Date: 20070305

File: 566-02-189

Citation: 2007 PSLRB 28

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

KENNY ROBERTS

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Other party to the grievance

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Michel Bouchard, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the other party to the grievance: Karen Clifford, counsel

Heard at Kingston, Ontario,
September 25 to 28 and December 12 and 13, 2006.
(Written submissions filed December 14, 15 and 21, 2006.)

I. Individual grievance referred to adjudication

[1] On January 26, 2006, the Correctional Service of Canada (referred to here as the "CSC", "the department" or "the employer") terminated for disciplinary reasons the employment of Kenny Roberts ("the grievor"), then working as a correctional officer classified at the CX-2 group and level at the Kingston Penitentiary. The grievor challenged the decision to terminate his employment in an individual grievance filed January 27, 2006. As corrective action, he specified:

> *I request immediate reinstatement, removal of all records of this discipline from my files, reimbursement for all monies lost, including all lost overtime opportunities, statutory holiday pay and shift premiums, and I request all other rights that I have under the Collective Agreement and the Canadian Human Rights Act, as well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.*

[2] Unsuccessful at the final level of the grievance procedure, the grievor referred the matter for adjudication to the Public Service Labour Relations Board ("the Board") on March, 16, 2006, under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*"). He is represented in this reference to adjudication by his bargaining agent, the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada - CSN.

[3] Pursuant to paragraph 223(2)(*d*) of the *Act*, the Chairperson of the Board has appointed me to hear and determine this matter as an adjudicator.

[4] In view of the reference to ". . . all other rights under . . . the *Canadian Human Rights Act* . . ." in the grievor's statement of required corrective action, I reminded the grievor at the beginning of the hearing of the mandatory requirement under subsection 210(1) of the *Act* to give notice to the Canadian Human Rights Commission should a party wish to raise an issue involving the interpretation of the *Canadian Human Rights Act*. In the course of the hearing, the grievor did not raise an issue of this nature.

II. Summary of the evidence

[5] The employer led oral evidence through six witnesses and the grievor called four witnesses, including himself. The parties submitted 24 exhibits, which are available on file at the Board for inspection. Over the five days of the evidentiary phase

of the hearing, I received a large volume of contextual information about the operations and layout of Kingston Penitentiary, reporting relationships among its staff, the shift schedules in place, the responsibilities of correctional officers and supervisors, the handling of inmates, procedures for submitting observation reports and use of force reports, and various other subjects. In the summary of the evidence, I have reported only the testimony that I have found most relevant to the issues argued by the parties. I wish to assure the parties that I have, nonetheless, reviewed all of the evidence adduced and all of the documents tendered at the hearing in reaching my decision.

[6] The inmate involved in the circumstances of this case was identified at the hearing as Inmate A and will be so identified in this decision. The parties also endeavoured to block out the inmate's name in all documents received as exhibits.

[7] Something allegedly happened to Inmate A in the treatment room of the Kingston Penitentiary hospital late in the evening of September 28, 2005, or in the very early hours of the morning of September 29, 2005. In their testimony, six witnesses present at the time recalled the incident in question. Some of their accounts are consistent in important respects but others differ, sometimes in substantial ways.

[8] Carl Jalbert was the correctional supervisor in charge of the penitentiary during the 23:00 through 07:00 "midnight" shift that night. Supervisor Jalbert is a long-service employee of the CSC who has held progressively more responsible roles in the department since his hiring in 1987.

[9] Supervisor Jalbert's account of the incident is as follows. Late in the afternoon of September 28, 2005, he was contacted at home and asked to supervise the midnight shift in addition to, and prior to, his normal day shift scheduled for September 29, 2005. He arrived at the institution at approximately 22:30, relieved the evening shift supervisor, conducted roll call of the incoming officers and then commenced the shift working in his office in Keeper's Hall.

[10] Very soon into the shift, Supervisor Jalbert received a telephone call from the segregation unit informing him that Inmate A was misbehaving. He proceeded immediately to the unit where he found that Inmate A, agitated and swearing, had slashed his left arm with a razor blade. His cell window, walls and ceiling were splashed with blood. Robert Cox, an officer in segregation, briefed Supervisor Jalbert

that Inmate A was upset over his lack of access to cigarettes and reading material, had "self-injured" and said that he had swallowed razor blades.

[11] Supervisor Jalbert managed to calm Inmate A down to the extent of securing his agreement to proceed to the penitentiary's hospital unit for treatment. As Inmate A's behaviour had previously been threatening, Supervisor Jalbert required that his hands be cuffed behind his back before leaving his cell. This restraint option affords officers greater control and, in this case, reduced the possibility of the inmate splashing blood on the officers. Prior to departing for the hospital, Supervisor Jalbert called staff to clean Inmate A's segregation cell.

[12] During the short walk from the segregation unit to the hospital, Inmate A was escorted by Supervisor Jalbert, Officer Cox and Linda Charlton, one of two spare officers available to Supervisor Jalbert on that midnight shift. Blood continued to drip from the arm of Inmate A during the walk causing Officer Cox to apply a paper towel to the wound. According to Supervisor Jalbert, the inmate's behaviour posed no problems during the escort.

[13] On reaching the hospital unit, the escorting officers and Inmate A met the grievor, Officer Michael MacKay and Nurse Paul Williams, all of whom had come to the first floor of the hospital from its second floor. At Kingston Penitentiary, the hospital is a two-storey unit with the second floor housing the CSC's Ontario regional hospital consisting of eight secure cells and one palliative care cell. During the midnight shift, officers and health care staff assigned to the hospital normally remain on the second floor. The first floor includes the treatment room to which inmates from Kingston Penitentiary or from other institutions are brought for medical assistance.

[14] The first floor treatment room is roughly "U-shaped" with the sides of the "U" shorter than the lateral portion. There is a door at each end of the "U". The corridor accessed on entry is approximately eight feet wide by ten feet long. The lateral portion of the "U" is approximately 20 feet in length with a counter running along one side and a wall with windows on the other. The distance from the counter to the opposite wall is very limited. A person standing with his or her back to the counter sees a stretcher, EKG machine and an elevated treatment chair lined up along the opposite wall, with windows behind.

[15] According to Supervisor Jalbert, Inmate A was under control when escorted into the treatment room. The officers had him stand with his back to the treatment chair. Supervisor Jalbert faced Inmate A whose injured left arm was on Supervisor Jalbert's right. Nurse Williams was close to Inmate A to the right of Supervisor Jalbert in position to treat Inmate A's left arm. Officer MacKay was further to the right of Supervisor Jalbert. The grievor was to the left of Inmate A and Supervisor Jalbert. Officers Cox and Charlton were behind and to the right of Supervisor Jalbert by about five feet.

[16] Nurse Williams, after wiping blood from Inmate A's arm, moved away momentarily to obtain a moist towelette. He was seen by Inmate A pouring a liquid from a brown bottle on the towelette. Inmate A immediately questioned whether the liquid was rubbing alcohol. When Nurse Williams returned and reached to apply the towelette to his arm, Inmate A twisted away counter-clockwise in an agitated fashion.

[17] Supervisor Jalbert, the grievor and Nurse Williams reacted to restrain Inmate A and move him onto the treatment chair. Once Inmate A was on the chair, the grievor placed his hand over Inmate A's face covering his nose and mouth. Supervisor Jalbert at that time did not know whether Inmate A was likely to spit, or not. He testified that he did not have a problem with what the grievor did at that moment.

[18] With Nurse Williams assuring Inmate A that the liquid was not rubbing alcohol to try to calm him down, Supervisor Jalbert motioned to the grievor to move his hand down from Inmate A's nose and mouth and to cup his chin instead. Supervisor Jalbert testified that he was concerned that Inmate A might not be able to breathe and felt he was under control. The grievor complied but Supervisor Jalbert then observed the grievor pushing Inmate A's head back and up with his hand. This action agitated Inmate A, who resisted because his head had nowhere to go. Supervisor Jalbert, concerned that the grievor was causing pain to Inmate A, told him to let go, at first with no result, then repeated his instruction. The grievor complied and moved away slightly further to the left. Asked why the grievor had not obeyed his initial instruction, Supervisor Jalbert suggested that the grievor may have been under stress and so had not heard it.

[19] With the grievor's hand removed, Inmate A calmed down, but said words to the effect of "Is this how you treat people?" He turned to look towards the grievor and said "You're a goof." Supervisor Jalbert then with his peripheral vision saw forward motion

of the grievor's arm, heard a contact noise and observed Inmate A's head snap back. When Inmate A's head came back forward, he saw that Inmate A's eyes were tearing.

[20] At that moment, Inmate A, in Supervisor Jalbert's judgment, was not a threat. He was restrained with his hands cuffed behind his back, his arm was still bleeding and he was doing nothing other than being verbally abusive. Supervisor Jalbert testified that he felt there had been no reason to strike the inmate.

[21] Supervisor Jalbert looked at the grievor and told him to leave the area. He knew that things "weren't right" and did not want a further escalation of the situation. Immediately after the incident, the room was very quiet. Supervisor Jalbert looked over his shoulder at the other officers present and saw a shocked reaction on their faces.

[22] Nurse Williams, after consulting a physician by telephone, informed Supervisor Jalbert that Inmate A had to be taken to Kingston General Hospital for stitches. Inmate A was upset on hearing the word "hospital", stating his fear that it meant the second floor of the prison hospital where he knew the grievor worked and that he "didn't want to get it again." Supervisor Jalbert managed to calm him down by telling him that he was going to an outside hospital and would return to his segregation cell after treatment. Supervisor Jalbert sent staff to secure the proper handcuffs for transporting the inmate and to bring the escort vehicle to the hospital unit.

[23] Walking away from where the incident occurred, Supervisor Jalbert encountered the grievor who had blood on his pants. The grievor said he wished to go home and change his uniform. Supervisor Jalbert testified that he had very serious concerns about what he had just witnessed but did not want to discuss his concerns in front of the other officers. He did not know fully what had happened. He said to the grievor that he could go home. Supervisor Jalbert then proceeded to the nurses' office next door leaving Inmate A in the custody of the remaining officers. The grievor followed him into the office. Supervisor Jalbert said to the grievor that he ". . . had put us in one hell of a predicament. . .", meaning the grievor's ". . . assault of an inmate in [his] presence." The grievor replied that he had done nothing wrong. Supervisor Jalbert told the grievor that he would deal with the situation when the grievor returned from home. He testified that he had expected that he would be able to talk to the grievor on his return and ask for his version of events. At that point, the grievor departed for home.

[24] After completing paperwork, Supervisor Jalbert returned to the treatment room and took Officers Cox, Charlton and MacKay aside into the corridor, still within sight of Inmate A. He told them that he needed observation reports from each of them about the incident but advised them to keep them "to a minimum". According to Supervisor Jalbert, "to a minimum" meant that they should only include facts relating to the inmate's behaviour and not the grievor's actions. Supervisor Jalbert testified that he first wanted to hear from the grievor in order to determine whether something had happened that he had not seen. He hoped that the grievor would "own up" and that they could deal with the situation at his level.

[25] Once Inmate A, escorted by Officer MacKay and Nurse Williams, departed in a vehicle driven by Officer Charlton, Supervisor Jalbert returned to Keeper's Hall to complete further paperwork.

[26] With Inmate A at Kingston General Hospital for treatment in the custody of others, Officer Charlton returned to the penitentiary and went to Supervisor Jalbert's office. The grievor returned to the penitentiary wearing a fresh uniform and also proceeded to Supervisor Jalbert's office. Supervisor Jalbert asked Officer Charlton to leave and began to talk with the grievor. He again said to him that the grievor had put them in "a hell of a predicament" and the grievor again denied doing anything wrong. The grievor waived his finger in Supervisor Jalbert's face and said words to the effect that "I did your job" and that your ". . . blue shirt had gone to your head." He repeated adamantly that he had done nothing wrong and that ". . . that's how we did things in the old days." Supervisor Jalbert testified that he understood the latter comment to mean that staff in the past handled offenders in a more violent way. Nowadays, there was more accountability and more rules protecting the rights of offenders.

[27] Supervisor Jalbert then asked the grievor for an observation report describing his actions throughout the whole incident. The grievor responded that he was not going to put anything into writing because ". . . you are going to try to hang me." After further conversation with raised voices, Supervisor Jalbert told the grievor to leave the institution if he was unwilling to submit an observation report. The grievor replied that he did not have to leave as Supervisor Jalbert had not given him a direct order. Supervisor Jalbert then told the grievor that he must leave given his refusal to complete and submit the required report.

[28] The grievor indicated to Supervisor Jalbert that he wished to retrieve some personal effects on the second floor of the hospital. Supervisor Jalbert replied that he would escort the grievor there, and then to the penitentiary gate. During the walk to the hospital, the grievor made remarks to Supervisor Jalbert similar to comments previously made in Supervisor Jalbert's office. The grievor said, for example, that Supervisor Jalbert's "shirt had gone to his head" and that ". . . you're a tough guy, you think you can be tough now." Supervisor Jalbert testified that he did not respond.

[29] Reaching the hospital, both Supervisor Jalbert and the grievor went upstairs where the grievor retrieved his personal effects. The grievor said to Nurse Williams that he would call him the next day to arrange a round of golf. Supervisor Jalbert escorted the grievor from the hospital. Outside, the grievor asked, "What's next?" Supervisor Jalbert indicated that the grievor should call the penitentiary the next morning but that his recommendation would be that the grievor should only be allowed to return to work when he submitted an observation report. The grievor left.

[30] Supervisor Jalbert returned to his office and opened a computer file at 00:35 to compose his first observation report (Exhibit E-2). After he completed and filed the report, he started around 01:00 to record a more detailed version of events in a separate MS Word file. He testified that he knew, given the seriousness of the incident, that there would be more questions about the event and why he had sent the grievor home. He was surprised that the grievor denied striking Inmate A. He had expected to get a better understanding from the grievor about what had occurred, and why, but had not. He had hoped that the matter could be resolved at his level and that some explanation from the grievor might ease the situation, even though striking an inmate in such circumstances was never acceptable. Supervisor Jalbert testified that he had no intent to "hang" the grievor but knew that he had a duty to report the incident. Thinking further about the situation, he sent an email to the officers present during the incident telling them that "this was bigger than all of us" and forewarned them that they would probably be required to submit other observation reports and would also likely be questioned about the incident.

[31] Later in the shift, Supervisor Jalbert decided to export the contents of his MS Word file into a second observation report, which he then submitted. He also submitted the top half of a "Use of Force" report (Exhibit E-2).

[32] Supervisor Jalbert admitted that he failed to observe two protocols in the course of the night shift: he neglected to videotape the situation beginning with the escort of Inmate A from the segregation unit, and he also forgot to offer the officers involved in the incident critical incident stress debriefing. The employer later imposed a verbal and a written reprimand for these failures.

[33] When asked about working with the grievor in the future, Supervisor Jalbert said he would not feel at all comfortable. The grievor had shown, by denying the incident, that he was not honest and that he was unwilling to accept responsibility. Supervisor Jalbert would not be able to trust him and would feel compelled to watch the grievor all of the time. If the grievor was prepared to strike an inmate in his presence, what would happen when he was not there?

[34] In cross-examination, Supervisor Jalbert confirmed that the section of the investigation report summarizing his interview was "pretty much" accurate (Exhibit E-2). He also confirmed that the statements made in his two observation reports and his use of force report (all included in Exhibit E-2) were accurate.

[35] Asked again what occurred after Inmate A's head came back following the alleged strike, Supervisor Jalbert testified that Inmate A was momentarily quiet before beginning to talk. During the "dead silence", Supervisor Jalbert looked left, then right, and saw Officers Cox, Charlton and MacKay looking at him. Their shocked reaction at the time told him that they knew something had happened. He does not remember seeing Nurse Williams.

[36] The grievor's representative (shortened hereafter to "the grievor") asked Supervisor Jalbert to draw a diagram showing the layout of the treatment room and the position of the witnesses at the time of the incident (Exhibit G-2). The grievor then took Supervisor Jalbert through the crucial moments of the incident. When Inmate A reacted to Nurse Williams approaching with the towelette, the witness verified that he, the grievor and Officer MacKay restrained him by placing him onto the treatment chair. Supervisor Jalbert held his hand on the inmate's chest, the grievor straddled the inmate's right leg with his hand on Inmate A's face pushing back, and Officer MacKay held him by the left arm. Supervisor Jalbert confirmed that the grievor let go of Inmate A's face after Supervisor Jalbert's second request to that effect. The inmate's head came down and he became calmer. At that moment, the witness was at arm's length from Inmate A looking at his face. Officers Cox and Charlton were six to eight feet

behind. Inmate A said to the grievor that he was a goof. Within seconds, Supervisor Jalbert heard the noise of the hit. He continued to look at Inmate A's face as Inmate A's head came back down after the strike. Asked how he failed to see the slap or strike, Supervisor Jalbert replied that he did see it through his peripheral vision and that it "happened so quick."

[37] The grievor questioned Supervisor Jalbert as to why he had not included various points in his "use of force" report, for example, the earlier use of force in cuffing the inmate's hands behind his back. The witness replied that he perhaps should have done so. He could not recall whether he had read the observation reports of the other officers when he drafted the "use of force" document, but conceded that he must have. He stated, however, that it had been his own observation report that led to his writing the "use of force" report, not those of the other witnesses.

[38] The grievor asked Supervisor Jalbert what he meant at the time when he said he hoped to deal with the situation "on his own." He replied that he thought that the grievor would have offered an explanation giving him "something to work with." The situation was a "predicament" because an assault occurred right in front of him. He was compelled to do something about it. Concerning his instruction to staff to keep their observation reports to a minimum, Supervisor Jalbert accepted that he was probably wrong in doing so. He did not tell the other officers not to bring up the assault, only that they not mention the grievor until Supervisor Jalbert had an opportunity to learn more from the grievor. He stated that he was trying to help the grievor by dealing with the situation between the two of them. His intent was not to "hang" the grievor, and he did not want to drag others into the situation.

[39] Supervisor Jalbert confirmed that observation reports are shared at morning management meetings unless they are stated to be protected information. He agreed that if Officer MacKay, for example, had written that he saw the grievor slap Inmate A, disclosure of that information could have made doing the job more difficult for the grievor. Asked if he could have ensured that the reports were handled in a way to prevent disclosure, Supervisor Jalbert answered that he knew that the information probably would get out at some point.

[40] Supervisor Jalbert indicated that he told the investigators that the grievor and Nurse Williams were friends on the basis of hearing their conversation after the incident about playing golf together.

[41] Officer Cox is classified at the CX-1 level and has worked for six years at Kingston Penitentiary. His current assignment is to the segregation unit and he also serves as part of the penitentiary's emergency response team.

[42] Officer Cox conducted his first walk through the segregation unit on September 28, 2005, at 23:00 and completed the count of inmates, finding no problems. Approximately five minutes later, he noticed on his monitor that Inmate A was throwing a dark liquid on the camera in his cell. He went immediately to the cell and found that the inmate had cut his left arm with a razor blade. Officer Cox determined that Inmate A was upset because he said he had been lied to about access to cigarettes and books. Officer Cox called Supervisor Jalbert right away.

[43] Officer Cox joined Supervisor Jalbert and Officer Charlton in escorting Inmate A to the penitentiary hospital. Reaching the treatment room, Inmate A had calmed down somewhat though he was not in a normal state and continued to bleed. Officer Cox did not find Inmate A's behaviour threatening at this stage. The latter was standing near the treatment chair by the window, slightly angled to the chair. Nurse Williams was trying to treat his wound when Inmate A started to become more belligerent, jerking, moving erratically and turning in towards the nurse. As Inmate A could have become a threat to the nurse at that moment, officers on each side restrained him and pushed him into the treatment chair. One officer had his hand on Inmate A's arm; the other had his knee on Inmate A's hips and his hand on Inmate A's face. Officer Cox, several feet away at the time, was not involved in restraining Inmate A because he felt that two officers were sufficient to restrain him.

[44] Officer Cox perceived nothing in Inmate A's behaviour that he judged to be threatening. Nurse Williams worked on Inmate A's arm with Officer MacKay assisting by holding the arm. Inmate A, appearing upset, said words to the effect of "what did you do that for?" There was an exchange between Inmate A and the grievor with both using the word "goof". During this exchange, the grievor struck Inmate A on the right side of his face with his fist. At that moment, Officer Cox was eight to ten feet away, leaning against the counter. He had a clear line of sight to the inmate and was focussed on Inmate A because it was a "heightened incident" involving the use of force and because the grievor and Inmate A were shouting.

[45] After the strike, Supervisor Jalbert, who was directly in front of Inmate A, intervened by placing himself between Inmate A and the grievor who were continuing their verbal exchange. Inmate A looked panicked and wild-eyed. The grievor moved around in a half circle and Supervisor Jalbert then had the grievor leave the room.

[46] Officer Cox had the impression that Inmate A was frightened. He said, "Are the rest of you guys going to get your shots in now?" Supervisor Jalbert calmed Inmate A down and explained to him that he would be going to an outside hospital. Inmate A said he did not want to go to the upstairs hospital at the penitentiary when he returned because the grievor worked there and he was afraid of him. Nurse Williams patched up Inmate A's arm and his hands were then cuffed in front of him. Inmate A was taken away to the emergency room of Kingston General Hospital.

[47] Officer Cox believes that the grievor's presence in the treatment room served only to escalate the situation. At the point the grievor struck the inmate, there was no reason for the use of force.

[48] Officer Cox testified that, after the incident, Supervisor Jalbert gave direction to the officers present about their paperwork. Supervisor Jalbert said that he intended to deal with the grievor's actions himself and asked the officers simply to document the inmate's behaviour.

[49] Officer Cox indicated that he would not want to work with the grievor in the future. He could not trust him to handle an incident, and felt that the grievor had had no consideration for the consequences of his actions for everyone else in the room. Trust among officers is important as they must know that other officers are capable of dealing with an intense situation with tact and professionalism. Officer Cox had experienced several situations involving the use of force where he had had to rely on fellow officers to intervene. He did not feel he could rely on the grievor. The grievor's action was reckless and impulsive. Nevertheless, the situation could have been resolved if the grievor had accepted responsibility for his behaviour without having to drag others into the situation, but he had not.

[50] Officer Cox testified that he did not want to appear as a witness at the hearing and that his appearance was ". . . a bad position for me but the right thing to do." He testified that giving evidence versus another officer is not a position anyone wants to be in. It causes others to question the integrity and trustworthiness of the officer.

[51] In cross-examination, Officer Cox reconfirmed where he was at the time of the incident and that he had had a clear line of sight on the inmate throughout. He reported that the grievor stepped back from Inmate A once he was no longer struggling in the treatment chair. He then saw the grievor strike Inmate A in the face with his fist. At that moment, Officer Charlton was near Officer Cox but slightly further back, with Supervisor Jalbert probably blocking her line of sight to Inmate A. Officer Cox does not recall an instruction from Supervisor Jalbert to the grievor to remove his hand and knee from the inmate.

[52] Officer Cox recalled being told by Supervisor Jalbert only to include the actions of the inmate in his observation report. He agrees that he had never before been told to exclude from a report what other staff were doing. He also recalled an email from Supervisor Jalbert telling him that he would likely have to speak to an investigator.

[53] In re-examination, Officer Cox stated that he understood Supervisor Jalbert's email as instructing him to give full information about what he had seen. He confirmed that he told the investigator everything about the incident that he could remember.

[54] According to Officer Cox, receiving verbal insults from inmates occurs every day. Correctional officers are not required to be abused, but they have to accept that verbal insults do happen. They must deal with them, either by telling the inmate that his behaviour is inappropriate or by laying an institutional charge against the inmate.

[55] Officer Charlton has worked as a CX-1 for almost four years. On the night in question, she was working as a "spare" on the midnight shift. Supervisor Jalbert asked her to assist in escorting an inmate who had slashed his arm from the segregation cells to the hospital. During the escort, the inmate was "okay".

[56] At the time of the incident, Inmate A was in the treatment chair receiving assistance from the nurse. The grievor and Officer MacKay were both near Inmate A with Supervisor Jalbert in front of him. Officer Charlton was behind Supervisor Jalbert as there was no room for her beside Inmate A. Inmate A became agitated when he thought that Nurse Williams was going to apply an alcohol solution to his arm. Nurse Williams reassured him that the liquid was not rubbing alcohol. At that point, Inmate A did not pose a threat. He asked, "Why are you doing this to me?" The grievor repeatedly told the inmate to behave, and stated that he must behave if he were to go upstairs in the hospital. Inmate A said he wanted to go to an outside hospital.

[57] Officer Charlton believes that the grievor's presence agitated Inmate A. No one needed to say anything to Inmate A about behaving. He was not a threat and was not misbehaving. There was no need for force as an intervention tactic.

[58] At the time the grievor allegedly struck Inmate A, Officer Charlton could not see Inmate A. She is not quite five feet, six inches in height while the officers in front of her were quite large and tall.

[59] Officer Charlton recalled hearing Supervisor Jalbert direct the grievor to leave the room. The grievor had to be asked several times to leave and was agitated, pacing around. After the grievor left, Supervisor Jalbert asked Officer Charlton to get the keys for the escort vehicle as well as restraint equipment. She brought the escort vehicle, a van, to the hospital entrance and then drove Inmate A and the escorting officers to Kingston General Hospital. Officer Charlton then returned to the north gate of the penitentiary where she encountered the grievor who had returned from home. While walking with him to Keeper's Hall, the grievor asked Officer Charlton if she was mad at him.

[60] As was the case with Officer Cox, Officer Charlton stated that she did not want to testify at the hearing.

[61] Under cross-examination, Officer Charlton restated her belief that there was no need to use force on Inmate A at any time. Nothing led her to believe that Inmate A was misbehaving. During the incident, she could not see Inmate A's face and was looking at the back of Nurse Williams, with a view only of Inmate A's arm being treated on the nurse's and her right. Officer Cox was standing directly across from her but she was not watching Officer Cox. She could not see the grievor's hands.

[62] Officer Charlton recalled Inmate A saying, "Why are you doing this to me?" just before seeing the grievor walk away. Officer Charlton left the treatment room to get the escort vehicle at about the same time that the grievor left. She confirms that Supervisor Jalbert asked the grievor to leave several times.

[63] Officer Charlton does not remember receiving instructions from Supervisor Jalbert about her observation report. She does remember seeing an email from Supervisor Jalbert on returning to the penitentiary the next night, but not what it said.

[64] Officer MacKay is in his fourth year of employment as a CX-1 at Kingston Penitentiary. He previously worked as a psychiatric practical nurse at Brockville Psychiatric Hospital. He confirmed that he was appearing as a witness under subpoena.

[65] Officer MacKay testified that he went down to the first floor treatment room of the hospital with the grievor and Nurse Williams shortly after they received a call alerting them to the impending arrival of Inmate A. He put on protective gloves in preparation for handling the inmate. On arrival, Inmate A was upset, screaming that he wanted a doctor, but under the control of the escorting Supervisor Jalbert and Officers Cox and Charlton. He was taken to the treatment chair where Nurse Williams began attending to his slashed left arm. Inmate A became upset at the prospect that rubbing alcohol would be used, and Nurse Williams tried to calm him by explaining that he was using a different solution to clean the wound.

[66] At that time, the grievor was on one side of Inmate A while Officer MacKay was on the other side helping Nurse Williams to manipulate the inmate's cuffed left arm. Nurse Williams had to crouch down at times. The grievor had his hand on Inmate A's face. Officer MacKay's arm was on Inmate A's left shoulder, holding him from a distance. Both the grievor and the witness were trying to block Inmate A from spitting on them and on the nurse. Asked why he and the grievor were handling Inmate A given the presence of the three escorting officers, Officer MacKay replied that "I guess we just took over."

[67] According to Officer MacKay, there was a heated verbal exchange between the grievor and Inmate A. The inmate indicated that he was upset with staff and wanted to see a doctor to address his concern about the razor blades he had swallowed. During the exchange, the grievor, in Officer MacKay's view, "got Inmate A more upset."

[68] Officer MacKay then heard a noise like the sound of a snapping latex glove. Inmate A became quiet momentarily, then more upset again. He said something along the lines of "Is this how it works here?" At the time Officer MacKay heard the noise, he was looking at Inmate A's arm. Supervisor Jalbert then asked the grievor to leave the room. Inmate A was quite hostile at this stage.

[69] Officer MacKay heard that Nurse Williams was contacting a doctor, and later that it had been decided to take Inmate A to Kingston General Hospital for treatment and for x-rays to determine whether he had swallowed razor blades. Inmate A had said that he did not want to go to the second floor of the penitentiary hospital unit.

[70] After Supervisor Jalbert asked the grievor to leave the room, the grievor departed. Officer MacKay next saw the grievor when the grievor came back up to the second floor hospital with Supervisor Jalbert to retrieve personal items. The grievor was upset that Supervisor Jalbert was making him go home, saying that he could not believe that this was happening.

[71] Asked why there was no mention in his observation report of the grievor and the noise Officer MacKay had heard (Exhibit E-2), he replied that he was not sure why and that he should probably have including that information. He admitted that he was trying to help the grievor out if something had happened.

[72] Officer MacKay stated that he would be concerned about working with the grievor because ". . . something may happen in the future." The grievor may have trouble dealing with a situation again. The grievor's presence during the incident seemed to escalate Inmate A's behaviour and did not help resolve the situation.

[73] In cross-examination, Officer MacKay stated that Supervisor Jalbert told him to write his observation report "as I felt", and did not recall being asked to keep the report to a minimum. He confirmed that he did not see the grievor strike Inmate A.

[74] Nurse Williams, called as a witness by the grievor, today works at the health services unit at Millhaven Institution, after serving in the regional hospital at Kingston Penitentiary from May 2004 through January 2006. Prior to his assignment at Kingston Penitentiary, Nurse Williams held other nursing and health services positions in the CSC, in the private sector and in the Canadian Armed Forces.

[75] According to Nurse Williams, his shift on September 28, 2005, began normally. At around 23:00, he received a telephone call from Supervisor Jalbert informing him that Inmate A had slashed his arm, swallowed razor blades and was being brought to the treatment room. Both the grievor and Officer MacKay accompanied Nurse Williams to the first floor in anticipation of Inmate A's arrival, leaving a practical nurse behind in the second floor of the hospital. The witness prepared by setting up trays for

cleaning and assessing Inmate A's wounds. The latter was extremely agitated when Nurse Williams saw him coming down the hallway accompanied by three officers. His hands were cuffed behind his back and there was blood on his security gown and shower shoes. The witness described him as yelling obscenities, not coming willingly and resisting.

[76] Once in the treatment room, Inmate A stood in front of the treatment chair. Nurse Williams stated that he proceeded to cleanse his wounded left arm. Blood was leaking from the cut in a steady flow. When Nurse Williams approached with gauze, Inmate A screamed, "Is that rubbing alcohol?" and moved towards the witness. Officer MacKay and the grievor restrained the inmate, moving him onto the treatment chair and controlling him there. The grievor placed his hand over Inmate A's mouth to prevent him from spitting. Nurse Williams stated that he had no reason to doubt at that moment that Inmate A would spit and did have blood in his mouth. He testified that he continued to try to assess the wound and control the bleeding. Inmate A yelled obscenities at staff and continue to be verbally aggressive. He said, for example, "Is this how this works here?"

[77] Nurse Williams determined that sutures were required to close the wound. Nurse Williams applied a dressing and then left to call the physician from the nurses' station. While there, he was out of view and earshot of the treatment room. The witness later testified that he was absent from the treatment room for approximately 15 to 20 minutes. He also indicated that he may have left the treatment room one or more other times while Inmate A was there.

[78] Nurse Williams received instructions from the physician that Inmate A should be taken downtown for assessment and treatment. When he returned to the treatment room, Supervisor Jalbert and the grievor were gone, and the other remaining officers were uncuffing Inmate A. The witness said that he cleaned up Inmate A so that he could put on fresh coveralls. Inmate A's hands were re-cuffed, this time in front.

[79] Nurse Williams described the potential problems associated with an inmate spitting, given that the rates of HIV and Hepatitis C infection approach two-thirds in the inmate population. He testified that none of the officers present in the treatment room had worn eye protection, except for the grievor who may have been wearing glasses. Some wore "Frisk master" protective gloves covered by latex gloves.

[80] Nurse Williams stated that he did not at any point see Inmate A mistreated by the attending officers, including the grievor. Asked whether it was possible that the grievor struck Inmate A without Nurse Williams knowing, he replied that he would have felt the impact of any such blow, given his contact with Inmate A's arm at the time. He maintained that the grievor's fist would have passed by his head, and that he would have noticed the motion. Moreover, Inmate A would have been forced deeper into the treatment chair by any strong blow. None of that happened.

[81] The witness stated that he was not concerned about working with the grievor again in the future. He had found the grievor to be a good officer who often calmed down inmates to allow physicians to treat them, and who demonstrated concern for the safety of nursing staff in their interaction with offenders.

[82] In cross-examination, the witness confirmed that he was kept reasonably busy throughout the period in the treatment room, and that he was not paying attention to conversations between the officers nor to everything else that was going on. Nurse Williams also agreed that he told the investigators that he was situated most of time below the level of everyone else, and that he could not see much. He could not recall whether he asked the officers present "to get out of the way." He verified that, though spitting by Inmate A could possibly have been dangerous, he did not don either the facial shield or goggles available in the treatment room, nor did he suggest to the officers present that they do so. Nurse Williams also testified that he had golfed with the grievor and had had several conversations with him since the grievor's suspension. Nurse Williams clearly stated that he disagreed with the employer's decision to terminate the grievor's employment.

[83] The grievor's testimony detailed his career as a correctional officer, beginning in May 1987 at Joyceville Institution, as well as the circumstances of the serious illness beginning in February 1999 that kept him away from work for over two and one-half years on disability. The grievor was left with impaired vision, able to see only with his right eye using a special lens. He has no tear ducts and must continually add fluid to his eyes. His mobility is not as good as it once was.

[84] Told by the employer that he had to return to work, the grievor saw Dr. Jeffrey Chernin, the CSC physician, who approved his return to duty with restrictions, recommending a posting at the staff college or somewhere else where the grievor would have no inmate contact. The grievor discussed possible options with

then Acting Warden, Mike Ryan, eventually coming to an agreement that a night shift assignment at the regional hospital would be an appropriate start. The grievor testified that he was not told that his duties would be modified, or that he should not deal with inmates brought to the hospital. The grievor said the employer gave him no instructions on what to do if an incident occurred and provided no special training. He believed that his job description remained the same as prior to his absence. His accommodation problem, according to the grievor, related to the number of inmates with whom he would have contact, and where. He understood that the hospital would be a "fairly safe place".

[85] The grievor recounted his version of events. At about 23:00, the grievor learned from Nurse Williams that Inmate A was coming to the treatment room because he had slashed himself. The grievor stood at the main barrier as Inmate A entered, escorted by Supervisor Jalbert and Officers Cox and Charlton. Inmate A, according to the grievor, was loud, his security gown was covered in blood, and more blood was dripping from his arm. Inmate A repeatedly said that he had swallowed razor blades and needed to see a doctor. The grievor told the inmate that he needed to be quiet and to take it easy before they would let him in to see the nurse.

[86] Once Inmate A quietened, Officer MacKay let him in and, together with the grievor, escorted the inmate to the treatment area. Inmate A remained verbally aggressive and exhibited unsteady body movements. According to the grievor, he "perhaps" was not in control of himself. The grievor continued to tell Inmate A to relax and take it easy. When Nurse Williams approached the inmate, Inmate A was standing with the grievor on his right side and Officer MacKay on his left. Officer Charlton was at the back near the entrance door. Officer Cox was on the right side leaning against the corner unit, and Supervisor Jalbert was a couple of feet ahead of Officer Cox.

[87] Nurse Williams left to get something. When he returned, Inmate A asked what he had, ". . . jumped out and moved towards Williams." The grievor reached out and pushed Inmate A back into the treatment chair, grabbing him by the left shoulder and bringing his own right knee up and onto the inmate's lap for greater control. The grievor put his hand on Inmate A's face, applying pressure so that he could not move his head, spit or bite. Inmate A was still trying to talk and the grievor again told him to relax and take it easy. The grievor stated that he heard other noises but did not hear what others in the room were saying.

[88] The grievor then did hear someone, possibly Supervisor Jalbert, say "Ken, you're squeezing his face too hard." Inmate A was still "fighting" the grievor so the grievor kept his hand in place. When the inmate became more compliant, the grievor slowly moved his hand down Inmate A's face but Inmate A then moved his head. The grievor quickly reacted by moving his hand back up again to give direction, and kept his hand there because Inmate A was not complying. Once Inmate A calmed down, the grievor took his knee and hand away and backed off. According to the grievor, "that was it." The grievor stated that he did not strike the inmate.

[89] The grievor demonstrated his hand movements with the assistance of a volunteer. He described his actions in the following terms:

> *What I did was move my hand up, reacting fast. Maybe you could consider it a slap. The inmate would probably think it was a slap . . . . It's all what you see or hear. Some might think it was a slap. I didn't.*

[90] The grievor testified that he moved his hand because he believed there was potential for Inmate A to spit, bite or perhaps even deliver a head butt. He felt that Inmate A was not cooperative and not in control, and that he was known before to have been assaultive. The grievor did not want to take anything for granted. He stated that he did not taunt the inmate but, rather, tried to tell him that he needed to relax and co-operate. Asked whether Supervisor Jalbert ever instructed him to let the escorting officers or others handle the situation, the grievor replied in the negative.

[91] Concerning his subsequent encounter with Supervisor Jalbert in an office near the treatment room, the grievor described the exchange as follows:

> *I went to see Jalbert and asked if I could go home to change. Jalbert said, "yes, Kenny, no problem, but Kenny you put me in a compromising situation." I asked him what he meant. Jalbert said that I used excessive force. I asked him what that meant. He said, "you hit him." I said that I didn't hit him . . . . This went on for five or ten minutes to the point where we were barking back at each other. Others could hear . . . .*

[92] Reflecting on the incident, the grievor testified that he did nothing wrong, and would not change anything because he did his job. "I would do the same thing again . . . . I was there for the other officers, for the nurses and for the inmate." The grievor insisted that the assault did not happen and that there was no excessive use of force:

> *I had no intention to harm the inmate. He was a very hostile, unruly, disturbing individual. The blood was overwhelming. It was a sight to see.*

[93] Cross-examination of the grievor opened with a review of the grievor's discussions with employer representatives concerning his return to work and the type of accommodation required in an assignment. The grievor agreed that Dr. Chernin's recommendation made sense that he not deal with inmates or be in a position where an injury was possible (Exhibit E-13). The grievor did not recall, however, that the issue of avoiding risks came up in return-to-work discussions, and stated that no one sat down with him to talk about conditions that would apply working in the regional hospital job or elsewhere. The grievor concurred that the goal was to find him a position that met the limitations expressed in the doctor's note, and that he could not return to his previous position. He had no recollection of any follow-up meetings to discuss his progress once in the regional hospital position, and could not remember seeing Dr. Chernin's subsequent progress report of March 3, 2003 (Exhibit E-17). The grievor stated that he believed that the February 3, 2003, interview mentioned in the report did not happen.

[94] Questions shifted to the post order for the grievor's position (Exhibit E-15). The grievor disagreed with the proposition that the post order did not require him to restrain or otherwise deal with an uncooperative inmate brought for treatment. He stated that he did not have a special job description, and that the post order ". . . did not alter my doing my job." If an inmate came accompanied to the hospital, the officers working at the hospital would attend to the situation. The post order, according to the grievor, did not tell him that he was to have no contact with inmates being treated.

[95] As to Kingston Penitentiary Warden Donna Morrin's testimony (summarized below) that the grievor was cautioned on two separate occasions not to insert himself in situations with inmates and to leave inmate handling to escorting officers (Exhibit E-18), the grievor said that those occasions never happened. He had never before seen Exhibit E-18, no one had ever talked to him about the two occasions, referred to in the exhibit, and no keeper had ever "told me I can't do this."

[96] The grievor confirmed that he read and signed the investigator's summary notes of his interview confirming their validity (Exhibit E-3). He testified that he answered the investigators' questions truthfully and to the best of his ability. Asked if he agreed that

the interview notes only contained two references to Inmate A being aggressive in any way, the grievor accepted that he could not find any others. The notes made no mention that Inmate A might head butt someone because the grievor had not shared that information with investigators. The reference that the grievor "struck the chin" of Inmate A was "probably bad wording", according to the grievor. He said again that he ". . . quickly moved his face back up with an open hand."

[97] The employer's representative (shortened hereafter to the "employer") asked the grievor whether there had been shouting in the nurse's room when he was there with Supervisor Jalbert. The grievor stated that they "were exchanging information". To the proposition that his exchange with Supervisor Jalbert became more agitated, he first answered "I have no idea" and then "absolutely not". Questioned whether Officers Cox, Charlton and McKay were all wrong when they testified that the grievor had escalated the situation, the grievor replied that he could not speak for those officers, did not know the answer to the question and that the three officers did not state, but should have stated that in their observation reports. He also maintained that Officer Charlton was incorrect in saying that the grievor had asked her whether she was angry with him when the two later met returning to the penitentiary.

[98] The grievor confirmed that, when he subsequently learned that Inmate A was unlawfully at large, he contacted Kingston Penitentiary Deputy Warden Gerald Henderson via email. The grievor agreed that he was concerned at the time that Inmate A might have a grudge against him ". . . out of all 250 correctional officers at KP."

[99] At the end of cross-examination, the employer put it to the grievor that Officer Cox had testified categorically that the grievor struck Inmate A in the face. Asked whether Officer Cox lied, the grievor replied "I can't answer that question."

[100] In re-examination, the grievor testified that he had contact with inmates prior to September 2005 and had not been warned against such contacts. Regarding his reaction on learning that Inmate A was unlawfully at large, he testified that he emailed the deputy warden because there had been no communication from the penitentiary, and that officers were to be informed of an escape by an inmate if they had been involved in an earlier incident or confrontation with the inmate. He agreed that it was part of the inherent duties of correctional officers to respond to incidents, whether or not it was stated in the post order.

[101] Since March of 2006, Gary Goodberry has worked as Detention Supervisor at the Kingston Immigration Holding Centre at Millhaven Institution. At the time of the events giving rise to the grievance, he served as Project Officer in the Security Division at CSC Regional Headquarters in Kingston. Together with the investigation board chairperson, Michel Bridgen, Supervisor Goodberry was assigned responsibility to review the circumstances surrounding the allegation that an inmate was assaulted on or about September 28, 2005, and to report their findings to the warden.

[102] Through Supervisor Goodberry, the employer introduced the investigation report (Exhibit E-2), as well as the following CSC authorities, adherence to which by the grievor formed part of the mandate given to the investigation board: the *Standards of Professional Conduct in the Correctional Service of Canada* (Exhibit E-4); the CSC's *Code of Discipline* (Exhibit E-5); *Commissioner's Directive 001 – Mission of the Correctional Service of Canada* (Exhibit E-6); *Commissioner's Directive 567 – Management of Security Incidents* – (Exhibit E-7); *Commissioner's Directive 567-1 – Use of Force* (Exhibit E-8); and *Commissioner's Directive 568-1 – Recording and Reporting of Security Incidents* (Exhibit E-9). Although he did not object to the filing of the investigation report as an exhibit (Exhibit E-2), the grievor did note for the record his contention that much of its content comprised hearsay evidence.

[103] Supervisor Goodberry outlined the procedure used by the investigation board. With Ms. Bridgen, he conducted face-to-face interviews on October 3 and 4, 2005, of six witnesses (listed in Exhibit E-2, Appendix B). They posed a series of scripted questions and, to some, additional spontaneous questions. Both members of the board usually took notes in the interviews. The statements given by the interviewees formed part of the subsequent report. Only the grievor signed the notes of his interview (Exhibit E-3). The board advised all persons contacted of their right to be accompanied by a representative, a right exercised by the grievor.

[104] The employer asked Supervisor Goodberry to summarize his impressions of the cooperation displayed by each person interviewed. Of the grievor, Supervisor Goodberry reported an initial reluctance to answer questions about the alleged assault given his concern about the possibility of a police investigation and criminal charges. The board advised the grievor that his conditions of employment compelled him to participate in the investigation. After further resistance to questions, and following a break during which the grievor consulted with his representative, the grievor agreed to

provide answers. He admitted to using force against Inmate A, initially to restrain him and then to prevent him from spitting at the correctional officers and attending nurse. The grievor denied that he struck Inmate A. Supervisor Goodberry concluded that this statement was not truthful.

[105] Supervisor Goodberry found that Carl Jalbert remained quite upset about the event at his interview. He seemed shaken and disturbed. Linda Charlton also appeared upset. She felt involved in something that "went against her character", and did not want to be part of it but was cooperative. Officer Cox was cooperative and openly answered questions. Nurse Williams responded to the board's questions but expressed reluctance, perhaps (in Supervisor Goodberry's view) trying to assist the grievor, who was a friend. Supervisor Goodberry found that Inmate A provided a version of the events that was consistent with statements made by several of the other officers.

[106] The investigation board concluded that the grievor struck Inmate A. Officer Cox had directly observed it. Supervisor Jalbert observed that the inmate's head snapped back and that his eyes watered. Officers Charlton and MacKay joined others in reporting that the room then went very quiet, although neither saw the grievor strike Inmate A in the face. In their findings (Exhibit E-2, pp. 54-7), the board stated that "CX-2 Roberts struck (Inmate A) on the right cheek/chin/jaw area, with a quick short blow delivered with his closed right fist while (Inmate A) was restrained." Inmate A was bleeding from an arm wound at the time, with his hands cuffed behind his back.

[107] The grievor's action, according to Supervisor Goodberry, was an excessive use of force and inappropriate in the context of Commissioner's Directive 567 (Exhibit E-7). This Directive outlines that, where an inmate is "physically uncooperative", the appropriate responses are to talk with the inmate, use restraint equipment, issue verbal orders or physically handle the inmate. "Physical handling" usually does not include striking an inmate although it depends on the situation. The correctional officer must use judgment in selecting the proper course of action. Based on the evidence, Supervisor Goodberry felt that physically handling Inmate A was the appropriate choice so as to prevent him from harming anyone or going somewhere that he should not and to make sure that the situation did not escalate. The grievor's action went beyond normal physical handling. Striking the inmate, in this context, was an excessive use of force. The rule is that "pain gives direction". If an inmate is moving in the desired direction or cannot move any further, there is no requirement to apply

further force. In this incident, Inmate A was seated on the treatment chair and could not move back.

[108] The investigators also found that the grievor had committed other violations (Exhibit E-2). The grievor refused a direct order to complete an observation report. He refused a direct order to leave the Kingston Penitentiary property. He failed to complete an observation report as soon as possible after the incident and prior to departing the institution in violation of the *Code of Discipline* (Exhibit E-5) and the *Standards of Professional Conduct in the Correctional Service of Canada* (Exhibit E-4). He was not in uniform during the incident but he intentionally misled the investigators by stating otherwise. He was abusive, by word or action, to Supervisor Jalbert.

[109] In cross-examination, the grievor asked Supervisor Goodberry whether the observation that ". . . [the] offender states no injury as a result of use of force. . . " contained in the use of force report submitted by a nurse (Exhibit E-2) raised any questions. The witness replied that it did not, but agreed that he had not interviewed Nurse Healey, had no idea whether the latter had provided care to Inmate A and could not say how Nurse Healey had formed his observation.

[110] The grievor questioned Supervisor Goodberry about the references in the investigation report that Officer Cox and Supervisor Jalbert were "exemplary officer[s]", while the grievor was "unremarkable". He indicated that the investigators relied on excerpted information from personnel files received from Deputy Warden Henderson in using these terms. The descriptor "exemplary" suggested that an officer was performing at "an A plus rather than B level", and "unremarkable" suggested that an officer was performing duties as required. He admitted that it was second-hand information, and that they had not looked at performance appraisals. In the case of Officer Cox, Supervisor Goodberry agreed that there was discipline on his file a year earlier related to the use of email but suggested that the corrective measure had caused Officer Cox subsequently to conduct himself more professionally.

[111] With respect to diagrams of the treatment room incident provided by Nurse Williams and Supervisor Jalbert during their interviews (mentioned in Exhibit E-2), Supervisor Goodberry stated that he could not remember any differences between the two versions and that he could not now recreate either. The diagrams were sent to the warden but were not included in the final report. According to Supervisor Goodberry,

the diagrams provided a perspective on the site and helped clarify who could have seen the incident. Neither diagram was "probably 100% accurate."

[112] Supervisor Goodberry answered questions about the grievor's interview. He confirmed that they had informed the grievor about the warden's convening order at the outset in order to make clear their mandate and identify the subject matter of the investigation, but did not specifically tell the grievor who had accused him of striking Inmate A. Referring to testimony that the grievor had appeared uncomfortable at the beginning of his interview, the witness was asked whether it was possible that the grievor felt that way because he did not know what he was alleged to have done. The witness replied that "anything's possible." He indicated that the grievor's initial statement that he would not disclose any information until he knew what was said by other witnesses and Inmate A had not had a bearing on the credibility given to the grievor's version of events. Supervisor Goodberry agreed that the grievor subsequently answered questions in the course of the interview. In the end, the investigators doubted his version of events in the face of contradicting evidence from Officer Cox, Supervisor Jalbert and Inmate A. Aspects of Officer Charlton's evidence also differed from the information provided by the grievor.

[113] The grievor probed Supervisor Goodberry concerning discrepancies between Supervisor Jalbert's first and second observation reports. Supervisor Goodberry admitted that the first report was devoid of any mention of the grievor, and was inconsistent with both Supervisor Jalbert's second observation report and his use of force report. Writing two observation reports, according to the witness, was not normal practice but was also not unusual if there were errors or omissions in the first version. He admitted, however, finding problems with all of the observation reports.

[114] Supervisor Goodberry also described Supervisor Jalbert's direction to other staff to keep their observation reports about the incident to a minimum as "inappropriate". He accepted that the investigation report had not addressed Supervisor Jalbert's deficiencies to the degree that it should have.

[115] The witness confirmed that Supervisor Jalbert told the investigators that he had only seen the grievor strike Inmate A peripherally, and could not tell whether the grievor's fist was open or closed. The grievor asked the witness whether the investigators questioned Supervisor Jalbert as to how he had seen the inmate's head snap back and eyes water when his view had only been peripheral. Supervisor

Goodberry replied that they had not asked him further questions on this point. He also could not recall asking Supervisor Jalbert why his vision had been peripheral in the first place.

[116] The grievor pressed Supervisor Goodberry about the precise positions of Officers Cox and Charlton in the treatment room at the time of the incident. The witness indicated that he was not sure which of the two officers was closer to the inmate, that Officer Cox had mentioned being approximately 10 feet away and that he could not recall Officer Charlton reporting her distance from Inmate A. He later testified that Officer Cox appeared in Supervisor Jalbert's diagram to be further away but that his line of sight to Inmate A was not blocked, probably unlike that of Officer Charlton. The witness testified that he believed Officer Cox's version of events because it was corroborated by both Supervisor Jalbert and Inmate A, with portions also corroborated by Officers MacKay and Charlton. He acknowledged that Officer Cox's failure to mention the grievor striking Inmate A in his observation report did seem to have been a glaring omission.

[117] Supervisor Goodberry further detailed that the investigators concluded that the grievor was standing in front, and a bit to the side, of Inmate A at the time of the incident. The grievor was not crouched; he removed his hand from Inmate A's face, after which Inmate A called him a derogatory name, and then the strike occurred.

[118] In re-examination, Supervisor Goodberry confirmed that the convening order provided to the grievor at the time of the investigation did mention the accusations against him (Exhibit E-2). The investigators also provided to the grievor a notice of the disciplinary investigation which noted that ". . . Disciplinary Action may be pending as a result of this Disciplinary Investigation." The grievor signed it. According to Supervisor Goodberry, the grievor did not need to know the names of the other persons interviewed by the investigators, nor what they said, to be able to address the questions that were posed to him.

[119] Donna Morrin is the warden of Kingston Penitentiary, currently on language training away from the institution. She has occupied her current role since March 2002 having previously served in the same capacity at Joyceville for six years.

[120] Warden Morrin confirmed that she prepared the convening order for the investigation (Exhibit E-2). She became aware of the incident in question the morning of September 29, 2005, at the daily management meeting. She then met with Supervisor Jalbert, the deputy warden, the assistant warden for security and the security intelligence officer to discuss the situation. Given her impression of the incident's seriousness and what appeared to be an excessive use of force on an inmate, she decided that an investigation was required. She elected an outside investigation team led by an experienced corrections manager, Ms. Bridgen.

[121] When Warden Morrin received the investigation report, she reviewed it in detail with Deputy Warden Henderson and read the question and answer summaries from the interviews conducted. She also held follow-up discussions with the investigators for clarification purposes.

[122] Asked whether she was concerned about the reference in the report to Supervisor Jalbert seeing the grievor's arm "through [his] peripheral vision" (Exhibit E-2, p.33), Warden Morrin indicated in the negative stating that she felt his summary was a clear statement describing what he saw as well as the limits of what he saw. In respect of Nurse Williams' reported statement that he did not see the grievor strike Inmate A (Exhibit E-2, p.24), Warden Morrin indicated that she took his evidence to indicate that he was busy at the time tending to Inmate A's arm. She did question Nurse Williams' statement but found credible his words to the effect that he was positioned most of the time below the level of Inmate A's head and was not paying attention to everything else going on.

[123] As to the absence in Officer Cox's observation report of a reference to the grievor striking Inmate A, Warden Morrin recounted that she questioned this when she had first seen his observation report. It had been explained to her that observation reports usually do not refer to the conduct of staff. Supervisor Jalbert told her that morning that he had directed the officers present to be concise and "stick to the facts." Warden Morrin felt that the officers would have felt bound by those instructions. Supervisor Jalbert did put all of the details into his second observation report and the use of force report. She convened an investigation knowing that it would get at all the facts.

[124] After reviewing the investigation report, Warden Morrin set up a disciplinary hearing to allow the grievor to add information. A vetted copy of the investigation report was shared with the grievor. The nature of the vetting became an important issue at the hearing. Warden Morrin agreed that the vetting was a concern and, following the first hearing, succeeded in having a new version of the report provided to the grievor (Exhibit E-2).

[125] At the first disciplinary hearing, the grievor initially stated that he was unable and not prepared to respond to questions about the incident, alleging that management's minds were already made up. When the grievor stood up to leave, Warden Morrin asked the grievor directly whether he had struck the inmate. The grievor refused to answer. His union representatives then asked for a break to consult with the grievor. After they returned to the meeting, the grievor eventually said that he did not hit Inmate A but declined to present details. He said he could not respond without a complete investigation report. He repeated that ". . . there was no sense in having a meeting because your minds are made up." Warden Morrin found the grievor uncooperative. He continually gazed about the room, slouching back and swivelling in his chair, and laughed at many of management's questions and statements.

[126] At the conclusion of the meeting, one of the union representatives agreed to draft written comments for subsequent submission but none were received.

[127] Once the grievor had time to review the re-vetted investigation report, Warden Morrin convened a second disciplinary meeting. At the meeting, the grievor adamantly denied striking the inmate. He suggested that there had been five persons in the room at the time but only two had claimed to see him hit Inmate A. As the three others present did not see the alleged strike, it could not have happened. Warden Morrin again found the grievor uncooperative. He refused to respond to direct questions, laughed at the concerns raised by management and demonstrated disrespect both in his body language and in what he said. At one point, he stated to Warden Morrin, "Donna, you're a fucking joke." On that remark, the union representatives asked for a break. On returning, they apologized for the remark on behalf of the grievor. The grievor agreed with the apology. Warden Morrin did not know whether the grievor understood the seriousness of the matter.

[128] One of the representatives suggested an explanation for what had occurred. Given the grievor's eye condition, which might have affected his distance perception

(see below), he suggested that the grievor might have pushed his hand out towards the inmate and inadvertently struck him. Warden Morrin asked the grievor directly whether this was the case, indicating that explanation might throw a different light on the matter. The grievor clearly responded "No", that he had an eye condition but was certainly not blind and that it certainly had not occurred that way.

[129] After the second meeting, Warden Morrin consulted with regional and national staff relations advisors. She was satisfied that the incident had occurred. She examined mitigating and aggravating factors, considered the options available and determined that termination of the grievor's employment was appropriate. Her primary objective in reaching her decision was to ensure the safe, secure and humane custody of inmates. Correctional officers are expected to be models of behaviour and to follow the rules and regulations. The evidence indicated that the grievor intentionally struck an injured inmate who had his hands cuffed behind his back, had swallowed razor blades and was restrained in a treatment chair. This was an unacceptable, excessive use of force whose intent was to mistreat the inmate. If there were no response to the incident, it would send a message to other officers and to inmates that the institution condoned such behaviour, undermining discipline and control. In a maximum security institution, if such behaviour is ignored, the result could be a situation where staff or inmates are injured and where there is a total lack of trust for correctional officers.

[130] Warden Morrin considered the grievor's lack of prior discipline to be an aggravating factor. His 18 years of service would normally be considered a mitigating factor as well but, in this situation, she felt that it was instead aggravating, because an officer with that length of service should have exhibited control. The grievor's refusal to take any responsibility for the incident as well as his lack of cooperation at both hearings were also viewed as aggravating factors.

[131] Warden Morrin lacked confidence that something similar would not occur again. The grievor displayed a lack of judgment when he inserted himself in a situation where the post order clearly indicated that responsibility for inmate control rested with the escorting officers, and not with him. He also showed a lack of judgment in responding to verbal provocation. Furthermore, the grievor stepped into a situation and stayed there voluntarily knowing that the restrictions placed on him due to his health precluded this type of contact (see below).

[132] With no indication of remorse or regret on the grievor's part and no mitigating explanation, Warden Morrin concluded that she had to terminate the grievor's employment in the interests of the safety and security of the institution, its staff and inmates. The incident and the grievor's response had irrevocably breached trust in the employment relationship that left the employer with no other disciplinary option.

[133] Warden Morrin notified the grievor of his termination of employment by letter dated January 26, 2006 (Exhibit E-19):

…

> *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 *evolving from an incident that occurred between 2300 hours on September 28, 2005 and the early morning hours of September 29, 2005 in the Kingston Penitentiary Hospital.*
>
> *I have carefully considered the evidentiary information regarding the findings of your misconduct with respect to this incident. I have also carefully considered your comments and those of your representatives during and related to our meetings of November 22, 2005 and January 18, 2006 concerning that information and the findings of misconduct and I have given all due consideration to your disciplinary and employment record and to your length of service with the Correctional Service of Canada.*
>
> *Following due and careful deliberation it is my conclusion that you, in the presence of fellow Correctional Officers, did exercise excessive force in that you deliberately struck an inmate who was in distress and receiving medical attention and who had his hands restrained by handcuffs behind his back. In so doing, you completely disregarded relevant legislation, Commissioner's directives and policies.*
>
> *Your misconduct represents a serious breach of the* Standards of Professional Conduct and Code of Discipline *of the Correctional Service of Canada. Given the nature and gravity of your misconduct, I can only conclude that the bond of trust that is fundamental to the employment relationship has been irrevocably broken. Moreover, the behaviour that you have demonstrated is grossly incompatible with the conduct expected of a Correctional Officer of the Correctional Service of Canada. I am therefore unable to maintain confidence in your ability to perform your duties as a Correctional Officer.*

> *You are hereby advised that it is my decision to terminate your employment with the Correctional Service of Canada effective this date, January 26, 2006, in accordance with Section 12(1)(c) of the* Financial Administration Act. *You are to return all Correctional Service of Canada property entrusted to you, including all identification cards, all issued equipment and articles of your uniform etc.*
>
> *You are entitled, as outlined in the collective agreement, to present a grievance relating to my decision. If a grievance is submitted it will be referred directly to the final level of the grievance procedure.*
>
> …

[134] During her testimony, Warden Morrin outlined her knowledge of the grievor's medical history as it related to restrictions on his role in the workplace. When she arrived at the Kingston Penitentiary in 2002, the grievor was on disability leave. On May 2, 2002, the employer sent him a letter advising him of possible return-to-work options following his lengthy absence (Exhibit E-10). On June 11, 2002, a rehabilitation specialist from the disability insurer wrote to the responsible CSC return-to-work advisor and indicated that the medical restriction qualifying the grievor's return was that he ". . . can not be placed in any role that would involve a significant potential for physical danger or requiring binocular stereoscopic vision" (Exhibit E-11). On this basis, and given a supporting functional abilities assessment (Exhibit E-12), CSC officials concluded that accommodation of the grievor's disability required CSC to find a role with low potential for physical interaction with inmates. After further discussions also involving a Health Canada occupational health medical officer (Exhibit E-13), the employer suggested assigning the grievor to the hospital on the midnight shift when there was extremely limited inmate movement and potential for inmate interaction. Given the condition of the grievor's eye, a physical confrontation with an inmate might cause further damage. Any struggle, hit or jostle posed a risk. Working midnight shifts in the hospital would minimize potentially problematic situations.

[135] The grievor agreed to the arrangement and returned to work for a trial period beginning November 5, 2002 (Exhibit E-14). The employer provided the grievor with a post order for his position (Exhibit E-15). Warden Morrin explained that the grievor, on the night shift, was not required to carry out many of the work elements listed in the post order. The grievor remained in his role at the hospital beyond the trial period subject to regular progress reports (e.g., Exhibits E-16 and E-17). There was discussion of the possibility of rotation to other posts but no rotation ever occurred.

[136] Warden Morrin became aware of two occurrences when the grievor involved himself willingly in confrontational situations with inmates despite his accommodation requirements (Exhibit E-18). In both situations, the grievor participated in the handling or restraint of an inmate even though it was not part of his assigned duties. Management was concerned about these situations given the risk to the grievor's health, and also to the safety of other staff. Management counselled the grievor and re-emphasized that he should avoid such circumstances in the future. Warden Morrin understood that the grievor had agreed.

[137] During her examination-in-chief, Warden Morrin had described Supervisor Jalbert as a competent and well-respected supervisor whom she had never known to fabricate incidents. He was, in her view, ". . . one of the most straightforward and honest people I know." In cross-examination, the grievor asked Warden Morrin for her impressions of several of the other persons involved in the incident. She depicted Officer Charlton as a relatively new member of staff about whom she had received positive reports from supervisors. She had no reason to question her integrity. Warden Morrin described Nurse Williams as a competent nurse who does his job well. She did not know Officer MacKay very well but had no reason to question either his job performance or character. The warden interacted somewhat more frequently with Officer Cox, especially given his role on the emergency response team and his duties in the segregation unit. She had a positive impression of his integrity.

[138] In response to further questions from the grievor, Warden Morrin clarified that she had not personally questioned any of the witnesses to the incident other than Supervisor Jalbert. She did not ask the staff of Kingston General Hospital whether Inmate A had spoken of the assault. She confirmed that the reasons for terminating the grievor's employment were as stated in the letter of January 26, 2006 (Exhibit E-19). Asked why she decided to discipline the grievor only on the finding that he struck Inmate A and not any additional grounds, Warden Morrin said that she elected to discipline on the most serious matter (Exhibit E-2).

[139] Warden Morrin discussed the publicity that followed the incident when Inmate A's sister appeared on a local television broadcast asking for someone to volunteer legal representation for her brother. Inmate A was interviewed by the police following the broadcast but had refused to lay a complaint against the grievor given his fear of

repercussions. At the time of the January termination of the grievor's employment, Inmate A was unlawfully at large.

[140] Agostino Lavorato, a witness for the grievor, has completed 17 years of service as a CX-1 at Kingston Penitentiary. He testified that he worked with the grievor a number of times on the night shift at the regional hospital, and more often in the past in the segregation unit where the grievor sometimes served as the acting CX-2 in charge in 1995 and 1996. Officer Lavorato indicated that he never observed the grievor assaulting or mistreating an inmate. Rather, he observed the grievor successfully de-escalate and defuse situations involving difficult inmates. The witness did not recall a situation while working with the grievor when officers were required to use force on an inmate. He attributes this to the grievor's positive impact as a supervisor. Officer Lavorato stated that he would feel confident working with the grievor in the future given his professionalism and long experience.

[141] In cross-examination, Officer Lavorato reconfirmed that the examples of the grievor dealing with difficult situations occurred in 1995 and 1996. The witness agreed that he is a friend of the grievor's but insisted he would not vouch for him if it were not deserved. He accepted the employer's propositions that it is important that an officer enjoy the trust of fellow officers, and that he show good judgment at all times.

[142] David Sly has worked at the Kingston Penitentiary as a CX-1 since June 2000 and, before that, was employed as part of the regional hospital surveillance team. He was elected president of the union's Kingston Penitentiary local in June 2006 following two and one-half years as the local's treasurer.

[143] Officer Sly testified that he was aware of many situations where offenders alleged that they had been mistreated by correctional officers, but knew of none that had been found to be true.

[144] Officer Sly described a diagram of the treatment room he personally prepared on November 27, 2006, with room dimensions and the position and size of items confirmed using a measuring tape (Exhibit G-3). The employer objected to the admission of the exhibit, arguing that a diagram made 14 or 15 months after the incident was not relevant, that it might be prejudicial and that there may well have been changes in the treatment room in the intervening period. I ruled to admit the

exhibit, indicating to the employer that its comments would be considered in weighing the value of the diagram as evidence.

[145] Officer Sly stated that he was familiar with the treatment room as it existed in September 2005. Exhibit G-3 differs only inasmuch as the treatment chair has since been replaced with a new model, slightly wider and shorter, and that the crash cart is absent, apparently missing on the day the witness prepared his diagram.

[146] Answering questions from the employer, Officer Sly agreed that the scale of the diagram was not exact and that it does not show the height of the treatment chair as it was in September 2005.

III. Summary of the arguments

[147] The oral submissions of the parties consumed a full hearing day, followed by a written submission on the relevant case law from the grievor and the employer's written rebuttal.

A. For the employer

[148] The employer submitted that the two questions to be answered in this case are: 1) Did the grievor engage in misconduct on the midnight shift of September 28-29, 2005? 2) If yes, what is the appropriate discipline?

[149] According to the employer, the eyewitness testimony of Supervisor Jalbert and Officer Cox supplies the clear, cogent and convincing evidence that proves that the grievor assaulted Inmate A. The balance of the evidence led by the employer corroborates their testimony.

[150] Supervisor Jalbert was completely forthright, candid and credible as a witness, and exhibited consistency and lack of bias. He has no personal interest in the outcome of the case and his story has never changed from the time of the investigation to the current hearing. Supervisor Jalbert saw the grievor hit Inmate A in the face, Inmate A's head go back and his eyes water. The incident was followed by an exchange in which Supervisor Jalbert confronted the grievor about what he had done. He said contemporaneously to the grievor that he saw him hit the inmate without knowing what anyone else present at the time would say or do. The incident troubled Supervisor Jalbert. He testified that he could not believe what he had seen. The matter snowballed for him when he learned that the grievor was not going to own up to his

actions. Knowing this put a different dynamic on the situation and created what was, for him, a difficult personal dilemma. This is why Supervisor Jalbert prepared two observation reports and reported the incident fully in the second, in a fashion that has since remained consistent. He was candid about his own shortcomings and was, in fact, disciplined.

[151] Supervisor Jalbert testified that he would be uncomfortable working with the grievor in the future. The grievor's handling of the situation, in Supervisor's Jalbert's opinion, showed that he was not honest. Confidence and trust in co-workers is absolutely necessary in the environment of Kingston Penitentiary. Supervisor Jalbert was concerned that other staff not be put at risk by the grievor. He could not know what the grievor might do when no supervisor was present, if the grievor was prepared to assault an inmate with a supervisor right there.

[152] Supervisor Jalbert's opinion, corroborated by Officers Cox and Charlton, was that Inmate A was under control when they arrived at the treatment room. Inmate A became agitated when he thought that rubbing alcohol was going to be used. At that point, Inmate A needed to be controlled but he was not a threat. Inmate A verbally abused the grievor but verbal abuse is nothing new. Officers are expected to handle verbal abuse without loss of control.

[153] Officer Cox did not want to testify against a fellow officer, and was very uncomfortable doing so, but said it was "the right thing to do." His evidence at the hearing was consistent with what he told the investigators, and he was unshaken in cross-examination. Officer Cox was unbiased and without any interest in the outcome. He had no history with the grievor and no reason to do anything but tell the truth. There can be no doubt as to the credibility of his evidence.

[154] Officer Cox had a line of sight and saw the grievor's right hand strike Inmate A. His attention was drawn to Inmate A because of the heated exchange between him and the grievor. He testified that the grievor's presence did not help in calming down Inmate A and served only to escalate the situation. Given what he saw, Officer Cox did not want to work with the grievor in the future, and did not trust that the grievor could handle the type of difficult situation that can be encountered at a maximum security facility. He felt that the grievor showed no consideration for fellow officers, displayed a lack of tact and professionalism, and was reckless and impulsive.

[155] Officer Charlton's evidence corroborates the principal witnesses. Although her view of Inmate A was blocked most of the time, she did hear the exchanges between Inmate A and the grievor, and concurs that Inmate A was never a threat. She specifically recollects her encounter with the grievor when he asked, "Are you mad at me?" The grievor's question to Officer Charlton supports the contention that he had acted in an inappropriate manner. The grievor recalled the encounter differently, but the evidence of Officer Charlton as an unbiased witness is preferable. For his part, the grievor lacks credibility on this and other points because of inconsistencies in his recollections of the evening. He would not, for example, confirm when asked at the hearing that he had shouted at Supervisor Jalbert, despite the fact that he signed his interview statement indicating that it had happened.

[156] Officer MacKay had no reason to suspect that the escorting officers did not have control of Inmate A. Officer MacKay admitted that he and the grievor just "took over." He testified that there were loud exchanges between the grievor and Inmate A, and that the effect of these exchanges was to leave Inmate A more upset and to escalate the situation. Like the previous employer witnesses, Officer MacKay did not want to work with the grievor again because he felt that the grievor could have trouble dealing with similar situations in the future. While Officer MacKay was not an eyewitness to the blow, he did hear a noise consistent with a blow by someone wearing a latex glove over a regular-issue glove, as was the grievor. Officer MacKay admitted the shortcomings of his own observation report but everything that he said at the hearing was consistent with what he told the investigators.

[157] Warden Morrin's testimony draws attention to the employer's additional concerns about the grievor's judgment. Her evidence shows that the grievor disregarded his medical condition and the directions the employer gave with respect to the accommodation of his condition. Following the clear direction of Dr. Chernin, the employer posted the grievor in the regional hospital on straight midnight shifts with the goal of minimizing his contact with inmates. As Warden Morrin pointed out, many of the duties outlined in the post order for the grievor's position did not apply when working on midnight shifts (Exhibit E-15). Because the risk of injury to his remaining eyesight was too great, the grievor was not to insert himself in situations with difficult inmates. Under paragraph 6(x) of the post order, escorting officers are to remain with an inmate brought to the hospital. The grievor's job was to open doors, not to be involved in physically restraining an inmate.

[158] Warden Morrin testified about two earlier situations where the grievor did not respect his limitations and inserted himself physically in the handling of inmates (Exhibit E-18). She said that the grievor "was spoken to" about those incidents and cautioned not to insert himself. The grievor denied that this happened but the logic of the evidence indicates otherwise. Exhibit E-18 expresses serious concerns about the grievor's safety as well as the employer's own liability. It only makes sense that the employer acted on the concerns and followed up with the grievor.

[159] Warden Morrin's evidence also shows that the grievor behaved inappropriately at the two disciplinary hearings she convened. He was offered two opportunities to explain himself, but did not, and admitted no wrongdoing. Warden Morrin came to the conclusion that the grievor was a liar, and that the required trust between the employer and him had been breached.

[160] Nurse Williams testified that he thought he would have felt a hard blow to Inmate A. The employer has never taken the position that the blow was necessarily hard, but rather that the grievor used force for no reason on a helpless inmate for whose well-being he was responsible. Nurse Williams admitted that, for most of the time in the treatment room, he was below the level of everyone else, he could not see much and he was not paying attention to everything else going on. His testimony must be considered in light of the fact that he was a friend of the grievor. His credibility as a witness was strained when he talked about the seriousness of the spitting threat from Inmate A, yet admitted that he did not avail himself of the face shield or goggles that were kept in the same room and did not suggest that anyone else put either on.

[161] The employer submitted that the grievor's evidence was not credible. He was not forthright, even with respect to his own job description. His characterization of Inmate A's behaviour changed at the hearing from what he told the investigators. Instead of describing the inmate as being merely verbally aggressive and standing up aggressively at one point when he feared rubbing alcohol, as indicated at his interview, the grievor described the inmate at the hearing as physically aggressive, fighting, not under control and hostile. Why did the grievor risk his remaining eyesight by putting himself anywhere near an inmate in that condition? The only possible conclusion is that the grievor has serious judgment problems that fall short of the standard expected of a correctional officer.

[162] Officer Lavorato, a friend of the grievor, talked about the grievor's conduct in the segregation units in 1995 and 1996. The grievor's conduct there, and at that time, is not of concern. The subject of this hearing is the incident of September 28-29, 2005, where the grievor put himself in a situation he had no business being in.

[163] The employer turned to argue the case law. *Gale v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2001 PSSRB 85, according to the employer, offers assistance on the correct approach to assessing credibility issues in a case involving a penitentiary setting. The decision emphasizes the need to consider the issue of motive in determining the truthfulness of testimony. In the special circumstances of a correctional institution where a "rat code" may prevail, there are disincentives to speaking out. Faced with these disincentives, the fact that a witness is actually prepared to make an allegation against a fellow officer is a sign of truthfulness. *Gale* reflects the earlier decision in *Teeluck v. Treasury Board (Solicitor General Canada – Correctional Service Canada)*, PSSRB File No. 166-02-27956 (19980820). *Teeluck*, beginning at paragraph 44, provides background concerning the existence and effect of the "rat code". This context is important for understanding the discomfort felt by witnesses at this hearing, a discomfort specifically expressed by Officer Cox. When assessing the credibility of the witnesses, the fact that they are breaking the code to speak adds credibility and weight to their testimony.

[164] *Chénier v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2002 PSSRB 40, echoes that point (see, especially, paragraph 124). *Chénier* also assists in considering the appropriate penalty for the misconduct in this case. The adjudicator in *Chénier* reinstated the grievor, based in part on testimony from fellow correctional officers that they could continue to work with the grievor (paragraph 99). The situation in Chénier is thus quite distinct from the case of the current grievor. There was also no real proof in *Chénier* that the bond of trust was broken, and Officer Chénier, unlike the grievor, showed remorse.

[165] The decision in *Courchesne v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-12299 (19820719), highlights the importance of trust and integrity in a correctional setting and stands for the proposition that, if the employer did not act unreasonably (i.e., if the employer conducted a thorough investigation), an adjudicator should not second guess the employer.

[166] *Renaud v. Treasury Board (Solicitor General Canada – Correctional Service)*, 2002 PSSRB 42, emphasizes that termination of employment is an appropriate disciplinary penalty for a very serious act of misconduct where the bond of trust between the grievor and the employer has been broken (paras. 83 and 84). *Renaud* also quotes from the widely cited decision in *Faryna v. Chorney*, [1952] 2 D.L.R. 354, on assessing witness credibility (paragraph 73):

. . .

> *In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions.*

. . .

Once again, the adjudicator in *Renaud* judges credibility (at para. 75) with the question, "Who has a motive to lie?" In the current case, there was no suggestion in the grievor's evidence that the employer's witnesses had any real motives to lie.

[167] The recent decision in *Rose v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 17, also involved an assault by a correctional officer on an inmate but the circumstances of *Rose* are easily distinguished. In *Rose*, the impugned act — a kick to the inmate's buttocks — was more a humiliating gesture than an application of abusive force (paragraph 107). It was not delivered from a dominant position above the inmate. The officer involved admitted the gesture was wrong (paragraph 110), apologized (paragraph 111) and was remorseful (paragraph 112). The evidence did not suggest that he had lost the respect of his colleagues (paragraph 113), and the adjudicator concluded that the grievor had learned his lesson and was unlikely to commit a similar mistake ever again (paragraph 114). Reflecting on these mitigating elements, the adjudicator decided to substitute a lengthy suspension for termination.

[168] None of the factors relied upon in *Rose* are present in this case. Furthermore, there was no issue in *Rose* of an officer's conduct escalating a crisis, no one was put at risk and there was no damage to the employer's reputation. The grievor in this case, unlike his counterpart in *Rose*, cannot be trusted to have learned anything.

[169] *Simoneau v. Treasury Board (Solicitor General of Canada – Correctional Service)*, 2003 PSSRB 57, upheld the termination of a correctional officer. Among the factors considered in that decision were the attempts by the grievor to camouflage the truth, and the fact that the image of the CSC was tarnished. *Simoneau* underscores, in particular, the importance of the issue of trust (see, especially, paras. 58 and 62).

[170] Warden Morrin testified that she did not consider the grievor's length of service to be a mitigating factor in this case. In *Swan v. Treasury Board (Department of Fisheries and Environment)*, PSSRB File No. 166-02-3579 (19780517), the adjudicator also found that long service was not a mitigating factor.

[171] The grievor in *Turner v. Treasury Board (Canada Border Services Agency)*, 2006 PSLRB 58, was terminated for use of force but reinstated with a lengthy suspension. Here, however, the adjudicator received evidence that the grievor was acting in good faith at the time, trying to save a life. His actions were condoned by his supervisors, there was no dishonesty, and the grievor admitted everything he had done. Once again, distinguishing factors of those types are absent in the current case.

[172] The decision in *Government of Province of British Columbia v. British Columbia Government Employees Union (Correctional Services Component)* (1987), 27 L.A.C. (3d) 311, focuses on the issue of the "required" use of force and what is expected of correctional officers (see page 327). It underscores that correctional officers must use force sparingly and judiciously. The evidence shows that the requisite self-control was lacking in the grievor. He violated his job description and the terms of the accommodation of his disability. He displayed a lack of control when he took over the handling of Inmate A from the escorting officers and when he assaulted Inmate A. He was, in fact, ". . . so wound up, he wasn't listening to his supervisor."

[173] The employer referred me as well to *Aitchison v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-16042 (19860819), *Natrel Inc. v. C.A.W. – Canada, Local 462* (2005), 143 L.A.C. (4th) 233, and *Bradley v. Treasury Board (Revenue Canada, Customs and Excise)*, 2000 PSSRB 82. In *Aitchison*, a grievor charged with assault was reinstated because the employer erred in assigning him to escort an inmate immediately after the grievor had participated in an emergency response to a serious hostage-taking incident. The incident involved the same inmate and the grievor had at one stage received orders to shoot the inmate in question. In *Natrel*, the adjudicator found that a grievor's lack of acceptance of wrongdoing suggested the likelihood of

recurrence, and that ". . . even significant seniority is not license for violence . . . ." In *Bradley*, the adjudicator determined that, once the bond of trust is broken, 27 years of service did not justify a reduction in the disciplinary penalty.

[174] The employer summarized the case in the following manner: The grievor violated the recommendation of the medical advisors. He violated the instructions of the employer who had accommodated his disability. He violated the instructions of his supervisor who told him to leave the area. He violated the standards expected of correctional officers as detailed in Supervisor Goodberry's evidence. He violated the trust of the public not to abuse an inmate, and he did so in front of junior officers for whom he was supposed to set an example, and in front of his supervisor. The grievor's lack of control continued when he shouted at Supervisor Jalbert within earshot of the officers in the adjoining room. His behaviour undermined the authority of the chain of command as well as the trust, support and respect of his co-workers. He brought into disrepute the reputation of correctional officers, the Kingston Penitentiary and the CSC. The grievor's comportment constituted an irrevocable breach of the bond of trust. The employer had no choice but to terminate his employment.

[175] In support of the decision to terminate the grievor's employment, there were 12 aggravating factors: the act of assault itself; the grievor's lying and denial of wrongdoing; the grievor's absence of remorse; the fact that other officers have serious misgivings about working with the grievor again; the grievor's poor judgment given his medical restrictions to insert himself in the situation; the grievor's failure to abide by his job description; the fact that the grievor's actions made a difficult situation worse; the fact that the grievor preyed upon an inmate who was wholly vulnerable; the grievor's lack of integrity in dragging other correctional officers into the situation; the breaking of the bond of trust; the damage to the employer's public reputation; and the grievor's length of service.

[176] The employer ended its submissions by urging me to conclude that the grievor did indeed engage in serious misconduct, and that the appropriate penalty for his misconduct was, and is, termination of employment.

B. <u>For the grievor</u>

[177] The grievor asked, with the consent of the employer, to restrict his oral arguments to an assessment of the evidence and the issues, leaving analysis of the

case law offered by the employer and his own case law to a written presentation. I accepted the proposal and ordered that he submit these written arguments to the employer and the Board by close of business on December 15, 2006. I also ordered that the employer submit any written rebuttal on issues raised by the grievor, to him and to the Board by close of business on December 21, 2006.

[178] The grievor submitted that the employer terminated his employment for quasi-criminal behaviour, and so informed the police. The grievor is disabled and a member of a visible minority group. His future job prospects and reputation are very clearly at stake. There can be no doubt that this is a case where the employer's evidence must be clear, cogent, convincing, substantial and reliable.

[179] The employer suggested that the appropriate standard of proof lies somewhere midway between 50% plus one and the criminal standard. Considering the repercussions on the grievor's life and the severity of the allegations against him, the grievor argued that the standard of proof should be at the top of the sliding scale — somewhere in "the high 90s."

[180] The questions for the adjudicator to answer are:

> 1) Could the level of force used by the grievor when dealing with Inmate A be considered to be within acceptable limits?
>
> 2) If the force used exceeded what is normally acceptable, how far did it stray from an acceptable level?
>
> 3) Of all of the people present, who was in the best position to evaluate the appropriate level of force to use?
>
> 4) If the force used by the grievor was inappropriate to the circumstances, what discipline does it merit, if any?

[181] The employer alluded to a "rat code". There was absolutely no evidence dealing with a "rat code" and no evidence that any of the witnesses had anything to fear from other members of staff. On the contrary, several witnesses for the employer freely expressed their opinion that they would not want to work with the grievor again in the future. Without a shred of evidence to establish its existence, it does a great disservice to the employer and to employees working at Kingston Penitentiary to accept that

there is a "rat code." An employer aware of a "rat code" should submit that it is doing something about it, but there is no evidence here of any employer efforts to that end.

[182] The grievor examined the evidence of each of the witnesses in turn, starting with Supervisor Jalbert. The witness stated initially that ". . . he heard a slap from the corner of his eye" [*sic*]. Next, he said he saw something through his peripheral vision, a forward motion of the grievor's arm. Supervisor Jalbert stated that he was not sure if there was a noise, but something drew his attention. He told the investigators that he was unaware whether the grievor's fist was open or closed. He also testified that he was looking directly at Inmate A's face during the whole period.

[183] Supervisor Jalbert's evidence does not meet the requirement of clear, cogent, convincing, substantial and reliable proof. All that can be deduced with certainty from him is that, at the critical moment, he saw the forward motion of the grievor's arm. This testimony is not inconsistent with the grievor's observation report nor with the grievor's demonstration at the hearing of what happened.

[184] Supervisor Jalbert testified that everything went quiet in the room after the alleged strike. In his use of force report, however, he stated that Inmate A was yelling at the grievor immediately after the alleged slap or punch. After the incident, the evidence shows that Supervisor Jalbert asked the officers present at the time to keep their reports to a minimum. He explained this instruction by noting his concern for the grievor and for the officers, yet he never offered the grievor assurances that the observation reports would be kept confidential. Supervisor Jalbert testified that he disciplined the grievor that night, but the only discipline imposed was because the grievor allegedly refused to submit an observation report.

[185] Regarding Officer Cox, the grievor argued that his position in the treatment room at the critical moment and that of the other officers can be established to a surprising degree of precision by cross-referencing the various diagrams drawn for the investigators and at the hearing with the statements made by Supervisor Jalbert and Officers Cox and Charlton. According to the grievor, the following is clear. Supervisor Jalbert was to the left of Nurse Williams and Officer MacKay, at arm's length or two or three feet in front of the seated inmate, and somewhat elevated with respect to him. Officer Cox was about 10 feet from Inmate A, or six to eight feet behind Supervisor Jalbert, either leaning or sitting on the edge of a table-height shelving unit in the entrance corridor. Examining the diagram drawn by Supervisor Jalbert (Exhibit G-2), it

would have been difficult for Officer Cox to have a clear view of Inmate A's face as Inmate A was almost directly in line with Supervisor Jalbert. Officer Sly's diagram (Exhibit G-3) leaves no doubt on this point. Officer Cox testified that he had a clear line of sight at all times. However, Supervisor Jalbert was directly in front of Inmate A (as per his testimony, and the testimony of Officers Cox and Charlton) and to the left of Officer MacKay and Nurse Williams. Officer Charlton stated that Supervisor Jalbert and Nurse Williams, both large men, blocked her view. The evidence is compelling that Officer Cox's field of view would also have been completely blocked off from where he was sitting or leaning. He could not have had, under any circumstances, a clear line of sight. According to the grievor, Officer Cox's evidence on what he could see was not logical and, therefore, not cogent.

[186] Officer Cox described a "punch", apparently a hard punch, which does not match Supervisor Jalbert's evidence that he heard a "slap". Officer MacKay spoke of hearing the snap of a latex glove. A punch does not make a snapping noise. Neither Nurse Williams nor Officer MacKay testified that Inmate A's arm moved in any significant way, as would be expected were there a punch. Nurse Williams stated specifically that it did not.

[187] The employer relied heavily on motive to establish the credibility of both Supervisor Jalbert and Officer Cox. The grievor suggested that both witnesses had a motive for testifying. In Supervisor Jalbert's case, he experienced a very negative interaction with the grievor after the incident when the grievor probably used inappropriate language in expressing how upset he was. This was a motive for Supervisor Jalbert to give the testimony he did. In Officer Cox's case, he began training for the emergency response team in the second week of October 2005 immediately after the incident, a select assignment with three or four candidates for each opening.

[188] Officer MacKay saw nothing. His testimony was not substantial and offered little regarding the precise moment of the alleged strike. What little Officer MacKay did offer was inconsistent with the evidence of other witnesses. He heard a snap, like the snap of a latex glove, but a snapping sound is inconsistent with what others described as either a punch or a slap. What is clear in Officer MacKay's testimony is that he has no direct knowledge of any strike to Inmate A's face.

[189] The grievor contended that Officer Charlton's perspective did not allow her to form a reliable opinion of the events at issue or of the grievor's response. She stood at

the back, situated such that her evaluation would be the least accurate of anyone else's in the room. Her opinion that the grievor did not help the situation must be taken in this context.

[190] Warden Morrin assumed, based on hearsay information, that the grievor had been advised to have no contact with inmates. The evidence shows that this assumption was inaccurate. The grievor testified that he was never informed prior to the hearing about the two situations of concern to the employer where the grievor allegedly inserted himself inappropriately into the handling of inmates. Documents introduced at the hearing about these situations were not addressed to the grievor, and there is no direct evidence that the grievor ever received them.

[191] The testimony suggesting that the grievor exhibited poor judgment when he became involved in the situation in the treatment room was arguable. It might have some validity if there were evidence that the employer had taken previous steps to impress on the grievor the importance of avoiding contact with inmates, but there is not. The grievor's evidence was very credible on this point. He made the decision to participate in a difficult situation with his supervisor present. The supervisor said nothing. It is important to note that the employer did not discipline the grievor for alleged poor judgment, nor for failing to own up to what he did.

[192] Considering the seriousness of her decision, Warden Morrin's cavalier attitude to the issue of observation reports was puzzling. When she questioned why the alleged assault was not included in the observation reports she saw on the morning of September 29, 2005, she was told that these documents are not meant to report on staff. Supervisor Goodberry disagreed and stated clearly that the alleged event should have been included, as did Supervisor Jalbert. All of the other witnesses who expressed an opinion on this point said that the incident should have been reported, yet Warden Morrin concluded that there was nothing odd about the situation.

[193] The adjudicator did not receive direct evidence from Inmate A, who was the only witness to the events not called to the hearing. Inmate A resided in segregation, a section reserved for problem inmates among Kingston Penitentiary's population of the most notorious maximum security offenders in the country. The investigation showed that Inmate A was misbehaving and belligerent. He was described at various times as posing a threat to officers. There was no evidence that Inmate A complained about the grievor until he was approached by the investigators on October 4, 2005. There was no

evidence of bruising on the inmate's person as a result of the alleged punch. We do know that the police approached Inmate A but that no charges were laid against the grievor. The grievor suggested that no weight can be given to anything Inmate A said or did. There was no evidence he was hurt, only an indication that he was not bruised. He was interviewed on camera when he returned from the Kingston General Hospital but said nothing at the time. There is also no evidence he said anything to health care workers at the Kingston General Hospital about being hurt.

[194] According to Warden Morrin, the level of force required in a given situation is a subjective evaluation depending on circumstances. It is clear that the grievor made a different evaluation at the critical point than did, for example, Supervisor Jalbert. The grievor testified that he began to remove his hand from Inmate A's face but then decided to return it with some force to the inmate's face. The grievor was clearly in the best possible position to evaluate the degree of force required at that moment. He was in direct physical, visual and verbal contact with Inmate A. All other evaluations by witnesses in the room run the risk of being less accurate. Everybody else was either occupied with a task or somewhat removed from the direct vicinity of Inmate A. Supervisor Jalbert was nearly as well situated as the grievor, but he testified that he was not sure immediately after the incident whether there was a reason for the grievor's use of force that he may have missed. He stated that he wanted the whole story. Did the grievor use more force than necessary to protect himself and others? The grievor has the honest opinion that he used just the amount of force necessary. Supervisor Jalbert thought it excessive but his observation was peripheral and could have been in error. Officer Cox was not in a position to see the incident from the beginning to the end. Everyone else testified that their attention was not on the scene. It is, therefore, a stretch to conclude that the grievor's use of force was beyond what he believed was necessary. It is also important to keep the nature of the workplace in mind when judging what discretion should be given to an officer in reacting to violent incidents — a high stress workplace where inmates swallow razor blades, where convicted criminals threaten to spit at officers, where officers are sworn at, where the environment has a high rate of infectious diseases and where there is a high risk of false accusations by inmates against staff.

[195] The employer questioned what the grievor might do in the future when a supervisor is not around. This is entirely a hypothetical question. The grievor acted in full knowledge that there was a supervisor directly behind him. While one might

perhaps argue that he should have taken a different course, it cannot be said that the grievor attempted to hide what he did.

[196] Both Officer Lavorato and Nurse Williams were in a good position to evaluate the grievor's competence. Both spoke of the grievor as a good, experienced officer. There was no evidence suggesting that the grievor abused other inmates. The people who testified that they would not work with him again had limited knowledge of him.

[197] There were many discrepancies in the investigation of the incident, as shown in Supervisor Goodberry's testimony. An example of its lack of thoroughness was the absence of any evaluation of the degree of excessive force allegedly used by the grievor. The employer never asked whether the grievor could have legitimately believed that the amount of force used was necessary.

[198] The employer mistakenly considered the grievor's length of service as an aggravating factor, and did not take into account the possibility that the grievor acted in good faith. The bond of trust has not been irrevocably broken, as shown by the testimony of Officer Lavorato and Nurse Williams. There is no evidence that the grievor was motivated by anything but an honest belief that he was doing the right thing. It was not a premeditated action but, rather, an immediate response to an immediate situation.

[199] There is no previous discipline on the grievor's file, nor any record of the employer trying to correct the grievor's behaviour in attending to inmates. Considering his length of service, there should be a presumption based on his past record that he intended no harm and that he was acting in the best of his judgment. There was also an element of provocation in Inmate A's verbal aggression towards him.

[200] In conclusion, the grievor argued that I should rescind the grievor's termination of employment as of January 26, 2006, and reinstate him to his position. In the alternative, if I find that the grievor used some undue force, I should reduce the disciplinary penalty taking all of the factors into account. The grievor asked further that I remain seized of the matter to deal with any difficulties the parties might encounter in implementing the decision.

[201] The grievor subsequently submitted written arguments on the case law that read as follows:

. . .

Tab 1: Canadian Labour Arbitration, 7:2500 Standard of Proof

The following points should guide your evaluation of the standard of proof to which the employer should be held:

> *1. The employer has shown that it considered Mr. Roberts' behaviour to be of a quasi-criminal nature when it informed the police of its allegations against Mr. Roberts, and has confirmed this assessment in its characterization of Roberts' behaviour during the course of this hearing.*
>
> *2. As this grievor also suffers a significant disability, and is a members of a visible minority, he has virtually no prospects of finding future suitable employment, if his termination for misconduct were to be maintained.*

Since both the conditions of allegations of quasi-criminal behaviour, and of dismal future job prospects are of the highest order imaginable, the level of proof that the employer must meet to make its case must fall just short of that which would be required in a criminal proceeding. It is noteworthy that Mr. Roberts was not criminally charged, despite the employer's, and the inmate's discussions with police. Mr.Roberts' employer, the Correctional Service of Canada, is an institution of the Canadian criminal justice system. Beyond a report to the police, it took no further steps to pursue the matter of Mr. Roberts' alleged assaultive conduct, despite its stated belief that the inmate would not press criminal charges himself due to fear of reprisals. It is reasonable to draw the inference that the police and the employer evaluated early on that the evidence did not meet criminal standards of proof. Although this is not necessarily determinative, it is a first indication that either the level of proof could not be met to demonstrate criminal conduct, or the evidence was that there was no criminal conduct.

Tab 2: Dagenais vs. Treasury Board

Many of the facts in Dagenais closely resemble the allegations in the case at hand. The events unfold in a maximum security penitentiary setting. The inmate is a difficult person to deal with. He is known to act strangely, and to be verbally abusive to officers. There is an alleged excessive use of force by Dagenais, a use of force clearly of greater magnitude than that which Mr. Roberts used. The adjudicator states (on the last paragraph of page 9):

> The assessment of whether excessive force has been used is very difficult. I did not witness the incident and this assessment may differ according to the person making it. However, I find that, at this moment, the two blows to the inmate were not necessary. It was excessive use of force as provided in the *Code of Conduct*. The reason is that the grievor struck him while the inmate was squirming, trying to get his head up and moving. However, his hands were handcuffed and placed under his body while the grievor was putting pressure on the small of his back. All that the grievor had to do was to place more pressure on the inmate so as to subdue him and, if this was not possible, he could have asked the other officers for help. They were around him.

The assessment on whether excessive force has been used is likewise very difficult in the matters at hand.

The inmate in the Dagenais case was clearly no longer a threat to the grievor when the use of force in question occurred. In his decision, Board Member Korngold Wexler considers the following factors, which are relevant in the Roberts case:

- *the grievor's ten years of service*
- *satisfactory prior performance*
- *no discipline on record*
- *no premeditation on the part of the grievor*
- *inmate not hurt, and grievor could have struck him harder*
- *spur of the moment*
- *over-reacted, 1 time incident*

In our opinion, the Dagenais decision should serve as a weighty guide as to the analysis to be made in the Roberts file, given its similarities with Roberts.

The adjudicator in this case reduced the 5 day suspension to a 1 day suspension. The employer is the same as Mr. Roberts'.

Tab 3: Penny vs. Treasury Board

The grievor in Penny was accused of twice slapping a handcuffed and shackled inmate, who would not pipe down. The act had the effect of quieting down the inmate. In this

case, the grievor was found guilty of common assault in criminal court.

The adjudicator considered the 21 years of experience, and reduced the penalty from 7 days to 3 days.

. . .

[202] The grievor commented on the case law presented by the employer as follows:

. . .

Response to employer's argument on Gale:

We agree with the employer that a thorough examination of the evidence would be consistent with the standard of proof in this case, as it was in the Gale case. What differentiates Gale from the present case is that such a thorough examination of the evidence does not support that a rat code existed at Kingston Penitentiary. Such an examination also reveals that the two versions provided by Misters Jalbert and Cox are at odds over significant details such as whether or not the inmate went quiet or began yelling at Roberts immediately following the use of force.

Response to employer's arguments on Teeluck:

The employer relied on this case in support of its proposition that the witnesses it relied on, did so in contravention of a hypothetical rat code, a term that was not even mentioned in evidence by any of the witnesses. We submit that witness discomfort typically stems from a variety of sources, unrelated to peer or management pressures, whether or not these are expressed. The witnesses at this hearing appeared inexperience [sic] *at being called to witness* [sic] *at tribunal hearings, with the exception perhaps of Mr. Jalbert. All were called upon to recall in detail an unpleasant series of events over one year old, which would not have been a comforting experience.*

Assigning meaning to witness demeanour involves a variety of factors, which must all be taken into account. The adjudicator is in a privileged position to make this assessment. I found it intriguing that Mr. Cox appeared most highly distressed in cross examination when asked to recollect where he and the others were located.

Response to employer's arguments on Chénier:

A senior officer (Lavarato) and a senior nurse (Williams), both with significant experience working with Mr. Roberts, testified adamantly that they would work with Mr. Roberts again. In this respect, the elements raised by Ms. Clifford

with respect to mitigating factors in Chénier, also apply to Mr. Roberts in this case. There is no real proof that the bond of trust has been broken.

The employer also submits that Mr. Jalbert testified in Chénier, on behalf of the grievor. My understanding of the employer's submission on this point was that this should bar the Union from raising issues on Mr. Jalbert's credibility in the present circumstances. This proposition should be rejected as the matters are entirely unrelated. In addition, the adjudicator made no specific finding with respect to Mr. Jalbert's credibility in his decision.

Of note in the Chénier decision: the grievor's misconduct occurred at Kingston Penitentiary. His [sic] *was re-instated by the adjudicator in a position at Bath Institution. Should you choose to vary Roberts' discipline, it is likely that the interests of all parties may be served by entertaining such an option for Mr. Roberts.*

Response to employer's arguments on Courchesne:

The facts in the case at hand differ significantly from the Courchesne case.

Mr. Roberts did submit an observation report outlining his role in the use of force, from his perspective, during his first meeting with the investigators. His actions do not lack integrity. As Mr. Roberts reacted in good faith, based on his 19 years of experience, he did not act in a manner to breach his employer's trust. The employer's investigation was anything but thorough, as evidenced by Mr. Goodberry's testimony. The employer accepted irreconcilable evidence at face value. The investigation left many important questions unanswered. The investigators did not seek to find out whether or not the inmate had been injured by Mr. Roberts. It did not adequately question the reasons why nobody reported the allegations on their reports.

Response to employer's arguments on Rose:

As in Rose, the grievor in the instant case did not hurt the inmate (Rose, paragraph) [sic]. *There is no evidence to suggest that mistreating inmates was characteristic of Mr. Roberts' lengthy service with the employer, (as in paragraph 91 of the Rose decision). The weight granted to this fact should be here, as in paragraph 115 of the Rose decision:*

> …factors of mitigation can include …an isolated and uncharacteristic outburst of temper, or any other fact pattern that explains the departure in terms that permits a finding that the conduct will not be

> repeated and that it was an aberration rather than a deliberate breach of duty.

What is different in Rose is that the use of force was unprovoked (paragraph 103), while there are elements of provocation in the case at hand. There was, in Rose, no question that the intent was not to prevent a danger to himself or others. Rose kicked an inmate in the buttocks.

You should discount the employer's remarks with respect to Roberts' track record of inserting himself, as there is no direct evidence to confirm that the grievor was aware that any of his workplace actions were cause for concern for the employer. This cannot serve to justify the employer's decision to dismiss an employee with 19 years of service.

Response to employer's arguments on Simoneau:

There is no doubt that trust is important to the employment relationship. However, it is not sufficient for the employer to state that it can no longer trust an employee. If this were the case, it would be impossible for adjudicators to re-instate dismissed employees whenever the employer made the assertion that it could no longer trust an employee. The facts in Simoneau differ substantially from the evidence in the case at hand. It is illogical for the employer to assert that a single incident of alleged excessive use of force should negate 19 years of trustworthy service by the grievor.

We agree with counsel for the employer that the employer is not running a daycare. That is precisely why discretion to use of force is given to officers in the workplace.

Response to employer's arguments on Swan:

The Swan case differs from the present case in that Swan's misconduct was premeditated, and was a culminating incident in a series of misconducts (last full paragraph at page 15). This old decision (1978) considered that repeated, premeditated, dishonest misconduct from an experienced employee did not warrant allowing the grievance.

Current doctrine considers that long service is a mitigating factor. Ms. Morrin erroneously considered it to be an aggravating factor in her decision to terminate Mr. Roberts ' employment.

Response to employer's arguments on Turner:

Mr. Roberts acted in good faith, for his safety, and that of his fellow workers, based on his evaluation of what appeared to him a difficult moment with an uncooperative criminal.

Mr. Roberts was honest in his written report. He gave a full account of events from his perspective. Unlike others involved in this incident, he did not omit to report significant details. He did not author two versions of the incident.

Response to employer's arguments on Government of BC:

At page 327, 2nd full paragraph, 2nd sentence:

> Firstly, the very nature of the custodial function permits a corrections officer to apply force to the person of inmates if circumstances require it, including…self-defence, and the routine of using physical force to compel inmates to comply with necessary instructions in the event of resistance.

And further, at the last line on the same page (page 327):

> That is not to say that the mere application of excessive force will justify dismissal.

And at the next paragraph, on page 328:

> But it is clear in those decisions that where a corrections officer is found to have applied excessive force to an inmate, while that conduct will be seen as deserving of discipline, it will not necessarily justify dismissal. Where the union can point to factors of mitigation that reconcile that apparent breach of duty with a rehabilitation of the employer–employee relationship, particularly the vital element of trust, arbitrators have substituted lesser penalties for dismissals. Factors of mitigation can include severe provocation, the use of excessive force in self-defence, an isolated and uncharacteristic outburst of temper, or any other fact pattern that explains the departure in terms that permit a finding that the conduct will not be repeated and that it was an aberration rather than a deliberate breach of duty.

The case at hand includes evidence of provocation (the inmate proffered insults), of self-defence (Mr. Roberts perceived a threat to himself and others), that it is an isolated and uncharacteristic event, and, further, the employee has a long history of service with the employer. The grievor in BC was viewed alternately as a short-service employee or one with approximately six years of service.

Response to employer's arguments on Natrel and Bradley:

We respectfully submit that the consideration given to length of service as mitigating factor in both the Natrel and the Bradley decisions is consistent with current doctrine.

> *Natrel (last paragraph):* "20 years of relatively good service is a significant factor."
>
> *Bradley (paragraph 134):* "The employer considered a number of mitigating factors, including the grievor's 27 years of service…"
>
> *That is what you should retain from these two decisions. Due to the distinct facts of each of these cases, the adjudicators evaluation was that despite the mitigating factor, reinstatement was not warranted. As the facts in both cases are not at all similar to the present circumstances, these decisions cannot serve as guides to determine whether or not Mr. Roberts' long service should warrant his re-instatement. The employer in this case erred when it considered Mr. Roberts' service weighed against him.*
>
> . . .

C. <u>Rebuttal</u>

[203] In oral rebuttal, the employer maintained that the only possible choice in this case is to determine that Supervisor Jalbert and Officer Cox were telling the truth when they said they saw the grievor hit Inmate A, or that they were lying. This is the same choice the employer faced in its investigation: whether to believe Supervisor Jalbert and Officer Cox or to believe the grievor. Note that even the grievor would not say that Supervisor Jalbert and Officer Cox were lying when asked in cross-examination.

[204] Supervisor Jalbert testified to more than just a forward motion of the grievor's arm. He saw the grievor hit Inmate A, whether from peripheral vision or not, and he told the grievor that he saw him hit the inmate right after the incident. As to Officer Cox, the grievor had no evidence that he was not credible. The grievor's comment to the effect that Officer Cox was seeking a place on the emergency response team does not suggest a valid motive for lying. Positions on the team go to good officers who are physically fit. Both Warden Morrin and Supervisor Goodberry testified that Officer Cox was regarded as a good officer.

[205] Officer Sly admitted that his map was not drawn to precise scale. As regards the position of various people in front of Inmate A, there was never any suggestion that everyone was holding still throughout the incident, and no reason to doubt that, at the crucial moment, Officer Cox did have a line of sight. Other witnesses heard comments from Inmate A to the effect of "Is this how you treat people?" and "Anyone else want

their shots?" The only conclusion is that Supervisor Jalbert and Officer Cox were telling the truth, that the grievor was not and that the hit happened.

[206] Concerning the stated reason for discipline in the termination letter, it is important to take into account Warden Morrin's evidence of what she was thinking in awarding termination of employment as the penalty and not something less. This is where the other concerns about the grievor come into play and should be given weight.

[207] The grievor denied that he was spoken to about inserting himself in direct situations with inmates, and that he did not receive the documents in evidence. Exhibit E-18 is an internal email, and not normally something that would be copied to the grievor. It is nonetheless logical that the grievor would know about his own serious medical condition that had led to an absence of three and one-half years from the workplace. It was incumbent on him to respect his own limitations when he returned to duty. Given privacy requirements, his personal medical details were not shared with other employees, except for his direct supervisor. Supervisor Jalbert would have been told that the grievor was assigned on a special posting, but not the details as to why.

[208] The presence or absence of details about the incident in the observation reports does not really matter since all of the officers involved met with the investigators within a week of the incident and provided full statements. Officer Cox, in fact, said that he did not submit a follow-up report because he knew he was going to meet with the investigators and tell them everything.

[209] The grievor cautioned in his argument that the discretion available to officers should take into account the high stress of the work environment. Kingston Penitentiary is a high stress workplace but officers are expected to cope with stress properly. There is no evidence that the incident in this case was violent. Inmate A was cuffed from behind, held at each shoulder and restrained in a chair. At no time did he threaten anyone.

[210] Was the grievor best able to assess the level of force necessary? The employer offered the grievor an opportunity at each of the disciplinary hearings to explain his use of force, but he did not. His union representatives were invited to make submissions in writing that would be considered, but they did not. The grievor certainly had ample occasion to explain what he did. The employer was not cavalier in

its decision to discipline. It took four months to weigh the evidence, and it provided the grievor with opportunities to respond.

[211] The employer submitted written rebuttal arguments respecting the case law cited by the grievor:

. . .

> *In response to the union's written submission, the employer repeats and relies upon its oral submissions of December 13, 2006, and the case law provided to the adjudicator on that date.*
>
> *In further response to the union's written submission regarding case law, and the comments made therein, the employer makes the following submissions:*
>
> ***I- Onus of proof and credibility***
>
> *In response to the union's assertion that the level of proof that the employer must meet to make its case must fall "just short" of that which is required in a criminal proceeding, the employer submits the following:*
>
> *In a 2004 decision (Mackie v. Solicitor General Canada – (Correctional Service) 2004 PSSRB 3),* [sic] *adjudicator Guindon cites the following:*
>
> > The higher onus was canvassed in Samra (Board file 166-2-26543) as quoted in Gale (supra) as follows:
> >
> > ...The existing jurisprudence is rife with cases which support the notion that in cases of serious alleged misconduct, particularly where a person's continued employment and reputation is at stake, the employer must demonstrate by clear, convincing and cogent evidence that the allegation has occurred. <u>While the standard is not that of criminal cases requiring proof beyond a reasonable doubt, it requires more than a mere preponderance of proof</u>.
> >
> > *(our emphasis)*
>
> *This accords with the submissions previously made by the employer on this point.*
>
> *He further stated the following at paragraph 65:*
>
> > In this case, some serious allegations concern incidents without witnesses other than the persons directly involved and such allegations require the

> application of the test of credibility as described by Justice O'Halloran in *Faryna v. Chorney*, [1952] 2 D.L.R. 354, as follows*:*
>
> In short, the real test of the truth of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> *(our emphasis)*

He concluded, in paragraph 66, by stating the following: Consequently, the employer should be required to demonstrate by clear, convincing and cogent evidence that each of the allegations has occurred.

The employer respectfully submits that the above standard is the onus of proof required by the labour arbitration boards in cases of termination of employment. Also, as already discussed, the adjective "convincing" is sometimes substituted with the word "compelling". The 2003 decision of adjudicator Mackenzie in the Oliver *case (Oliver v. Canada Customs and Revenue Agency, 2003 PSSRB 43, at paragraph 93), found that testimony of witnesses was "compelling" because they had no direct interest in the outcome in the proceedings. This is applicable in the instant case because it speaks to the compelling nature of the testimony of the employer witnesses, none of whom had a direct interest in the outcome of the proceedings.*

II- Dagenais decision

At the outset, the employer submits that neither the Dagenais *nor the* Penny *decision has* [sic] *any relevance to the case at hand. Mr. Roberts has consistently denied striking the inmate; therefore, the analysis of the mitigating factors from those cases has no applicability. Mr. Roberts' conduct needs to be considered in its totality, including his refusal to accept responsibility for his actions. Mr. Roberts has never admitted striking the inmate, which puts the events in this case in a completely different context than these cases. Ms. Morrin and Mr. Jalbert were very clear in their respective testimonies that, had Mr. Roberts admitted to striking the inmate, they would have been open and receptive to hearing his view of the matter and to then evaluating whatever information he provided. However, because he refused to admit that he had done anything wrong, there was consequently no discussion as to what factors could serve to mitigate or explain Mr. Roberts' striking the inmate.*

In Dagenais, [PSSRB File No. 166-2-15767 (19870818)], *the facts were not in dispute and the grievor admitted to striking the inmate. In addition, there was uncontradicted evidence that demonstrated that inmate S was a special inmate, that he was violent, dangerous, abusive and unpredictable. It was established that he constantly provoked correctional offers. It was stated that he was probably the worst criminal in Canada. Furthermore, at the time of events, "he was abusive throughout the whole evening from the time the officers arrived to transfer him to cell A-1-6- to the moment he was returned to cell A-1-4 and even when the officers left the Range" (page 9). Lastly, inmate S was provoked the grievor* [sic]*; he was verbally abusing the grievor and threatened the grievor and his family. The adjudicator concluded that this inmate was verbally aggressive, violent, threatening and dangerous.*

This is a far reach from the evidence presented at the adjudication hearing before you. The employer submits that witness testimony from Correctional Officers Jalbert, Cox, Mackay and Charlton supported an inmate who was not threatening, not physically abusive, and under control. Furthermore, the inmate never threatened the grievor or his family nor did he strike the grievor as was the case in Dagenais. The employer submits that the Dagenais case cannot be compared to the case in front of you and do not find [sic] *any of the mitigating factors found in Dagenais to be present in the case.*

III- Penny decision

In the Penny [PSSRB File No. 166-2-15652 (19860819)] *case, the facts were not in dispute. The grievor candidly admitted to slapping the inmate. The questions to be answered were whether the force used was necessary and if so, whether it was reasonable. This case cannot be compared to the case at hand. Mr. Roberts denies categorically to punching, slapping or hitting the inmate and the questions at law are: Did the assault occur? If so, was termination a reasonable penalty? Therefore, the employer submits that no parallel can be drawn with this decision since the factual content and issues are entirely different then* [sic] *the case at hand.*

Regarding the union's response to the employer's argument on Gale and Teeluk the "rat code" and credibility:

- *The union is incorrect when it states that the evidence does not support that a rat code existed at Kingston Penitentiary. In fact, the evidence on this point was very clear:*

Mr. Jalbert recognised that this code of silence is still very much a part of reality at Kingston Penitentiary in that he was worried what other staff would say about the individuals in the room. He stated that people would ask themselves "Are they going to rat him out?" He testified that there is pressure in terms of officers not reporting certain things and this is precisely why he wanted to try to resolve this incident at the lowest possible level, more specifically between the grievor and himself without getting other staff involved.

Mr. Cox also made reference to fellow officers questioning his integrity if he were to testify against a fellow officer. Mr. Cox clearly indicated that he did not want to testify at this hearing and this was visibly observed by his posture and demeanour. The same is true for officers MacKay and Charlton who clearly indicated that they did not want to testify at this hearing. Officers MacKay, Cox and Charlton indicated that their presence was required by subpoena.

- *The case law stands for the finding that there is indeed a "rat code" in penal institutions. As stated above, this was corroborated by testimony at the hearing. Further, it is well recognized in case law (Teeluck, Renaud and Mackie) that the rat code exists in the Correctional Service of Canada. In the Mackie decision it was stated:* "The label "rat" in the correctional service is related to a "code of silence" inside the institution. Someone is called a "rat" when, rather than covering up or keeping silent about the going-on within the institution, they break the code of silence and tell people" *(paragraph 24).*

- *The union is incorrect when it characterises Mr. Cox as being highly distressed when asked to recall physical location* [sic] *of officers during the incident in the Treatment Room. Mr. Cox was, on his own admission, feeling ill just at the thought of having to testify against a fellow correctional officer. His evidence on cross-examination was clear, cogent and consistent with what he had told the Investigators.*

- *The evidence of Messrs. Jalbert and Cox was consistent on the issue of Mr. Roberts striking the inmate. They both also recalled the wording of the comments made by the inmate, both before after* [sic] *he was struck. They both heard him direct the word "goof" at Mr. Roberts before the strike.*

- *Lastly, adjudicator Potter, in the 2002 Renaud decision, addressed the existence of a rat code at Kingston Penitentiary and stated:* "There is absolutely no question in my mind that a rat code was in existence at the time of this incident" *(paragraph 75).*

Regarding the union's response to the employer's arguments on Chenier:

- *Contrary to the assertion by the union that nurse Williams had "significant" experience working with Mr. Roberts, there was no evidence led as to the amount of shifts that the two had worked in common. Mr. Williams does not work as a correctional officer; further, he and Mr. Roberts are friends outside of work. When these factors are viewed along with the exaggerations and inconsistencies in Mr. Williams' testimony that arose during cross-examination, the employer suggests that his evidence should be given little or no weight.*

- *From Mr. Lavarato's testimony, it was established that he had worked with Mr. Roberts approximately ten years ago. Therefore, based on this experience, some ten years ago, he stated that he would work with him again. The employer submits that this testimony should be given little weight, as it does not reflect upon Mr. Roberts' most recent conduct as a correctional officer.*

Regarding the union's response to the employer's arguments on Courchesne:

- *Any difficulty or shortcoming with the investigation, if any exist, are cured by the hearing before you. The Federal Court of Appeal decision in* Tipple v. Canada (Treasury Board) *[1985] F.C.J. No. 818, stands for the proposition that any procedural unfairness in the discipline process is cured by a de novo hearing by this Board.*

Regarding the union's response to the employer's arguments on Rose:

How can the union refer to provocation for Mr. Roberts' actions? Mr. Roberts has denied he did anything wrong. Therefore, this cannot logically be a consideration. If in fact Mr. Roberts is admitting to striking the inmate, this would be contrary to what Mr. Roberts told the investigators, and what he told his employer at the two disciplinary hearing [sic] *and what he testified to at the hearing. It also begs the question as to what type of officer Mr. Roberts really is, given that he put his fellow correctional officers through the trauma of having to testify because he denied any wrong-doing.*

The distinctions between the Rose *case and this one were already referred to in oral submissions. The employer does not agree with the union's characterization as to "what is different" between the two cases. The union has failed to mention one of the main distinctions; namely, that the inmate assaulted by Mr. Roberts was: handcuffed from behind, seated in a chair, being treated for a wound, in mental distress as evidenced by the fact that he had self-injured, and in physical distress due to having swallowed razor blades.*

Regarding the union's response to the employer's arguments on Rose, Courchesne, Simoneau and Turner:

- *The union has referred to Mr. Roberts as being "trustworthy", "honest", having "integrity" and "acting in good faith", and also says that there is no "direct evidence" to confirm that Mr. Roberts was aware that his actions of risking his eyesight were a concern to his employer. The evidence speaks to the contrary. Specifically:*

  - *Mr. Roberts denies that he struck the inmate. Therefore, this would mean that Mr. Cox and Mr. Jalbert are lying;*

  - *Mr. Roberts denies saying to Ms. Charlton "are you mad at me" when he encountered her on the grounds of Kingston Penitentiary after the incident with the inmate. Therefore, this would mean that Ms. Charlton is lying;*

  - *Mr. Roberts denies that he had meetings with Lynne Van Dalen in 2003 regarding his progress in his accommodations* [sic]. *Therefore, this would mean that Ms. Van Dalen filed a false report* ***[Exhibits E-16 and E-17].***

  - *Mr. Roberts denies knowing about his medical restriction to avoid physical danger despite his having been cc'd with a letter to that effect* ***[Exhibit E-11],*** *and despite his own evidence about the seriousness of his condition.*

  - *Mr. Roberts denies that he was cautioned about not inserting himself in situations with inmates under escort, despite the serious concerns raised by the employer in* ***Exhibit E-18****, and the sworn evidence of Donna Morrin that Mr. Roberts was cautioned as a result of those concerns.*

The employer submits that it is not believable that so many other people would be lying and that Mr. Roberts is telling the truth. Mr. Roberts' evidence needs to be evaluated in light of significant problems with his credibility.

In further response, as stated in the employer's verbal submissions, the actions of Mr. Roberts display a significant lack of both integrity and good faith. Those submissions have already been made and are relied upon in further response.

Regarding the union's response to the employer's arguments on Government of BC:

- *How can the union now be arguing self-defence and provocation? Mr. Roberts has repeatedly denied that he struck the inmate. Therefore, there is no context within which to evaluate these comments.*

Regarding the union's response to the employer's arguments on Swan, Natrel and Bradley:

- *By his own admission, Mr. Roberts was aware that there were officers in the room with just a few years' service. He had a responsibility to set a good example, and he did not do so.*

- *Mr. Roberts, as an experienced officer, has "no excuse" for his behaviour, to use the words of Donna Morrin, Warden of Kingston Penitentiary.*

Therefore, the employer respectfully submits that the appropriate disposition of this matter is to dismiss the grievance of Mr. Roberts.

. . .

IV. <u>Reasons</u>

[212] Although the evidence and arguments presented in this case were extensive, the issues to be decided are not complex. The main task before me is to determine what happened in the hospital treatment room at Kingston Penitentiary on the evening of September 28, 2005, or in the very early hours of the morning of September 29, 2005, and whether what happened comprised a disciplinary offence for which termination of the grievor's employment was a just and proportionate response. The following two elements frame the reasons for the decision that follow: 1) Did the grievor use excessive force on Inmate A, as alleged by the employer? 2) If the grievor did use excessive force on Inmate A, was this action just cause for the employer to invoke discipline in the form of termination of his employment?

[213] Warden Morrin's disciplinary letter of January 26, 2006 (Exhibit E-19) answers the first question with the following finding of fact: ". . . Following due and careful deliberation it is my conclusion that you, in the presence of fellow Correctional Officers, did exercise excessive force in that you deliberately struck an inmate who was in distress and receiving medical attention and who had his hands restrained by handcuffs behind his back . . . ." On the second question, Warden Morrin states that the grievor:

> *. . . completely disregarded relevant legislation, Commissioner's directives and policies. . . . Your misconduct represents a serious breach of the Standards of Professional Conduct and the Code of Discipline of the Correctional Service of Canada . . . . Given the nature and gravity of your misconduct, I can only conclude that the bond of trust that is fundamental to the employment relationship has been irrevocably broken. Moreover, the behaviour you have demonstrated is grossly incompatible with the conduct expected of a Correctional Officer of the Correctional Service of Canada. I am therefore unable to maintain confidence in your ability to perform your duties as a Correctional Officer.*

[214] The employer's disciplinary investigation identified several other acts of misconduct by the grievor on the evening in question. I also heard evidence and arguments at the hearing about the grievor's judgment, or lack thereof, in inserting himself in the handling of Inmate A that night. These matters necessarily form part of the context of the case but the disciplinary decision for review here must be as formally specified by the employer: the single charge that the grievor used excessive force.

A. <u>Did the grievor use excessive force on Inmate A as alleged by the employer?</u>

[215] The employer's witnesses used different verbs at different points in their testimony to describe what the grievor allegedly did to Inmate A at the critical moment in the treatment room — he "struck", "hit", "slapped", "punched" or "assaulted" the inmate in the face. The precise word or words used to depict the act are obviously significant and do assist my understanding of the nature and gravity of what occurred. In my view, however, it is less important that I come to a finding that the act was, for example, a "slap" rather than a "punch" than to determine whether the alleged act did occur, however best described, and whether the act, if it occurred, constituted excessive force in the situation.

[216] The evidence and exhibits before me are convincing that the concept of "excessive force" is not absolute. Whether an application of force by a correctional officer is excessive depends on the dynamic circumstances of the situation at hand, understanding that each correctional officer must judge what is appropriate in any given situation. I take note, in particular, of the principles expressed in *Commissioner's Directive 567* at paras. 7 to 9 (Exhibit E-7):

> *7. All procedures related to this policy shall be carried out in order to promote a safe and secure environment, while respecting the rule of law.*
>
> *8. All interventions designed to manage or control situations that jeopardize the security of an institution shall:*
>
> *a. encourage the peaceful resolution of the incident using verbal intervention and negotiation;*
>
> *b. be consistent with the Situation Management Model;*
>
> *c. be based on the safest and most reasonable measures appropriate to prevent, respond and resolve the situation; and*
>
> *d. be adapted to respond to changes in the situation.*
>
> *9. No person shall ever consent to or take part in any cruel, inhumane or degrading treatment or punishment of an inmate.*

[217] The CSC's *Situation Management Model* (Exhibit E-7a) describes different types of situations encountered by correctional officers (e.g., "verbally resistive", "physically uncooperative", "assaultive") and the range of responses appropriate to each that are available to an officer according to his or her evaluation of the event. The model thus recognizes that there is room for choice in many events, although some choices clearly lie outside what the circumstances of a given situation permit. The underlying imperative is, as outlined in *Commissioner's Directive 567*, to select the ". . . most reasonable measures appropriate to prevent, respond and resolve situations."

[218] Determining whether the grievor used excessive force in this case requires that I understand the nature of the situation in which he found himself, how he responded and whether his choice of response was appropriate to that situation. Unlike in the case of *Rose* discussed by both parties, there is no videotape evidence here to assist

me. On critical points, some of the witnesses clearly disagree. As both parties have recognized, their disagreements bring the issue of credibility to the forefront.

[219] The parties argued about the existence of a "rat code" and its significance for assessing the credibility of several of the witnesses. The grievor suggested that there is no direct evidence before me establishing the existence of a "rat code" at Kingston Penitentiary nor how it may have affected the testimony of the officers at this hearing. The employer counter-argued that there was evidence of the impact of a "rat code" in the reticence of several witnesses to testify and in their demeanour at the hearing. The employer also referred me to several adjudication decisions that have found that a "rat code" does exist and has significance for assessing the credibility of evidence.

[220] I believe it unnecessary in this decision to find that a "rat code" existed at Kingston Penitentiary at the time of the incident. There are undoubtedly factors at play in this case that reflect the special and complex human context of a maximum security penitentiary. How precisely these factors influenced the testimony I have heard, however, cannot be known. In my view, the issue of assessing credibility remains as described in *Faryna v. Chorney*. The truth of what each witness has said lies in ". . . its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions." That said, I was certainly not unmoved by the dilemma obviously expressed by a witness such as Officer Cox, nor by his demeanour. I prefer nonetheless to evaluate his credibility, and that of other witnesses, using the *Faryna* formula rather than make any special assumption about credibility based on the alleged impact of a "rat code". While I do not reject what other adjudicators before me have found on this point (see *Gale*, *Teeluck* and *Chénier*), I find that I have no strong basis in the evidence of this case to infer or deduce how exactly a "rat code" may have operated.

[221] The issue of standard of proof is obviously very important in this case. The employer conventionally bears the burden of proving its case when a grievor attacks a decision of the employer to impose discipline. Adjudicators under the *Act*, as well as under the former *Public Service Staff Relations Act*, have customarily adopted the civil standard of proof, "on a balance of probabilities", in most situations. They have normally required something more of the employer, however, in circumstances where the offence attracting discipline is found to be very serious and, particularly, in cases that involve the ultimate employer sanction of termination. This higher requirement

centres about the concept of "clear and cogent" evidence, to which adjudicators have sometimes added descriptors such as "compelling" or "convincing".

[222] The need for "clear and cogent" evidence has been recognized most notably where impugned misconduct comprises an act that could be "viewed in a criminal context." This approach is well described in *Séguin v. House of Commons*, 2001 PSSRB 37:

> *[80] The preponderant arbitral jurisprudence [See* Brown and Beatty, *Canadian Labour Arbitration,* Third Edition, topic 7.2500] *holds that the burden of proof in all cases of discipline is the civil burden of proof. The employer must prove its case on a balance of probabilities, but to a degree varying with the severity of the discipline and the misconduct. In the instant case, the employer deemed that the incidents were serious acts of misconduct that required the ultimate sanction of discharge. The alleged three instances of misconduct were serious enough that Mr. Hofley recognized that they could have been viewed in a criminal context. Therefore, the onus is on the employer to prove each alleged act of misconduct by clear and cogent evidence.*

[223] The allegation at the heart of this case is that the grievor struck an inmate in the face in a situation where the inmate was under control, with his hands cuffed behind his back and was receiving medical treatment in a hospital setting for self-inflicted wounds. As indicated in Warden Morrin's evidence, there was a police investigation after the incident became public knowledge that might have resulted in a criminal complaint against the grievor. The evidence further suggests that the grievor himself was concerned about the possibility of criminal prosecution at the time. In the end, no charges were laid. In a case with elements such as these, the requirement that the employer prove its case with clear and cogent evidence is, in my view, entirely appropriate.

[224] In its submissions, the employer spoke of evidence that is "clear", "cogent" and "convincing" or "compelling". The grievor, for his part, argued that the employer's evidence must also be "substantial" and "reliable." I find it unnecessary to choose among these additional descriptors. It is not unreasonable, in my view, to suggest that "clear and cogent" evidence probably includes elements that are "convincing", "compelling", "substantial" and "reliable". The overall sense is of a standard conceptually distinct from, and discernibly more onerous than the simple "balance of probabilities" test.

[225] The parties took the debate about standard of proof further in their arguments. The employer suggested that the required standard lies approximately midway between "balance of probabilities" and the criminal requirement of proof "beyond reasonable doubt". The grievor countered that the required standard should be interpreted in the circumstances of this case as falling much closer to "beyond reasonable doubt" — somewhere "in the high 90s" on a sliding scale between 0% for the civil standard and 100% for the criminal standard.

[226] I decline to enter a debate about the appropriate position of the "clear and cogent" benchmark on any numerical scale. I do suggest that a threshold short of "beyond reasonable doubt" logically includes the possibility of some doubt in interpreting the evidence. Applying the "clear and cogent" standard, an adjudicator can find, for example, that the grievor has posed questions about the employer's evidence that raise doubts, but that these doubts are overcome by strong elements of proof submitted by the employer that leave the adjudicator confident in his or her findings. The appropriate standard is thus clearly more demanding than "50% plus one", but how much more is a question in the hands of each individual adjudicator.

[227] Several diagrams that purport to indicate the configuration of the treatment room were presented at the hearing (Exhibits G-1, G-2 and G-3). All but one of the diagrams also proposes the location of Inmate A and the various witnesses at the time of the incident. This visual evidence purportedly bears upon the reliability of testimony concerning what individual witnesses saw, and from where. I have found the diagrams only somewhat helpful, and certainly not conclusive on any issue, either way. Officer Sly's map (Exhibit G-3) is apparently the most precise but has the shortcoming of having been prepared over a year after the incident. He testified, based on earlier knowledge of the treatment room, that several elements had changed during the intervening period, principally the treatment chair itself, but that those changes were not substantial. While I have no reason to doubt Officer Sly's evidence on this point, he was not himself a witness to the event and cannot attest to the precise configuration of persons or items in the room on the night in question. The other diagrams offered in evidence were drawn by individuals who were in the room at the time, but their diagrams are also subject to possible problems of recall and are certainly less precise in their scale and detail.

[228] My conclusion that the diagrams are of limited assistance is illustrated by referring to the example of Officer Cox. The diagrams vary, although perhaps not considerably, in establishing exactly where Officer Cox was at the time of the alleged incident. As such, they do not offer unimpeachable corroboration of his account that he had an unimpeded line of sight to Inmate A. On the other hand, the diagrams do not greatly assist the counter-arguments stressed by the grievor on this point. The grievor contends that Officer Cox was the furthest away from Inmate A at the time of the incident and thus the least reliable witness of what transpired. The grievor also suggests, relying mainly on Officer Sly's diagram, that Officer Cox could not have had a clear line of vision to Inmate A, given the large bodies in front of him and the probable angle of his perspective (leaning against or sitting on the shelf in the corridor).

[229] In my view, it is hazardous to conclude that distance and the reliability of observations are always directly and positively correlated. It can, in fact, be the case that more distance is required in a given situation to provide the proper angle for a good line of sight as well as an overall perspective on a complex interplay of persons or objects. It could be, in this case, that Officer Cox was as well or better situated as a witness than others in the room closer to Inmate A. I also suggest that, barring a more dynamic reconstruction of what occurred, there are risks in concluding from any of the static diagrams in evidence that large bodies in front of Officer Cox necessarily obscured his sightline at the very moment of the alleged strike. Small forward or lateral movements from moment to moment by Supervisor Jalbert or Officer MacKay, or by others, could have made a difference. In view of these possible complications, I believe it safer to test the proposition that Officer Cox, or others, observed the grievor strike Inmate A by relying on the descriptions that he and other witnesses have given, both contemporaneously and at the hearing, than on the basis of the diagrams.

[230] The employer argued that the evidence given by Supervisor Jalbert and Officer Cox offers the clear, cogent and convincing proof of the grievor's misconduct required to sustain the employer's case. In what follows, I examine what Supervisor Jalbert and Officer Cox said about the key moments of the incident, as reported in the documentary evidence before me and as given in oral testimony at the hearing.

[231] Supervisor Jalbert's earliest account of events on the evening in question is his observation report created at 00:35 on September 29, 2005 (Exhibit E-2). The report makes no mention whatsoever of any interaction between the officers and Inmate A in

the treatment room. It states simply that, ". . . Upon arrival at the hospital subject was seen by Health Care. The doctor was called and wanted the offender taken to outside hospital . . . Subject was taken to outside hospital by KP staff." [*Sic* throughout]

[232] Supervisor Jalbert's second observation report, at 07:00 on the same day, is more detailed (Exhibit E-2):

> . . .
>
> *I asked COI Roberts to let go of the face and he did. The offender was upset and swearing at staff at this time. [Inmate A] told the officer he was a goof or something to that effect. At this time, COI Roberts reached over and struck with his hand [Inmate A] to the face. I told COI Roberts to leave the area.*
>
> . . .
>
> *. . . COI Roberts approached the writer about going home to change his pants as he got blood on them. I informed him that he had placed me and the others in a compromising position with his actions . . . .*
>
> . . .
>
> *At about 00:10 COI Roberts came back to work and reported to the Keeper's Hall. At this time again we talked about the situation he had put me in . . . . COI Roberts was adamant that he had done his job and not struck the offender. I told him he had stepped away and when the inmate swore at him he stepped in and struck him . . . .*
>
> . . .

[233] Supervisor Jalbert also submitted a "Use of Force Report" (Exhibit E-2). In it, he wrote:

> . . .
>
> *. . . I asked COI Roberts to let go of the face and he did. The offender was upset and swearing at staff at this time. [Inmate A] told the officer he was a goof or something to that effect. At this time COI Roberts reached over and struck with his hand to the face. At this time [Inmate A's] head went back as his head came back up [Inmate A] was yelling at COI Roberts. Looking at [Inmate A] you could see his eys* [sic] *watering as he was trying no to cry. I told COI Roberts to leave the area . . . .*

[*Sic* throughout]

[234] The investigators interviewed Supervisor Jalbert on October 4, 2005, within a week of the incident. The notes of this interview contain the following point form entries (Exhibit G-1):

. . .

Nurse continues to tell him to calm down.

tell Kenny to let him go

i/m says is this how you are going to deal with this and calls him a Goof

I told him to let go before i/m made all comments

finally when he let him go – i/m calls him a goof

through peripheral I saw hand come across, contact with face and head go back

tell Kenny to get out of here

. . .

Do you realize predicament that you put me in

I didn't do anything

You struck him

I didn't strike him

. . .

[235] The investigators summarized Supervisor Jalbert's statement in their subsequent report (Exhibit E-2 at pages 32-33), a summary that Supervisor Jalbert described as accurate when probed on its contents during cross-examination:

. . .

ROBERTS and MACKAY put the inmate in the chair. KENNY cuffs him over the mouth and face and shoves him back. He placed his knee between the inmate's legs. I looked at KENNY and told him to move his hand, cup the chin between the thumb and index finger. KENNY pushed the inmates head forcefully back. I have no problem with preventing an inmate from spitting, but this was too forceful. Pain gives direction and the inmate had no place to go. The nurse tried

> *to tell the inmate to calm down. I tell KENNY to let go of the inmate.*
>
> *The inmate says: "Is this how you are going to deal with this?" The inmate then calls KENNY a "goof" Through my peripheral vision I saw KENNY's hand come across make contact with the inmate's face. The inmate's head snapped backwards and the inmate's eyes watered right away. I don't know which hand KENNY hit him with or if his hand was opened or closed. I told KENNY to get out of there.*
>
> . . .
>
> *KENNY came to the Hospital Office. I asked him: "Do you realize the predicament you put me in?" KENNY stated: "I didn't do anything". I said: "You struck him". KENNY replied: "I didn't strike him. I never let him go."*
>
> . . .
>
> *KENNY returned to the institution at about 00:45 hours.*
>
> *I asked KENNY if he knew what he had done. He said: "I did what you "woosies wouldn't. He still denied hitting him . . . .*
>
> . . .
>
> [*Sic* throughout]

[236] In examination-in-chief, Supervisor Jalbert testified that he saw forward motion of the grievor's arm with his peripheral vision, heard a contact noise and observed Inmate A's head snap back. When Inmate A's head came forward, Supervisor Jalbert stated that he saw that the inmate's eyes were tearing. Regarding his two subsequent encounters with the grievor, Supervisor Jalbert reported saying to him that the latter had struck or hit Inmate A and described the subject of both discussions as the ". . . assault of an inmate in [his] presence."

[237] Taken as a whole, Supervisor's Jalbert's various statements are broadly consistent in describing the grievor as hitting or striking Inmate A. His evidence is also consistent with respect to the two post-incident encounters with the grievor where he confronted the grievor with what had occurred. His evidence, however, is not free from imprecision. In his statement to the investigator and at the hearing, he could not specify whether the grievor's fist was open or closed when the grievor delivered the alleged blow. He also indicated both to the investigators and at the hearing that he saw the action "peripherally" or "out of the corner of [his] eye." Use of those terms suggests that Supervisor Jalbert's view of what the grievor allegedly did may not have

been full and direct. In cross-examination, he explained that he was looking at Inmate A's face both immediately before and at the time he heard the "slapping" noise that drew his attention, and not at the grievor. Asked by the grievor how he could not see the slap or strike directly when he was looking right at Inmate A's face, Supervisor Jalbert repeated that the movement of the grievor's arm had been in his peripheral vision, and that "it happened so quick [*sic*]." While the latter testimony does not undermine the overall consistency of Supervisor Jalbert's evidence, there is at least a possibility that Supervisor Jalbert could have misinterpreted what he saw "peripherally".

[238] What did Officer Cox say about the same crucial moments? In his observation report, Officer Cox says nothing about the incident (Exhibit E-2): "The inmate was taken to HCC and his injuries attended to. While the RN was treating his injuries, the inmate became hostile and uncooperative, at which time he was directed to sit in the treatment chair . . . . The inmate was taken to KGH . . . ."

[239] The notes of Officer Cox's interview with the investigators (Exhibit G-1) are more fulsome and contain the following entries:

. . .

> *Kenny Roberts pinned IM to chair with his knee & by placing his hand over IM mouth/nose area & pushed head to the side — thought he was going to spit*
>
> *Inmate was angry that he had been restained in the chair — called Kenny Roberts a goof*
>
> *Banter back and forth between IM and K.R.*
>
> *K.R. struck inmate on right jaw/cheek area w closed fist*
>
> *Very fast punch — would not have seen it if I hadn't been looking*
>
> *Linda couldn't see*
>
> *I had clear view from about 10' away*

. . .

[240] The investigators' summary of Officer Cox's statement (Exhibit E-2) reads as follows:

. . .

> *Two officers MACKAY and ROBERTS grabbed his arms and placed him in the chair. CARL JALBERT was there and had his back to me I don't know if he did anything. I couldn't see MACKAY well. MIKE had a hold of the injured side. KENNY ROBERTS pinned the inmate to the chair with his knee and by placing his hand over the inmate's mouth and nose area. He pushed his head to the side. I thought he was going to spit. I was not needed to help.*
>
> *The inmate was angry that he had been restrained in the chair. He called KENNY ROBERTS a goof. There was banter back and forth between the inmate and KENNY ROBERTS. KENNY ROBERTS struck the inmate on the right jaw/cheek area with a closed fist. This was a very fast punch. I would not have seen it if I hadn't been looking. From where LINDA was she couldn't see. I had a clear view from about 10-feet away.*
>
> *CS JALBERT intervened. He told KENNY ROBERTS that was enough and to get out at least once. ROBERTS was visibly upset . . . .*
>
> *The inmate was scared. He asked if others were going to get their shots in . . . .*

. . .

[241] Officer Cox's examination-in-chief repeated the principal observations summarized in the investigation report in a virtually intact fashion.

[242] I have concluded that the evidence of Supervisor Jalbert and Officer Cox, viewed jointly but in isolation from the rest of the evidence, provides strong support for the employer's contention that the grievor struck Inmate A in the face. While there is a possibility of imprecision in Supervisor Jalbert's version, given his "peripheral" view of the act, the overall impact of what the employer's two principal witnesses together have said strikes me as convincing. The risk that Supervisor Jalbert misinterpreted what he saw peripherally is, in my view, minimal given Officer Cox's unqualified direct observation of the strike. I note also that Supervisor Jalbert's testimony about his two encounters with the grievor immediately after the incident leave very little doubt that he was convinced during both conversations that he had witnessed an assault, and that he said so to the grievor.

[243] I accept that the lack of any reference to the grievor striking the inmate in Supervisor Jalbert's first observation report or in Officer Cox's only observation report might be troubling, if taken out of context. The evidence given on this point, however, is reasonable and suggests that the officers present understood and followed Supervisor Jalbert's instructions to keep the observation reports simple and focussed on the inmate. That the instructions may have been inappropriate is largely beside the point. I find no reason in the evidence to doubt Supervisor Jalbert's reason for giving the instruction. He appears to have been motivated in good faith to hear the grievor's account before taking any action, to try to deal with the problem "at his level", and not to "hang" the grievor. I also have not identified in the evidence any reason to doubt the integrity of the fuller descriptions that were subsequently given by Supervisor Jalbert and Officer Cox, the former in his second observation report and "use of force" report", and both in their statements to the investigators. At the hearing, Supervisor Jalbert and Officer Cox repeated versions of the event that were substantially consistent with their earlier documented accounts. Neither witness was significantly shaken in his evidence during cross-examination.

[244] The analysis must, of course, go much further than assessing only what Supervisor Jalbert and Officer Cox have said. Does the other evidence adduced at the hearing support or undermine their accounts of the event? Addressing the test for credibility in *Faryna,* is the evidence offered by Supervisor Jalbert and Officer Cox in harmony with the other relevant evidence presented at the hearing, i.e., with ". . . the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place in those conditions".

[245] The employer described evidence given by Officers Charlton and MacKay as corroborating. On the key question of whether the grievor struck Inmate A, however, neither witness offered direct confirmation. By her own testimony, Officer Charlton could not see Inmate A at the crucial moment, nor did she have a line of sight on the grievor's hands. For his part, Officer MacKay testified only that he heard ". . . a noise like the sound of a snapping latex glove." He did not see what happened. As the grievor argued, a "snapping latex glove" noise is not necessarily consistent with a punch or a strike. It is not in itself compelling corroboration that the grievor hit Inmate A.

[246] Officer Charlton's failure to see the alleged strike is quite plausibly explained in the evidence. She testified that she was standing behind Supervisor Jalbert, a relatively large man whose body very likely prevented her from having a good line of vision at certain points. To be sure, Officer Cox confirmed in his testimony that he believed that Officer Charlton's view of Inmate A, unlike his own, was blocked by Supervisor Jalbert. The fact that Officer MacKay also did not see the alleged strike is explained as well in his testimony. He stated that he was looking at Inmate A's arm at the time. This orientation would have likely have required him to be looking down and slightly to the inmate's left, not at his face nor to his right where the grievor was situated.

[247] In other respects, Officers Charlton and MacKay offered support for the employer's depiction of the event. Officer Charlton was clearly of the view that the grievor agitated Inmate A and made repeated comments to him that were unnecessary. She testified that the grievor was himself agitated and paced around the treatment room, suggesting a state of mind other than calm and professional. She confirmed that Inmate A did not pose a threat at the time of the incident and that there was, in her view, ". . . no need for force as an intervention tactic." Officer MacKay, in turn, described a "heated verbal exchange" between the grievor and Inmate A and agreed that the grievor's comments had the effect of upsetting Inmate A and escalating the situation. Officer MacKay stated clearly that he would have concerns about working with the grievor again in the future, a statement that tends to reveal a conclusion on his part that the grievor interacted inappropriately with Inmate A in the treatment room.

[248] Officer MacKay conceded that he left out certain details of the incident in his original observation report, because ". . . he was trying to help [the grievor] out if something happened." This statement caused me to wonder whether there were similar gaps in his oral testimony reflecting the same concern for the grievor. I do not, however, base any finding on this speculation.

[249] The investigators interviewed Inmate A as part of their inquiry. In their summary of his evidence, Inmate A unequivocally indicated that the grievor delivered a punch with a closed fist to his chin (Exhibit E-2). In other circumstances, this evidence might offer powerful corroboration to what Supervisor Jalbert and Officer Cox testified. However, the employer did not call Inmate A as a witness at the hearing. There was, as a result, no opportunity to test at the hearing what Inmate A told the

investigators. There are obvious reasons why the credibility of Inmate A as a maximum security offender might deserve critical scrutiny in these proceedings. Without such an opportunity, I give no weight to his statement to the investigators in this decision.

[250] Nurse Williams is the one witness to the events of September 28-29, 2005, other than the grievor himself, who offers a fully contrasting version of events. Nurse Williams described Inmate A as more aggressive, yelling and resisting both when he arrived at the treatment room and while he was being treated. Nurse Williams stated that he witnessed no mistreatment of Inmate A at any point, and that he would have noticed the impact of any assault on Inmate A given his proximity to the inmate.

[251] Nurse Williams' statement to the investigators also challenges the evidence received from other witnesses concerning the verbal exchange between the grievor and Inmate A prior to the alleged strike. Nurse Williams told the investigators that Inmate A was verbally aggressive but not solely towards the grievor: "He was calling us fucking goofs. His name calling was not to anyone in particular, it was to all of us."

[252] How much weight should be given to this contrasting evidence? If Nurse Williams was in physical contact with the grievor at the moment of the alleged strike, it does seem reasonable that he would have noticed the effect of an application of excessive force to Inmate A's person. That he did not could raise a reasonable doubt about the incident. Nurse Williams' statement to the investigators, however, was unclear in establishing that he was holding Inmate A's arm at the crucial moment of the alleged strike. I note that he told the investigators that ". . . I had to keep asking the officers to get out of the way." This statement suggests that his physical access to Inmate A may have been impeded at one or more times during the event. At the hearing, his testimony changed. He said he could not recall asking the officers to get out of the way. I find his earlier evidence given within a week of the incident more persuasive on that point. More importantly, Nurse Williams' statement to the investigators and his oral testimony do not conclusively establish how soon Nurse Williams was able to access Inmate A's arm after the officers found it necessary to restrain Inmate A in the treatment chair. He told the investigators that the inmate ". . . lunged toward me when I was attempting to tend to his wounds." At the point of Inmate A lunging towards him, it is very unlikely that Nurse Williams was holding the offender's left arm or any other part of his body. His use of the phrase "attempting to tend to his wounds" during that period also suggests that there were impediments to

his doing so at some point or points. Reacting to the lunge, the officers moved to restrain Inmate A. How long did it then take before Nurse Williams was able, in his words, to be ". . . down on the inmate's left side holding pressure to the laceration?" The evidence suggests that events moved relatively quickly from the time the officers restrained Inmate A in the treatment chair to the moment of the alleged strike. If, during that period, Nurse Williams did not regain physical contact with the agitated inmate, or if that contact was again momentarily broken, he may not have been in a position to feel the impact of the alleged strike. The timeline of events and the exact position of Nurse Williams are critical here, but the evidence does not allow either to be proven with precision.

[253] As to Nurse Williams' statement that he saw no mistreatment that night, he did concede in cross-examination that he was located for much of the time below the level of everyone else and "could not see much." He also testified that he was once absent from the treatment room for 15 to 20 minutes and possibly left it on more than one occasion. Similarly, the reliability of what Nurse Williams claims to have heard during the incident — for example, at whom Inmate A's verbal aggression was directed — must be very cautiously assessed given his statement to the investigators that ". . . I wasn't paying attention to conversations between the officers", and his admission in cross-examination that ". . . [he] wasn't paying much attention to what was going on."

[254] On balance, I find it difficult to attribute significant weight to the version of what occurred given by Nurse Williams. Adding in the evidence of his apparent relationship with the grievor outside the workplace, a relationship that could colour his credibility as a witness, I am left to conclude that Nurse Williams' testimony did not substantially undermine the evidence given by the employer's two principal witnesses or the partial collaboration provided by Officers Charlton and MacKay.

[255] Neither Officer Lavorato nor Officer Sly witnessed the incident on September 28-29, 2005. Consequently, their evidence does not assist me in determining whether the grievor used excessive force that night.

[256] This brings me to the evidence of the grievor himself. The grievor's observation report (Exhibit E-2), described what happened as follows:

. . .

> *. . . . When Nurse Williams approached Inmate [A] with a saturated gauze pad Inmate [A] became agitated, was yelling, "is that alcohol" and made an aggressive motion towards Nurse Williams. This writer and Officer MacKay contained the situation by restraining Inmate [A] and sitting him back into the chair. This writer placed his hand over the face of Inmate [A], tipping his head back to prevent Inmate [A] from spitting on the staff present. This writer also placed his right knee on Inmate [A] to hold him in the chair. Physical handling was the appropriate measure to ensure the safety of the inmate and the staff involved in this situation.*
>
> *Keeper Jalbert instructed this writer to move his hand, as this writer was removing his hand Inmate [A] moved his head in a manner that this writer felt Inmate [A] was preparing to spit. This writer once again tipped the chin of Inmate [A] up preventing him from spitting at staff. Inmate [A] had earlier stated that he had swallowed razor blades and this writer was concerned for everyone's safety.*
>
> *When Inmate [A] ceased his aggressive behaviour, this writer removed his hand from Inmate [A]. Inmate [A] received the medical attention he required and arrangements were made to transport him to the outside hospital for further medical attention.*
>
> . . .

[257] The notes of the investigators' subsequent interview with the grievor contain the following points (Exhibit E-3):

> . . .
>
> *Paul got a big gauze pad and poured something on it.*
>
> *I/M stood up aggressively — Is there alcohol on it — I felt this gesture was threatening towards Paul*
>
> *I grabbed one arm MacKay the other — minimal force was used*
>
> *Put my hand up in his face, struck chin because I thought he would spit — pushed head back and placed him back into the chair — placed my knee into stomach area to gain control*
>
> *I/M became compliant*
>
> *Nurse Paul continued to clean wounds*
>
> . . .
>
> *At any point him in time* [sic] *did CS Jalbert ask you to leave*

> *No*
>
> *When I/M became compliant, Carl left area and went to other nursing area*
>
> . . .

[258] The investigators summarized these points in their report virtually word for word (Exhibit E-2):

> . . .
>
> *. . . PAUL got a big gauze pad and poured something on it.*
>
> *The inmate stood up aggressively, stating "Is there alcohol on it"? I felt this gesture was threatening towards PAUL. I grabbed one arm, MACKAY the other. Minimal force was used. I put my hand up on his face, struck his chin because I thought he would spit. I pushed his head back and placed him back into the chair. I placed my knee into his stomach area to gain control. The inmate became compliant.*
>
> . . .
>
> *The Board of Investigation asked: "At any time did CS JALBERT ask you to leave"?*
>
> *CX-2 ROBERTS responded: "No".*
>
> *When the inmate became compliant CARL left the area and went to the other Nursing Station . . . .*
>
> . . .

In cross-examination, the grievor confirmed the validity and truthfulness of this account.

[259] The grievor's examination-in-chief on the key moments of the incident is summarized above at paras. 85–92.

[260] Does the evidence given by Supervisor Jalbert and Officer Cox remain strong if set against the grievor's account of the event? The employer urged in its rebuttal that the only possible choice in this case is to determine either that Supervisor Jalbert and Officer Cox were telling the truth when they said they saw the grievor hit Inmate A, or that they were lying. While I prefer not to express the issue so starkly, there is a strong sense here that the grievor's account and the evidence of the employer's two principal witnesses cannot be reconciled. One or the other is credible. To be confident that the

employer has met its burden at the required level of clear and cogent proof, I believe that I must be able to conclude that the employer's case convincingly withstands any substantial doubts raised by the grievor's account of what occurred. The employer's evidence will not meet the requirement of "clear and cogent" proof if I find that there are credible elements in the grievor's version of events that reasonably and practically undermine the harmony of the employer's case.

[261] Reviewing the evidence given by the grievor, I find some inconsistency in his account of the key moments of the incident. His observation report referred to his "tipping" the chin of Inmate A up when he felt movement of the inmate's head after he and Office MacKay restrained him in the treatment chair. His statement to the investigators referred instead to "striking" Inmate A's chin, although he qualified this reference as "probably bad wording" when asked at the hearing. In his examination-in-chief, he stated that he quickly moved his hand back up to Inmate A's face when Inmate A moved his head. He also suggested that some might "consider it a slap", although he did not.

[262] There is a crucial need here to focus the analysis clearly. Was the action described by the grievor — the quick movement of the hand, the slap or the strike — the misconduct alleged by the employer for which the grievor was disciplined? In my view, it was not. The weight of the evidence leads me to conclude that the movement described by the grievor of his hand was, in fact, a separate and prior act to the strike observed by Supervisor Jalbert and Officer Cox.

[263] I accept the grievor's testimony describing how he reapplied force with his hand quickly upwards on the inmate's face (and take no position whether the action was justified or excessive). Supervisor Jalbert testified that he saw the movement. It occurred after Supervisor Jalbert motioned the grievor to move his hand down from Inmate A's nose and mouth (para. 18). When the grievor, in Supervisor Jalbert's words, then ". . . pushed Inmate A's head back and up with his hand. . .", he asked the grievor to remove his hand because he felt that the renewed application of force was causing pain to Inmate A. The grievor did not at first comply but then he did remove his hand and ". . . moved away slightly further to the left." At that point, according to Supervisor Jalbert, Inmate A calmed down but verbally abused the grievor. He said words to the effect of, "Is this how you treat people?" Only then did Supervisor Jalbert "peripherally" see the grievor strike Inmate A.

[264] In Officer Cox's testimony, the grievor's strike to Inmate A's face also came after Inmate A said words to the effect of, "What did you do that for?", after the verbal exchange between Inmate A and after the grievor used the word "goof." The investigators' summary of his statement similarly identifies the strike as occurring after the officers had restrained the inmate, after the verbal exchange and after the word "goof" was heard (Exhibit E-2). Officer Charlton testified that she heard Inmate A say "Why are you doing this to me?" and then saw the grievor walk away. In possible contrast, Officer MacKay heard the noise of a snapping latex glove and then heard Inmate A say "Is this how it works here?" Nurse Williams' testimony reports Inmate A saying that same phrase after the grievor had controlled Inmate A by placing his hand above Inmate A's mouth. For his part, the grievor says that he only moved away from Inmate A after he had applied force to him. Once he moved away, "that was it".

[265] Disentangling these accounts is admittedly a challenge. I believe, nonetheless, that the most reasonable and consistent reconstruction of the event is as follows. After Inmate A had moved in an agitated fashion as Nurse Williams approached, the grievor participated in the restraint of Inmate A in the treatment chair. His hand was on the inmate's face. At a certain point, he moved his hand lower, perhaps believing that less restraint was required as the inmate became more compliant. He may also have seen Supervisor Jalbert motion or heard Supervisor Jalbert ask him to move his hand down to cup the inmate's chin. The grievor then felt movement of Inmate A's head and reacted by reapplying strong pressure upwards to the inmate's face, the motion he had described to the investigators as "striking the chin". The grievor testified that others might have seen it as a slap. (This could have been the noise of a "snapping latex glove" that Officer MacKay heard.) Supervisor Jalbert then instructed the grievor twice to let go of the inmate. The grievor may or may not have heard the instruction. He nonetheless shortly removed his hand and then backed away, apparently no longer in physical contact with Inmate A. Inmate A became somewhat calmer but was verbally aggressive, calling the grievor a goof and saying words to the effect of "Is this how it works here?" At that point, the grievor reacted and delivered a blow to Inmate A's face.

[266] Given this probable sequence of events, the question is not whether the grievor used excessive force while he physically restrained Inmate A in the treatment chair, with his hand on the inmate's face. What the grievor described as the quick upward movement of his hand on the inmate's face (or the slap or the strike to the chin) was not the assault seen by Supervisor Jalbert and Officer Cox. The allegation of excessive

force instead concerns the grievor's subsequent action, after he had ceased restraining Inmate A, after he had backed away and after the verbal exchanges with Inmate A. When the grievor testified that he backed away and "that was it", he was in reality denying that anything at all happened at the key moment when the employer's principal witnesses maintain that they saw him strike Inmate A in the face.

[267] Is the grievor's denial credible? He clearly had, and has, a strong motive for denying that the act occurred. Any admission that he struck the inmate could expose the grievor to the likelihood of a very serious disciplinary sanction. It might also open the possibility of criminal prosecution, a prospect that the evidence suggests was in the grievor's mind in the period following the incident. In contrast, I have not found in the evidence any basis for concluding that either Supervisor Jalbert or Officer Cox had a motive to be untruthful. The grievor suggested that Supervisor Jalbert may have wanted to get back at the grievor after the grievor "probably" used inappropriate language in his post-incident encounters with Supervisor Jalbert. The grievor also inferred that Officer Cox's desire to win a place on the employer's select emergency response team may have provided a motive for colouring his testimony. I find that the grievor has not substantiated either of these allegations. Moreover, nothing in the demeanour of these two witnesses at the hearing suggested to me any evasiveness or lack of candour.

[268] The grievor also argued that there was no evidence that Inmate A was hurt during the incident, no evidence that Inmate A complained about what happened until he was approached by the investigators, no testimony from health care workers at the Kingston General Hospital about the nature of Inmate A's injuries and no reason to expect that Inmate A's later approach to the media about the incident was anything other than the act of an opportunist. I find, with respect, that none of these points creates serious doubt that the incident occurred. The question of bruising versus evidence of a more serious injury may relate to the question of exactly how much force the grievor used, but it does not itself contradict that he struck Inmate A. I draw no inference from the absence of testimony from health care workers who, in any event, may have been constrained in their testimony by privacy issues. Regarding the lack of a complaint from Inmate A prior to being approached by the investigators, I have previously indicated that I have given no weight to Inmate A's evidence to the investigators, and cannot by extension be influenced by any untested supposition here about what Inmate A did or did not do after the incident. As to the subject of the

inmate's subsequent contact with the media, I have concluded that the evidence on this point is neither sufficiently detailed nor clear to support any inference in favour either of the employer's or the grievor's case.

[269] Looking further at the credibility of the grievor's denial, I find it difficult to reconcile several of the comments he allegedly made immediately after the event with his contention that nothing inappropriate happened. The grievor, for example, denies asking Officer Charlton whether she was angry with him, a question that could be viewed as revealing a consciousness of guilt. He did not offer an explanation, however, as to why I should I find Officer Charlton's testimony on this point untruthful.

[270] During his encounter with the grievor in Keeper's Hall, Supervisor Jalbert testified that the grievor said ". . . your blue shirt has gone to your head. . . " and ". . . that's how we did things in the old days", and also that ". . . you are going to try and hang me. . . " The grievor did not specifically deny making any of these statements during his own testimony. He talked instead about the two "barking at each other" for five or ten minutes. At another point, however, he said that he and Supervisor Jalbert were only "exchanging information", and replied "absolutely not" to the proposition that his exchange with Supervisor Jalbert had become more agitated. The two versions of the tenor of the conversation are evidently not consistent.

[271] While the grievor's statements reported by Supervisor Jalbert can be given different meanings, they are, to me, much more suggestive of someone on the defensive than of an individual with a clear conscience about what he did. This is particularly true of the alleged remark, ". . . that's how we did things in the old days." Taken together with other testimony that the grievor had a heated verbal exchange with Inmate A and was himself pacing in an agitated fashion about the treatment room, the image in the grievor's evidence of an officer who was purportedly "there for" Inmate A, who tried to calm him down and who did nothing inappropriate strikes me as quite unconvincing. Moreover, I found it odd, at the very least, that the grievor "did not know the answer" to the employer's question asking whether Officer Cox, Officer Charlton and Officer MacKay were all wrong when they testified that the grievor had escalated the situation. It was similarly odd when his response was only, "I can't answer that question" when asked whether Officer Cox lied about seeing him strike Inmate A. I also took particular note of the grievor's statement to the effect that "[t]he blood was overwhelming. It was a sight to see." No one else, including Nurse Williams,

reported a similar reaction in their testimony. It speaks to me of a person who was probably not fully in control of his emotions at the time of the incident, someone who could well have reacted unprofessionally in the stress of the moment.

[272] Other elements in the grievor's testimony raise further concerns about his overall credibility. In examination-in-chief, the grievor testified, for example, that he was not told that his duties would be modified to accommodate his medical condition when he returned to work. In cross-examination, he did not recall that the issue of avoiding risks arose in any return-to-work discussions, and said that no one had discussed with him the conditions that would apply when he did take up his job at the regional hospital. I find these statements implausible. The grievor was copied on the June 11, 2002, letter from the disability insurer's rehabilitation specialist to CSC (Exhibit E-11), stating that ". . . this gentleman can not be placed in any role that would involve a significant potential for physical danger or requiring binocular stereoscopic vision." The grievor agreed in cross-examination that Dr. Chernin's letter of September 5, 2002, made sense when it specified that the grievor needed a position ". . . where he would not have to deal with inmates or any position where there could be the possibility of injury to his eye" (Exhibit E-13). The grievor himself testified that he met with the CSC's physician as part of the return-to-work process, and that he had then had discussions with Acting Warden Mike Ryan to identify a suitable position. The grievor concurred in cross-examination that the goal had been to find him a position that met the limitations expressed in Dr. Chernin's note, and also that it was not possible for him to return to his former position.

[273] None of this evidence is consistent with an individual unaware of the issue of avoiding risks. The grievor testified openly about his medical condition. The impairment he described to his vision is obviously very serious. That he would himself be unconcerned about finding a position where the risks to his health were minimized does not stand to reason. The grievor seemed throughout his testimony to go to some lengths to avoid accepting any suggestion that that he knew, or should have known, that physically intervening with an inmate posed risks to his health. He denied knowledge of follow-up meetings to discuss his progress at work, denied being told about the employer's concerns about two incidents where he had allegedly intervened with inmates and denied that the post order for his position had any implications about how he should interact with inmates brought to the hospital for treatment. The grievor seemed to be saying either that it was really business as usual when he

returned to work, or that any event where he physically intervened with inmates should not be held against him because he was really never told by the CSC not to do so. While it may be that the grievor did not receive as much ongoing counselling about work risks and limitations as he should have — the record is not all that clear on this point — the grievor's version of what his return to work entailed appears to conflict with the reality of a disability that he intimately experienced, the required accommodation of which he must have been aware and the commonsense proposition that he would have himself known of the need to take care.

[274] These types of observations about the grievor's testimony add considerably to the sense of a grievor whose truthfulness cannot be accepted with confidence. Examining his testimony through the lens required by *Faryna*, I have concluded that the grievor was not a fully credible witness in respect of key points in contention. I find that the employer's allegation that the grievor struck Inmate A in the face does withstand the grievor's testimony and arguments to the contrary. The allegation is supported by the direct evidence of Supervisor Jalbert and Officer Cox. It is also supported, for example, in the evidence of others who commented on the inmate being agitated or frightened by what had happened and referring to people present taking their own "shots" at him. There is, in my view, clear and cogent evidence that the alleged misconduct did occur.

[275] Was the use of force by the grievor excessive in the context he faced on the night of September 28-29, 2005? Supervisor Jalbert testified that, at the moment the grievor struck Inmate A, the latter posed no threat. According to Supervisor Jalbert, the inmate was under control for much of the time, beginning with his escort to the treatment room through to his departure for the Kingston General Hospital. The only moment when Inmate A may not have been under adequate control was when he twisted away in an agitated fashion on seeing Nurse Williams approach with what he feared was rubbing alcohol. Officer MacKay and the grievor immediately restrained the inmate. The grievor placed his hand on Inmate A's face. Supervisor Jalbert testified that he did not have a problem with that initial application of force. Inmate A was subsequently again under control.

[276] Officer Cox testified that he did not find Inmate A's behaviour threatening when the escort team reached the treatment room with the inmate. Once Inmate A was in the treatment chair and subsequently, he again saw nothing in the inmate's behaviour that

was threatening. Officer Cox stated that he felt no requirement to intervene as his colleagues had the situation under control.

[277] Officer Charlton indicated that Inmate A was not a threat and was not misbehaving. She testified that there was no need to use force as an intervention tactic.

[278] Officer MacKay testified that Inmate A was upset and screaming when he arrived at the treatment room, but he was under control by the escorting officers. Officer MacKay described subsequent hostility and verbal aggression on the part of the inmate, but no other clearly threatening behaviour, or any sense that Inmate A was not adequately controlled.

[279] Nurse Williams described Inmate A as conducting himself more aggressively and resisting, but the only form of aggression concretely described in his testimony at the time of the incident was verbal.

[280] The grievor's own description of the crucial moments that night did not identify any substantial, threatening behaviour on Inmate A's part other than moving his head in apparent resistance to the restraint applied by the grievor. This raised in the grievor's mind the possibility that Inmate A might spit. The grievor testified that, after he reapplied force, Inmate A calmed down. He later stated that he felt the inmate was uncooperative most of the time or not under control, and that he was known to have been assaultive before. The grievor said that he ". . . did not want to take anything for granted." He offered no clear evidence, however, that Inmate A was behaving in a way that posed a reasonable possibility of a threat justifying the use of force other than what the grievor did with his hand while restraining Inmate A.

[281] There is no doubt among any of the witnesses that, at the time of the incident, Inmate A's hands were cuffed behind his back and that he was injured, bleeding and being treated as a patient.

[282] I conclude that the substantial preponderance of evidence indicates that Inmate A, once restrained in the treatment chair, was in fact under control. If Inmate A posed a threat at that point or thereafter, the threat lay in the possibility that he might spit at the officers present or at Nurse Williams, exposing them to the risk of contact with the inmate's blood or bodily fluids. The evidence given by Nurse Williams concerning the incidence of blood-borne contagious infection in the inmate population established

that such a threat must be taken as real. I find, however, no suggestion in the testimony or the policy documents before me that striking an inmate can be an appropriate response to the threat of spitting. It seems clear that the more appropriate measures to counter the threat involve the use of protective clothing and equipment or reasonable physical restraint measures (i.e., "physical handling").

[283] Inmate A, by all accounts, was verbally aggressive. The evidence, and common sense, tells me that exposure to verbal aggression is a frequent occurrence in the daily life of correctional officers. The grievor suggested that Inmate A's comments were provocative. However provocative they may have been, nothing at the hearing convinced me that verbal aggression justifies a reaction in the form of striking an inmate; the CSC's *Situation Management Model* (Exhibit E-7A) is explicit on this point. The use of restraint equipment may be an appropriate response to an inmate who is "verbally resistive", but other options involving physical handling or more extreme tactics are outside the accepted range of responses.

[284] The grievor argued that he was in the best position of anyone at the time of the incident to judge what level of force was required to restrain the inmate. As outlined above, the grievor's application of force while he was physically restraining the inmate in the treatment chair is not the fundamental issue here. It may well be that he was, at that moment, in the best position to evaluate what was required. Once he stepped away from the inmate, the situation changed. The grievor has not offered any evidence that would persuade me that he was in any way uniquely positioned to conclude that there was a reasonable need for him, confronted by verbal aggression, to reach forward from his position a step or two away to deliver a blow to Inmate A's face.

[285] Finally, I believe that striking a person who is wounded, with hands cuffed behind his back, sitting as a patient in a treatment chair in a medical facility, offends a reasonable sense of what is appropriate, even in the extremes of a correctional setting.

[286] I find that there is clear and cogent evidence that the grievor used excessive force when he struck Inmate A on the night in question.

B. Was the grievor's action just cause for the employer to invoke discipline in the form of termination of employment?

[287] The CSC *Code of Discipline* (Exhibit E-5) states that an employee has committed an infraction if he or she ". . . uses excessive force (that is, more force than is

reasonable and necessary) to carry out his or her legal duties." More generally, there is wide arbitral consensus that a physical assault committed by an employee in the workplace will attract discipline unless there are circumstances that mitigate, condone or otherwise justify the conduct.

[288] Are there any circumstances in this case that suggest that the grievor's use of excessive force should be excused from a disciplinary penalty, despite the employer's code of discipline or the usual arbitral response to a physical assault? I think not. The grievor has argued that there are mitigating circumstances that should be considered. His arguments speak, in my mind, to the selection of an appropriate disciplinary penalty rather than to grounds for absolving the misconduct. The grievor did argue that it is important that I understand the uniquely stressful environment of a correctional institution, and that I particularly bear in mind that Kingston Penitentiary houses some of the most serious offenders in Canada, whose behaviour routinely threatens correctional staff. This is, undoubtedly, an important contextual factor, but it is one confronting all correctional officers in that setting. In the absence of compelling evidence that this factor operated in a particularly caustic way on the grievor, or in the circumstances that night in the treatment room, it does not comprise a reason why discipline should not be invoked.

[289] The question, then, is whether the employer has established that termination of the grievor's employment was the appropriate and proportional penalty. The employer referred me to a number of cases in support of the proposition that termination of employment was well-justified in the circumstances of this case. I turn briefly here to the decisions argued by the employer.

[290] The adjudicator in *Chénier* ordered reinstatement of a correctional officer because, in part, the evidence did not reveal a breach in the bond of trust between the grievor and the employer or with fellow staff. According to the employer, the circumstances in the case before me are quite different, with no comparable justification for reinstatement. I readily accept that evidence of a breach of trust, or lack thereof, is an important factor. Of this element, the adjudicator in *Courchesne* said: ". . . So important a factor is trust, where the lives and safety of individuals are concerned, that serious doubt as to the integrity of an employee in the prison environment is sufficient in itself to preclude his reinstatement . . . ." I find both *Chénier* and *Courchesne* otherwise unhelpful because the circumstances giving rise to

the decisions to terminate were quite different. In both, the critical element of excessive use of force was entirely missing.

[291] The issue of excessive force is also not a feature of *Renaud*. *Renaud* is a very concise decision, also in a correctional setting, focussed primarily on an analysis of witness credibility. The adjudicator in *Renaud* adopted the *Faryna* approach to assessing credibility, the same approach used in this decision. I differ somewhat from the adjudicator in *Renaud* who was confident how the purported "rat code" operated in the circumstances before him. As indicated above, I do not share the same confidence with respect to the evidence in this case.

[292] The recent decision in *Rose* figured prominently in the employer's argument. I find that *Rose* provides a useful indication of the types of factors to be considered in deciding whether to modify a termination penalty concerning excessive use of force. In its submissions in this case, the employer maintained that many of the mitigating considerations identified in *Rose* that led the adjudicator to substitute a lengthy suspension for termination do not operate here. I return later to a number of these mitigating factors and to the grievor's opposing arguments regarding them.

[293] *Simoneau* echoes *Courchesne* in asserting the critical importance of a correctional officer maintaining trust. The adjudicator's observation at para. 58 seems particularly relevant: ". . . the employer's loss of trust in Mr. Simoneau is strongly motivated and clearly supports the fact that nothing could restore it. It is quite clear that, given this loss of trust, Mr. Simoneau cannot properly assume his functions as a correctional officer in a penal situation, where the notion of trust lies at the very roots of the institution's security system . . . ." Note, once more, that *Simoneau* does not address an issue of excessive force.

[294] I largely agree with the grievor's comments dismissing the importance of *Swan*. That decision was rendered in the wake of a criminal trial where the grievor was found guilty of the same offence of fraudulent accounting of funds. The only real point of possible interest here, as mentioned by the employer, is the adjudicator's judgment that long service did not operate as a mitigating factor in the case, an issue to which I return below.

[295] Of the five remaining decisions offered by the employer, *Natrel* and *Turner* are the most recent. *Natrel* examines an assault committed against a supervisor, but the

assault in *Natrel* was of a substantially more serious nature as measured by the nature of the injuries caused, differentiating it to some extent from the case at hand. *Turner* is also notable for the adjudicator's discussion of the behaviour of supervising officers as a mitigating factor, equally a differentiating element. *Turner* does, however, offer an important framework of aggravating and mitigating factors to be considered in a case involving an assault, as derived from four other decisions, including *Natrel* and *Rose*:

. . .

> *[106] A number of decisions relating to assault have set out the following factors that adjudicators should consider (see* Re Dominion Glass Co. v. United Glass & Ceramic Workers, Local 203 *(1975), 11 L.A.C. (2d) 84,* Re Natrel Inc. v. C.A.W.-Canada, Local 462 *(2005), 143 L.A.C. (4th) 233, and* Re SRI Homes Inc.*):*
>
> - *nature and seriousness of the attack;*
> - *who was attacked;*
> - *whether the assault was a momentary aberration or premeditated;*
> - *whether the actions of the grievor were made in good faith;*
> - *presence or absence of provocation;*
> - *apology and/or expression of remorse and acceptance of responsibility for actions;*
> - *condonation of supervisor(s);*
> - *proportionality of discipline imposed;*
> - *likelihood of a recurrence of this behaviour/rehabilitative potential;*
> - *length of service and employment record.*
>
> *[107] In* Rose*, the adjudicator took into account a number of aggravating and mitigating factors, including the nature of the assault, the intention of the grievor, whether there was an application of abusive force, and whether the grievor apologized or showed remorse. In that case, the adjudicator concluded that a one-year suspension was warranted. Each case, of course, must be decided on its own facts.*

. . .

[296] *Aitchison*, I believe, should be viewed as an entirely different type of case involving extreme mitigating circumstances — a hostage taking as well as employer directions to the grievor, at one stage, to shoot an inmate.

[297] Finally, I have also considered the decisions in *Bradley* and *Government of Province of British Columbia* introduced by the employer. The former was cited for its treatment of the grievor's length of service; the latter offers additional general observations on the duty of trust and the importance of integrity and self-control in the correctional context.

[298] For his part, the grievor offered two precedent cases, both now almost 20 years old, in which adjudicators reduced the disciplinary penalty imposed on correctional officers who had been found to have used excessive force on an inmate. I have reviewed both decisions very closely and concluded that each has significant distinguishing features.

[299] In *Dagenais v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-15767 (19870818), the undisputed evidence showed that the grievor struck the inmate several times, in the first instance after the inmate ". . . suddenly turned towards the grievor, swinging his arms around, verbally threatening him. He raised his handcuffed hands, clenched in a threatening manner . . . ." The adjudicator found that the inmate at that point was "mobile and dangerous" and that he ". . . quite probably was going to strike him . . . ." The grievor's response, a strike to the inmate's jaw, was a justified act of self-defence, according to the adjudicator. The subsequent blows by the grievor to the inmate occurred seconds later, but in a changed context where the inmate had been pushed by the grievor onto his cell bed, on his stomach, with his handcuffed hands pinned beneath his body. The adjudicator determined that the two punches delivered by the grievor at that point constituted excessive force. She reduced the grievor's suspension, however, in light of several mitigating factors including the constantly abusive and threatening behaviour of the inmate throughout the incident, and the inmate's background and reputation as: ". . . probably the worst criminal in Canada. He is dangerous, violent, unpredictable and very manipulative . . . . He was constantly threatening the life of correctional officers and the lives of members of their family. . . . He was described as a mental case who would 'snap' suddenly and without provocation . . . ." The adjudicator found that the grievor ". . . was pushed to the point of reacting and making an error in judgment . . . . He overreacted and this was a one-

time incident. I am confident that the grievor has learned his lesson and will try not to fall again into the trap set by an inmate. . . . ."

[300] In *Penny v. Treasury Board (Solicitor General Canada – Correctional Service)*, PSSRB File No. 166-02-15652 (19860819), the employer imposed a seven-day suspension, subsequently reduced to three days by the adjudicator, on a correctional officer who pushed and then slapped a handcuffed and shackled inmate. The inmate had refused to obey an order to sit down, and was, at the time of the incident, exhorting three other inmates awaiting transfer in the admission and discharge area to similarly disobey. The adjudicator recognized that there was room for judgment in the situation, and found reason to mitigate the penalty given the grievor's good faith intent to bring the situation under control, although determining that the slap itself was an excessive use of force.

[301] The case at hand differs materially from the situations described in *Dagenais* and *Penny*. The inmate in the case before me was verbally aggressive but there is no clear evidence of other more threatening behaviour, only the possibility of spitting. In *Dagenais*, the physical threat posed by the inmate appears to have been much more substantial and immediate, set against a background where the inmate was widely known for constant, threatening behaviour. In *Penny*, the inmate disobeyed an order, was not under control and was inciting other inmates to disobey correctional staff. In both *Dagenais* and *Penny*, unlike here, the grievor admitted to the actions that attracted discipline. In *Dagenais*, the adjudicator formed the clear judgment that the grievor was very unlikely to repeat his offence. A similar conclusion in this case is problematic given the grievor's position that he did nothing wrong and his assertion that he would "do the same thing again." For these reasons, I find neither decision of great assistance in determining this case.

[302] I received evidence and arguments from the grievor concerning the investigation process and Warden Morrin's decision making, both faulty according to the grievor. On the issue of the investigation process, I have not relied in this decision on the investigators' findings as proof of misconduct, nor have I based factual conclusions solely on the statements gathered from witnesses in the course of the investigation. To that degree, the actual investigation process was not critical to my analysis. Unless the employer's investigation was patently unreasonable or produced a result that was clearly wrong on its face — neither of which, in my view, has been persuasively

established by the grievor — any procedural problems that may have occurred were overcome by the fresh opportunity to evaluate the evidence in the course of this adjudication hearing. I rely, in this regard, on the longstanding principle enunciated in *Tipple v. Canada*, [1985] F.C.J. No. 818 (C.A.). Similarly, this hearing offered a full opportunity to test what Warden Morrin said and did, and to assess the reasoning that led to her determination.

[303] Bearing in mind the submissions of the parties, the remaining task is to consider how the aggravating and mitigating factors operate in this case. For that purpose, I adopt below the framework outlined in *Turner*, with some modifications, and as supplemented in *Rose*.

1. Nature and seriousness of the assault

[304] The grievor argued that there was no evidence of an injury resulting from the incident. The grievor also pointed out that I did not receive testimony from the attending health care professionals at the Kingston General Hospital concerning the nature of Inmate A's injuries.

[305] I accept that I should take into consideration that the strike to Inmate A's head was not sufficiently forceful to cause an injury. I also note that there was not a second or subsequent blow. The grievor's excessive use of force nevertheless constituted serious misconduct that could have resulted in a criminal charge. There is, in my view, no more than a very minor mitigating element here.

2. The victim and the presence or absence of provocation

[306] Earlier in the decision, I found that the verbal aggression of Inmate A was not a provocation that justified the grievor striking him. Inmate A was undoubtedly provocative, but his provocation took a form experienced on almost a daily basis by correctional officers at Kingston Penitentiary, according to other witnesses. There was no evidence that this example of provocation was particularly personal or severe. Beyond the possibility of spitting, there appears to have been nothing overt to cause the grievor to fear for his own safety nor, for example, the safety of his family. The threat of spitting existed, but the threat never took concrete form.

[307] I have no doubt that the victim in this case was not a model citizen. As an offender incarcerated in a segregation unit in one of Canada's toughest prisons, there

is strong reason to suspect that Inmate A was capable of erratic, difficult, threatening and even violent behaviour. The fact nonetheless remains that, at the time of the incident, Inmate A was a patient in a treatment facility. With his hands cuffed behind his back, restrained and wounded, he was in a vulnerable condition. I take that condition and situation to be a significant aggravating factor in this case.

3. Whether the assault was a momentary aberration or premeditated

[308] The employer did not argue that the grievor's actions were premeditated. It did, however, suggest that there was a pattern of the grievor inserting himself into situations with inmates in a fashion unwarranted by his job description and outside the limitations established by the accommodation of his disability. On the other hand, I have no evidence from the employer that these other situations involved violent behaviour on the grievor's part.

[309] I would normally take the absence of evidence of premeditation in this case as a mitigating factor. There might be an argument to be made that the grievor reacted on the spur of the moment to what he viewed as provocative behaviour on the part of Inmate A. Taking into consideration the grievor's attitude about the incident (below), however, I cannot be sure that his behaviour was altogether an aberration nor that the grievor's attitudes about the treatment of inmates — ". . . that's how we did things in the old days" — might not predispose him to inappropriate conduct in other stressful circumstances. Confronted by another difficult situation with an inmate, how would he act?

[310] I view this element as, at best, a neutral factor in the analysis.

4. Good faith and the intention of the grievor

[311] The grievor argued that he exercised a good faith judgment as to how best to deal with Inmate A on the night in question. He also maintained that he had no intent to harm Inmate A and, conversely, that he was "there for him."

[312] It is always difficult to evaluate the state of mind of an individual in a dynamic, difficult situation. In this case, I can only evaluate the grievor's good faith and intent based upon what he has done and said. To me, the evidence does not reveal signs of good faith and intent on his part. Other witnesses have variously testified that he engaged in a heated verbal exchange with Inmate A, that he was agitated and that he

paced around the room. The evidence also is that he argued with Supervisor Jalbert and made disparaging remarks to him after the incident, and much later to Warden Morrin. I have formed from this and other evidence a strong impression of an individual who can be disrespectful of authority and probably can be disrespectful of the inmate population with whom he interacts signifying an aggravating element. The contrary testimony of Officer Lavoratto and Nurse Williams did not diminish the impression, for reasons stated earlier. I cannot find in the overall weight of the evidence markers of good will and intent that might mitigate the grievor's misconduct.

5. Length of service and employment record

[313] Warden Morrin testified that she viewed the grievor's lengthy service as an aggravating rather than mitigating factor. Her message essentially was, "he should have known better." In support, the employer pointed to the decisions in *Swan* and *Bradley* where adjudicators did not accept lengthy service as a positive element in weighing the appropriate degree of discipline.

[314] On that point, I respectfully disagree. It is almost always possible to suggest that a person who has been on the job for many years should know better. Expectations of a seasoned professional are justifiably greater than for a new employee. That said, it remains a strong arbitral principle across Canadian jurisdictions that lengthy service and a good employment record normally count towards an employee in weighing a disciplinary award, unless there are good reasons to discount these elements.

[315] The grievor had 12 years of service with the CSC prior to taking two and one-half years of disability leave beginning in February 1999. His total period of active employment at the time of his termination approached 15 years. There is no record before me of any prior discipline. In his testimony and in the investigation report (Exhibit E-2), Supervisor Goodberry referred to the grievor's past performance as "unremarkable." I draw no negative inference from that assessment as the grievor's performance appraisals are not in the record.

[316] On balance, I find that the grievor's service and employment record are a mitigating consideration in this analysis.

6. Apology, remorse and acceptance of responsibility

[317] The grievor was adamant in his contention that he did nothing wrong in the treatment room. More to the point, he testified that "I would do the same thing again." Statements of this type, reinforced by the evidence of the grievor's disrespectful comportment during the two disciplinary hearings convened by Warden Morrin, strongly suggest that he was, and is, unprepared to accept any responsibility for his actions on the night of September 28-29, 2005. I expect that the grievor will remain convinced that all of his actions were appropriate and undertaken with good will despite the finding in this decision that he used excessive force on Inmate A. There is clearly no element of remorse here, and certainly no apology, that could serve as mitigating factors.

7. Condonation

[318] I find no compelling evidence of employer condonation of the grievor's behaviour. The grievor argued that the employer did not show that it previously took steps to impress on the grievor the importance of avoiding contact with inmates. I accept that the evidence on that point might be imperfect, but the critical issue is not whether the employer through inattention or neglect somehow condoned the grievor's propensity to interact with inmates beyond the limitations of his disability. The employer did not terminate the grievor's employment for his alleged record of inserting himself physically in situations with inmates. The issue is whether the employer in any way condoned use of the type of force applied that night by the grievor to Inmate A. The directives issued by the CSC and known to all correctional officers, particularly the *Code of Discipline* (Exhibit E-5) and the *Situation Management Model* (Exhibit E-7A), highlight the imperative of avoiding the use of excessive force. Nothing in the evidence before me showed that there were occasions where the employer did not apply these directives or otherwise turned a blind eye to the type of conduct exhibited by the grievor.

[319] The grievor suggested that Supervisor Jalbert said nothing to him that night to preclude his participation in the handling of Inmate A. The grievor is correct on this narrow point, but the evidence also shows that Supervisor Jalbert at several points during the incident issued instructions to the grievor to modify or end his handling of Inmate A so as to avoid the inappropriate use of force. Moreover, Supervisor Jalbert's interaction with the grievor following the incident and all of his subsequent actions speak diametrically against condonation on his part as the employer's representative. I,

therefore, find that the grievor has failed to establish the presence of any condonation on the part of the employer that could amount to a mitigating factor.

8. Likelihood of reoccurrence/rehabilitative potential

[320] The grievor expressed a strong attachment to his work and stated his conviction that he is a good correctional officer who can again be a valued contributor in the workplace. I have no doubt that the grievor believes this to be the case, and ardently wishes to resume his CSC career, but this is not enough. Rehabilitation of his career requires, at the very minimum, that he accept that he may have acted inappropriately. However else I weigh the other aggravating and mitigating factors, the reality remains that the grievor appears to be completely unrepentant, which is a very unpromising foundation for rehabilitation.

9. Trust

[321] The imperative that the employer and fellow staff members have confidence in the judgment and comportment of a correctional officer has been well emphasized in previous decisions, including *Chénier*, *Courchesne*, *Simoneau* and *Government of Province of British Columbia*, cited here by the employer. Warden Morrin's testimony echoed the theme, suggesting that failure to respond forthrightly to an incident of excessive use of force sends a very negative signal to other officers and the inmate population, potentially undermining discipline, control and, ultimately, personal safety. This organizational perspective is obviously important. If anything, however, I found more compelling in this case the very personal testimony of several individual officers who, without any obvious reason to bear malice towards the grievor, formed a strong conclusion based on their experience of the incident on September 28-29, 2005, that the grievor was reckless and impulsive or that they could not trust him to deal with a difficult situation in the future. The sentiment extended, in the case of Officer MacKay, to a colleague who otherwise testified he ". . . was trying to help the grievor out. . ." when he completed his observation report about the incident. Evidence of this type indicates how serious the breach apparently was in the essential bond of trust in the workplace.

[322] As previously indicated, Officer Lavorato's conflicting testimony on that point was very dated, and thus unpersuasive. Indeed, I found it noteworthy that the grievor did not adduce stronger, more contemporary testaments to his professionalism and

comportment in the workplace, other than the evidence of Nurse Williams, which I did not feel merited great weight. If the grievor is an officer who commands respect in the workplace, whose behaviour during the incident was truly an aberration, I might have expected a stronger challenge in his case to the perspective offered by employer witnesses. I was, in short, not given a forceful basis to refute Warden Morrin's assessment that the bond of trust was broken. It is the employer's onus to demonstrate that to be the case. I believe that it has met its burden through its witnesses, despite the grievor's counter-arguments on the point. Moreover, I have not found a strong reason to challenge most of Warden Morrin's assessment of aggravating and mitigating factors, although it is my own evaluation of these factors that has brought me to the conclusions in this decision.

[323] I have avoided introducing into this analysis the issue of the media attention purportedly given this case and its possible impact on the employer's reputation. Warden Morrin's letter of discipline makes no mention of this factor. The testimony received during the hearing about media coverage was, at best, indirect and sketchy. Without more substantial indication of the nature of the media reports at the time as well as evidence of how the coverage impacted public perspectives about the CSC and the Kingston Penitentiary, in particular, I am not in a position to determine whether this element should play a role in understanding and assessing the employer's decision.

[324] After very careful consideration, I have reached the conclusion that the employer was justified in its selection of termination of employment as the appropriate penalty in the circumstances of this case. Although I have identified some elements of mitigation — the grievor's length of service and employment record and, possibly, the lack of serious injury to the inmate — they are very much outweighed, in my view, by other important factors. Principal among them are the vulnerability of the victim as a patient in a treatment setting, the grievor's manifest lack of remorse and failure to accept responsibility for his actions, my concern for his rehabilitative potential, and the serious undermining impact of what he did on the confidence of his colleagues and the bond of trust with his employer. In light of these factors, and based on the weight of the evidence, I am unable to find sufficient reason to intervene in the employer's determination. I find that the employer has discharged its burden to prove misconduct with clear and cogent evidence and to establish that termination of employment was an appropriate and proportional response to the misconduct.

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

(The Order appears on the next page)

V. Order

[326] The grievance is dismissed.

March 5, 2007.

Dan Butler,
adjudicator