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*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**KRISTIN DALEN**

Grievor

and

**DEPUTY HEAD  
(Correctional Service of Canada)**

Other party to the grievance

Indexed as  
*Dalen v. Deputy Head (Correctional Service of Canada)*

In the matter of an individual grievance referred to adjudication

**REASONS FOR DECISION**

***Before:*** [John Steeves, adjudicator](#)

***For the Grievor:*** [Corinne Blanchette, UCCO-SACC-CSN](#)

***For the Other party to the grievance:*** [Richard Fader, counsel](#)

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Heard at Abbotsford, British Columbia,  
March 21 and 22, 2006.

## REASONS FOR DECISION

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### Individual grievance referred to adjudication

[1] This is a decision about whether the employer had an employment-related reason to terminate the probationary employment of the grievor, Ms. Kristin Dalen, effective August 26, 2005.

[2] The employer submits that during an employee's probationary period it need only demonstrate an employment-related problem to terminate the employment of the employee. Just cause is not required. In this case, the employer submits that during a fight between inmates on March 3, 2005, the grievor failed to perform the required duties of her employment. Specifically, she failed to respond in a timely manner and this created a dangerous situation for other staff and inmates. The employer submits the dismissal of the grievor, or rejection on probation, was justified.

[3] The grievor accepts that she was in her probationary period of employment when her employment was terminated. However, there were other problems with the response to the March 2005 incident and the grievor should not be blamed for them. As well, any problems with the grievor's actions were the result of inadequate training, especially on-the-job training. The grievor also submits that the employer's actions were a sham, a camouflage and done in bad faith. Specifically, the grievor was "less popular" and it was easier to let her go than deal with the real problems at work. Finally, the grievor was involved in an off-duty incident with another officer. According to the grievor, the employer took sides in this incident by dismissing her. The grievor seeks reinstatement or, in the alternative, demotion to another position.

### Summary of the evidence

[4] The employer operates correctional facilities across Canada. One of these facilities is the Kent Institution, part of the Pacific Region of the Correctional Service of Canada. Kent Institution is a maximum-security institution with about 250 inmates and about 300 staff. It contains the most serious offenders and they are capable of violent, spontaneous actions. One experienced staff member testified there are about three incidents a week that require staff intervention. A high level of security is required.

[5] The grievor commenced employment as a corrections officer effective August 28, 2004. At the beginning of her employment she participated, with other officers, in twelve weeks of training at the Pacific Training College and then another

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three weeks training at Kent Institution. Pursuant to the *Public Service Employment Act*, R.S.C. Chapter P-33, and its regulations she was required to complete a probationary period of twelve months. She signed a declaration when she was hired that she “undertake to maintain, in the course of my employment, the standards of professionalism and integrity” as set out in the *Standards of Professional Conduct* and the *Code of Discipline*.

[6] Work at Kent Institution is shift work and, during a shift, officers rotate between posts. One of these posts is the gym gun walk. This is an elevated post, around the walls of the gym. At some points, it is an open walkway and at other points there is a “cage”. One officer is on this post. Officers carry a rifle and a loud hailer is also available. The activities of the gym are monitored by two video cameras, in different locations. The officer on the gun walk is also required to watch the outside sport fields beside the gym. As well as the single officer on the gun walk there are two officers on or near the gym floor.

[7] Kent Institution issues post orders that set out the requirements for each post. The post order for the gym gun walk officer (September 30, 2002) states that the officer “controls a very strategic vantage point in the safety and security of the institution”. One of the duties of the officer is to “maintain constant vigilance to prevent assaults on persons or attempts to escape by inmates”.

[8] Around 1730 hours on March 3, 2005 the grievor started her post on the gym gun walk.

[9] The video record from the gym taken by both cameras for the events giving rise to this grievance was played more than once in evidence (but without sound). A chronology of the events giving rise to this grievance, using the clock on the video camera and the evidence, is recorded here. The events are discussed in more detail in subsequent paragraphs.

1930 hours

Grievor arrives at the gym gun walk post. She makes phone calls including confirmation of back-up arrangements.

A small number of inmates enter an empty gym, singly or in twos and threes, after passing through security. The two officers on the gym floor are running the security check in a vestibule outside the gym, partly visible on the video camera. For this reason, the only officer who has a full view

- of the gym floor is the one on the gun walk, the grievor in this case.
- 1935:20 Inmate A enters the gym with some other inmates and he proceeds to the washroom, at the side of the gym.
- 1935:50 Inmate A leaves the washroom, returns to the gym, and begins pacing. He re-enters the washroom and returns to the gym two more times. Four other inmates leave the washroom and walk past Inmate A, who is still pacing in circles.
- 1937:45 Inmate B enters the gym and he walks directly to Inmate A. The other inmates are dispersed in the gym.
- 1937:58 There appears to be a brief conversation between the two inmates and then Inmate B throws the first punch. Inmate A reaches behind his back and takes out what was later identified as a pointed wooden weapon. He drops it, retrieves it and then attacks Inmate B. Inmate A drops the weapon again.
- 1938:27 The grievor becomes aware of the fight while still on the phone. She drops the phone.
- 1938:35 Inmate B breaks away from Inmate A and takes his coat off. Inmate B picks up the weapon from the floor and attacks Inmate A.
- 1938:39 The two inmates continue to fight and an officer, Ms. Laurie Berg, enters the gym, from the security area after completing her duties at the security gate. At this point, Inmate B has a hold of Inmate A and is having the better of the fight. As Ms. Berg walks into the gym she becomes aware there is a fight.
- 1938:50 Ms. Berg approaches the fighting inmates and orders them to stop.
- 1939:00 Ms. Berg becomes aware that Inmate B has a weapon and he is using it on Inmate A. She backs away, as she was trained to do, and calls for assistance on her radio. Her message is not clear or is broken up. The grievor hears it and uses her radio to repeat it.
- 1939:25 Two officers enter the gym to respond to Ms. Berg's call. Other officers follow. One of them brings out a spray used to incapacitate inmates and holds it in front, directed at the inmates who are fighting, but he does not use it.
- 1939:34 The fight is broken up by the officers and the two inmates are separated.

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1939:49	Some of the inmates who were watching the fight take exception to what they thought was the use of the spray. They begin yelling and gesturing towards the officers.
1940:07	Other inmates come out from the weight training area and join the inmates protesting the use of the spray. They begin advancing towards the officers. The officers form a line and the spray is pointed at the advancing inmates. Orders are given to back off or force (the spray is considered force) will be used. The inmates are also told that the spray was not used to break up the fight.
1940:16	The inmates back off. Inmate A is removed from the gym and taken to health care.
1940:18	Inmate B is handcuffed.
1940:59	Inmate B is removed from the gym, and most of the staff also leave.

[10] On March 4, 2005, the grievor was reassigned, with no loss of pay, to duties within the administration department of Kent Institution while a security investigation and disciplinary investigation were completed. The warden of Kent Institution, Mr. Alex Lubimiv, testified that he did this because he did not feel confident in the grievor's ability to follow proper procedures and act safely in a security incident. The grievor was told of this decision and the reasons for it.

[11] On April 6, 2004, Mr. Lubimiv directed that an investigation of this incident be convened. This occurred and a Board of Investigation report dated May 24, 2005 was the result. They interviewed the grievor and others and they reviewed the video record. A number of deficiencies were identified in the response to the incident. One of these deficiencies was the response of the grievor. They made the following findings about the grievor's role (reproduced as written):

8. *The gunwalk officer, DALEN, failed to follow direction contained in the Post Order in that:*

- *She was not vigilant in her monitoring of activities on the gym floor;*
- *She was pre-occupied during the movement of inmates into the gym by initiating and maintaining telephone conversations with other officers; and*

- *She failed to take decisive action to warn other staff of the incident, stop or warn the inmates to cease their activities,*
- *She failed to take any effective action to support officers responding to the incident when previously non-involved inmates became agitated and began to approach staff in an aggressive manner.*

9. *DALEN either did not point the firearm as she now asserts, or she failed to report a Use of Force in accordance with [policy].*

[12] A disciplinary investigation was then convened and it reported on July 15, 2005.

The findings of that report were:

*Correctional Officer I, Kristin DALEN, contravened the Code of Discipline Section 1, Standard 1 by failing to take the appropriate action during a serious incident in the gymnasium at Kent Institution. Through her inaction and lack of vigilance DALEN put the safety of staff and inmates at risk. DALEN did not assess the situation accurately and as a result did not take the necessary action in accordance with the Situational Management Model.*

*Correctional Officer I, Kristin DALEN, contravened the Standards of Professional Conduct, Standard 1, by failing to fulfill her duties in a diligent and competent manner in accordance with Post Orders for the Gymnasium Gun Walk Officer, in that she failed to maintain constant vigilance of the areas under her responsibility and take the appropriate action to prevent or stop the assault.*

[13] In a letter dated August 12, 2005 the grievor was advised by the warden that her employment was terminated. There were previous meetings between the warden and the grievor about the warden's concerns. Since the grievor was still working in her probationary period, she was "rejected on probation", effective August 26, 2005. The reasons given were that she had failed to take appropriate action during the March 2005 incident in the gym. An incident from October 27, 2004 was also relied on and the conclusion was there was a demonstrated "pattern of failing to perform under pressure". Finally, it was felt that training would not overcome "this deficit" because death and serious injury can result and, therefore, the risks were too high.

[14] The grievor now grieves the termination of her employment.

Reasons

[15] The situation of the termination of the employment of employees on probationary status has been discussed in previous decisions.

[16] A summary of those decisions is as follows (many of these are referred to in *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33):

(a) The legislative regime that applies to probationary employees involves the interplay of the *Public Service Employment Act (PSEA)* and the *Public Service Labour Relations Act (PSLRA)*. Section 28 of the *PSEA* provides for a probationary period; in this case the period is twelve months, as set out in the regulations promulgated under the *PSEA*.

(b) Subsection 28(2) provides for the rejection of a probationary employee. This means the termination of the probationary employee's employment.

*28(2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish ...*

(c) Section 211 of the *PSLRA* states that nothing in the provision that permits an employee to refer to adjudication for discipline and other matters (section 209) "shall be construed or applied as permitting the referral to adjudication of an individual grievance with respect to ... any termination of employment under the *Public Service Employment Act*".

(d) The Federal Court of Appeal has directed that these provisions should be interpreted to mean that an employer need not establish a prima facie case or just cause. The employer simply has to provide "some evidence that the rejection was related to employment issues and not for any other purpose" or "a dissatisfaction with the suitability of the employee" (*Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529).

(e) Therefore, the employee has "the legal and evidentiary burden of establishing a sham" but the employer has an "initial burden of establishing the rejection on probation was employment-related" (*Leonarduzzi*). In another case, the situation was described as, once the employer has tendered credible evidence pointing to

some cause for rejection that is valid on its face, “the discharge hearing on the merits comes shuddering to a halt ... “(*Canada (Attorney General) v. Penner*, [1989] 3 FC 429 (C.A.)).

(f) Implicit in these cases is that the grievor has a “very high standard or threshold” to meet (*Owens*). However, the employer’s authority to reject on probation is “not entirely unfettered ... if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regards to the facts, and therefore not in good faith, then that decision is a nullity” (*McMorrow and Treasury Board (Veterans Affairs)*, Board File No. 166-2-23967 (1993)). There is also a suggestion that an employer has to be fair and at least inquire into the reasons for the employee’s performance problems (*Dave Dhaliwal and Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109).

(g) In general terms the burden on the employer is to demonstrate with credible evidence an employment-related reason for the rejection on probation. Proof of just cause is not required. Then the burden is on the employee to demonstrate that the decision to reject was not employment-related. Instead, it was a sham; a camouflage for some other purpose, and/or it was done in bad faith.

[17] In this case the employer relies on two events as employment-related reasons for rejecting the grievor on probation.

#### Events before the fight

[18] The first reason relates not to the fight between the inmates themselves, but to the events leading up to the fight. As above, Inmate A came into the gym, went into the washroom more than once and was pacing in the gym. The employer submits that a vigilant officer would have noticed something was not right with this situation. On this view, it was clear that something was going to happen from the actions and body language of the inmates, Inmate A in particular, and some intervention by the grievor was required at this stage.

[19] I accept that this may be the case for an experienced officer. I heard evidence from officers with many years of experience, in many difficult situations, who watched the video of the March 2005 fight. According to this evidence, the events before the fight in the video were suspicious but it requires some experience to analyze the situation and reach that conclusion. Mr. Lubimiv, the warden, reviewed the video and



with regards to the events before the fight, he stated, “intuitively it does not look right”. Another officer explained, “experience gives you the information to tell you what is true”.

[20] I had the opportunity to review the video more than once. With the benefit of hindsight, it is clear that something was going to happen when Inmate A was pacing back and forth, entering and then leaving the washroom. He was also rubbing his head, his hand movements looked agitated and the other inmates in the gym did not display the same level of agitation. As well, when experienced officers watched the video and described to me there was something “coming down” before the fight occurred, I understood what they were saying. On the other hand, I also note that one officer thought the first contact between Inmate A and Inmate B was horseplay, which is often seen in the gym. There were injuries to Inmate A as a result of stabbing but the first actions of Inmate B were, according to one experienced officer (who had witnessed several stabbings), not typical stabbing motions. It was later determined that Inmate B held the weapon in a semi-concealed manner in his fist and this may have been the reason for the atypical arm movements.

[21] Later investigations also turned up that Inmates A and B had shared a cell and had fought previously. The code of the prison required Inmate A to challenge Inmate B again; hence Inmate A waiting for Inmate B in the gym. This also explains the meeting with other inmates in the washroom and later investigations suggested that someone else gave Inmate A the wooden weapon while they were in the washroom. With this knowledge, the situation can be reconstructed so that it was likely that all the inmates in the gym knew what was going to happen. Indeed, with this information one can observe that they very quickly gathered around the combatants to watch. But hindsight is not and cannot be the test in these situations (and nor did the officers who gave evidence suggest that is the test).

[22] The grievor was posted to the gun walk with a rifle, on her own (while the other officers ran the security check) in a maximum-security prison, with less than one year’s experience. It is true that she had training at the staff college and also when she came to Kent Institution. However, I take from the evidence of all the experienced officers that there are some things in corrections that come only with experience. One of them is the ability to understand the culture of the prison population and to translate that

into understanding the behaviour of the inmates in situations like in the gym before the fight.

[23] Assuming the grievor was watching the situation, I am not persuaded that she would have seen what the more experienced officers saw when they reviewed the video for the time before the fight started. That knowledge does not come from training at the staff college or with less than one year's experience. For someone without experience the fight appears to be spontaneous. But with experience, the behaviour leading up to it has meaning and some earlier intervention may have been possible.

[24] For these reasons, I find that lack of response during the events before the fight was the result of inexperience. In my view, this is not a matter in the control of the grievor and it is not an employment-related reason to reject her on probation. Put another way, I am not persuaded that inexperience in the circumstances of this case is a *bona fide* reason for terminating the grievor's probationary employment. There was also a suggestion in the evidence that there is difficulty assigning experienced staff to all posts; if that is the case, it would also be a matter beyond the control of the grievor.

#### The fight

[25] The second reason given to justify the rejection of the grievor on probation relates to the fight itself. The employer alleges that she was either distracted on the telephone or she froze when she saw the fight. In either case, there was no response from her and the result was an incident that escalated to the point that officers and other inmates were put in danger.

[26] All parties accept the above chronology (paragraph 9) with the times from the video cameras as being accurate.

[27] The grievor testified that when she arrived at the gym gun walk post at 1730 hours she checked in by telephone with Tower 3 and Tower 4 to confirm back-up arrangements. This is a normal part of taking over the post. She further testified that she was on the telephone when she "turned around" and saw the fight. The reason why she was not facing the gym was that, according to her, she had to watch inmates on the outside field so she could not always watch the gym. However, any inmates going to the field would have passed underneath the gun walk where the grievor was posted and the video shows that no inmates went outside. The grievor was shown this

fact on the video and her response was “it does not mean that I should not be looking outside”.

[28] The Disciplinary Report of July 15, 2005 describes a telephone conversation the grievor had with another officer. According to this report, at 1938:27, the grievor was “still on the phone” with this officer and the other officer reported that the grievor said, “Holy shit, two inmates are fighting in the gym”. Again, the first punch was thrown at 1937:58 hours. The other officer then told the grievor to get off the phone because a supervisor may be trying to contact her. In her evidence, the grievor stated that the officer she was talking to did not say that; she just dropped the phone. In any event, it appears that the fight had been going on for about half a minute before the grievor was distracted from her phone call. Certainly by this time the fight was fully developed with the two inmates chasing each other around the entire gym area.

[29] The grievor testified that she thought what the two inmates were doing was horseplay, at least at the beginning. Other evidence was that the inmates sometimes do this when they come into the gym. However, the video makes clear that horseplay should have been ruled out very early on. For example, during the early stages Inmate B was dropping the weapon and retrieving it. This is obvious from the video and it would have been more obvious if observed directly from the gun walk. As well, the video reviewed in evidence did not have any sound and the sounds in the gym would have been available to the grievor.

[30] The first call from an officer was at 1939:00, more than a minute after the fight started. Significantly, it was not the grievor but Officer Berg that made this call when she entered the gym and saw what was going on. Therefore, the grievor knew about the fight and watched it take place. She testified and told the disciplinary investigation that she shouted at the inmates to stop. Other than this she did nothing about the fight from 1938:27 to 1939:00, about half a minute. As well, as above, the fight started and went on for about another half minute without the grievor knowing about it. One experienced officer commented that the staff should have been on the gym floor about 1938:40, meaning that a call should have been made sometime before then. I note that it took Ms. Berg about twenty seconds to make the call, from the time she walked into the gym.

[31] In total there is about a minute during which the grievor either did not know about the fight or did not respond to it. As one officer testified the grievor “had some

options” on the gun walk, even when she was late seeing the start of the fight. As I understand these options included, in increasing levels of force: a verbal shout, use of the loud hailer, charging the rifle (putting a round in the chamber in a way that the inmates were aware of the threat of force), and firing a warning shot. The grievor did shout to make the inmates aware of her presence. A loud hailer was available but it was not used. The grievor testified that she charged her rifle prior to the call by Ms. Berg. However, immediately after the event she did not claim to have done this. As well, as pointed out in the Board of Investigation report, if she charged her weapon, she did not make a use of force report. I find that she did not charge her weapon and, as a result, I must conclude that there was only the shout from the grievor until she repeated Ms. Berg’s call.

[32] She carried a rifle and some officers, although not all, thought a warning shot would have been appropriate, especially later in the fight. That is obviously a serious escalation in the level of force and it is hard to second-guess the situation from my point of view. It also seems to be starting with the most extreme force without trying less extreme methods, although I accept that at some point the less forceful measures would be pointless. Certainly, in the final stages of the fight it is probable that a shout or using the loud hailer would have made little difference.

[33] The point, as I understand it, is to intervene at an early stage so there are as many options as possible, starting with the least force. In this case, we do not know whether something beyond a shout would have made a difference. We do know that an inmate was injured and staff had to be summoned to not only stop the fight but also deal with the other inmates who became agitated because they thought spray had been used to break up the fight.

[34] Apart from these options the grievor also had available to her the telephone and her personal alarm. For reasons that are not explained she did not close the line with the person she was talking to and then call for assistance, instead she just “dropped the phone”. In her evidence, the grievor stated that she did make a call on her own to Ms. Berg just when Ms. Berg was walking into the gym. However, as the grievor acknowledged, this call was not mentioned in any of the previous investigations or conversations prior to the hearing. I find that this call was not made by the grievor and the only call she made during the material times was when she repeated Ms. Berg’s garbled call.

[35] It is true that there were other problems in the response to the fight on March 3, 2005. The Board of Investigation report made a number of findings about problems separate from the grievor's response. These included: a shared accommodation assessment had not been done to determine the risk level between Inmate A and Inmate B (who had shared accommodation and had fought previously); the two inmates had just come from segregation before the fight and problems with the risk management of their release were identified; the pointing of the spray dispenser in the gym was considered disproportionate to the risk; and protection of the crime scene and handling of evidence was not in accordance with policy. I acknowledge these problems but I am not persuaded that they absolve the grievor of her responsibilities as a corrections officer.

[36] There were also critical comments about the method of on-the-job training being conducted at Kent Institution in the Board of Investigation report. The grievor submits that she was not given the kind of training that would have prepared her to deal with the serious situation that occurred on March 3, 2005. The evidence suggests that new officers receive professional training at a staff college and then further on-site training at Kent Institution. I have no doubt that the training is changed from time to time, as any program would be, especially in light of the deficiencies in on-the-job training identified by the Board of Investigation. But I cannot find any probable connection between the training received by the grievor and the problems she demonstrated on March 3, 2005.

[37] There is also the matter of an off-duty incident between the grievor and another officer. According to the grievor's evidence, prior to the March 2005 fight in the gym, she was at a party with other officers and drinking of alcohol took place. After the party, she left with a co-worker and the grievor says this co-worker sexually assaulted her. This became an employment matter because the officers were in uniform. The grievor says that the employer favoured the co-worker and took his side of the incident. In other words, the employer thought she was "less popular" and they were looking for a reason to get rid of her.

[38] With regards to this allegation, I would have little difficulty finding it was a sham for an employer to reject an employee on probation because of an attempt to get rid of the employee for reasons totally unrelated to her employment. However, in this case, I am satisfied that the off-duty incident with the co-worker was not a factor in the

employer's decision to reject the grievor on probation. In my view, the events related to the March 2005 fight and the grievor's lack of response during those events stand on their own.

[39] In the above circumstances, I can only conclude that the grievor was not vigilant for about half a minute when she was on the phone instead of watching the gym. Then there is another half minute when the grievor observed the fight but provided minimal response. I do not think that observing is the same as being vigilant in these circumstances. In real time, one minute does not seem a long period. But it was long enough for the fight to escalate from tentative punches, and dropping of the weapon more than once, to a fully engaged fight that included stabbing with a weapon. One can only speculate at this point, unfortunately, but there is a real possibility that escalating intervention of some kind early on, even a telephone call to the control office, would have prevented some injury and/or some risk.

[40] I have identified the inexperience of the grievor as an issue in the events before the fight and, logically, her inexperience has to be considered in the context of the fight itself. I note that the March 2005 fight was the first serious incident in the grievor's short career and she was on her own at a post that was strategically important for the security of Kent Institution (to paraphrase the post order), a maximum security institution. However, the facts are that the grievor was not attentive at the beginning of the fight. More importantly, the fight was fully developed when she saw it, or it was very quickly after she saw it, and she was not able to make what seems to be a straightforward judgement to call control for assistance.

[41] As a final matter, the employer relied on an incident in October 2004 in which the grievor did not respond adequately to a security incident. The evidence is that this incident was treated as a training opportunity and no discipline or any other sanction was discussed with the grievor. Accordingly, I have not based my decision on that event.

[42] For all of these reasons I can only conclude that there was an employment-related reason for the termination of the grievor's employment. She was not vigilant when she failed to see a fight among inmates until it was fully developed and likely too late to apply escalating responses. Further, when she did see the fight she did not respond as she was trained to do and as the circumstances required.

Finally, the rejection on probation of the grievor (for her lack of a response to the actual fight) was done for employment purposes and not any other purpose.

[43] For all of the above reasons, I make the following order:

*(The Order appears on the next page)*

Order

[44] The grievance is denied.

June 15, 2006.

**John Steeves,  
Adjudicator**