands. Chalk could be an irritant causing contact dermatitis and Dr. Misik would likely have ordered further testing before concluding that the problem was the pool environment. Under the circumstances, the Employer could challenge the Doctor's note as a convenience produced to justify absence from work. The medical note should be rejected because the Doctor did not perform any testing. The Grievor was teaching on the 1st, 2nd and 4th of October and had little contact with the pool environment in the week prior to visiting the Doctor. The Employer suggested the reason the Grievor did not disclose all the relevant information to the Doctor was that it did not suit her objective to teach at the school. The Grievor admitted that she was concerned if she was not available to teach, then the school would find someone else. The Grievor knew the reason she requested the shift change was to teach at the school, but did not admit the reason to the Employer. The Grievor accepted the validity of having continuity of instruction at the school, but showed disregard for the students in swimming lessons. She also showed disregard for her primary Employer, the

City of Mount Pearl, by seeking the shift change to accommodate her personal interests. The Grievor carried out a plan to accommodate her own interests when her shift change was not approved. She placed her own interests ahead of the interests of the Employer. She claimed that she was waiting for the response to her grievance about the shift change, but the grievance was not filed until October 7th. The Employer did not accept as a coincidence that the Grievor's illness coincided with the exact day that she was already scheduled to teach at the school. The Grievor contacted the Employer and said that she was ill which has the same effect as saying she was unable to perform her duties. The inference of being "sick" is that the Grievor is either convalescing in hospital or at home. The Grievor should know that the purpose of sick leave is to replace lost income and not to provide an opportunity for financial gain. The Grievor's approach to Mr. Osmond after learning that he was asking questions at the school indicated that she realized she had been "caught". She then decided to provide the details for her absence from work which she had previously believed were not the Employer's business. The Grievor did not have any remorse and her reaction was defiance. The Employer referred to arbitral authorities concerned with employees abusing sick leave and working for other employers. The authorities indicate an obligation on the employee to disclose all relevant information to the Employer or to medical doctors. There was a breach of the bond of trust and the circumstances do not indicate that trust could be restored. The Grievor does not have a lengthy

period of service with the Employer. The Employer concluded there were no redeeming factors to justify reducing the penalty and asked that the grievance be dismissed.

Union Submission

The Union denied that the Grievor had engaged in any fraudulent activity to receive sick leave. The Employer had rejected the medical note without seeking any clarification. The Grievor expected the Union to successfully resolve the matter of changing her shifts through the grievance procedure and she was waiting until the last minute on October 7th before notifying Mount Pearl Junior High School that she was unable to teach. Her call to work at O'Donel High School on October 7th was after she had called in sick to the Employer. She had visible signs of excema on her hands, according to the Doctor. She had a previous skin condition in April which was caused by the pool environment and she believed that the problem was related to her work at the pool. The Doctor's note clearly stated that she was off work as a result of the pool environment. The Grievor believed that the problem was related to her work at the pool. There was no reason to inform the Doctor of her work as a teacher. The appropriate response according to the Doctor was to prescribe cream and observe if the condition improved. The possible use of chalk at the school was insignificant to the Grievor. She usually teaches physical education where it is not normal to use chalk. There was no

evidence to suggest that her excema was related to anything other than water. The Doctor would not likely have given any different opinion if he had known that the Grievor was working as a teacher. There was nothing wrong with the Grievor making the decisions or taking the actions that she did. She was concerned about her credibility at the school by the manner in which Ray Osmond was asking questions about her. She believed that Mr. Osmond should have asked her first before going to the school. The Grievor admitted that she was teaching and she attempted to explain her illness to the Employer but the Employer did not want to accept any further medical evidence. The Employer made the decision that she was ill without checking on the facts. The Employer had its dismissal letter typed and ready to give to her before hearing the reason that she was sick. The Grievor tried to produce the amended medical note before the termination meeting, but it was not accepted. The Union referred to Article 21.01 of the Collective Agreement and noted that there are many reasons for sick leave. The Employer was unlikely to use Article 14.08 and assign the Grievor to other duties because the Employer had never done so in the past. The Employer did not reject the medical note when it was presented. There was no just and reasonable cause for termination of employment. The Grievor gave a reasonable explanation for her sick leave. This was not an issue of "moonlighting". Although the Grievor felt that she had the right to take the action that she had taken, she acknowledged that if her actions were improper, then she would behave in a different manner in the future. The trust

relationship may be restored. The Grievor was open and honest about her activities. It was not necessarily a case where she had to stay home as a result of her condition. The Grievor did not carry on an activity that was inconsistent with the advice given by her medical doctor. The Grievor did not fraudulently obtain sick leave. She had a good record of service with the Employer. The Union submitted arbitral authorities and distinguished the authorities referred to by the Employer. The Union asked that the Grievor be returned to work with the City, be paid sick leave and all lost wages, benefits and seniority. In the alternative, the Union requested that a lesser penalty be substituted for discharge.

Considerations:

The Employer discharged the Grievor, Sherri Colbert, for the reasons set out in its letter dated October 16, 1996 which stated that while on sick leave she worked for another Employer.

The relevant sections of the Collective Agreement are as follows:

Article 12 - Discharge, Suspension and Discipline

12.02 Discharge Procedure

An employee may be dismissed but only for just and reasonable cause and only upon the authority of the Employer. A Department Head may suspend an employee within the Department, but shall immediately report such action to the Employer. When an employee is discharged or suspended, the employee shall be given the

reason in the presence of the employee's Steward. Such employee and the Union shall be advised promptly in writing by the City Manager or designate of the reason for such discharge or suspension.

12.04 Unjust Suspension or Discharge

Should it be found upon investigation that an employee has been unjustly suspended or discharged, such employee shall be immediately reinstated in the former position, without loss of seniority, and shall be compensated for all time lost in an amount equal to the normal earnings during the pay period next preceding such discharge or suspension, or by any other arrangement as to compensation which is just and equitable in the opinion of the parties or in the opinion of a Board of Arbitration, if the matter is referred to such a Board.

Article 14 - Promotions and Staff Changes

14.08 Handicapped Worker Provision

An employee who has become incapacitated by injury or illness, shall be employed in other work which the employee can do, if such a position is available. Such employees may not displace an employee with greater seniority.

Article 18 - Shift Work

18.04 Change Shifts

Employees may switch a shift or shifts, provided the employee in question is capable of performing the duties required. A minimum of four (4) hours notice must be given to the Employer if an employee is unable to perform the work required.

Article 21 - Sick Leave

21.01 Sick Leave Defined

Sick leave means the period of time an employee is absent from work with full pay by virtue of being sick or disabled, exposed to a contagious disease, or under examination or treatment of a physician, chiropractor, or dentist, or because of an accident for which compensation is not payable under the Workers' Compensation Act or days used for illness in the family.

21.02 Annual Paid Sick Leave

Twenty-one (21) days sick leave per year shall be earned by an employee at the rate of one and three quarters (1 3/4) days for every month an employee is employed.

21.06 Proof of Illness

An employee may be required to produce a certificate from a medical practitioner for any illness in excess of two (2) working days, certifying that the employee was unable to carry out the employee's duties due to illness; however, after a total of seven (7) days sick leave have been used in any one contract year, a medical certificate may be required for any sick leave.

21.11 Notification of Sick Leave

The supervisor shall be notified within one-half (1/2) hour of the commencement of a shift of the reason for an employee being absent on sick leave.

The issues for the Arbitrator to determine are as follows:

- (1) Did the Employer have just cause to impose any discipline?
- (2) If the answer to question (1) is in the affirmative, did the

Employer have just and reasonable cause to discharge the Grievor?

- (3) If the answer to question (2) is no, then what penalty should be substituted?

The facts as set out in the Award are essentially not in dispute. The Grievor was scheduled to work at the swimming pool for the City of Mount Pearl on October 7 and 8, 1996. At 7:30 a.m. on October 7th, she telephoned the Employer to say that she was sick and would not be reporting to work. Later that day she attended at the office of her family physician, Dr. Misik, and obtained a note advising her to be off work from October 7th to October 9th, inclusive. The original note did not state the reason for the illness. The Grievor showed the note to her Supervisor on October 7th and informed her she was unable to work until October 10th. At that time the Grievor was planning to work as a substitute teacher at Mount Pearl Junior High School on the following day, October 8th. In fact, she had also worked as a substitute teacher on the afternoon of October 7th at another school. She had not planned to substitute teach on October 7th as she had only received a telephone call from the school that morning to work in the afternoon. When the Grievor presented the medical note to her Employer on October 7th, she did not inform her Employer that she had worked as a substitute teacher on that day nor did she inform her Employer of her plan to work as a substitute teacher on the following day. If the Employer had not discovered that the Grievor

worked at the school on October 8th, the Grievor would have received sick leave benefits from the City of Mount Pearl and also received salary as a substitute teacher from the School Board. Once it learned that the Grievor worked as a teacher, the Employer withheld the payment of sick leave benefits for October 7th to 9th. However, the consideration of the facts of this case is not any different because the Grievor did not actually receive sick leave benefits but in fact applied for sick leave benefits that were withheld by the Employer.

The Union claims that the Grievor was legitimately entitled to sick leave and relies upon the medical note and the testimony of Dr. Misik. The Union submits that the Grievor had a skin condition for which she was unable to work at the pool. The Union submits she was therefore "sick" and entitled to sick leave according to Article 21.01 of the Collective Agreement. The fact that the Grievor worked as a teacher does not mean that she was not "sick" under the Collective Agreement, according to the Union. The Union compared the Grievor's situation with the facts of Bay St. George Senior Citizens Home and Newfoundland Association of Public Employees (Theresa Young), unreported, May 27, 1986 (Dicks), upheld in the Supreme Court of Newfoundland, Trial Division, 1986 St.J. No. 361, unreported, November 24, 1986. In that case the grievor had a medical certificate stating she should be off work for four days for a "bad chest cold". The employer allowed her claim for sick leave for three of the four days, but denied her claim for one

day for the reason that on that day she walked to her place of employment, picked up her pay cheque and then travelled by taxi to the bank and the drug store on her way home. The Board found that the employer had accepted the medical certificate and there was no basis for finding that the certificate was erroneously or fraudulently obtained. On judicial review the Supreme Court held that the Arbitration Board had accurately identified the issue to be "was the grievor sick", and not "should the grievor have been outdoors". Once it accepted the medical certificate, then the Employer was obligated to pay sick leave.

I agree with the finding made in the Bay St. George Senior Citizens Home case that it is not the activities of an employee, while on sick leave, that necessarily invalidate the claim for sick leave, but rather it is the fact of such activities that could legitimately cause an employer to question the validity of the medical certificate. In this case, the Employer did address the issue of whether the Grievor was "sick", therefore, the facts of the present case may be distinguished from the Bay St. George Senior Citizens Home case. The Employer did not accept the medical certificate or pay sick leave benefits for any of the three days that the Grievor claimed sick leave. The Employer questioned the medical certificate on the basis that the Grievor did not disclose all relevant information to her family physician when she attended at his office to request the certificate.

Arbitrators have upheld disciplinary penalties where employees had some basis to claim sick leave while at the same time engaging in activities inconsistent with being sick. In Re Ford Motor Company and U.A.W. (1975) 8 L.A.C. (2d) 149 (Palmer), the grievor injured his elbow and thigh and was advised by his doctor to stay home and rest. The grievor worked as a driving instructor and denied to the employer the fact he was working. The arbitrator found that the grievor had misled his doctor by not informing the doctor that he was working at another job. The concealment of that fact could have affected the doctor's diagnosis of the extent of the injuries, and the certification by the doctor was not sufficient to explain the absence from work. Discharge was upheld.

In Re Kenroc Tools Corp. and U.S.W.A. (1990) 17 L.A.C. (4th) 416 (M.G. Picher), a medical doctor concluded on the basis of the grievor's medical history and his description of the pain that he was suffering from an inflammation of his right testicle and he was ordered to stay off work for two weeks to rest. During that time the grievor spent some time at a hunting camp and also engaged in some light carpentry work. He claimed to be resting at the hunting camp. The arbitrator found the grievor was under a duty to obtain clearance in advance from his doctor and his employer prior to performing any activities which might be unusual, such as the hunting trip, during the course of medical leave. The arbitrator upheld a five week suspension. The arbitrator stated at page 419 as follows:

As a person receiving indemnity benefits at the company's expense, the grievor was under a minimal obligation to follow a faithful program of treatment and convalescence and to clear in advance with both his physician and his employer any contemplated activities which might be unusual in the circumstances.

Arbitrators have also considered cases where an employee claims to be sick but there is no basis at all for the claim for sick leave. In Re Canada Post Corp. and C.U.P.W. (Gilbert) (1990) 12 L.A.C. (4th) 210 (H.D. Brown), the grievor was not sick, but made a claim for sick leave to attend a real estate course. The grievor knew that the sick leave application was false and carried out a deliberate plan to take the course. Discharge was upheld. In Re Kennedy House Youth Services and O.P.S.E.U. (1996) 53 L.A.C. (4th) 54 (M.G. Picher), the Grievor called in sick and received sick leave pay at one youth care centre while working at another centre. The arbitration board was clearly troubled by the grievor's testimony and the fact he exhibited no remorse and maintained he had done nothing wrong. The board upheld discharge and stated at page 61 as follows:

We accept that a Board of Arbitration should be prepared to accept that claiming sick leave when one is not ill is perhaps a too common indiscretion which, in a isolated case, might not merit discharge. However, the instant case goes farther.

This is not a case where the Grievor had no basis to claim sick leave. I accept the Grievor's testimony that she had a skin

condition that was not clearing up and she reasonably sought medical attention. Dr. Misik confirmed that she had excema on her hands. His diagnosis was that she had contact dermatitis which was aggravated by the pool environment. Dr. Misik's diagnosis was based on the information that was presented to him by the grievor at the time and his knowledge of her history. He stated that he prescribed a cream and directed the Grievor to stay away from the pool environment for a few days to determine if her condition would improve. Having no reason to suspect there was another cause of the contact dermatitis, based on the information presented to him, Dr. Misik did not order further testing to be done at that time to determine the cause of the Grievor's skin condition. However, it is possible that the Grievor's excema may have been aggravated by another cause including her activities while teaching. Dr. Misik testified that chalk may be a cause of contact dermatitis. Although the Grievor testified that she has very little contact with chalk while teaching, it remains a possible cause of her condition. In the circumstances, it may have been reasonable for the Grievor to have concluded that her skin condition was caused by the pool environment and not caused by chalk or anything else in her environment. However, the Grievor did not tell Dr. Misik that she also worked as a substitute teacher. She did not tell him that she had worked as a teacher earlier on the same day that she visited his office and obtained a medical note excusing her from work. She did not tell Dr. Misik that she planned to work as a teacher on the following day, which was one of the days that was

covered by the medical note. The Grievor had an obligation to inform Dr. Misik of the fact that she worked as a substitute teacher on October 7th and planned to work as a substitute teacher on October 8th, so that he could consider that information before giving her the medical note to be off work. Had the Grievor fully disclosed her activities to Dr. Misik, it is likely he would have ordered further testing and he likely would not have provided the same medical note. For the Grievor to have a valid medical certificate, she should have disclosed to Dr. Misik her plan to work as a substitute teacher and specifically sought his advice as to whether or not she should engage in that activity. In these circumstances, the Grievor was under a duty to inform Dr. Misik of her planned activities and obtain specific medical approval to be absent from her work with the City of Mount Pearl and approval to work as a substitute teacher. In this regard, I agree with the conclusion of Arbitrator Picher in the Kenroc Tools case that an employee ought to clear in advance with both her medical doctor and her employer any activities that might be unusual while absent on sick leave. The Grievor's work as a substitute teacher in this case would be such an activity for which she ought to have received specific clearance. The Grievor maintained that what she did on her own time was her own business and not her Employer's business. However, the Grievor was mistaken in this view to the extent that when she engages in activities while in receipt of sick leave benefits that are relevant to her entitlement to such benefits, the Employer should be informed of such activities.

The Grievor was dishonest in her claim for sick leave benefits to the extent that she failed to disclose all the relevant facts to her family physician when she requested a medical note. The Grievor planned to work as a substitute teacher. She placed her own interests ahead of the interests of the City of Mount Pearl and its customers and must accept the consequences for her actions. The Grievor appears to have acted according to her belief she was entitled to sick leave under the terms of the Collective Agreement. However, the Grievor has not paid due attention to the fundamental nature of the employment relationship which includes her duty of honesty and trustworthiness to her Employer. She has breached that duty and the Employer had just cause to impose discipline.

The next issue to consider is whether or not the penalty of discharge was just and reasonable in the circumstances. In this regard I have considered decisions of other Arbitrators in similar cases as well as the mitigating factors in this case.

In Re De Havilland Aircraft of Canada and U.A.W. (1981) 2 L.A.C. (3d) 402 (H.D. Brown), the arbitrator replaced a discharge with a suspension of about one month. The grievor had breathing problems and applied for and received sickness and accident benefits. At the same time the grievor took an aircraft maintenance training course. The grievor had asked for a shift change and was denied.

The arbitrator noted that the grievor did not have fraudulent intent because he made his claim for benefits based on valid medical evidence and he did have a disability which would prevent him from performing his regular duties. In Re Metropolitan General Hospital and C.U.P.E. (1990) 16 L.A.C. (4th) 193 (Hunter), a penalty of discharge was reduced to a suspension of about five months in a case where the grievor called in sick on three days and on two of those days worked at another nursing home. The Arbitrator found that the grievor misunderstood the nature of sick leave, considering it to be an earned benefit, and while he found the grievor to be dishonest, she was not guilty of a deliberate scheme to defraud the employer.

I have considered the various mitigating factors identified by arbitrators as relevant to the appropriate disciplinary penalty. These factors are identified in Re U.S.W.A., Local 12357 and Steel Equipment Company (1964) 14 L.A.C. 356 (Reville) and in Re C.B.C. and C.U.P.E. (1979) 23 L.A.C. (2d) 227 (Arthurs) and a combined list of mitigating factors from those two cases is as follows:

1. The previous good record of the grievor;
2. The long service of the grievor;
3. Whether or not the offence was an isolated incident in the grievor's employment history;
4. Provocation;
5. Whether the offence was committed on the spur of the moment or was premeditated;

6. Whether the penalty has created special economic hardship for the grievor in light of the grievor's circumstances;
7. Whether the company's rules of conduct have been uniformly enforced;
8. Circumstances negating intent;
9. The seriousness of the offence in terms of company policy and obligations;
10. Bona fide confusion or mistake with the grievor as to whether he was entitled to do the act complained of;
11. The grievor's inability to appreciate the wrongfulness of his act;
12. The relatively trivial nature of the harm done;
13. Frank acknowledgement of misconduct by the grievor;
14. The existence of a sympathetic personal motive, such as family need; and
15. The grievor's future prospects for likely good behavior.

Applying these factors to the present case, it is noted that the Grievor has a good employment record. She was considered to be a good employee and had no prior incidents of discipline on her record. The Grievor does not have a lengthy period of service with the Employer as a permanent employee, but she worked at various intervals over the past eight years. The offence was an isolated incident in the Grievor's employment history. This was the only occasion on which the Grievor claimed sick leave while working for another Employer. In this respect I have considered her work as a substitute teacher on both October 7th and October 8th to be part of a single continuous incident. I find that the Grievor did not

plan to use a medical note to excuse her absence from work on October 8th until the day before. The Grievor telephoned her Employer to say she was sick on the morning of October 7th and it was only after she made the phone call that she received a call to teach on that day. She did not plan to obtain a medical note for the purpose of teaching on October 7th. However, she had known for more than one week that she had agreed to substitute teach on October 8th and she had ample opportunity to cancel the substitute teaching. The Grievor has acknowledged her actions and has not denied the fact that she was teaching. She objected to the Employer making inquiries at the school. However, the Employer had the right to conduct an investigation of any activity that would be inconsistent with the Grievor's claim for sick leave. The Grievor has not admitted wrongdoing or shown remorse for her actions, as this would be inconsistent with her claim that she was entitled to teach while on sick leave. The Grievor was either confused or mistaken in her belief that she was entitled to substitute teach without first informing her medical doctor and her Employer. The Grievor has stated that she will accept the ruling of the Arbitrator if her actions were wrong and she will govern herself accordingly in future. I believe the Grievor will honour her commitment in this regard. I am satisfied that the trust relationship may be restored between the Grievor and the Employer in these circumstances.

The Employer prepared the letter of dismissal prior to meeting with

the Grievor and the Chief Shop Steward on October 16, 1996. Prior to that meeting the Employer was not aware of the full details of the medical certificate or the reasons for the Grievor's absence from work. If the Employer had met with the Grievor and the Chief Shop Steward and obtained a full account of her version of the events prior to making the decision to discharge the Grievor, the Employer may have reached a different conclusion on the disciplinary penalty.

I find that the Employer did not have just and reasonable cause to discharge the Grievor and that a lesser penalty ought to be substituted. Under the circumstances, a three month suspension shall be substituted for the penalty of discharge.

Decision

The grievance is allowed in part. The Employer is ordered to reinstate the Grievor. The penalty of discharge shall be replaced with a suspension of three months without pay or benefits or accumulation of seniority.

DATED at St. John's this 9th day of January, 1997.

James C. Oakley

