IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SERVICE AGENCY

(the "Employer")

AND:

BRITISH COLUMBIA GOVERNMENT AND SERCIVES EMLOYEES' UNION

(the "Union")

(Warren Munroe Grievance – Arb. Ref. No. 211:06/07)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Marli Rusen for the Employer
	Jan O'Brien for the Union
HEARING:	June 22, 2007 Nanaimo, BC
PUBLISHED:	October 1, 2007

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The parties agreed that I was properly constituted as an arbitrator with jurisdiction under the Collective Agreement to hear and determine the matter in dispute.

BACKGROUND

The grievor, Warren Munroe, was terminated by way of a letter dated April 11, 2006:

> I have received a recommendation that you be dismissed from your employment as a Population Analyst with the Ministry of Labour and Citizens' Services. Your dismissal was recommended as a result of your insubordinate behaviour, your failure to follow direction, and your failure to accept any responsibility for what you perceive as a dysfunctional workplace.
>
> Upon review of your four years of service with this Employer, I note a previous five-day suspension on February 28, 2006 for insubordination.
>
> In a letter from the Employer, received by you on March 30, 2006, you were directed to return to work immediately. In that letter you were put on notice that any further insubordination would lead to a recommendation for your dismissal. As of this date, you still have not returned to work.
>
> In reviewing all of the circumstances, I have concluded that your behaviour and continued insubordination has rendered the employment relationship no longer viable.
>
> Accordingly, pursuant to my authority under the Public Service Act, you are hereby dismissed from employment with the Public Service, effective immediately,
>
> Yours sincerely,
>
> Gordon Macatee
> Deputy Minister

The grievor filed a grievance on July 11, 2007, which reads as follows:

> I was subject to personal harassment and a constructive dismissal by all members of the Population Section of BC Stats. I was ridiculed, laughed at, called stupid, yelled at, excluded from all methods and modeling meeting and informal meeting (the manager and the co-workers would go for coffee breaks together) and treated as though I was stupid and lazy. The manager threatened me with a formal reprimand and pretended to fire me.

The remedy sought by the grievor on the grievance form was:

> Team effectiveness training and project planning courses for the whole section including the manager.

The Union amended the grievance form to include "Reinstatement and to be made whole".

The Employer raises a preliminary objection to the hearing of the grievance based on Article 8.10, which is set-out as follows:

> 8:10 Deviation from the Grievance Procedure
>
> (a) The Employer agrees that, after a grievance has been initiated by the Union, the Employer's representatives will not enter into discussions or negotiation with respect to the grievance, either directly or indirectly with the aggrieved employee without consent of the Unions.
>
> (b) In the event that, after having initiated a grievance through the grievance procedure, an employee endeavours to pursue the same grievance through any other channel, then the Union agrees that, pursuant to this article, the grievance shall be considered to have been abandoned.
>
> (c) Where an employee has filed a complaint with the Ombudsman at the Employment Standards Branch, the grievance shall be deemed to be abandoned unless the complaint is withdrawn, in writing, within 45 days of it being filed.

> (d) Notwithstanding (b) above, an employee who has filed a complaint with the Human Rights Tribunal shall not have their grievance deemed abandoned through the filing of the complaint.

The basis of the Employer's objection is a series of letters that the grievor sent to the Deputy Minister regarding his termination. The first letter was sent immediately following his termination, but prior to his grievance, to the then Deputy Minister Gordon Macatee, dated May 10, 2006:

> Re: Wrongful dismissal
>
> Hello Gordon,
>
> Thank you for your letter April 11, 2006. I have enformed the BCGEU (May 2, 2006) that I do not agree with the claim of 'just cause' regarding the dismissal.
>
> I would very much appreciate an apology for the wrongful dismissal, and also I expect full compensation for having paid for moving my family to Victoria from Ottawa. I had applied for a full time regular position and I did not expect to be taking a job where I would be working in an antagonistic, intimidating and abusive work environment.

On May 25, 2006, the grievor followed-up with correspondence to the Deputy Minister that had attached a letter he had sent to his Union outlining the issues he believed were involved in his termination.

Following the filing of the grievance, the grievor continued to correspond with the new Deputy Minster, Lori Wanamaker. On August 22, 2006, he wrote the following letter, which he also copied to the Union and the BC Labour Relations Board:

Re: Constructive Dismissal

Hello Deputy Minister,

I am writing to inform you that there is a posting for a job opportunity (Population Analyst with BC Stats) for which there is an outstanding grievance. On July 20, 2006, a request for an arbitrators(s) was submitted to the Arbitration Registrar by the BCGEU regarding my (constructive) dismissal from this position.

Since the Arbitrator(s) will be asked to consider my returning to the position (so long as there are constructive steps taken to work toward creating a positive work environment and thereby, if not encouraging it, at least not discouraging it), I consider the posting of this position to be premature. I would very much like to have the posting withdrawn until the arbitration process had been completed, not only for the sake but for those who may apply. If you are not aware of the constructive dismissal to which I was subjected by the manger and employees of the Population Section for the BC Stats, I have enclosed a copy of the cover letter delivered on January 30, 2006 to the office of the Deputy Minister of the Ministry of Labour and Citizens' services at the time, Gordon Macatee. This letter was delivered with a listing of events (time, place, and people involved) that led to the grievance, and eventual dismissal, and should still be on record.

I look forward to finding a constructive resolution to this issue.

The Deputy Minister replied on September 13, 2006, with a copy to the Union, as follows:

Thank you for your letter of August 22, 2006 regarding the posting of the Population Analyst position you held at BC Stats, BC Ministry of Labour and Citizens' Services, prior to your dismissal on April 11, 2006. As mentioned in your letter, the matter of your termination is being addressed by way of a grievance filed directly at arbitration July 20, 2006.

As per Article 8.10, Deviation from Grievance Procedure, of the master Agreement, section (a) the Employer's representatives are precluded from entering "into discussion or negotiation with respect to the grievance, either directly or indirectly with the aggrieved employee without consent of the Union." Further,

> 8.10(b) states, "in the event that, after having initiated a grievance through the grievance procedure, an employee endeavors to pursue the same grievance through any other channel, then the Union agrees that, pursuant to this article, the grievance shall be considered to have been abandoned."
>
> Based on the above I am advised that by writing me, asking that I find "a constructive resolution to this issue," you risk having your grievance considered to be abandoned. Therefore, I recommend that instead you share your most recent related concerns with a representative of the BC Government Employees' Union, which has conduct of this grievance.

The grievor wrote a further letter to the Deputy Minister dated September 19, 2006, in which he stated, in part:

> …I find it hard to believe that aspiring for a constructive resolution could be considered an abandonment of a grievance, discussions or negotiations, but given the history of antagonism directed toward me asking for help in creating a positive work environment, I guess I should not be surprised by your statement…
>
> As you may know, I have maintained that 1) team effectiveness training, project planning, and/or the core competencies courses be taken by all members of the Population Section of BC Stats; or if there is no interest in this, 2) I would like to have my name cleared (for having been subject to constructive dismissal), an apology and compensation for having moved my family from Ottawa to take the job…
>
> I would like to reassure the Employer's representatives and the Union that I am working every effort to exhaust the internal grievance procedures before going through "any other channel(s)."

POSITIONS OF THE PARTIES

The Employer takes the position that the grievor has "endeavoured to pursue" the substance of his grievance through a channel other than the grievance procedure. The substance of the grievance, in the submission of Counsel for the Employer is that he was personally harassed to the point where he could not report for work and that, instead of dealing with the situation, the

Employer wrongfully terminated him. This is the very content of the grievor's repeated letters to the Deputy Minister, argues Ms. Rusen.

In the submission of Counsel, the grievor again wrote to the Deputy Minister in contravention of Article 8.10(b), even after being advised that his actions could constitute abandonment of his grievance. In both August and September, the content of the grievor's letters reiterate his issues and his proposal for their resolution.

It is the position of Counsel for the Employer that the case law supports a finding of abandonment under Article 8.10 of the Collective Agreement. Ms. Rusen argues that the letters the grievor wrote are no different from the situations that have been considered and accepted as a deviation from the grievance procedure by the arbitrators in the following decisions: *Re British Columbia Building Corporation (Robinson Grievance)*, May 16, 1980 (Chertkow), appeal denied in BCLRB No. L126/80; *Re Government of the Province of British Columbia (Amos et al.)*, June 16, 1988 (Bird); Re *Government of British Columbia (Malahias Grievance)*, [1992] B.C.C.A.A. No. 36 (Kelleher); appeal denied in BCLRB No. B141/93; *Re Government Personnel Services Division (Penner Grievance)*, BCLRB No. B333/93 (October 14, 1993); *Re Public Service Employee Relations Commission (Lane Grievance)*, [1994] B.C.C.A.A.A. No. 300 (Bird); appeal denied in BCLRB No. B430/94; and *Re PSERC (Gould Grievance)*, [2002] B.C.C.A.A.A. No. 261 (Nordlinger).

For its part, the Union takes the position that the grievance should not be considered abandoned under Article 8.10(b). Counsel for the Union, Ms. O'Brien submits that the grievor's letters to the Deputy Minister cannot be considered to be requests for intervention in his grievance or in "self help" as in the other cases submitted by the Employer. Put another way, Counsel argues that the grievor did not ask the Deputy Minister to endeavour to resolve his

grievance or overturn his dismissal, but rather he was simply advising them of his concerns.

The Union submits that the grievance was not filed until July, so it is only the August 22, 2006 letter that falls within the restrictions of Article 8.10(b). The purpose of that letter, argues Counsel, was simply to draw the attention of the new Deputy Minister to the fact that his former position, which was being posted as vacant, was the subject of a grievance.

Ms. O'Brien submits that the grievor's letter of September 19, 2006 was in reply to the Deputy Minister's letter of September 13, 2006, in which he warned the grievor about Article 8.10(b). In that letter, argues the Union, the grievor does not ask for anything specific, but rather sets out what has taken place and clarifies his previous (August 22, 2006) letter.

In sum, it is the Union's position that it is not enough to simply write a letter to support a finding of abandonment of a grievance under Article 8.10(b). Counsel submits that, given the severe consequences there must be clear and cogent evidence of the grievor's intent to seek alternate help outside the grievance procedure.

In reply, the Employer says that the case law establishes that arbitrators declined to take a narrow approach to Article 8.10(b), but rather have looked at the actions of the grievor and determined whether it is a deviation from the grievance procedure. Put another way, Counsel argues that the narrow analytical approach advanced by the Union has been rejected by other arbitrators.

Ms. Rusen contends that the grievor repeatedly wrote to the Deputy Minister complaining and bringing attention to his issues all of which constitutes deviation from the grievance procedure. Further, the Employer

argues that the grievor cannot get around Article 8.10(b) by delaying the filing of his grievance. As of May 10, 2006 he should have filed the grievance but instead he wrote to the Deputy Minister and that is a deviation within the meaning of Article 8.10(b), argues Counsel.

Finally, Counsel for the Employer argues that there is no basis to agree with the Union and it can only be concluded that the grievor deviated from the grievance procedure on several occasions when he wrote to the Deputy Minister.

DECISION

The Employer raises a preliminary issue that the Union has abandoned the grievance pursuant Article 8.10(b) of the Collective Agreement (formerly Article 8.12(b)), which reads as follows:

> 8.10 Deviation from Grievance Procedure
>
> (b) In the event that, after having initiated a grievance through the grievance procedure, an employee endeavours to pursue the same grievance through any other channel, then the Union agrees that, pursuant to this article, the grievance shall be considered to have been abandoned.

There is a significant body of case law dealing with this provision of the Master Agreement.

In *Re British Columbia Building Corporation (Robinson Grievance), supra*, at pp. 9-10, the arbitrator reviewed the Bigattini arbitration and made the following finding:

> In the Bigattini case (P.S.A.B. 22/79, unreported decision of Vice-Chairman Levely dated August 24, 1979), the grievance was considered to have been abandoned because the grievor pursued

his grievance by letter to his MLA, who also happened to be the Premier. At page 4, the Adjudicator says:

> Article 8.12 is an interesting and important article, the purpose of which is twofold. It is designed by the Employer and Union to protect the grievance procedure as being the only way in which disputes and differences are settled. It precludes an Employer from bypassing the Union and making a separate and direct settlement with an Employee (unless the Union specifically consents), which could undermine the Union's position as the exclusive bargaining agent for all employees, including the grievor. The other side of the coin is the situation brought forth in this preliminary objection. It is to protect the Employer from having to deal with the same grievance in a multiplicity of actions or procedures.

And, at page 7, he finds that Article 8.12 is a substantive provision which must be applied:

> The letter filed as Exhibit 4 is not a mere procedural irregularity, but is a fact bringing into play the substantive language of Article 8.12. This is a mandatory provision which must be applied and which the parties, Union included, have agreed to be applied.

In dismissing an appeal by the Union in the Robinson case, the BCLRB dealt with Article 8.12 (now 8.10) and held, at pp. 5-6:

> The Union quite properly points out that if the arbitration board's decision is upheld there will be no hearing on the merits of the Grievor's case. The Union argues that this is a denial of natural justice if an arbitration board refused to hear a case on the merits without any proper justification. However, in this case, the parties themselves have agreed in Article 8.12 that, under certain circumstances, the grievance would be deemed to be dismissed if the grievor took certain actions. The Grievor did in fact take action outside the grievance procedure in this case and has paid the penalty. This is unfortunate for the Grievor, but is certainly not a denial of natural justice.

> The parties quite specifically provided for this result and did so presumably with certain purposes in mind. In Article 8.12 of the Collective Agreement, the Employer agrees not to enter into direct discussions with the employee in respect of the grievance. The quid pro quo for this commitment by the Employer is that the grievor is foreclosed from taking any action outside the grievance procedure in order to settle his grievance. This clause balances nicely the need for both parties to be assured that the grievance procedure is the only way in which a legitimate grievance under the Collective Agreement will be resolved. Such a clause represents not only good labour relations policy, but a high degree of sophistication in understanding the proper method for resolving labour relations disputes. Both parties have provided for this result by agreement. It should not be surprising in cases such as the instant one that, the grievor will not have his grievance heard on the merits. This may be an unpleasant result for the grievor, but one which was in his control and which the parties specifically contemplated.

In the case involving grievors Amos et al, the grievors engaged in picketing, however arbitrator Bird commented on the application of then Article 8.12(b), starting at page 22:

> The grievors, after initiating grievances through the grievance procedure, endeavoured to pursue the same grievances through another channel, i.e. by picketing. The union agreed that in such circumstances, pursuant to Article 8.12(b), the grievances shall be considered to have been abandoned. The union ought not to have presented these grievances to arbitration.

Arbitrator Bird went on to note, at pp. 22-23:

> An arbitrator does not have the authority to overlook Article 8.12(b); see *Bigattini* and *Robinson,* above. A grievor who acts in the way described in that article loses the right to have his or her grievance arbitrated. I have no discretion in the matter. I conclude I am without jurisdiction. I cannot hear grievances which are considered to have been abandoned.

In *Re Government of British Columbia (Malahias Grievance), supra*, arbitrator Kelleher dealt with the intersection of this provision and a complaint filed by the grievor under the Human Rights Code, at para. 15-16:

> Article 8.12 has been the subject, then, of successive arbitration awards all of which have given it a broad interpretation. Moreover, the parties have renegotiated the Collective Agreement on several occasions subsequent to some or all of those awards without amending the language. I therefore have no hesitation in adopting the reasoning of those awards.
>
> On the other hand, for reasons which I will explain, it is my view that making a complaint under the human rights legislation of the Province cannot, of itself, trigger the application of Article 8.12.

Having confirmed that Article 8.12(b) does not preclude an application under the Human Rights Code, the arbitrator went on to deal with the impact of a letter sent by the grievor's representative to the Attorney-General. At paras. 26-29, he held:

> On the other hand, I have concluded that the letter to the Attorney-General dated December 1, 1991, is the very sort of communication or action at which Article 8.12 is directed. Counsel for the Union makes two submissions in this respect. First, he says that the Employer has not shown that the letter was sent to Mr. Gableman in his capacity as a politician. After all, the Union argues, the Attorney-General is no more than the senior person in the Ministry in which the grievor worked.
>
> I disagree. The letter asks the Attorney-General to involve himself in both the human rights complaint and the grievance. The Coalition sent copies of the letter to the Ombudsman as well as the Minister responsible for Human Rights.
>
> Second, the Union says, the complaint under the Human Rights Code is different from the grievance. While the Union concedes that they have allegations that are in common (both allege discrimination on the basis of medical condition and on the basis of sex), the Union points to the fact that other violations of the Collective Agreement are alleged.

> I do not accept that. It is clear to me that the main focus of the grievance is an allegation of discrimination. The other sections referred to in the grievance are minor aspects of the dispute. This is clear from the text of the human rights complaint.

Continuing at para. 32, arbitrator Kelleher held:

> If I were to agree with the Union in this case, the decision would be inconsistent with the well established principles which have been applied in interpreting Article 8.12. The letter to the Attorney-General is no different from the letter to the Premier in the Bigattini matter.

Arbitrator Bird again dealt with the case of a grievor writing a letter to the Attorney-General in the *Lane Grievance, supra*. At paras. 36-38 of that award, the arbitrator held:

> Article 8.12(b) does not impose a duty upon a grievor not to resort to other channels. It is a citizen's right to complain to and seek the assistance of elected officials including the Attorney General. I cannot read Article 8.12 as a prohibition against making such a complaint and seeking assistance in the pursuit of a grievance. However, a grievor under the Master Agreement who does so will place the Union in a position where it is contractually bound to abandon his or her grievance.
>
> Article 8.12(b) is like a fork in the road. If a grievor chooses the road marked "other channel" the grievor is no longer on the road marked "grievance procedure". He or she cannot go down "other channel" and then back up and go along "grievance procedure". If the grievor chooses any other channel in which to "endeavour to pursue the same grievance" unaware of the consequence described in the collective agreement, Article 8.12 still obliges the Union to treat the grievance as abandoned. It is not a question of intention. It is a question, in the present case, of whether the grievor endeavoured to pursue another channel seeking resolution of his two grievances.
>
> …Whether the grievor is able to pursue the grievance through another channel is irrelevant. Simply by endeavouring (trying) to

> pursue another channel a grievor will create the condition for the application of Article 8.12(b) to the grievance.

Arbitrator Bird again found that he had no discretion to relieve against the consequences of Article 8.12, at paras. 39-40:

> I find that there is no room for the exercise of discretion so as to relieve a grievor of the consequences of a breach by the Union of Article 8.12(b). The parties have agreed on what is to happen when a grievor endeavours to pursue another channel in order to resolve his or her grievance. The Union is to treat the grievance as having been abandoned. Re Bigattini at p.4 (above) explains the policy basis for Article 8.12(b). I take this explanation at p.4 as being part of the argument advanced by counsel for the Employer and not a conclusion stated by Vice-Chairman Levey. I adopt that part of the argument…
>
> …I find that the grievor, by means of his letter to the Attorney General, endeavoured to pursue the same grievances as the Union presented to the Employer on his behalf through another channel. I interpret that letter as a request to the Attorney General to cause inquiries to be made within his Ministry as to the propriety of the criminal charge then pending against the grievor and of the suspension and discharge of the grievor with a view to withdrawing the criminal charge and reinstating the grievor to his employment. The grievor endeavoured to secure the intervention of the Attorney General so he would solve the grievor's problems with the criminal law and with his employment.

Having considered the ample case law on Article 8.10(b), formerly Article 8.12(b), it is clear that this provision has been applied strictly and has not been open to the exercise of arbitral discretion. Indeed, the Union has incorporated language warning of the potential for grievances to be found to be abandoned under this (or similar provisions) in its standard grievance form.

Put another way, all that is available to be decided in this matter is the question of whether the grievor did something that brings him within the scope

of Article 8.10(b). Did Mr. Munroe "endeavour to pursue the same grievance through another channel"? It is my finding that he did.

The Union makes a number of arguments: that the letters were only informational; that the grievor was not asking for the same remedy; that the August letter was only to advise of the grievance in respect of the job posting; and that the final, September letter was only in response to the Deputy Minister's earlier letter to the grievor. The fact of the matter is that the grievor wrote no less than four times to the Deputy Minister, the subject of the correspondence being the same as his grievance. These actions leave little doubt that he was seeking to pursue the subject of this grievance through another channel, namely the intervention of the Deputy Minister. This kind of correspondence and activity outside the grievance procedure is exactly what the parties have agreed renders the grievance abandoned. Indeed, in prior cases arbitrators have held as much.

In the result, I find the grievance has been abandoned by the Union by the operation of Article 8.10(b) of the Collective Agreement.

As such, the Employer's preliminary objection succeeds.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 1st day of October, 2007.

Vincent L. Ready