IN THE MATTER OF AN ARBITRATION
UNDER THE COLLECTIVE AGREEMENT
AND THE ONTARIO *LABOUR RELATIONS ACT*

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

("the Employer")

AND

ONTARIO PUBLIC SERVICE STAFF UNION

("the Union")

GRIEVANCE OF SHAWN KOZA

FINAL AWARD

Arbitrator:	**Barry Stephens**
Union Counsel:	**Roberto Henriquez, McMahon Molyneaux Henriquez**
Employer Counsel:	**Mark Mendl, Mendl Workplace Law**

Heardings on January 17, June 5, July 8, 23, 30, October 22, November 9 and December 18, 2020; January 18, February 12, 2021
And by Video Conference on May 14, June 2 and July 7, 2021.

Decision Released December 7, 2021

AWARD

[1] This case involves five grievances that are related to events around the termination of the grievor, who worked as a Staff Representative for the employer. The grievor had approximately 11 years of service, and was terminated for cause on September 9, 2019, for being continuously absent from work without leave or authorization for the period from September 3 to 9, 2019, and for failing to provide a medical note when asked to do so. In the letter of termination, the employer characterized the grievor's conduct as unacceptable and insubordinate.

[2] The main facts are not in dispute. The grievor advised his supervisor, Denis Boyer, that he was filing a health and safety complaint about a training assignment under the Member Development Training (MDT) program that involved work with a particular individual with whom the grievor had had a previous conflict. Boyer's response to the health and safety complaint was to ask the grievor whether he would be interested in a "buy-out" package to voluntarily end his employment. The grievor made a buyout proposal. The employer's response was that the grievor's proposal was not acceptable, and the employer did not make a counter-proposal. The grievor was advised his grievances would be discussed on his return to work the following week. The grievor then went off work ill, and it is this period of illness that led to the grievor's termination.

[3] The parties agreed that there were five grievances that were relevant to the events that led to the grievor's termination, and all of them were consolidated in this hearing:

2019-44	Termination Grievance
2019-50	Discrimination in Termination
2019-49	Improper Request for Sick Note
2019-48	Violation of Occupational Health and Safety Act, s. 25.2(h)
2019-51	Toxic Work Environment and Harassment - this grievance to be addressed as part of compensation, pending outcome of grievances above

There was a sixth grievance that did not form part of this hearing and is not affected by this award:

2019-52	Parties agreed this grievance would be placed in abeyance pending the outcome of another arbitration hearing

Evidence

[4] Denis Boyer, the Region 6 & 6 Supervisor for OPSEU, was the main employer representative in the events leading to the grievor's termination. Unfortunately, Mr. Boyer became ill in the early stages of the hearing and, although he was expected to testify at some point, he did not recover and passed away in December 2020. I offer my condolences to his family, friends and colleagues for their loss.

[5] Brock Suddaby was the Senior Advisor Employee Relations at OPSEU. He was directly involved in the events related to the grievor's termination. His evidence-in-chief was provided by way of a will-say statement that he confirmed at the hearing. Suddaby stated that the grievor was terminated for insubordination and for being absent from work from September 3 to 9, 2019 without reasonable cause or justification. The sequence of events is not in dispute. The grievor advised Boyer on August 28, when the buyout issue was first raised, that he would take the rest of that week to consider the

buyout suggestion. He also told Boyer on August 28 he would to be off sick as of Tuesday, September 3. Although the grievor was in the office from August 28 to 30 (Wednesday through Friday), he spent his time cancelling scheduled meetings and packing personal items in his office. He did not attend work from September 3 through to Monday September 9, the date of his termination. On August 30 the grievor sent Boyer an email saying he would voluntarily resign in exchange for two years of salary continuance including benefit coverage. Boyer responded to state that the grievor's proposal was "not even in the ballpark" and that he would discuss the grievor's grievance about the MDT assignment when the grievor returned to work after the Labour Day long weekend.

[6] On Tuesday, September 3, the grievor wrote Boyer to ask him to forward the application forms for Short Term Disability (STD) to his personal email address. That email prompted an email exchange between the two men, which led to Boyer making his first request for medical information.

[7] There was no deadline associated with this request for information, just a request the documentation be provided at the grievor's "earliest convenience." Suddaby testified that the grievor's response indicated that he was refusing to provide medical documentation.

[8] The "threshold" mentioned by the grievor is in Article 23.02.02, which reads as follows:

> 23.02.02 After five (5) consecutive days of absence due to illness, no leave with pay shall be allowed unless a certificate from a legally qualified medical practitioner is forwarded to the Employer certifying that the employee is unable to attend to their official duties.
>
> After frequent absences due to sickness, the Employer may request a medical note or require the employee to submit to a medical examination, at the expense of the Employer.

The grievor took the position at the time that Article 23.02.02 prohibited the employer for asking for a sick note except in the two circumstances set out in the article. During the hearing the union agreed that Article 23.02.02 did not prevent the employer from asking for a medical note in circumstances where there were reasonable grounds to suspect abuse of sick leave.

[9] The next day, September 4, Boyer emailed the grievor a longer and more formal communication about his absence. Boyer detailed his understanding of how the buyout discussions had arisen and been disposed of and set a deadline to provide the information, stating as follows:

> Based on the sequence of events described above, your assertion that you would be off sick before having consulted with your "medical Team", the fact that you did not report for work on September 3 without contacting your supervisor or Employee Relations, as well as a less than clear response to my specific request for a medical certificate, are issues that of are [sic] great concern to the Employer. Further, your calendar shows no appointments except for pre-scheduled sector conference calls in what is normally a busy time of the year. Lastly, you verbally advised me that you would be off sick on August 28th, but I have no further notifications regarding any credits being used on August 29th and 30th.
>
> Under the circumstances, your absence remains undocumented and questionable. Article 23 of the OPSSUE CA does not preclude the Employer from requiring documentation to substantiate absences that the Employer reasonably considers suspect.

> You are hereby ordered to provide medical documentation and any further information you deem relevant to explain your absence from work since last Thursday, August 29/19. If this information is not provided by 4 p.m. on Thursday September 5, you will be deemed to have abandoned your position and as a result, may be subject to discipline, up to and including termination.

[10] On Friday, September 6, Suddaby emailed the third request for medical information setting out another deadline for the information. Suddaby stated that the grievor had "one final opportunity" to provide documentation by 7 p.m. that day.

[11] The grievor did not respond to the emails of September 4 and September 6. He was terminated on the following Monday, September 9. Suddaby testified that the employer did not receive any documents with respect to the grievor's medical condition until just prior to the first hearing date in this arbitration. Suddaby testified that the employer's view was that the grievor's sickness was not legitimate. He had advised the employer almost a week before his absence that he would be sick the following week. In addition, the grievor attended the workplace over the weekend, on Saturday, August 31, returning his OPSEU laptop and cellphone and removed his personal effects from his office. He also changed his business phone greeting to state that he would be absent until September 11. There were no meetings or other work activities scheduled on the grievor's work calendar for the month of September 2019.

[12] In cross-examination Suddaby confirmed the employer did not treat this case as a deemed termination. He stated that he normally communicates with employees by email

or in person. He testified that he preferred to use email and that letters are only sent via Canada Post when employees were hired. He did not want to send the grievor a letter because it would take too long to be delivered. In this case, he used the grievor's home email address because he was not at work and the home address was the same address the grievor was using for the STD application process. He confirmed that it was normal for the employer to advise the insurance carrier immediately as soon as an employee was terminated. Suddaby stated that he was not aware of any discussion among management officials about the possibility that the grievor's health may have impacted his actions during the relevant time.

[13] Stephen Giles was a Senior Human Resources Advisor for OPSEU, responsible for overseeing the administration of the sick leave STD plan. He testified that, while the employer was aware that the grievor had requested the STD application forms, the employer was not made aware of when employees apply for STD, and that he did not become aware that the grievor had applied until his application was denied in October, well after his termination. He stated that the employer always followed the medical conclusions reached by the insurance carrier, even in cases where the employer had concerns about the carrier's decision. Giles testified that, in this case, the employer had concluded that the grievor's absence was not related to an illness because the grievor had stated during the week of August 26 that he was going to be sick the following week. His subsequent actions indicated that his departure from the office was not a result of illness but of a decision to "elect to not come back to work." Under cross-examination Giles

confirmed that the STD packages were routinely sent to employees by both email and regular mail. Giles agreed that he was not a doctor and agreed that the question of whether the grievor qualified for STD was different from the question of whether he was suffering from an illness.

[14] Alison Raison testified for the union. Raison was a social worker with a private practice in the Thunder Bay area. She was a member of the Ontario College of Social Workers and Social Service Workers. She had been a social worker for more than thirty years. Her clients were mostly adults, who presented with a variety of issues such as past trauma, depression, anxiety, and related problems. Raison stated that, as a social worker, she was not permitted to render a diagnosis of mental disorders, but that she worked closely with physicians and psychiatrists who have the authority to render diagnoses, and that those practitioners often reviewed her assessments of her clients when reaching their own conclusions. She testified she worked with clients with a variety of mental health conditions, and she had used different types of psychological therapies. She testified that she has a copy of the DSM-IV manual (now DSM-V) used to diagnose mental health conditions. She stated that it took from six months to a year to see a psychiatrist in the Thunder Bay area and from two weeks to three months to book an appointment with a family doctor.

[15] Raison's first contact with the grievor was after he had been in a car accident in March 2018. She stated that he told her he had problems with the treatment he had

received at the hospital and with the other person who had been involved in the accident. The grievor also reported that he was experiencing considerable pressure at work at the time. Raison recommended he take some time off in order to process his reactions. She saw him several times in April and May 2018, at which point he was able to cope on his own and she advised him to call if he needed any further assistance.

[16] Raison next saw the grievor on September 2, 2019. At that time, he told her that he felt overwhelmed and hopeless. She described him as at times shaking, in tears, having trouble finding his words, and he told her he was not sleeping well. She concluded that he was not someone who could perform professional duties, and she recommended he see his family doctor in order to find out if it would be appropriate to take some time off.

[17] Under cross-examination Raison confirmed she was not a licensed psychotherapist. She stated that, although she was aware the grievor was being treated by his family doctor, Dr. Toppin, she did not speak directly to Dr. Toppin about the grievor. She stated her assessment of the grievor was based on what he was reporting but also her observations of his emotional state as described above. She noted during the session that he had a diminished ability to think or concentrate. She stated she assumed the events he was describing were described accurately but she was also aware that there was always "another side." She added she had to base her interventions on what she learned and observed during the session. She stated that she did not ask the grievor if he had been using prescribed or recreational drugs. She was not aware the grievor had been

in discussions to leave his job. Raison agreed that "stress" was not identified as a disability under the DSM V.

[18] Dr. James Toppin was a General Practitioner in Thunder Bay. He was the grievor's GP since 1990. He provided diagnosis and treatment for approximately 1700 patients for physical and mental illnesses. He testified that if he was unsure about the diagnosis of a mental illness, he referred the patient to a psychiatrist. Dr. Toppin stated that the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) was the standard reference for the medical profession with respect to mental illness, and that it provided criteria for diagnosis as well as suggested treatments of various disorders.

[19] Dr. Toppin testified about the difference between adjustment disorder and major depressive disorder (MDD). MDD was a deeper-rooted condition that involves the individual's past experience. Adjustment disorder was a form of depressive state that arose from the individual's difficulty in absorbing the impact of a traumatic external event and reorienting their lives to a new reality created by the event. Dr. Toppin stated that his method of diagnosis included information reported by the patient as well as observations of their behaviour during assessment.

[20] Dr. Toppin testified about the history of the grievor's treatment for mental health problems. The first occurred in 2010 as the result of the end of a relationship. Dr. Toppin testified that he diagnosed this incident as adjustment disorder and treated the grievor

with medication. He noted that the grievor had a relapse after finishing his course of treatment and returned to taking the medication for several months thereafter. Dr. Toppin testified that the adjustment disorder might have sparked an underlying MDD, which could have explained the relapse after first going off the medication.

[21] The grievor's next mental health issue arose in response to a motor vehicle accident in 2018. Dr. Toppin testified that the grievor was anxious and stressed in the aftermath of the accident but reported the source of his problems to be related to workplace issues. He stated that the grievor seemed to recover quickly from this episode.

[22] Dr. Toppin was asked about booking procedures in his office. He testified that if a medical issue is 'acute' he can see a patient within an hour but that otherwise an appointment can take between 2 to 6 weeks to schedule. He stated that after speaking to the person in his office who had taken the grievor's call, he determined the grievor was "under pressure" and that the need for an appointment was "urgent but not life threatening." He offered the grievor an appointment the following week, on September 10.

[23] During the September 10 appointment the grievor advised that he had been fired the night before. Dr. Toppin testified that the grievor exhibited symptoms including: upset, crying, flustered, agitated movements, a "hang-dog" demeanour, difficulty finding words and answering questions, and an uncharacteristic slovenly appearance. He

testified that, although he did not conduct a full mental status examination, his observations amounted to “about 90%” of such an examination. He concluded the grievor was experiencing an adjustment disorder at that point, observing that the DSM-V indicates that MMD is not normally diagnosed unless the patient exhibited depressive symptoms for a period of more than two weeks. The grievor had a follow-up appointment on September 24. The doctor observed at that point that he was “still crying” and reached the conclusion that the grievor was suffering from a more severe depression and suspected that the grievor may have been suffering from a “low level” depression since 2018 which had resurfaced because of the loss of his job. Dr. Toppin stated that it was possible that the grievor had known that he would need time off after the employer raised the possibility of a buy-out, because he may have felt the onset of the symptoms of his depression.

[24] During cross-examination Dr. Toppin agreed that his report, dated November 11, included all his observations up to that point, not just the results of the September 10 appointment. He stated that the assessment on September 10 lasted approximately 10-12 minutes and included time to fill out the STD form. He testified that he changed his view about the severity of the grievor’s condition during the September 24 appointment because he observed depression-related symptoms that had been in place for more than two weeks, at which point he diagnosed the grievor with depression.

[25] Dr. Toppin was cross-examined closely on his notes, and particularly why his clinical notes did not contain direct references to the criteria for depression. He responded generally that he does not take detailed notes and tends to record either observations or conclusions with respect to how the patient presents and responds during an assessment. At times he would note a conclusion in his notes, while at other at times he might note a detail that points to a conclusion. It was put to Dr. Toppin that he was "jumping to conclusions" to conclude from the fact that the grievor was wearing sweatpants that he was depressed. He responded that he had diagnosed depression based on several factors. The grievor's appearance was one factor given that he knew the grievor to be someone who normally dresses well, and the notation about the grievor wearing sweatpants to the November session was his way of recording that the grievor had an unusual unkempt appearance, which reflected his low mental state. Dr. Toppin stated that he observed that the grievor was better dressed when he arrived at the appointment on January 14, and that this was an indication that his mood had improved in that he was taking better care of himself.

[26] Dr. Toppin stated that he had known Raison for years, was familiar with her reports, and had found her to be a reliable health care professional. His conclusion was that the grievor's state of mind in 2019 was very similar to the depressive episode after the motor vehicle accident in 2018, that the grievor was unwell and that he had no information that pointed to a better explanation than a recurrence of the adjustment disorder and MDD.

[27] The grievor, Sean Koza, worked previously as a psychiatric nurse. He joined OPSEU staff in 2008 in a temporary position, and eventually became a Staff Representative. He testified that Denis Boyer became his supervisor approximately five years prior to his termination.

[28] The grievor testified that he lived about a half hour drive outside of Thunder Bay and his home was in a "fringe" area for internet access. For this reason, he testified, he did not often work from home. He stated that his co-workers, including Boyer, were aware of these limitations on his access to internet.

[29] The grievor testified about his medical history. He was involved in a motor vehicle accident in March 2018. Ultimately, this accident contributed to his decision to begin to prepare for his retirement, including enrolling in the employer's pre-paid leave plan, which he hoped to use as a means of retiring early. After he returned to work from the accident, he said, he experienced a higher-than-normal workload, which included often driving to Dryden, about four hours from Thunder Bay. He testified he often felt stressed and exhausted. He developed some concerns about the distribution of work because his opinion was that his assignment was more demanding than that of other staff and discussed these issues with Boyer, but no changes were made.

[30] One of the events that led up to the grievor's termination involved Membership Development Training. The grievor spoke to Boyer about one participant in the program with whom the grievor had previously had a conflict. He asked Boyer not to assign him to work with that individual during the MDT process. The grievor testified that Boyer got back to him later and advised him that the response to his request from higher-level OPSEU management was less than favourable, and that Boyer then asked him what it would take for the grievor to voluntarily leave his employment. The grievor said that the suggestion of a buy-out "hit me hard", and he contacted Boyer later that day to ask if he was "serious" about the question, and Boyer confirmed he was. The grievor said he would need a few days off to consider, get advice and respond, and that Boyer agreed he should do so.

[31] The grievor testified that he felt like his options were limited. He either had to "play ball" with respect to the MDT issue or take a buy-out. He stated that he assumed that if he did not take a buy-out he would be in danger of being terminated regardless. He needed to consider the possibility of a buy-out. The grievor responded to Boyer by email on August 30, stating that he would leave his position in exchange for two years' salary continuation with full benefit coverage. Boyer responded quickly by email to the grievor's proposal as follows:

> Hi Shawn.
> Your proposal is not even in the ballpark. We can discuss your grievances next week.

The grievor testified that he was "stunned" by the response. He advised Boyer that he would likely be taking sick leave the following week. The grievor testified that, given his history with mental health issues, he knew it would take a week or two to come to terms with events and, as he put it, "get the train back on the rails." He stated that he had taken similar leaves for mental health reasons in the past that Boyer had accepted, and he had covered his pay by using vacation or compensating times as permitted by the collective agreement.

[32] On Saturday the grievor drove to the Thunder Bay office twice to return items that belonged to the employer. He also cleared his scheduled for the month of September. These actions indicate the grievor did not expect he would be returning to work. He testified that he understood that the employer did not want him to continue working and that he "had to be prepared for termination."

[33] The grievor attended an appointment with his therapist, Raison, on Monday, September 2. He testified that he was an emotional "mess" that day, which was confirmed by Raison's evidence. He said that she advised him to get an appointment with Dr. Toppin because she thought it might be appropriate for the grievor to take time off from work. The grievor did not report to work on September 3. Boyer sent the grievor an email that day stating that the grievor should provide a medical note for his absence at his "earliest convenience." The grievor responded to Boyer that a medical note was not required under Article 23.02.02 of the collective agreement and that he intended to

grieve. He testified, however, that once he received Boyer's request, he took steps to secure an early appointment with his doctor. He conceded that he did not mention this fact in his response but that once it had been requested it was "understood" that he had to provide it. The next day, September 4, the grievor was able to secure an appointment with Toppin for September 10, the following week. He testified that the appointment was booked more quickly than was normally the case, and that he thought he was being compliant with Boyer's instructions by booking the appointment for the following week. He did not believe he was being insubordinate and that the appointment was booked at his "earliest convenience."

[34] The grievor began the process of applying for short-term illness benefits (STD) on September 3 by asking Boyer to arrange for the STD application package to be sent to his personal email address.

[35] Under cross-examination, the grievor stated the drive from the OPSEU Thunder Bay office was approximately 30 to 45 minutes, depending on the time of year and the weather. He agreed that he did not provide complete medical information to the employer until after having been ordered to do so as part of these arbitration proceedings. He stated that he had discussed the end of his employment with Boyer on one previous occasion but in the context of succession planning in the office, given that he intended to use the pre-paid leave plan to bridge to an early retirement.

[36] The grievor agreed that on August 28 he had advised Boyer he would be "off sick" the following week. He stated that he knew on August 28 that he would be sick on the following Tuesday, after the long weekend. He agreed he was not sick on August 28, 29 and 30. He testified, however, that he felt a mounting anxiety around the circumstances given that he was only 50 and was about to become unemployed. He stated it was "difficult to get his head wrapped around" the major life change he saw coming. He knew he needed time to manage his anxiety and would need to take time off work to do that.

[37] Employer counsel put to the grievor that clearing out his office and other actions indicated that he had decided that he would never return to work with OPSEU. The grievor responded that that was a decision that had already been made by the employer when they told him that there was a desire on the part of OPSEU management for him to leave. He agreed, however, that he had not been formally terminated. When it was put to him that his actions were not consistent with a person intending to return to work, he responded that his actions were consistent with a person who was not welcome back at work. The grievor agreed that the employer had the right to ask for a sick leave note despite Article 23 in cases where there was a reasonable suspicion of misuse of sick leave. The grievor acknowledged that he had asked the employer to send him the STP application forms by email.

[38] The grievor testified that he became aware that he had been terminated when he received a text from Lois Boggs, the OPSSU President, at approximately 5 p.m. on

Monday, September 9. Boggs advised the grievor to check his email. He testified that he drove down the road to download his email and read the letter of termination. He testified that, similarly, he did not read the September 5 deadline email notice sent by Boyer until the next day, September 10. Similarly, he testified he had not previously read either of the two 'deadline' emails, one sent by Boyer on September 4 and the other by Suddaby on September 5.

[39] The grievor was asked why it was that he saw his doctor on September 10 but that he did not get a medical report from his doctor until November 11. He stated that by the time he saw his doctor he was aware he had been fired and he "did not see any point" to providing the documentation. He stated in retrospect this was not a good decision but that he was not in a "good mental condition" at the time. The grievor acknowledged that he had posted a harsh comment about Boyer on a Facebook group shortly after Boyer's death. He stated that, while it would be difficult to return to work at OPSEU, he did not want to close off any options.

Employer Submissions

[40] The employer stated that the grievor had been terminated for being absent without leave from Tuesday, September 3 to Monday, September 9. The grievor had no valid medical reason to justify his absence, nor did he follow clear directions to provide medical information in a timely manner. The employer asserted that the only way to understand the evidence was to accept that the grievor had voluntarily absented himself

from the workplace, believing that the employer would eventually propose a severance package. All his actions were intended to serve this aim, and to increase the pressure on the employer to make a proposal for a buyout of his employment. The employer submitted that it had good reason to suspect the grievor's absence and to ask for medical confirmation. The union asserted he knew on August 28 that he was going to be sick the following week, but he did not ask for the STD forms until September 4. This was not explained. His statement that he knew he would need two weeks off to "get back on track" was incoherent and self-serving.

[41] The employer described as "incredible" the grievor's story about not reading the emails from Boyer and Suddaby setting deadlines for medical information. His evidence was not consistent with the surrounding known facts, including that the grievor had communications through the same email address with the employer both before and after the two emails in question. At the time the grievor was also expecting the employer would make an offer for a termination package. It was highly likely that the grievor was checking his email and that he read but decided to ignore the two messages. The employer argued that it did not matter why the grievor ignored the messages. He held the mistaken view at the time that the employer did not have the right to request medical documentation until after five days of absence, and he also harboured a deep animosity to Boyer, as was demonstrated by his Facebook post in the aftermath of Boyer's death. Either or both could have motivated the grievor to ignore the employer's clear directions.

[42] The employer argued the evidence demonstrated that the grievor had decided he was not going to return to work with OPSEU. He stopped working for the employer during the week of August 26. He attended the workplace that week only to work on disengaging from the job, cancelling meetings, organizing his personal effects, and so on. He ceased communicating using his work email address and he cleared his calendar of all meetings in the month of September. He drove to the office on Saturday to pick up his remaining personal items and to return all OPSEU property in his possession. He made the long drive to the office a second time on Saturday to return a file he had at home but had failed to return on the first trip. After that Saturday, he did not return to the office. There was no question that the grievor considered that his employment at OPSEU was over, yet he did not properly explain why in his evidence. His actions to terminate his working contact were taken prior to consulting with any of his medical advisors, which demonstrates that his decision to leave was unrelated to any medical considerations.

[43] The union argued that the grievor had a history of mental disorders, but the employer was not aware of his medical condition, so the only relevant question was whether he was properly absent from work. The employer relied on the fact that it received no medical documentation until shortly prior to the first hearing day in this arbitration and full disclosure required an order for production. As a result, the employer asserted it had been deprived of the opportunity to reconsider the decision to terminate in light of timely medical information solely because the grievor decided he would not disclose any information to the employer.

[44] The employer argued that the grievor's assertion that he did not see the 'deadline' emails was not credible and did not pass the test set out in *Faryna v. Chorny*. The grievor had argued that he checked his email before and after the two key emails, but not for a period of five days in between. Such an assertion was simply not believable, particularly given all that was happening and the critical nature of any communication that would have been coming from the employer around this time. Similarly, the grievor's failure to tell Boyer on September 3 that he was making plans to see his doctor, and to let him know on September 4 that he had booked an appointment on September 10 deprived the employer of the chance to consider how those facts affected the situation. The grievor had decided that the employer was not entitled to any information, and he kept Boyer in the dark. In the circumstances, it looked as though the grievor hoped the employer would terminate him. Ultimately, the employer asserted, it did not matter because email was the grievor's chosen method of communication, and his failure to check it would have been highly unreasonable and irresponsible.

[45] The employer was critical of the medical evidence of Raison and Dr. Toppin. Both relied on "sketchy", incomplete notes. Raison was "argumentative" and acted as an advocate for the grievor. Dr. Toppin was not a specialist and not qualified to treat psychological disorders and, rather than apply objective testing, he conceded much of his obligation to diagnose the grievor to the analysis made by Raison. Dr. Toppin did not have independent recall of the grievor's condition, and he relied on his vague notes as the basis

for his evidence. He did not check to find out if the grievor's behaviour was related to drug abuse; he did not observe symptoms daily over a two-week period before diagnosing depression, as required by the DSM-V; he did not conduct a full mental health assessment; and he never stated in his testimony that the grievor was unable to perform his full duties because of his condition.

[46] In summary, the employer argued the grievor ignored employer directives to provide medical documentation. He was absent without leave from September 3 to 9 inclusive but his explanation of illness was not substantiated by any medical evidence. Those were sufficient facts to support termination. In addition, there were aggravating factors, including the grievor's refusal to disclose medical information, his unexplained measures to sever his employment relationship, and the fact that he did not acknowledge that he has any responsibility for the events around his termination.

[47] In the alternative, the employer submitted that it would not be appropriate to reinstate the grievor and that this case should be considered as one requiring compensation in lieu of reinstatement. In the event the termination was not upheld, the withholding of medical information should be weighed as an egregious transgression on the part of the grievor, and that he be suspended without pay until the date of the award.

[48] The employer relied on the following authorities: *Salvations Army Grace Hospital*, [1980] O.L.A.A. No. 23 (McLaren); *St. Joseph's Health Centre*, [1998] O.L.A.A. No. 79

(Joyce); *City of Toronto*, [1987] O.L.A.A. No 51 (Davis); *Kubota Metal Corporation*, [2012] CarswellOnt 13497 (Trachuk); *Sault Area Hospital*, [2011] CarswellOnt 12072 (Steinberg); *Regional Municipality of Waterloo*, [2011] CarswellOnt 15619 (Rayner); *Labatt's Ontario Breweries*, [1990] CarswellOnt 4183 (Brandt); *Brown & Beatty*, 7:6142; *Town of Caledon*, [2008] CarswellOnt 5574 (MacDowell); *City of Brampton*, [2008] CarswellOnt 5338 (MacDowell); *TRW Linkage & Suspension Division*, [2005] CarswellOnt 6375 (Hinnegan); *Toronto District School Board*, [2009] CarswellOnt 10856 (Luborsky); *Aviscar Inc.*, [2012] CarswellOnt 4961 (Chauvin); *Calgary Co-operative Association*, [2012] CarswellAlta 941 (Ponak); *Canada Post Corporation*, [2004] CarswellNat 1192 (Jolliffe); *Canadian Regional Airlines Ltd.*, [1998] CarswellNat 3225 (Smith); *Regional Municipality of Cape Breton*, [2003] CarswellNS 660 (North); *Grand Erie District School Board*, [2018] CarswellOnt 9820 (Howe); *Real Canadian Superstore*, [2015] CarswellAlta 1521 (Sims); *Spectra Energy Transmission*, [2013] CarswellNat 5701 (McPhillips); *Telus Communications Co.,* [2015] CarswellNat 7398 (Hornung); *Toronto Community Housing Corporation*, [2016] CarswellOnt 9657 (Johnston); *Metro Ontario Inc.*, [2017] CarswellOnt 8258 (Chauvin).

Union Submissions

[49] The union argued that this case was largely one about fair treatment of the grievor. The grievor was an employee who was suffering from high levels of stress and having difficulty coping in the workplace. He had a history of mental disorders going back to 2010 and as recently as 2018, one year before he was terminated. Boyer was aware of this history and had previously demonstrated flexibility when the grievor needed time off.

[50] The grievor testified that he had been devastated when the employer raised the possibility of a buyout. It was a blow to him, and it caused another mental health episode, diagnosed initially as adjustment disorder and then as Major Depressive Disorder by Dr. Toppin. In other words, the grievor was ill and had required time off.

[51] The union submitted that there was no substance to the employer's allegation that the grievor had been insubordinate. He told Boyer's he was going to grieve the first request, but, at the same time, he took immediate steps to get an urgent appointment with his family doctor, responding appropriately to Boyer's instruction to do so at his "earliest convenience." Unfortunately, he did not read the next two emails with the deadlines, and the situation deteriorated from there. The employer did not show any concern about the grievor's state of health although, they were aware that the grievor was applying for sick leave benefits. The grievor had no disciplinary history and yet he was terminated with unseemly haste, with the employer imposing tight deadlines and not taking responsibility for ensuring those deadlines were clearly communicated.

[52] The grievor had about eleven years of experience, during which time he had worked as the "face of the organization" to OPSEU members. Despite the grievor's lengthy service, the employer appears to have discounted his concerns about the MDT assignment. There was no evidence that the employer had conducted a basic investigation into the grievor's concerns. When the buyout option was raised, and the

grievor had absorbed the impact of the employer's response, he realized he would need time to consider his response and relied on Boyer to allow him similar flexibility with respect to time off, just as he had been accorded in the past. The grievor took two days to respond. He made an opening proposal. The employer's response was particularly damaging. Boyer refused to make a counterproposal and suggested the situation could all go back to normal, and they would carry on with reviewing the grievance the following week. The response was, for obvious reasons, hard for the grievor and, understandably, he confirmed that he was going to be sick the following week. At this point, the grievor understood his career as a union representative with OPSEU was over and he had difficulty accepting he was unemployed at the age of 50.

[53] The grievor sought medical care for his mental distress. He saw Raison on the Labour Day Monday and booked an appointment with his family doctor on September 10. On September 4, the employer unilaterally decided to "up the ante" and sent an email to impose a 24-hour deadline for providing medical information. This act appeared to be a direct response to the grievor's request for STD forms. The grievor testified that Boyer regularly reached him via text messages, but that did not happen this time. The grievor was not well and the employer used an unreliable means of communication.

[54] The union asserted that Raison's evidence was reliable and useful. She was a health care professional with more than 30 years of experience providing counselling and support for people with mental health disorders. She had worked with the grievor

previously. She assessed the grievor's symptoms without providing a diagnosis, which she was not permitted to do. She was subjected to tough cross examination but remained consistent in her observations. Dr. Toppin also had decades of experience as a family doctor and treated the grievor for each of his major episodes of depression in 2010, 2018 and 2019. His diagnosis of depression was attacked on the basis that his notes were not clear and, in the employer's opinion, did not match with the DSM-V. Even assuming the notes were not easily understood by anyone else, that did not affect Dr. Toppin's ability to understand them, and he was able to testify in detail about his observations and state of the grievor's health.

[55] The union argued that the medical evidence showed the grievor was in a mental health crisis at least by September 2, when he was seen by Raison, and he was diagnosed by Dr. Toppin on September 10 as suffering from a "severe" adjustment disorder. The union argued that it was not appropriate to discipline an employee in such circumstances, particularly when the discipline was based on rushed timelines contained in unverifiable communications.

[56] In summary, the union submitted that the central question was whether the grievor was genuinely ill. The union argued that, if the grievor was scheming, his plan had no coherent logic and led to his termination, which provided him with no advantages. The evidence did not show that the grievor was insubordinate or absent without leave. The request for medical information was improper because there was no basis to suspect

the grievor was abusing sick leave. The grievor complied with Boyer's first request and took steps to obtain medical information at his earliest convenience. The subsequent requests were not clearly communicated. The grievor was sick during the relevant time. Even if the grievor bore some culpability in the circumstances, termination was not a reasonable response, and a short suspension would have been more appropriate given the mitigating circumstances of the grievor's illness.

[57] The union relied on the following authorities: *Ontario Provincial Police*, [Unreported, Abramsky, August 31, 2018]; *Ontario Ministry of Housing*, [1994] O.L.A.A. No. 19 (Stewart); *Lilly Industries Inc.*, [2000] O.L.A.A. No. 91 (Dumoulin); *Maritime Paper Products*, [Unreported, Richardson, September 7, 2018]; *Good Humour – Breyers*, [2008] O.L.A.A. No. 79 (Trachuk); *Mistahia Health Region (Alta.)*, [1998] A.G.A.A. No. 87 (Moreu); *Wm. Scott & Co.*, [1976] B.C.L.R.B.D. No. 98 (Weiler); *Dashwood Industries Ltd.*, [1998] O.L.A.A. No. 430 (Rose); *Good Humour-Breyers*, [2005] O.L.A.A. No. 173 (Kirkwood); *Labatt's Ontario Breweries*, [1990] O.L.A.A. No. 60 (Brandt).

Conclusions and Decision

[58] The grievor was terminated for two reasons. First, the most important allegation was that the grievor had been absent without leave and not sick for the period from September 3 to September 9, the date of his termination. Second, the employer alleged that he insubordinately failed to provide medical evidence when requested by his managers.

Allegation 1 – Was the Grievor sick?

A – Impact of the Medical Evidence

[59] The question as to whether the grievor was legitimately sick from September 3 to 9, 20019 is an issue that turns on medical evidence. Dr. Toppin saw the grievor on September 10, the day after his termination, and diagnosed the grievor was suffering from adjustment disorder with anxiety. Raison observed similar symptoms during her session with the grievor on September 2. In addition to their testimony, the medical evidence included Dr. Toppin's and Raison's reports, dated November 11 and September 19 respectively, their clinical notes and the relevant portions of the STD application and appeal. The employer urged that the combined evidence of Raison and Toppin should be given no weight, that both witnesses were unreliable, that their reports were questionable and that both were wrong in what they observed and the conclusions they reached.

[60] Raison was a social worker with more than thirty years of experience. She had previously counselled the grievor with respect to depression. The grievor contacted her office requesting an "emergency appointment." Raison saw the grievor on September 2. He presented as "very tearful and overwhelmed" according to her clinical notes. She stated the grievor reported symptoms of lack of sleep, feeling overwhelmed and hopeless. She noted that she thought he might have been experiencing a "relapse of his depression symptoms." Raison testified that, given what she observed on September 2,

she thought the grievor was not capable of carrying out the complex professional duties associated with his position, and she advised him to see Dr. Toppin to find out whether he should take some time off work.

[61] Dr. Toppin had been the grievor's family doctor for 30 years. He had treated the grievor during his prior episodes of depression. He testified that the appointment on September 10 was scheduled on an "urgent" basis. Dr. Toppin also testified that he observed many of the same symptoms that had caused Raison's concerns. On September 10 he diagnosed the grievor with anxiety adjustment disorder, although on September 24 he changed the diagnosis to a major depressive disorder. I note that Mr. Mendl identified issues with the latter diagnosis but I do not need to rule on that aspect of the grievor's medical history. The issue before me is the grievor's medical condition from September 3 to September 9, and whether he was unable to work during that period due to illness. The illness identified on September 10 was adjustment disorder.

[62] The employer submitted that I should discount the medical evidence of both Raison and Dr. Toppin with respect to the grievor's state of health from September 3 to 9. Both witnesses testified that they did not believe the grievor was capable of working, given the symptoms they observed. Thus, to reach the conclusion urged by the employer, I would have to conclude that both Raison and Dr. Toppin were taken in by the grievor, who was feigning symptoms, or they were both incompetent, or that they both gave unsubstantiated, false testimony and false assessments of the grievor's condition.

[63] I do not accept the employer's submission that neither Raison nor Dr. Toppin provided useful medical evidence. It does not seem reasonable to conclude that two seasoned health care professionals were fooled by the grievor, who was only pretending to be ill. I note that the conclusions reached to by both Raison and Dr. Toppin were largely based on the grievor's behaviour and how he presented himself, not on self-reporting. The facts are distinguishable from those in the *TDSB* decision, where a medical examination found no evidence of "any diagnosable psychological condition." This was not a case of the grievor telling his medical advisors that he had flu symptoms several days prior but had since recovered. The grievor had a history of mental illness. Both medical professionals had been involved in the treatment of his previous mental illness. The symptoms observed by both Raison and Dr. Toppin included crying, shaking, slovenly appearance, difficulty "word finding", being flustered and agitated, exhibiting a "hangdog" expression and so on. These collected symptoms could have been observed by someone with no medical training and still lead them to the reasonable conclusion that the grievor was not capable of performing his job, as alluded to by Arbitrator Trachuk in *Good Humour*. Raison and Dr. Toppin, were best placed to assess the genuineness of the grievor's behaviour and to determine if he was faking or embellishing the symptoms, and neither indicated they detected any such dishonesty. It does not strike me as likely that the grievor would have been able to successfully feign such symptoms and do so in a manner that would have convinced Raison and Dr. Toppin, both of whom had known and

treated the grievor for some time and both of whom had many years of clinical experience.

[64] Similarly, I have not concluded that either Raison or Dr. Toppin gave false evidence or acted as unethical advocates for the grievor. Both were closely cross-examined by Mr. Mendl about their reports and their clinical notes. The employer was particularly critical of Dr. Toppin's clinical notes. I agree that some of his notes were difficult to understand from the perspective of a non-medically trained layperson, and perhaps even for another doctor. However, I am satisfied that Dr. Toppin explained the contents of his notes and how those notes related to his diagnosis of adjustment disorder and, later, depression. The issue of the clarity of his notes is not a matter I have to rule on. What is important in this case is the nature and quality of Dr. Toppin's testimony and his medical reports. In this regard, it matters that this was not the first time Dr. Toppin, or Raison treated the grievor for mental health issues, which increases the likelihood that they could more readily identify the signs of illness for this patient, a factor noted by Arbitrator Davis in *City of Toronto.* In my view, both Raison and Dr. Toppin provided coherent evidence about the grievor's observed symptoms, how such symptoms related to past mental health problems, and how such symptoms compared to the grievor's behaviour when not mentally ill. I expect that neither Raison nor Dr. Toppin found the cross-examination process to be an easy experience. However, both defended their observations and conclusions vigorously and, in my view, in a manner that was rational and persuasive – I did not reach the conclusion that either were acting as an advocate for the grievor or that

they tailored their testimony to benefit the grievor. I have concluded that the medical evidence provided by both Raison and Dr. Toppin about the grievor's health between September 3 and September 9 was objective and relevant.

[65] The employer cited the decision in *Spectra* as authority for the proposition that GPs do not have the expertise or the training to diagnose mental illnesses. I do not agree with this general proposition, nor can it reflect the state of the law. GPs are not specialists in mental health – it requires additional training to become a psychiatrist. However, GPs are part of the mental health care system, in the same way that they are part of any other area of health care. GPs have the competence and authority to assess, diagnose and treat mental illness, including prescribing medication. GPs are usually the first place at which individuals seek help with mental illness and, as Dr. Toppin testified, the GP must be able to determine when it is necessary to refer a patient to a specialist, which is not different from any other kind of health complaint. I would not discount the opinion of a GP on a mental health issue solely because they are not psychiatrists, and I have not done so in this case. Similarly, Dr. Toppin's evidence is not diminished by the fact that he did not refer the grievor to a psychiatrist.

[66] As mentioned previously, Mr. Mendl raised some issues about Dr. Toppin's diagnosis of depression during the September 24 session in relation to the criteria for depression set out in the DSM-V. As stated above, the focus of this dispute was the state of the grievor's health at the time of his termination, which Dr. Toppin diagnosed on

September 10 as adjustment disorder with anxiety. The question I must answer is whether the evidence shows that the grievor was likely suffering from an adjustment disorder with anxiety during the week leading up to his termination that was serious enough to prevent him from performing his job.

[67] In my view, the critique of Dr. Toppin's later diagnosis of MDD does not affect his initial diagnosis of adjustment disorder. Adjustment disorders are diagnosable mental health conditions, and are described in the DSM-V as emotional or behavioural symptoms in response to an "identifiable stressor." The definition of the diagnosis provides several examples of possible stressors, including "marked business difficulties" which would capture events involving the loss of or threat to one's career. The DSM-V stipulates that adjustment disorders are characterized by marked distress as well as significant impairment in social, occupational, and other functioning. Dr. Toppin observed and identified the following symptoms exhibited by the grievor that are listed as symptoms of adjustment disorder: low mood, tearfulness, feelings of hopelessness, nervousness, worry and jitteriness. The doctor characterized the symptoms as "severe" in his report for the grievor's application for STD, and he indicated it was his conclusion that the grievor should be on indefinite sick leave. This was not a case where the employee claimed they could not work due to "stress", such as in *TRW*. Adjustment disorder is a recognized mental illness, and the medical evidence was consistent with the hallmarks of the illness set out in the DSM-V. I do not think it reasonable to conclude that the grievor could perform his normal duties as a union representative when in such state of health.

[68] Given the clinical observations made by both Raison and Dr. Toppin, and given their evidence placing those observations in context of the grievor's history of mental illness, I am not persuaded there is a basis to discount the conclusions of either health care professional. Even though the grievor's sick leave declaration on August 28 was suspicious (a point I discuss in detail below), I have reached the conclusion that, at least by September 2, he was demonstrating objective indicators of a diagnosable mental illness, and that his behaviour was sufficiently serious to lead Raison to conclude that he should see his family doctor to get an opinion on whether he should report for work. Raison, as a social worker, could not and did not provide a medical diagnosis but her evidence was important in establishing when the grievor began exhibiting the symptoms that would lead to the diagnosis of adjustment disorder. Dr. Toppin made his assessment on September 10. By that time, the grievor had already been terminated. However, given that the symptoms Dr. Toppin observed on September 10 were like those observed by Raison on September 2, I find that the evidence is sufficient to conclude that the grievor's mental health began to deteriorate at the latest by September 2, and that the diagnosed adjustment disorder would have prevented him from performing his duties as an OPSEU representative between September 3 and September 9.

B – Impact of Insurance Carrier Rejection of STD Claim

[69] The employer relied on the findings of the insurance carrier, SSQ, to support the assertion that the medical evidence did not demonstrate that the grievor was medically

unfit to work. The evidence of Giles was that the employer had a practice of following the medical decisions of the insurance carrier, even in cases where they may not necessarily agree with the carrier's opinions.

[70] The insurance carrier initially rejected the grievor's claim for STD on the basis that he was not "totally disabled" and that he had not seen a doctor for his illness before his coverage was ended by his termination on September 9. These conclusions were set out in the letter rejecting the grievor's claim dated October 25, 2019. The key finding of SSQ in this letter was as follows:

> While we recognize you may have some difficulties and associated symptoms, the medical evidence does not confirm that you have experienced a level of impairment that has restricted you from performing your job duties as a Staff Representative.

[71] The employer relied on the decision in *Caledon* for the proposition that a conclusion contrary to that of the insurance carrier, whose task it is to review STD applications, must be based on "clear and cogent" evidence, and that otherwise it is reasonable for the employer to rely on the carrier. However, *Caledon* was a case about eligibility for sick benefits, not about the termination of an employee. Giles explained why the employer follows the decisions of the insurer with respect to the assessment of sick leave claims, and that explanation makes sense and was consistent with the reasons outlined by Arbitrator MacDowell in *Caledon.* However, an arbitrator's decision with respect to just cause for discipline is based on evidence weighed on the balance of probabilities. The quality of such evidence is not coloured by administrative

considerations, but by the impact the evidence has on the factual issues in dispute. For this reason, I do not think it would be helpful to apply the reasoning in *Caledon* to a termination case.

[72] Secondly, even were I to apply the same standard, MacDowell's point was predicated on the condition that the insurer's decision should stand so long as it was within a range of reasonable conclusions. I do not believe that it is *prima facie* reasonable to conclude that a person suffering from adjustment disorder can carry out the duties of a union representative. Thus, some explanation from SSQ as to why they thought the grievor was able to work would have been necessary. It is not possible to assess the reasonableness or medical relevance of the SSQ rejection of the grievor's claim in this matter because no reasons were provided. The passage excerpted above set out SSQ's decision. The first part is a statement of sympathy or compassion. There is nothing wrong with that, but it contains no medical analysis. The rest of the passage says no more than that the medical evidence did not meet the carrier's standard, which is the same as saying you did not qualify for benefits because you did not qualify for benefits. Dr. Toppin's medical evidence was that the grievor had "severe" symptoms of adjustment disorder and needed time off work. The insurer's statement added no meaningful response to the medical evidence and it cannot be considered as an alternative medical analysis. The conclusion reached by SSQ was, in essence, that they did not agree with Dr. Toppin's conclusions, but the disagreement was not explained and there was no analysis of the

medical information they had been provided. Some reasoning is required if the carrier's conclusion is to be given weight beyond a bare statement of ineligibility.

[73] It is reasonable to assume from SSQ's later appeal decision that the primary reason the grievor was denied benefits was the fact that he did not see his doctor before he was fired. By September 10 it was too late because his benefit coverage had terminated at the moment he lost his job. This was mentioned in the initial rejection letter but was made clearer in SSQ's reasons for the rejection of the grievor's appeal, dated April 21, 2020. In the appeal decision the carrier stated that benefit payments commenced on the date the employee is under the care of a doctor, adding:

> As your disability coverage terminated on September 9, 2019 you were not eligible for STD benefits prior to the date you first were seen by a licensed doctor, September 10, 2019.

In other words, SSQ rejected the appeal because the grievor had been terminated on September 9 prior to seeking treatment from a licensed doctor. As was the case with the first letter rejecting the STD application, there was nothing substantive in the SSQ appeal decision that can be viewed as medical evidence or analysis that should impact my evaluation of the evidence of Dr. Toppin or Raison. When the initial rejection and the appeal decisions from SSQ are read together, I can find no reasoning or critique of the medical evidence. As a result, there is no evidence available that would allow me to assess the reasonableness of SSQ's rejection of the medical evidence. The only medical evidence in this case is that provided by Raison and Dr. Toppin, as outlined above.

Allegation 2 – Insubordination re Requested Medical Note

A – Background to the Dispute

[74] The background for the events that led to the grievor's termination was that he was advised that he would be working with an OPSEU member as part of Member Development Training (MDT), an OPSEU program to train union activists as OPSEU Representatives. The grievor testified that he had had a previous negative experience with the member in question, but the experience was based on hearsay and for that reason I will identify the member as X. The grievor stated he had been advised that some OPSEU members had voiced criticisms of him in a discussion with X, and that X had said to them: "If he [the grievor] is giving you a hard time, I will take it up with the Board of Directors of OPSEU and get him straightened out." The grievor was not present for this alleged exchange. He was told about X's alleged comment by someone else, and no evidence was led about the truth of the statement attributed to X. Nevertheless, the grievor believed the incident to be true. He spoke to Boyer about his concerns and advised that he would not work with X as part of the MDT and would instead exercise his rights under the *Occupational Health and Safety Act* (OHSA) to declare a work refusal.

B – The Buyout 'Discussion'

[75] The employer's response to the grievor's concerns about the MDT assignment was a clear sign that the employment relationship was not healthy. Boyer spoke to the grievor on August 28 and advised him that he had raised the MDT matter with senior managers

at OPSEU and that they had a negative reaction to the grievor's concerns. Boyer then formally raised the question of whether the grievor would be interested leaving OPSEU with a buyout package. Boyer wrote later that he made this suggestion because the grievor had previously stated that he would be interested in a buyout. The grievor testified that his previous comments were taken out of context. Be that as it may, it is significant that the employer, not the grievor, raised the possibility of a buyout.

[76] The grievor responded to the buyout suggestion by telling Boyer that he would need some time to consider his position and to confer with his spouse and advisors. He told Boyer that he would take the rest of the week off to consider the matter, and that he would take sick leave starting on September 3, the Tuesday after the long weekend. Although it appears it was not clear to Boyer what credits the grievor would use for August 28 through 30, there is no dispute that those days were taken as one personal day and two compensating days. The employer considered the grievor to be absent without leave on the first working day after the long weekend, September 3.

The grievor responded to the question of a buyout package in an email to Boyer on Friday, August 30, with an offer to leave his position in exchange for two years of salary continuance including benefit coverage. Boyer responded within half an hour, stating that the grievor's offer was "not even in the ballpark" and that they would discuss the grievor's outstanding grievances after the long weekend. The employer made no counter-offer. Boyer's response appeared to indicate the employer was no longer interested in

discussing the buyout option, and that the grievor was expected to report for work the following Tuesday. Anyone who has performed the job would understand that a union representative could not work effectively in an environment where they know that the leadership of the union may not be there to back them up when needed. In my view, it was not reasonable for the employer to open the door to a buyout and then slam it shut and expect that the grievor could return to "business as usual" the next day. I cannot say whether this was a bargaining strategy or an expression of frustration, but it was a decision that had a major impact on what followed.

C – Grievor's Actions After Buyout Raised

[77] It was reasonable in the circumstances for the grievor to conclude that he had lost the confidence of his employer. It was clear that the employment relationship was in trouble, both from the fact that Boyer had raised the possibility of a buyout and by the dismissive and somewhat contemptuous response to the grievor's proposal. The grievor testified that he considered his work at OPSEU to be over. He took steps to follow through with that conclusion. He cleared all appointments from his calendar for the month of September. On Saturday, August 31 he made two trips from his home to the Thunder Bay office to collect his personal effects and return the employer's property. The grievor agreed that, as of August 28, he no longer performed any work for the employer, other than the work of disengaging from his assignments. But he did not tender his resignation and, although the employer had given a strong indication of non-confidence in him, the grievor had not been formally terminated.

[78] The employer suggested that the grievor's decision to separate himself from his job duties was part of a scheme to pressure the employer to make a buyout offer, and that the grievor hoped that his absence would force the employer's hand. The employer also asserted that the grievor believed that he would be successful in an application for STD commenced on September 3, and that he would be well placed to 'wait it out.'

[79] It is possible the grievor was, as the employer asserted, engaged in some sort of scheme designed to pressure the employer but the self-defeating nature of his decisions argues against such a conclusion or at least suggests that his scheme was incoherent and illogical. It is difficult to accept that the grievor, an individual with considerable experience as a union representative, would take steps to deliberately force his own termination. Such a move would mean he would be without any income and forced to fight for compensation. He had applied for STD, which offered his best chance for income security, but termination could, and did, put his application for sick benefits at risk. If his decision to disengage was a plan, it was not a part of a plan that brought him any obvious benefits. The actions the grievor took to separate himself from the workplace were not rational and did not advance his interests.

D – Did Employer have Reasonable Grounds to Suspect Abuse of Sick Leave?

[80] The grievor did not report for work on September 3. The employer sent a total of three emails to the grievor requesting confirmation of sickness, the first one sent by Boyer

on September 3; the second one also from Boyer sent on September 4 with a deadline for providing the sick note of September 5 at 4 p.m.; and the third from Suddaby on September 6 with a deadline of that same day at 7 p.m.

[81] There was an issue between the parties as to whether the employer had the right to make the requests for sick notes given Article 23.020.02. However, at the hearing both parties agreed that, despite Article 23.02.02, the employer had the right to request a medical note prior to five days absence where there were reasonable grounds to suspect abuse of sick leave, as set out in the decision in *Salvation Army* and the long line of cases following therefrom. The question, therefore, is whether the employer had such reasonable grounds for suspicion?

[82] The documentation from Boyer seems to suggest that he was uncertain after the conversation on August 28 what the grievor was doing, but the grievor agreed in cross-examination that he had told Boyer on August 28 that he would be off sick on the following Tuesday, September 3. As Giles pointed out this was, to say the least, an unusual assertion to make before seeking medical advice unless one is expecting to be absent for scheduled surgery or some other medical procedure. Indeed, as Giles as testified, in the case of mental illness it is hard to predict how one might feel from one day to the next. The fact that the grievor claimed almost one week prior that he would be sick on September 3 was not consistent with the normal process of the onset of illness. In addition, the comments were made in the context of the failed buyout discussion.

[83] It was reasonable for the employer to assume that the assertion of sick leave was not related to *bona fide* illness but was related to the buyout process. I have concluded that the assertion of the illness in advance and in this context gave rise to reasonable grounds for the employer to suspect the validity of the grievor's claim for sick leave. For this reason, the employer's decision to request medical confirmation of illness was related to a reasonable suspicion of sick leave abuse and was not limited by the normal sick leave procedures set out in Article 23.02.02.

E – Grievor's Response to Boyer on September 3

[84] There is no dispute that the grievor read Boyer's September 3 email requesting medical documentation to cover his absence from work. In the email, Boyer did not stipulate a deadline, asking only that the information be provided at the grievor's "earliest convenience." The grievor testified that he knew at the time that, even if he disagreed, the email put him in an "obey now, grieve later" situation and that he intended to follow through. Although the grievor stated he intended to comply with Boyer's September 3 directive, he did not express that intention to Boyer at the time. The email exchange between the two on September 3 started when the grievor sent Boyer an email asking that STD application forms to be sent to his personal email address. That prompted an email exchange that can be summarized as follows:

> Boyer: Have you provided HO with a doctor's note or an indication of a time frame regarding your expected sick leave?

Grievor : I have not but I have not passed the threshold at this point.
…

Boyer: The Employer requires you to provide a sick note from a medical practitioner from your first day off sick at your earliest convenience.

Grievor: This is contrary to Article 23.02.02 and as such please be advised of my intent to grieve.

What is significant here is what the grievor did not say. The grievor did not say that he had seen Raison the day before, and that she had advised him to make an appointment with Dr. Toppin on an urgent basis. He could have advised Boyer he was going to make an appointment with Dr. Toppin. He could have let Boyer know about the September 10 appointment with Dr. Toppin after it was scheduled on September 4. These were all pieces of information that were relevant to the medical note demand. The grievor did not share any of this information with Boyer. Had he disclosed the information, at worst Boyer might have insisted the grievor attend a clinic immediately. Given the grievor's claim that he knew he was in a situation where he had to 'obey now and grieve later', such an outcome would have been a minor but not unexpected inconvenience. The grievor's explanation for his silence was puzzling. During cross-examination he said "it was understood" he would comply because his supervisor had made the request. This struck me as more of a rationalization than an explanation. The grievor's response to Boyer on September 3 did not imply any compliance. It was clear that there was not a good working relationship between the two men, so clarity of communication was important. There was nothing about the grievor's efforts to see his doctor that would have been difficult or stressful to explain or that might have provoked any greater conflict

with Boyer. Indeed, assuring Boyer that he was taking steps to get medical information, while reserving his right to grieve, would have helped to reduce tension between the two.

[85] I accept that the grievor was sick and was likely in a poor mental state at the time. However, he recognized the importance of providing medical evidence to support his STD application. This implies that the grievor was capable of responding more fully to Boyer on September 3 and September 4 and to Suddaby on September 6 but, for reasons of his own, he did not. He might have maintained his silence out of anger or for some other reason, but whatever his motivation, his decision to do so played a significant role in this dispute.

F – Did the Employer Properly Communicate the Deadlines?

[86] The secondary reason why the grievor was terminated was for insubordination for refusing to provide medical documentation when requested. The two 'deadline' emails, sent by Boyer on September 4 and by Suddaby on September 5, were emailed to the grievor's home email address. As stated above, the employer had a right to request medical documentation, and that would include the right to attach reasonable deadlines for providing such information. There was an issue between the parties as to whether those deadlines were communicated to the grievor. The grievor stated he did not read either email until after he was terminated. The employer argued it was highly unlikely the grievor did not read the emails, and it was more likely that he chose to ignore them.

[87] It seems likely that the grievor received the emails in question. He received and responded to other emails with the employer before and after the warning emails were sent. He responded on September 3 to the first email in which Boyer requested the medical documentation at the grievor's "earliest convenience." He also received and responded to emails related to his application for STD, including on September 6. It seems unlikely that he would have failed to receive these two specific emails. Thus, I accept the employer's submission that the grievor likely received the emails of September 4 and September 6.

[88] However, I am not persuaded that the employer has been able to demonstrate that the grievor read and ignored the two emails. Insubordination requires proof that an employee willfully disobeyed an order, and there must be evidence of a clearly communicated order. In this case, the evidence of communication is not clear.

[89] The employer was aware that the grievor had initiated the process to apply for STD coverage, which meant the employer was aware that there was the possibility that the grievor had a valid medical condition that prevented him from working. Even though the grievor's pre-announced sick leave was suspicious, the employer could not be sure of the grievor's fitness to work until after seeing medical reports. One of the key factors in this case is that the employer moved so rapidly to termination. In addition to the fact that the employer could not be certain that the grievor had received the two 'deadline' emails, and they could not be sure whether he was healthy enough to work, the period

from the first request for medical information to the grievor's termination was just six days, September 3 to September 9. Compare that to the efforts employer made prior to terminating an employee, as set out in the jurisprudence. In *Aviscar*, the grievor went off work on August 7. After some weeks, the employer made several unsuccessful attempts to reach him by phone and then, in October, sent him a registered letter. The grievor refused delivery of the letter and did not respond to Canada Post notices to pick up the letter at a local post office for several weeks. In *Calgary Co-op*, there were similar facts to the instant dispute, in that the grievor in that case was off work for up to 6 weeks with depression. He asked his employer for a buyout. After the six-week period, the employer made multiple attempts to contact the grievor, both directly and through the union, over a period of several weeks. Similarly, multiple attempts to communicate over extended periods can be seen in the *Canada Post*, *Canadian Regional Airlines* and *Cape Breton* decisions. The question of what efforts are required in cases such as the one before me must be answered in context of the specific facts, but it was clear in this case the employer moved very quickly to terminate the grievor's employment. Added to these considerations is the fact that the employer should have known that a union representative, even one without a history of mental illness, would have faced considerable difficulty returning to work in the circumstances. It may well be that a broader context for this troubled employment relationship has been lost because Boyer was not able to testify, but I note there was no history of discipline against the grievor. Regardless, there is no question but that the employer moved with some haste to terminate the grievor's employment. It was not reasonable for the employer to move to

terminate the grievor's employment so quickly without making greater efforts to first ensure he had received the warning emails and secondly to clarify his medical status.

[90] The grievor's actions after he discovered he was terminated are difficult to understand. Upon being told by his local president that he had been terminated he should have immediately understood that the employer had acted under the misapprehension that he was not gathering the requested medical documentation. The obvious reaction should have been to contact the employer immediately and advise that he had an appointment with is doctor scheduled for the next day, that he had already been assessed by Raison, that he had not seen the deadline emails – in other words he should have provided the same explanation to the employer at the time that he provided during his testimony. Given that he asserts the OPSSU president advised him of the termination letter, he did not even have to take these steps on his own. He could have given his union president the information and asked her to communicate with OPSEU management in an to attempt to reverse the termination. Surprisingly, the grievor took no steps to get an immediate medical report and did not ask Dr. Toppin for a medical note on September 10, the day after his termination. He testified that he did not because he had already been discharged by then, so there was "no point." Obviously, there was a point. In the end, the employer was not provided with any medical documentation about the grievor's health until shortly before the commencement of the hearings in this matter.

[91] The failure of the grievor to provide the employer with medical documentation remains an issue to be addressed. As Arbitrator Luborsky pointed out in *TDSB,* there is an important contractual expectation that employees should provide medical confirmation of illness, and that failure to do so can lead to loss of sick pay and, eventually, termination of employment. However, while I consider it important that the grievor withheld medical information, most of that happened after he was terminated. Arguably he withheld information from Boyer on September 3 about steps he was taking to see his doctor, but that was not a decision that should attract serious discipline. Otherwise, the grievor's withholding of information took place after he was terminated. Although the withholding of medication information should not be considered a disciplinary matter, it was significant that the grievor's mental health did not prevent him from arranging to provide SSQ with the necessary documentation to process his claim for STD. From this I have concluded as a fact that the grievor understood, despite his illness, that medical information had to be provided to others if he wanted them to consider it in assessing his rights. The grievor's explanation that he did not provide the employer with any medical information after termination because it was "too late" was not sufficient. The employer did not have the chance to reconsider the termination based on timely medical reports, which would have included reports that could have been provided soon after termination. These are aggravating factors to be weighed in calculating compensation owed to the grievor.

Resolution of Grievances

***1. Grievance re OHSA* – 2019-48**

[92] This grievance alleges a breach of the *Occupational Health and Safety Act* in relation to the employer's response to the grievor's concerns about the assignment related to the MDT.

[93] There is no evidence to support a conclusion that the employer breached the *OHSA*. The MDT training situation had not materialized by the time the grievor was terminated and there were no steps the employer could or should have taken to address a work refusal regarding an anticipated future unsafe situation, other than what it did, which was to indicate its willingness to meet the grievor to discuss the matter. The last communication on the subject was in Boyer's August 30 email to the grievor, indicating they could discuss the matter in greater detail after the Labour Day long weekend. The grievor was terminated before that meeting took place. Grievance 2019-48 is dismissed.

***2. Grievance re Sick Note* – 2019-49**

[94] This grievance alleged that the employer improperly requested a sick note prior to the five-day period in Article 23.02.02. It was my understanding that the union had conceded this grievance during the hearing. Regardless, as explained above, the employer had the right to request the sick note in the circumstances in accordance with the long line of cases following *Salvation Army*. Grievance 2019-49 is dismissed.

***3. Grievance re Discrimination for Union Activity* – 2019-50**

[95] This grievance alleged that the employer: "reprised against me and acted in a discriminatory fashion as a result of my Union membership." The evidence did not support any such finding with respect to union discrimination. The grievor had difficulties with Boyer, but there was no evidence to connect those difficulties with the grievor's membership or participation in his union. Grievance 2019-50 is dismissed.

***4. Grievance re Discrimination related to Disability* – 2019-51**

[96] This grievance raised issues of discrimination related to the employer's alleged failure to accommodate the grievor's disability, as well as his complaint with respect to a toxic work environment. The employer's decision to terminate the grievor was to a large extent triggered by the grievor's failure to communicate at the time that he intented to provide the medical information requested. Moreover, the grievor did not provide the employer with any medical information until shortly before the arbitration hearing. There is no basis for concluding that the employer did not accommodate the grievor's medical condition. Grievance 2019-51 is also dismissed.

***5. Grievance re Termination* – 2019-47**

[97] The employer had the right to request medical information from the grievor outside of Article 23.02.02 because the grievor's advance declaration of sickness gave rise to a reasonable suspicion of abuse of sick leave. However, I find that the evidence does not support the conclusion that the grievor was absent without leave, given that he was,

in fact, sick and unable to perform his regular duties from September 3 to 9. The grievor's illness was real and serious. Even during the hearing, it was evident he found it emotionally difficult to talk about the issues in dispute.

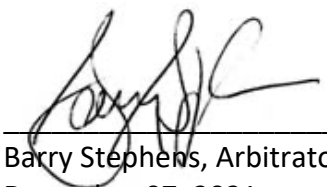
[98] I find that it is likely that the grievor received the two 'deadline' emails, in the sense that they were in the grievor's inbox in his email application, but the employer has not demonstrated that the grievor read and ignored those instructions. The grievor might have seen but avoided the emails out of anger or anxiety, he might not have noticed them, or he might have read them and decided to ignore them. Any of these is possible but none has been demonstrated to be more likely than the other. Insubordination requires a clearly communicated order. The evidence of communication in this case was not clear enough to support a finding of insubordination as just cause for discipline.

[99] The employer argued in the alternative that the employment relationship has been irredeemably damaged, and I agree. Although Mr. Boyer has since passed away, the message of non-confidence he communicated to the grievor was described as a joint opinion of OPSEU management. The grievor also took steps to terminate his working relationship with OPSEU. It is fair to say OPSEU did not want the grievor to continue working as a union representative and the grievor did not want to continue working for OPSEU. It did not help matters that, after his termination, the grievor published a harshly critical opinion online about Boyer shortly after the latter's death. In addition, the trust necessary for the employment relationship has been further undermined by the grievor's

unexplained failure to provide medical evidence until the onset of the arbitration process. The arbitration hearing has not brought to light any softening of attitude on either side. I agree with the employer's submission that there is no reasonable prospect that the employment relationship can be renewed.

Summary Conclusion

[100] The employer has not proven just cause for discipline, and the termination is rescinded. There is no reasonable prospect of re-establishing the employment relationship, and I decline to order the grievor to be reinstated to employment with OPSEU. The grievor is entitled to compensation in lieu of reinstatement. I refer the issue of the quantum of compensation back to the parties for discussion and resolution if possible. The grievor's decision to withhold medical information is an unusual factor in this case that should feature in the calculation of the remedy, along with the usual considerations. The parties have until December 23, 2021 to reach a settlement. If no agreement is reached by that date, either party may contact me to request the reconvening of the hearing to resolve the issue of compensation and any other outstanding issue related to the implementation of this award.



Barry Stephens, Arbitrator
December 07, 2021