

IN THE MATTER OF AN ARBITRATION
PURSUANT TO THE *LABOUR RELATIONS CODE* OF BRITISH COLUMBIA
R.S.B.C. 1996, c. 244

BETWEEN:

UNIVERSITY OF BRITISH COLUMBIA

(the "Employer")

AND:

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 116

(the "Union")

(Attendance Management Committee and Six-Point Letter Grievances)

ARBITRATOR:

Christopher Sullivan

COUNSEL:

Michael Korbin and
Judith Macfarlane for
the Employer

David Tarasoff for
the Union

DATES & PLACE OF HEARING:

April 8, 9, 10 & 11 and
May 27, 28 & 29 & June 30, 2008
Vancouver, BC

PUBLISHED:

October 24, 2008

The parties agree I have jurisdiction to hear and determine the matters in dispute. The case involves two policy grievances filed by the Union regarding the Attendance Management Policy (AMP) and the Attendance Review Committee (ARC). The Union seeks relief on behalf of employees affected by the grievances but the nature of the relief sought is not particular to the individual circumstances of those employees.

The first grievance filed by the Union is dated February 1, 2005 and it alleges the Employer violated Articles 17.07 and 17.04 of the Collective Agreement, "and any other relevant Article, Act or Code". The Union framed this objection as a policy grievance although it referred to a specific employee who was required to provide medical information outside the Attendance Review Committee process. The grievance was referred to at these proceedings as the six-point letter grievance in recognition of the number of matters raised in the Employer's letter requiring medical information. The Union essentially alleges the Employer violated the Collective Agreement in sending the letters outside of the agreed upon Attendance Review Committee process provided for in Article 17.07.

The Union filed its second policy grievance on June 12, 2006, alleging that the Employer violated Articles 2.01 and 17 of the Collective Agreement, "and any other relevant Article, Act or Code", by virtue of its introduction of the Attendance Management Policy in its Land and Building Services (LBS) Department. Amongst other matters the Union alleges this policy is being improperly and inconsistently applied in the workplace.

At the outset of the proceedings the Employer made a preliminary objection to the effect the Union's grievances are inarbitrable on the basis of there being a previous settlement, delay, waiver and abuse of process. The Employer also initially took the position the Union was estopped from pursuing its grievances but this claim was ultimately withdrawn. I reserved judgment on these matters and will address them later in this Award.

RELEVANT COLLECTIVE AGREEMENT PROVISIONS

During the course of these proceedings the parties referred to the following Collective Agreement provisions:

ARTICLE 2 MANAGEMENT RIGHTS

2.01 Management Rights

The management and the direction of the working force is vested in the University, except as in this Agreement is otherwise specified.

ARTICLE 6 GRIEVANCE PROCEDURE

6.03 Policy Grievances

Where a dispute involving a question of general application or interpretation occurs or where a group of employees or the Union or the University has a grievance, Steps 1, 2 and 3 of this Article may be bypassed. The intent of the foregoing Article is that it will apply only to General Policy disputes.

ARTICLE 17 SICK LEAVE

17.01 Sick Leave Defined

Sick leave means the period of time an employee is absent from work with full pay by virtue of being sick, disabled or quarantined, or because of an accident for which compensation is not payable under the Workers' Compensation Act. Employees, who exhaust their sick leave credits due to lengthy illness, etc., shall be allowed an automatic leave of absence without pay for two (2) months. A review of the case shall be made at the end of the two (2) month period.

17.02 Annual Sick Leave

One and one-quarter (1-1/4) day's sick leave at full pay for each month of accumulated service up to a maximum of one hundred and fifty-two (152) days will be allowed....

17.04 Employee's Report of Illness

Where an employee is absent through illness or injury, he/she must report by phone or otherwise to his/her immediate supervisor

In case of absences exceeding six (6) days, report by phone or otherwise must be made to the employee's supervisor each week whenever possible. On return after absence, an "Employee's Report of Illness" must be presented on a standard form provided.

A certificate of fitness issued by a licensed medical practitioner may be requested from an employee returning to work following prolonged illness or injury....

17.07 Attendance Review Committee

A joint Union/Management Attendance Review Committee consisting of one (1) Union Executive, one (1) Senior Department representative, and one (1) representative from Human Resources will be established. The mandate of this committee shall include but not be restricted to reviewing and making recommendations to the University regarding cases covered under Article 17.01 above where employees have exhausted their paid sick leave credits and the automatic two (2) month extension of sick leave without pay, disability cases rejected for Workers Compensation or Long Term Disability Insurance, and cases involving excessive absenteeism and/or medical appointments.

As part of the review process the committee shall be empowered to require an employee to provide medical certificates to substantiate periods of absenteeism, to confirm degree of physical limitations due to injury, to ascertain the prognosis regarding the employee's anticipated date of return to work and his/her ability to carry out his/her full range of duties on a regular and consistent basis, and the like. The employee shall have the choice of obtaining such certificates from either his/her own doctor or from the University's physician. Where the committee deems it appropriate, however, it shall be entitled to obtain a second medical opinion from a physician of its choice.

See: Letter of Understanding re: Attendance Review Committee

The Letter of Understanding that Article 17.07 refers to is LOU #8, which provides as follows:

**Re: Attendance Review Committee
(Article 17.07)**

It is understood and agreed that the Committee constituted under Article 17.07 shall function on the basis of consensus. However, if consensus cannot be achieved in a given instance, the University may exercise its rights as if Article 17.07 did not exist.

SUMMARY OF RELEVANT EVIDENCE

While a considerable amount of evidence was provided during the course of the hearing, much of it is not controversial. The Attendance Management Policy in LBS was implemented by the Employer to address concerns raised by the University Board of Governors regarding both the frequency of time loss accidents as well as sick time usage. LBS contains the largest group of CUPE members at the University with 696 employees. The great majority of these employees work in Plant Operations. The second largest component of these employees is in Utilities, which has twenty CUPE members.

In a letter dated March 28, 2002 Director of Human Resources and Administration, Deborah Austin, advised Local Union President, Paul Cooke, that the Employer, in concert with "UBC HR, Land and Building Services", had created the Attendance Management Policy, as well as an Absence Notification Policy, which were designed to support direction from the Board of Governors. Mr. Cooke was provided with a copy of the two policies for review and comment and his prompt feedback was requested.

On April 17, 2002 Ms. Austin sent a further letter to Mr. Cooke enclosing the LBS Attendance Management Policy, which had been revised to include the Attendance Review Committee pursuant to Article 17.07. By letter dated June 12, 2002 Colleen Garbe, at that time the Union's General Vice President, wrote to the Employer alleging it violated the Collective Agreement by questioning two employees regarding their

attendance under the new policy. It was alleged this action violated the procedure set out under Article 17.07 regarding the Attendance Review Committee.

After the Union filed its grievance, Mr. Cooke met with Dan Leslie, Associate Director Building Operations and Kyle Cormier, then HR Employee Relations Manager (now Director of Human Resources and Administration in LBS). Subsequently, changes were made to the LBS Attendance Management Policy. As set out in a letter from Ms. Austin to Mr. Cooke dated September 26, 2002 changes were made with respect to the Attendance Review Committee meetings and the issues to be discussed with employees.

In a letter from Mr. Leslie to Ms. Garbe, dated January 28, 2003 the Employer suggested a further change to the process, the result of which was that certain letters previously provided to affected employees were rescinded by the Employer. On January 29, 2003 the Union replied:

Grievance Number 2002-092
CUPE 116 – Land & Building Services – Attendance Review Committee

The Union is writing in respect to the above noted grievance, there is an agreement in principal regarding “Attendance Management Policy” that appears to be working relatively smoothly.

The Union is of the opinion that a Policy grievance on the matter is not required at this time.

The Union is withdrawing this grievance on a without prejudice or precedent basis to any future similar/identical issues that may arise.

The Attendance Management Policy is based on the premise that regular attendance at work is vital and the objective of attendance management is to promote regular attendance at work. The policy itself explains that non-culpable absences are not in themselves disciplinary and, for this reason, it is necessary to review attendance records, discuss attendance issues with employees and set attendance objectives.

In terms of the procedures for managing non-culpable absenteeism, the policy indicates that an interview is to be held with employees whose sick time is excessive or follows established patterns or for other reasons. A follow up letter is to be sent to the employee after the interview. Should attendance not improve, the policy provides that further interviews will occur, with progressively more pointed letters being sent to the employee, warning of consequences to their continued employment, including termination. The policy indicates that copies of the letters sent to the employee will be provided to the Union and that an employee has opportunity to file a grievance at any stage of the process.

The policy also makes reference to the Attendance Review Committee. Initially, the Attendance Management Policy provided that an employee would be sent to the Committee at the second step in the policy. In a letter dated April 19, 2004 to Mr. Cooke, Mr. Cormier confirmed that the parties had reached an “agreement to incorporate ...(certain) changes to the attendance management policy.” Specifically, the Attendance Review Committee would now become involved after the third absenteeism letter, unless there were unusual circumstances.

Mr. Cormier’s April 19, 2004 letter confirmed that the letters sent to employees under the Attendance Management Policy were written in form style although they could be expanded upon. The letter also indicated that employees would not be required to attend the Attendance Review Committee if no medical reason is provided for their absenteeism. Mr. Cormier’s letter added:

To date, it is acknowledged that the program has worked well and there has not been a grievance filed by either side. It is believed that the above change to the program will reduce the need to send employees to their doctor for medical exams and make the program more effective.

It is understood that Union is free to grieve the issuing of any letter that they feel was issued without just cause.

Please inform your stewards about the attached changes.

I trust you will find all the changes to your satisfaction.

The policy was applied thereafter in the Land and Building Services Department without any further negotiated alterations.

Evidence led in these proceedings addressed the Employer's use of the Attendance Management Policy and the thresholds/triggers/standards that were set for the purposes of determining when to interview an employee regarding their attendance record. The policy itself contains no specific threshold but makes reference to "an individual employee whose sick time is excessive", and "individual employees who are maintaining unacceptable sick time."

Prior to 2006 no specific threshold had been developed for the LBS Attendance Management Policy. Up until that time at least sixty letters had been sent to employees pursuant to the policy and none were grieved.

In 2006, after Mr. Cormier moved to his position in LBS, the Employer established a threshold of absenteeism of more than 100 days over the five-year period between 2000 and 2005. A second phase was introduced in 2007 which involved an annual review to determine whether employees were above a threshold of 36 days over a three year period. The evidence indicates the Employer has used the thresholds as a basis upon which to determine whether to interview an employee about his or her attendance.

The evidence also indicates the Employer includes in its calculation of absenteeism: sick leave, WCB absences, vacation in lieu of sick, and banked time in lieu of sick. The LBS policy is silent on this topic.

In LBS the Employer has conducted somewhat regular reviews to determine whether an employee is to be placed in Step 1 of the policy, or moved to the second, third or fourth steps. Between Steps 3 and 4 an employee may be referred to the Attendance Review Committee. Currently there are about 140 employees at some stage of the policy. Ninety are at Step 1; thirty at Step 2; fifteen at Step 3 and five at Step 4.

Evidence was led that despite the threshold established for review, discretion was exercised in the case of individual employees such that all employees who met the standard were not necessarily interviewed because of factors particular to their case.

Evidence was also led regarding the specifics of the six-point letter, which is addressed to the employee's physician, and asks the following questions regarding the employee's circumstances:

1. What is the nature of the illness or injury, either evident, latent, or otherwise, that caused [the employee's] most recent absence from work and how does it affect and/or limit [his/her] ability both to attend work on a regular and consistent basis and to properly perform job duties safely and effectively...
2. What is [the employee's] prognosis for recovery with a view to being medically fit to perform all of the responsibilities of [the] job, and what limitations, if any, are to be placed on the type or duration of activities that [the employee] is to undertake, and for how long?
3. When do you expect that [the employee] will be physically and mentally able to safely and effectively perform the tasks of [his/her] regular job, in either a standard or modified capacity? (Please try to be as precise as possible and indicate whether you are referring to either a standard or modified capacity and to what degree).
4. What is the nature of the treatment plan that has, is, or will be prescribed, and has [the employee] been following this plan?
5. In your opinion, after [his/her] current medical problems are resolved, is [the employee] at risk of re-injury if [he/she] performs

the tasks of [his/her] regular job? If so, how would you rate the magnitude of that risk?

6. Where possible, the department is supportive of returning injured or ill employees back into the workplace on modified duties. These modified duties can be as easy as just dust mopping or wiping furniture. What workplace modification will be required to facilitate [the employee's] return to work in at least a modified capacity, and how many hours per day can the employee work in a modified capacity?

At these proceedings the Union called the following bargaining unit members who testified about their personal circumstances and experience with the Employer's Attendance Management Policy, including the receipt of six-point letters: Bookstore Cashier Julie Frkovich, Carpenter Gord Dobie, Steamfitter Bruce Villman, Cook/Baker Peter Cunningham, Commissary Chef Gord Stewart, Steamfitter/Pipefitter Wane McCoy, Custodian Gulnaz Hussain, Communications Officer Sue Black, and Electrician Brian Templeton.

SUMMARY OF THE PARTIES' POSITIONS

On behalf of the Union Mr. Tarasoff argues the Employer has applied the Attendance Management Policy in a manner that is unreasonable and or inconsistently applied and or otherwise contrary to the Collective Agreement. Counsel alleges the Employer has not consistently applied the Attendance Management Policy, either within LBS or within other departments across the University and that consistent application of this policy is fundamental and essential in order for the policy to be upheld. He points to the use of different "triggers" within various departments as an example of the inconsistent application of the policy.

Mr. Tarasoff states the policy in question must also be brought to the attention of the affected employees before the Employer attempts to act upon it and that the policy was not sufficiently communicated to either the employees or the Union. Counsel states that failing to communicate the standard of attendance required of employees is sufficient

to warrant the remedy sought by the Union. Even if it is assumed that the standard is reasonable, the Union states that the application of this standard, or “trigger”, was unreasonable in light of the collective agreement provisions that provide for accumulation of sick leave credits.

Mr. Tarasoff also refers to the inclusion of WCB absences as further evidence of the unreasonable application of the policy and seeks an arbitral declaration to this effect. Counsel adds that the Employer’s application of the policy is unreasonable as it has been applied in a mechanistic fashion. Counsel refers to the regular inclusion in letters issued under the policy the statement that the recipient of the letter is a burden to their co-workers, which is not necessarily true in every situation.

Turning to the six-point letter grievance, Mr. Tarasoff argues the Employer is not entitled to issue these letters unless the Attendance Review Committee has determined to do so, subject to the provisions of LOU #8. Counsel states the role of the Committee is not necessarily confined to issues of absenteeism and restriction in this sense constitutes a violation of the Collective Agreement.

By way of remedy, the Union seeks a declaration that the Attendance Management Policy is unreasonable and or contrary to the Collective Agreement or inconsistently applied. The Union seeks an order that all letters issued to employees under the policy since 2004, or alternatively 2006, be removed from their personnel files. The Union further seeks an order compelling the Employer to remove the six-point letters from the files of a number of named employees, together with reimbursement of costs for any medical reports prepared in response to a six-point letter.

The Union relies on the following authorities: *Vancouver Shipyards Co. and United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 170*, [2005] B.C.C.A.A.A. No. 296 (Hope); *Vancouver Shipyards Co. and United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local*

170, [2006] B.C.C.A.A.A. No. 186 (Hope); *Vancouver Shipyards Co. and United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 170*, [2006] B.C.C.A.A.A. No. 187 (Hope); *Rosewood Manor and Hospital Employees' Union, Local 180* (1990), 15 L.A.C. (4th) 395; *Health Employers Assn. of British Columbia and Hospital Employees' Union*, [2002] B.C.L.R.B.D. No. 112; *Health Employers' Association of British Columbia and Hospital Employees' Union*, (1999), 54 C.L.R.B.R. (2d) 96; *Health Employers' Association of British Columbia and Hospital Employees' Union*, [1997] B.C.C.A.A.A. No. 580 (Greyell); *Coquitlam District and District of Coquitlam Firefighters Union, Local 1782*, [1998] B.C.L.R.B.D. No. 217; *Coquitlam City and International Association of Firefighters, Local 1782*, [1997] B.C.C.A.A.A. No. 499 (Hickling); *Coast Mountain Bus. Co. and National Automobile, Aerospace, Transportation and General Workers of Canada, Local 111*, [2000] B.C.C.A.A.A. No. 461 (Dorsey); *Purolator Courier Ltd. and Teamsters, Local 31*, [2000] C.L.A.D. No. 238 (Greyell); *Simon Fraser University and Association of University and College Employees, Local 6*, (1983), 2 C.L.R.B.R. (NS) 329; *British Columbia Railway Co. and Canadian Union of Transportation Employees, Local 6*, (1982), 8 L.A.C. (3d) 250; and *Gorsky et al., Evidence and Procedure in Canadian Labour Arbitration* (Toronto: Thomson Carswell, 1994) pp. 2-1 to 2/32.

On behalf of the Employer, Mr. Korbin argues the parties reached an agreement with respect to the terms of the Attendance Management Policy, which is very different from the Employer unilaterally implementing such a policy. As the parties agreed to the policy it is not now open for the Union to challenge its terms or the reasonableness of its terms. Where the parties have reached an agreement it is not open to an arbitrator to interfere with the terms of the agreement regardless of whether or not they are reasonable.

Mr. Korbin submits that the agreement is specific to LBS and does not apply, and was never intended to apply, to any other department or unit. Counsel states that while the Union filed a grievance regarding the initial unilateral implementation of the LBS

Attendance Management Policy, the parties subsequently reached agreement over the terms of the policy. He points out an agreement was reached in 2002 and subsequently modified in 2004 and at all relevant times it remained specific to LBS. Subsequent to the parties having reached the agreement, the Union's policy grievance filed in 2002 was withdrawn.

Mr. Korbin states the complete answer to the Union's case is the fact the parties themselves reached an agreement with respect to the Attendance Management Policy. He alleges the Union is in essence arguing that the policy is unreasonable, despite expressly not challenging the reasonableness of that policy.

Mr. Korbin submits the standard or threshold that is applied and leads to inclusion in the Attendance Management Policy is reasonable. Counsel asserts that LBS has administered the policy in a consistent and reasonable fashion and there is no breach of the agreement between the parties.

The response on behalf of the Employer with respect to the six-point letter is that the Union's position represented a "complete code" argument, which is an approach rejected by arbitrators in this province. Counsel for the Employer argues that employers retain the general right to seek medical attention in a variety of circumstances. Although collective agreement provisions may stipulate when a medical certificate may be required, such as within the mandate of the Attendance Review Committee, Counsel says that these provisions do not otherwise limit the Employer's right to obtain medical information.

The Employer takes the position that in the absence of individual grievances with specific facts peculiar to individual circumstances, there is no basis upon which to conclude that the Collective Agreement has been breached or upon which to grant the remedy sought by the Union, or any remedy. The Employer submits that the grievances be dismissed.

The Employer relies upon the following authorities: *Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.*, (1965) 16 L.A.C. 73 (Robinson); *Coquitlam (City) and I.A.F.F., Local 1782*, [1997] B.C.C.A.A.A. No. 499 (Hickling); *Health Employers Association of British Columbia and H.E.U.*, [2002] B.C.L.R.B.D. No. 112; *Purolator Courier Ltd. v. Teamsters, Local 31*, [2001] C.L.A.D. No. 238 (Greyell); *Surrey School District No. 36 v. British Columbia Teachers' Federation (Wyndham Grievance)*, [2006] B.C.C.A.A.A. No. 152 (Taylor); *Skeena Cellulose Inc. v. Christian Labour Assn. of Canada, Local 44*, [2001] B.C.C.A.A.A. No. 164 (Blasina); *Labatt's Ontario Breweries and Brewery Workers Union*, [1990] O.L.A.A. No. 60 (Brandt); *British Columbia School District No. 9 (Castlegar) and Castlegar District Teachers' Assn. (Dudley Grievance)*, [1996] B.C.C.A.A.A. No. 478 (Sanderson); *Capital Health Authority (Royal Alexandra) v. United Nurses of Alberta, Local 33 (Schram Grievance)*, [2006] A.G.A.A. No. 60 (Ponak); *United Nurses of Alberta, Local 33 v. Capital Health Authority*, [2008] A.J. No. 202; *Overwaitea Food Group, A Division of Great Pacific Industries Inc. and U.F.C.W., Local 1518*, September 30, 2005 (Hall); *Thompson General Hospital and Thompson Nurses M.O.N.A., Local 6*, (1991) 20 L.A.C. (4th) 129 (Steel); *Loomis Armoured Car Service and Independent Canadian Transit Union, Local 1*, [1988] C.L.A.D. No. 17 (Dorsey); *Northern Telecom Canada Ltd. and C.A.W., Loc. 1915*, [1991] O.L.A.A. No. 38 (Kennedy); and *Oakville (Town) v. Canadian Union of Public Employees, Local 136 (Attendance Management Grievance)*, [2005] O.L.A.A. No. 393 (Kaplan).

DECISION

As noted at the outset of this Award the Employer made a preliminary objection regarding the arbitrability of the Union's grievances on a number of grounds. At the conclusion of these proceedings the Employer withdrew its objection on the basis of estoppel. I am of the view that none of the Employer's preliminary objections can be sustained. Suffice it to observe, the *Labour Relations Code* requires that I have regard to the real substance of the matter in dispute, and I am not persuaded the evidence in any

way at all supports the Employer's objections to effectively make the Union's substantive claims inarbitrable.

I propose to address the merits of each of the policy grievances separately.

The Attendance Management Policy Grievance (No. 2006-14)

The Union confirmed at the outset of the hearing it was not challenging the existence of the LBS Attendance Management Policy or the reasonableness of that policy. While the Union did not consider the Attendance Management Policy to be a "joint" policy, the Union accepted, properly in my view based on the evidence, there was an agreement between the parties with respect to the terms of the policy.

In 2002, soon after the Employer's original unilateral implementation of the Attendance Management Policy, the Union raised substantive matters of concern and the result was an agreement to amend the policy. This conclusion is evidenced by the Union's withdrawal of its policy grievance filed in conjunction with the initial implementation of the policy by the Employer. Further evidence of an agreement between the parties is the subsequent modification of the Attendance Management Policy in 2004. This agreement resulted in a substantive change sought by the Union being implemented regarding the stage at which the Attendance Review Committee becomes involved.

As to the nature of the agreement reached between the parties, the issue is approached by the parties from two very different perspectives. On the one hand, the Union argues that the Attendance Management Policy was not applied consistently both within LBS and across other departments and units, and it is therefore unreasonable and should not be upheld. The Employer, on the other hand, argues the parties agreed to the terms of the policy only with respect to LBS and there was no agreement to extend the application of the policy to other departments of the University. The Employer submits

that even if the policy was extended outside of LBS, it was a unilateral extension and is of no significance with respect to the application of the agreement reached for LBS.

Given these opposing perspectives, it is necessary to reach a conclusion regarding the nature of the agreement reached by the parties.

Mr. Lance gave evidence that after the agreement between the parties was reached in 2004, the Attendance Management Policy was not applied throughout LBS. Rather, the policy was applied in Plant Operations only and not in Utilities. Mr. Cormier essentially agreed with this observation but indicated that following the departure of a former director of Utilities in 2007, the policy was and remains applied throughout LBS. Furthermore, Utilities has only twenty bargaining members out of a total of 696 in LBS.

As noted, the Attendance Management Policy has not been implemented in all departments of the University outside of LBS. An attendance management policy had been in place for some other departments, but it did not necessarily apply in the same manner as the LBS policy or, for that matter, always continue to be in use.

As described above, the parties agreed to changes to the Attendance Management Policy in 2004. The parties met with respect to these changes on April 15, 2004 and in a letter dated April 19, 2004 Mr. Cormier confirmed the changes to be made to the policy. Mr. Cormier indicated that employees would no longer be required to attend the Attendance Review Committee as the second step in the policy. The letter then stated:

Please accept this letter as a formal change to the program that will now apply to every department and unit on campus.

The Union at these proceedings takes this statement to mean that there was a plan to extend the Attendance Management Policy to all departments and units at the University, while the Employer takes the position that the agreement between the parties

only applied to LBS. I find on a balance of probabilities that there was no agreement to extend the Attendance Management Policy outside of LBS.

I reach this conclusion for the following reasons. Mr. Cormier gave evidence with respect to the discussions on April 15, 2004 and stated that there was no discussion about extending the Attendance Management Policy outside of LBS. His uncontradicted evidence stands as strong support to the effect the parties did not actually intend the LBS policy to be extended throughout the University, but rather the newly negotiated changes would be applied to the three or four departments and units on campus which were at that time using the LBS Attendance Management Policy, with or without some variation.

Extension of the Attendance Management Policy throughout the entire University would constitute a significant event unrelated to the Employer's discussions with the Union that occurred on April 15, 2004. The fact that Mr. Cormier did not at the time distribute his letter to all departments and units at the University indicates that he certainly did not intend for the policy to be extended as the Union now claims. Further, there is no indication that the Union agreed to extend the application of the LBS policy to every department and unit at the University.

I therefore conclude that the evidence falls short of establishing that the Employer implemented the Attendance Management Policy in other departments and even less so that it reached agreement with the Union regarding such implementation. I find that the agreement consummated between the parties concerned only the implementation of the Attendance Management Policy with respect to LBS.

Having found that the agreement between the parties regarding the Attendance Management Policy applied only to LBS, I turn to the Union's allegation that the Employer has applied the policy in a manner that is inconsistent, unreasonable or contrary to the Collective Agreement. In support of its position, the Union relies on the

analysis set out in the seminal *KVP* case, wherein the arbitration panel made the following statement regarding unilaterally introduced policies or rules:

A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

I am not satisfied the *KVP* analysis is applicable to the LBS Attendance Management Policy because the parties have agreed upon the policy. *KVP* expressly and unequivocally speaks to rules “unilaterally introduced by the Company, and not subsequently agreed to by the union”. This is not the situation in the present case where an agreement was clearly reached by the parties regarding the policy at issue.

In *Loomis Armoured Car Service, supra*, Arbitrator James Dorsey had opportunity to comment on the application of *KVP* in the context of a “no beard rule” included in an Employee Rule Book that was given to each employee. The Rule Book was expressly recognized in the collective agreement and the parties agreed to review it during the term of the agreement with respect to any new changes that might be implemented.

Arbitrator Dorsey essentially held that the *KVP* principle did not apply to the case before him as it involved an agreement between the parties, and not the unilateral implementation of a rule or policy. He observed:

The employer's rule was made in good faith. However, I would not find it to be a reasonable rule in the circumstances of this employer unless there were much more evidence that beards (neatly trimmed) threatened its image and business. The evidence would have to be very cogent. Unilaterally imposed employer no beard rules have only withstood scrutiny against the test of reasonableness where they operated in retail food outlets or were necessitated for safety reasons or to avoid food contamination. However, all of those cases dealt with a "rule unilaterally introduced by the company, and not subsequently agreed to by the union". (*KVP Co. Ltd.*) This is not the case here. The union has accepted the no beard rule by virtue of Article 26. The employer cannot add to or even delete from the Rule Book. In fact, to tie down the employer's rules, the union succeeded in having the collective agreement make specific mention of the booklet issued in June, 1979. The Rule book is to be jointly reviewed "with a view of implementing any new policy and/or procedural changes". The Rule Book is no longer merely a unilateral exercise of management authority, but one expressly accepted by the union.

An arbitrator should not interfere with that agreement. Parties may make agreements that others would say are unreasonable and they may have very good reasons at the time for making such agreements.

In *Health Employers Association of British Columbia, supra*, a Reconsideration Panel of the Labour Relations Board had opportunity to comment on unilaterally implemented attendance management policies as distinct from those negotiated by the parties. The Board observed:

9 ...The problems that are most commonly encountered in unionized settings have usually stemmed from the fact that the programs have been introduced unilaterally by the employer rather than negotiated between the parties. Although an employer is entitled to take such action, a union may challenge the program arguing that it takes insufficient account of the terms of the collective agreement. Such programs may use language and introduce concepts that cut across traditional lines of distinction between culpable and non-culpable behaviour and disciplinary and non-disciplinary

responses. In the perception of the union and its members, they may appear to undercut the protection of the collective agreement, for example, by denying employees access to the grievance procedure or depriving them of the benefit of clauses that cleanse their records after the passage of a period of time without further transgressions; by depriving them of the full benefit of provisions on matters such as accumulated sick leave and long term disability benefits; or by attaching new conditions of entitlement to those that have been negotiated. These may be only some of the broader catalogue of factors that, arguably, may render unreasonable the unilateral introduction of an attendance improvement program.

At the end of the *HEABC* decision the Reconsideration Panel wrote a summary of the points it wished to make, which included the following:

104 ...Endorsement by the union is not a condition precedent to the implementation of plans designed to improve attendance. The *Code* does encourage not only collective bargaining, but also “co-operative participation between employers and trade unions in resolving workplace issues ... and promoting workplace productivity”: Section 2(1)(a) and (d) of the Code. Arguably it is in the interests of employers and their representatives to co-operate in reducing absenteeism. From the employer’s perspective, we observe that union involvement or acquiescence may afford safe passage throughout what may be, without its consent or approval, a veritable minefield of rights that have been accumulated over years of collective bargaining at a time when managerial policies focused less on return to work strategies than on the blanket application of a rigid policy on absenteeism. Strategies unilaterally introduced by the employer for dealing with excessive absenteeism must not only take account of statutory obligations (such as the duty to accommodate workers with disabilities) but must be reasonable and consistent with the collective agreement.

These comments have application to the circumstances at hand. Reasons exist for the parties to enter into an agreement regarding the type of policy at issue in the present case, and I am not prepared to disturb the consensus reached by the parties.

To the extent the present case does not involve a unilateral policy or rule the *KVP* analysis is not applicable. Having said this, I also accept the appropriateness of any discipline that might follow a breach of the Attendance Management Policy would remain subject to an assessment of reasonableness as set out in the *Vancouver Shipyards, supra*. In that case Arbitrator H. Allan Hope Q.C. recognized that any agreement between the parties regarding just cause for discipline would not be binding upon an arbitrator who was empowered by the *Labour Code* and the *Wm. Scott* authority to conduct an independent inquiry. Arbitrator Hope stated:

It is clear in the current state of the law that parties cannot introduce a code of conduct binding upon an arbitrator. In terms of the Employer's Policy, even if the Unions had agreed to its terms, and even if employees were to agree to accept it as binding upon them, it would not be binding on an arbitrator in a particular application. The best that employers can expect where bilateral discipline codes, including drug and alcohol policies, are introduced is a measure of arbitral deference.

Where the parties have agreed to a rule or policy, an arbitrator should not interfere with that agreement. Nonetheless, it remains open to the Union to challenge the application of the rule or policy in individual circumstances. The application of the policy can be disputed by an affected employee at any step of the process and a determination made as to whether the measures taken by the Employer are excessive or otherwise inappropriate. The same cannot be said with respect to a review of the agreed upon rule or policy itself.

The Employer asserted that the existence of an agreement by the parties was a complete and sufficient answer to all of the Union's arguments raised in regards to the grievance at hand, but I do not agree. Despite my conclusions that the agreement between the parties concerned only LBS and that the analysis in *KVP* is not applicable, it remains necessary to address the argument that the application of the LBS Attendance Management Policy is unjust or unreasonable.

The Union has raised a number of issues that it says are indicative of an inconsistent or unreasonable application of the Attendance Management Policy. Those issues include the application of a “trigger” in light of the Collective Agreement provision that allows for the accumulation of sick leave credits. The Union also objects to the inclusion of WCB absences in the calculation of absenteeism. Further, contrary to Article 8.05 of the Collective Agreement, the policy contains no sunset clause that results in the removal of documentation from one’s file due to the passage of time. Article 8.05 essentially provides adverse reports shall be removed from an employee’s file if there is no further infraction within twenty-four months from the date of issue.

With respect to the use of a trigger to bring an employee under the LBS Attendance Management Policy, the policy specifically contemplates there will be a threshold or standard that, when reached, will bring the employee’s attendance under review. The use of a standard or threshold is a necessary element to assist in the consistent application of the Attendance Management Policy, and is consistent with the agreement reached by the parties.

The thresholds used in LBS were developed in conjunction with the realities of that particular workplace, and I accept they meet the test of reasonableness. It should be noted that while the threshold was used to initiate a review, some employees were not brought into the program because of their particular situations. In addition, the University conducted regular reviews of the circumstances of employees within the program. These actions are consistent with the objectives of the program and the terms agreed to by the parties.

I am also unable to conclude that the absence of a sunset clause in the Attendance Management Policy results in an unreasonable application of the policy. The reference in Article 8.05 to the removal of adverse reports relates to disciplinary matters qualitatively distinct from attendance. Article 8.05 is contained within the broader Article 8, which

addresses discharge, suspension and discipline, and it specifically refers to notification by the Employer of dissatisfaction with an employee's "work". I consider this to be separate and distinct from the question of whether an employee is brought within the Attendance Management Policy because of concerns regarding absenteeism.

Put another way, the matters contemplated in Article 8.05 are different in character from a policy intended to address absenteeism, albeit a policy that could lead to termination from employment. Article 8.05 cannot in my view be seen as neutral or bearing no connotation of culpability. Written censures, letters of reprimand and adverse reports possess a negative connotation that is inconsistent with the more neutral advice to an employee regarding their attendance at work.

The fact the Attendance Management Policy also includes consideration of WCB absences does not make it unreasonable. On this issue, Arbitrator Hickling made the following comments in *City of Coquitlam, supra*, which are appropriate to the present circumstances:

110 On the evidence before me, a good argument could perhaps be developed for excluding Workers' Compensation absences from the operation of the AIP. I do not think that it would be unreasonable to do so. That does not, of course, mean that the alternative of including Workers' Compensation absences is in itself unreasonable. Indeed, as explained earlier, there are practical policy reasons why it might be desirable to include such absences. I am not persuaded that the disadvantages of including them are so overwhelming that their very inclusion must result in the AIP being characterized as unreasonable. Thus, on balance, I am not prepared to condemn the AIP as unreasonable *per se* simply because injuries or illnesses compensable under the *Workers Compensation Act* are included in the program.

In regards to matters that the policy is silent on it remains always the case that discretion must be exercised reasonably.

The final comment I wish to make regarding this grievance concerns the evidence with respect to the application of the LBS Attendance Management Policy within that department. Mr. Lance's evidence was that the policy was applied only within Plant Operations and was not at all times applied to the Utilities portion of the department. Had the evidence been that the policy continued to be applied unequally within LBS, I would have had no difficulty in concluding that this was an unreasonable or arbitrary application of the policy, given the nature of the agreement between the parties. However, the evidence supports a conclusion that since the departure of a former director the policy has in fact been applied in the same fashion in both Utilities and Plant Operations. I therefore find that the previous failure to apply the policy equally was an anomaly and not a sufficient basis upon which to find an inappropriate application of the Attendance Management Policy has occurred. The cases do not suggest that the Employer's action must meet a standard of perfection and I am satisfied that the LBS policy has been applied consistently apart from this anomalous circumstance.

I therefore conclude that in the context of the policy grievance at issue there has been no unreasonable or inconsistent application of the LBS Attendance Management Policy, and this grievance must therefore be dismissed.

The Attendance Review Committee Grievance (No. 2005-006)

This policy grievance raises the issue of when the Employer is entitled to request medical information through the utilization of the "six-point letter". Specifically, the issue raised in the grievance is whether such a letter can be issued only in the circumstances contemplated by Article 17.07, or can it be issued in other circumstances?

In order to resolve this question it is first necessary to consider whether Article 17.07 has application in all circumstances that might give rise to a need for medical information. Article 17.07 specifically provides that the mandate of the Attendance

Review Committee shall include but not be restricted to reviewing and making recommendations to the University with respect to three specific situations:

- cases under Article 17.01 where sick leave and the automatic two month extension of sick leave without pay have been exhausted;
- disability cases rejected for Long Term Disability Insurance or Workers' Compensation, and;
- cases involving excessive absenteeism and/or medical appointments.

While the evidence is that the Attendance Review Committee is predominantly used in cases involving excessive absenteeism, I am unable to conclude from the language chosen by the parties that the role of the Committee is restricted to cases of that nature. While there can be no doubt that the cases in which Committee has a role to play include excessive absenteeism, the parties have agreed that where employees are off work in circumstances that do not necessarily constitute excessive absenteeism, the involvement of the Committee may be appropriate.

The Attendance Review Committee's involvement appears to be desirable in cases where there is an absence from work of longer duration, such as where sick leave and leave without pay are exhausted or where Long Term Disability has been denied. It cannot be said however, that this is the only rationale for the Committee's involvement as disability cases rejected for Workers' Compensation would not necessarily be associated with absences of long duration. The parties have expressly agreed that the Committee has a role to play specifically where Workers' Compensation has been denied.

While I agree with the position of the Union that the role of the Attendance Review Committee is not limited solely to cases of excessive absenteeism, given the clear language of the Collective Agreement, this conclusion does not necessarily lead to the outcome that the Committee has a role to play in all situations such as where there is a

need, for example, to substantiate the reasons for an absence, to obtain a prognosis, or to determine the degree of physical limitations. Although the Collective Agreement is specific as to the situations in which the mandate of the Attendance Review Committee applies, these are not the only situations where a need for medical information might arise. Article 17.07 cannot serve to preclude or negate the Employer's right to request medical information outside of this provision.

In *Skeena Cellulose, supra*, Arbitrator Blasina had opportunity to consider a collective agreement which specifically provided the Employer could request a medical certificate in two particular instances. The question that arose was whether, having agreed to those terms, the Employer was precluded from requesting a medical certificate in any other circumstance. Arbitrator Blasina held that despite the inclusion of specific circumstances in the collective agreement under which medical information could be requested, the employer was nonetheless entitled to request medical information in other situations. He stated:

Expressing this in terms of the "management rights doctrine, the employer may within its management rights request a medical certificate unless the collective agreement specifically prohibits it, which would be most unusual indeed. That said, managers should still be cautioned that even when acting within their "management rights", their discretion is not absolute. It has been accepted in this province that management rights must be exercised fairly and reasonably. Commensurate with that principle is the very requirement that management must have reasonable and probable grounds for doubting the validity of the employee's claim. Collateral circumstances must be present which would give the employer "reasonable and probable grounds" to demand a medical certificate.

As to the application of this principle to the question of entitlement to medical information in cases other than those where the *bona fides* of an absence is questioned, Arbitrator Blasina continued:

An employer is also entitled to demand a sufficiently explanatory medical certificate in cases where the employee makes himself available for work and his *bona fides* is not suspect. This occurs in those cases where an employee seeks to return to work after a prolonged absence, or after demonstrating a pattern of chronic absenteeism even when the absenteeism seems to be attributable to different medical problems. In such cases the employer is entitled to know that the employee is indeed fit and able to return to work and will not present any undue risk to himself or fellow employees. It seems that in such cases it is also a “reasonable and probable grounds” criteria which would apply, although it would be reasonable and probable grounds for concern, or perhaps suspicion, about the employee’s alleged fitness; i.e., alleged availability for work.

Regardless of whether the parties have provided specific examples of when a medical certificate or medical information may be required, the employer nonetheless retains the ability to request medical information under its general management rights. This right is retained regardless of whether the events leading to the request for information may lead to a disciplinary response, or because of other issues such as safety and fitness to return to work.

In *Surrey School District No. 36* Arbitrator Colin Taylor Q.C. had opportunity to consider whether the employer could request additional medical information where the collective agreement provided for medical leave upon the production of a medical certificate. In addressing the argument that following production of a medical certificate the employer could not request additional information unless the *bona fides* of the illness was in question, the Arbitrator stated:

The Union’s submission is that entitlement to a partial medical leave is governed by Article 39.90 and that the Grievor met those requirements by producing a Certificate. That is the “complete code” argument advanced and rejected in the *City of Windsor* and in *British Columbia School District No. 9 (Castlegar) and Castlegar District Teachers’ Assn. (Dudley Grievance)*, 1996 unreported, (Sanderson), (application for review

dismissed BCLRB B303/97). The production of a Certificate is the threshold requirement for a teacher to be considered for eligibility for a partial medical leave: Munroe award, p.6. The employer asserts that the Certificate is inadequate for the purposes for which it is intended and for the benefit sought. The authorities make it clear that, subject always to the provisions of the collective agreement, an employer is entitled to request additional information where the issue is whether the employee has provided sufficient information to support application for the benefit. In such circumstances, the question will be whether the employer's request is reasonable.

These authorities have application to the present circumstances and support a conclusion that the Employer may properly issue six-point letters to employees without the approval or authorization of the Attendance Review Committee. Article 17.07 identifies specific circumstances that the Committee shall review and make recommendations to the University and, in so doing, is empowered to require production of medical information. Nothing in Article 17.07 or the authorities suggests a limitation to the Employer's general management rights to obtain medical information, subject to the requirement that the request be reasonable within the context of the individual circumstances involved. This right remains regardless of whether the Employer is, for example, questioning the legitimacy of an absence, or safety and the fitness of an employee to return to work, or to establish entitlement to a benefit.

These are not the only circumstances where an Employer request for medical information may be appropriate. While I do not propose to outline all possible circumstances where additional medical information might be permissible, I do note that Article 17.07 does not address return to work after absences covered by WCB or LTD, or situations where there may be no time loss from work, but nonetheless a question arises with respect to safety or fitness to perform job duties. These examples would not fall within other Collective Agreement provisions such as Article 17.04, which allows the Employer to request a certificate of fitness where an employee returns from work following a prolonged illness or injury.

Given Article 17.07 makes no specific reference to accommodation cases I am unable to conclude to that it is only through the Attendance Review Committee that the issue can be addressed. In these circumstances the Employer must necessarily be able to request further information in appropriate circumstances to fulfill its duty to accommodate.

While it is certainly possible that duty to accommodate issues may arise in conjunction with rejected WCB or LTD cases, I am unable to conclude these would be the only situations where a request for medical information for these purposes may be permissible. Accommodation issues may arise with or without absence from work, or independently of WCB or LTD circumstances, rejected or not. To prevent the Employer from addressing these issues without involvement of the Attendance Review Committee is inconsistent with the Employer's obligations at law with respect to the duty to accommodate.

Article 17.07 uses mandatory language in establishing the mandate of the Attendance Review Committee "shall" include the three circumstances noted above, and there is no indication on the face of the language to suggest the parties intended the Committee would also necessarily include all other situations outside those circumstances. On the other hand, there is no specific language in the agreement restricting the right of the Employer to obtain medical evidence outside of the circumstances outlined in Article 17.07.

In arriving at my conclusion I have also considered the effect of LOU #8, which provides that if the Attendance Review Committee cannot reach consensus the University may exercise its rights as if Article 17.07 did not exist. On this matter the Union argued Article 17.07 limits the Employer's general management rights, while the Employer asserts it maintains these rights despite the provision.

I interpret LOU #8 to mean that if an individual employee's excessive absenteeism, for example, is being reviewed pursuant to Article 17.07 and agreement cannot be reached by the Committee as to the next steps to be taken or recommendations made, the University nonetheless is able to address the issue of excessive absenteeism. Article 17.07 enables the Committee to reach a consensus as to the process to be followed, rather than a unilateral decision on the part of the Employer. Article 17.07 serves to restrict the Employer's actions but the provision does not otherwise equate to an elimination of the more general rights to obtain the necessary medical information required in order to comply with its obligations, such as the duty to accommodate, or to determine entitlement to benefits. In the absence of any clear indication that the Attendance Review Committee possesses a mandate to deal with these matters the right to obtain necessary medical information remains with the Employer.

I therefore conclude the Employer is not precluded from obtaining medical information in circumstances other than those expressly referred to in Article 17.07 or that the Attendance Review Committee must be involved outside of those particular situations. In other words the Employer is entitled to issue the six-point letter requesting medical information without the Committee's authorization or agreement in regards to circumstances that fall outside of the specific circumstances provided for in Article 17.07. Requests for medical information in order to address these issues remain generally appropriate. The reasonableness of the Employer's request for information in any given situation will be dependent on the particular facts at hand.

Put another way, specific requests by the Employer for medical information remain subject to the requirements outlined in the authorities that the request be reasonable and not conflict with express provisions of the Collective Agreement or the applicable law. As this is a policy grievance, the outcome of this grievance is not dependent upon any personal circumstances. I therefore make no findings with respect to any individual situation.

The grievances are therefore denied.

Dated at the City of Vancouver in the Province of British Columbia this 24th day
of October, 2008.

A handwritten signature in black ink, appearing to read 'CS', written over a horizontal line.

Christopher Sullivan