IN THE MATTER OF AN ARBITRATION

B E T W E E N:

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Service Act*

Employer

- and -

THE UNION OF NORTHERN WORKERS

Union

GRIEVANCE RE	**GRIEVANCE NUMBERS**
Christina Holman	**08-E-00588**

A W A R D

BEFORE:	Thomas Jolliffe, Q.C.
FOR THE EMPLOYER:	Brian Asmundson
FOR THE UNION:	Michael Penner
HEARING LOCATION:	Yellowknife, Northwest Territories
HEARING DATES:	July 21, 2009

Date Award Issued:
October 30, 2009

Our File: 52,215 TJ

This matter concerns the grievance initiated on behalf of an employee of the Delcho Health and Social Services Authority, Ms. Christina Holman, following her receiving a warning letter wherein her superior claimed that she "did not obtain the necessary conditional approval for your absence on February 19, 2008". He went on to state his decision to grant annual leave for the previous day, Monday, February 18, when she was not at work but had called in and also that she would be considered as having been away on unauthorized absence on February 19 and "you shall not be paid for that day". Her manager further stated therein that in future he would only grant annual leave in advance, not after the fact when she was absent from the worksite. He also pointed out that she was expected to call in each day that she was absent from work on unauthorized leave.

Thereafter, service officer Norman Smith submitted a second-level grievance to the Authority's chief executive officer, Kathy Tsetso, also providing an accompanying letter setting out what the Union understood to be the factual background leading up to the discipline, essentially that the grievor had accompanied her son to Yellowknife on medical travel and as matters developed needed another day off to complete her stay as his escort, which may have resulted in a miscommunication between herself and her supervisor as to what was understood to be the situation.

In the formal grievance form, Mr. Smith asserted that he was filing the grievance on Ms. Christina Holman's behalf "as per article 37, and any and all other pertinent articles of the Collective Agreement, Legislation and/or Regulations, Laws, Policies, precedent and past practices". By way of remedial action sought, he requested that "the Employer make the member whole in terms of compensation, as result of the disciplinary action taken towards the member ...". He went on to request that the Employer "remove any and all reference to this issue from any and all Employer files and that nothing surrounding this should be used in any fashion in the future to the

member's detriment". Under the heading "Details" Mr. Smith claimed only that "The Employer has disciplined a member without just cause".

The immediate issue presented on the day set aside for hearing was one of determining the Employer's preliminary objection to the arbitrator's jurisdiction. It asserts that the circumstances giving rise to the grievance were such that there was no final resolution available before an arbitrator. The applicable provision of the collective agreement reads as follows:

> **37.01 (1) The Employer and the Union recognize that grievances may arise in each of the following circumstances:**
>
> **(a) By the interpretation or application of:**
>
> **(i) a provision of an Act, or a regulation, direction or other instrument made or issued by the Employer dealing with terms or conditions of employment;**
>
> **(ii) a provision of this Collective Agreement or Arbitral Award.**
>
> **(b) Disciplinary action resulting in demotion, suspension, or a financial penalty.**
>
> **(c) Dismissal from the Public Service.**
>
> **(d) Letters of discipline placed on personnel file.**
>
> **(2) The procedure for the final resolution of the grievances listed in (1)(a) above is as follows:**
>
> **(a) Where the grievance is one, which arises in circumstances outlined in (1)(a)(i) or in (d), the final level of resolution is to the Minister responsible for the Public Service Act.**
>
> **(b) Where the grievance is one which arises out of the interpretation or application of the Collective Agreement the final level of resolution is to arbitration.**
>
> **(c) Where the grievance arises as a result of disciplinary action resulting in demotion, suspension, or a financial penalty or**

dismissal from the Public Service, the final level of resolution is to arbitration.

Mr. Asmundson on behalf of the Employer submitted that the facts of the situation came within article 37.01(1)(d), in that the grievance referred to a letter of discipline placed on her personnel file, and accordingly the final level of resolution under 37.01(2)(a) was by the Minister responsible for the *Public Service Act*. Mr. Penner on behalf of the Union responded that the matter rightly came under article 37.01(b) as a "disciplinary action resulting in... a financial penalty" which allows an arbitrator to resolve the matter under article 37.01(2)(c) inasmuch as the employee's pay was docked ("... and you shall not be paid for that day.") as also indicated in the warning letter. In effect, she had been denied her entitlement to paid leave which had resulted in a financial penalty. The parties entered the following mutually agreed facts, there being no testimony from witnesses:

1. **Ken Stewart, Finance Officer with the Dehcho Health and Social Services Authority issued a letter of reprimand against Christina Holman on March 12, 2008 for being absent without leave on February 19, 2009 (see Tab 8)**

2. **The letter of reprimand is disciplinary in nature, and a copy of it was placed on Ms. Holman's personnel file.**

3. **Prior to issuing the letter, on March 13, 2008, there was a meeting on March 7, 2008 with Ken Stewart, Roy Ries (Human Resources Manager), Christie Holman and UNW Representative Marilyn Storm.**

4. **On or about May 12, 2008, Norman Smith, Service Officer for the Union of Northern Workers wrote to Kathy Tsetso, Chief Executive Officer of Deh Cho Health and Social Services Authority disputing the issuance of the letter of reprimand and filing this at the second level of grievance on behalf of Ms. Christine Holman. (see Tab 9)**

5. **By an undated letter to Norman Smith which is believed to have been issued in or about May of 2008, Kathy Tsetso, Chief Executive Officer of Dehcho Health & Social Services Authority denied the grievance. (see Tab 10)**

6. **By letter dated August 21, 2008, the Minister responsible for the Public Service Act, namely Robert R. McLeod, denied the grievance. (see Tab 12)**

7. **The Collective Agreement and the Human Resource Manual - 701 - Employee Discipline (see Tab 3) include provisions dealing with progressive discipline and the resolution of disputes.**

8. **At this point, the parties seek a preliminary ruling as to whether the said grievance is independently arbitral, pursuant to article 37.01 of the Collective Agreement.**

It is apparent that in explanatory letter, accompanying the formal grievance document filed on the grievor's behalf, her union representative, Mr. Smith, asserted a factual scenario which arguably could have suggested the possibility of a valid absence situation occurring. Certainly, it was understood by the Union that the grievor had been able to take an extra day of leave for Monday, February 18, 2008 following completion of her vacation time the previous Friday to stay with her son on medical travel to Yellowknife. By her version, as matters developed she had ultimately required another day, February 19, concerning which she may have contacted her supervisor on February 18 to inform him that she could not return to work the next day as her son had a further medical appointment which required she stay in Yellowknife another day as his escort. The Employer disagreed with the factual scenario to some extent, not understanding that the grievor had made any call with respect to February 19.

The grievance denial document sent to the grievor in May 2008 by the Employer's chief executive officer, Kathy Tsetso, set out the understood circumstances on which she relied in considering and rejecting the grievance. It was that the grievor had been granted annual leave for three days extending from Wednesday, February 13 to Friday, February 15, 2008. On the following Monday, February 18, she was understood to have contacted her supervisor to advise she would not

be into work that day, and she did not attend. She was not understood to have made any statement regarding being absent from work the next day, Tuesday, February 19 and accordingly was expected to be at work. She was understood to have not reported for work or contacted her supervisor to request any additional leave, and accordingly she was recorded as being absent without approved leave. A suitable explanation was not seen to have been provided at the discipline meeting which followed. The grievor received the warning letter and was not paid for the day she missed, which is to say no leave was provided. In denying the grievance, Ms. Tsetso stated that she was satisfied that the letter of reprimand was warranted inasmuch as the grievor was well aware of the process for requesting leave, having been required to contact her supervisor when she was unable to work, which she did not believe occurred. The grievance was subsequently reviewed at the "final level" by the Minister of Human Resources, Mr. Robert McLeod, who denied it on the basis that he was "satisfied that Ms. Holman failed to seek approved leave and was appropriately deemed absent without approved leave on February 19, 2008."

There was no indication on the evidence that the grievor was ever understood by the Employer to have presented an application for paid leave at any point covering the disputed day, whether verbally or in writing. The Human Resources Manual at topic 802 dealing with attendance issues indicates the employee may verbally request authorization for any unscheduled absence and that the manager may ask for the request in writing.

In argument on behalf of the Employer, Mr. Asmundson submitted that in dealing with the issue presented of whether there had been a financial penalty imposed against the grievor such as to allow the matter to be advanced to arbitration, one should look to the governing language of the collective agreement, and the *Public Service Regulations,* section 15(3) dealing with employee

attendance. It indicates that where an employee is absent for 15 minutes or more, "and the absence is not excused by his or her supervisor", there shall be a deduction from salary, which is to say that failing to conduct for such an absence is not an option. The deduction is required, presumably on the fundamental basis that the Employer is not obligated to pay for work not done, which should not suggest any penalty being applied. The only reason for any payment to be provided in such a circumstance of non-attendance would be by reason of some negotiated entitlement which was not considered applicable to the circumstances at hand, which is to say no special leave was granted, nor understood to have been requested. By the Employer's information, it was not a situation where the grievor was somehow prevented by the Employer from working, nor was she suspended without pay. Rather, it was simply a matter of the her not being paid for work not done, and receiving a written warning for her actions without financial penalty. Certainly, she was not viewed as having grieved any denial of leave.

In addition, Mr. Asmundson said, the Employer relies on its Human Resources Manual, and in particular topic 802 dealing with attendance matters which defines an "unscheduled absence" as an employee's absence from the workplace "which has not been authorized in advance", and defines an employee's being absent without leave (AWOL) as "an unauthorized absence from the workplace during the scheduled hours of work". In terms of the setting out stipulated guidelines respecting employee attendance, it states that an employee "must request authorization of any unscheduled absence as soon as reasonably possible after learning that the absence will occur" such request to include the reason and the estimated duration. It is then that managers "must be fair and reasonable in determining whether any unscheduled absence from the workplace will be authorized" and the setting out a number of various circumstances to be considered in each instance including whether

the employee's explanation was unreasonable. It is only when the Employer has deemed the absence to be "reasonable and unavoidable" that authorized leave will be granted. In the event that it is considered an AWOL situation "appropriate deductions may be made from the employee's pay" and it "is subject to disciplinary action". The Human Resources Manual at topic 802 goes on to indicate that a person either on unpaid leave or considered AWOL shall have his or her pay "reduced to reflect the time away from work" or at the employee's request and the manager's discretion may be permitted to make up the time outside of regularly scheduled hours. It also points to the possibility of discipline being taken as a breach of the employee's standard of conduct. The definition for "written reprimand" is covered by topic 701 which states it to be "a written warning about performance or conduct is unsatisfactory and must be corrected. A copy of the written reprimand is placed on the employee's personnel file, becoming part of the employee's record".

In my considering the issue, Mr. Asmundson said, it is necessary to distinguish financial loss by reason of one's not attending at work, from financial penalty as a disciplinary response. He cited the *Random House College Dictionary (revised ed.)*, for "penalty" as including "a punishment imposed or incurred for a violation of law, rule, or agreement", and *Black's Law dictionary (6th ed.)* as meaning "an elastic term with many different shades of meaning; it involves idea of punishment, corporeal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment". In taking action against the grievor for her missed shift, a warning letter was considered by her manager to suffice as a disciplinary response. As one might expect, she was not paid for the day she did not work, being away without any authorized leave.

In support, Mr. Asmundson cited arbitrator Moreau's decision in *GNWT and UNW* (Paul McAdams Grievance), unreported, March 31, 2008, where the aggrieved employee received a letter

of reprimand for allegedly breaching confidentiality by speaking to an applicant in a job competition about the results. In upholding the objection, the arbitrator considered and relied on the explicit language of article 37.01(2)(d) which "indicates that both the employer and the union have agreed that minor discipline shall be grieved to the level of the Minister and no further". He cited an earlier award between the same parties by arbitrator Alan Beattie, *Carolyn Kolbelka,* unreported expedited December 14, 1995, where in considering the nature of a reprimand letter issued against the aggrieved employee for allegedly misusing the GNWT mail system and causing embarrassment to the Minister, he succinctly stated as follows his conclusion that the matter was non-arbitrable:

> **Clause 37(2)(a) of the Collective Agreement provides that for grievances involving "letters of discipline... the final level of resolution is the Minister of Personnel".**
>
> **Accordingly, although letters of reprimand are grievable, they are not arbitrable. I have no jurisdiction to hear the grievance".**

With the grievor here presumably claiming that there was some financial penalty inasmuch as she was not paid for the lost day, whose alleged conduct also generated the disciplinary warning letter, Mr. Asmundson in his review of case law also cited *Treasury Board (Government Services Canada) and Topping,* [1994] C.L.A.S. 392 (T.W. Brown) where the reliance was on section 92 of the *Public Service Staff Relations Act.* It allowed for certain workplace disputes to be arbitrable before an adjudicator, and included, as here, "disciplinary action resulting in suspension or a financial penalty". In *Topping,* the aggrieved employee filed several grievances following management's investigation concerning an alleged "incident" where no disciplinary action in the usual sense had resulted. The employee had argued that as a result of the investigation into his conduct there had been a financial penalty resulting inasmuch as it had such an effect on him that he fell sick and suffered "several nervous breakdowns" following which his annual vacation time

was ruined and later his sick leave bank was utilized, including recovery of overpaid benefits, also lost pensionable time by his understanding as he had not been earning a salary for some period of time and believed he was making no pension contributions. He also alleged that there had been a *de facto* suspension inasmuch as he had been "driven off work". On his review of the circumstances giving rise to the several grievances, the adjudicator determined that "the financial loss suffered by the grievor in the instant case is not to be confused with a financial penalty envisaged by section 92 of the *Act*. Any financial loss suffered by the grievor as a result of the employer's investigation cannot be seen as a financial penalty resulting from disciplinary action taken against the grievor", and hence he denied all of the various filed grievances on the basis that he had no jurisdiction to hear any of them, "as none of these grievances involve disciplinary action resulting in suspension or financial penalty".

In response to the Employer's position that the grievance is non-arbitrable under the collective agreement, article 37.01(2)(a), Mr. Penner submitted on the Union's behalf that it should be a matter of one considering the entirety of what occurred with respect to the grievor's absence in order to determine whether any financial penalty existed, and not just "insulating an arbitrable issue within a non-arbitrable vehicle". Realistically, on considering what occurred in the grievor's manager issuing her a letter of reprimand, its foundation lay in the denial of the grievor's special leave, said not to have been done reasonably. It is the essential failure to provide paid leave which was said to have been "obscured" by the discipline, and it is the denial and the results flowing therefrom, which includes a very real financial aspect, which should be viewed as incorporated into the grievance itself. Obviously, the responsible manager first had to make his decision on the possible leave issue before moving on to the warning letter. The warning letter which incorporated

the leave denial effectively imposed a financial penalty by reason of leave monies, to which the aggrieved employee was arguably entitled, not being paid. It accordingly should not be considered just a matter of the grievor not being paid for a day not worked. Obviously, the parties over the years have had occasion from time to time to arbitrate denial of various forms of paid leave. Here, no doubt, the warning letter followed on the heels of the manager's refusal to consider the absence as a special leave situation, despite what the grievor would say was a call-in made for that purpose, and accordingly she has suffered a financial penalty in the form of what ultimately amounted to a denial of paid leave which lay at the core of the written warning. It would be necessary for an arbitrator to hear the entire case in order to determine whether the grievor was wrongly denied special leave, which if that be the case would amount to a financial penalty attaching to the warning letter.

In his reply submission, Mr. Asmundson said that whatever the reason behind the warning letter, which the Employer says was tied to the grievor being considered AWOL for failing to get approval for extra day's absence, at no point did the Union grieve any supposed leave request denial, only the warning letter. The type of leave the grievor may have had it in mind to seek, or not, was realistically not presented as an issue in the grievance, he said, only the fact of the grievor being warned and not getting paid for a day she did not work.

Conclusion on preliminary jurisdiction issue:

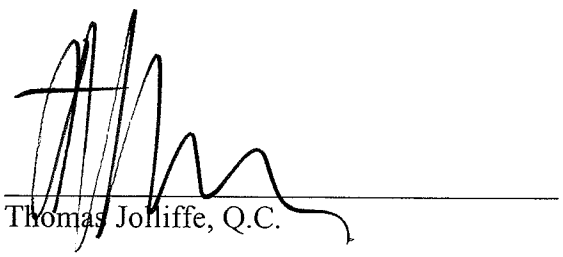
Once properly appointed, either consensually or in some other valid manner, an arbitrator gains his jurisdiction over a matter from the collective agreement and from the grievance document outlining the complaint do be presented. It has long been accepted that on receipt of the originating

written submission in the form of a valid grievance document, the arbitrator cannot add to the issues to be reasonably taken therefrom, substitute or create any other issues not found to exist in that document, or even enlarge or modify the issues to be found therein, unless by consent of the parties. On my reading of the formal grievance document filed in this matter, while no doubt there was an immediate ancillary issue of the grievor having telephone her supervisor, or not, possibly seeking another day's leave for the following day, or not, the grievance itself is plain enough. The issue presented was one of disputing the warning letter which was plainly grieved, but not whether the grievor was the same time improperly denied paid leave, which was not grieved. Notably, the formal grievance document makes no reference to any denial of special leave or financial penalty related thereto, but by way of details presents the plain assertion that "the Employer has disciplined a member without just cause", which I take to be a reference to the written warning. It does not allege the grievor to have been improperly denied some form of leave, whether paid leave or otherwise. Even the accompanying explanatory letter from Mr. Smith, while indicating there may have been a misunderstanding in the message that was communicated between the grievor and her supervisor in her arguably needing to take another day off, does not refer to her allegedly being improperly denied paid leave, or claiming to be financially penalized in that regard.

I agree with Mr. Asmundson's characterization that not being paid for a day not worked does not transform the warning letter into a financial penalty inasmuch as no monies were earned by not working. Clearly, she was not suspended for the day. One would have to incorporate an issue of refused paid leave into the grievance, which in my view is unwarranted, plainly being nowhere mentioned in the document, and not reasonably capable of being taken as a financial or penalty issue on reading the document. It is not even clear on the documentation that the grievor ever sought or

expected paid leave, although certainly she objected to having received a warning letter after having advised she would not be at work. On the circumstances presented, I accept that article 37.01(2)(a) applies in that this grievance matter, on the face of the documentation filed, concerns only a letter of discipline placed on the grievor's personnel file, and does not constitute any financial penalty. The final level resolution was to the Minister responsible for the *Public Service Act*, which is what occurred, and accordingly I am without jurisdiction to convene an arbitration hearing into the merits of the grievance. The matter is respectfully dismissed on that basis.

DATED this 30th day of October, 2009



Thomas Jolliffe, Q.C.