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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

AUGUSTIN ERNEST CHÉNIER

Grievor

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

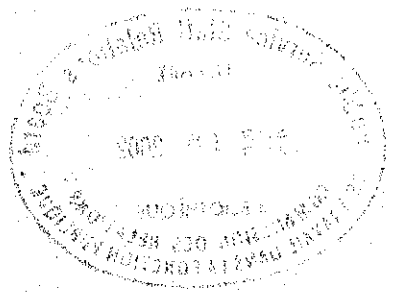
Before: Joseph W. Potter, Vice-Chairperson

For the Grievor: Jacques Bazinet, Counsel, UCCO-SACC-CSN

For the Employer: Richard E. Fader, Counsel



Heard at Kingston, Ontario,
February 11 to 15 and 25, 2002.



DECISION

[1] This case concerns two grievances filed by Augustin Chénier a correctional officer, level 1, at Bath Institution. The first grievance is dated April 3, 2001 and is in relation to an indefinite suspension without pay that he received. The second grievance is dated May 29, 2001 and concerns the termination of his employment.

[2] The May 29, 2001 letter of termination signed by the Warden of Bath Institution, Jim Marshall, states in part (Exhibit E-22):

This is further to the disciplinary investigation commissioned to review allegations of infractions of the Correctional Service of Canada's Standards of Professional Conduct and the Code of Discipline. The matter has now been investigated and the final report was provided to you on April 27, 2001. You were given the opportunity to review the disciplinary report prior to the disciplinary hearing on May 10, 2001. When we met on May 10, 2001, you provided me with new information and this information has been investigated and subsequently reviewed and considered by me in making my final decision. You were also provided with this information for your review prior to this meeting on May 29, 2001.

Based on the evidence gathered, you were involved in acts of serious misconduct. It has been determined that you have provided inmates with unauthorized items and contraband. You have accepted gifts from inmates. I have carefully reviewed all facts and circumstances, and based on all available information, I have concluded that you have violated the Correctional Service of Canada's Code of Discipline and Standards of Professional Conduct. You have failed to responsibly discharge your duties and you have had inappropriate relationships with inmates. You have failed to disclose information that you had an obligation to share and you have acted in a manner likely to discredit the Service.

[...]

[3] During opening remarks, counsel for the employer stated that he was relying on three events to support the discharge. The first event related to the grievor giving a high profile inmate a bank card. The grievor did not dispute that he had done so. The second and third events related to a sworn statement of a fellow correctional officer, Sonya Thompson, alleging that she saw the grievor give a \$50 bill to an inmate and receive change for it; as well, she stated that she saw the grievor receive money from inmates and order pizza for them and it appeared he received free pizza.

[4] A request was made, and granted, for the exclusion of witnesses. I heard from 15 witnesses and counsel for the employer tendered 22 exhibits; the grievor's counsel tendered four exhibits.

[5] At the outset, counsel for the employer stated that the indefinite suspension was, in effect, subsumed by the termination of employment, as the termination was backdated to coincide with the commencement of the indefinite suspension on April 3, 2001.

[6] Mr. Chénier's termination of employment was based on activities that the employer alleged took place while he was a correctional officer at Kingston Penitentiary, a maximum security institution, (hereinafter referred to as KP). It was a very high profile case in Kingston, involving extensive media coverage of the adjudication hearing itself. The decision to terminate Mr. Chénier's employment followed a two-year covert operation undertaken jointly by the Ontario Provincial Police (OPP) and the Royal Canadian Mounted Police (RCMP).

[7] Following the completion of the covert operation, a number of correctional officers received various forms of discipline, up to and including discharge. In addition, two other correctional officers committed suicide.

[8] The grievor's counsel requested that the parties take a view of certain areas in KP. This viewing took place at an opportune break point in the hearing and will be commented upon in the decision.

Background Concerning the Bank Card Incident

[9] In December 1997, Monty Bourke became the Warden at KP. As the institutional head, Mr. Bourke has responsibility for the safe custody, care and control of offenders at KP, as well as responsibility for the overall security of KP.

[10] Shortly after arriving as Warden, Mr. Bourke heard about a number of issues that were supposedly taking place inside KP involving correctional officers, including allegations that alcohol and drugs were being brought in, as well as assaults being perpetrated upon inmates. Mr. Bourke testified that he tried to investigate these issues but frequently ran into a dead end because the inmates who made the initial allegations would alter their stories when the matter was investigated. It was apparent to Mr. Bourke that the stories changed after the inmates were approached by

correctional officers, and the investigation failed to get staff witnesses who would support allegations of unprofessional conduct of other correctional officers.

[11] Mr. Bourke testified there is an unwritten code for correctional officers of not "ratting" on a fellow officer and of always taking the side of the correctional officer over the inmate. Various names have been attached to that, including the "rat code" and "parking lot justice".

[12] With the internal investigation not meeting any success in terms of being able to prove or disprove these various allegations, Mr. Bourke went to the Deputy Commissioner, Correctional Service Canada, and asked that an RCMP investigation be done. In September 1998, Mr. Bourke received formal notification that a joint-force RCMP led investigation would start.

[13] Mr. Bourke testified he had to go outside the Department for his investigation because he felt corruption among correctional officers inside KP was pervasive and more than he could handle. The investigative tools available to him had met a dead end and, since the RCMP were equipped to investigate staff crime, he felt they were best equipped to conduct this investigation.

[14] For obvious reasons, it was necessary to restrict the knowledge about the investigation to as few individuals as possible. Aside from Mr. Bourke, only three other employees at KP knew about the commencement of the investigation. Those three were the Deputy Warden (Alex Lubimiv), the Co-ordinator, Correctional Operations (Bruce Somers) and the Institution Preventative Security Officer, commonly referred to as the IPSO, (Rick Rogers). It was decided that Mr. Rogers would be the one individual who would have ongoing contact with the joint investigation team.

[15] The investigation itself, dubbed "Project O Correct", began in March 1999 and, although Mr. Bourke thought it would be done quickly, it was not completed until March 2001.

[16] Jeff McCann, an OPP sergeant, was the lead investigator on Project O Correct. Since the allegations concerned activity inside KP, the investigating team determined it needed someone inside KP to provide additional information. Its goal was to identify someone inside who could be used as an inmate agent, and the project team relied on the IPSO, Rick Rogers, to identify someone for this task.

[17] For the first eight months of the investigation, no one was identified as a potential police informant; consequently, the project team concentrated its efforts on doing surveillance in the community. Eventually, two inmates were identified as potential informants, and for the purposes of this hearing an inmate identified as "Agent #2" provided the investigation team with information about a number of correctional officers, including Mr. Chénier.

[18] Agent #2 was a very high profile inmate and was scheduled to testify for the Crown at an upcoming hearing. In order to guarantee his safety, KP took what can best be described as extraordinary security measures. Initially, he was placed in the segregation unit and locked up for 23 hours a day. His one hour outside his cell was spent exercising when no other inmates were around. Mr. Chénier knew about the special security arrangements made for Agent #2, having been briefed by the IPSO before Agent #2 arrived at KP that a high profile inmate was to be arriving and the security arrangements that would be made. Initially, upon Agent #2's arrival, he was placed in a secure area in segregation and Mr. Chénier worked in that area. I took a view of the current segregation area and observed where the previous segregation area was before renovations required its closure. Eventually, Agent #2 was moved to the hospital area, following the closure of the segregation unit, where he had a double cell at the end of the wing. This is the location that I also took a view of.

[19] While in the hospital area, Agent #2 was allowed to cook his own meals, as there were concerns his food could be poisoned. He was permitted knives in his cell to prepare his meals and also, out of security concerns, an outside hairdresser was brought in to cut Agent #2's hair.

[20] A separate logbook was kept on the hospital floor for correctional officers and other staff to sign if they had any contact with Agent #2 (Exhibit E-13). This was in addition to the normal logbooks which are located throughout KP and routinely signed by officers when something occurs in that location. The logbook for the hospital area was identified as Exhibit E-14.

[21] Sergeant McCann felt that Agent #2 should have a cellular phone in order to keep in touch with the investigation team. Normally, an inmate would not be permitted to have a cellular phone and in normal circumstances, if a search of an inmate's cell revealed a cellular phone, it would be confiscated as contraband. For the

purposes of this hearing, suffice it to say that a cellular phone was given to Agent #2 via Correctional Officer Perkins, who ultimately committed suicide.

[22] At the start of the investigation, Sergeant McCann testified that numerous inmate allegations suggested Mr. Chénier was someone who sold drugs and other contraband to inmates. Mr. Chénier, therefore, was a focus of attention from the outset as far as the investigation team was concerned. Accordingly, some time was spent doing surveillance on Mr. Chénier to try to determine what activities, if any, he did.

[23] Sergeant McCann testified that other KP employees were also targets for surveillance and it was Sergeant McCann who decided who would be the focus of the surveillance on any particular day.

[24] Most of the allegations of corruption amongst the guards were coming from inmates and Sergeant McCann felt a higher level of corroboration was needed. For situations involving an exchange of cash, a great amount of time was spent marking and recording bills, then recovering them and matching serial numbers. In order to simplify this, it was decided by the investigating team to introduce a bank card to Agent #2.

[25] Sergeant McCann opened an account with a local bank and placed money into the account. He obtained a bank card with no name on it so a target could not see where the money was coming from, nor could the target obtain a statement from a bank machine. Exhibit E-16 is a photocopy of the front and back of the bank card. It appears to be a typical bank card, with the top portion showing the name of the financial institution, the words "Access Card" and "Temporary" on the upper portion, and a series of 16 numbers in the middle of the card. The back of the card has an area where typically a cardholder would sign, but in this case the area was blank when the card was first introduced to Agent #2. The authority to introduce the bank card into KP was signed by the Warden, Monty Bourke (Exhibit E-17).

[26] The IPSO, Rick Rogers, delivered the bank card to Agent #2, and only Mr. Rogers, Warden Bourke and Sergeant McCann knew of its existence.

[27] Sergeant McCann explained that the bank card was, in effect, money. The idea was for Agent #2 to attempt to purchase contraband from correctional officers using the bank card. The bank card would be given to a correctional officer, together with the Personal Identification Number (PIN) which was required to withdraw money. The correctional officer would go to the bank, withdraw money, purchase the contraband for Agent #2 and then return the card, with the contraband to Agent #2.

[28] Sergeant McCann testified that his surveillance team videotaped Correctional Officer Perkins (now deceased) making two withdrawals from the bank machine on August 4, 2000 and another one the following day.

[29] Mr. Perkins had arranged to take a leave of absence from his position in the hospital in early August 2000. Sergeant McCann learned from Agent #2 that Mr. Perkins was going to give the bank card to Mr. Chénier in order to return it to Agent #2.

[30] Agent #2 said August 6 was the delivery date for the card to go to Mr. Chénier. Sergeant McCann and four other police officers had Mr. Chénier under surveillance throughout the day of August 6, except for one hour when the surveillance team went to lunch. The surveillance team did not see any meeting between Messrs. Perkins and Chénier on that day.

[31] Mr. Chénier testified that Mr. Perkins had called him on August 6 saying he wanted to meet with him. He agreed to the request and told Mr. Perkins to come to his house. The two met outside Mr. Chénier's home at about 1:00 p.m.

[32] Mr. Chénier testified the two men shook hands and he saw that Mr. Perkins was very agitated and sweating. Mr. Perkins asked Mr. Chénier if he would do him a favour, as he was "going trucking" for the next three to four months. Mr. Perkins put the bank card in Mr. Chénier's hand and asked him to return it to Agent #2. Mr. Chénier looked at the card briefly, then put it in his pocket.

[33] At no time did Mr. Chénier request or receive the PIN, nor was it ever alleged that he actually used the bank card. He took the bank card from Mr. Perkins, went inside his home and put the bank card inside a clear plastic holder which was on the inside cover of his work agenda book.

[34] Mr. Chénier was asked in cross-examination if he did not think it strange that a colleague who appeared nervous and sweating was asking him to give a bank card to a high profile inmate who was housed in an area where the grievor was not working. There was no dispute that Mr. Chénier was not assigned to work in the hospital but rather was assigned to work in another area. He replied that Mr. Perkins was a fellow officer and he trusted him.

[35] In cross-examination, Mr. Chénier said he did not know the card he received from Mr. Perkins was a bank card, although he did state he assumed it was a bank card. He also testified he did not see the name of the bank on the top of the bank card.

[36] At around 1:00 p.m. on August 6, Mr. Chénier was in possession of the bank card which he had received from Mr. Perkins. However, the surveillance team which was watching Mr. Chénier, except for their lunch break, saw nothing up to 6:30 p.m. Sergeant McCann then called Agent #2 on his cellular phone and asked him to call Mr. Perkins and inquire about the bank card. Agent #2 agreed.

[37] A short time later, Agent #2 called Sergeant McCann back and informed him the bank card had been delivered to Mr. Chénier at about 1:00 p.m. At that point, Sergeant McCann realized the exchange had taken place while they had broken off surveillance for lunch.

[38] After receiving the bank card on August 6 from Mr. Perkins and placing it inside his personal agenda, which he took to work daily, Mr. Chénier testified he intended to give the bank card to Agent #2 "if I bumped into him." Due to the fact that Agent #2 was being kept in a secure section in the hospital wing of KP and Mr. Chénier was working elsewhere, Mr. Chénier testified he thought this encounter could occur when Agent #2 was brought to the gym for exercise. However, the opportunity did not present itself for Mr. Chénier to give the bank card to Agent #2 until August 24.

[39] When asked by his counsel why it took between August 6 and August 24, some 18 days, to deliver the bank card, Mr. Chénier replied: "Because I don't run for inmates, I wasn't going to make a special trip to get it to him."

[40] On August 24, 2000 Mr. Chénier was working the 11:00-23:00 shift (see Exhibit E-15). Towards the end of his shift, at about 22:30 hours, he went from his workstation to the hospital area. This would have taken a few minutes, based on my view of the area, and would require the unlocking of some four barriers before the grievor could actually enter the hospital floor.

[41] Mr. Chénier said he went to the hospital area on August 24 to see if the officers there wanted to join him and some fellow officers for a beer after the shift ended. There were two officers working the hospital sector and they had to decline his offer, as both had to work the midnight shift.

[42] At the entrance to the hospital area there is a desk where the officers are stationed, and both the regular logbook and the special security logbook for Agent #2 were located there. Mr. Chénier did not sign either logbook because, he said, only the supervisor had to sign the regular logbook and he said he was not aware of the special logbook for Agent #2.

[43] While at the desk speaking to the two officers on duty, Mr. Chénier asked them if he could see Agent #2. He was told to "go ahead". He proceeded down the range to Agent #2's hospital cell.

[44] Mr. Chénier arrived at Agent #2's cell and asked him: "Does this card belong to you?" Agent #2 replied that it did and Mr. Chénier put the card on the cell barrier so Agent #2 could reach it, saying "Officer Perkins asked me to return it to you." Agent #2 took the card and told Mr. Chénier there was lots of money in the account and said if he was willing to bring something in, Agent #2 could make it worth his while. Mr. Chénier replied: "I don't go there. I'm not interested." He then walked away. The entire meeting lasted approximately two minutes, Mr. Chénier testified.

[45] In cross-examination, Mr. Chénier was asked what he thought when he handed Agent #2 the card and Agent #2 said he had lots of money in there. He replied he thought Agent #2 wanted him to do him some favours, like bringing in contraband.

[46] Mr. Chénier was asked why did he not seize the card, as he knew it could be used to purchase contraband. He testified he thought it was the inmate's card; he said this was a very special inmate who had whatever he wanted.

[47] The IPSO, Rick Rogers, testified he was the individual who had to design the security program for Agent #2, and he had a number of dealings with Agent #2. Mr. Rogers acted as the liaison between Agent #2 and Project O Correct.

[48] Mr. Rogers stated it was difficult to believe Mr. Chénier would deliver a bank card to an inmate and not know the ramifications of such an act. In an institution such as KP, money is the fuel for purchasing drugs, alcohol or sexual favours. In order to limit the number of drug-related incidents, it is necessary to limit the introduction of money into KP.

[49] After delivering the bank card to Agent #2, nothing of significance insofar as this case is concerned took place until Mr. Chénier heard of Mr. Perkins' suicide in December 2000. At that point, he was very upset and scared. He knew something was not right, as he had received the bank card from Mr. Perkins, delivered it to an inmate, and Mr. Perkins had committed suicide. The grievor testified he told his wife, his priest and his lawyer what he had done.

[50] In March 2001, Project O Correct went from covert to overt status. A number of correctional officers were interviewed by the police, including Mr. Chénier. His interview took place on March 19, 2001, and it was recorded by both video and audio. The transcript of the interview was introduced as Exhibit E-19, and all parties agreed it accurately reflected what took place during the interview.

[51] Mr. Chénier testified he did not have legal counsel with him when he spoke to the two police officers on March 19, 2001, but he said he did not have a problem talking to them because he had nothing to hide.

[52] During the course of the interview, Mr. Chénier was asked about what took place when he met with Mr. Perkins on August 6, 2000. The following is the excerpt from the transcript of the interview (Exhibit E-19, page 32):

[...]

JAMIESON: *I was working that day okay and I was working surveillance*

CHENIER: *Mhm*

JAMIESON: *And uh I was watching Dave*

CHENIER: *Uh huh*

JAMIESON: *What did he hand you on that day*

CHENIER: *He handed me a card*

JAMIESON: *And what did you do with that card*
CHENIER: *I gave it back to who it belonged to*
JAMIESON: *Okay what was the card*
CHENIER: *It was a bank card*
JAMIESON: *Do you recall what bank*
CHENIER: *No I never used it I put it in my book and about
a month later I gave it to the person it belonged
to*

[...]

[53] Later in the interview, Mr. Chénier was asked what he should have done with the bank card when it was given to him to deliver to Agent #2. He replied that he should have turned the bank card over to the IPSO (see page 35 of Exhibit E-19).

[54] At the time of the interview, Mr. Chénier was no longer working at KP; he had transferred to Bath Institution, a medium-security facility in the same region.

Allegations Made by Correctional Officer Sonya Thompson

[55] During the course of the interview portion of Project O Correct, the RCMP interviewed Correctional Officer Sonya Thompson. Ms. Thompson was a correctional officer at KP from 1994 to 1998, following which she moved to a number of other locations; she is currently at Collins Bay Institution and is on maternity leave.

[56] Keith Latchford is an RCMP Officer and he took the sworn video statement of Ms. Thompson (Exhibit E-20) on March 13, 2001. Officer Latchford testified that sworn statements were referred to as "KGB" statements (in reference to the decision of the Supreme Court of Canada in *R. v. K.G.B* (1993), 79 C.C.C. (3d) 257) and are taken in the event an individual later recants his or her statement. In those situations, the sworn videotaped statement may be used to show the evidence the individual provided under oath.

[57] Officer Latchford testified that a Commissioner of Oaths came into the interview room and swore Ms. Thompson in. With respect to Mr. Chénier, the transcript indicates Ms. Thompson stated that while at work at KP, she saw Mr. Chénier give an inmate a \$50 bill and the inmate came back and gave him change for the \$50. Another time she saw Mr. Chénier receive money from inmates so he could order pizza for them and, she said, it looked like Mr. Chénier was getting free pizza (see pages 47 and 48 of Exhibit E-20).

[58] When called to the witness stand for this hearing, Ms. Thompson said she did not recall the interview with Officer Latchford at all. She did not recall making the statements about the grievor and had no independent memory with respect to the events. She did not recall speaking to the employer's counsel the previous week, nor did she recall indicating that she feared testifying because she had been threatened. Finally, she said she was not aware of a "rat code" at KP.

[59] Mr. Chénier testified he never received change from an inmate for a \$50 bill. Also, the only time he ever gave pizza to an inmate was when he had some leftover from his own lunch and, rather than throw it out, on occasion he would give it to an inmate who had previously done him a favour. Other correctional officers testified they also gave inmates pizza or other unwanted food and, in return, some useful information would usually ensue.

[60] The Warden at Bath Institution is Jim Marshall. His involvement in this case commenced when he received a telephone call from Warden Bourke informing him that Mr. Chénier was under investigation. Accordingly, on April 3, 2000, Mr. Chénier was suspended indefinitely without pay pending the investigation.

[61] The letter of suspension issued to Mr. Chénier by Dave MacDonald, A/Warden, Bath Institution, (Exhibit G-1) states, in part:

[...]

Your suspension is required due to ongoing investigations into alleged acts of misconduct while employed at Kingston Penitentiary. These allegations include, but are not limited to, the introduction of contraband (alcohol, marijuana) into Kingston Penitentiary and inappropriate relationship with an offender. It is also alleged that you provided an unauthorized item (television) to an inmate. It is Management's view that the alleged acts of misconduct are very serious and completely incompatible with the Mission and Values of the Correctional Service of Canada.

[...]

[62] Mr. Marshall met with Mr. Chénier and his representative on May 10, 2001 to discuss all allegations against Mr. Chénier. With respect to the bank card, Mr. Marshall testified that Mr. Chénier said he did not see the bank card as being a major issue because there were no bank machines inside KP.

[63] Mr. Marshall testified he considered all of the information he had available to him with respect to all of the allegations made against Mr. Chénier. He had the admission with respect to the bank card; he had the sworn statement of Ms. Thompson and was aware of inmate statements made in relation to the allegations outlined in the letter of suspension (Exhibit G-1). All of this was taken into consideration by Mr. Marshall, as well as Mr. Chénier's length of service, performance records, absence of a disciplinary record and letters of good conduct on his file, before deciding to terminate Mr. Chénier's employment. Notwithstanding all of the above mitigating factors, Mr. Marshall felt that the grievor violated the trust placed in him to the extent that termination of employment was appropriate.

[64] The letter of termination was issued on May 29, 2001 and was backdated to take effect when the indefinite suspension commenced, namely, April 3, 2001.

[65] In cross-examination, Mr. Marshall was queried about the allegations contained in the letter of suspension (Exhibit G-1). When asked if there was any wrongdoing on the grievor's part with respect to alcohol and marijuana, Mr. Marshall replied: "In isolation, no." With respect to the inappropriate relationship with an offender, Mr. Marshall replied: "We didn't go into it."

[66] Mr. Marshall testified that he took all the information concerning all allegations made against Mr. Chénier into account before deciding that termination of employment was appropriate, but the major issue for him in reaching this decision was the bank card.

[67] Correctional Officers Fritz Sorenson and Craig Campbell testified on behalf of the grievor with respect to the special conditions that Agent #2 had, and essentially outlined what has been described in this decision already. In cross-examination, Mr. Sorenson stated that if he had seen Agent #2 with the bank card, he would have reported it because the bank card was as good as cash. Both officers testified that, if they had been asked to give a bank card to an inmate, neither would have done so because a bank card is regarded as contraband.

[68] Trevor Lee is a correctional officer at KP as well as a union representative. He explained that every month there is what is termed a "food drive" at KP. On this occasion, certain inmate groups meet and they can order food, like pizza, chicken, Chinese food, etc. Money is collected from the inmate groups and given to a guard to order the requested food.

[69] Carlsen Jalbert is a correctional supervisor at KP and has worked with Mr. Chénier in the past. He testified that he had no problems in the past with the grievor, and felt that Mr. Chénier was an above-average performer. He was aware that Mr. Chénier had admitted to the bank card issue but Mr. Jalbert would have no difficulty continuing to work with him in spite of this.

[70] When asked in cross-examination what he would do if someone asked him to deliver a bank card to an inmate, Mr. Jalbert replied he would not do it because it is against procedures.

Arguments

For the Employer

[71] At the outset of counsel's argument, he presented a Book of Authorities of the various case law he would rely on.

[72] Two questions need to be answered here; namely:

1. Did the grievor do the three things the employer alleges he did?
2. If so, are they sufficient to warrant termination of his employment?

[73] With respect to the bank card, there are eight points that are not in dispute. They are:

1. Mr. Chénier received the card from Mr. Perkins on August 6, 2000. At that meeting, Mr. Perkins appeared agitated and sweating.
2. Mr. Chénier gave Agent #2 the bank card on August 24, 2000.
3. Mr. Chénier was not working in the hospital area at the time he gave Agent #2 the card. In fact, he had to go out of his way to get there.

4. Mr. Chénier did not sign either logbook at the hospital.
5. In delivering the bank card, Agent #2 said there was lots of money in the account and offered some to Mr. Chénier in return for bringing in products. Mr. Chénier failed to report this.
6. Mr. Perkins committed suicide at the end of December 2000.
7. Upon hearing of Mr. Perkins' suicide, Mr. Chénier still did not report the bank card incident.
8. Not until he was caught red-handed on March 14, 2001 did Mr. Chénier concede the bank card issue.

[74] The other allegations of the employer are in dispute; namely, obtaining change for \$50 from an inmate and receiving money from inmates in exchange for pizza.

[75] With respect to the two allegations in dispute, Ms. Thompson swore under oath that they were factual. There was no motivation for her to make it up, and none has been suggested. The memory loss she experienced at the hearing is her bending to the code of silence. To discount her sworn statement would be to reward witness tampering.

[76] To what extent can a trier of fact rely on a previously sworn statement? Prior to the Supreme Court of Canada ruling in *R. v. K.G.B. (supra)*, the old rule was, as stated at page 920 of the *Law of Evidence in Canada* (Sopinka, Lederman and Bryant):

[...]

16.67 ...a proved prior inconsistent statement could not be used as evidence of the truth of its contents unless the witness admitted the truth of the statement.

[...]

[77] The rule has now changed, and as stated at page 922 of the *Law of Evidence in Canada*:

[...]

16.69 ...in certain situations, a prior inconsistent statement may be admitted as proof of the contents of the statement.

[...]

[78] This new admissibility rule is outlined commencing at paragraph 73 of *R. v. K.G.B. (supra)*. Firstly, there is the threshold matter. A prior inconsistent statement will only be admissible if the statement would have been admissible as the witness' sole testimony. In the instant case, had Ms. Thompson testified to the fact she saw Mr. Chénier give an inmate \$50 and accept money for pizza, it would have been admissible. Therefore, the threshold issue is met.

[79] The next element to consider in this new rule is one of reliability. There are three points to consider here. Firstly, the statement has to be made under oath or solemn affirmation, accompanied by a warning with respect to the consequences of lying. Secondly, it has to be videotaped so the trier of fact can see the interaction between the interviewer and the witness, as well as observing the witness' various reactions. Thirdly, there has to be an opportunity to cross-examine the witness. All of these are present here.

[80] The other element to consider with respect to the new rule of admissibility is that of necessity. In the instant case, necessity arises out of a witness claiming not to recall giving the RCMP a sworn statement.

[81] Ms. Thompson's statement should be relied upon. She did not recant and she was clearly afraid and most reluctant to testify, and she was not cross-examined in great detail with respect to her sworn statement. To ignore the statement rewards a fear of testifying.

[82] With respect to the issue of penalty, Mr. Chénier's actions were inconsistent with his position as a correctional officer and he knew or should have known this. He has violated the *Code of Discipline*, a document that he was provided with in his capacity as a correctional officer (see Exhibit E-2, pages 5, 9 and 10).

[83] Mr. Chénier was not as forthright as he suggests he was. He did not admit his actions until his interview with the police on March 19, 2001. He should have told his employer as soon as he received the request from Mr. Perkins to bring a bank card into KP. Even if he is to be believed that he did not know it was a bank card when asked to

deliver it, he definitely knew what it was for when Agent #2 said to him there was lots of money in the account. At the very least, he should have reported it at that moment to the employer.

[84] All the witnesses who testified, including those who testified on behalf of Mr. Chénier, said they would have seized the card as it was contraband and was as good as money.

[85] The introduction of contraband into KP is as serious as it can get in a maximum security institution. The evidence established that the introduction of money fuels violence and this can jeopardize the security of KP.

[86] In spite of his 13½-year disciplinary free record, Mr. Chénier's conduct is so absolutely at odds with the requirements of his position that there is no reason to reinstate him.

[87] These are difficult cases that can evoke certain sympathies. However, the case law supports termination of employment where violations are so serious that it is not appropriate to reinstate.

For the Grievor

[88] The first question to be asked is, was the disciplinary process fair? Did Mr. Chénier in fact know the charges levied against him, and did he have an opportunity to answer them? If the answer is no, is this sufficient to nullify the whole process?

[89] The issue of fairness is easily answered when one reads the letters of suspension and termination. Mr. Chénier was dismissed for reasons other than those specified in the letter of suspension. In fact, it was not until the outset of the hearing that the specific reasons for the termination of his employment were stated. The whole process is so far removed from the duty to act fairly that it should be rendered void *ab initio*.

[90] In the alternative, the employer in this case has a higher burden of proof to meet than a simple balance of probabilities. While the burden is less than that in a criminal case, given the consequences of the employer's actions, the bar must be raised for the employer in this case.

[91] Did the employer, in fact, prove the allegations? Mr. Chénier voluntarily went to the interview conducted by the police. At the outset of the interview, he stated he thought he should have a lawyer present if he was being investigated (see page 3 of Exhibit E-19). However, he chose to stay and he answered all questions posed to him. When he was asked about the bank card, he did not hesitate; he replied openly and honestly that he did deliver the bank card to Agent #2.

[92] The bank card is not currency. In order to be considered currency, you require the card, the PIN and a bank machine. Obviously, there are no bank machines inside KP.

[93] Was the bank card really contraband? As seen by Exhibit E-17, the introduction of the bank card was, in fact, authorized by the Warden. Therefore, technically speaking, it was not contraband.

[94] With respect to the allegation of giving pizza to inmates, Mr. Chénier stated the only time he did this was when he had some left over from lunch or dinner. It was not uncommon to do so as we heard from others. Ms. Thompson swore under oath in these proceedings that she did not recall seeing Mr. Chénier give inmates pizza. Her statement here under oath should be every bit as reliable as anything else she may have said.

[95] Would Ms. Thompson have a motive to lie? When one examines the full text of her sworn statement, there are many occasions when she stated she simply did not recall. To say she did not recall during these proceedings is not out of the ordinary and it is simply speculation as to why she said it here.

[96] Therefore, two of the employer's allegations rely solely on the statement of Ms. Thompson. Neither allegation makes any sense whatsoever. Trying to order pizza in for some inmates would cause a riot and implies many inmates have money. No substantive evidence has indicated this. In addition, it simply does not make sense to go to an inmate to get change for \$50. If you wanted change, you would go to another officer.

[97] There is the issue of entrapment that should be considered here. The employer introduced the bank card with the idea of setting up Mr. Chénier. Mr. Chénier had no predisposition to introduce a bank card into KP. But for the fact the employer introduced the card, Mr. Chénier would not have done anything wrong.

[98] Mr. Chénier did not benefit personally in any way from introducing the bank card into KP. If he were corrupt, he would have agreed to use the card for Agent #2 and purchased contraband with it.

[99] The list of mitigating factors in support of reducing the penalty for Mr. Chénier is extensive. He has over 13 years of service and has an exceptional record. He is highly trained and his colleagues said they could continue to work with him. He gained nothing personally from his actions and has exhibited remorse. This is the only job he has ever had, and he relies on it to support his family, which includes two young children. The extraordinary circumstances surrounding the arrangements for Agent #2 render giving him the bank card less serious than if it were provided to an inmate in the general population.

[100] Progressive discipline has not been implemented here and there is no real proof that the bond of trust has been broken.

[101] Mr. Chénier has indeed learned his lesson. While he did admit to introducing the bank card into KP, this action should not warrant the termination of his employment, and a suspension of some length should be substituted.

Rebuttal

[102] Any procedural unfairness was cured by the hearing *de novo*, as stated by the Federal Court of Appeal in *Tipple v. Canada (Treasury Board)* [1985] F.C.J. No. 818 (F.C.A.).

[103] With respect to entrapment, it was Mr. Perkins who selected the grievor as the officer to give the card to, not the employer. The employer did not know who was going to be picked to do this task. In any event, it is not a mitigating factor in labour law.

[104] The letter of termination specifies Mr. Chénier's employment was terminated for introducing contraband, not currency, into KP. Furthermore, the allegation that the bank card was authorized and therefore not contraband is absurd. The fact is Mr. Chénier did not know it was authorized.

Reasons for Decision

[105] There are two references to adjudication that are to be decided here. The first reference is in relation to the indefinite suspension (Board file 166-2-30887) and the second is in relation to the discharge (Board file 166-2-30888). The employer's counsel stated at the outset that the suspension reference was subsumed by the termination and ordinarily this may be so. However, here the reasons for the suspension and the reasons for termination of employment are different.

[106] The letter of suspension, dated April 3, 2001, makes no mention of the bank card issue, in spite of the fact the employer begins the letter by saying: "Further to information obtained from a police investigation..." and the police interviewed Mr. Chénier on March 19, 2001. Why the employer did not mention the bank card incident in the letter of suspension I do not know, but the specific reasons for suspending Mr. Chénier were never proven to me. In fact, there was not one scintilla of evidence surrounding issues involving alcohol, marijuana, inappropriate relationships with offenders or providing a television to an inmate.

[107] Therefore, the grievance with respect to the indefinite suspension is sustained and the grievor is to be compensated for the period between April 3, 2001 and the date of the letter of termination, namely, May 29, 2001.

[108] The termination grievance is obviously the critical one and the one that raises the most issues that need to be addressed.

[109] Firstly, with respect to the issue of procedural fairness, I agree with the submission of counsel for the employer that any lack of procedural fairness on the employer's part has been cured by virtue of this hearing. The Federal Court of Appeal in *Tipple (supra)* has stated as much as well. Furthermore, during the disciplinary meeting Mr. Chénier had with Warden Bourke, there was never any dispute that a serious issue arose surrounding the bank card. Having heard the evidence, I have no

doubt Mr. Chénier was well aware a major reason for the termination of his employment flowed from his admission to giving a bank card to Agent #2.

[110] The next area I will address is the argument that the bank card was not, in reality, contraband because it was authorized by the Warden. I simply do not accept this argument. The simple fact of the matter is Mr. Chénier did not know it was authorized and should have either seized it himself or told someone in higher authority about it. Only at that point would it be determined if the item could be returned to the inmate due to its pre-authorization, but unless Mr. Chénier knew the item was authorized, he should seize it from the inmate. He did not do so.

[111] Mr. Bazinet stated that in cases of this type, where discharge has occurred, the burden taken on by the employer is higher than a mere balance of probabilities. I agree. In this case, I find that clear, cogent and convincing evidence would be required by the employer to show that the facts which the employer has relied upon to justify the termination of the grievor's employment have in fact occurred.

[112] Having established the burden that the employer must meet, I must next determine whether it has been adequately proven that the grievor did what he is alleged to have done.

[113] At the outset of the hearing, counsel for the employer stated that the employer was relying on three incidents to support its decision to terminate Mr. Chénier's employment. Those three incidents are: (1) giving a bank card to an inmate; (2) asking an inmate for change for \$50; and (3) receiving money from inmates in return for ordering pizza. While that is what the employer's counsel stated he would rely on in support of the employer's position, the fact of the matter is the letter of termination is what was stated at the outset as the reasons for the termination. I must base my decision on whether or not the employer has proven its case as detailed in the letter of termination. It says, in part: "...you have provided inmates with unauthorized items and contraband. You have accepted gifts from inmates...."

[114] With respect to the bank card, there is no dispute that Mr. Chénier did give it to Agent #2. There were mitigating factors offered to attempt to downplay the significance of this act insofar as showing the extreme security arrangements made for Agent #2 and the special privileges this inmate was provided with, but there was no dispute that Mr. Chénier gave Agent #2 the bank card. The grievor's counsel admitted

that this act warranted some disciplinary response from the employer, but suggested termination of employment was too severe a penalty under the circumstances.

[115] There is absolutely no question in my mind that the act of giving a bank card to an inmate has the potential to be very harmful to the Institution. Witnesses Sorenson, Campbell and Jalbert were called by the grievor and yet all agreed that, if they had been asked, none would have delivered a bank card to an inmate. All agreed it was wrong to do so. Mr. Sorenson agreed the bank card was as good as cash, and both the IPSO, Rick Rogers, and Warden Bourke described the dangers in introducing money into a maximum security institution. It was described as the fuel for purchasing drugs, alcohol or receiving sexual favours.

[116] Mr. Chénier said he did not know it was a bank card. I simply can not believe that. He received the card from Mr. Perkins and in looking at Exhibit E-16, a photocopy of the front and back of the card, it is difficult to imagine someone not knowing what it is. However, Mr. Chénier said he did not really look at it when Mr. Perkins gave it to him; he just took it and put it in a clear plastic container on the inside portion of his agenda book. Even if I accept the fact that he did not look at it when Mr. Perkins gave it to him, Mr. Chénier had to have looked at it to put it inside the plastic pouch of his agenda book. Either the front or rear of the card would have clearly been visible and I believe he would have known what it was.

[117] Mr. Chénier had to go to another area of KP to give the card to Agent #2. He was not working in the hospital sector where Agent #2 was being kept under protective custody; therefore, a special trip had to be made. He went there and gave the card to Agent #2. Then Agent #2 offered him money in exchange for bringing in unspecified items and, to his credit, Mr. Chénier said no, he would not participate in that type of activity. However, he should not have given the card to Agent #2 in the first place.

[118] Mr. Chénier admitted to the police during his interview with them on March 19, 2001 that he gave the bank card to Agent #2 (see Exhibit E-19). He admitted again while testifying at this hearing that he gave the bank card to Agent #2. I have no hesitation in concluding that, on the basis of clear, cogent and compelling evidence, Mr. Chénier did indeed give a bank card to Agent #2.

[119] The other two allegations made by the employer are, I believe, not so clear. The employer alleges that Mr. Chénier obtained change for \$50 from an inmate and also that he collected money from one or more inmates and ordered pizza for them and received some free. These are not specifically stated in the letter of termination, but could be covered by "provided inmates with unauthorized items" and "accepted gifts from inmates."

[120] The proof of this, as far as the employer is concerned, comes from the sworn statement of another correctional officer, Sonya Thompson. When Ms. Thompson was called to this hearing to testify, she developed what can best be described as an extreme case of amnesia. She testified under oath at this hearing that she had no independent memory of making the statement to the police, nor did she have any independent memory of the events as stated in her sworn statement.

[121] Can an adjudicator rely on the sworn statement of a witness who later recants the evidence? Counsel for the employer pointed out that the rules of evidence on this point have changed, and this change resulted from the Supreme Court of Canada's decision in *R. v. K.G.B. (supra)*. The elements of reliability and necessity must be met before accepting this type of hearsay evidence.

[122] In their book *The Law of Evidence* (1999, Irwin) (Second Edition), David Paciocco and Lee Stuesser, at page 83, state:

[...]

...the Supreme Court has confirmed that the necessity criterion is met whenever a witness recants.

[...]

[123] In the instant case, the witness has stated she has no independent memory of the events. She does not say they did not happen, but rather she has no memory of the events.

[124] Insofar as reliability is concerned, I find that Ms. Thompson's sworn, video-taped statement to the police interviewers is reliable because of the presence of the "rat code" and because there was nothing I was made aware of that would provide a motive for her to lie. The very presence of a "rat code" suggests that, if a correctional

officer states to someone in authority that another correctional officer has done something inappropriate, the ramifications that will befall the accuser are so great it is unlikely that he/she would make the accusation unless there was some truth to it. It is not difficult for me to conclude that Ms. Thompson, in all likelihood, was told by someone not to elaborate on her sworn statement at this hearing. This is, perhaps, the most distasteful thing an adjudicator can encounter. In all likelihood, the "rat code" has been enacted here in the form of silencing a witness. Ms. Thompson would, I believe, have known a "rat code" exists at KP and this gives more credence to her sworn statement.

[125] Also indicating Ms. Thompson's sworn statement is reliable is the fact that there was no motive I was made aware of for her to lie. She did not gain personally or financially as far as I was made aware of for making the statement she did to the investigating officers. This fact, in my view, lends further reliability to her sworn statement (Exhibit E-20).

[126] With respect to the two incidents Ms. Thompson witnessed, namely getting change for a \$50 bill from an inmate and having inmates gather money to give to Mr. Chénier so he could order pizza, I heard evidence from Mr. Lee about something called a "food drive". I heard this took place once a month, when various inmate groups would meet and be authorized to order pizza, chicken or some such food. Perhaps this is what Ms. Thompson witnessed. Maybe the initial money exchange and the ordering of pizza were related. I simply do not know and I have not been presented with sufficient evidence to make a final conclusion in this case that there was misconduct on the grievor's part with respect to these two events. I accept Ms. Thompson's sworn statement to the RCMP that she saw these two events, but counsel for the grievor has put forward a plausible explanation for them.

[127] Having now canvassed the issues the employer stated it based its decision on, I will turn to the testimony of Jim Marshall, the Warden at Bath Institution, who issued the termination letter.

[128] Mr. Marshall testified he took into account all the allegations Mr. Chénier was accused of before deciding on termination of employment. Included in this list, according to Mr. Marshall, were the allegations contained in the letter of suspension. As stated earlier, not one scintilla of evidence was proffered by the employer with respect to the allegations contained in the letter of suspension. The bank card issue

has been proven and stands. The other two allegations of getting change for a \$50 bill and receiving money from inmates for pizza have a plausible explanation for them.

[129] Obviously, some of the allegations Mr. Marshall looked at and considered have not been proven; one has been. Is the one proven so serious as to warrant termination of employment? Mr. Marshall states the violation is contrary to the *Code of Discipline* (Exhibit E-2) and *Standards of Professional Conduct* (Exhibit E-3) and termination is warranted.

[130] In this instance, Mr. Chénier has 13 and one-half years of what can fairly be described as exemplary service. He has letters of commendation on file for various incidents he handled. His recent performance reports all indicate he meets or exceeds the goals set for him. He has a discipline-free record. These have to count for something.

[131] In addition to the above, Mr. Chénier gained nothing personally, that I was made aware of, by giving Agent #2 the bank card. Mr. Chénier was offered the opportunity to profit personally from this act and provide contraband to Agent #2, but he declined to do so.

[132] After having heard all of the evidence and having observed witnesses firsthand, I have no difficulty in concluding that a very serious incident took place when Mr. Chénier gave Agent #2 the bank card. This is a violation of the *Code of Discipline* (see Exhibit E-2, page 5) and the *Standards of Professional Conduct* (see Exhibit E-3, page 12). However, this is the only serious incident which is not contested. The termination was based on a compilation of all of the allegations, a number of which have not been proven.

[133] In light of this, I find that termination in this particular situation to be too severe a penalty. A disciplinary penalty of some type is appropriate, but I find that the employer has not shown to me that the bond of trust, in this case, is not reparable. I believe Mr. Chénier has the capability of again proving to this employer that he can be a trusted correctional officer. It will be up to him to do so.

[134] Accordingly, I order that Mr. Chénier be reinstated in his correctional officer position at Bath Institution within two weeks of the date of issue of this decision. The interval between May 29, 2001 and the date of reinstatement shall constitute a

disciplinary suspension without pay or other benefits. I can only hope that this lengthy suspension will impress upon Mr. Chénier the seriousness of his action, and he can start a new chapter in his life.

[135] In conclusion, the grievance against the indefinite suspension is allowed. The grievance against the termination of the grievor's employment is allowed in part, as indicated above.

[136] I will retain jurisdiction with respect to the implementation of this decision for the period up to July 1, 2002 in the event there is any difficulty between the two parties concerning the implementation of the remedy.

**Joseph W. Potter,
Vice-Chairperson**

OTTAWA, April 11, 2002.

