11-11-2001

Re Annapolis Valley Regional School Board and NSTU

Innis Christie

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE NOVA SCOTIA TEACHERS UNION

(The Union)

and

THE MINISTER OF EDUCATION AND CULTURE

(The Minister)

and

ANNAPOLIS VALLEY REGIONAL SCHOOL BOARD

(The School Board)

RE: Rhonda Sewell (The Grievor)
Denial of Leave for Injury on Duty

BEFORE: Innis Christie, Arbitrator

AT: Halifax, Nova Scotia

HEARING DATES: December 8, 2000 (telephone conference), January 3, 4, 5, 18 and 19 and April 5 and 16, 2001.

FOR THE UNION: Lorraine P. Lafferty, Counsel
Bill Berryman, Nova Scotia Teachers' Union,
Executive Staff Officer

FOR THE EMPLOYER: Patrick Saulnier, Counsel
John T. Shanks, Counsel
Wayne MacDonald, Director of Human Resources,
Annapolis Valley Regional School Board

DATE OF AWARD: November 11, 2001

Union grievance alleging breach of the Teachers' Professional Agreement between the Minister of Education for the Province of Nova Scotia and the Union made on

November 2, 1994 for the term June 5, 1994 - October 31, 1997, which the parties agreed is the relevant collective agreement here, in that the Employer failed to place the Grievor on "Leave for Injury on Duty" with full salary after she had become ill, allegedly in the performance of her duties as a result of workplace conditions. The Union requests an order that the Grievor be paid her full salary and benefits for the period from October 29, 1996 to January 4, 1998 during which she was off work due to the illness in issue and that all sick leave used by her in that context be restored.

At the outset of the hearing in this matter the parties agreed that I am properly seized of this matter, that all post-hearing time limits are waived and that I should remain seized after the issue of this award to deal with any matters arising from its application, including, if I were to allow the Grievance, the quantification of any benefits that would have flowed to the Grievor had she been granted injury on duty leave for the period in issue.

AWARD

The Grievor has been employed as a teacher by the School Board and its predecessors for 18 years, commencing in 1983-4. She suffers from asthma, or, as it was sometimes referred to, "reactive airway disease" or "bronchial hyper-reactivity", and claims that due to her asthma and its aggravation by the air quality in her work place she did not work from October 29, 1996 to January 4, 1998. The substantive issues before me are whether the asthma and/or its aggravation was "injur[y] in the performance of [her] teacher's duties", as that phrase is used in Article 26.01 of the Collective Agreement;

> 26.01 When injured in the performance of the teacher's duties, which duties shall have been approved by the School Board or its representative, the teacher, on application to the School Board, shall be placed on leave on full salary until the teacher is medically certified able to continue teaching.

and, if so, whether that injury in the performance of her duties prevented the Grievor from working from October 29, 1996 to January 4, 1998. Allegedly due to her asthma the Grievor also had not worked from February 29, 1996 to the end of the school year in June, 1996. There is no grievance for that period, during which she was on sick leave. She worked from the start of the school year in September 1996 to October 29, 1996. The Grievor and the Union on her behalf allege that the asthma that kept her off work for both periods was caused originally by her exposure on September 23, 1994 to ozone gas used to try to solve a problem with mould by the School Board in the school where she worked.

The Employer does not dispute that the Grievor was ill over the period that is the subject of the Grievance, but in the Employer's submission the Grievor's asthma was not caused by exposure to ozone at work. The Employer's position is that (i) the Grievor was not significantly exposed to ozone, (ii) alternatively, if she was, she was not adversely affected by ozone in a way that would give rise to any entitlement to injury on duty leave under Article 26.01, and (iii) the re-occurrence of the Grievor's asthma in October 1996 and thereafter did not disable her from working.

Counsel for the Employer also relied on several points of process under the grievance procedure in the Collective Agreement to justify the denial of injury on duty leave to the Grievor. For the period from February 29, 1996 to the end of that school year the Grievor drew on her accumulated sick leave benefits. In that period she applied for injury on duty leave, which was denied by the Employer. The Grievor corresponded with Dr. James Gunn, the School Board's Superintendent of

Schools, which, the Employer argues, fell under the "Teacher's Informal Discussions", part of the Grievance Procedure in Article 42.03(a) of the Collective Agreement. The Grievor did not then file a written grievance under the "Grievance" part of Article 42.03(a), and in the Grievance before me she has not grieved having had to use her sick leave benefits for that period. However, on November 5, 1996, after she again allegedly found herself unable to work because of her asthma the Grievor formally applied for injury on duty leave and, after it was denied on November 13, on March 7, 1997 the Union commenced the Grievance Procedure that led to this arbitration.

Counsel for the Employer takes the position that the Grievor commenced the Grievance process during her first period off work and did not withdraw her Grievance on a without prejudice basis. He also takes the position that the Grievance was not filed within the 30 day time limit set by Article 42.03. Counsel for the Union does not agree that the Grievance process was commenced prior to the filing of the Grievance before me, so in her submission there was no withdrawal that precluded the filing of this Grievance. Counsel for the Union also responds that by not raising the 30 day time limit until the hearing before me the Employer waived its right to rely on that time limit.

The parties also disagree on the correct interpretation of Article 26.02 of the Collective Agreement, with respect to the period of entitlement to injury on duty leave. It provides:

> 26.02 Such leave shall not exceed two (2) years from date of the injury. If the teacher is still unable to resume teaching duties which had been assigned the teacher shall be entitled to use the teacher's sick leave.

The Employer's position is that the two years referred to are calendar years, so that even if the Grievor were entitled to injury on duty leave it would have expired two years from September 23, 1994 when, allegedly, exposure to ozone caused her to first suffer from asthma. The Union's position is that the two years referred to are two years of teaching time.

Finally, the Employer takes the position that, whatever was the case up to the exhaustion of the Grievor's sick leave half way through April 14, 1997, all of the Grievor's absence after the middle of the day on April 14 was unpaid leave, to January 5, 1998 because of correspondence in which, according to the Employer, the Grievor requested and was granted a change to that status.

Before dealing with these process issues I will put them in context by setting out the relevant facts as I have found them. I do not purport to set out all of the evidence here and I will state some of the relevant facts only in considering the specific process and substantive issues to which they relate. I have not attempted to set out all of the evidence or even all of the facts proven before me in six days of hearings and many documents.

The Facts. There is nothing to contradict the Union's evidence that the Grievor is and has been a competent, hardworking teacher at Central Kings Rural High School since 1983. She is an articulate well-educated woman. At the time of the hearing she was married with four children aged 9, 8, 6 and 2 and had lived in the same 1863 house in Centreville for the last sixteen years. As well as, with her husband, being a parent, maintaining the house and grounds and owning two big dogs, she has continued her formal education. She graduated with a B.Sc. from Saint FX in 1978,

worked on an M.Sc. at Dalhousie from 1978 to 1981 and obtained a B.Ed. from Dalhousie in 1982. She obtained an M.Ed. from Acadia in 1989 and an M.Ed. in elementary science from Mount Saint Vincent in May, 2000.

Up to September 1994 the Grievor's absences from work because of illness were about the average for teachers at her school. Her record of "days taught and claimed", which is in evidence, shows that the most days she ever claimed in any school year before September 1994 was ten. There is no family history of asthma and before that the Grievor had never been diagnosed as having asthma, having never, to her knowledge, been specifically tested for asthma. She had had some episodes of bronchitis as a child and again in her early twenties, which tended to be seasonal, spring and fall. It is clear from the medical charts of Dr. Barbara Leitch, her family doctor, that the Grievor had had respiratory problems between 1987 and September 1994. The chart notes show nine office visits when "bronchitis" was noted and one when "sinusitis" was noted.

On Tuesday, September 20, 1994 the Grievor was examined by Dr. Leitch who noted "fever, cough, sore throat resolving, chest congested, bilateral rales." [a sound that might indicate infection, such as pneumonia]. She was off work for the second half of that day and again on Wednesday, September 21. She returned to work on the morning of Thursday, September 22.

In September 1994 there were concerns about air quality at Central King's Rural High, which the Grievor shared. When she returned to work on September 22 she learned of an ozone treatment used at the school the previous night and proposed for that night. In a memo dated that day, to all staff, students and parents/guardians headed, "Re: Air Quality", the Principal, A.K. Stewart, stated;

During the past week, I have been meeting regularly with Mr. David Floyd, Supervisor of Maintenance; Mr. Greg Ross, Assistant Superintendent of Personnel, and Dr. Jim Gunn, Superintendent of Schools for the Kings County District School Board regarding concerns about the air quality at our school. As I indicated to you in our September 16th Newsletter, air testing has begun and the results of those initial tests in the Music Complex are now in and show a spore count of 263 CFU per meters^3.This spore load was slightly above the outdoor count. As a means of comparison, Wolfville School and Coldbrook Elementary, which have been in the news lately, had spore counts in excess of 1, 000 CFU per meters^3 (one Wolfville classroom had 4,500 CFU per meter^3). Nevertheless, the Board is concerned and has begun to address our concerns.

Last evening, the Music Complex was flushed with ozone gas. Such a treatment is common practice in many institutions including hospitals, office buildings, schools, etc. as a means of eliminating molds and odours. In fact, the Board has purchased an ozone machine and it has already been used in a number of County schools which are experiencing air quality problems. I am assured by Board personnel that such a treatment is safe and poses no safety risk.

At a meeting this morning between the three above-mentioned individuals and myself, the following action plan was initiated for our school:

1. the lower floor of the Senior High will be treated with ozone gas this evening;
2. beginning tomorrow, all water stained and/or damaged ceiling tiles will be replaced;
3. ozone treatment will continue in other carpeted areas of the school beginning next Monday evening;
4. an engineering firm will be employed to test the air in our school following the ozone treatments.

The long-term solution appears to be the removal of all carpets and replacing these with tile flooring. In fact, such action has already begun in some schools and I anticipate will follow in others (including our own) in the near future. However, with over 7 acres of carpeting in the system, such a plan cannot happen overnight thus the need for the ozone treatment and follow-up testing.

Upon reading this, the Grievor testified, she became involved in discussion among the teachers in the staff room about students and teachers not feeling well because of the smell of ozone from the music room. She went to the Principal and expressed concerns for the students and for herself, particularly because she had just been ill with respiratory problems. The Grievor testified in cross-examination that she would not have gone to school the next day, Friday, September 23rd, because she

was not feeling well, had it not been for this discussion and an important appointment.

When the Grievor did arrive at school the following morning, between 7:00 and 7:30 a.m., she entered "the lower floor of the senior high", which appears in the diagram in evidence as the north east wing of the school. She testified that as she went up to her classroom on the upper floor, at the north east corner, she detected an odour and heard a fan or other motor running. She presumed the ozone machine was still being used. She discussed this briefly with another teacher, Deborah Harvey, who had seen "the machine" and then went to her classroom, and began immediately to open the windows.

Then, the Grievor testified, she began to cough and felt a stinging in her eyes. She went back down to the lower hall looking for Ms. Harvey. She said she was gagging, coughing hard, her eyes were watering and she felt her chest "tightening" in a way she had not previously experienced from bronchitis. She said she felt unwell and "very nervous". She and Ms. Harvey got the students out of the halls. Some coughed and she testified that she and Ms. Harvey were passing out Kleenexes. She then went to the administrative area and discussed the matter with Greg Ross, Assistant Superintendent of Personnel for the then School Board, who told her the ozone machine was not running and that testing had been done earlier that morning to be sure the senior hall was safe. She disputed both of these statements.

Deborah Harvey is no longer teaching because, she said, she suffers from a bronchial condition and chemical sensitivity which causes her to react, she testified, "to almost everything". She testified that she thought the ozone machine was still running when she went to her classroom on the morning of September 23, 1994.

She was starting a headache but answered student questions in her classroom. The students were, of course, aware of concerns in the school about air quality and some said they were nauseous or had headaches. They went to the administrative office to seek answers to their questions about what was going on.

Ms. Harvey testified that, although she did not particularly look, she did not notice any open windows that morning in rooms off the senior hall, and both she and the Grievor testified that the windows in their own rooms were not open.

The Grievor testified she tried to teach in the first period, although she was losing her voice. Shortly after 9:00 there was an announcement that the school was closing for the day. The school buses had all left by 11:30 and then the teachers, including the Grievor and Ms. Harvey, left. Ms. Harvey testified that she did not visit her doctor and did not miss any time from work as a result of whatever happened on the morning of September 23, 1994. The Grievor did not fare so well, but before addressing the evidence of her subsequent illness I will turn to the evidence introduced by the Employer with respect to the use of ozone that morning.

David Floyd, Coordinator of Property Services for the School Board, and Supervisor of Maintenance for the predecessor Board in place in September 1994, testified with respect to, among other things, what happened on the morning or September 23, 1994. Mr. Floyd is a professional engineer. I found him to be a very credible witness, not given to exaggeration, as I think the Grievor is at least with respect to the facts relating to the causes of her ill health. The documents in evidence written by the Grievor to the Board and to her fellow teachers contain ample demonstration of this tendency. Where their evidence is in conflict I have

preferred Mr. Floyd's, although for the most part there is no direct conflict based on any first hand knowledge held by the Grievor.

Mr. Floyd testified that Dr. Gunn, Mr. Ross and he had decided to use ozone to kill mould in the then School Board's schools, on the basis of research and discussion with a number of "experts". He acknowledged that in sufficient concentration ozone gas can be toxic, irritating the respiratory tract, the eyes and mucous membranes. If it is present below the threshold limit value of .1ppm it is not toxic. In discussion with the principal hygienist in the Occupational Health and Safety Division of the Nova Scotia Department of Labour, Shelley Gray, Mr. Floyd drew up the following protocol;

PROCEDURE FOR OZONE TREATMENT

1) Set up ozone generator in area to be treated.

2) Set up fan system in area to be treated.

3) Set timer on the ozone generator to start fifteen minutes from present time and to stop after desired treatment time.

4) Start mechanical system after treatment, if present in areas that are being treated. These units are to be started remotely. They are not to be started manually by entering the tested area.

5) After treatment, and two hours after the time has shut off the ozone generator, open the door and take a test to measure the concentration of ozone present.

6) If levels are below 0.1 ppm, enter the room and open windows to flush the area.

7) Remove equipment to safe area.

While he could not recall each of his actions on that specific morning, Mr. Floyd testified that this procedure was followed on the evening of September 22 and the morning of September 23, 1994 in the senior hall at the Central King's High School. He was not specific about what windows he opened. As mentioned above, the

Grievor and Ms. Harvey recalled clearly that the windows in their own classrooms were not open and Ms. Harvey testified that she had not noticed any others open. I do not doubt their testimony about their own classrooms, but I do not find that the fact that Ms. Harvey did not notice other windows open casts doubt on Mr. Floyd's credibility. She was not at all sure on this point under cross-examination.

Mr. Floyd further testified to the testing procedure he followed, demonstrating the sort of tube used in the testing machine or pump. The tube he used was engineered to measure down to .05 ppm. He got no reading. While I recognize that testing equipment can possibly be fallible, and that Mr. Floyd did not retain the pump he used for the test, on the balance of probabilities I am far from satisfied by the Union's evidence that the test performed by Mr. Floyd did not in fact show, as he testified, that there was no unsafe level of ozone in the air of the lower senior hall, the hall above or the adjoining classrooms. This was the fifth occasion that September on which he had used the equipment, the first being in his own office.

Mr. Floyd explained that the ozone machine had to be moved "to a safe area", as called for by his "Procedure" so that no one would turn it on. A large fan, which Mr. Floyd referred to as a negative air unit, was turned on early that morning and could safely be left running in the senior hall because it had no unprotected moving parts.

I find as a fact that on the morning of September 23rd, 1994 the ozone machine shut off some time, probably two hours, before Mr. Floyd arrived at the school at 6:00 a m. What the Grievor and Ms. Harvey heard, and what Ms. Harvey saw, was undoubtedly the negative air unit, which had been running since the ozone machine shut off. Mr. Floyd had tested the air by 6:30 and determined it to be safe. He

personally suffered no physical symptoms from the 20 minutes to _ hour he spent in the senior hall that morning.

On September 23, 1994, when the Grievor entered the lower senior hall there may well have been some remnant of the odour of ozone, familiar to anyone who has ever witnessed an electrical short circuit, but I find that the level of ozone was below the threshold limit value of .1 ppm approved by the Department of Labour's hygienist.
The facts that Central King's Rural High was closed for the remainder of the day on September 23rd, 1994 and the ozone machine was not used again do not prove to the contrary.

In cross-examination Mr. Floyd made the same point as does the last paragraph of Principal Stewart's memo of September 22, 1994. The long term plan was the removal of carpets. The ozone treatment was an attempt to "buy time". In a report to Mr. Floyd dated October 13, 1994 Kim Strong Manager of the Environmental Division of Maritime Testing Ltd,. the company used by School Board to test for mould, stated that he did not believe the ozone treatment had been effective. This, rather than any conclusion that it had harmed the Grievor's or anyone else's health, may explain the cessation of the use of ozone to combat mould in the school.

Around 9:30 on September 24, 1994 it was announced that the school would be closed for the day. There is no evidence as to why that decision was made, or specifically why it was made with respect to the whole school. Clearly, there could have been no rational concern about ozone poisoning that would have justified closing the whole school. Indeed, Mr. Floyd testified that he was not even called about the results of his testing. I can only conclude that the Principal or Mr. Ross or

some other member of management made the decision on the basis of the concerns expressed by the Grievor, Ms. Harvey, students in their classes and possibly other teachers and students. To try to calm those concerns may well have been a wise decision for an employer and educator to make, but that does not prove that there was ozone gas in the Grievor's work area at a level that was above the safe level. I note that there is no evidence of anyone else suffering adverse health effects that morning, other that some minor temporary irritation to their respiratory tracts and eyes.

I repeat that I find that the level of ozone gas in the lower senior hall, the hall above it and the classrooms opening off them on the morning of September 23, 1994 was not above .1 ppm., the threshold limit value approved by the Nova Scotia Department of Labour's hygienist as safe.

I return to the health problems experienced by the Grievor following the closing of the Central Kings Rural High for the remainder of the day on September 23, 1994. The Grievor testified that she worked through several meetings in the remainder of the day during which her breathing continued to be uncomfortable, to the point where several people asked her if she was feeling alright. She picked up her children and took them home, although she had trouble driving, to the point where she got lost temporarily. The Grievor testified that she was quite sick over the weekend, and could only remember being in bed, coughing a lot and having slept a lot.

On Monday September 26 the Grievor returned to the office of Dr. Leitch, her family doctor, complaining of "coughing, headache, sore throat, running nose and a "tight chest", complaints which do not differ markedly from those noted by Dr.

Leitch on September 20, although she may have meant something other than "congested" by the reference to a "tight chest". However, the Grievor was emphatic in her testimony that she "had never felt like this before". Dr. Leitch sent the Grievor to the hospital for an x-ray, to rule out pneumonia, but, most importantly, appeared to treat her for asthma for the first time, although she did not specifically note that condition on the occasion of that visit. However, Dr. Leitch prescribed a bronchial ventilator with Pulmicort and Ventalin, which are asthma treatments. She gave the Grievor a "Return to work or School Certificate" dated "26 Sept. 94" which stated only that the Grievor had been under her care from "20 Sept." and, in the space for "Remarks", "off work until Oct. 3. ? environmental illness".

Dr, Leitch's "Progress Notes" for the Grievor, which are in evidence, note only for September 26, 1994;

> Worse O/E [on examination] chest still congested - went to school Friday
> school closed for environmental reasons
> x-ray
> Ventolin/Pulmicort
> switch to Keflex - off work 1/52 [a week]

Dr. Leitch is a qualified family practitioner who has treated many patients with bronchitis and asthma. Although she is not a respirologist, she has had some experience with respiratory problems beyond her general family practice of medicine. In the late 70's she worked half days for four years at what was the Nova Scotia Sanatorium, a hospital for patients with tuberculosis, and later the Miller Hospital. She testified that bronchitis starts with fever, respiratory infection, muscle aches and a slight cough, which changes to a heavy productive cough. The treatment for acute bronchitis is antibiotics, if there is secondary colonization, fluids and temperature control. Asthma, which takes many different forms, is

accompanied by no fever but by coughing and the patient complains of difficulty getting air in and out. The treatment is identification and removal of triggers, treatment of inflammation with inhaled steroids and of bronchial spasms with a bronchial dilator. Pulmicort is an inhaled steroid, Ventalin is a bronchial dilator and Keflex is an antibiotic.

Dr. Leitch testified that she prescribed asthma treatment on September 26 because she "listened and heard something different" in the Grievor's chest, which she described as "wheezing". The Grievor had told Dr. Leitch about the ozone treatment so, Dr Leitch testified, she noted "environmental illness" and put the Grievor off work for a week because she was "suspicious that something she had inhaled at work had triggered an asthmatic attack."

When Dr. Leitch was asked in cross-examination why she did not note "wheezing" or "asthma" in her progress notes for September 26 her response was to ask why else she would have prescribed Pulmicort and Ventalin. She acknowledged, however, that those drugs are useful generally in easing the symptoms of a cough, although she said she tends to reserve them for people with "reactive airway disease". When asked directly if she diagnosed the Grievor as having asthma on September 26, 1994 Dr. Leitch responded that "the Grievor appeared to have asthma but the diagnosis was not made then and there."

The Grievor then returned to work the following week and for the remainder of the 1994-5 school year had only three days of illness, although she testified that she had "asthmatic episodes which were not always debilitating". There are no relevant entries in Dr. Leitch's progress notes, and there is a report from Valley Regional Hospital, Department of Diagnostic Imaging dated January 25, 1995 which states

"lungs are clear of active disease". The Grievor testified that she was greatly improved through the summer of 1995. She was off inhaled medication. She had, however, in that period identified a number of things which she considered to cause her asthma to "flare up". She testified that the main things at Central King's that she was aware of were paint, glues, some carpeting, mould, toners, whiteout, perfumes, cigarette smoke, some floor cleaners with ammonia in them, WD 40 and powders like fibreglass powders. Although she was a golfer previously she testified that she had only golfed once since 1994. She was concerned, she said, about pesticides. She visited Dr. Leitch on August 30, 1995, and the progress notes for that date include, "bronchitis/asthma stable".

In September of 1995 the Grievor's teaching assignment was changed from 75% science and 25% guidance and counselling to 70% guidance and counselling and 30% science. Her guidance office was a windowless space close to the principal's office in the administrative office area at the core of the school. This was unchanged from 1994-5 but she spent more time there in 1995-6. The Grievor testified that after she returned to work in September 1995 she had more and more frequent asthmatic episodes, coughing, gagging, hoarseness, headaches and feeling fatigued. She found it difficult to process information. She went back to Dr. Leitch on September 13. Dr. Leitch's progress notes indicate that the Grievor had a cough that started two days after she returned to school, that she was "miserable", with decreased air entry and expiratory rales [the sound that is heard when there are secretions in the lungs]. Dr. Leitch prescribed Pulmicort and Ventalin and referred the Grievor to Dr. Richard Stern, an internist in Kentville.

The Grievor saw Dr. Stern that day. The relevant parts of Dr. Stern's report to Dr. Leitch dated September 13, 1995, which is in evidence, are:

Re: Rhonda Sewell
... She was exposed to this [spraying with ozone] and following this she has never been quite herself. She has recurrent attacks of "bronchitis" with productive cough, congestion, feeling that she can't breathe and shortness of breath and wheeziness. She obtains relief with a combination of Ventolin MDI without an aerochamber and Pulmicort turbuhaler a little while ago but is now off the Pulmicort.

It does bother her at night. She told me initially she can't sleep at all because she can't breathe. When I told her both these statements [were] incompatible with life, she retracted a little and in fact seems to get several hours of sleep at night although it is interrupted with coughing.

She gets frequent colds, and has a cold at the moment but she says that the symptoms are quite different from the above mentioned. The symptoms always seem to occur every September when she goes back to school and are never as bad at other times of the year.

She recently had some bloodwork but hasn't had any x-rays and hasn't been allergy tested.
...
On physical exam today, she was a pleasant healthy looking woman who was in no acute distress, except that she did exhibit quite a congested sounding cough here in the office. She was not, however, short of breath or tachypneic with no clubbing or cyanosis, formal exam of her lung field was entirely normal with no crackles, wheezes, or other localizing or lateralizing abnormalities and the rest of the exam was unremarkable. ...

Heart, abdomen, extremities, CNS, etc. were all normal and apart from the fact that she was mouth breathing and sounded as if she had a cold, there were no obvious ENT abnormalities either.

Impression & Recommendations:

At least I can attempt to run some tests to see if she has any identifiable lung disease or specifically asthma. I have ordered some PFTs, with and without bronchodilators and with a bronchial provocation challenge test as well as some x-rays of her sinuses, chest x-ray and a radionuclide reflux scan to rule out silent reflux which can lead to these symptoms.

She is quite convinced that there is a problem within the environment in the school that is causing it. I explained to her that as an internist I would not be able to identify precisely what the triggering factor was. I feel that straightforward allergy testing would be quite helpful here in case we can show that she is clearly allergic to mold or similar obvious thing in the environment but if it comes down to trying to make a more specific diagnosis of a "sick building syndrome" type, then as you aware, as I am sure she is aware, there is a lot of hocus pocus, not very much science and a low success rate in identifying clearly reproducible specific abnormalities.

I think she should go back on her Pulmicort turbuhaler, but I would prefer it, if possible, immediately after her histamine test so it doesn't interfere with the test and

> in the meantime, I have told her that she can use a Bricanyl turbuhaler which she finds easier to take than the Ventolin on a prn basis but a maximum of just two puffs 4 times daily and it should be reserved only for particularly bad spells of wheezing or shortness of breath.

On October 18 Dr. Stern wrote his report of the follow up to Dr. Leitch, including the following relevant passages;

> Histamine challenge testing confirms that she does have moderate to marked level of bronchial hyperactivity with good reversability after bronchodilators. I understand that Charlie Brown's allergy testing confirmed positive skin reactions to molds and also to histamine which is, of course, non specific and so it may be that she has a general disposition to mild bronchial hyperactivity (asthma) and that certain factors in the environment including very probably molds can trigger of her feelings of cough, wheeziness and general respiratory misery. ....

I note that it was at this point that it was officially determined that the Grievor had asthma. I note too that Dr. Charles Brown reported to Dr. Leitch on September 25 that the Grievor "responded negatively" to the allergies for which she had been examined by skin testing, specifically to ten listed moulds.

The Grievor continued to work until February 29, 1996, with only two days off for illness. On January 31, however, she returned to Dr. Leitch, who heard a "wheeze" in her chest and decided to send her to Dr. Mary Roddis for further allergy testing. Dr. Leitch explained in her testimony that Dr. Brown, to whom the Grievor had been referred by Dr. Stern for allergy testing, was a paediatrician who would have done basic testing but that Dr. Roddis would do "more detailed testing". I note that the Grievor told Dr. Leitch that she "didn't like Stern, found him blunt", and said that because he was not respirologist, she wanted a specialist with better qualifications. Dr. Roddis is not a specialist although she is an experienced family doctor who has concentrated her practice on allergies and the treatment of asthma. The referral to her was as follows;

> Allergy tests and advice please. Bronchial hyperactivity is definitely worse at school (teacher at C.K.)
> Healthy until 2 yrs. ago - normal well adjusted. Jeannie Muggah's sister in law.

Dr. Roddis testified in a dual role, as the doctor who initially advised the Grievor not to work in the conditions in which she found herself at Central King's Rural High in the winter of 1996 and as an "expert" on asthma giving her opinion on that disease and the Grievor's medical history in that respect. In the latter role she also submitted a report dated December 12, 2000 from which I quote here with respect to her qualifications and the Grievor's first office visit with her;

> I am a family practitioner at present working in Wolfville, NS. I graduated with my M.B.Ch.B. from Aberdeen University, Scotland in 1970 and obtained my LMCC in 1991. I have worked in solo and group family practice for 30 years. For the last twenty years allergies and their investigation and treatment have formed part of my practice and for six years I have run a referral only allergy practice. A large percentage of patients referred to me for investigation have suffered from asthma and I have developed expertise in that area.
>
> Rhonda Sewell was first referred to me in February 1996 by her family physician Dr. Barbara Leitch for investigation and advice regarding her bronchial hyper-reactivity which was apparently much worse at work [Central Kings school] Dr. Leitch noted that she had been well until two years before when the discovery of mould in the rugs at school prompted treatment with ozone. Unfortunately the school inhabitants were exposed to the ozone and because of many people reacting, the school had to be closed for a short time.
>
> I saw Ms. SeweII on 21st. February 1996 to carry out an assessment and allergy testing. She gave a history of a recent problem with asthma, dating from the ozone exposure, symptoms being worse in fall and winter. There was a positive family history of allergies in that her elder daughter had allergy problems. Her current asthma treatment was Intal x 2 t.i.d; Bricanyl xi p.r.n. and Pulmicort 400 micrograms b.i.d. Allergy testing was negative to pollens, inhalants, animal danders, moulds and foods. There was good histamine control indicating a valid test. While in my office for testing, Ms. Sewell became dyspnoeic. I really thought she was going to show a mould allergy, as there had been a leak in the adjacent office over the weekend and I was aware of a damp and mildew smell, despite the fact that the carpets had been cleaned. Ms. SeweII was not aware of the leak. My opinion at the time was that Ms. SeweII was having asthmatic attacks provoked by conditions at the school, mould in the ceilings, unventilated work area, and I advised in my report that she should be off school till 8th April. I suggested that if she did not improve a respirologist should be consulted.

When she saw the Grievor originally, on February 21, 1996, she sent the following hand written report to Dr. Leitch;

> Rhonda has I think true environmental sensitivity to moulds. Interestingly there had been a leak in my office over the w'end. I had the rug steam cleaned yesterday. She was not in the affected office but by the end of the visit she was very wheezy & coughing. Her description of her working conditions appals me - mould in the ceiling - no window in the office. I have given her a note to be off work until 8 April. I hope that this will
> 1) let her recover a bit
> 2) give the school time to think what they can do
> 3) If they won't make changes she can consider her future plans
>
> If she continues to work in these surroundings in my opinion she will become progressively more sick. I would be glad to meet with the School & advise them. She should improve away from school & on Pulmicort. If not I wonder if Dr. Bowie could help in the future.

The degree to which this assessment is driven by what the Grievor told first Dr Leitch and then Dr. Roddis about the ozone incident and her working conditions is obvious. There are two further comments I will make here before proceeding with the Grievor's medical narrative.

First, Dr. Roddis found that the Grievor was not allergic to moulds, yet she concluded that the Grievor had "true environmental sensitivity to moulds" and that "If she continues to work in these surroundings in my opinion she will become progressively more sick". While in the course of hearing Dr. Roddis was careful to describe the Grievor's condition as asthma I must conclude that, at least at the time she first saw the Grievor and wrote the assessment I have just quoted, she subscribed, at least to some degree, to views that I rejected in an earlier award involving the Union and another school board (*The Nova Scotia Teachers Union and The King's County District School Board -Van Zoost, Denial of Leave for Injury on Duty* February 23, 1996, unreported). I stated there at p. 60;

> the literature seems to be overwhelmingly in support of the views expressed by Dr. Burnstein and Dr. Mullen. The position paper of the American College of Physicians (111 *Annals of Internal Medicine*, 15 July 1989, at p. 176) states:
>
> > Review of the clinical ecology literature provides inadequate support of the beliefs and practices of clinical ecology. The existence of an environmental illness as presented in clinical ecology must be questioned because of the lack of clinical definition. Diagnoses and treatments involve procedures of no proven efficacy.

Earlier in that award I had stated, at p. 51;

> True sensitivity, Dr. Mullen stated, involves the immune system, that is allergic reactions. People do become immunologically sensitized so that they develop a more ready immune response, but only to substances that are chemically the same, or very similar, in relevant respects as those to which they have become sensitized. "Immune response", he said, "is by nature highly substance-specific". Each toxic substance elicits a particular response antigen or antibody. "The determination of serum IgG antibody to a particular substance may indicate prior exposure (possibly years previously) to that substance." The "total load" theory has no scientific basis...

Those conclusions were not challenged in this hearing, and I have had no reason to change them.

Second, Dr. Roddis had no independent verification of the Grievor's work situation when she "put the Grievor off work" until April 8, nor did she explain to Dr. Leitch what the physiological problem was, other than saying she had "true environmental sensitivity" but no allergy to moulds. Dr. Roddis acknowledged in cross-examination that she did not test or treat the Grievor for asthma yet stated in her medical certificate for the School Board "Rhonda Sewell has acute reactive airway disease and will be unable to work until April 8, 1996." This, she said, she did because the Grievor had already been diagnosed and was being treated for asthma. She further acknowledged that it was "aggressive", and something she would only do with the patient of a doctor she knew well, to put a patient, who was

not seeing her on an emergency basis, off work herself rather than leaving that to the referring physician.

At the hearing before me, after testifying about asthma generally, Dr. Roddis discussed the loss of cilia, the loss of buffering cells and the thickening and inflammation of airway walls, all of which may be progressive. Dr. Roddis noted that asthma attacks may be the result of an irritant, of an infection such as pneumonia or of an allergy. She also said in testimony, "some people produce symptoms because they are unhappy. I think Barbara [Dr. Leitch] is saying this is real." Dr. Roddis testified that she had concluded that the Grievor had extrinsic airway disease, that is asthma triggered by some external irritant, not internally by an allergy or otherwise. She acknowledged that her conclusion that the Grievor's asthma was triggered by mould was based partly on the incident in her office. She had no objective basis for suggesting that there was any greater accumulation of mould in her office than is normal in the ambient air, other than that there was a musty smell, in spite of the fact that she had had the carpets cleaned. She also acknowledged that in an asthmatic an attack can be triggered by acute stress, but said that she assumed there was no reason for the Grievor to be stressed on that occasion. My layman's assumption would be otherwise. The Grievor's illness and her concern about its cause must have been putting her under great stress.

The Grievor went on sick leave on February 29, 1996, on the basis of Dr. Roddis' certificate. She testified that she stayed at home and tried to avoid triggers, but got "worse and worse". She "became quite isolated" in terms of what she could do. She suggested that she tried to go back to school but that Dr. Leitch advised her not to because her illness was environmentally triggered. The evidence is that she was on sick leave until the end of term in June. On April 2 she visited Dr. Leitch's office

and was given a slip putting her off work "indefinitely until environmental changes are made in her workplace". Dr. Leitch's progress notes for that day state: "see MR's [Mary Roddis'] consult - definite environmental sensitivity. Well away from school. ...to Dr. Bowie." Dr. Dennis Bowie is a respirologist practising in the Respirology Clinic at the Victoria General Hospital in Halifax.

The relevant parts of Dr. Leitch's referral note to Dr. Bowie are:

> I am enclosing a copy of Mary Roddis' allergy testing. Rhonda took her advice and stayed away from school for a few weeks but her symptoms returned after going back for a day. It appears that she does have <u>true</u> environmental sensitivity to moulds and I was wondering if you have any suggestions as to her management.

There was also a visit on April 17, with respect to which it is noted that the Grievor is "on puffers."

I will not quote much of Dr. Bowie's lengthy report, dated May 22, 1996. His stated "impression" is "1. Bronchial hyper-reactivity, ie, asthma. 2. Probable allergic rhinitis". [runny nose]. He says on p. 4;

> My impression is that this lady does have asthma that is mild bronchial hyper-reactivity. I do believe it could well be aggravated by her environmental exposures at school and indeed perhaps even around home. I suggested to her that she should try to make her environment as dust free as she can. I would prefer her to avoid definite exposures to aggravating factors if at all possible, although it was my feeling that if she used the Pulmicort on a regular basis that she may well be able to return to her previous occupation which she would like to do.
>
> However, it is my feeling that she will have, from time to time, increase in symptom as a result of being exposed to aggravating factors, such as allergens which may well be mould etc, cold air, and viral infections. During these times, she should immediately bump up her inhaled steroids and you might give consideration to using a decongestant if she has nasal symptoms. I would like to use something like Seldane on a regular basis for her nasal symptoms, at least initially. When she is good, she might try stopping this during the summer, but if she develops symptoms again, I would start an antihistamine and if this failed to control her, I would give consideration to inhaled nasal steroids .

His specific recommended uses of medicines were:

> 1. I would suggest doing a CBC, total eosinophil count and IgE level. Please forward the results when available. 2. I would continue her on her Intal 2 puffs to 3 puffs tid on a regular basis. During the spring, she should remain on her Pulmicort at 400 micrograms bid and if necessary, during acute exacerbations, she should double this up to 400 micrograms qid until she has no symptoms for four days. At that time, she could decrease down to tid for a further four days and then decrease it down. During any time that she has increased symptoms, she should increase her Pulmicort. As well , prior to returning to school, she should increase her Pulmicort to a maintenance dose of 2 puffs bid if she has been able to discontinue during the summer as I suspect she might be able to. She should continue to use her Bricanyl only when needed and I would remain on her Intal through the summer, although she could try to wean herself from the Pulmicort.

The Grievor did not return to Dr. Leitch's office until August 28, just before the new school year was about to start, but in June she had correspondence Dr. James Gunn, the School Board's Superintendent and senior executive officer. One letter from the Grievor to Dr. Gunn dated June 23, 1996 concerned the air quality in the counselling office and discussions about moving it to another part of the school.

> I would like to take this opportunity to formally express my appreciation for your support in correcting some of the safety concerns at my workplace, Central Kings Rural High School in May of this year. Following our meeting of April 17, 1996 at which we discussed my health situation, the office machines were moved and ventilated, and central office carpeting at the school was removed. Both of these measures seem to have contributed to better air quality according to responses of several office personnel. ...
>
> Subsequent to our meeting, I have met several times with Mr. Humphreys, Erica Bawn, John Aker and the counselling office staff in an attempt to address our continued concerns around the continued poor health which seems to remain prevalent in the counselling area of the school. We have prioritised several options for moving the counselling services within our school... Our second option of the Old Senior High staff room cannot be properly ventilated according to consultation with Mr. David Floyd. There remains the <u>current Resource area which could be suitable with a few structural changes that would accommodate our needs</u>. ... With your support changes could be made over the summer in time for our August start-up. I hope that your continued support will allow us to address this serious issue and prevent any further health crisis. [underlining in original]

Another letter also dated June 23, 1996 concerned the Grievor's health, and relates to the process issues set out at the start of this award;

> I am writing this letter to inform you of the progress in my ongoing health situation. Since our meeting on April 17, 1996 I have obtained further information on my health status which relate directly to my current medical leave. Subsequent to Dr. Leitch and Dr. Roddis diagnosis of environmentally induced pulmonary damage, I was referred to a pulmonary specialist, Dr. Bowie, ...It was his conclusion that my pulmonary damage was environmentally triggered and it was permanent. ... He stated that I had also developed asthma which was environmentally triggered. He supported Dr. Roddis's demand that a window be available in my workspace if I were to consider returning at all to my place of employment. In view of the doctors' recommendations and warnings of further damage if I do not follow their instructions, I am continuing to negotiate with my administration for a suitable office when I return in August. I am very anxious to return to my duties and resume my contribution to our educational programs. In light of the repeated medical opinion that my physical state is work induced/related, I have completed my "Days Taught and Claimed" form indicating that the leave from Feb. 29 until June 27th reflects a work injury and those days should remain in my bank of sick days. This is a compensation issue and reflects a legal precedent already in place in our board. ... I will continue to shoulder the financial burden of medical expenses arising out of this situation however the depletion of my sick leave for injury related to my employment should not be my responsibility. ...[underlining in original]

In my opinion to say that Dr. Bowie stated that the Grievor's "pulmonary damage was environmentally triggered and it was permanent" or that she had "developed asthma which was environmentally triggered" somewhat over-states what he said, in writing at least. What he said was "this lady does have asthma that is mild bronchial hyper- reactivity [which] could well be aggravated by her environmental exposures at school and indeed perhaps even around home." He also stated that he "suggested to her that she should try to make her environment as dust free as she can. I would prefer her to avoid definite exposures to aggravating factors if at all possible, although it was my feeling that if she used the Pulmicort on a regular basis that she may well be able to return to her previous occupation which she would like to do."

By letter dated June 25, 1996, Dr. Gunn replied to this second letter;

> In response to your letter of June 23, 1996, I wish to advise you that I am unwilling to approve your request to claim February 29 to June 27 as "injury on duty".
>
> I regret very much that you have had health problems but I must maintain my position as I have in other situations that those days can only be claimed as sick days.

The Grievor replied by letter of July 12;

> Re: Claim for Injury on Duty days:
>
> I have attempted to seek legal/union advice regarding my options on this issue, but due to the vacation schedules of Mr. Calloway at the N.S.T.U. and his inability to contact the Inspector of Schools regarding this issue, I unfortunately have been unable to identity my options in this matter. As the deadline for grievance is rapidly coming an end, I have done a great deal of soul searching around this issue as to what I do. I have decided not to grieve this matter at this time. This in no way reflects my agreement with the decision. I feel very strongly that there was extreme negligence in the application of chemicals at Central Kings which directly resulted in my physical condition. I continue to be concerned about the disregard for common safety in the application of tiling to floors, painting and other chemical uses during school hours. Despite numerous discussions with administration around these concerns little seems to change. I sincerely hope to return to work in September healthier, and hope to remain that way.
>
> In conclusion I will submit my days taught and claimed as required, but with the express understanding that I do not agree that these days were not injury at work. I hope that this episode is over, but if my health deteriorates again once I return to work I will have to pursue other legal options in dealing with the physical damage done.

As a result of Dr. Bowie's advice the Grievor began in July 1996 to maintain "peak flow" charts by testing her own breathing with a peak flow meter. Her peak flow charts for July 1996 - May 1997, with a few gaps, including the last two weeks of November 1996, are in evidence. She testified that she had kept peak flow charts after May 1997 but had been unable to find them.

In the early summer of 1996 the Grievor also arranged to have her home inspected by Kim Strong of Maritime Testing Ltd., the same person used by the Employer to test the air at Central King's Rural High. His report to the Grievor of June 30, 1996 is in evidence;

> At your request I visited your house on 27 June, 1996, to see if factors might be present that could impact upon air quality. The following were noted:
>
> 1. The seals around the freezer in the basement are mouldy and must be cleaned with a dilute Javex solution (about 5% is sufficient) and a toothbrush.
>
> 2. In general, the basement appears to be damp. Numerous porous materials are stored on the basement floor (wood, cardboard boxes, etc.); these were damp and will be good locations for mould growth, The basement should be cleaned up as much as possible, materials should not be stored on the floor if they call soak up water, and a dehumidifier should be used to keep the relative humidity as low as possible.
>
> 3. Although it likely is not currently affecting air quality, there are asbestos panels (about 90% chrysotile asbestos) near the furnace that could, if removed improperly, release asbestos duct into the house. These should be handled carefully if they should need to be removed,
>
> 4. There are several locations in the house where there is evidence of either past or current leakage near the roof, ...if these areas have been wet some mould growth should be expected. ...
>
> 5. The front closet has a decidedly musty smell and some items, especially a vinyl suitcase, were quite mouldy ....
>
> 6. The undersides of the reservoirs in both toilets were quite mouldy, These must be cleaned with a 5% solution of Javex and kept clean as needed. Also, the underside of the porcelain sink in the porch near the downstairs washroom also seemed to have some mould growth; it too should be cleaned.
>
> 7. Mould growth on the house exterior near the front entrance is resulting from shading which keeps tile finish damp. There are products available that can be used to remove the mould, but unless this area is allowed to receive more sunlight (which might not be possible) additional mould growth can be expected.

> As you recall from previous conversations, mould growth in houses may result in complaints of headaches, sore eyes and skin, allergies, and general malaise. Control of the mould that was observed, especially on the undersides of the toilet reservoirs may result in substantial improvements to air quality at this location.

The Grievor testified in cross examination that although Mr. Strong has said there was mould and had given a cost breakdown for its removal she "couldn't afford it so didn't pursue it". However, in the course of the summer, the Grievor's husband, who has had construction experience, removed the asbestos and steps were taken to make the other changes recommended by Mr. Strong. I note her testimony that while she felt well most of the summer she was sick on the ferry to P.E.I. and had become ill from the smell of pipe smoke and perfume.

On August 28 the Grievor visited Dr. Leitch who wrote in her progress notes;

> Has been well all summer. Peak flows good. Started into school → had to double Pulmicort, Wheezing, ↓ in peak flow readings. Stable today and will try to return to school on reg. basis. her office has been moved - now has window but smoking area is outside.

When the Grievor returned to work in September 1996 she was given the "old senior high office", also called "the animal room" because at one time it have been use by biology, but there were no phone jacks so during September she ended up spending a good deal of time in her old office. She brought in her own air purifier. She testified that when she first went to her new office it was not ready, so she "wore a mask" and cleaned out "bird feces, dust and powder." She was concerned because there was a white powder flaking off the ceiling tiles which she thought was asbestos, and one of the maintenance staff told her there was mould above the tiles.

Her new office had a window but was immediately above an area where grade 12 students habitually smoked. Although it is not a designated smoking area, even Dr. Gunn knew of this. I found the evidence on this point unsatisfactory. It seems to me that the effect of some students smoking from time to time in the open air on the ground below the Grievor's second story window could have been reduced almost to nothing by a combination of some disciplined approach to the students by the Grievor or the Principal and by not opening the window when there were actually students there smoking. Nevertheless, this was, apparently, a great source of dissatisfaction with her new office, as evidenced by the fact that she told Dr. Leitch about this problem even before school started.

On September 26 Dr. Leitch wrote in her progress notes, after seeing the Grievor;

> Peak flows falling at school. OK at weekends - getting worse. Started Pulmicort with flowvent. Chest clear, No wheezing but has cough.

The Grievor testified that when at work she coughed, gagged, lost her voice in a way that she found "embarrassing", and felt fatigued. She seemed to have trouble doing basic tasks, and a couple of times got lost going home. On October 21 she saw Dr. Leitch again. Her progress notes are;

> Peak flow ↓ since school started. Feels brain is "foggy". tearful and upset. Nil o/e [on examination] [Prescribed] off school x4weeks

Dr. Leitch gave the Grievor the following, dated October 21, 1996;

> Off work for 4 weeks or until necessary changes in her environment have been made.

The Grievor worked up to Monday October 28, which included attending a conference on Friday October 25.

Dated October 23, 1996 she wrote the following letter to Dr. Gunn;

> I am writing to inform you of my health status at this time. After having to take time off last year due to environmental illnesses caused by my workplace, I spent a significant amount of time and money in an attempt to actively recover my health. I purchased, at my own expense, air purifiers, had my home inspected to eliminate any possible environmental problems here (there were none), and continue to purchase at my own expense an vast array of vitamins and supplements to help maintain my health. As well, I have gone regularly to my doctor (Dr. B. Leitch) in order to monitor my health. At my last checkup the end of August I was in excellent health and respiratory function was near normal level. I also attended the asthma clinic at the Valley Regional Hospital to learn how to effectively monitor and control my asthma.
>
> Despite my repeated concerns over the location of my new office space over the student smoking area, I returned to school the last week of August to find that nothing had been done to prepare that space as we had discussed the previous spring. I had to call Mr. David Floyd personally to have the screen replaced so that the birds would not enter the room when the window was open. At this time he expressed some concern over the location of my "new" office due to the intake of smoke in that area of the building. I attempted to find another space in the school (the old lower staff room) which might be a more healthy location, but it was being used as a staff room and some staff did not feel that they wanted to switch spaces at that time. It was my impression that Mr. Humphreys did not support the change.
>
> In my designated office space there had been no computer or phone jack installed as agreed, nor had the carpets in the Sr. classrooms been removed as you had indicated would be done by the end of the summer. To compound the situation, the cleaning to the school had not been done over the summer, and painting/cleaning was going on inside the school work areas while we were there for early registration the last week of August. I had to go home early two days due to the fumes and worked after hours to try and catch up.
>
> A week after contacting the custodial staff myself to help move my office upstairs, they were still not available so I moved all but three furniture items up to the office area myself. During this time Mr. Dale Eisnor approached me and expressed his concern over the amount of mould he believed to be present directly over the ceiling tiles in my office. He had been previously working in that area and was concerned about the condition of the ceiling and what was above it. I immediately expressed my concern over this to Mr. Humphreys.
>
> Over the next two weeks I had to work out of the old office area due to the fact that the computers had not been hooked up in my office and were needed to register

students. Mr. Aker allowed me to use his office when possible, but the effects of the air quality were beginning to be noticeable in my breathing so I 'retreated' to my upper office and ceased doing that part of my work until my computers were hooked up after Mari MaCabe and myself called Fred and Bill asking them to come out and connect them.

Within one week after returning to school I noticed a decline in my pulmonary function as monitored on a flow meter. It would decline markedly during the week, an average of at least a 25% decline, then improve on weekends. This pattern continued through September and into October despite having my air purifier on and window open when using my office. Despite a concentrated effort by staff and Mr. Aker and Mrs. Foote to keep students from smoking under my window, the strong smell of smoke continued to be a problem. Frequently clients or guests to my office (such as Mr. Peter Sheppard) would comment on the cigarette smell. On September 23/96 the custodial staff informed me that the ceiling tiles in my new office area were made of fibreglass fibre, and expressed their concerns over the fibres and dust that potentially fall out of them each time the door or window was open or shut. I immediately went to Mr. Humphreys with my concern and asked that they be removed. He informed me that he had just spoken to David Floyd and told him that I was doing fine so he would have to call him back. As I was not asked how things were going, I did not have an opportunity at that time to tell Mr. Floyd that things were not going well. I do not feel that Mr. Humphreys is intentionally being dismissive, I just question whether he is aware of the severity and implications of the situation for myself and others. It has been over three weeks since that time, and despite having workmen come in and count ceiling tiles and tell me to bring in my own tarps to cover up my office furniture as they would be in the NEXT day (Friday, October 11/96), there has been no work done on it yet.

I filed a letter of concern with my administration and the Occupational Health and Safety Committee regarding this and the continued lack of response to serious health concerns. I also tried a new steroid drug in an attempt to stop the pulmonary decline. Neither option has resulted in any changes.

My health has continued to deteriorate and on October 21/96 my physician, Dr. B. Leitch, has ordered me to stay away from work for a minimum of four weeks to try and recover some of the pulmonary function I have lost since returning to Central Kings High School this August. In addition I have begun to experience many of the environmental symptoms which I experienced last year when I became ill. Dr. Leitch also indicated that a long term leave might be necessary in order to attempt to reverse some of the damage.

Dr. Gunn when we spoke last Spring you seemed a reasonable person and I appreciated your support. At this point I really feel that I have done everything I can possibly do to maintain my health. I have reported concerns to my administrator and Health and Safety Committee and gone through all of the channels that I am aware of in order to voice my concerns.

I strongly feel that despite an increasing number of people at our school, both staff and students, who are diagnosed with environmental illnesses or have the

> symptoms of them, NO ONE IS LISTENING!! When I corresponded with you in the past I was very clear about my feeling and intentions around this issue.
>
> I feel that the school and Central office have been negligent in placing me in an area that its own personnel deemed unfit, that despite several proposals for alternative sites Mr. Humphreys did not support a different location and that lack of response to numerous concerns and requests for changes show disregard for health issues in my situation. I realise I am only one individual, but I am not the only one being affected by these oversights.
>
> I will be off my school duties due to work related health injury as can be verified by my Physician and two other specialists. I will not accept the days I am away for these four weeks as deductions from my sick days as they area direct result of the school system's lack of action. I will be very clear that I will grieve any attempt to deduct these days. If my situation does not dramatically improve I am also pursuing legal action by my administrator and the Kings County School Board/Valley Regional School Board. I really regret that it has come to this point; but two years of non responsiveness and the loss of my health is enough for me.
>
> I sincerely hope you recognise that through whatever reasons action was not taken, the financial cost to the school system in paying for my leave and related expenses will be far greater that what minimal costs would have been involved in listening to my repeated concerns. How much can it cost to clean a ventilation system more than once in three years, or take carpet out of one room to move an office? The cost of my substitute will surely exceed that. I recognise that we are in a time of restraint, but at no time should the health of students and staff be risked to pinch pennies. [underlining in original]

David Floyd testified with respect to some of the matters addressed in this letter, and referred to a memo he had written to his immediate superior, Stuart Jamieson, on November 1 in response to the copy of the Grievor's letter that he had received. He said that the Grievor had misunderstood Dale Eisnor (or Isnor), a maintenance electrician, who had told her about mould in the "lower senior east entrance" which he had found above the ceiling tiles where he had "discovered old sandwiches etc." He had confirmed that the ceiling tiles in the Grievor's new office were fibreglass, not asbestos, and that there was no mould above them. The tiles were to be replaced, and there was delay, first because the Grievor wanted notice so she could cover her desk then as the result of a miscommunication. Arrangements were finally made to replace the tiles on November 1, 1996.

Starting Tuesday October 29, 1996 the Grievor did not return to work until January 5, 1998. That is the period for which she seeks injury on duty leave.

On November 5, 1996 the Grievor wrote to Dr. Gunn and Wayne MacDonald, the School Board's Director of Human Resources,

> As a follow up to my previous letter of October 26, 1996 I am writing to apply for "injury on duty" leave with pay under Article 26. This is due to the fact that my health has deteriorated since returning to my workplace at Central Kings in late August, 1996. ... I am including additional documentation on the advice of Mr. Berryman [of the Union] who I have consulted on this matter. He will be receiving copies of this documentation as well.
>
> Due to the 30 day contractual time line indicated by the provincial agreement, I would appreciate a response on this application immediately upon receiving this letter. ...

Dated November 13, 1996 Dr. Gunn replied;

> In response to your letter of November 5, 1996, I am unwilling to approve your request to claim injury on duty. My position is the injury on duty article cannot be applied to your situation. ...

The Grievor's medical history during that period is in evidence. On November 4, 1996 she visited Dr. Leitch who noted that the Grievor's peak flows had improved considerably since she stopped work but that she had "not bounced back as quickly as she should have". She had a sore throat and a bladder infection. During that visit, in Dr. Leitch's office, the Grievor had a reaction, according to the doctor's notes "to my perfume". On November 13 she visited again and was noted as being "much better away from schools. Peak flows all 350. Not to go back.". On December 5 Dr. Leitch filled out a form for Aetna Insurance, the carrier of the School Board's sick pay insurance, in which she stated the Grievor's "Primary Diagnosis" to be "bronchial hyper reactivity - environmental sensitivity" and stated that she would be

able to return to work "when necessary changes are made to her workplace and NOT BEFORE". Her "remarks" included "This lady is rare in that she has TRUE environmental sensitivity and cannot return to work in her present school until it has been cleaned up". A similar form was filled out to much the same effect on January 28, 1997.

On January 31, 1997 Dr. Leitch wrote to a claims staff member of Aetna;

> I am writing in reply to your letter of December 10, 1996, in which you request a narrative report on Rhonda Sewell.
>
> As you know, Ms. Sewell remained well over the summer holidays of 1996 and attempted to return to school at thc beginning of September. This was her third attempt to return... However, shortly after returning her symptoms recurred in full force. Again, there is dramatic fall in her peak flow measurements while at school and her rhinorrhea, cough and wheeze return. Also her ability to concentrate is a concern to her. ...
>
> As you know, she was seen by Dr. Mary Roddis for allergy tests ... she is sensitive to moulds, not allergic to them. ...
>
> I have [sic] never a believer in "environmental illness" and I am skeptical of colleagues who promote such ideas in their patients. However, over the last two years 1 have seen dramatic changes in this patient that are extremely troublesome. She is a very normal level-headed intelligent woman who has now become unable to go into her classroom because of environmental triggers. I have even witnessed a reaction here in my office ...
>
> There is no rational explanation for this nor do we have any proven therapy. ... Therefore I cannot recommend that she return to her present occupation. The school board has been less than half-hearted in their efforts to change the conditions under which she works and at the moment there does not seem to any solution to this ongoing problem.

On February 17 Dr. Leitch referred the Grievor to Dr. Michael Reardon, a dermatologist whom she had seen previously for concerns about "multiple nevi". This was following a visit in respect of which Dr. Leitch noted in her progress

notes, "productive cough (? started after exposed to fumes in underground parking garage)".

Returning to the facts relating to the Grievor's employment status, on March 7, 1997, over Mr. Bill Berryman's signature, the Union formally filed the Grievance under Article 42.03 of the Collective Agreement that led to this arbitration. The Employer's formal response at Step 1, signed by Mike Sweeney, Director Regional Education Services, dated April 16, 1997 concluded;

> I have been in contact with Dr. James Gunn, Superintendent, Annapolis Valley Regional School Board on April 8, 1997, and wish to report that there is not resolution to this grievance at this step. I have reviewed the details of this grievance and deny the grievance at step one.

As noted below, in connection with the Employer's process objections relating to the Grievance, there was a similar denial at step two, dated May 16, 1997.

After the filing of the Grievance and prior to its denial at Step One, on March 25, 1997 the Grievor wrote "To Whom It May Concern" with a copy to Wayne Macdonald, the School Board's Director of Human Resources;

> I am writing to inform the Annapolis Valley Regional School board and the Administration/Staff at Central Kings Rural High School that it is with great regret I must request a medical leave from my position as Counsellor at Central Kings. This leave would be from the end of my sick leave days April 14, 1997 (_ day) until the end of the academic year 1997. My physician recommends that I not return to work without the proposed structural changes to my work environment in place. ...

Mr. MacDonald replied to the Grievor's letter on April 2;

> I am writing to acknowledge receipt of your 25 March, 1997 letter which was received on 01 April, 1997, indicating that you will be off work for the remaining days of the school year.

> Please be advised that the plans for rectifying the guidance facilities at Central Kings have been temporarily put on hold pending a possible resolution to your grievance ...

On April 6, 1997 Johnson Inc., insurance administrators for the Grievor's benefit plans, sent her a letter advising her of the cost of keeping her benefits on foot while on unpaid leave, which she duly paid. Similar statements were sent by Johnson Inc. and paid by the Grievor for the whole of the period that ended January 5, 1998, because on August 14, 1997 the Grievor applied to the School Board for a continuation of her leave for the first half of the academic year 1997-8.

> ...with regret I must request an extension of my medical leave from my position as Counsellor at Central Kings. This leave would be from this September until the end of first term of the 1997/1998 academic year. My physician recommends that I not return to work without the proposed structural changes to my work environment in place, and as these have not been addressed it would be a further danger to my health to return at this time. ...

On September 15, 1997 Mr. MacDonald wrote to the Grievor;

> I am writing to advise that the Human Resources Committee of the Annapolis Valley Regional School Board at its meeting on 05 September, 1997 approved your request for a 50% leave of absence from 01 August 1997 to January 31, 1998.

These exchanges are the basis of the Employer's position that, whatever was the case up to the exhaustion of her sick leave half way through April 14, 1997, all of the Grievor's absence after April 14 (_) was unpaid leave, to January 5, 1998. I note that in fact the Grievor returned to work on January 5 rather than January 31, at her request.

Returning again to the Grievor's medical condition, in his report of April 10, 1997 Dr. Reardon, the dermatologist, found nothing serious and his report is irrelevant here except for the history he reported in part as;

> She has apparently had permanent loss of cilia in her respiratory tract which has helped perpetuate her symptoms and problems. she has had a previous tonsillectomy. She does have some chronic fatigue.

Dated June 6, 1997 Dr. Leitch noted in her progress notes;

> Started serzone [an anti-depressant] this week. Still a bit flat, but more accepting of diagnosis of depression. ... To see Dr. Powell in 4/52 to follow up on depression (Kim - true environmental sensitivity - unable to work (teacher) - off work for past 2 years.
>
> → feeling of inadequacy etc.
>
> → recent reactive depression
> very pleasant lady

Dr. Leitch testified that "on her own" the Grievor had been seeing a psychiatrist through this period, who had suggested that the Grievor see Dr. Leitch at this point. Dr. Leitch testified that she let "Kim", Dr. Powell, the psychiatrist, know that the Grievor had suffered from environmental sensitivity before depression, not the reverse. Dr. Leitch's progress notes for June 17 state "depression", that she has restarted the Grievor on serzone and that the Grievor has had a miscarriage which she has had difficulty accepting.

As noted above, on August 14, 1997 the Grievor wrote, with copies to Mr. MacDonald, the School Board's Director of Human Resources, and Dr. Robert Harris, the then Principal at Central King's, requesting "an extension of my medical leave ...from this September until the end of the first term of the 1997/1998 academic year." She went on, "My physician recommends that I not return to work

without the proposed structural changes to my work environment in place..." Mr. MacDonald wrote on September 15, 1997 to advise that the School Board's Human Resources Committee had approved this request at its meeting of September 5.

Dr. Leitch's next notes, dated 22 September 1997 state "miscarriage x2, depression, Pulmicort, serzone". There are two notes in October which are illegible.

Under date of October 6 Dr. Leitch wrote "TO WHOM IT MAY CONCERN", a letter that is in evidence;

> Ms. Rhonda Sewell has asked me to provide some information about her. [after recounting her early history and the ozone incident as reported to her by the Grievor] ...she was in the school building when the carpets were being cleaned with Ozone. Within 30 minutes of applying the Ozone she had to leave the school and missed work for several weeks. Since that time she has had bronchitis frequently during the year although it markedly improved over the summer but on returning to school in late August - early September in 1995, it restarted and persisted until she stopped work in February, These episodes of coughing are associated with chest tightness, followed by gagging and shortness of breath. Anytime on returning to school these symptoms will recur. Allergy tests have been negative. Histamine challenge test is positive, with moderate level of bronchial hyper-activity.
>
> Since 1994 her general health has been poor as a result with constant coughing with runny nose and eyes on coming in contact with certain stimulants. Because of her inability to return to work, she has experienced feelings of unworthiness and loss of self-esteem which has resulted in altered mood (depression). It is not surprising that she has developed a reactive depression. This was a happy, healthy, well adjusted young woman prior to her developing environmental sensitivity and I have seen a marked change in both her physical and mental health since 1994 and I feel that the conditions at her school are primarily responsible for these changes.

Dr. Leitch testified, and I accept as a fact, that her reference to "bronchitis" in the middle of the first paragraph was an error. She meant to write "asthma" and that is what she goes on to describe. Based on the facts as I have outlined them, the preceding sentences of that paragraph are, obviously, quite misleading, undoubtedly in part due to the fact that Dr. Leitch had no source of information other than the Grievor about the ozone incident. It also, however, reflects a compression of the

facts which may serve for some medical purposes but is not adequate for determination of the issues before me.

On Dec. 4, 1997 Dr. Leitch noted in her progress notes:

> Well today. No cough, feels great. (continue serzone until end Jan) O/E chest clear - has to start back to school (for financial reasons) in January ... her room will be discussed

There is no question that there were air quality concerns at Central King's Rural High in the autumn of 1997. Dr. Robert Harris started as Principal that summer. On October 7 he wrote to David Floyd, the Supervisor of Maintenance for the School Board advising him that many people, staff and students alike, had been expressing concerns. People, Dr. Harris testified, were well when they were not in the building and not when they were. He himself suffered "coughs, raging headaches and extraordinary fatigue", as well as "brain fog and memory loss". On November 4, 1997 he wrote to Dr. Gunn with a catalogue of problems at the school. He noted that on October 29 he had met with Mr. Floyd concerning issues "including experiences people are having that lead me to believe that some people are manifesting signs, to varying degrees, of symptoms suggestive of environmental illness, though I am not sure what the term 'environmental illness' means." Dr. Harris stated that he believes that during this period he was short of oxygen where he worked, and that he himself "has become sensitized to various kinds of odours." He testified that some 20 members of his staff, of a total of 47, now feel they have environmental illness.

Dr. Harris' correspondence was followed by tests conducted by Kim Strong of Maritime Testing, which resulted in the school being closed from December 8,

1997 to January 5, 1998. Dr. Gunn sent the following memorandum addressed to "All Staff at Central Kings Rural High";

> SUBJECT: Air Quality Test Results
>
> Please find attached a copy of the test results which caused my decision to close your School yesterday. Dr. Jeff Scott, the Medical Health Officer, and Shelley Gray of Occupational Health and Safety agreed with my position that 1 should close immediately, not because we had reason to be alarmed but because we did not know what we were dealing with in the test results.
>
> Early this morning, Dr. Scott advised me that he had discussed the test results with one of his professional colleagues in Ontario. who is an expert on molds. Dr . Scott was assured that the toxigenic species identified in these tests are "on the low end of the scale" in regard to toxicity and their presence should not cause undue alarm or concern. These particular molds may affect certain individuals who have respiratory problems such asthma or allergies, depending on the concentration levels and length of exposure.
>
> Without going into details, we have already taken quite a bit of action to deal with this problem and we are moving as quickly as possible to find the sources, remove them and then to some testing. We will keep you fully informed.
>
> 1 am very sorry for this loss of time with your students but 1 must be assured that your environment is safe. ...

In this context, on December 2, 1997 the Grievor wrote to Mr. Macdonald with respect to her return to work;

> I am writing to inquire as to the status of my request to return to work on January 5, 1998. At the time of our meeting with Mr. Berryman on November 5th, you indicated that you would inquire about my request for additional sick days as well as a suitable place for me to return to work. ...On November 13th I met at Central Kings with Mr. Berryman, Mr. Aker, Mr. Floyd and Mr. Strong. We toured three main areas which had been indicated were possible sites for a working space for me. ... there were concerns expressed by several parties present regarding the general condition of the school and its ventilation. I would like to mention that it took me less than seven minutes to experience in full force the symptoms which forced me to leave school in October of last year. At the end of the November 13th meeting Mr. Berryman and I requested that we be informed of the air test results, as well any decisions regarding a suitable site for me to work. It was indicated by Mr. Strong at that meeting that those results would be forthcoming the following week.

> I have yet to hear from any of the parties involved in the Board's decision regarding my returning to work, or specifically where I am to work. ...

It is clear from Dr. Harris' testimony that the school's air quality problems were not solved by the work done over the Christmas period of 1997. There were concerns, he testified, in the autumn of 1998 and the school had been closed for the first three months of 2000 for $1m worth of work related to mould. During that period students and staff from Central King's did a split shift at Horton. The Grievor testified that her health was good at Horton.

After she returned to work on January 5, 1998 the Grievor missed only one day for personal illness up to the end of the school year. She was pregnant at the time she returned to work, but testified that she did not know it. In 1998-9 school year she was on pregnancy leave until Christmas and after that on unpaid pregnancy leave until the February 1, after which she missed no days due to illness. In August 1998, when she was 8_ months pregnant, the Grievor started work on her masters degree from Mount Saint Vincent, working largely at the New Minas Teachers' Centre. In 1999-2000, which included three months at Horton High School, the Grievor was absent for 8 days due to personal illness.

The only other medical evidence before me with respect to the period after the Grievor's return to work are three reports from Dr. John A. Gjevre, a respirologist to whom Dr. Leitch referred the Grievor on January 13, 1998 at the request of the insurance carrier. The statements in his reports that I consider relevant, apart from the history taken from the Grievor and Dr. Leitch, which reflect their view of the ozone incident and subsequent causes of the Grievor's illnesses as already set out here, are as follows.

In his report of April 6, 1998 Dr. Gjevre states with respect to the period October 1996-January 1998;

> Her breathing was relatively O.K. during this time. In fact she stopped her puffers in December 1996 and has stayed off them until present. she has had two or three episodes when she had been exposed to perfumes, etc. where her breathing has worsened significantly. Otherwise she has done well. She has done all her usual daily activities. As well she has been out raking leaves as well as painting with a filter mask on. She returned to work in January 1998 ...

Dr. Gjevre concludes;

> Lungs: no clubbing, good air entry, no wheezes, no crackles. ...
>
> **Impression:**
> (1) Asthma. It is mild-moderate based on previous Methacholine/Histamine Challenge tests. It would appear to be moderate clinically based on her symptoms of frequent nocturnal wakening for dyspnea and frequent daytime cough and dyspnea. ...
>
> **Recommendation:**
> ...
> (2) Given her mild/moderate asthma and especially given nocturnal dyspnea on a frequent basis, I do not feel that she had her asthma under control. [and prescribe Pulmicort, and Bricanyl or Ventalin on a rare as needed basis, notwithstanding her pregnancy]

Under date of June 3, 1998, having seen the Grievor on May 27, Dr. Gjevre wrote that the Grievor's asthma was stable, and that she should continue with the Pulmicort, maintain her peak flow diary and "follow closely" with Dr. Leitch. He saw the Grievor finally on January 26, 1999, following the birth of her child, when he found her asthma "now well controlled" and made much the same recommendation with some changes in medication due to the fact that the Grievor was no longer pregnant. The Grievor, it will be recalled, returned to work on February 1, 1999, after her unpaid pregnancy leave.

The Issues. I will deal first with the **process issues** raised by counsel for the Employer. (1) Did the Grievor by her letter of June 23, 1996 to Dr. Gunn withdraw the same Grievance she is now pursuing before me here?
(2) Was the Grievance filed by the Union on March 7, 1997 out of time according to the Grievance Procedure in Article 14.03(a) of the Collective Agreement?
(3) Is the period claimed by the Grievor as injury on duty leave within the two year period covered by Article 26.02 of the Collective Agreement?
(4) If the Grievance is otherwise timely and if it is allowed on the merits, is the Grievor entitled to injury on duty leave for the period from the middle of April 14, 1997 to January 5, 1998 for which she was granted unpaid leave.

The issue of substance before me is whether, if her Grievance is otherwise properly before me, the Grievor was entitled to injury on duty leave from October 29, 1996 to January 5, 1998.

Award. I have concluded that the process issues raised by the Employer do not preclude me from dealing with the issue of substance. I have, however, concluded that the Grievor was not, and is not, entitled to injury on duty leave for the period in issue.

Process Issues

(1) Did the Grievor by her letter of June 23, 1996 to Dr. Gunn withdraw the same Grievance she is now pursuing before me here? The Employer's position is that, on June 23, while drawing on her accumulated sick leave benefits, the Grievor applied for injury on duty leave, which was denied by the Employer. The Grievor corresponded with Dr. James Gunn, the School Board's Superintendent of Schools, which, the Employer argues, fell under the "Teacher's

Informal Discussions", part of the Grievance Procedure in Article 42.03(a) of the Collective Agreement. Subsequently in that correspondence the Grievor stated that she was not going to file a grievance, which the Employer says constituted withdrawing the grievance not on a without prejudice basis. The Employer relies on the arbitration jurisprudence to the effect that a grievance once withdrawn cannot be filed again.

Article 42.02(a) provides that "a teacher on the teacher's own behalf" may lodge a grievance". Article 42.03 provides;

> (a) Teachers' Informal Discussions
> Within (30) clear days of the effective knowledge of the facts which give rise to an alleged grievance, the teacher shall discuss the matter with the Regional School Inspector. The Inspector shall answer the matter within ten (10) days of the discussions. When any matter cannot be settled by the foregoing informal procedure, it shall be deemed to be a "grievance" and the following procedure shall apply provided said teacher(s) has/have the approval of the Union in writing or is represented by the Union.

The three step "Grievance" procedure is then set out. Article 42.07 provides;

> If advantage of the provisions of this Article has not been taken within the time limits stipulated herein, the grievance shall be deemed to have been abandoned. On the other hand, the grievor(s) may proceed to the next step in the case of absence of a stipulated meeting or answer within the stipulated time limits. Such time limits may be extended by mutual written agreement.

The Employer takes the position that the Grievor commenced the Grievance process during her first period off work and did not withdraw her Grievance on a without prejudice basis. Counsel for the Employer relied on the following passage in Brown and Beatty, *Canadian Labour Arbitration* (3rd ed., looseleaf), at para. 2:3230;

> A settlement is an agreed-upon resolution of a dispute or grievance ... Withdrawal, on the other hand, is a unilateral act of discontinuance of proceeding with the grievance and it has the same operative effect as does a settlement unless carried out on an "agreed-upon "without prejudice" basis. ... Generally where in the course of the grievance procedure the parties have dealt with a particular grievance so that it is settle, withdrawn, abandoned or has become time barred, that will prevent the revival and resubmission of the same grievance to arbitration. ... Unless there are specific provisions in a statute or a collective agreement that vest the right to arbitrate in the individual employee that right belongs to the parties, the union and the employer, and it is accepted that it is an incident of that right to be able to settle, compromise or withdraw a grievance.... However where the grievance procedure gives the individual the right to launch a grievance, one arbitrator has held that it can be withdrawn by him without union consent and thereby rendered inarbitrable. But where union consent was contemplated and not granted, an employee's settlement has been held not to be a bar to arbitration.

He also relied on the awards in *Re RWH&RE and Guildwood Inn* (1968) 19 LAC 407 (Palmer, Chair) and *Re Collingwood Shipyards and United Steelworkers* (1977) 15 LAC (2d) 241 (Brent, Chair), the latter holding that "an unsolicited, voluntary withdrawal by the grievor in a discharge case where there are no greater issues at stake than the effect on one employee", was effective, and submitted that the Grievor's withdrawal of her grievance here was binding. I am much more persuaded by the award of the Board of Arbitration in *Re Dartmouth General Hospital and CBRT&GW, Local 606* (1981), 1 LAC (3rd) 444 (Langille, Chair) to the contrary, based on the understanding that it is the Union that has carriage of the grievance. More importantly, on the wording of this Collective Agreement I am not satisfied that there was a "grievance" to be withdrawn.

In the second letter of June 23, 1996 from the Grievor to Dr. Gunn she stated;

> I have completed my "Days Taught and Claimed" form indicating that the leave from Feb. 29 until June 27th reflects a work injury and those days should remain in my bank of sick days. This is a compensation issue and reflects a legal precedent already in place in our board. ... the depletion of my sick leave for injury related to my employment should not be my responsibility. ...[underlining in original]

I am not sure this constituted "discuss[ing]" the matter as contemplated by Article 42.03(a), nor is it clear to me that Mr. Gunn filled the role of the "Regional School Inspector" referred to there. Those, however, are not the bases of my award on this point. Rather I have decided on the basis of the last sentence of that clause;

> When any matter cannot be settled by the foregoing informal procedure, it shall be deemed to be a "grievance" and the following procedure shall apply provided said teacher(s) has/have the approval of the Union in writing or is represented by the Union.

I interpret that as meaning not only that the procedure shall apply but also that a matter "shall be deemed a 'grievance'" *only* where the teacher(s) who engaged in the informal discussion "have the approval of the Union in writing or is [are] represented by the Union." I recognize that Article 42.02(a) is explicit that under this Collective Agreement individual teachers can "lodge" a grievance, but it is not inconsistent with that, and is consistent with the general theory of a Union's exclusive bargaining rights, that the Union has the degree of control of the grievance process that I attribute to it by my interpretation of this language.

When the Grievor wrote on July 12, 1996 that although she had not been able to contact the Union she had "decided not to grieve this matter at this time" she did not withdraw the grievance on a "not without prejudice" or any other basis, because there was no "grievance" to withdraw.

Counsel for the Employer also submitted that Union impliedly consented to the Grievor's grievance and its withdrawal by not pursuing this issue when it learned of her letters of June 23 and July 12, 1996. I do not accept this submission. Clearly there was no "approval of the Union in writing" nor was the Grievor "represented

by the Union" when she wrote either letter, as required by Article 42.03(a) of the Collective Agreement.

(2) Was the Grievance filed by the Union on March 7, 1997 out of time according to the Grievance Procedure in Article 14.03(a) of the Collective Agreement?

The Employer takes the position that the Grievance was not filed within the 30 day time limit set by Article 42.03(a) and 42.07:

> 42.03(a) Teachers' Informal Discussions
> Within (30) clear days of the effective knowledge of the facts which give rise to an alleged grievance, the teacher shall discuss the matter with the Regional School Inspector. ...
>
> 42.07 If advantage of the provisions of this Article had not been taken within the time limits stipulated herein, the grievance shall be deemed to have been abandoned. ...

The Union commenced the Grievance Procedure that led to this arbitration on March 7, 1997. The Employer's first position was that, because the Grievor and the Union on her behalf claim that she was injured on duty on September 23, 1994, the morning after the ozone treatment was used, the 30 days started to run then, or as soon after that as the Grievor purportedly had knowledge that that was the basis of her injury. Second, the Employer says, she had knowledge that she was denied injury on duty leave on June 25, 1996, so the 30 day time limit started to run then. Third, the Employer says, at the latest the 30 day time limit started to run when the injury on duty leave sought by the Grievor on November 5 was again denied on by Dr. Gunn on November 13, 1996.

The Union takes the position that by not raising the 30 day time limit until the hearing before me the Employer waived its right to rely on that time limit. Counsel

for the Employer quite appropriately did not dispute that in the course of the grievance procedure time limits were waived by the correspondence between parties, but he did not agree that the initial 30 day time limit set out in Article 42.03(a) was waived, and pointed to the fact that 42.07 makes it "mandatory".

In my opinion the first relevant date is October 29, 1996, the start of the period for which the Grievor seeks injury on duty leave by the Grievance before me. The 30 day time limit in Article 42.03(a) started to run when the Grievor was denied injury on duty leave by Dr. Gunn on November 13, 1996. However, until the hearing before me the Employer did not at any point in the Grievance Procedure assert that this Grievance was time barred on this or any other basis. At each step the Grievance was simply "denied". At Step Two Acting Deputy Minister Douglas E. Nauss wrote May 16, 1997;

> Re; Grievance - Rhonda Sewell
>
> Further to your meeting of May 12, 1997, attended by Mike Sweeney and Claudia Fox on my behalf, I have reviewed the matter and find no violation of the collective agreement. The grievance is, therefore, denied at Step 2.

Brown and Beatty, *Canadian Labour Arbitration* (3rd ed., looseleaf), state at para. 2:3130 [footnotes omitted] ;

> Waiver of procedural irregularities
>
> The concept of "waiver" connotes not insisting on some right, or giving up some advantage. It involves both knowledge and intention to forgo the exercise of such a right. In its application, it is a doctrine which parallels the one utilized by the civil courts known as "taking a fresh step", and holds that by filing to make a timely objection and "by treating the grievance on its merits in the presence of a clear procedural defect the party 'waives' the defect'. That is, by not objecting to the failure to act within mandatory time-limits until the grievance comes on for hearing, the party then objecting will be held to have waived non-compliance and his objection to arbitrability will not be sustained. ...

I have therefore concluded that I cannot sustain the Employer's objection to my dealing with this Grievance on the ground that it was filed after the expiry of the time limit set out in Article 42.03(a).

(3) Is the period claimed by the Grievor as injury on duty leave within the two year period covered by Article 26.02 of the Collective Agreement?

The parties disagree on the correct interpretation of Article 26.02 of the Collective Agreement, with respect to the period of entitlement to injury on duty leave. It provides:

> 26.02 Such leave shall not exceed two (2) years from date of the injury. If the teacher is still unable to resume teaching duties which had been assigned the teacher shall be entitled to use the teacher's sick leave.

The Employer's position is that the two years referred to are calendar years, so that even if the Grievor were entitled to injury on duty leave it would have expired two years from September 23, 1994 when, allegedly, exposure to ozone caused her to first suffer from asthma. The Union's position is that the two years referred to are two years of teaching time. Further, the Union's position is that the two years started when the Grievor ceased work on October 29, 1996, for the period for which she sought injury on duty leave on November 5, which was denied on November 13, 1996.

Putting Article 26.02 in the context of the rest of Article 26 assists in its interpretation. Article 26.01, which has already be set out above, provides;

> 26.01 When injured in the performance of the teacher's duties, which duties shall have been approved by the School Board or its representative, the teacher, on application to the School Board, shall be placed on leave on full salary until the teacher is medically certified able to continue teaching.

This may appear to suggest that injury on duty leave can only start after application to the School Board. The reality is, of course, that the application will relate to a start date that may well have come earlier. In the simple case of a broken leg, for instance, it could hardly be suggested that injury on duty leave would not be back-dated to start with the accident. This is consistent with the use in Article 26.02 itself of the phrase, "Such leave shall not exceed two (2) years *from date of the injury*". Moreover, in any case where the processing of the application is other than straight-forward, or where, as here, it is disputed and grieved, back-dating and substitution of injury on duty leave for sick leave would be matter of course, and that must have been foreseen. Were such not the case Article 26.05, entitling the School Board to require a medical examination, would be quite unworkable. The fact that there will be more complex injuries for which the start date may be difficult to ascertain cannot change this. The "two (2) years" will start from whatever is determined to have been the start date of the injury in question.

Therefore, the major issue here is, "What is the injury in question?" Is it the alleged injury to the Grievor by ozone on September 23, 1994, or is it the alleged reactivation of her asthma in October 1996? If it is the former, by virtue of the two year limit in Article 26.02, Article 26.01 clearly did not cover her for the period that is the subject of the Grievance before me. If it is the latter, the two year limit would not have disentitled her until October 29, 1998, if the Employer's position that the two years referred to are calendar years is correct. If the Union's position that the two years referred to are two years of teaching time is correct she would

probably be covered for the whole of the period covered by the Grievance. I need not make the calculation based on the Union's position here.

My conclusion is that the Grievance must be taken as relating to the alleged reactivation of the Grievor's asthma in October 1996. The March 2 letter signed by Mr. Berryman for the Union states simply, "this matter has not been settled at the discussion stage. ...the grievor believes she was injured in the performance of her duties, as approved by the School Board..." This brings into play the Grievor's letter of November 5, 1996 in which she stated "As a follow up to my previous letter of October 26, 1996 I am writing to apply for "injury on duty" leave with pay under Article 26. This is due to the fact that my health has deteriorated since returning to my workplace at Central Kings in late August, 1996." Certainly, her letter of October 26, 1996 is all about what she thought had happened to her that Autumn.

I realize that Article 26.06 carries the implication that injury on duty leave traceable to a particular injury can only total two years so that "any disability resulting from the original injury" is cumulative. It provides;

> 26.06 Notwithstanding 26.02, should an injured teacher return to work within the two (2) years as provided in Article 26.02, the unused portion of this leave shall be credited to the teacher to be used by the teacher in case of any disability resulting from the original injury. ...

Where the original injury resulted in injury on duty leave, to characterize a "disability resulting from the original injury" as a new injury would allow more than two years injury on duty leave for the original injury. This would defeat the apparent intent behind this provision and the two year limit in Article 26.02, so the

difficult characterization of a disability as "resulting from the original injury" must be made with care. However, where, as here, there has been no previous grant of injury on duty leave that apparent intent, which is to limit leave for any injury on duty to two years, is not defeated by disregarding any alleged "original injury". The question is simply whether the teacher has been injured on duty, not whether the injury is related to an earlier injury. For purposes of the two year limit I am, therefore, concerned with the alleged reactivation of the Grievor's asthma in October 1996, as submitted by the Union.

I now turn to deciding whether in providing in Article 26.02 that "Such leave shall not exceed two (2) years from date of the injury" the parties must be taken to have intended two calendar years or two years of teaching time. Both counsel called in aid of their differing positions Article 26.06, which I have just quoted. Clearly, it was intended that a teacher's time on injury on duty leave does not have to be consecutive, but that does not suggest any answer to this question.

The ordinary meaning of "two (2) years" is two calendar years. There was no extrinsic evidence of past practice or negotiations nor is there any other meaning of the single word "year" or "years" in this Collective Agreement. Article 25, the immediately preceding article in the Collective Agreement, is headed "School Year". Article 25.02 provides that "The school year shall consist of one hundred and ninety-five (195) school days". and 25.07 states that "A teaching day is any day other than Saturday, Sunday or a statutory holiday which is within the school year." It is significant, I think, that in Article 26 the reference is to "years", not "school years", nor is it to "teaching days". The position of the Union boils down to saying that "two (2) years" in Article 26.02 means two school years or, more accurately,

390 school days. I must proceed on the basis that if that is what the parties had intended they would have said it.

I hold that the Employer's position, that the two years referred to in Article 26.02 are calendar years, is correct. Therefore, if the Grievor is entitled to injury on duty leave she is disentitled after October 29, 1998, two years from the date she stopped working allegedly as a result of injury on duty.

(4) If the Grievance is allowed on the merits, is the Grievor entitled to injury on duty leave for the period after April 14, 1997 for which she was granted unpaid leave.

The Employer's position is that from the middle of the day on April 14, 1997, when the Grievor's sick leave was exhausted to January 5, 1998 she was not on sick leave, rather she was on leave without pay. That, says the Employer, is what she applied for on March 25 and that is what she was granted. Therefore, counsel for the Employer submitted, even if I were to find that the Grievor was entitled to injury on duty leave for the period from October 29, 1996 to April 14, 1997, she could not be awarded injury on duty leave for the period after April 14.

Wayne MacDonald, the School Board's Director of Human Resources, with whom the Grievor dealt in seeking leave of absence, testified that from the School Board's point of view the Grievor was considered to be on medical leave without pay, which was treated as no different from any other leave of absence. There was some initial administrative confusion over the Grievor's status at the first of August, but any financial ramifications were cleared up. In his letter of September 15, 1997 to the Grievor he advised her that the School Board had "approved your request for a 50% *leave of absence* from 01 August 1997 to January 31, 1998".[emphasis added]. Mr. MacDonald testified that on this leave the Grievor's status was quite different

from that of a teacher on sick leave or injury on duty leave, in that the School Board never refuses an initial request for unpaid leave, and neither the insurance carrier nor the Employer requires proof of disability. However, he acknowledged that at all relevant times after April 14, 1997, when her sick leave ran out, he and, effectively, the Employer were aware that the Grievor was still claiming to be sick and claiming injury on duty leave.

I have concluded that for purposes of this Grievance the Grievor was in no different position after April 15, 1997 when her sick leave ran out, or after August 1, 1997 when she applied for an extension of her leave without pay, than she was prior to those dates. The issue for me is whether she was entitled to injury on duty leave under Article 26 starting October 29, 1996. If I find she was, it is inherent in the *ex post facto* nature of the remedies I can award that arrangements made in those periods in accordance with the Employer's contrary view will have to be undone and compensated for as far as possible. The fact that while her Grievance was being processed the Grievor made the best arrangements for herself that she could within the framework dictated by the Employer cannot be held to have constituted giving up any of the rights or remedies she was seeking by her Grievance.

It is clear from Mr. MacDonald's testimony that the Employer was under no illusions that the Grievor was giving up any part of her claim to injury on duty leave for two years following what she claimed was an injury on duty. Indeed, as canvassed in connection with the Employer's submission that the Grievor withdrew this same Grievance in June of 1996, it is the Union that would have had to deal with the Employer to achieve that purpose.

I do not accept the Employer's position on this issue.

The Issue of Substance. Was the Grievor was entitled to injury on duty leave from October 29, 1996 to January 5, 1998.

It was not disputed, and I find, that the Grievor did have a form of asthma during the period for which she seeks injury on duty leave. This, however, does not answer the critical questions, which are whether her asthma was caused by her exposure to ozone on September 23 or by any other workplace condition and, if it was, whether it prevented her from working for the period that is the subject of the Grievance.

There is no direct evidence that the Grievor had asthma before September 23, 1994 when she alleges exposure to ozone gas caused her asthma. On the other hand, there is no evidence that she did not, although she had not been diagnosed as having asthma before that. Clearly, she has had reasonably serious respiratory problems all her life, which could have included asthma undiagnosed until after September 23, 1994. Dr. Leitch first started treatment appropriate for asthma on September 26, 1994, but there was no confirmed diagnosis of asthma until October 18, 1995, by Dr. Stern.

In her capacity as expert witness, although not as a certified specialist, Dr. Roddis testified and states in her report of Dec 12, 2000 that after reviewing the Dr. Leitch's medical notes, the Grievor's peak flow charts, letters from Drs. Stern, Brown, Gjevre and Bowie and other medical records from September 1994 to February 1998 she has come to the conclusion that exposure to ozone had caused the Grievor's asthmatic response. She states in her report (square brackets in the original);

> Rhonda Sewell was first referred to me in February 1996 by her family physician Dr. Barbara Leitch for investigation and advice regarding her bronchial hyper-reactivity which was apparently much worse at work [Central Kings school] Dr. Leitch noted that she had been well until two years before when the discovery of mould in the rugs at school prompted treatment with ozone. Unfortunately the school inhabitants were exposed to the ozone and because of many people reacting, the school had to be closed for a short time. ...
>
> She gave a history of a recent problem with asthma, dating from the ozone exposure, symptoms being worse in fall and winter. ...
>
> The progression appears to be: Exposure to ozone at Central Kings school in September 1994 during mould treatment in the school. Development of asthma, [reactive airway disease] requiring the use of inhaled bronchodilators and inhaled steroids for the first time. [see Dr Leitch's progress notes of September 26th.] Symptoms improved during the summer recesses and worsened when working at school [see Dr. Leitch's progress notes dated August 30th. and September 13th, 1995 also August 28th. and September 26th. 1996]. Ms. Sewell was advised to take sick leave in February 1996. She returned to work in September 1996 but had to leave again in October 1996 because of worsening asthma. ...
>
> Because of her objective [peak flows] as well as subjective [cough, wheeze, increased use of inhalers] symptoms at work, and improvement away from that environment, I conclude that Ms. Sewell has developed occupational asthma. This was initially triggered by exposure to ozone, and she now reacts to smoke, exhaust fumes, infection, moulds strong perfume and fumes.

The Employer called as its expert witness Dr. Matthew Burnstein, who is also not a specialist, but who is the President of the Occupational and Environmental Medicine Association of Nova Scotia. He was accepted as an expert with respect to the matters covered in his Report to counsel for the Employer dated January 18, 2001, which was submitted in evidence, having been provided in advance to counsel for the Union. Never having examined the Grievor, Dr. Burnstein addressed the relationship between the Grievor's illness and the conditions of her workplace, as he understood it from the medical records. He states in his written report, which is in evidence;

> Ms. Sewell has a history of respiratory complaints, which predate the 1994 ozone exposure. Dr. Leitch, in a referral note to Dr. Stern on September 13,1995 writes, "For many years she has been troubled with a cough (in childhood it was labeled bronchitis)". Dr. Bowie, in his report dated May 22,1996 states, "She notes that she had bronchitis as a child up until the age of six, this tended to occur mainly in the

> Spring, two to three times a year". Bronchitis does not typically have a seasonal pattern. An individual who describes a seasonal pattern to their respiratory complaints most likely has asthma, triggered by a seasonal or allergen. In the Spring, this would typically be grass or tree pollen. In the same letter, Dr. Bowie goes on to say that "She was good until approximately the age of 20, when she began having bronchitis, mainly in the Spring again. Often times this would be associated with fever, although on occasion, it would not be". Again, a seasonal "bronchitis" is probably not an infection (unless associated with a fever) but an asthmatic reaction. Again, this is suggestive of a pre-existing asthmatic condition.

I do not, on this basis, find that the Grievor suffered from asthma prior working at the Central King's Rural High. However, Dr. Burnstein's testimony suggests that I should be slow to conclude more than that the Grievor was not diagnosed as having asthma until October 18, 1995. If she had asthma on that date and nothing that happened in the preceding year that, standing alone, could have caused it then she probably had asthma before September 23, 1994, although conceivably she contracted it in the mean time.

I have found that the level of ozone in the Grievor's workplace on September 23, 1994 was below the threshold limit value of .1 ppm approved by the Department of Labour's hygienist. In fact it was below .05 ppm. There is no evidence whatever that ozone gas at anything below that threshold limit value, let alone below half that, did cause, or could cause, the Grievor's asthma. Indeed, it is not my understanding that any single minor exposure would ever cause asthma.

All I have, and all Dr. Roddis or any of the doctors treating the Grievor have ever had, was the Grievor's own assertion, and probably honest belief, that she did not have asthma before September 23 and did have it at some point after that date. In ascribing her asthma to her exposure to ozone on September 23, 1994 neither Dr. Leitch nor Dr. Roddis appear to have known how minuscule her exposure in fact

was, and, perhaps for that reason, neither of them appears ever to have explored whether, when or why asthma might have developed apart from that.

All of the specialists the Grievor saw, except Dr. Bowie, either do not address the cause of the Grievor's asthma or simply accept the statement as to cause put in her medical file on the basis of her own assertion, and Dr. Bowie says nothing in his report, which is in evidence, to support the conclusion that the Grievor's asthma was caused by her exposure to ozone gas on September 23, 1994. Although he mentions that the Grievor "felt there was some problem with gasses", as I emphasized in setting out the facts above, Dr. Bowie simply reported that the Grievor's "mild bronchial hyper- reactivity...could well be aggravated by her environmental exposures at school and indeed perhaps even around home." He also stated that he "suggested to her that she should try to make her environment as dust free as she can". His report continues, "I would prefer her to avoid definite exposures to aggravating factors if at all possible, although it was my feeling that if she used the Pulmicort on a regular basis that she may well be able to return to her previous occupation...". I therefore do not accept Dr. Roddis' opinion that the Grievor's asthma was initially triggered by exposure to ozone on September 23, 1994.

In this Grievance the onus is on the Grievor, and the Union on her behalf, to satisfy me on the balance of probabilities that she was "injured in the performance of [her] duties." Her assertion and the medical evidence do not satisfy me on the balance of probabilities that her asthma was caused by her exposure to ozone gas on September 23, 1994. Indeed, my conclusion is that her asthma was probably not caused by exposure to ozone gas on that date or at any other time. There is simply no evidence of an exposure significant enough to have caused the Grievor's asthma.

There may well have been a faint odour of ozone in the Grievor's workplace on September 23, 1994, and possibly even sufficient remnants to cause some watering of the eyes or nose in particularly sensitive people, but that does not prove that the ozone treatment caused the Grievor's asthma. Indeed, there is no evidence before me that any odour alone can cause injury, although, of course, the substances whose presence are normally indicated by odours may do so. Furthermore, odours may elicit conditioned responses to the chemicals they are assumed to indicate, even if the chemicals are not in fact present, or are not present in sufficient quantity to cause any injury.

Therefore to find that the Grievor was "injured in the performance of [her] duties" I have to be satisfied that her asthma, which is the basis of her claim here, was an injury suffered other than because of ozone on September 23, 1994 but in the performance of the Grievor's duties. Other than "the ozone incident", virtually all of the evidence before me relevant to this substantive issue relates to the physical condition of the Grievor's workplace and her health after September 23, 1994. As I have said, other than repeating the history none of the specialists to whom the Grievor was subsequently referred addressed the probable cause of her asthma.

Having found myself unable, on the facts, to accept Dr. Roddis' opinion that the Grievor's asthma was initially triggered by exposure to ozone gas I see some difficulty for the Grievor and the Union in that their expert witness identified that exposure, not other aspects of her workplace, as the initial trigger of the Grievor's asthma. Nevertheless I must address the submission of counsel for the Union that the Grievor was "injured in the performance of [her] duties" because, as counsel for

the Union put it, her chronic asthma was caused by exposures in the workplace subsequent to September 23, 1994 and every triggering thereafter worsened it.

At the risk of being unduly repetitive I must stress that the only question for me here is whether the Grievor was "injured in the performance of [her] duties". It is not for me to decide whether, or why, the Grievor was sick for some reason other than the asthma she and the Union claim constituted her injury in the performance of her duties, nor is it for me to decide whether the Grievor was properly accommodated by the Employer for her mild/moderate asthma, which I suppose was arguably a disability.

After September 1994 the Grievor returned to work and for the remainder of the 1994-5 school year had only three days of illness, although she testified that she had "asthmatic episodes which were not always debilitating". The Grievor's testimony was that what caused those episodes was paint, glues, some carpeting, mould, toners, whiteout, perfumes, cigarette smoke, some floor cleaners with ammonia in them, WD 40 and powders like fibreglass powders and pesticides. This is a wide range of substances, not peculiar to the work place and not sharing either chemical or physical characteristics. There is no evidence that they are all irritants to one suffering from asthma. This suggests to me that by this time the Grievor had self-identified as suffering from multiple chemical sensitivity, which is often described as environmental illness, although she avoided describing herself in the hearing before me as having had this condition, concentrating instead on her asthma. I need not, and do not, make any finding about that condition.

I find the Grievor had not been "injured in the performance of [her] duties" during the 1994-5 school year.

The Grievor testified that after she returned to work in September 1995, with 70% of her time in the inadequate counselling office, she had more and more frequent asthmatic episodes, coughing, gagging, hoarseness, headaches and feeling fatigued and she found it difficult to process information. From that point on the Grievor's focus became getting an office where she felt she could work in spite of her health concerns. However, there is no medical evidence that at that point the Grievor had asthma that precluded her from working. In October Dr. Stern confirmed that she had mild asthma but did not suggest that she could not work. Dr. Brown found that she did not have any allergies and, except for two days, she worked continuously until the end of February. On February 29 she ceased to work on the basis of Dr. Roddis' direction, although she had no allergies, which is what she went to Dr. Roddis to be tested for.

Dr. Roddis' report to Dr. Leitch stated in part "Rhonda has I think true environmental sensitivity to moulds. ...Her description of her working conditions appals me - mould in the ceiling - no window in the office." From this and the other medical records in evidence it appears that, like the Grievor, and unlike Dr. Stern, Dr. Roddis and then Dr. Leitch concluded that the Grievor suffered from environmental illness precipitated by the office she worked in. No case was put before me that the Grievor was "injured in the performance of [her] duties" on that basis. I recognize that Dr. Roddis' certificate to the School Board stated that "Rhonda Sewell has acute reactive airway disease and will be unable to work until April 8, 1996", but I do not accept that diagnosis. Dr. Roddis did nothing to test for asthma, other that to determine that the Grievor had no relevant allergies, including no allergies to mould, and no specialist ever found the Grievor's asthma to be more than "mild". I note that according to Dr. Gjevre's report dated April 6,

1998 she stopped her puffers in December 1996 and stayed off them until she saw him. He described her asthma as mild/moderate at its worst.

The expert witness called by the Employer, Dr. Burnstein, addressed the causes of asthma. He noted, consistently with the testimony of Dr. Leitch and Dr. Roddis, that;

> Asthma may be allergic in origin (extrinsic asthma). It can be triggered by pollens, mould, dust, etc. -the same things that are typically associated with allergic rhinitis (runny nose). Asthma may also be triggered by non-allergic means (intrinsic or idiosyncratic asthma) .Exercise, stress, change in humidity, change in temperature, and infection can all trigger asthmatic reactions.

Dr. Burnstein went on to comment on mould as a cause of non-allergic asthma;

> Dr. Leitch, in a report dated May 13, 1996, diagnosed an environmental "sensitivity" to mould. Dr. Roddis, an Allergist, has also suggested that mould is a trigger for Ms. Sewell's asthma. It is suggested that the mould in her workplace triggers her asthma. There is little objective evidence to support this theory. The allergy testing performed for mould was negative

After she was "put off work" by Dr. Roddis the Grievor did not then work again until school started the following September. When she saw Dr. Bowie in the late spring and summer he confirmed that she suffered from "mild bronchial hyper-reactivity" which "could well be aggravated by her environmental exposures at school and indeed perhaps even around home". His focus was on making her environment "as dust free as she can" and suggested "that if she used the Pulmicort on a regular basis that she may well be able to return to her previous occupation".

On the evidence it cannot be said that up to this point the Grievor had been injured in the performance of [her] duties. Dr. Bowie's advice suggests that her home conditions may have been part at least of the cause of any asthma she had suffered. The evidence that the Grievor had become ill that summer from the smell of pipe smoke and perfume suggests that whatever she suffered from was not peculiar to her workplace. At most, following Dr. Roddis' advice, based as it was on the Grievor's description of the effect of her working conditions on her health and on Dr. Roddis' assessment of the Grievor's supposed reaction to mould in the doctor's own office, the Grievor was off work to avoid injury, not because she had been injured. Dr. Bowie's advice, however, was that it was not necessary for her to stay off work to avoid illness.

I cannot enter the fray over whether "the animal room" was suitable as an office for the Grievor after she returned to work in September of 1996. The Grievor's desire to have a workplace with a window is certainly understandable, particularly for someone with asthma, even mild asthma. But, as I have said, whether the School Board properly accommodated that "disability", and whether her workplace could be said to have been unsafe for her, are not the questions properly before me.

The evidence is that after she returned to school in the autumn of 1996 the Grievor's peak flows declined, while she was at school. However, Dr. Leitch found a cough but no wheezing, which suggests a bronchial problem but not asthma. Undoubtedly, the Grievor felt ill, She testified that when at work she coughed, gagged, lost her voice in a way that she found "embarrassing", and felt fatigued and that she seemed to have trouble doing basic tasks, and a couple of times got lost going home. I note Dr. Burnstein's unrefuted testimony that "An asthmatic may become anxious during an attach, which further contributes to the sensation of

difficulty breathing. Confusion or reduced cognitive function is not associated with asthmatic episodes, unless an individual is extremely anxious or approaching respiratory failure." In cross examination Dr. Leitch agreed that asthma doesn't cause cognitive impairment but anxiety does.

On October 21 Dr. Leitch "put the Grievor off work "for 4 weeks or until necessary changes in her environment have been made", following an office visit in which the findings were that her peak flows were down since she had started school and "Feels brain is "foggy". tearful and upset. Nil o/e [on examination]". I have not set out above or up to this point discussed the Grievor's peak flow charts, which are in evidence. She started maintaining them on Dr. Bowie's advice in the summer of 1996. The best evidence before me of their usefulness is that of Dr. Burnstein in his report to counsel for the Employer, which he addressed in his testimony. Nothing Dr. Roddis said about peak flows in general contradicts what he said, as follows;

> Peak flow meters have been used to monitor asthma. They are a handy device, though do not have the reliability of spirometers. The results are completely effort dependent. There are a number of protocols in place for tracking peak flow meter measurements. Generally, several readings are taken at several specific points during the day. The best reading is charted. Fluctuations in the range of plus or minus 10 percent are usual, and are not the sign of disease. A change of 20 percent or greater is considered significant. Too little a variability suggests that the patient is not performing peak flow meter readings properly. Changes in medications must be documented on the chart. Unless this is documented, variations in readings will be difficult, if not impossible, to interpret.
>
> Reviewing the peak flow meter records provided [by the Grievor] is difficult, as no times are given. However, the vast majority of readings fall in the 300 range, +/- 20 percent (240 -360). There are prolonged periods (April 1997) where the readings are almost identical, without the 10 percent variation that one would normally expect in properly performed peak flow readings.

Taking into account the fact that the Grievor's peak flow readings were down when she visited Dr. Leitch in the Autumn of 1996, and what Dr. Roddis said about them in her report of Dec 12, 2000, the evidence does not satisfy me that up to the point

where she left work on October 29, 1996 the Grievor had been "injured in the performance of [her] duties" by her workplace causing or significantly worsening her asthma. Therefore, when the Grievor's request to Dr. Gunn and Mr. MacDonald on November 5 requesting injury on duty leave was refused by Dr. Gunn's letter of November 13 there was no denial of leave in breach of the Collective Agreement.

Because the Grievor was never placed on injury on duty leave, and the Union has not made out its case that she was entitled to have been, the last phrase of Article 26.01 does not come into play. That is, the question of whether not a teacher has been "medically certified able to continue teaching" only arises where the teacher has been, or should have been, "placed on leave with full salary" in accordance with that provision of the Collective Agreement. The fact that the Grievor continued not to work because Dr. Leitch said that she should not return until "necessary changes are made to her workplace and NOT BEFORE" and thought that she had "TRUE environmental sensitivity and [could] not return to work in her present school until it [was] cleaned up" [see Dr. Leitch's Aetna Insurance forms of December 5, 1996 and January 28, 1997, quoted above] does not establish that she had been "injured in the performance of [her] duties" by asthma when she stopped work on October 29, 1996.

I have taken the evidence before me about the continuing air quality problems at Central King's High into account to the extent that it is relevant to my determination that the Grievor's asthma has not been proven to have been caused by her workplace. Her negotiations with the School Board over her office in the context of returning to work and particularly in course of attempts to settle this Grievance do not seem to me to be relevant.

Counsel for the Union referred to my awards between the Union and The King's County District School Board in *Van Zoost, Denial of Leave for Injury on Duty* February 23, 1996 and *Manzer, Denial of Leave for Injury on Duty* July 29, 1997. (both unreported). In those awards the fact that the Employer did not use Article 26.05 of the Collective Agreement to arrange for an independent medical examination of the Grievor was held to be significant. It provides;

> 26.05 For the purposes of this Article, the School Board may require the teacher to be examined by a medical practitioner agreeable to both the teacher and the School Board.

In both of those cases the Grievors were off work for some time before they were advised that the School Board did not accept their absences as being caused by injury in the performance of their duties under Article 26.01, and on balance the evidence did not refute their claims that such was the case for the period for which their grievances were allowed. Here the Grievor's claim was denied very shortly after she made it, and the evidence does not support her claim. Where the School Board is satisfied that the specialist reports it has do not support a claim for injury on duty leave it may chose not to invoke Article 26,05. I still think the School Board should attempt to use Article 26.05 in a case such as this, but its failure to do so does not give the Grievor the right to leave under article 26.01.

Counsel for the Union argued that asthma is recognized as a compensable workplace injury by workers' compensation boards and invoked my statements in *Van Zoost* where I said, at p. 39;

> I do think the evident intent of the parties in agreeing to Article 26 is that teachers not be required to use up sick leave for what in many other contexts would be considered compensable workplace injuries and would not require workers to use up sick leave. ...

I am still of that view. However, I have not found here that the Grievor's asthma has been proven to have been caused by her workplace.

Referring again to my award in *Van Zoost*, counsel for the Union submitted that the Employer has to "take the victim as it find him". I said there, at p. 43,

> The Grievor may have been particularly vulnerable due to his asthma, but [that] does not preclude a finding that his non-asthma illness was caused by airborne contamination in the school, if that contamination was in fact the trigger. Causation is not a question of whether the contamination made, or would make, others ill; it is a question of whether it made him ill.

In the result I held that airborne chemicals in the school more probably than not caused the Grievor to become too ill to work (although they did not cause him continuing multiple chemical sensitivity.) I have not found that to be the case here.

In *Manzer*, where the Grievor succeeded in part on a claim that his debilitating asthma was caused by mould in his school workplace, at p. 42 I addressed the "cause" of asthma and asthma attacks, in the context of asthma caused by mould allergy, which was proved there;

> where an atopic individual has been exposed to an antigen and an immunologic process has taken place which has resulted in "the body being prepared for future encounters" an allergy "has been sustained" or developed. An individual's response to any such allergy then "tends to be consistent". If that immunologic process can be proved to have been caused by workplace conditions and to prevent further work, it will be compensable. Similarly, I have concluded, it will constitute injury in the performance of duties for purposes of Article 26 of this Collective Agreement.

In the case before me here not only was there no allergy, it has not been proven that the Grievor's asthma, which made her "particularly vulnerable" was caused by workplace conditions. Under those circumstances what then of asthma attacks in the workplace? In *Manzer*, I continued on pp. 43 and 44 in terms that are applicable to the Grievor's asthma here, although there was no allergy involved;

> An incident of allergic reaction itself, if sufficiently serious, or its potential recurrence, is what will disable the individual from working. Under this Collective Agreement it must be proved that the teacher did suffer an allergic reaction and that the allergy which resulted in the reaction was an allergy caused by the workplace, in the sense described ... above. Where the latter is proved, whether the allergic reaction was triggered at work is not in itself significant. *On the other hand, an incident of allergic reaction because of an active allergy which has developed or to which a teacher has been sensitized by non-workplace exposures cannot be the basis of a claim for injury on duty leave, whether or not it has been triggered at work.* [emphasis added]
>
> The critical point here is that I have not concluded and do not hold that every workplace allergic reaction is an injury in the performance of duty for the purposes of Article 26 of this Collective Agreement. If a teacher has an active allergy to which he or she has been sensitized by non-workplace exposures he or she cannot claim injury on duty leave on that basis. The injury or illness simply cannot be said to have been caused by the his or her duties. It is the activation or development of the allergy that I take the parties to this Collective Agreement to have intended to be considered an "injury", not an incident of allergic reaction. It is here that I would invoke the common sense I relied on at p. 40 of *van Zoost*:
>
> > As a matter of common sense, I do not attribute to the parties an intention that Leave for Injury on Duty is to be available for ordinary illnesses, like colds or flues, even if it could be concluded that, on balance of probabilities, they were contracted at school. More careful consideration confirms that conclusion on three bases: first, the whole tenor of Article 26 suggests something serious and at least temporarily disabling in the ordinary sense of that term; second, the cause of such minor illnesses is difficult to identify, partly because they may in fact be multi-causal; and, third, the Article appears to be to some degree a substitute for the Workers' Compensation Act, which does not apply to teachers...
>
> While the development of an allergy is a very serious matter, in a person with an allergy each individual reaction must be considered ordinary, the reaction is clearly multi-causal and it is the sensitization, not each reaction, which I understand to be a compensable injury.

In my opinion the same is true of the development of asthma and asthma attacks.

The Grievor suffered from depression in the Spring of 1997. Counsel for the Employer referred me to p. 65 in *Van Zoost* where I stated,

> "I do not accept the alternative submission by counsel for the Union that, even if the Grievor's illness is a result of his psychological state, that state was in turn caused by airborne contaminants at work and in respect of his continuing illness he can therefore be said to have been injured in the performance of his duties, in accordance with Article 26.01. That connection is not proven and even if it were would be too remote."

Counsel for the Union responded that here the connection is not too remote and is proven, referring to Dr. Leitch's progress notes of June 6, 1997, and her testimony. Both may be true, but, because I have not found that the Grievor was off work because she was "injured in the performance of [her] duties" by her asthma, her depression, whether arising from her asthma or the fact that she was not working, cannot be said to itself be an "injur[y] in the performance of her duties.

Conclusion and Order.

As I stated at the outset of my reasons for reaching my decision, I have concluded that the process issues raised by the Employer do not preclude me from dealing with the issue of substance. I have, however, concluded that the Grievor was not, and is not, entitled to injury on duty leave for the period in issue.

In this Grievance the onus is on the Grievor, and the Union on her behalf, to satisfy me on the balance of probabilities that she was "injured in the performance of [her] duties." Her assertion and the medical evidence do not satisfy me on the balance of probabilities that her asthma was caused by her exposure to ozone gas on September 23, 1994. Furthermore, the evidence does not satisfy me that up to the point where she left work on October 29, 1996 the Grievor had been "injured in the performance of [her] duties" by her workplace causing or significantly worsening

her asthma. Therefore, when the Grievor's request to Dr. Gunn and Mr. MacDonald on November 5 requesting injury on duty leave was refused by Dr. Gunn's letter of November 13 there was no denial of leave in breach of Article 28.01 the Collective Agreement.

The Grievance is denied.

Innis Christie
Arbitrator

10 p