Date: 20081216

Files: 566-02-1009 and 1294

Citation: 2008 PSLRB 105

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

GLORIA BAPTISTE

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Employer

Indexed as
Baptiste v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Roger Beaulieu, adjudicator

For the Grievor: Harinder Mahil, Professional Institute of the Public Service of Canada

For the Employer: Richard Fader, counsel

Heard at Abbotsford, British Columbia,
January 15 and 16, 2008.
Written submissions filed on February 5 and 15 and March 14, 2008.

I. Individual grievances referred to adjudication

[1] I am seized with two individual interpretation grievances filed by Gloria Baptiste ("the grievor"). The grievor is a registered nurse and was employed at the Correctional Service of Canada (CSC) in that capacity for more than 16 years. For the last few of those years, she worked at Matsqui Institution, a medium-security facility located in Abbotsford, British Columbia.

[2] The first interpretation grievance (PSLRB File No. 566-02-1009) reads as follows:

. . .

> *The employer has launched a disciplinary investigation into my conduct but has not provided me access to information being used during the disciplinary investigation. I allege this is in violation of article 37.04 of the Health Service Collective Agreement.*

. . .

The grievor requested the following corrective action: "That the investigation be terminated and results not used in any disciplinary proceedings."

[3] Clause 37.04 of the collective agreement signed by the Treasury Board and the Professional Institute of Public Service of Canada on May 31, 2005, for the Health Services Group bargaining unit (the "collective agreement") states the following:

> **
>
> ***37.04*** *Subject to the* Access to Information Act and Privacy Act*, the Employer shall provide the employee access to the information used during the disciplinary investigation.*
>
> [**Asterisks denotes changes from the previous collective agreement]

[4] The second interpretation grievance (PSLRB File No. 566-02-1294) alleges a violation of Appendix "R" of the collective agreement and reads as follows:

. . .

> *The employer recently conducted a disciplinary investigation into my conduct as a result of some allegations about me. I allege that the employer violated the Health Service Collective Agreement by not having a disciplinary investigation procedures* [*sic*] *in place as required by appendix R of the collective agreement.*

. . .

The grievor requested the following corrective action: "That the investigation report prepared by the CSC investigators, in violation of the collective agreement, be withdrawn and the result not be used in any disciplinary proceeding."

[5] Appendix "R" of the collective agreement states the following:

> ***Appendix "R"***
>
> ***Letter of Understanding***
> ***Concerning the Health Services Group***
> ***Re: Disciplinary Investigation Procedure***
>
> *This letter is to give effect to the understanding reached by the Employer and the Professional Institute in negotiations for the renewal of the agreement covering the above specified group.*
>
> *Accordingly, in the departments (Health Canada, Veterans Affairs Canada (Ste-Anne-de-Bellevue Hospital), National Defence, Correctional Service Canada and Public Health Agency of Canada) where an investigation procedure does not exist, the departments agree to discuss items such as timeframe, process and corrective action in view of developing an investigation procedure regarding investigation in accordance with article 37 – Standards of Discipline in collaboration with the Institute.*
>
> *The investigation procedure will be in effect no later than six (6) months after the date of the signing of the collective agreement for the Health Services Bargaining Unit.*
>
> [**Asterisks denotes changes from the previous collective agreement]

[6] The grievances raise a fundamental question that must be answered. Did the employer violate the collective agreement? In each case, did the grievor prove that the employer, on the balance of probabilities, violated the respective provisions of the collective agreement?

A. Contextual background

[7] On August 31, 2006, the grievor reported to work at Matsqui Institution but was refused access. She was advised that she had been placed on administrative leave and was sent home. The grievor's position is that she was suspended on August 31, 2006, and she filed a grievance concerning this suspension.

[8] The grievor and Harinder Mahil, her bargaining agent representative, attended a meeting with Glen Brown, Warden, Matsqui Institution, on September 5, 2006. She was advised that four allegations had been made against her, that she was suspended without pay and that Warden Brown was initiating a disciplinary investigation with respect to her conduct. The grievor was also advised that, shortly, she would be convened to another meeting for further discussion. That meeting took place on October 6, 2006.

[9] The allegations against the grievor can be summarized under two headings:

a) that she gave the wrong medication to certain inmates; and

b) that she altered the "Narcotic Controlled Drug Record" regarding the administration of an inmate's medication and that she altered the "Narcotic Controlled Drug Record" completed by two other nurses.

[10] As part of this brief background summary, it is important to underline the following uncontested facts:

a) All of the alleged misconduct occurred in a short period of time between August 16 and 21, 2006.

b) A board of investigation completed its investigation and submitted its final report to Warden Brown on January 5, 2007.

c) Both interpretation grievances were filed during the term of the collective agreement.

d) The parties have agreed that the evidence is common to both grievances and the burden of proof is upon the grievor.

[11] Also to be noted is that the grievor has filed a total of five grievances, all of which have been referred to adjudication. Three of those five grievances are of a disciplinary nature and will be heard separately. The grievor has no disciplinary record.

[12] The grievances were referred to adjudication in March and June 2007. Initially, they have been held in abeyance at the employer's request. Afterwards the parties were not available for a hearing until January 2008.

II. Summary of the evidence

A. For the grievor

[13] The grievor's evidence was introduced through one witness, Mr. Mahil.

[14] Subsequent to being denied access to the workplace on August 31, 2006, the grievor received a convening order on September 5, 2006, advising her that a disciplinary investigation would take place. She was also advised that she would be contacted for an interview about four allegations that she had contravened the CSC's *Nurse Code of Professional Conduct*. The disciplinary investigation meeting eventually took place on October 6, 2006, which the grievor attended with Mr. Mahil. This was the first meeting between the grievor, Mr. Mahil and the board of investigation, which was presided over by Kevin Morgan, Labour Relations Adviser, Staff Relations, Regional Headquarters, Pacific Region, CSC, acting as chairman. Diane Thiessen, a registered nurse and Team Leader Health Care, Fraser Valley Institution for Women, CSC, was the other member of the board of investigation.

[15] The board of investigation's October 6, 2006, fact-finding interview of the grievor lasted approximately 1 hour and 20 minutes. The first several pages of the transcript of the recordings (Exhibit U-26) indicate that the first part of the interview was consumed by the repeated requests of Mr. Mahil that all documents, information and interviews conducted by the board of investigation be provided to the grievor before any questions were asked of her. Mr. Mahil stated that the grievor required all documents and information gathered, including from all the interviews conducted during the investigation, to know the case against her and to prepare her case sufficiently to properly defend herself.

[16] Exhibit E-3 is the board of investigation's report. It reads as follows:

. . .

> *Board member Morgan responded that article 37.04 required that the Board must provide copies of all documentation used during the investigation, the word 'used' being past tense, meaning once the investigation was completed. He commented that the investigation interview was not the time to provide a defence and that there is no requirement for the employee to defend herself at any time during the investigation process. The interview is simply a fact-finding process where the employee has an opportunity to respond to*

> *questions and provide information that would assist in the investigation. Board member Morgan advised that Nurse* ***Baptiste*** *would be provided copies of all documentation upon completion of the process which she may use to develop a defence, if such a defence was necessary.*
>
> . . .
>
> [Emphasis in the original]

[17] The employer maintained the board of investigation's position in its first-, second- and third-level decisions on the grievance. It must be noted that the uncontradicted evidence is that the request for access and disclosure of all information used during the disciplinary investigation was not only repeatedly made to all levels on every occasion by Mr. Mahil, but also that copies were also sent to Warden Brown, his key executives and other CSC executives located outside Matsqui Institution.

[18] Exhibit U-18 is a letter from the grievor to the Access to Information and Privacy Coordinator, CSC, dated March 21, 2007. It reads as follows:

> . . .
>
> *I am an employee of the Correctional Service of Canada presently employed at Matsqui Institution in British Columbia. I request personal information under the Privacy Act. Attached is a completed form requesting this information.*
>
> *I am seeking all information including electronic records, about me and in particular pertaining to my employment including, but not limited to, information that may be held in data banks concerning:*
>
> - *my employee profile*
> - *personal records*
> - *attendance, leave and overtime*
> - *performance reviews and appraisals*
> - *employment activities*
> - *productivity*
> - *employee assistance*
> - *discipline*

- *internal investigations*

as well as information concerning me in the personal files of Linda Dean, Donna Mynott, Glen Brown, Kevin Morgan and Diane Thiessen. Thank you for your immediate attention to this matter.

. . .

[19] Exhibit U-19 is a letter from Mr. Mahil to the Privacy Commissioner of Canada, dated August 7, 2007. It relates to the grievor's request for information and reads as follows:

. . .

I represent Ms. Gloria Baptiste concerning her request for personal information under the Privacy Act *to the Correctional Service of Canada (CSC). Ms. Baptiste has had no response from the CSC despite her letters of March 21 and May 30, 2007 and my letters of June 12 and June 14, 2007. Copies of letters sent to the CSC are attached.*

Ms. Baptiste has been patient with the CSC with respect to her request. The CSC is clearly in violation of sections 14 and 15 of the Privacy Act*. This is an urgent matter for Ms. Baptiste as her employment has been terminated by the CSC and she needs to review documents in possession of her former employer.*

I urge you to investigate this matter expeditiously and require the CSC to disclose documents as required under the Privacy Act*.*

. . .

[20] Exhibit U-20 is a letter dated December 4, 2007, from Joyce McLean, Manager, Investigations, Office of the Privacy Commissioner of Canada, to Mr. Mahil about the grievor's *Privacy Act* complaint. It reads as follows:

. . .

Privacy Act *Complaint – Time Limits*

Ms. Gloria Baptiste

Attached you will find our report on the investigation of your complaint on behalf of Ms. Baptiste against the Correctional Service Canada (CSC). You alleged that it failed to satisfy the legislative requirements for responding to her Privacy Act request.

> *Following our review, I have concluded that your complaint is well-founded. Please note that CSC has also been informed of the results.*
>
> *If you have any questions, please contact the Privacy Investigator of record. . . .*
>
> . . .

[21] It is also clear from the evidence that during the 1 hour and 20 minute interview of October 6, 2006, the grievor cooperated with the board of investigation and answered 100 questions, some of which, the board of investigation agreed, were complicated medical questions. For most of the documents presented to the grievor that day, it was the first time that she had seen them. It is clear from the evidence that, on October 6, 2006, when Mr. Mahil asked for a copy of the disciplinary investigation procedure, Mr. Morgan did not provide one. It was at the end of the October 6, 2006, interview that Mr. Mahil advised the grievor to file a grievance, which she did on October 13, 2006 (Exhibit U-2).

[22] It is important to emphasise that although the grievor and Mr. Mahil made many requests for information, with copies of the requests sent to all levels of supervision, nobody at the CSC, according to the evidence, raised a flag of concern about this constant "cry" and request for missing information relating to the disciplinary investigation.

[23] At the first meeting of the board of investigation with the grievor, Mr. Mahil asked for a letter of complaint from inmate Legault (the instigating document that led to the creation of the board of investigation). Mr. Morgan's answer was, "not at this time."

[24] The transcript of the recording of the grievor's interview with the board of investigation (Exhibit U-26) read as follows:

> . . .
>
> *Mr. Mahil: -- that you're looking at now. But Kevin's showing you the convening order.*
>
> *Mr. Morgan: Yeah.*
>
> *Q. Okay. So our questions are – are going to be directed to the four allegations that are contained in the – in the convening order.*

Okay.

The first allegation is – - is one that I'll be asking questions about, and Diane may or may not have some. The - - other questions, the other issues, Diane will address because they're - - they're issues related to nursing, and I - - I don't have any expertise there.

Okay.

So the first allegation, and in regard to your request before the machine was turned on, it relates to an allegation that you administered incorrect medication to Inmate Legault. Now, the - - the allegation in this case comes from the Inmate Legault, and then the matter was referred to the chief of health care, Donna Raketti. She was the chief of health care at the time. She did some initial investigation with Mr. Legault, and I understand she spoke to you, and I understand that she also consulted some - - some documents. So that's - - and as a result those investigat - - - the - - those - - the original complaint filed by Mr. Legault and the information that Miss Raketti obtained, the warden convened the investigation in regard to issue number 1. So I'm wondering if I could - -

Mr. Mahil: Is - - is there any kind of written documentation about it? Like, did - - would Mr. Legault put it in writing or simply verbally make a complaint?

Mr. Morgan: He - - no he's - - he's put - - he's written essentially an account.

Mr. Mahil: Does - - does she get an access to that account?

Mr. Morgan: <u>Not at this time</u>.

Mr. Mahil: Well, why - - why not?

Mr. Morgan: But you'll certainly - - you'll certainly have a copy of it. Well, see, at - - at this point in time we're not asking Miss Baptiste to defend herself. We're just asking her to answer some questions.

Mr. Mahil: Okay.

Mr. Morgan: If it comes to a point where she's - - where she has to defend herself, then all of these documents would be made available. But right now all we're doing is asking.

Mr. Mahil: With respect, you know she - - this is a disciplinary investigation.

Mr. Morgan: Yes.

Mr. Mahil: She has access to those documents so that she can really - - you know, she can look at the information and respond properly. When I say that "she has access to," she has access to by virtue of the fact of agreement that clearly says that during disciplinary investigations, she has access to the documents that have been used during the investigation.

Mr. Morgan: During the disciplinary investigation, she has access?

Mr. Mahil: Exactly. If you look at article 37, sub 4.

Mr. Morgan: Yeah, this relates to information that was used during the investigation. It - - it doesn't state that she has access during the investigation to these documents.

Mr. Mahil: Well, would you - - you - - would you read the document, Kevin, and maybe, you know - - so we can read it in the record as well, what it is?

Mr. Morgan: Okay. Sure. 37-04 - - article 37 - - Standards of Discipline, 37-04: "Subject to the Access of Information Act and Privacy Act, the employer shall provide the employee access to the information used during the disciplinary investigation."

Mr. Mahil: Yeah. I mean, our interpretation is that she is entitled to - - during the investigation. I mean, these are the allegations made against her on the basis of which she could end up losing her job. So she has to be able to look at what is being alleged and respond to it.

Mr. Morgan: Yeah. And I believe that what that means is that she has access to any documents that we used during the process of this investigation. So after the investigation is completed, Gloria would have access to everything we used.

Mr. Mahil: So what you're saying is she doesn't get to see it during the investigation; she gets to see it after the investigation.

Mr. Morgan: That's right.

Mr. Mahil: Okay. I mean, our interpretation is different.

Mr. Morgan: Yeah.

Mr. Mahil: And - - and I'm saying that on the record.

Mr. Morgan: Yeah.

Mr. Mahil: But I would - - I would ask Gloria to - - to respond to your questions and - - and if at any time it becomes

> *available for her to take a look at it, then I would say, you know, she's entitled to it.*
>
> *Mr. Morgan: Yeah. Okay. So I'm just going to make some - - I should point out that what we'll be doing is - - is making notes.*
>
> *Mr. Mahil: Yeah. Fair enough.*
>
> *Mr. Morgan: Lots of notes during our meeting. And while the recorder is on and the recorder's taping - - and we'll be making a CD of this. We don't make transcripts.*
>
> *Mr. Mahil: Fair enough. Fair enough.*
>
> *Mr. Morgan: And - - and I won't be, you know, using transcripts. We'll be writing our report from our notes but we will check back on the CD.*
>
> *Mr. Mahil: Okay.*
>
> *Mr. Morgan: And, as I said, you'll - - you'll have access to a copy of the recording.*
>
> *Mr. Mahil: That's great. Thank you.*
>
> *Mr. Morgan: So I'm just going to make a note of that.*
>
> . . .
>
> [Emphasis added]

"Not at this time. . .", as mentioned above, was the response given when the investigators asked and expected answers from the grievor. The investigators made their report that led to her termination based on her answers to their questions.

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

[25] The employer's evidence was introduced through three witnesses: Mr. Morgan, Ms. Thiessen and Warden Brown.

1. <u>Mr. Morgan's testimony</u>

[26] Mr. Morgan is a long-service employee and has assumed several supervisory roles within the CSC at both medium- and maximum-security institutions. He also has a labour relations background coupled with experience in about 45 disciplinary investigations. This latter experience was the main reason why Warden Brown appointed him as chairperson of the board of investigation.

[27] Mr. Morgan testified that he conducted the disciplinary investigation with Ms. Thiessen. He was involved in all aspects of the investigation and was an integral part of interactions with the persons who were consulted and interviewed. He wrote the final report with the assistance of Ms. Thiessen and submitted it to Warden Brown on January 5, 2007.

[28] On the central question of the alleged violation of clause 37.04 of the collective agreement, Mr. Morgan testified that the grievor was not denied access to any documents that she requested.

[29] In cross-examination, Mr. Morgan admitted that at the first board of investigation meeting, Mr. Mahil raised questions on the availability of information and documentation required by the grievor to prepare her case. He specifically recalled that a request for the disciplinary investigation procedure was made but that no copy was provided to Mr. Mahil. In cross-examination, Mr. Morgan stated that he felt that it was "highly unlikely" that he would have said that there was no written disciplinary investigation procedure, but he agreed that he did not provide a copy of the disciplinary investigation procedure when asked to do so by Mr. Mahil.

[30] Mr. Morgan explained in cross-examination that his goal was to conduct a fair and objective investigation.

[31] Mr. Morgan admitted in cross-examination that Mr. Mahil made numerous requests, both verbally and in writing, to obtain all the information used during the investigation and used by the employer in its final determination.

[32] At the October 6, 2006 interview of the grievor, Mr. Mahil objected to how the investigation was being conducted. He noted that clause 37.04 of the collective agreement stipulates that copies of all documents in the possession of the board of investigation had to be provided to the grievor before any questions were asked of her. He stated that she required the documents to know the case against her and to prepare sufficiently to properly defend herself.

[33] Mr. Morgan stated that clause 37.04 of the collective agreement requires that the board of investigation provide copies of all documentation used during the investigation, but only once the investigation is complete. He stated that the grievor would be provided with copies of all the documentation used by the board of

investigation on completion of the investigation. Therefore, during the interview on October 6, 2006, the grievor was only shown documents containing the questions that the board of investigation was to ask, and she had to leave those copies behind once the interview ended. The subsequent convening order after the October 6, 2006, interview was revised to include six additional disciplinary allegations. Mr. Mahil then corresponded with Warden Brown, complaining about the alleged violation of the principles of national justice, including procedural fairness.

[34] Exhibit E-4(b), is a list of documents shown to the grievor on October 6, 2006, so that she could respond to questions about those documents:

References in transcript to Ms. Baptiste receiving documents during interview

Page	*Line*	*Comment*
5	*19*	*Baptiste given the MAR for Legault*
6	*1*	*Baptiste reading MAR*
6	*15*	*Baptiste commenting on her entry to MAR*
6	*16*	*Baptiste being shown page with VIP photo/tombstone data of Legault*
7	*5 & 11*	*Baptiste shown envelope*
7	*22*	*Mahil advising Baptiste to take her time while she reads Legault's statement*
8	*15-17*	*Baptiste refers to the MAR again and reaches for it*
8	*20*	*Baptiste is handed the MAR*
13	*6-8*	*Baptiste has a document of her own regarding medication dispensing times*
15	*12-13*	*Baptiste gives Legault's MAR back to Thiessen*
15	*24-29*	*Baptiste is shown the envelope again*
16	*44*	*Thiessen shows Narcotic Controlled Drug Register to Baptiste*
17	*3*	*Thiessen refers to MAR for Shaler*
17	*6*	*Thiessen refers to VIP photo/tombstone data for Shaler and it's shown to her*
17	*29-30*	*Baptiste given Shaler's MAR*
18	*8*	*Thiessen refers to Baptiste having Shaler's MAR while she's asked a question related to it*
20	*1-6*	*Thiessen gave the original Narcotics Controlled Drug Register book to Baptiste*
20.	*7*	*Baptiste makes comment re the book indicating she has it in her possession*
20	*8-19*	*Baptiste commenting on the entries in the book*

21, 2		*Baptiste referring to the Narcotics book continuously*
24	*12-15*	*Thiessen asked Baptiste to hold on to the Narcotics book and hand back Shaler's MAR*
25	*17-35*	*Several references to Narcotics book by both Thiessen and Baptiste and comments from Baptiste regarding entries in the book (apparently reading it)*
25	*33*	*Baptiste reading an entry from the Narcotics book out loud*
28	*12*	*Thiessen referring Baptiste to a specific entry*
28	*22*	*Thiessen gives Baptiste photocopies of pages from the Narcotics book copied on Aug 21, 2006 at 1400 hrs.*
29	*22*	*Thiessen gives Baptiste copy of Dr's order again*
34	*32-46*	*Baptiste shown copies of pages of Narcotics book and referred to the original book re differences in the two*

[35] It is clear from the transcript of the recording of the grievor's interview (and the testimony of Mr. Morgan and Ms. Thiessen) that the grievor was given brief access to all the relevant documents used during the interview on October 6, 2006. Mr. Morgan testified that no question was asked of the grievor without the document in front of her.

[36] Mr. Mahil and Warden Brown exchanged correspondence concerning the six new disciplinary allegations. Warden Brown responded on October 30, 2006, as follows:

. . .

> *. . . information regarding the additional allegations will be shown to Ms. Baptiste by the investigators at the time Ms. Baptiste attends the disciplinary interview to discuss the additional allegations. Documentation used to investigate this matter will be shared with Ms. Baptiste at the conclusion of the disciplinary investigation, in accordance with article 37.04 of the PIPSC collective agreement.*

[37] Finally, after further exchanges, Mr. Mahil informed Warden Brown on November 7, 2006 that, because of concerns relating to the principles of natural justice, including the rule against bias, and a serious breach of the principles of procedural fairness, he had advised the grievor not to meet with the board of investigation to respond to questions concerning the additional disciplinary allegations.

[38] The board of investigation's report (Exhibit E-3) includes a list of documents, reports and information from different sources that the board of investigation used. The report was the basis of Warden Brown's decision. The report enumerates the following:

. . .

Documents:

1. *Copy of OSOR by K. Mathieson titled "Changing of Narcotic Count by NU Gloria **Baptiste**", dated 1314 hours 2006-08-21*

2. *Copy of OSOR by J. Plate titled "Count Change", dated 1330 hours 2006-08-2 1*

3. *Handwritten statement titled* [inmate Legault], *5 pages, undated by author, dated stamped as received by Warden's Office on August 22, 2006*

4. *Photocopy of a small medication envelope with 6 lines of text*

5. *Copy of document by Randie Scott titled "Personal Notes Regarding Inmate Legault and RN G. **Baptiste**", 2 pages, dated 2006-08-22*

6. *Copy of memorandum to A/Warden Brodoway from A/CS Lister titled "**Baptiste**, Gloria RN" dated 2006-08-22*

7. *Copy of memorandum to A/CS Lister from CO-2 Koch titled "Re: Acceptance of medication envelope"; dated 2006-08-23*

8. *Copy of memorandum to Gloria **Baptiste** from Donna Raketti titled "Medication Error" dated 2006-08-22 (not received by G. **Baptiste**)*

9. *Copy of note to G. Baptiste from Donna Raketti titled "Re Wrong Medication" undated (not received by G. **Baptiste**)*

10. *Copy of Nursing Incident Report by K. Mathieson RN dated 2006-08-23*

11. *Copy of OSOR by J. Plate titled "Observation Report written 06/08/21" dated 1100 hour on 2006-09-28*

12. *Copy of email message (undated) from the account of Linda Dean titled "Re Extra duty sheet for*

*Gloria **Baptiste**" with 2 attachments. The first is titled "Extra Duty Pay and Shiftwork Report", for August 2006. The second is titled "Overtime Report", for August 2006*

13. *Three pages of documents. First page titled "Master Roster 2006 F-1 July", second page titled "Master Roster 2006 F-2 August", third page titled 'Matsqui Health Services A-l August — September 2006"*

14. *VIP Offender Profile for* [inmate Legault] *with attached Radar report (7 pages). Radar report extracted 2006-08-21.*

15. *VIP Offender Profile for* [inmate Shaler].

16. *Copy of Regional Health Services Order # AS 800.06 titled "Reporting Nursing Care — Inmate Related Incidents", with two page annex. Dated 2003-04-14*

17. *Copy of Regional Health Services Order #AS 800.10 titled "Documentation" with three page annex. Dated 2005-08-24*

18. *Copy of Regional Health Services Order # P&T 805.05 "Medication Error — Incident' with 3 page annex. dated 2003-03-13*

19. *Copy of Regional Health Services Order # P&T 805.06 "Narcotic and Control Drugs". Dated 2005-12-14*

20. *Copy of CRNBC Practice Standard titled "Documentation", undated, downloaded 2006-12-07*

21. *Copy of CRNBC Practice Standard titled "Administration of Medications", undated, downloaded 2006-12-07*

22. *Copy of CRNBC Practice Standard titled "Duty to Report", undated, downloaded 2006-12-07*

23. *Copy of CRNBC Practice Standard titled "Duty to Provide Care", undated, downloaded 2006-12-07*

24. *Copy of the Professional Standards for Registered Nurses and Nurse Practitioners, published by the College of Registered Nurses of British Columbia in December 2005.*

25. *Copy of the Controlled Drugs and Substances Act 1996, c. 19*

26. *Copy of a document titled "New Medication Line Times — Effective August 8, 2006"*

27. *Copy of photograph of an inmate dated 06/08/21 signed by J. Plate and D. Raketti*

28. *Copy of Medication Administration Record for* [inmate Legault] *for August 2006*

29. *Copy of page from medical chart for* [inmate Legault] *covering 06-06-21 to 06-08-21*

30. *Copy of Medication Administration Record* [inmate Shaler] *for August 2006 with attached encounter report for 2006-08-18 (2 copies- 1 with handwriting below text and 1 without)*

31. *Copy of Doctors Orders and Progress Notes for* [inmate Shaler] *covering 06-08-18 to 06-08-21*

32. *Copy of Medication Administration Record for* [inmate Ylirussi] *for August 2006*

33. *Copy of Doctors Orders and Progress Notes for* [inmate Ylirussi] *covering 06-07-19 to 06-09-11 (2 pages)*

34. *Copy of Medication Administration Record for* [inmate Jakse] *for August 2006*

35. *Copy of Medication Administration Record for* [inmate Lorenzetto] *for August 2006*

36. *Copies of 5 pages (legal size) from the Narcotic Controlled Drug Record, numbered 1 to 5 in upper right corner. #1 and #2 are dated as being copied on 06-08-21 in the lower right corner. #3 to #5 inclusive are dated as being copied on 06-08-22.*

37. *Copies of 4 pages (11 x 17 size) pages from the Narcotic Controlled Drug Record numbered 1 to 4 in the upper right corner and dated as being copied on 06-09-07.*

38. *Copy of email message from the account of Donna Mynott titled "FW: Reports please", 1 page, dated August 23, 2006 12:37 PM*

39. *Copy of email message from the account of Donna Mynott titled "FW: Re Medication", 1 page, dated August 25, 2006 8:21 AM*

40. *Copy of email message from the account of Donna Mynott titled "FW: Altering narcotic counts", 1 page, dated August 25, 2006 1:24 PM*

41. *Copy of email message from the account of Kristan Brodoway titled "Re Schedule", 1 page, dated August 24, 2006 2:47 PM*

42. *Copy of email message from the account of Donna Mynott titled "Re Letter", 1 page, dated August 25,2006 9:04 AM*

43. *Copy of email message from the account of Kevin Morgan titled "FW:" 1 page, dated September 05, 2006 4:32 PM. Has a 2 page memorandum attached — the attachment is the document referred to at #8.*

44. *Copy of email message from the account of Kevin Morgan titled "FW: Re Wrong Medication", 1 page, dated September 5, 2006 4:33 PM — this is the same content as the note referred to in #9.*

45. *Copy of email message from Jason Wong to Diane Thiessen titled "RE: Info Needed Please" dated October 10, 2006 11:47 AM.*

46. *Copy of cover and the first two pages of Compendium of Pharmaceuticals and Specialties — 2006 edition. Also 7 pages regarding "Zoloft" including page containing illustration of capsule. Also 6 pages regarding "Seroquel" including page containing illustration of tablet.*

47. *Copy of LDV Contract #21831-6-0387-1014052 between CSC and FBIG Investigations*

48. *Faxed copy of Security Screening Certificate and Briefing Form for William B. Thorpe*

49. *Package of 5 documents:*

    a. *TX Transmission report dated 11/21 12:06*

    b. *Copy of Fax cover sheet dated 2006-11-21*

    c. *Copy of grievance dated 2005-05-20 (identifying information blacked out)*

    d. *Copy of envelope containing 6 lines of handwritten text*

e. *Copy of pay stub with handwriting on the bottom and date stamped APR 0496 on the left side (identifying information blacked out)*

50. *Package of 4 documents*

a. *Copy of letter to Mert Mohr from Kevin Morgan dated 2006-11-28*

b. *Copy of envelope containing 6 lines of text (as per #46.d above) with handwriting added at the bottom, beginning with the date 06-11-28*

c. *Copy of letter starting with Box 3100 to "Dear Linda" dated June 14, 2004, with handwriting added at the bottom beginning with the date 06-11-28*

d. *Copy of a Pay stub for* ***Baptiste*** *GA (as per #46.e above) without blacked out information, and with handwriting added at the bottom beginning with the date 06-11-28.*

51. *Package of 6 documents*

a. *Letter to Kevin Morgan from Men Molt dated 2006-12-04*

b. *Report of William Thorpe, Forensic Document Examiner (2 pages), dated 2006-12-02*

c. *CV of William Thorpe*

d. *Original envelope as referred to at 46.d and 47.b*

e. *Original pay stub as referred to at 46.e and 47.d*

f. *Original letter as referred to at 46.c*

Interviews:

1. *Donna Raketti, Registered Nurse, Matsqui Institution.*

2. *Jenny Plate, Registered Nurse, Matsqui Institution.*

3. *Katherine Mathieson, Registered Nurse, Matsqui Institution.*

4. *Gloria* ***Baptiste****, Registered Nurse, Matsqui Institution.*

5. *Matt Lister, A/Correctional Supervisor, Matsqui Institution*

> 6. *Sean Koch, Correctional Officer 2, Matsqui Institution.*
>
> 7. *Dr. Linda Healey, Psychiatrist, Director Psychiatric Hospital, RTC*
>
> 8. [Inmate Legault], *former inmate at Matsqui Institution.*
>
> *Written notes were taken during each interview, and the interviews were recorded by digital voice recorder. The recordings were transferred to compact disk, but transcripts were not made of the recordings. Witnesses Raketti, Plate and Mathieson were accompanied during the interview by PIPSC representative Marie-France Lapierre. Nurse Gloria* ***Baptiste*** *was accompanied by PIPSC representative Harinder Mahil.*
>
> [*Sic* throughout]
>
> [Emphasis in original]

[39] On November 28, 2007, Mr. Mahil wrote to Richard Fader, counsel for the employer, requesting access to certain documents used during the investigation, which had yet to be provided to the grievor (Exhibit E-5).

[40] During cross-examination, Mr. Morgan admitted, when shown the letter that the grievor sent to the CSC's Access to Information and Privacy Coordinator on March 21, 2007 (Exhibit U-18), that the grievor had requested, but had not received, the documents and information listed in that exhibit.

2. <u>Ms. Thiessen's testimony</u>

[41] Ms. Thiessen, a seasoned, competent and devoted professional, testified in an honest and straightforward manner. Ms. Thiessen has been a registered nurse with public health care responsibilities in CSC institutions since 1997.

[42] Ms. Thiessen testified that the interview on October 6, 2006, with the grievor was fair and was not rushed. The grievor had access to every relevant document, and she understood the questions put to her.

3. <u>Warden Brown's testimony</u>

[43] At the date of this hearing, Warden Brown was an EX-02 with more than 29 years' experience at the CSC. Warden Brown is the senior ranking executive at Matsqui Institution responsible for all operations and support services.

[44] Warden Brown set up the board of investigation and stated that the process was both open and fair. He reaffirmed the employer's position that once the disciplinary investigation report was finalized, all the documents used in the completion of the report would be provided to the grievor, subject to the *Access to Information Act* and the *Privacy Act*.

[45] On the issue of the disciplinary investigation procedure provided in Appendix "R" of the collective agreement, Warden Brown's first-level decision on the grievance was that the "Correctional Service of Canada is currently developing an investigation procedure as per the provision of Appendix 'R' of the PIPSC Collective Agreement." As of the date of the beginning of this hearing, on January 15, 2008, the employer's commitment, as stated by Warden Brown, had not yet been fulfilled.

[46] Warden Brown decided as follows on April 4, 2007, on grievance 566-02-1294 at the first level of the grievance procedure (Exhibit U-16):

. . .

> *Management Decision on Grievance*
>
> *You are grieving that the Employer recently conducted a disciplinary investigation into your conduct as a result of allegations about yourself. You allege that the Employer violated the Health Services Collective Agreement by not having a Disciplinary Investigation Procedure in place as required by Appendix R of the Collective Agreement.*
>
> *You request that the Investigation Report prepared by the CSC investigators, in violation of the Collective Agreement, be withdrawn and the result not be used in any disciplinary proceeding.*
>
> *Following my review, I find that you did not present your grievance within the time limits specified in your collective agreement. The collective agreement provides for an employee to present a grievance to the first level of the procedure not later that the twenty-fifth (25th) day after the date on which he or she first became aware of the action or circumstances giving rise to grievance. Your grievance was received by management on March 14, 2007, which is well outside the time limits specified in the collective agreement. However, were your grievance timely, my response would be as follows:*
>
> *Paragraph 12 (1) (c) of the Financial Administration Act authorizes every deputy head in the core public*

administration to establish standards of discipline. The exercise of this authority is subject to the provisions of subsection 11.1(1) of the Financial Administration Act (FAA) which states that in the exercise of its human management responsibilities, the Treasury Board may establish policies or issue directives respecting the exercise of the powers granted by the FAA to deputy heads in the core public administration.

As such, the Treasury Board of Canada developed guidelines for Discipline which outlines the responsibility of management when imposing discipline. Collective agreements must be honoured, steps followed in determining misconduct and disciplinary action, conduct investigation and interviews, determine appropriate disciplinary action, apply flexibility and [*sic*] *application of discipline and conduct a disciplinary hearing.*

The Correctional Service of Canada developed a "Guide to Staff Discipline & Non-Disciplinary Demotion or Termination of Employment for Cause" to guide management in the application of discipline. As well, procedural rights must be applied to the employee; that is, the employee is made aware of the allegations against him/her, the employee has the right to be heard, and the employee has the right to representation.

Correctional Service of Canada is currently developing an investigation procedure as per the provision of Appendix R of the PIPSC Collective Agreement.

Irregardless [*sic*] *whether an investigative procedure is in place as a result of Appendix R of the PIPSC Collective Agreement* [*sic*] *does not preclude the employer from practicing the right to conduct a disciplinary investigation. As well, the employer does have an investigative process in place respecting the Treasury Board Policy on discipline. You have been afforded your procedural rights in accordance with Treasury Board Policy on Discipline, CSC Guide to Staff Discipline & Non-Disciplinary Demotion or Termination of Employment for Cause", and Article 37, Discipline, of the PIPSC Collective Agreement.*

As such, this grievance is denied.

. . .

[*Sic* throughout]

[Emphasis added]

[47] The employer submitted in evidence a policy document dated November 1994 (Exhibit E-2) as the existing disciplinary investigation procedure under the collective agreement.

[48] The investigation report was finalized on January 5, 2007, and the grievor received a copy on January 29, 2007. The grievor was terminated on April 10, 2007.

III. Summary of the arguments

[49] The parties filed written submissions of their arguments and I will refer to their respective submissions by both section and page number, as required.

[50] I must state at the outset that both parties presented voluminous cases in support of their respective positions. However, most of the jurisprudence presented was not on point.

A. For the grievor

[51] The grievor's position is that she should have been given adequate notice and the particulars of the allegations made against her and of the disciplinary investigation procedure so that she would be in a position to make representations, to effectively prepare her case and to answer the case against her.

1. Clause 37.04

[52] In the case involving clause 37.04 of the collective agreement, Mr. Morgan testified that the grievor was provided access to documents during the disciplinary interview on October 6, 2006. He stated that she was shown a number of documents during the disciplinary interview. The grievor was in the interview room for 1 hour and 20 minutes. Some of the time was taken up by Mr. Mahil asking the board of investigation for access to information. During the interview, the board of investigation showed the grievor a number of documents (including a five-page letter of complaint from inmate Legault) and asked her approximately 100 questions, some related to medication and quite complex.

[53] According to the grievor, the purpose of the October 6, 2006, interview was to answer the questions of the board of investigation. It was not appropriate for the board of investigation to show her documents for only a few seconds and then

immediately start asking her questions. She should have been provided with the documents beforehand so that she could review them and, if necessary, seek advice. The grievor's position is that she was unable to adequately respond to the allegations made against her because she was not provided access to all the information.

[54] It is the grievor's position that the medications that she and other nurses administered were registered in the "Medication Administration Record". The employer and the board of investigation had access to relevant information, including the "Medication Administration Record". However, they did not provide this information to the grievor and thereby deprived her of her ability to fully respond to all the allegations and questions posed by the board of investigation on October 6, 2006.

[55] It is also the grievor's position that clause 37.04 of the collective agreement is clear and unambiguous. It entitles her to receive all the information used during the disciplinary investigation. She was entitled to receive not only the complaints made against her but also all the relevant documents, including information and statements provided by persons interviewed by the investigators.

[56] As part of her argument, the grievor submitted that clause 37.04 of the collective agreement must be read as part of the whole article:

> ***ARTICLE 37***
> ***STANDARDS OF DISCIPLINE***
>
> ***37.01*** *Where written departmental standards of discipline are developed or amended, the Employer agrees to supply sufficient information on the standards of discipline to each employee and to the Institute.*
>
> ****
>
> ***37.02*** *When an employee is required to attend a meeting, the purpose of which is to conduct a disciplinary hearing concerning him or to render a disciplinary decision concerning him, the employee is entitled to have, at his request, a representative of the Institute attend the meeting. Where practicable, the employee shall receive a minimum of two (2) days notice of such a meeting as well as its purpose.*
>
> ****
>
> ***37.03*** *At any administrative inquiry, hearing or investigation conducted by the Employer, where the actions of an employee may have had a bearing on the events or circumstances leading thereto, and the employee is required to appear at the administrative inquiry, hearing or*

> *investigation being conducted, he may be accompanied by a representative of the Institute. The unavailability of the representative will not delay the inquiry, hearing or investigation more than forty-eight (48) hours from the time of notification to the employee.*
>
> ****
>
> ***37.04*** *Subject to* the Access to information Act and Privacy Act*, the Employer shall provide the employee access to the information used during the disciplinary investigation.*
>
> ***37.05*** *The Employer agrees not to introduce evidence in a hearing relating to disciplinary action any document concerning the conduct or performance of an employee the existence of which the employee was not aware at the time of filing or within a reasonable time thereafter.*
>
> ****
>
> ***37.06*** *When an employee is suspended from duty, the Employer undertakes to notify the employee in writing of the reason for such suspension. The Employer shall endeavour to give such notification at the time of suspension.*
>
> ***37.07*** *Notice of disciplinary action which may have been placed on the personnel file of en employee shall be destroyed after two (2) years have elapsed since the disciplinary action was taken provided that no further disciplinary action has been recorded during this period.*
>
> [**Asterisks denotes changes from the previous collective agreement]

[57] The grievor emphasized that article 37 must be read in connection with the "Management Rights" clause found at article 5:

> ***ARTICLE 5***
> ***MANAGEMENT RIGHTS***
>
> ***5.01*** *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*

[58] The argument made by the grievor with respect to clause 37.04 of the collective agreement is that the "Management Rights" clause has been abridged or modified and that management cannot ignore the (mandatory) requirements of article 37 before imposing discipline on an employee. Finally, the grievor's requested remedy for the employer's failure to give effect to such rights is that the discipline imposed be declared null and void.

2. Appendix "R"

[59] The second grievance alleges the employer's violation of Appendix "R":

> ***Appendix "R"***
>
> ***LETTER OF UNDERSTANDING***
> ***CONCERNING THE HEALTH SERVICES GROUP***
> ***RE: DISCIPLINARY INVESTIGATION PROCEDURE***
>
> *This letter is to give effect to the understanding reached by the Employer and the Professional Institute in negotiations for the renewal of the agreement covering the above specified group.*
>
> *Accordingly, in the departments (Health Canada, Veterans Affairs Canada (Ste-Anne-de-Bellevue Hospital), National Defence, Correctional Service Canada and Public Health Agency of Canada) where an investigation procedure does not exist, the departments agree to discuss items such as timeframe, process and corrective action in view of developing an investigation procedure regarding investigation in accordance with article 37 – Standards of Discipline in collaboration with the Institute.*
>
> *The investigation procedure will be in effect no later than six (6) months after the date of the signing of the collective agreement for the Health Services Bargaining Unit.*
>
> [**Asterisks denotes changes from the previous collective agreement]

[60] The grievor's argument is that the employer did not have a disciplinary investigation procedure in place six months after the signing of the collective agreement.

[61] On October 6, 2006, the day of the grievor's interview by the board of investigation, Mr. Mahil asked Mr. Morgan questions about whether a disciplinary investigation procedure existed. Mr. Morgan admitted that no copy of a disciplinary investigation procedure was given to either the grievor or Mr. Mahil.

[62] The evidence shows that although the question of the disciplinary investigation procedure was raised on October 6, 2006, further correspondence with Warden Brown, dated November 7, 2006 (Exhibit U-12), which was copied to Susan McKenzie, Regional Administrator, Human Resources; Anne Kelly, Deputy Commissioner; and Donna Mynott, Human Resources Advisor, was never acknowledged by him, Ms. Kelly

or any other CSC representative. Mr. Mahil's letter of November 7, 2006 reads as follows:

. . .

> *This is to acknowledge your letter dated October 30, 2006 which was sent to me by fax on November 3, 2006.*
>
> *Your letter states that the investigators assigned to the disciplinary investigation noted additional irregularities during the course of the initial investigation that then formed the basis of six additional allegations against Gloria Baptiste. These same investigators, who made the additional allegations, are responsible for investigating these allegations. It is the position of the Union as well as Ms. Baptiste that the investigation has been seriously tainted and compromised.*
>
> *When I accompanied Ms. Baptiste to meet with the Board of Investigation on October 6, 2006, I asked Chairperson Kevin Morgan for a copy of the investigation procedure. The Chairperson advised both myself and Ms. Baptiste that while there was no written investigation procedure, the Board will conduct a fair investigation.*
>
> *Ms. Baptiste is extremely concerned that the Board of Investigation responsible for investigating allegations against her can itself make further allegations. The investigation is neither fair nor unbiased.*
>
> *The draft Guidelines On The Conduct of Administrative Investigations recently circulated by the Treasury Board state that managers:*
>
> - *Are expected to act in an objective way to be thorough in conducting the preliminary investigation.*
> - *Must ensure that rights of all parties are respected throughout the investigation.*
> - *Are expected to follow the rules of natural justice……..*
>
> *The draft Guidelines also states that the Investigator:*
>
> - *Is responsible for having a clear understanding of the mandate and purpose of the investigation.*
> - *Is responsible for obtaining all relevant preliminary information relating to the incident or allegation by conducting thorough, unbiased inquiries into the facts surrounding a reported incident or allegation.*

- *Respect the rights of individuals being interviewed.*

The same Guidelines under the heading "Process for Conducting an Investigation where there is an Allegation of Employee Misconduct or a Security Incident" state that the Rules of Natural Justice must be applied.

The draft Guidelines with respect to the "Terms of Reference for the Formal Investigations" state that "the investigator is expected to apply the Principle of Procedural Fairness and to abide by the assigned terms of reference."

The Rules of Natural Justice require that the person facing the allegations should be given adequate notice of the allegations against her and of the procedure for determining the allegations so that she may in a position to make representations on her behalf to effectively prepare her own case and to answer the case against her. They also require that a person who makes a decision should be unbiased and act in good faith. ***The decision maker can not be one of the parties in the case.*** *Yet that is precisely now the case where the investigators have made the additional allegations.*

One of the elements of the Principles of Natural Justice is the rule against bias. This rule provides that a party should not be judged by his accuser.

In this case, the investigators have not followed the Rules of Natural Justice and there has been a serious breach of the Principle of Procedural Fairness. More importantly, the investigators have not abided by the terms of reference set out in the Convening Order outlined to Ms. Baptiste in a memorandum dated September 5, 2006. They have proceeded to make further allegations against Ms. Baptiste.

Ms. Baptiste is extremely concerned that the information related to the allegations has not been shared with her. Article 37.04 of the Collective Agreement between the Treasury Board and the Professional Institute of the Public Service of Canada entitles her to receive all information used during the disciplinary investigation. She is entitled to this information so that she can fully respond to the allegations.

For the reasons set out above, Ms. Baptiste on the advice of the Professional Institute of the Public Service of Canada has decided not to meet with the investigators to respond to the additional allegations made by them.

Please feel free to contact me . . . if you wish to discuss this matter with me.

. . .

> [*Sic* throughout]
>
> [Emphasis in the original]

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

[63] The employer objected to the timeliness of both grievances.

1. <u>Clause 37.04</u>

[64] The employer argues at page 3, section 9 of its written submission that:

> . . .
>
> *clause 37.04 of the instant collective agreement requires access to information in a reasonable time after the investigation process is complete, subject to the Access to Information Act and the Privacy Act, <u>so that the employee has the information prior to any disciplinary meeting</u>. . . .*
>
> [Emphasis added]

[65] At page 4, section 10, of its written submission, the employer suggests that ". . . the purpose of clause 37.04 of the collective agreement is to fast-track the information to the employee <u>prior to the disciplinary meeting</u>, subject to the *Access to Information Act* and the *Privacy Act*. [emphasis added]"

[66] The employer further argues at page 4, section 11, of its written submission, that ". . . the goal of an Arbitration Board in interpretation is to discover the intention of the parties creating the agreement [and] as a rule of construction; the clear words of a collective agreement are to be given their ordinary and plain meaning. . . ."

[67] According to the employer, the clear intent of clause 37.04 of the collective agreement is that the requirement for access crystallizes once the disciplinary investigation is complete.

[68] Furthermore, the disciplinary investigation report, contains the following mention:

> . . .
>
> *<u>During the interview with her</u>, Nurse **Baptiste** was permitted to see all documents necessary for her to respond to questions. For example she was permitted to have the Narcotic Controlled Drug Record book, copies of the Medical Administration Record (MAR) documents, and other medical*

> *documentation in front of her while she was asked questions in regard to medication she'd issued and entries she'd made.*
>
> . . .
>
> [I underline]
>
> [Bold emphasis in the original]

A copy of the report was sent to the grievor on January 29, 2007.

[69] According to the employer, there was no evidence of trickery or unfairness during the board of investigation's interview of the grievor, only a blanket complaint by the grievor that she did not receive full and complete disclosure of all the documents in the possession and under the control of the employer. It is clear that the grievor knew of the allegations made against her and that she had access to all the relevant documents to address the questions that were posed to her.

[70] According to the employer, the grievor has failed to establish in evidence any specific unfairness in the process. In fact, the grievor failed to testify. Therefore, counsel for the employer requested that a negative inference be drawn.

[71] The employer suggests, at page 10 section 23, that it is not required to fully disclose all the documents "in its power, possession or under its control". It goes on to state that the grievor's request for disclosure of all documents on the grounds of fairness is not a rule of procedural fairness and that there is no such requirement in the collective agreement. On that point, the employer goes on to say that:

> . . .
>
> *. . . there is no reason to introduce a concept into the labour law context that extends beyond what is required in the criminal law. This is particularly true when such a finding could be a radical departure from the wording of the collective agreement and the development of labour law generally. There is simply no legal requirement for full disclosure at the investigative stage.*
>
> . . .
>
> [Emphasis added]

The employer indicates that ". . . furthermore, there is simply no requirement under the collective agreement for this type of disclosure. The collective agreement doesn't use the word 'disclosure'. . . ." Had the intent of the parties to the collective agreement

been for the employer to provide disclosure of all documents "in its power, possession and under its control" during the investigation stage, they would have explicitly specified that in the collective agreement.

[72] Furthermore, the employer argues that ". . . it was the grievor's own behaviour of not going to the second interview that deprived her of access to those documents [relevant to the expanded list of allegations]. As noted in Warden Brown's October 30, 2006, letter to Mr. Mahil, ". . . information regarding additional allegations will be shown to Ms. Baptiste by the investigators at the time Ms. Baptiste attends the disciplinary interview to discuss additional allegations. [emphasis added]"

[73] Finally, at page 34 of its argument, the employer states the following: "However, the grievor chose not to participate in the second interview, thereby depriving herself of access to the relevant information. . . ."

[74] Another point of interest, based on the evidence, is that the employer appears to have been surprised by the grievor's lack of cooperation to attend meetings to discuss six new allegations that resulted from the fact-finding interview of October 6, 2006.

[75] The employer argues that the grievor did not grieve the adequacy of the disclosure, which was provided to her in January 2007. It refers to *Burchill v. Canada (Attorney General),* [1981] 1 F.C. 109 (C.A.), to submit that an adjudicator is without jurisdiction to hear the issues concerning the post-investigation production of documents. The employer relied on the *Access to Information Act* and *Privacy Act* as the only authority for redress on the issue of the January 2007 disclosure.

[76] On the question of remedy, the employer states that ". . . the purpose of remedy for a collective agreement violation is to put the employee in the position she would have been had there been no violation."

[77] Also on remedy, the employer relies on *Tipple v. Canada (Treasury Board),* [1985] F.C.J. No. 818 (C.A.) (QL), and states that, if there was any unfairness, it could be ". . . wholly cured by the hearing de novo before the adjudicator. . . ."

[78] Finally, on the question of remedy, the employer argues that ". . . the grievor has failed to establish any harm."

2. Appendix "R" grievance

[79] The employer's first argument, at page 24, section 84, of its written submission, is one of jurisdiction, in that Appendix "R" of the collective agreement cannot support an individual grievance under section 209 of the *Public Service Labour Relations Act* (*PSLRA*) since Appendix "R" refers only to the employer and the grievor's bargaining agent. Also, the employer refers to section 208 of the *PSLRA* to argue that the grievor has no basis to argue that she was personally aggrieved by the alleged violation of Appendix "R".

[80] The employer argues that the grievor's bargaining agent's only recourse, if it felt aggrieved by the alleged violation of Appendix "R" of the collective agreement, would be to present a policy grievance under section 220 of the *PSLRA*.

[81] Furthermore, the employer argues that, regardless of the outcome of its position on the jurisdiction issue, there has been no violation of Appendix "R" of the collective agreement since the CSC had a disciplinary investigation procedure in place. That procedure was entered into evidence as Exhibit E-2, and the employer claims that it contains a detailed disciplinary investigation procedure.

[82] Finally, on the question of remedy, the employer argues that, in the alternative, if there was a breach, the corrective action being sought by the grievor is inconsistent with what was requested in her grievance. Therefore, the *Burchill* principle applies. Furthermore, the remedy requested is out of proportion to the alleged violation of the collective agreement.

IV. Reasons

[83] My analysis of all the evidence and arguments presented by both parties, including a thorough reading of the voluminous jurisprudence submitted, leads me to make the following comments, observations and statements, which are the foundation and rationale for my decision.

[84] All witnesses were straightforward, direct and honest in their testimony and I did not observe or sense any bad faith.

A. Timeliness

[85] On the question of timeliness, some background is necessary for a full comprehension of the dates during which several events occurred. When the grievor was advised that she was put on administrative leave on August 31, 2006, she considered herself suspended and filed a grievance. However, because the grievance alleges an unreasonable suspension, it will be heard at a later date along with another suspension grievance and a termination grievance.

[86] A grievance was filed on October 13, 2006, with respect to clause 37.04 of the collective agreement. This grievance is one of the two grievances that I am concerned with here. Following the August 31, 2006, refusal of access to Matsqui Institution, the grievor and Mr. Mahil met with Warden Brown on September 5, 2006. The grievor was advised that she would be convened shortly to another meeting. The board of investigation interviewed the grievor on October 6, 2006. Following the meeting, the grievor filed her October 13, 2006 grievance.

[87] The grievance filed on October 13, 2006, following the October 6, 2006, fact-finding interview, is within the time limits prescribed at clause 34.09 of the collective agreement:

> ***34.09*** *An employee may present a grievance to the first (1st) step of the procedure in the manner prescribed in clause 34.03, not later than the twenty-fifth (25th) day after the date on which the employee is notified orally or in writing or on which the employee first becomes aware of the action or circumstances giving rise to the grievance.*

[88] Furthermore, if the grievance had not been timely, it should be noted that the employer's first-level decision on the grievance raised the timeliness issue. However, the employer did not raise it at any other level of the grievance procedure, including the final level. Consequently, as per subsection 95(2) of the *Public Service Labour Relations Board Regulations,* the employer cannot object to the timeliness of the grievance at adjudication: *McWilliams et al. v. Treasury Board (Correctional Service of Canada),* 2007 PSLRB 58.

[89] Also, on the time limit issue with respect to the grievance filed on March 14, 2007, about Appendix "R" of the collective agreement, the employer decided the grievance only at the first level of the grievance procedure. At the first level,

Warden Brown raised the question of timeliness, but no further mention of time limits was raised by the employer, including within 15 days of the referral to adjudication. Consequently, as per subsection 95(2) of the *Public Service Labour Relations Board Regulations,* the employer cannot object to the timeliness of the grievance at adjudication: *McWilliams et al.*

B. <u>The merits of the grievances</u>

[90] The parties argued that, in a collective agreement interpretation case, the adjudicator should seek the intention of the parties to the collective agreement and that the clear words of the agreement must be given their ordinary and plain meaning. One need not seek the intention of the parties to the collective agreement if the language is clear and unambiguous.

[91] The two main collective agreement provisions being examined are clause 37.04 and Appendix "R". However, it is imperative to consider these provisions together with other related provisions of the collective agreement such as clauses 4.01, 5.01, 6.01, 34.09, 36.01, 36.07(h), 36.08, 37.01, 37.03, 37.04 and 37.05. These other provisions read as follows:

. . .

> ***ARTICLE 4***
> ***APPLICATION***
>
> ***4.01*** *The provisions of this Agreement apply to the Institute, employees and the Employer.*
>
> ***ARTICLE 5***
> ***MANAGEMENT RIGHTS***
>
> ***5.01*** *All the functions, rights, powers and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Institute as being retained by the Employer.*
>
> ***ARTICLE 6***
> ***RIGHTS OF EMPLOYEES***
>
> ***6.01*** *Nothing in this Agreement shall be construed as an abridgement or restriction of an employee's constitutional rights or of any right expressly conferred in an Act of the Parliament of Canada.*

. . .

ARTICLE 34
GRIEVANCE PROCEDURE

. . .

34.09 *An employee may present a grievance to the first (1st) step of the procedure in the manner prescribed in clause 34.03, not later than the twenty-fifth (25th) day after the date on which the employee is notified orally or in writing or on which the employee first becomes aware of the action or circumstances giving rise to the grievance.*

. . .

ARTICLE 36
JOINT CONSULTATION

36.01 *The parties acknowledge the mutual benefits to be derived from joint consultation and will consult on matters of common interest.*

. . .

36.07 *Without prejudice to the position the Employer or the Institute may wish to take in future about the desirability of having the subjects dealt with by the provisions of Collective Agreements, the following subjects as they affect employees covered by this Agreement, shall be regarded as appropriate subjects of consultation involving the Employer and the Institute during the term of this Agreement:*

. . .

(h) provision to the Institute of departmental manuals and Treasury Board directives.

36.08 *With respect to the subjects listed in clause 36.07, the Employer agrees that new policies will not be introduced and existing regulations or directives will not be cancelled or amended by the Treasury Board in such a way as to affect employees covered by this Agreement until such time as the Institute has been given a reasonable opportunity to consider and to consult on the Employer's proposals.*

ARTICLE 37
STANDARDS OF DISCIPLINE

37.01 *Where written departmental standards of discipline are developed or amended, the Employer agrees to supply sufficient information on the standards of discipline to each employee and to the Institute.*

. . .

> **
>
> ***37.03*** *At any administrative inquiry, hearing or investigation conducted by the Employer, where the actions of an employee may have had a bearing on the events or circumstances leading thereto, and the employee is required to appear at the administrative inquiry, hearing or investigation being conducted, he may be accompanied by a representative of the Institute. The unavailability of the representative will not delay the inquiry, hearing or investigation more than forty-eight (48) hours from the time of notification to the employee.*
>
> **
>
> ***37.04*** *Subject to the* Access to Information Act and Privacy Act*, the Employer shall provide the employee access to the information used during the disciplinary investigation.*
>
> ***37.05*** *The Employer agrees not to introduce as evidence in a hearing relating to disciplinary action any document concerning the conduct or performance of an employee the existence of which the employee was not aware at the time of filing or within a reasonable time thereafter.*
>
> **
>
> [**Asterisks denotes changes from the previous collective agreement]

[92] It must be emphasized that clause 37.04 and Appendix "R" of the collective agreement are new.

1. <u>Clause 37.04</u>

[93] Clause 37.04 of the collective agreement creates, for the employer, a new obligation to provide an employee with access to information used during a disciplinary investigation involving that employee, subject only to the *Access to Information Act* and the *Privacy Act*. This newly negotiated provision gives an employee a contractual right to obtain all the information used during the disciplinary investigation process, subject only to the *Access to Information Act* and the *Privacy Act*. In other words, all the information used during the disciplinary investigation period, starting with the appointment of the board of investigation on September 5, 2006, until the filing of the disciplinary investigation report on January 5, 2007, must be provided to the grievor. This obligation of the employer is owed to the grievor, without request, even though the evidence illustrates clearly that requests for the information

were made both verbally and in writing on numerous occasions during the disciplinary investigation.

[94] Not only is the language of the collective agreement clear on this point, it is also reinforced by the evidence and testimony of different employer witnesses, as follows:

- Exhibit U-4: the employer states in its first-level decision to the grievance alleging a violation of clause 37.04 of the collective agreement, the following: "therefore, documents used through the course of the investigation and the disciplinary investigation report will be shared with you when the investigation is complete. . . ."

- Exhibit U-6: the employer's second-level decision states the following:

  > *"the word 'used' in this article implies that the release of information will not take place until the disciplinary investigation has been completed. You will then be given access to the information used (subject to the Access to Information Act and the Privacy Act) and be given the chance to respond to the investigation before the results are finalized. . . ."*

- In its final-level decision, the employer states the following:

  > *"Concerning your request of being provided access to the information used during the disciplinary investigation, subject to the Access to Information Act and the Privacy Act, you will be given full access to information used during the disciplinary investigation report once it is completed. You will then be given the opportunity to respond to the outcome of the investigation. . . ."*

- Exhibit U-26: during the grievor's fact-finding interview of October 6, 2006, Mr. Morgan, in response to the questions from Mr. Mahil on access to information used, states the following:

  > *"Yeah. And I believe that what that means is that she has access to any documents that we used during the process of this investigation. So after the investigation is completed, Gloria would have access to everything we used."*

- Finally, at page 3, section 9, of its written submission, the employer argues that:

> *". . . clause 37.04 requires access to the information in a reasonable time after the investigation process is complete, subject to the Access to Information Act and the Privacy Act, so that the employee has the information prior to any disciplinary meeting.* [emphasis added]"

In other words, if, during this rather long disciplinary investigation of several months, there were, let's say, 500 pieces of information used by the employer (memoranda, letters, notes, recordings, interviews or other information related to the events being investigated), the grievor is entitled to access those 500 pieces of information, subject only to the *Access to Information Act* and the *Privacy Act*. If, at the end of the disciplinary investigation process, the grievor received only 400 documents or pieces of information and not all 500, then the provisions of clause 37.04 of the collective agreement would not have been complied with if any of the remaining documents could have been provided to the grievor in compliance with the *Access to Information Act* and the *Privacy Act*.

[95] The employer's evidence indicates that once the investigation was completed the grievor was entitled to access all the information used by the employer during its disciplinary investigation.

[96] Clause 37.04 of the collective agreement is clear and unambiguous as to the employer's obligation. Had the parties to the collective agreement wanted to provide the grievor with only "some" or only "the relevant" or "the most relevant" information used during the disciplinary investigation, they would have stated it in clause 37.04. They did not qualify the information to be provided to the grievor other than to state that it is to be provided subject to the *Access to Information Act* and the *Privacy Act*.

[97] No argument was put forward by either party on the question of the *Access to Information Act* and the *Privacy Act.*

[98] I am not going to engage in an analysis or a distinction between "access" and "disclosure" of information to be provided by the employer in this case, except to say that be it "access" or "disclosure" or both, all the information used should have been provided in a timely manner subject to the *Access to Information Act* and the *Privacy Act*.

[99] The employer's argument is that:

> *". . . clause 37.04 requires access to the information in a reasonable time after the investigation process is complete, subject to the Access to Information Act and the Privacy Act, so that the employee has the information prior to any disciplinary meeting. . . ."*

[100] One has to infer from the employer's argument that all the information must be available to an employee being investigated before that employee is informed of the employer's decision taken as a result of the investigation.

[101] In this case, the employer had to provide the grievor with access to all the information used, subject only to the *Access to Information Act* and the *Privacy Act*, between January 5, 2007, and before any disciplinary meeting.

[102] All the information used by the employer must have been put in the hands of the grievor so that she had sufficient time to prepare for a disciplinary meeting with the employer. This would then have allowed the grievor and Mr. Mahil to contradict errors, identify any omissions, challenge false allegations and challenge the credibility of information, if required.

[103] In this case, the issue of access to information used during the disciplinary investigation was flagged to the highest authorities, both verbally and in writing, and the flagging was not heeded by the employer. We are looking at mandatory language in clause 37.04 of the collective agreement, which was not respected, the whole without any bad faith by either party — something fell through the cracks. This serious matter could affect the remedy in this case.

[104] I have not been presented with any evidence or any argument by the employer that satisfies me that the employer was prevented from providing access to the information in this case.

[105] The uncontradicted testimony is that the grievor and Mr. Mahil requested at the very first opportunity, verbally and in writing, information used by the board of investigation (Exhibit U-26).

[106] The board of investigation's report (Exhibit E-3) contains a non-exhaustive list of documents to which, as of the date of the grievor's termination on April 10, 2007, neither she nor Mr. Mahil had access. The board of investigation used the following

documents during the disciplinary investigation period, which ended on January 5, 2007:

. . .

28. Copy of Medication Administration Record for [inmate Legault] *for August 2006*

29. Copy of page from medical chart for [inmate Legault] *covering 06-06-21 to 06-08-21*

30. Copy of Medication Administration Record [inmate Shaler] *for August 2006 with attached encounter report for 2006-08-18 (2 copies- 1 with handwriting below text and 1 without)*

31. Copy of Doctors Orders and Progress Notes for [inmate Shaler] *covering 06-08-18 to 06-08-21*

32. Copy of Medication Administration Record for [inmate Ylirussi] *for August 2006*

33. Copy of Doctors Orders and Progress Notes for [inmate Ylirussi] *covering 06-07-19 to 06-09-11 (2 pages)*

34. Copy of Medication Administration Record for [inmate Jakse] *for August 2006*

35. Copy of Medication Administration Record for [inmate Lorenzetto] *for August 2006*

36. Copies of 5 pages (legal size) from the Narcotic Controlled Drug Record, numbered 1 to 5 in upper right corner. #1 and #2 are dated as being copied on 06-08-21 in the lower right corner. #3 to #5 inclusive are dated as being copied on 06-08-22.

37. Copies of 4 pages (11 x 17 size) pages from the Narcotic Controlled Drug Record numbered 1 to 4 in the upper right corner, and dated as being copied on 06-09-07.

. . .

47. Copy of LDV Contract #21831-6-0387-1014052 between CSC and FBIG Investigations

. . .

50. a) Copy of letter to Mert Mohr from Kevin Morgan dated 2006-11-28

. . .

> *51. b) Report of William Thorpe, Forensic Document Examiner (2 pages), dated 2006-12-02*
>
> . . .

These documents were not disclosed to the grievor or to Mr. Mahil, nor did the grievor have access to the documents used by the board of investigation as of the time of her termination on April 10, 2007.

[107] Before closing this section of my decision, I point out that on the eve of the January 15, 2008 hearing, Mr. Mahil had still not been provided with some of the requested critical information. This is evidenced in Exhibit E-5, a letter that the grievor's representative sent to Mr. Fader on November 28, 2007. This letter, which he copied to Ken Graham, Employer Representation Advisor, Treasury Board Secretariat, and Martin Ranger, Employment Relations Officer, Professional Institute of the Public Service of Canada, stated that Mr. Mahil was available to review this missing information at any of the CSC's offices. This letter reads as follows:

> . . .
>
> *I represent Ms. Gloria Baptiste with respect to these matters. I write to you as I understand from Mr. Ken Graham that you are representing Correctional Service of Canada (CSC).*
>
> *As you may be aware Ms. Baptiste's employment was terminated by the CSC on April 10, 2007. The Public Service Labour Relations Board has scheduled a hearing into these matters in Abbotsford, British Columbia from January 15 to 18, 2008.*
>
> *The Union has been concerned that CSC has not shared all information with Ms. Baptiste. Firstly, information was not shared with her during the investigation process. Secondly, when information was provided to her after the investigation, some significant pieces of information were withheld from her. Now that the hearing is coming up in the next few weeks, both I and Ms. Baptiste are entitled to receive information that was relied upon by CSC to justify her dismissal.*
>
> *The CSC's takes the position that on August 20, 2006 Ms. Baptiste altered the Narcotic Controlled Drug Record regarding the administration of Inmate Shaler's medication and that on August 21, 2006 she altered the Narcotic Controlled Drug Record morning narcotic count completed by Nurse K. Mathieson and Nurse J. Plate. However, copies of Narcotic Controlled Drug Records for these days have not been provided to Ms. Baptiste. We are unable to see what was*

> *altered and how was it altered. Ms. Baptiste has not been provided other relevant information as well.*
>
> *As her representative, I request to see the Narcotic Controlled Drug Record for the relevant period. I am prepared accompany Ms. Baptiste and attend at any office of the CSC to review this information.*
>
> *I will appreciate if you can make arrangements for us to review this information as soon as possible.*
>
> . . .
>
> [*Sic* throughout]

[108] It is clear that the employer has not met the test set out at page 3, section 9 of its written submissions: ". . . access to the information in a reasonable time after the investigation process is complete, subject to the *Access to Information Act* and the *Privacy Act*, so that the employee has the information prior to any disciplinary meeting." Disciplinary action was imposed on April 10, 2007.

[109] In this case, there is no justification for not having provided to the grievor or to Mr. Mahil all the information referred to in clause 37.04 of the collective agreement. It is certainly inappropriate to suggest that the grievor would have received the information if she had presented herself at a subsequent fact-finding interview by the board of investigation. The employer had a contractual obligation to provide access to or disclose all the information used during the investigation process, with no strings attached, other than the requirements of the *Access to Information Act* and the *Privacy Act*. I repeat that the contractual obligation is on the employer to provide the information used during the disciplinary investigation, without the grievor having to request it.

[110] It is imperative, however, to underline that this decision does not condone any actions or lack of actions on the grievor's part. Furthermore, it is imperative to also underline in this case that management's right to conduct a full and comprehensive disciplinary investigation is unabridged.

2. <u>Appendix "R"</u>

[111] I will deal first with the question of jurisdiction. Appendix "R" contains first-time contractual language that deals specifically with the disciplinary investigation procedure.

[112] An examination of the language of Appendix "R" and clause 4.01 of the collective agreement clearly establishes (and it is my ruling) that Appendix "R" can be the subject of an individual grievance. Article 4.01 of the collective agreement does not exclude Appendix "R" from the collective agreement.

[113] Section 208 of the *PSLRA* provides that an employee can file a grievance when he or she feels aggrieved by the employer's violation of the collective agreement. Furthermore, section 209 entitles an employee to refer to adjudication a grievance relating to the collective agreement. Finally, the *PSLRA* specifically recognizes at section 232 that individual and policy grievances are not mutually exclusive.

[114] The employer's position on the merit of the grievance is that there was no violation of Appendix "R" of the collective agreement since the employer already had a disciplinary investigation procedure in place.

[115] One must not state that the employer already had a procedure in place when the new contract language in the collective agreement was negotiated, which explicitly provides for a disciplinary investigation procedure in Appendix "R".

[116] Exhibit E-2 shows that the November 1994 policy document referred to by the employer as the existing disciplinary investigation procedure under the collective agreement was already in place at the time when the collective agreement was signed.

[117] In 2005 the parties to the collective agreement negotiated a new disciplinary investigation procedure in Appendix "R".

[118] Let us briefly examine Exhibit E-2. The 1994 procedure is "dated" not because it was a policy introduced in 1994 but because it is out of step with the collective agreement. A thorough examination of the 1994 procedure reveals that "although employees are not entitled, as a legal or contractual right, to representation during an investigation, the employer should allow such representation." This extract from the November 1994 procedure is but one example of it being "dated." Also, Exhibit E-2 contradicts several of the contractual rights being part of the collective agreement. I come to the conclusion that the board of investigation's report, which was deposited with Warden Brown in January 2007, was not written, and thus the investigation leading to it not conducted, in accordance with the disciplinary investigation procedure found in Exhibit E-2. One cannot therefore logically conclude that the

investigation report deposited with Warden Brown in January 2007 was conducted in compliance with the investigation procedure found in Exhibit E-2.

[119] Furthermore, why would Appendix "R" deal specifically with a new disciplinary investigation procedure if there had already been a disciplinary investigation procedure in place since 1994? Surely, the skilled negotiators of the collective agreement, with all of their resources, knew that there was no disciplinary investigation procedure for the Health Services Group bargaining unit when they negotiated the new contract language. It is my ruling that the new language of Appendix "R" introduced a new disciplinary investigation procedure in the collective agreement.

[120] Finally, Warden Brown, the highest executive at Matsqui Institution, wrote, in April 2007, in his first-level decision to the grievance relating to Appendix "R", that ". . .the Correctional Service of Canada is currently developing an investigation procedure as per the provisions of Appendix 'R' of the PIPSC collective agreement." Warden Brown's response to the grievance clearly indicates that a disciplinary investigation procedure did not exist and that one was being developed in compliance with the language in Appendix "R".

[121] Appendix "R" of the collective agreement also states that the disciplinary investigation procedure was to be in effect no later than six months after the signing of the collective agreement on May 31, 2005. As of the date of the hearing — January 15, 2008 — that new investigation procedure was not yet in effect.

[122] The employer must live with the collective agreement language that it negotiated.

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

(The Order appears on the next page)

V. Order

[124] I declare that the employer has violated clause 37.04 of the collective agreement and I order the employer to provide forthwith the grievor access to the information that was used during the disciplinary investigation and that has not yet been disclosed to her, subject to the *Access to Information Act* and the *Privacy Act*.

[125] I declare that the employer has violated Appendix "R" of the collective agreement.

December 16, 2008.

Roger Beaulieu,
adjudicator