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RE NATIONAL HARBOURS BOARD AND PUBLIC SERVICE ALLIANCE OF CANADA

I. Christie, C. Butler, J. D. Merrigan. (Nova Scotia)
November 4, 1974.

1974 CanLII 2395 (NS LA)

EMPLOYEE GRIEVANCE alleging unjust discharge.

H. E. Done for the union.
W. A. Gagnon, for the employer.

AWARD

Employee grievance alleging breach of a collective agreement between the parties dated August 15, 1973, in that the grievor was discharged without just cause because the "medical reasons" for his discharge are not supported by the evidence. At the hearing it was also argued on behalf of the grievor, that his grievance should be allowed because he did not receive fair notice of the grounds upon which his employment was terminated. The grievor requests that he be reinstated in his position as constable with the National Harbour Police, with full pay and benefits retroactive to the date of his release. He further requests that all reference to this action be

purged from the National Harbours Board's and Government's files.

Counsel for the National Harbours Board raised three preliminary objections to the jurisdiction of this arbitration committee: he alleged that the grievance procedure was not properly initiated because the grievance was not "dated" as required by the collective agreement; he argued that termination for medical reasons is not a "discharge" and is therefore beyond the purview of the collective agreement and the jurisdiction of the arbitration committee; and he established that subsequent to the termination of his employment the grievor was dismissed as a police constable and peace officer in accordance with the procedure established by s. 5 of the *National Harbours Board Act,* R.S.C. 1970, c. N-8, the consequence of which, he alleged, is that the arbitration committee is without jurisdiction to reinstate the grievor in his employment. In the course of the hearing, the arbitration committee ruled on these preliminary objections, rejecting the first two unanimously and the third with Mr. Merrigan dissenting. In relation to these preliminary objections the provisions of art. 24.07 must be noted:

> The Arbitration Committee may, if the question is put to it, decide on its jurisdiction to hear the grievance submitted. The Arbitration Committee shall decide on the merits of the grievance, the remedy to give to it if need be and all questions of interpretation of this Agreement; the decision rendered shall be binding upon the Board, the Alliance and the employee. The Arbitration Committee shall not be authorized to alter, modify or amend these presents or any part or provisions thereof.

In relation to each of the preliminary objections the question of the "jurisdiction to hear the grievance submitted" was clearly "put to" this committee and we concluded on those questions that as a matter of law we had jurisdiction to deal with this matter. We advised the parties that reasons for these rulings would be included in this award and they are set out here before we turn to the merits of the grievance.

Preliminary objection No. 1

Article 24.03 of the collective agreement provides:

> Any grievance in order to be valid must be submitted in writing stating the facts which gave rise to the grievance and the remedy sought, such written notice being dated thirty working days following the occurrence which gave rise to the grievance.

The grievance submitted by Constable Hetherington states, in part,

> On June 5, 1974, I was informed by Supt. A. Taylor, N.H.B. Police

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> and Security, Halifax, that on instructions received from L. H. Beveridge, I was to be immediately relieved of my duties as a Constable and released from the service of the N.H.B. Police and Security for medical reasons.

The grievance was filed on a National Harbours Board form provided for the purpose. Nowhere on the form is there any reference to a date except in the lower right hand corner where there is space under the words "Date received at Level I" (and the French translation thereof). In that space the words "June 6th, 1974" have been written by hand. The evidence is that this was done by Superintendent Taylor when he received the grievance form from Constable Hetherington. Counsel for the National Harbours Board argued, on these facts, that the grievance was not properly before this committee because the "written notice" submitted "was not dated".

It would perhaps suffice to dispose of this objection to say that art. 24.03 of the agreement does not specify by whom the grievance is to be dated. It might also be that what is meant by the relevant phrase in art. 24.03 is that the grievance must be submitted within 30 days, but we do not find it necessary to rule on that point. In our view this objection is not well taken because the National Harbours Board effectively waived any right it might have had to object at the outset of the grievance procedure to this alleged defect on the face of the grievance form. The grievor's failure to place a date on the grievance form resulted directly from the fact that the National Harbours Board did not see fit to provide space for such date on its form and the fact that Superintendent Taylor did not see fit to object to the lack of a date on the form when it was handed to him by the grievor. Furthermore, throughout the grievance procedure which preceded the hearing of this mater there was no objection to the fact that the grievance form was not "dated".

At the risk of lavishing on this preliminary objection more serious attention than it deserves we may apply the words of arbitrator Weatherill in *Re. U.A.W. and Daal Specialties Ltd.* (1967), 18 L.A.C. 141 at pp. 146-7:

> It is my conclusion that the company has, by its conduct, waived the requirements [that the grievance be "dated"] set out in the grievance procedure. . . .
>
> In concluding that timely objection to defects in the procedure (if such there be) has not been taken, I do not intend to suggest that a fundamental issue of jurisdiction may not be raised for the first time at a hearing. Such an objection may be distinguished from an objection to formal or procedural irregularities, such as we are here concerned with.

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Preliminary objection No. 2

It was objected that this arbitration committee does not have jurisdiction because the grievor's submission that the evidence does not support his termination for medical reasons is not, in fact, a "grievance" within the purview of the collective agreement. The relevant part of art. 24.01 provides:

> For the purpose of this Agreement, the word "grievance" means any complaint by an employee concerning his working conditions, the right of payment of his salary or the application of this Agreement in respect of himself . . .

The reply on behalf of the grievor is that this matter does, in fact, concern the "application . . . in respect of himself" of art. 24.01, which provides, in part:

> Except as specifically provided herein, nothing in this Agreement shall limit the Board in the exercise of its function of management, under which it shall have among other things, the right to . . . discharge *for just cause* . . .

(Emphasis added.)

On behalf of the National Harbours Board, Mr. Gagnon cited *Bell Canada v. Office and Professional Employees' Int'l Union, Local 131* (1973), 37 D.L.R. (3d) 561, [1974] S.C.R. 335 in which the Supreme Court of Canada held an arbitrator under a collective agreement to have exceeded his jurisdiction in deciding that compulsory retirement on pension is a form of dismissal and therefore subject to the "just cause" provision of the collective agreement. Judson, J., for the majority, stated at pp. 565-6:

> Until the words "retire on pension" appear in art. 8 of the collective agreement, there can be no basis for the arbitrator's decision. Dismissal, suspension and retirement on pension are three different and distinct concepts.

The National Harbours Board's submission is that it may equally well be said that termination for medical reasons is different and distinct from "discharge" and, since there is no specific reference in the collective agreement to termination for medical reasons that is not a matter with which this arbitration committee can deal.

The Harbours Board's submission on this point cannot be accepted. In this and virtually every collective agreement the union has bargained for and gained a significant measure of job security for the employees, based on a combination of seniority rights and protection from discharge for other than just cause. The security which it is apparent on the face of the agreement was intended by the parties must not be eroded. In its normal everyday meaning the word "discharge" compre-

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hends all forms of unvoluntary termination. There is nothing in this collective agreement to indicate that the parties intended it to be given any narrower meaning. It was submitted by Mr. Gagnon that the term "discharge" in art. 2.01 should be interpreted as meaning "disciplinary discharge", but the parties have not chosen in the collective agreement to confine the term to that aspect of its normal meaning and there is nothing elsewhere in the agreement to indicate any such intent. In our view there is simply no basis in this collective agreement for the suggestion that the employer can avoid the responsibility of demonstrating just cause in any situation where he discharges an employee.

Arbitrators under collective agreements such as the one before us have frequently dealt with the issue of whether medical evidence demonstrates "just cause" for discharge. In *Re U.A.W., Local 399, and Anaconda American Brass Ltd.* (1966), 17 L.A.C. 289 at pp. 295-6, arbitrator Arthurs said, in the course of his reasons for reinstating the grievor:

> ...the grievor is claiming that the agreement gives him rights which he is now seeking to enforce, regardless of the company's "policy" or its motives. The right in question, the right not to be discharged except for just cause, is a legal right, whose dimensions are fixed by the language of the agreement and by the practice of the company. As I have indicated, those dimensions are broad enough to protect the grievor, and to enable me to say that he was not discharged for cause.
>
> . . . . .
>
> ...I would hold that in the case of *bona fide* doubt by the company's doctor that the grievor is able to do available work, the doctor's opinion shall prevail unless the union can discharge the onus of showing either that it is in error, or that it is not a *bona fide* opinion.

See also the report of *Re Int'l Brotherhood of Electrical Workers, Local 1966, and Collins Radio Co. of Canada Ltd.* (1969), 20 L.A.C. 77 (Weatherill), where it is noted that the board of arbitration held that "an employer, when deciding an employee is not physically fit to work, must be prepared to support that determination with the appropriate evidence". See also the report of *Re Int'l Chemical Workers, Local 536, and Dupont of Canada Ltd., Maitland Works* (1970), 21 L.A.C. 147 (Curtis), where it is noted that "onus was on the Company to show that the risk to the grievor's health and the risk to the efficient operation of the plant was sufficiently high to justify the discharge". See also *Re Consumers' Gas Co. and Int'l Chemical Workers, Local 161* (1973), 2 L.A.C. (2d) 366 (Brown); *Re Shell Canada Ltd. and Oil, Chemical and Atomic Workers, Local 9-600* (1973), 3 L.A.C. (2d) 229

(Bellan) and *Re University Hospital of London and London & District Building Service Workers' Union, Local 220* (1973), 4 L.A.C. (2d) 16 (Simmons), in each of which the board of arbitration considered the merits of the medical cause for discharge. The *University Hospital* involved alleged psychiatric cause for discharge, as does this case. This catalogue of arbitral decisions is not the product of exhaustive research but as far as it goes it demonstrates unanimity among arbitrators in concluding that a medical discharge must, in the absence of some special provision, be justified under the normal requirement of "just cause" for dismissal. In the view of the arbitrators generally, then, such matters are within the jurisdiction of arbitrators and boards of arbitration established under collective agreements.

Considering the importance of the employees rights at stake and the established attitude of arbitrators in this country, in the opinion of this committee, it would be wrong for us to extend the decision of the Supreme Court of Canada in *Bell Canada* by analogy and on that basis refuse to deal with the discharge which is before us. Were the *Bell Canada* case on point we would, of course, have no choice; but we are not here dealing with an early retirement. We are dealing with a termination of employment for alleged inability, for medical reasons, to perform the work legitimately assigned to the grievor.

Preliminary objection No. 3

Mr. Gagnon's third objection to the jurisdiction of this committee is based on the fact that the grievor is not only an employee of the National Harbours Board, he is a police constable and peace officer and therefore subject to special statutory provisions governing his power to function in that capacity.

Section 5 of the *National Harbours Board Act* provides:

> 5(1) Any superior court judge within whose jurisdiction property under the administration of the Board is situated may, upon application by the Board, appoint any person as a police constable for the enforcement of this Act and the by-laws and for the enforcement of the laws of Canada or any province in so far as the enforcement of such laws relates to the protection of property and to the administration of the Board or the protection of persons present upon, or property situated upon, premises under the administration of the Board, and for that purpose every such police constable is deemed to be a peace officer within the meaning of the *Criminal Code* and to possess jurisdiction as such upon property under the administration of the Board and in any place not more than twenty-

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five miles distant from property under the administration of the Board.

(3) Any superior court judge referred to in subsection (1) or the Board may dismiss any police constable appointed under that subsection, whereupon all powers, duties and privileges belonging to or vested in such constable by virtue of this section are terminated.

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We have in evidence the affidavit of F. B. Ellam, secretary of the National Harbours Board, to which is annexed a minute by which the National Harbours Board, pursuant to the powers vested in it by s. 5, resolves that the grievor, Constable Hetherington, be dismissed as a constable and a peace officer. The minute is dated July 10, 1974, five days after the date of the discharge which is the subject of the grievance before us.

Mr. Gagnon, on behalf of the National Harbours Board, submitted that this committee has no jurisdiction to interfere with the grievor's appointment or dismissal as a peace officer. In that submission we agree with him. Our jurisdiction does not extend beyond the realm of the collective agreement and we have no power to issue any direction to a Superior Court Judge to make an appointment under s. 5 of the *National Harbours Board Act*. However, that in itself does not preclude this committee from ordering the grievor reinstated in his employment. He can enjoy the rights of employment even though the "powers, duties and privileges belonging to or vested in [him] by virtue of [s. 5] are terminated". It is up to the employer to reinvest him with such powers as it wishes him to have. We have reached this conclusion after considering Mr. Gagnon's submissions to the contrary, in which he relied, in part, on art. 1.01 of the collective agreement, which provides:

The following conditions of work, insofar as the Board has the right to agree thereto, shall apply to employees working in the Police and Security branch at Halifax Harbour, in the classification set forth in Article 25 hereof.

The collective agreement, Mr. Gagnon submitted, cannot override, s. 5 of the *National Harbours Board Act*, quoted above, and therefore the matter of the employment of the grievor is something that the National Harbours Board did not have the right to agree to. Furthermore, he submitted the effect is that disputes in this area are not to be settled by arbitration but by the procedures provided for in s. 5 of the *National Harbours Board Act*. Section 5, he suggested, is the kind of thing contemplated by s. 155(1) [rep. & sub. 1972, c. 18, s. 1] of the *Canada Labour Code*, R.S.C. 1970, c. L-1 (as amended) where it provides that every collective agreement must provide for

settlement of disputes arising under it "by arbitration *or otherwise*".

The short answer is that under the collective agreement before us the chosen method of settling differences is by arbitration and not otherwise. We do not agree that s. 5 of the *National Harbours Board Act* limits power of the Board to agree that none of its employees shall be discharged except for just cause. Section 5 provides a procedure by which certain employees of the National Harbours Board may be vested with special powers in dealing with the public and a procedure by which they may be divested of those powers. The question of what powers the Board's employees are to have is quite different from the question before this committee, over which we have jurisdiction: whether an employee of the Board was discharged for just cause. We are unable to read into the collective agreement, in art. 1.02 where the National Harbours Board recognizes the Public Service Alliance of Canada as the sole bargaining agent for the Halifax Police and Security branch or in any other part of the agreement, the implication that an employee who has ceased to be a police constable and peace officer under s. 5 of the *National Harbours Board Act* must necessarily be excluded from employment in the unit covered by the agreement.

Following Mr.Gagnon's argument one step further we reach the point at which Mr. Merrigan dissents. The submission is that since this committee of arbitration is powerless to alter the situation created under s. 5 of the *National Harbours Board Act*, the grievor will lack the legal capacity to do his normal job and there is, therefore, just cause for discharge. In other words, it is submitted that by its own act the National Harbours Board has put the grievor in a position where there is just cause for his dismissal.

We are unable to agree. In the first place, the grievor's lack of capacity to act as a peace officer was not the cause assigned for the dismissal with which we are concerned; nor could it have been because he was not divested of those powers until July 10th, five days after his dismissal. Secondly, we do not accept that the National Harbours Board may by its own action create a cause for dismissal of an employee which will then automatically be assumed to be just under the collective agreement. When the board creates the cause for dismissal, the justness of the cause must depend on the justness of the board's action in creating that cause. In practical terms this arbitration committee has jurisdiction to determine whether there is just cause for dismissal of the grievor and to order his

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reinstatement if it is called for by the evidence. If the National Harbours Board does not wish to enable him to act as a police constable and peace officer that is up to them. All we can say is that if the grievor is willing and able to do whatever aspects of his job he is reasonably requested to perform by his employer there is no apparent just cause for discharge.

The merits: the procedural issue

After all the evidence in this matter had been heard Mr. Done submitted that the grievance should be allowed and the grievor reinstated on the basis that he had not been adequately advised of the grounds of his discharge on June 5, 1974, when he was terminated or at any time during the grievance procedure until the matter reached this committee. In support of this submission Mr. Done relied on the decision in the *Vogel* case, an adjudication under the *Public Service Staff Relations Act*, R.S.C. 1970, c. P-5, before Kenneth E. Norman, adjudicator. Mr. Done submitted that the grievance should be allowed because the grievor had been denied natural justice in that he was not advised of the case that he had to meet.

We do not accept Mr. Done's submission on this point. The *Vogel* decision involved the issue of whether an employer who has dismissed an employee for one reason may, for the first time before the arbitrator or adjudicator, substantiate the dismissal by evidence of other grounds for dismissal. The conclusion there was that under the *Public Service Staff Relations Act* scheme of collective bargaining, as in private sector labour arbitrations, such new grounds may not be relied upon to justify dismissal although at common law they may be. In our view there is a different issue here. The National Harbours Board made it clear from the outset that the grievor was being discharged for medical inability to perform his work. There has been no suggestion whatever before us that there is any other justification for his discharge.

The real substance of Mr. Done's complaint on behalf of the grievor is that there was a failure to specifiy with any particularity the medical grounds upon which the National Harbours Board was relying. We agree that the grievor would have been unfairly prejudiced if he had not been given adequate opportunity to challenge the evidence in support of the Harbours Board's decision but, in our opinion, he has been afforded very adequate opportunity to meet that evidence. The grievance procedure is not a judicial or *quasi*-judicial proceeding. The grievor's rights are not finally determined until the matter is disposed of by this arbitration committee and it is at

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this stage that the rules of natural justice come into play. The question is whether the grievor was given adequate opportunity before this committee to meet the case against him, not whether he was given adequate opportunity to meet the case against him in the grievance procedure.

If Mr. Done felt that there was a lack of particulars he should have objected in the course of the hearing and requested an adjournment. In fact the hearing in this matter took three days with a break of several weeks between the first and second days upon which medical evidence was heard. There is no basis for the submission that the grievor was not afforded an ample opportunity to meet the case against him. Indeed, Mr. Done has never suggested that the proceedings before this committee were not fairly conducted. His objection relates only to the grievance procedure and, as we have indicated, that objection does not appear to us to be well taken.

Finally on this point, even if there had been a lack of natural justice in the proceedings before this committee the result would not be that the grievance would be allowed and the grievor reinstated. Rather, the arbitration proceedings would be invalidated and a new hearing would have to be held because the grievor stands discharged until he is ordered reinstated by an arbitration committee acting within its jurisdiction, in terms of both substance and procedure, under the collective agreement.

The substantive issue

The real issue before us is whether there was just cause for the discharge of the grievor. In the judgment of the National Harbours Board, it is necessary for its police constables to be armed and that judgment was not seriously questioned before us. The grievor was judged by doctors in the employ of the Department of National Health and Welfare, acting in effect as the National Harbours Board's "company doctors", to be medically unfit to carry a gun. The matter has been dealt with throughout on the footing that unsuitability, on medical grounds, to carry a gun would render the grievor unsuitable for the job in question.

There was no suggestion at any time that superintendent Taylor of the National Harbours Board Police Security unit in Halifax or any doctor upon whose judgment the decision to discharge was based acted other than *bona fide*. The question is simply whether the medical opinion that the grievor was unfit to carry a gun was in error. An arbitration committee composed of laymen must obviously find it very difficult to

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decide such a question. Considerable deference must be accorded to medical opinion whether expressed by witnesses at the hearing or appearing in the medical records. However, it is for this committee to decide whether there was just cause for discharge and to do other than hear and assess the evidence to the best of our ability would be an improper denial of our jurisdiction under the collective agreement. It was open to the parties of a collective agreement to agree explicitly that continued employment of people in this bargaining unit was to be subject to their attaining the specified health standard established by the Department of National Health and Welfare. The Department of National Health and Welfare or doctors employed by that department or doctors employed by the National Harbours Board could have been specifically designated as the final arbiters on the question of whether any specified health standard had been attained by any employee, but the parties did not do that.

This committee heard considerable medical testimony and received a number of medical reports in evidence. We have concluded that the facts thus proved before us do not support the conclusion that the grievor was medically unfit to carry a gun. We hold, therefore, that there was no just cause for his discharge. It was agreed at the hearing that it would not be in the interests of the grievor, the National Harbours Board or the doctors involved for us to reproduce the medical evidence here. We do, however, wish to explain our conclusion to the extent that we can do so without going into harmful detail.

The grievor, Constable Hetherington, has been employed by the National Harbours Board Police and Security since 1958 and, according to the evidence, his work record is unblemished. His personal life, however, has been extremely difficult. As a result of a combination of his personality makeup and the pressures to which he has been subjected, Constable Hetherington was a patient in the Nova Scotia Hospital for a period of several weeks in 1970 and again in July of 1973. On both occasions he was treated for depression and alcoholism. There was also an indication on his National Health and Welfare file that he had been hospitalized in 1968, but we heard no elaboration on that.

The evidence is that since his hospitalization in 1973, the grievor has consumed alcohol only very moderately and there has been a complete change for the better in his home situation. He has remarried and now lives in his own apartment with his wife and one of his three daughters by his previous marriage. His teenage daughter is now independent and his

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cerebral-palsied child is in training school in Truro. These details, about which there was no dispute whatever, are crucial because all the medical evidence relating to the grievor's mental health problems stressed the domestic difficulties with which he had to cope but no account appears to have been taken of the fact that his domestic difficulties had become significantly less throughout 1974, both when the medical judgment in question was made and when he was discharged. His home problems appear to have now been solved to the point where his life seems quite normal. It is obvious from the course of the medical assessments, to which we now turn, that the assessment of his capacity to carry a gun was made without any knowledge whatever of the change in his domestic circumstances.

The doctor who made the assessment that the grievor was medically unfit to carry a gun never saw the grievor until he testified before this committee. We are not suggesting that there is anything improper about making such an assessment from a review of the medical file, but this fact makes it especially important for us to review with some care the documentary material and other information on the basis of which the assessment was made.

Constable Hetherington was discharged on June 5th, by Superintendent Taylor because Superintendent Taylor, on that date, received a telex from Superintendent L. H. Beveridge, officer in charge of administration, National Harbours Board Police and Security in Ottawa, which stated:

> On the strength of report received from Department of National Health and Welfare, Ottawa, Constable W. J. Hetherington is to be relieved of his duties immediately and released from the service of Police and Security for medical reasons.

Superintendent Beveridge testified that he sent the telex directing dismissal because on June 5th he received a letter on the matter from Dr. Hicks, senior consultant, in the Public Health Service of the Department of National Health and Welfare. In his letter Dr. Hicks noted the opinion expressed by the responsible medical official in the Atlantic region of the medical services branch. That opinion, according to Dr. Hicks, was based on a careful review of the medical records and stated clearly that Constable Hetherington should not be armed. Superintendent Beveridge testified that the letter from Dr. Hicks followed upon earlier correspondence. Specifically, in a letter to Dr. Hicks dated April 2nd, which Superintendent Beveridge prepared for the signature of Mr. D. M. Cassidy, director general, Police and Security, National Har-

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bours Board, "A review of the file and a thorough re-examination of Constable Hetherington" was requested.

These letters are significant in two respects. First, they leave no doubt that the grievor's discharge was a direct result of the opinion expressed by the medical officer who reviewed the grievor's file and expressed the opinion that he should not be armed. Secondly, they lend special significance to the conclusions drawn by Dr. Poulos, the psychiatrist who saw the grievor on April 17th, since Dr. Poulos' consultation was the only "re-examination" of the grievor in compliance with the specific request sent by the National Harbours Board, Police and Security, to the Department of National Health and Welfare. Superintendent Beveridge testified that when he sent the direction to discharge the grievor on June 5th he was satisfied that there had been a re-examination because he knew of the consultation with Dr. Poulos.

The medical officer who made the ruling that the grievor should not be armed, testified fully and fairly before this committee and we have examined all of the materials which, by his own account, he considered in reaching his conclusion. As has already been indicated, in spite of the deference to be granted to medical judgment in such a matter, this arbitration committee has felt impelled to conclude that for the purposes of the collective agreement the medical officer's assessment of the grievor, as of the Spring of 1974, was not justified by the facts.

According to his file, the grievor had passed his routine medical examination conducted by the medical services branch of the Department of National Health and Welfare for the National Harbours Board in December of 1972. In connection with that examination, however, there was a notation of a nervous breakdown suffered by the grievor in 1968 as a result of which he was hospitalized for several months. The file also disclosed that in 1970 the grievor had been in a mental hospital for several weeks as a result of depression and alcoholism. Again, in the Summer of 1973, the file indicated that he had been committed to the Nova Scotia Hospital for similar reasons. Reports in connection with the 1973 period of hospitalization stressed the grievor's domestic difficulties. There was nothing in the file in connection with these three periods of hospitalization that referred directly to the grievor's ability to continue to perform his job upon release or directly to the question of whether he should be armed.

The only item on the file which did, in fact, suggest that the grievor should not be armed was a 1971 report by a psychol-

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ogist in a private consulting service addressed to Superintendent Taylor of the National Harbours Board Police and Security. There was nothing on the file which in any way placed this report in context. Superintendent Taylor's very frank and fair evidence before us was most revealing in this connection. Prior to his taking charge of Police and Security for the National Harbours Board in Halifax in 1968 the Board's constables were not armed. The increase of crime and the high incidence of terrorist activities resulted in a change of policy across Canada so that in 1970, Superintendent Taylor began to make preparations for the arming of his force. In the latter part of 1970, he engaged a psychologist to test his constables to determine their suitability to carry arms. According to the evidence of the psychologist the test used was a new one developed for Superintendent Taylor's purposes and not since adopted elsewhere. The result of the test was that 12 of the 29 constables tested proved to be unsuitable to carry arms and two were marginal. Constable Hetherington was one of those who failed. Superintendent Taylor stated, quite simply, that he could not live with those results and in order to double-check sent those who had failed the psychologist's test to a psychiatrist for assessment. In May of 1973, the psychiatrist pronounced all but one fit to be armed, in his judgment. The grievor, Constable Hetherington, was among those declared fit. He and all the others who were given a favourable assessment by the psychiatrist were subsequently armed once they had satisfied superintendent Taylor's training requirements.

The psychiatric assessment of April 12, 1973 was included on the medical file which was reviewed by the doctor who made the assessment that the grievor should not be armed. In the final paragraph of the psychiatrist's letter he states, "Constable Hetherington is quite willing to carry a firearm and I see no reason why he should not do so if it is to become police policy." This and the adverse report of the psychologist are the only specific references to capacity to carry firearms on the grievor's file.

On December 11, 1973, when Constable Hetherington went for his routine checkup, the relevant items on his medical file were: a record of his positive medical checkup of 1972, with a notation of psychiatric treatment in 1968 and 1970, the results of the psychologist's test and the psychiatrist's report. The doctor who examined the grievor on December 11th testified that the grievor was up to the required standard physically, but he deferred completion of the "General Physical Examination Report" because the grievor had brought to his attention

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the fact that he had been hospitalized that summer although the file did not contain any record of it.

Subsequently, the examining doctor received the "Physician's Certificate of Disability" and the discharge report pertaining to the grievor's hospitalization in the Summer of 1973. He also received a letter from the grievor's family physician in which mention was made of the fact that the grievor had been hospitalized for 10 days in the Halifax Infirmary early in February of 1974. The examining doctor then secured the infirmary file on the grievor. That file revealed that on the second of February the grievor was admitted complaining of chest pains. In the 10 days that followed he underwent extensive physical examinations which revealed no physical cause for the pains. The resident doctor at the infirmary who had overall charge of the grievor during his stay there testified that the grievor was generally not a co-operative patient and implied that he might have been malingering. The most directly relevant aspect of the infirmary file is the following statement in the resident's report to the grievor's family physician, "It was felt that he needed psychiatric help. When this was explained to the patient he became very angry and refused such." In his testimony, the resident made it clear that the suggestion of psychiatric help was made as part of his attempt to make an exhaustive search of all possible explanations for the pains of which the grievor complained. The grievor testified that he had gone to the hospital for chest pains, with no intention of seeking psychiatric help, and was upset and offended by the suggestion that he needed such treatment for the pains. Whatever his reason for refusing, it is quite clear that the suggestion of psychiatric help or assessment was never made to him in a context which in any way related to his job or indicated that there would be any sanction for refusing it.

Early in March when the examining doctor at National Health and Welfare had considered the infirmary file and the reports from the Nova Scotia Hospital he indicated on the "General Physical Examination Report" that the grievor fell into the class, "unfit for work". He testified before this arbitration committee that in his opinion the report was an interim one as a result of which he expected the grievor to be pressed to consult a psychiatrist; if he did not, he would probably be discharged; if he did, his job would depend on the outcome of that consultation. The report then went to the reviewing medical officer whose report led ultimately to the grievor's discharge.

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The reviewing medical officer, after considering the file on March 6, 1974, noted on the "General Physical Examination Report" the words "unfit, needs psychiatric help which he refuses". The "General Physical Examination Report" then went to Superintendent Taylor at the National Harbours Board Police and Security who, on the basis of the statement that the grievor was unfit, relieved him from duty. The grievor contacted his union representative and as a result of the union's intervention it was made clear to all concerned that the grievor was, in fact, quite willing to undergo psychiatric assessment if his job was involved. The grievor's family physician wrote a letter to the National Health and Welfare doctors stating that in his opinion the grievor was quite fit to work, with no mention one way or the other of firearms. The family physician's letter was forwarded to Superintendent Taylor with a covering letter from the reviewing medical officer in National Health and Welfare dated March 19, 1974, in which he stated that the grievor's family physician had arranged an appointment with a psychiatrist for April 18th and that, pending the psychiatric consultation, the grievor "should not be armed". We think it is important to note that here for the first time the reviewing doctor in the Department of Health and Welfare committed himself to a position that there was danger in arming the grievor and he did so based solely upon the contents of the medical file.

The medical file in its final form was completed by the report of the psychiatrist who examined the grievor in accordance with the arrangement between the doctors of the National Health and Welfare Department and the grievor's family physician. After reviewing the grievor's history, and making a general assessment of him as an individual, and commenting on his domestic difficulties the psychiatrist's report concluded:

> The only treatment appears to be support from social agencies at the time of crisis. I could not confirm many of the concerns of his superior or fellow employees. If this man is not working to an acceptable level, I would suggest that the matter be dealt with on an employer-employee basis.

The reviewing medical officer testified that upon receiving this report he phoned the psychiatrist to try to get him to express an opinion about the propriety of the grievor being armed. The psychiatrist refused to express an opinion one way or the other. Thereafter the reviewing medical officer wrote a letter to Superintendent Taylor, dated May 15th, which is the documentary expression of his formal opinion on

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the matter — the opinion that led directly to the grievor's loss of his job. The reviewing medical officer stated that the psychiatrist,

> has not expressed and will not express an opinion on the specific question of Hetherington's fitness to carry firearms, but *on the basis of medical information* and *opinions available to us, including [the psychiatrist's report] I feel that this man should not be armed.*

(Emphasis added.)

As stated earlier, our conclusion is that this opinion was not well founded and that the grievor's discharge was therefore not for just cause. The examining doctor at National Health and Welfare had expressed the opinion of unfitness for duty as a means of pressuring the grievor to have a psychiatric examination although he at no time suggested to the grievor that he should have one. The reviewing medical officer first suggested that the grievor was unfit for duty because he had refused psychiatric help which the resident at the infirmary said he needed. The resident at the infirmary said he needed psychiatric help because no physical cause for chest pains could be found and in that context, but never in any job context had the grievor refused psychiatric help. Once it was apparent to the grievor that his refusal of a psychiatric assessment affected his job position, he readily submitted himself to such an assessment. In the meantime, the reviewing medical officer had suggested that he should not be armed although there was no direct support from that suggestion other than the psychologist's test, the results of which had not been followed in the case of the other 11 members of the National Harbours Board Police and Security who had failed it. The suggestion was also made in the face of the affirmative assessment by the first psychiatrist who saw him of the grievor's ability to carry firearms. At any rate, the direction was that he should not be armed "pending receipt of the psychiatrist's report". The psychiatrist's report cannot conceivably be interpreted as supporting the opinion that the grievor was not fit to carry firearms, and yet the reviewing medical officer treated it as confirming his opinion. The opinion, thus confirmed, made its way to Dr. Hicks and satisfied superintendent Beveridge and, apparently, director general Cassidy that the "thorough re-examination" called for had, in fact, been carried out.

The reviewing doctor may have felt that it was his responsibility to ensure that no person about whom he had any doubt on psychiatric grounds should be permitted to be armed. However, his opinion carries special weight only on medical mat-

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ters, not on the policy question of whom should be employed by the National Harbours Board Police and Security. As the psychiatrist's report suggests, what is involved here is really a matter of employer-employee relations. This committee is struck by the fact that in January of 1974, knowing everything that the doctors knew about the grievor's history, as well as knowing his work record intimately, knowing him personally and having some knowledge of the change in his domestic situation, Superintendent Taylor, an experienced policeman, decided to arm the grievor. It must be noted that in the Fall of 1973, Superintendent Taylor had been put under some pressure by a grievance from the union over the fact that not all of his constables were armed. However, he testified that his refusal to arm four constables at that time, including the grievor, was entirely a matter of training and shooting ability, which the grievor subsequently brought up to standard. Superintendent Taylor did not leave any room for the inference that he acted irresponsibly under pressure in arming the grievor. Indeed, he noted that he had discussed it fully with his second in command.

Conclusion and order

After a careful consideration of all the facts this arbitration committee has concluded that the grievor was not discharged for just cause, in that the medical evidence does not support the conclusion that he was not medically fit to be armed. In accordance with art. 24.10 he is therefore to be restored to his former position and compensated for time lost as provided for by the collective agreement. At the hearing it was agreed that the parties should attempt to work out the exact amount of money involved and that this arbitration committee would remain seized of the matter, with power to reconvene if further evidence or argument needs to be heard to settle any dispute arising out of the effectuation of this order.

The National Harbours Board's personal file on the grievor and any other Government file over which the National Harbours Board has any control must, of course, henceforth carry a clear indication of the findings of this committee. Beyond that we have no power to order that the files be purged as requested by the grievor.

DISSENT (Merrigan)

I have had the opportunity to peruse the award prepared by the chairman, Innis Christie. With due respect, I cannot agree with the conclusion and with some evidentiary findings. I will

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proceed first with my objections to the findings of the evidence.

The grievance was *not* filed on a National Harbours Board form provided for that purpose. Notwithstanding the fact that no evidence was presented regarding the origin of the form, it is common knowledge that the "grievance form" is one used in the public service by the union.

The doctors of the Department of National Health and Welfare were *not* acting as the National Harbours Board's "company doctors" but rather were acting under the "Periodic Health Examination Standard" programme of the Public Service of Canada, a programme to which the National Harbours Board has adhered. Furthermore, the National Harbours Board is bound by the procedures and standards applied under this medical programme. The National Harbours Board must defer to the conclusion on medical findings under the programme.

Superintendent Taylor, in January, 1974, was not aware of the extent of the knowledge that the doctors had about the grievor's medical history. It is my understanding, from the evidence, that the normal procedure of the Department of National Health and Welfare is to provide the National Harbours Board following the periodic health examination with a copy of the "General Physical Examination Report". Furthermore, this report is not the complete report, but that part of the report which is usually returned to the "initiating department", indicating that the periodic health examination has taken place and stating the findings of the doctors. Also, other dealings between the Department of National Health and Welfare and the National Harbours Board were by letters, and the pertinent letters were entered into evidence as ex. "C" — letter of May 15, 1974, from Dr. Sinclair advising that Mr. Hetherington should not be armed; ex. "G" — Dr. Sinclair's letter of March 19, 1974, stating that Mr. Hetherington had agreed to undertake psychiatric assessment. To my understanding, what medical history superintendent Taylor knew came in part to his attention on and after March 7, 1974 and at the hearing. I note also that the moment Superintendent Taylor was apprised of the findings of the doctors on March 7, 1974, he proceeded to immediately disarm Mr. Hetherington. I would like to add that I was impressed by police and security department handling of the matter at hand. All through this delicate matter, the police officials have insisted that all unfavourable medical findings be re-examined, by way of example, I would mention Superintendent Taylor having National

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Health and Welfare arrange psychiatric assessment for those who were given an unsuitable rating by the psychologist in 1971; also I would mention Superintendent Beveridge's request that the findings of March 7, 1974 regarding Constable Hetherington be reviewed and re-examined. Furthermore, I would like to indicate that all through this matter, the police and security deferred to the opinion of the medical profession, as they should under the "Periodic Health Examination Standard" programme of the Department of National Health and Welfare.

I would like at this point to address myself to the merit of the case. Except for any above remarks concerning certain evidentiary findings, I generally agree with the facts as set out by the chairman in his award. As agreed at the hearing, I will not reproduce any medical evidence here that can be harmful.

The case before the arbitration committee is by its very nature difficult for laymen to decide. Therefore, I believe that a guideline must be set out at the start. This guideline will help us to establish the parameters of the case.

The matter before us is a medical one. Such a matter, I believe, should not be isolated either to the grievor's private life (*i.e.* home life), or to the grievor's work history. The grievance before us, by way of example, is not a straightforward disciplinary incident where the facts can be readily ascertained and the sanction of management can be appreciated by reference to the employee's work file, company policy and reported arbitration awards. But here we are dealing with a medical matter, the parameters of which is difficult to define. I am of the opinion that the grievor must be considered as a total person, that is, we must consider the grievor's home situation and his work context as one. The nature of the case warrants this. The home situation and work environment influence each other. The difficulties of the home can affect a person's job performance as the frustrations of the job can influence the family life of that person. The opposite is also true. A happy and stable family situation helps the person on the job as job satisfaction reflects on the home situation.

I would differ on the conclusion for the following reason. The arbitration committee must consider the work context in which the grievor was called to function. We are dealing with a police situation. By definition, a police work environment is highly stressful and potentially violent. Such a work environment is geared to constant public contact and is not isolated as compared to an industrial-production work environment

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where employees are assigned definite tasks at a precise location. On the other hand, a policeman in the exercise of his duties must deal not only with his fellow policemen but is in constant contact with the public, in the case at hand with the users of the Port of Halifax. In *Re University Hospital of London and London & District Building Service Workers' Union, Local 220* (1973), 4 L.A.C. (2d) 16 (Simmons), at p. 30, such a reason was retained in a "hospital institution" context:

> We do not rest our decision on the above ground alone. The second major reason for arriving at our decision is due to the fact that we are dealing with a hospital institution. We realize that there is a tendency for emotions to become a part of one's deliberations when discussing such problems. However, we have consciously attempted to discard our emotions from forming a part of our decision. Nevertheless, while we are aware from the evidence that many of the patients in the hospital are ambulatory, a significant number are bedridden who would require assistance to evacuate the premises. We therefore restrict the range between average and greater than average risk because of the physical surroundings.

Coupled with the fact that the present matter deals with a police work environment in which a policeman, in the exercise of his function, exercises an original authority, I refer to the findings of the psychiatrist on April 18, 1974, whereby he states that "the only treatment appears to be support from social agencies at the time of crisis". I ask myself how can the grievor faced with a stressful and potentially violent situation during the course of his duties as a policeman where the decision has to be immediate, cope with his job if he "requires the support from social agencies at the time of crisis". The above is not an imagined situation. Granted that such stressful and potentially violent situations are not an every-day occurrence for one policeman. But such situations occur everyday in police work. Not to consider the police work environment in the present case, I am of the opinion that we would be delinquent in our duties to the parties.

Another reason which I consider must be considered by the arbitration committee is the recurring and repetitive nature of the medical findings. The grievor's file reveals that in 1968 he suffered a nervous breakdown and was hospitalized for several months. The file also indicates that in 1970 the grievor was admitted to a mental hospital for a period of several weeks as a result of depression and alcoholism. Also, the file disclosed that in the Summer of 1973, the grievor had been committed to the Nova Scotia Hospital. Here I refer to ex. "F". Noting the grievor's difficulties in his personal life, I cannot help but conclude that the grievor cannot cope with

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pressure and stressful situations. Should the nervous breakdown, depression or others have occurred on only one occasion, and having in mind the grievor's personal life, I would be inclined to conclude that the grievor could cope with pressures and difficulties but the recurring and repetitive pattern leave me no choice but to conclude otherwise. My findings as to the inability of the grievor to cope with social pressures and stressful situations is supported by the remarks of the psychiatrist's report of April 23, 1974, ex. "B", where the learned doctor recommended: "The only treatment appears to be support from social agencies at the time of crisis." The probability of the problem recurring and arising again, in the future, is very strong in light of the past history and the doctor's report. In light of this, I would reject the grievance and maintain the National Harbours Board's decision.

Finally, I would like to indicate that the National Harbours Board has a responsibility to an employee from illness attributable to the nature of the job. Such a responsibility was considered in *Re Int'l Chemical Workers, Local 536, and Dupont of Canada Ltd., Maitland Works* (1970), 21 L.A.C. 147 (Curtis) [at p. 147]:

> *Held*, the company has the responsibility to protect an employee from illness attributable to the nature of the work, and to operate the plant efficiently. The onus was on the company to show that the risk of the grievor's health and risk of the efficient operation of the plant was sufficiently high to justify the discharge. Since the evidence only indicated that the grievor was ulcer-prone, that onus was not discharged.

I submit that in the case at hand, the National Harbours Board accepted and discharged such a responsibility. The weight of the evidence indicates, in my opinion, that there existed a risk to the grievor's health. That evidence illustrates that the grievor cannot cope with pressures and difficulties encountered in his personal life. We know the nature of police work to be highly stressful and potentially violent. The National Harbours Board has shown that to retain the grievor in its employ as a policeman would be a "risk to the grievor's health". Also the employer has the responsibility to see that there be no "risk to the efficient operation of the plant". Here, I would mention the police work environment is not a plant context but a public harbour and that the grievor, during the course of his employment, deals with fellow policemen, other workers on the harbour and the general public. I would consider "the efficient operation", because of the nature of the police work, to be preventive in nature. The National Harbours Board cannot predict or foresee probable stressful situ-

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ations and potentially violent incidents and prevent the grievor from being there or replace him ahead of time. Therefore, the National Harbours Board in the findings of medical doctors are under the responsibility to assure themselves that potential situations or incidents involving the grievor do not take place. By proceeding in this fashion, the National Harbours Board is avoiding "risk to the efficient operation of the plant". In view of the evidence, I hold that the risks of maintaining the grievor in his position are sufficiently high to justify his discharge. The evidence has indicated that the grievor cannot cope with stressful situations. I would so hold, even if the question of firearms was not before us.

In conclusion, I disagree with the draft award on the grounds that National Harbours Board procedures require that its constables be armed and the available medical evidence suggests that Constable Hetherington on medical grounds, is not capable of carrying arms.

A summary of the medical reports and hospitalization periods follow:

(1) Nervous breakdown and hospitalization in 1968.

(2) Hospitalization in 1970 for several weeks in a mental institution for depression and alcoholism.

(3) Admitted to a mental hospital in June, 1973. Particular attention should be drawn to ex. "F", para. 2 and the ramifications for the grievor and those he is hired to protect.

(4) Psychiatric assessment of April 12, 1973 clears grievor to carry firearms but in 1974 he was admitted to the Halifax Infirmary where he was declared physically fit but referred for psychiatric assessment. This assessment failed to comment on grievor's ability to carry arms, and when pressed on the matter the psychiatrist, Dr. Poulos refused to comment. It is rather significant that he did not even see fit to declare the grievor as fit "as any other normal person" to carry a firearm. His refusal to comment on this matter is most understandable in view of the grievor's medical history which indicates a general instability and an inability to tolerate stress such as that encountered in police work.

In May, 1974, Dr. R. M. Sinclair, regional advisor, medical support services, Department of National Health and Welfare, recommended on the basis of medical information and opinions including that of a psychiatrist, Dr. Poulos, that the

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grievor should not be armed. Obviously, this medical opinion should not be proffered lightly.

For these reasons, I am unable to agree with the conclusions reached by the chairman. The grievance should fail and the dismissal should stand.

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