

Date: 20091222

Files: 566-02-800, 842, 843,
949 and 1268

Citation: 2009 PSLRB 178



*Public Service
Labour Relations Act*

Before the Public Service
Labour Relations Board

BETWEEN

MAHALINGAM SINGARAVELU

Grievor

and

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

Respondent

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

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: [Renaud Paquet, adjudicator](#)

For the Grievor: [Yavar Hameed, counsel](#)

For the Respondent: [Karen Clifford, counsel](#)

Heard at Kingston, Ontario,
July 29 to August 1 and October 16 and 17, 2008.
Written submissions filed October 13 and November 4 and 9, 2009.

I. Individual grievances referred to adjudication

[1] Mahalingam Singaravelu (“the grievor”) worked as an engineering supervisor, first class, for the Correctional Service of Canada (CSC or “the respondent”) in Kingston, Ontario. His bargaining agent is the Public Service Alliance of Canada. However, the grievor is not represented by his bargaining agent but by counsel.

[2] In the first grievance (PSLRB File No. 566-02-800), the grievor disputes a one-day suspension that the respondent imposed on him for an alleged violation of the CSC’s harassment policy and of the CSC’s standards of professional conduct. The suspension was served on November 7, 2006. The grievance was filed on November 15, 2006, and was transmitted to the final level of the grievance procedure on December 19, 2006. The grievance was referred to adjudication on February 5, 2007.

[3] In the second grievance (PSLRB File No. 566-02-842), the grievor disputes a one-day suspension that the respondent imposed on him for an alleged wrongful use of the CSC’s email system. The suspension was served on November 16, 2006. The grievance was filed on November 17, 2006, and was transmitted to the final level of the grievance procedure on January 3, 2007. The grievance was referred to adjudication on February 15, 2007.

[4] In the third grievance (PSLRB File No. 566-02-843), the grievor disputes a one-day suspension that the respondent imposed on him for alleged insubordination during a meeting on September 28, 2006. The suspension was served on November 21, 2006. The grievance was filed on November 17, 2006, and was transmitted to the final level of the grievance procedure on January 3, 2007. The grievance was referred to adjudication on February 15, 2007.

[5] In the fourth grievance (PSLRB File No. 566-02-949), the grievor disputes a three-day suspension that the respondent imposed on him for alleged aggressive behaviour that occurred on November 1, 2006. The suspension was served on December 5, 6 and 7, 2006. The grievance was filed on December 7, 2006 and was transmitted to the final level of the grievance procedure on January 25, 2007. The grievance was referred to adjudication on March 9, 2007.

[6] In those four grievances, the grievor asked to be reimbursed wages and benefits corresponding to the days of the suspensions. He also asked that all records be

expunged from his employee file and that he be reimbursed for all out-of-pocket expenses and for his legal fees.

[7] In the fifth grievance (PSLRB File No. 566-02-1268), the grievor disputes the respondent's decision to place him on leave without pay on January 25, 2007, after an occupational health and safety assessment that found that the grievor was not fit to work at the CSC in any capacity. The grievance was filed on February 26, 2007, and was transmitted to the final level of the grievance procedure on April 4, 2007. The grievance was referred to adjudication on May 22, 2007.

[8] The fifth grievance reads as follows:

...

By the following letter I hereby grieve the decision of Correctional Services Canada (CSC) to place me on leave without pay following the Occupational Health Medical Officer's (OHMO) evaluation of January 25, 2007, which recommends my placement in employment in another Federal department outside the CSC.

Whereas, as stated in the Warden's letter dated February 9, 2007; though there is a possibility that I may be eligible for either disability benefits and/or employment insurance benefits during my leave without pay, both regimes do not allow me to receive compensation at a level commensurate with my normal salary and pay grade. I understand that there is a waiting period for eligibility for disability benefits or employment insurance benefits during which I will not receive any salary. Thereafter, my remuneration will be at a level between 45 to 70% of my normal salary. Moreover, it is also unlikely that I will be eligible for disability benefits given that I have no specific restrictions which limit my ability to work (as per the January 25, 2007 letter of the Occupational Health Medical Officer). The one recommendation of the OHMO is simply that I be transferred to employment outside the CSC.

The recommendation for my transfer outside the CSC is further to a series of medical recommendations by my treating physician and Health Canada as well as the two safety directives/compliances from the Health and Safety Officer, Labour Program, Human Resources Development Canada. CSC has failed repeatedly to abide the above recommendations/compliances made to assess the workload assigned to me and has been unwilling to provide me with required training to complete the duties assigned to me. It is the CSC's constant unwillingness to accommodate my

legitimate concerns and its frustration of my reintegration into the workplace, which has been the cause of stress for me and has required me to take medically approved stress leaves of absence from work.

CSC's failure to remedy this ongoing pattern of inappropriate behaviour has created a circumstance in which it is medically inadvisable for me to return to work under its auspices. Under the circumstances, it is patently unfair that I should be required to bear a financial burden for my employer's inability to accommodate me in the workplace

. As a corrective measure for the instant grievance I request that I be made whole in all respects including but not restricted to compensating me for all salary lost since January 25, 2007 and the CSC's decision to bar me from the workplace. Further, the CSC has an obligation to facilitate my integration in another department of the federal public service and to this end, in view of the January 25th decision of Health Canada, I request that I be given full access to CSC intranet and other facilities that will assist me in finding appropriate job postings within the Federal Public Service and assist the CSC Employees' Relation Advisor, as indicated in Ms. T Westfall's letter, dated Feb 9, 2007

...

[Sic throughout]

[9] The parties agreed that the evidence for the five grievances would be grouped. Six hearing days were held in Kingston, Ontario, from July 29 to August 1, 2008 and on October 16 and 17, 2008. During those six days, the respondent produced its evidence on the five grievances. Shortly after the sixth day of hearing, the grievor requested that the adjudicator recuse himself. Based on written submissions received on November 12 and 25 and December 3, 2008, the adjudicator dismissed the request for recusal (see *Singaravelu v. Deputy Head (Correctional Service of Canada)*, 2009 PSLRB 8).

[10] After several communications with the parties, it was decided that the hearing would continue from September 28 to October 2, 2009. On August 26, 2009, the Board sent the notice of hearing to the parties. On September 4, 2009, the grievor advised the Board that he was not prepared to participate in the hearing unless the entire proceeding were video recorded. The grievor suggested that it was necessary to monitor "non-verbal" messaging in the hearing room. On September 11, 2009, the

Board informed the grievor that his request for video recording was denied because it was not the Board's practice to allow video recording of its proceedings. On September 18, 2009, the grievor advised the Board that he would not attend the hearing scheduled for September 28 to October 2, 2009 but that he was maintaining his grievances.

[11] Considering that the grievor refused to attend the hearing but that he maintained his grievances, I decided that the arguments on the merits of the grievances would proceed by way of written submissions.

II. Summary of the evidence

[12] The respondent called Theresa Westfall, Brian Joyce, Tai-Yu Ngai, Glen Chambers, Robert Clooney, David Foster and Stewart Holland as witnesses. Ms. Westfall is the warden at the Kingston penitentiary. In 2006, she was the warden at the Joyceville penitentiary. In 2006, Mr. Joyce was the chief of plant maintenance at the Joyceville penitentiary and Mr. Ngai was a correctional manager at the same penitentiary. In 2006, Messrs. Clooney, Foster and Holland were shift or maintenance engineers at the Joyceville penitentiary. Mr. Chambers is the assistant warden of operations at the Collins Bay penitentiary. The respondent adduced 50 exhibits at the hearing.

[13] The grievor did not call any witnesses. He could have at the continuation of the hearing starting on September 28, 2009, but he decided not to participate. The grievor adduced 19 exhibits at the hearing while cross-examining the respondent's witnesses.

A. Ms. Westfall's testimony

[14] Ms. Westfall was the first witness called by the respondent. In early June 2006, Mrs. Westfall agreed to accept the grievor for a three-month return-to-work assignment at Joyceville. The agreement was that the grievor would work at Joyceville but that the Bath penitentiary would pay his salary for the three months. The plan was that the assignment would provide the grievor with a fresh start and that he could return to work at Bath afterwards.

[15] The grievor's substantive position was at Bath penitentiary, where he was an engineering supervisor, classified at the HP-08 (Heating and Power) group and level.

The engineering supervisor is in charge of the engineers at the power plant, which provides the power and water for the penitentiary's facilities.

[16] For his temporary assignment at Joyceville, the grievor was not asked to perform all the duties of an engineering supervisor. In fact, the engineering supervisor at Joyceville, Dave Kearney, was still in the position during the grievor's assignment. The grievor was originally assigned the following five tasks: complete all boiler and pressure vessel inspections, plan and coordinate the vacation schedule for all engineers, complete and record all fire inspections and drills, update all fire safety building plans, and oversee the development of a complete operating manual to be compiled by the shift engineers.

[17] In early August 2006, the grievor was provided with an email account for the purpose of performing his duties and for communicating in the course of his work. When using their email accounts, CSC employees are subject to the CSC Commissioner's Directive entitled "Use of Electronic Networks" and to the Treasury Board "Policy on the Use of Electronic Networks." When CSC employees turn on their computers, a warning appears, indicating that the system is monitored in accordance with those two policies, that evidence of unacceptable or illegal use will be reported and that disciplinary action may follow. Also, Ms. Westfall wrote a memo to the grievor on August 1, 2006 and attached for his review a copy of the CSC directive on the use of electronic networks. Furthermore, on April 6, 2006, the grievor had been advised in writing by CSC legal counsel that he did not comply with the intended use of the corporate network when he used it to send an article to a vast number of CSC staff under the title of "mistreatment at the hands of the CSC."

[18] On August 4, 2006, a few days after receiving access to his CSC email account, the grievor sent an email to CSC senior managers to which he attached the harassment complaint that he had filed against Mr. Joyce. The grievor also sent a copy of that email to several other people, including Beth Hoedicke, Unit Manager, Joyceville, and John Oddie, Acting Assistant Warden of Administrative services, Joyceville. Later the same day, the grievor sent an email to Mr. Joyce, writing that he had filed a harassment complaint against him and that Mr. Joyce was harassing him and abusing his authority. The grievor sent a copy of that email to Debbie Gipson, who reported to Mr. Joyce at that time. Later that same day, the grievor forwarded the content of that same email to James Jackson, who also reported to Mr. Joyce.

[19] A few hours after receiving the grievor's email, Ms. Hoedicke wrote to Ms. Westfall, expressing her concern that it was very inappropriate and disrespectful to Mr. Joyce that the grievor sent that information to so many other people. Ms. Westfall sent an email to everyone who had received the grievor's email, agreeing that the grievor's behaviour was inappropriate.

[20] Ms. Westfall considered that the content of the email and its distribution undermined Mr. Joyce's authority as a manager and that it created a negative work environment. The grievor should have known that he could not use his email account for that purpose. The policies on the use of electronic networks had been provided to him. Ms. Westfall decided to impose a one-day suspension on the grievor for the improper use of his CSC email account.

[21] In her memo informing the grievor of that suspension, Ms. Westfall wrote the following:

...

On August 4, 2006 9:43 am you distributed a string of email to a number of persons that contained an attachment outlining a harassment complaint against Mr. Brain Joyce. This email was distributed to the Regional Deputy Commissioner and to persons who did not have an obvious need to know, These persons include Mr. John Oddie and Mrs. Beth Hoedicke. Both Mr. Oddie and Ms. Hoedicke did not have a need to know any information related to a complaint of harassment against Mr. Joyce.

On this same date you sent emails pertaining to the Telephone in the Boiler room and copied this email to Ms. Debbie Gipson and Mr. James Jackson. Contained in the string of emails you made reference to your harassment complaint against Mr. Joyce.

This occurred after your corporate email access was restored on August 1, 2006 and within days of being advised of the policy on the use of email. You were also provided a hard copy of that policy.

You have been previously counselled by the Director of the Staff College regarding appropriate use of email.

You were counselled by the RA Tech Services on appropriate use of email.

In a letter from CSC Legal Counsel Mel Sater dated April 6, 2006; Mr. Sater asked that your legal counsel discuss appropriate use of email with yourself.

[Sic throughout]

...

[22] Ms. Westfall scheduled a meeting with the grievor for September 28, 2006 to discuss several work-related issues with him, including his refusal to perform some tasks that were assigned to him. Mr. Joyce and Helen Ronan from the human resources branch also attended the meeting. Ms. Westfall accepted the grievor's request that the meeting be audiotaped. The tape was adduced as evidence, and Ms. Westfall testified to clarify its content. During the meeting, the grievor complained about his physical work environment and about the sound level. The grievor's tone was aggressive and, at several points, he yelled at Ms. Westfall. He also interrupted her while she was talking. Ms. Westfall took offence with the grievor's tone, and she told him that his behaviour was unprofessional. The grievor accused Ms. Westfall of harassing him. He also accused Mr. Joyce of lying. At some point, the grievor said that he was stressed. Ms. Westfall then decided to stop the meeting.

[23] On November 8, 2006, Ms. Westfall imposed a one-day suspension on the grievor for his behaviour at the September 28, 2006 meeting. In the suspension letter, Ms. Westfall wrote that the grievor had conducted himself in a manner that was insubordinate, aggressive and abusive. The grievor filed a harassment grievance against Ms. Westfall. That grievance was denied at the final level of the grievance procedure and was not referred to adjudication.

[24] The respondent believed that it was important for the grievor to be given a site tour of the Joyceville penitentiary so that he would better understand the facilities and the fire safety information that needed updating. On October 18, 2006, at 08:59, Wendy Smith advised the grievor by email that Mr. Kearney would give him the tour. At 09:07, the grievor acknowledged Ms. Smith's email and asked to be advised in advance so that he could go on the tour. Ms. Smith showed up later at the grievor's workstation. The grievor refused to go on the tour because he was busy and because it would take too much time considering that he would need to take notes on several systems.

[25] On October 31, 2006, at 15:08, Ms. Westfall sent an email to the grievor to inform him that she would make arrangements to give him a tour of the facilities with a correctional manager the next day. At 15:18, the grievor replied that he needed a technical person to show him the general location of the fire systems and other related details. At 16:34, Ms. Westfall replied to the grievor's email and maintained her position that a correctional manager would give the tour.

[26] At 09:00 on November 1, 2006, Messrs. Ngai and Joyce went to the grievor's workstation to give him a tour of the facilities. The grievor was upset and insisted that the conversation be taped. After the incident, Messrs. Ngai and Joyce each completed an observation report to document the incident. Mr. Joyce wrote that the grievor insisted that any conversation be taped, pointing to a tape recorder and his finger. He also wrote that the grievor escalated the incident to the point of confrontation, that he was agitated, that he continually raised his voice, that he refused to listen to anything Mr. Ngai had to say and that he was focused on imposing his point of view. In his report, Mr. Ngai wrote that at some point he told the grievor that the conversation was finished and that he would see the warden about the incident. He also wrote that the grievor's imposing behaviour was threatening and completely unacceptable.

[27] On December 1, 2006, Ms. Westfall imposed a three-day suspension on the grievor for his behaviour on November 1, 2006. In the suspension letter, Ms. Westfall wrote that the grievor demonstrated hostility and aggression towards Messrs. Ngai and Joyce and that it was unacceptable. By his behaviour, the grievor violated the CSC Standards of Professional Conduct. Ms. Westfall also wrote that she took into consideration that the grievor was previously disciplined for his abusive and insubordinate behaviour of September 28, 2006 and that he had not corrected his behaviour.

[28] Ms. Westfall testified that the CSC takes harassment very seriously. The CSC adheres to the Treasury Board's policy on harassment. The CSC has regional anti-harassment coordinators who handle complaints. The respondent adduced the harassment policy in evidence. That policy defines harassment and establishes the responsibilities of employees, complainants, respondents, witnesses, managers and investigators. Employees must submit their complaints in writing within one year of the alleged harassment. Unless there are extenuating circumstances, the delegated manager screens out complaints filed outside that one-year period.

[29] Ms. Westfall explained that her role was to facilitate the grievor's return to work after his absence for health reasons. During that period, Mr. Joyce supervised the grievor and ultimately reported to Ms. Westfall, the warden for Joyceville penitentiary. In summer 2006, Ms. Westfall received Mr. Chambers' detailed report. He had completed an investigation into harassment complaints filed by seven CSC employees against the grievor. In his report, dated May 1, 2006, Mr. Chambers concluded that there were four founded allegations of inappropriate behaviour by the grievor.

[30] Based on Mr. Chambers' finding, Ms. Westfall imposed a one-day suspension on the grievor. In the suspension letter, dated November 6, 2006, Ms. Westfall blames the grievor for the following: accusing Mr. Clooney of breaking the butterfly valve and revealing that suspicion to an inmate, following staff members into washrooms, referring to staff members in a derogatory manner, and stating to Mr. Holland that he was so mentally and physically unstable that he belonged in a hospital, not a central heating plant. Ms. Westfall noted that the grievor showed no remorse for his behaviour.

[31] Ms. Westfall was preoccupied with the grievor's health, and she started wondering if he were healthy enough to stay in the workplace. He was out of control in his work area, where there are inmates and other staff members. Ms. Westfall had already provided the grievor, on September 29, 2006, with a list of names and phone numbers of persons who could be contacted if the grievor felt that he needed some assistance from the Employee Assistance Program.

[32] On October 28, 2006, Ms. Westfall wrote a lengthy letter to Dr. Jeffrey Chernin, Occupational Health Medical Officer, Health Canada. Dr. Chernin had previously examined the grievor. She asked Dr. Chernin to clarify the grievor's fitness to continue to work in any environment. Specifically, Ms. Westfall asked Dr. Chernin if the grievor was fit to return to his full-time duties as a first-class stationary engineer and to return to his substantive position at the Bath penitentiary. She also asked that the grievor's limitations be indicated if he was not fit to return to full-time duties, and the relevant time frame. Finally, Ms. Westfall asked if the grievor was fit to participate in meetings, grievance hearings or disciplinary hearings.

[33] On January 25, 2007, Dr. Chernin answered Ms. Westfall's inquiry into the grievor's health. Dr. Chernin wrote the following:

...

Based on our consultant's recommendations, with which I am in full concurrence, it is recommended that Mr. Singaravelu should not return to work at Corrections Canada. He would however be suitable for an alternative position at an equivalent level outside of Corrections Canada in another area of the Federal Public Service. I would not place any limitations on his employment in those areas at this time.

...

[34] Ms. Westfall had never seen such a medical assessment by Health Canada. Usually, assessments include limitations but this time it was a complete ban from working at the CSC. Ms. Westfall consulted a CSC specialist at national headquarters, and she wrote to the grievor on February 16, 2007 to inform him of the situation and to instruct him not to show up to work again. Ms. Westfall asked the grievor to contact Ms. Ronan in the human resources branch and to indicate to her the location as well as the type of position for which he would like to be considered. Ms. Westfall also asked for an updated copy of the grievor's curriculum vitae. She also sent him a federal public service self-identification form. Ms. Westfall informed the grievor that he would be on sick leave until February 28, 2007. Following that date, the grievor would be on leave without pay.

[35] On March 14, 2007, Ms. Ronan communicated with the grievor to give him information on the job websites of the Ontario and the federal governments. She also suggested to the grievor that he register for the Public Service Career Watch. She gave him National Defence and Veterans Affairs department phone numbers. That same day, the grievor replied that he should be allowed to access the CSC's intranet for his job search. He also wrote that he would not contact any federal or provincial departments because they would not consider a candidate of his age and because it was not his duty to do so.

[36] Ms. Westfall testified that the grievor never provided any medical certificate that contradicted the medical assessment written by Dr. Chernin on January 25, 2007. Even if the CSC had no obligation to help the grievor, it decided to provide him with some assistance in his job search. A full binder of job offers that the CSC sent to the grievor was adduced in evidence. Ms. Westfall preferred to provide the grievor with written

copies of job listings rather than providing him with intranet access. There were some concerns about how he would use the intranet because of his past behaviour.

[37] In cross-examination, Ms. Westfall stated that, before the grievor's arrival at Joyceville penitentiary, his discipline record was clean. Because he was temporarily assigned to that penitentiary, any discipline would have to be imposed by the managers working there. Considering the tense relationship that existed between Mr. Joyce and the grievor, Ms. Westfall decided to handle the discipline herself. Furthermore, the regional management asked her to decide whether to discipline the grievor for the harassment incidents that occurred at the Bath penitentiary, because the warden there was leaving. Ms. Westfall was instructed to make that decision in June 2006. However, a lot of correspondence with the grievor needed handling at that time, and the grievor was away on sick leave several times.

[38] Ms. Westfall wanted the grievance hearing to take place in October 2006, but the grievor produced a medical certificate stating that the hearing could have an adverse affect on his recovery. Ms. Westfall finally decided that there would be no hearing. Rather, the grievor would be offered the opportunity to make a submission in writing and to submit the documents that he wanted Ms. Westfall to consider before she made a final decision on the discipline. The submission would be about the following three discipline incidents: harassment at the Bath penitentiary, inappropriate distribution of an email and insubordinate conduct during the September 28, 2006 meeting.

[39] During cross-examination, the grievor submitted a copy of a declaration that he signed on October 23, 2006, attesting that he received the CSC Standards of Professional Conduct and the Code of Discipline. Ms. Westfall testified that she asked the grievor to sign that new declaration to refresh his memory. The grievor had already signed it on March 12, 2003.

[40] Ms. Westfall testified that harassment investigators are appointed by the anti-harassment coordinator in consultation with the human resources branch. The investigators are normally CSC managers trusted by management and the bargaining agent. Nobody has the authority to order an investigator to change his or her report. Ms. Westfall made her decision to discipline the grievor based on Mr. Chambers' investigation report.

[41] During cross-examination, the grievor adduced in evidence several emails that CSC managers had exchanged about him.

[42] On June 7, 2006, Mike Sadler, a labour relations officer from the CSC's Ontario region, wrote an email entitled, "Next steps - Singa." Of particular interest is the following, which he wrote to Ms. Westfall: "If I may be blunt, this matter has potential for very serious implications for the individual and I am sure Nancy requires the on-hands involvement of you EX types." In her testimony, Ms. Westfall explained that the comment did not refer to discipline but rather to the seriousness of the return-to-work plan. Initially, the return-to-work plan was supposed to be for three months, and the grievor was to return to the Bath penitentiary after that.

[43] On October 11 and 12, 2006, Mr. Sadler and Ms. Westfall exchanged emails. Ms. Westfall detailed the problems that she was experiencing with the grievor. She asked for clarification on several issues, including the timing of discipline for the harassment at Bath penitentiary, the possibility of another fact-finding investigation into his refusal to return to work, her reluctance to refer the grievor back to Heath Canada, and the option of demoting or firing him. Ms. Westfall also wrote that she thought that the human rights investigator had begun his or her investigation and that the issue of timing was looming. Ms. Westfall explained in her testimony that there was a consensus that the grievor was fit to do his work but that he was behaving in a very defiant manner.

[44] On October 10 and 11, 2006, Mr. Sadler and Ms. Westfall also exchanged emails. Ms. Westfall asked if any consideration was given to demoting the grievor since he apparently did well at National Defence as a shift engineer and once promoted did not do well. In his reply, Mr. Sadler wrote the following: "That is exactly where I want this to go and why we are on the conference call this week." Ms. Westfall explained in her testimony that the grievor seemed to have had success in his previous employment as a shift engineer, but when he was appointed supervisor at Bath penitentiary, there were problems with his performance. Ms. Westfall said that she was just exploring how to accommodate the grievor.

[45] On September 29, 2006, Mr. Sadler wrote an email to Ms. Westfall to indicate that, if the grievor took sick leave for more than a couple of days for excess stress, she should ask for a medical certificate. He also wrote the following: "This is an

opportunity, let's not miss it." When asked to explain what Mr. Sadler meant by this comment, Ms. Westfall answered that she did not know.

[46] On November 24, 2006, Ms. Westfall sent an email to Nancy Stableforth, the deputy commissioner for the CSC's Ontario region. Referring to the grievor, Ms. Westfall briefly explained the discipline that had been imposed on him. She also wrote that there were 4 other issues that required a disciplinary hearing and that within the next 2 weeks, he would reach the 10-day disciplinary mark and that he would be close to termination. She added that the strategy was to have Dr. Chernin from Health Canada see the grievor as soon as possible, before any decision to terminate was made. In her testimony, Ms. Westfall explained that the grievor's infractions were piling up and that the CSC was on a disciplinary path with him. He had already received three suspensions, and more were coming. Based on what she had observed, Ms. Westfall believed that the grievor would continue with his incorrect behaviour and that ultimately it could lead to termination. At the same time, she had made the decision to refer him to Dr. Chernin for an assessment.

B. Mr. Joyce's testimony

[47] The grievor reported directly to Mr. Joyce during his temporary assignment to the Joyceville penitentiary. The grievor was assigned to perform five tasks that did not represent the full duties of an HP-08 employee. The grievor was not asked to supervise staff, which an HP-08 employee normally does. The grievor was fully qualified to perform those tasks, which were clearly explained to him. To perform his duties, the grievor needed a tour of the facilities. Mr. Joyce had tried to arrange one, but the grievor wanted to be advised of the precise time that the tour would take place. It was impossible to set a specific time because security needs could not be assessed in advance.

[48] On August 4, 2006, the grievor advised Mr. Joyce by email that he had filed a formal harassment complaint against him and that he wished to refrain from any contact with him until his complaint had been investigated. Mr. Joyce was surprised when he read that email because he felt that he had always treated the grievor fairly. In his 28 years at the CSC, no harassment complaint had ever been made against him. He felt that it was highly inappropriate that the grievor informed several people by email that he had filed a complaint. Those people included two employees reporting to Mr. Joyce, in addition to other managers. Mr. Joyce was troubled that those people

were made aware of the complaint. He felt that it was extremely invasive on him, and it was undermining his authority.

[49] Mr. Joyce remembers well the September 28, 2006 meeting with the grievor and Ms. Westfall. Ms. Westfall called it to provide the grievor with some clarification on his assignment and his tasks. The grievor did not want Mr. Joyce to talk about the assignment, and he did not want to take direction from him. Rather, he wanted to impose his own ideas. The grievor was extremely angry during the meeting. He was aggressive, disrespectful and threatening. Mr. Joyce had never encountered behaviour like it from someone reporting to him.

[50] On October 31, 2006, Ms. Westfall advised the grievor that the tour would take place the next day, without specifying the exact time. On November 1, 2006, Mr. Joyce, accompanied by Mr. Ngai, showed up at the grievor's office. The grievor saw them coming, and he met them at the door in a very aggressive manner. He had a tape recorder in his hand, and he told Messrs. Joyce and Ngai that he would record everything that they said. It was very clear that the grievor had no intention of listening to what they had to say. Mr. Joyce was concerned that the grievor would turn violent. The grievor had an aggressive stance and posture. He was angry, loud and out of control. He pointed his finger at Mr. Ngai, almost to the point of assault. He was very intrusive, and his behaviour was completely unacceptable. Inmates work in that area, making things worse. Messrs. Joyce and Ngai removed themselves to avoid an escalation of the situation.

[51] In cross-examination, Mr. Joyce explained that he had developed the five tasks or work objectives assigned to the grievor on his arrival at Joyceville penitentiary. According to him, the grievor was fully qualified to perform those tasks. On the September 28, 2006 meeting, Mr. Joyce remembered that at some point the grievor said that he was stressed, and he asked that the meeting be stopped. The meeting was then stopped.

C. Mr. Ngai's testimony

[52] In 2006, Mr. Ngai was in charge of inmate movements in his unit. He was very familiar with the installation at Joyceville penitentiary. On occasion, he would give a tour of the installation to new employees when the warden asked. Mr. Ngai explained that every time an incident or something abnormal happens, correctional employees

are supposed to write an observation report to document the incident. That is why he wrote a report after the incident with the grievor on November 1, 2006.

[53] That day, Mr. Ngai walked with Mr. Joyce to the power house where the grievor was working to give him a tour of the facilities. When the grievor saw them arriving, he stood up with a tape recorder. He was speaking rudely and abruptly, and he pointed his finger at Mr. Ngai. The grievor's voice and body language were aggressive. Mr. Ngai told him to stop, but the grievor was not listening. Messrs. Ngai and Joyce decided to leave. Mr. Ngai testified that, in his entire career, he has never been treated that way by another employee.

D. Mr. Chambers' testimony

[54] Mr. Chambers was asked by the CSC Ontario region to conduct an investigation into harassment complaints filed against the grievor in March 2005 by employees of the Bath penitentiary. Mr. Chambers is very familiar with the Treasury Board policy on harassment. He has been trained in harassment investigation, and he has conducted about 25 investigations in his career, 5 of them harassment investigations.

[55] Mr. Chambers interviewed the complainants in April and May 2005. Mr. Chambers offered to interview the grievor, but he refused and instead chose to submit several documents. Mr. Chambers provided the grievor with a copy of his preliminary findings on September 21, 2005. On September 30, 2005, the grievor wrote to Mr. Chambers, indicating that he was unhappy with Mr. Chambers' findings, and he requested that the investigator withdraw from the process. Mr. Chambers indicated in his report that he was instructed not to proceed with the finalization of his report by the CSC Ontario region. That instruction changed on April 27, 2006, when he was directed to complete his report.

[56] Of the 25 allegations made by the complainants, Mr. Chambers concluded that the following 4 were founded: (1) accusing Mr. Clooney of breaking the butterfly valve and revealing that suspicion to an inmate, (2) following staff members into washrooms, (3) referring to staff members in a derogatory manner, and (4) stating to Mr. Holland that he was so mentally and physically unstable that he belonged in a hospital, not a central heating plant. Mr. Chambers' report indicates that those events occurred around the following times: allegation (1), in fall or November -December 2003; allegation (2), fall 2003 - winter 2004; allegation (3), fall

2003; and allegation (4), summer 2003. There are no comments in Mr. Chambers' report to indicate if there were extenuating circumstances that prevented the complainants from filing their complaint within one year of the incidents.

[57] During his interviews, Mr. Chambers did not find that the complainants were motivated by racism. Rather, their complaints were related to the grievor's management style. Mr. Chambers' role was limited to fact-finding and to writing his report. He was not involved in deciding to discipline the grievor.

[58] In cross-examination, Mr. Chambers said that he thought that the investigation was fair, even though the grievor was not interviewed. Although he was invited to be interviewed several times, he refused. Mr. Chambers said that he was not aware of the two reports signed by Dr. Chernin on January 25, 2005 and on April 14, 2005, about the grievor's health and fitness to work. In his January report, Dr. Chernin wrote that the grievor should be considered fit for a trial return to the workplace. In April, he reiterated that the grievor was fit to work. He stated that there were some administrative issues to be addressed. Among those issues, the CSC had to ensure that the duties assigned to the grievor were possible for an employee to perform in 37.5 hours a week. Mr. Chambers testified that, even had he seen those reports from Dr. Chernin, he would have gone ahead with his investigation.

[59] Mr. Chambers also testified that, had he been presented with a medical certificate like the one the grievor presented on October 20, 2006, he would have postponed his investigation. In that certificate, the doctor advised that the grievor's recovery would be adversely affected were he asked to participate in a disciplinary hearing on October 23, 2006.

E. Testimony of Messrs. Clooney, Foster and Holland

[60] Before Mr. Clooney began to testify, the grievor asked to be allowed to question the witness directly, rather than to have his counsel ask the questions. I refused that request and stated that the grievor's counsel would be authorized to ask questions in cross-examination. I would not permit the grievor to directly question a witness who filed a harassment complaint against him. If there were questions of a technical nature related to the grievor's trade, the grievor could write them for his counsel who could then ask them. If time were needed to prepare those questions, I would allow breaks for that purpose.

[61] Mr. Clooney testified that the grievor was always in a hurry and that he would follow him into the washroom. Mr. Clooney told the grievor to stop, but he continued. Mr. Clooney testified that a meeting was held in November 2003 or 2004 with all the other engineers, and they discussed the problems that they were experiencing with the grievor. They decided to write down their facts. For Mr. Clooney, the problem had nothing to do with the grievor's culture but rather with his attitude at work. In cross-examination, Mr. Clooney admitted that he and other employees used to take very long lunch breaks that often lasted over an hour-and-a-half.

[62] Mr. Foster testified that he heard the grievor make negative comments about Messrs. Clooney and Holland. At some point, Mr. Foster started to take time off because of the work climate. Mr. Foster explained that they waited a long time to file their complaints because they had raised the issue with the manager, and they thought that the issues would settle down. Mr. Foster testified that he saw the grievor following Mr. Clooney into the washroom. The grievor also followed Mr. Foster into the washroom.

[63] Mr. Holland testified that, when the grievor was appointed as his supervisor, he shared with him that he had a disability. At the beginning, they shared a strong trust, but things changed after two or three months. According to Mr. Holland, the grievor was using the information about his disability against him. That situation created high stress for Mr. Holland, who started not to sleep well. In cross-examination, Mr. Holland could not remember the derogatory comments that the grievor was accused of making to him.

III. Summary of the arguments

A. For the respondent

1. Abandonment of the grievances

[64] On August 26, 2009, the Board sent a notice of hearing for the continuation of this proceeding. The notice of hearing specified that, if the grievor failed to attend the hearing or any continuation, the Board might dispose of the matter on the evidence adduced and representations made at the hearing without further notice to him. On September 4, 2009, counsel for the grievor sent an email to the Board demanding that the entire proceeding be video recorded and stating that, if his demand were not met,

he would not participate in further hearings. His demand was not met, and the grievor refused to attend the hearing. Given the grievor's refusal to attend the hearing as scheduled, the respondent submits that he has either abandoned his grievances or withdrawn from the adjudication process, and therefore, the grievances should be dismissed.

[65] In support of that argument, the respondent referred me to the following previous Board decisions: *Synowski v. Deputy Head (Department of Health)*, 2007 PSLRB 63; and *Jeewanjee v. Treasury Board (Canadian International Development Agency)*, 2007 PSLRB 109.

2. PSLRB File No. 566-02-800

[66] Staff members who reported to the grievor filed complaints that he had harassed them. Accordingly, in April 2005, an investigation began into the harassment allegations. The investigator, Mr. Chambers, concluded that the following four allegations made by the complainants were founded: (1) accusing Mr. Clooney of breaking the butterfly valve and revealing that suspicion to an inmate, (2) following staff members into washrooms, (3) referring to staff members in a derogatory manner, and (4) stating to Mr. Holland that he was so mentally and physically unstable that he belonged in a hospital, not a central heating plant.

[67] Mr. Chambers testified about the grievor's refusal to be interviewed, despite numerous requests.

[68] The facts revealed by the investigation show that the grievor's actions warrant discipline. The grievor's behaviour was in clear breach of the CSC Standards of Professional Conduct that he had agreed would govern his behaviour. Under the circumstances, the one-day suspension levied as a result of the harassment allegations was not unreasonable.

[69] In support of those arguments, the respondent referred me to the following decisions: *Nowen v. Treasury Board (Solicitor General - Correctional Service Canada)*, 2001 PSSRB 47; *Loyer v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 16; and *Sobey's Inc. v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 1090*, (2004) 126 L.A.C. (4th) 334.

3. PSLRB File No. 566-02-842

[70] When the grievor began his assignment at Joyceville, he requested access to a computer and to his email password. The uncontradicted evidence is that the grievor was counselled about the appropriate use of electronic networks and warned of potential disciplinary action for inappropriate use.

[71] On August 4, 2006, the grievor sent two messages accusing Mr. Joyce, his supervisor, of harassing him. In addition to using insubordinate and abusive language to Mr. Joyce, the grievor copied the message to other employees. Some were other managers who were not involved in the harassment complaint; others were subordinates of Mr. Joyce. It created a negative work environment.

[72] Separate and apart from the issue of the use of electronic networks, the grievor's email was insubordinate in tone and content and deserves discipline. He undermined the authority of his supervisor and was disrespectful. Under the circumstances, particularly given the grievor's lack of remorse and lack of insight into his actions, a one-day suspension was appropriate and ought not to be interfered with.

[73] In support of those arguments, the respondent referred me to the following decisions: *Briar et al. v. Treasury Board (Solicitor General Canada - Correction Service)*, 2003 PSSRB 3; and *Camosun College v. Canadian Union of Public Employees, Local 2081*, [1999] B.C.C.A.A.A. No. 490 (QL).

4. PSLRB File No. 566-02-843

[74] On September 28, 2006, the grievor met with Mr. Joyce and Ms. Westfall. Ms. Ronan from the human resources branch was also present as an observer. At the grievor's request, the meeting was audiotaped. A copy of that tape was entered into evidence at the hearing. Ms. Westfall and Mr. Joyce testified that the grievor was very aggressive, that he interrupted continually and that he would not listen. In the discipline letter of November 8, 2006, Ms. Westfall wrote that the grievor had conducted himself in a manner that was insubordinate, aggressive and abusive, despite numerous cautions to behave appropriately.

[75] The evidence adduced at the hearing about the grievor's insubordinate behaviour is clear and uncontradicted. Relative to the circumstances and the authorities on point, a one-day suspension was entirely reasonable.

[76] In support of those arguments, the respondent referred me to the following decisions: *Crossley Carpet Mills Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Local 4612*, [2003] N.S.L.A.A. No. 22 (QL); and *MacLean v. Treasury Board (Revenue Canada - Customs, Excise & Taxation)*, PSSRB File No. 166-02-27968 (19990107).

5. PSLRB File No. 566-02-949

[77] The grievor requested a tour of the penitentiary and was advised that one was to be arranged for him on November 1, 2006. On the morning of November 1, 2006, Messrs. Ngai and Joyce went to the grievor's office. The grievor met Messrs. Ngai and Joyce at the door of his office and immediately started to behave in an extreme manner. He was focused on recording the exchange and waved around a tape recorder around. He had an aggressive stance, was loud and was out of control. He pointed his finger in Mr. Ngai's face.

[78] Ms. Westfall was justified in imposing a three-day suspension for the incident. The grievor demonstrated hostility and aggressiveness toward Messrs. Ngai and Joyce, and his actions were unprovoked. The grievor had previously disciplined for abusive and insubordinate behaviour at the September 28, 2006 meeting and had not corrected his behaviour. Furthermore, there is no evidence before the adjudicator of any mitigating factors.

[79] In support of those arguments, the respondent referred me to the following decisions: *Thomas v. Treasury Board (Revenue Canada - Customs, Excise and Taxation)*, PSSRB File Nos. 166-02-27608, 28503 and 28504 and 149-02-172 (19991105); *Robillard v. Treasury Board (Department of Finance)*, 2007 PSLRB 41; and *Otis Canada Inc.*, [2005] O.L.R.D. No. 4077 (QL).

6. PSLRB File No. 566-02-1268

[80] On January 25, 2007, Health Canada advised the CSC that the grievor was not fit to return to work at the CSC. On February 16, 2007, Ms. Westfall wrote to the grievor and advised him that, as a result of the medical recommendations, he would not be returning to work at the CSC. The grievor was advised that he could use his sick leave credits initially, after which he would be placed on leave without pay as of February 28, 2007.

[81] In his grievance, the grievor stated that he takes issue with the decision to place him on leave without pay. While he does not specify any dispute with the finding that it would be medically inadvisable for him to return to work at the CSC, he does state his view that his medical issues are the respondent's fault due to its alleged failure to accommodate him. He also refers to the fact that disability benefits or unemployment insurance would provide him with less money than his full salary and benefits.

[82] If the grievance purports to address matters governed by the collective agreement, such as leave without pay status (articles 34 and 52) or failure to accommodate (article 19), then both clause 18.02(b) and subsection 209(2) of the *Act* preclude the grievor from presenting such a grievance without the approval and representation of the bargaining agent. The grievor is not represented by his bargaining agent in this proceeding.

[83] The referral-to-adjudication form refers this grievance under paragraph 209(1)(b) of the *Act*. The grievor now alleges that the respondent's actions constituted disciplinary action resulting in termination, demotion, suspension or financial penalty. The respondent's position is that there was no disciplinary action; rather, the grievor was placed on leave without pay as a direct result of the Health Canada letter. Therefore, the respondent's action was administrative in nature, and the Board is without jurisdiction over this grievance.

[84] For the adjudicator to consider the grievance, he has to decide whether the respondent's action of placing the grievor on leave without pay amounts to disguised discipline. Although the grievor was placed on leave without pay and was not suspended, the case law on whether a suspension is administrative or disciplinary can apply by analogy. In determining whether the action of placing the grievor on leave without pay was administrative or disciplinary, it is appropriate for the adjudicator to consider whether it was the respondent's intention to punish the grievor.

[85] Ms. Westfall's letter of February 16, 2007 is clear in its purpose and effect. It follows Health Canada's medical recommendation that the grievor not return to work for the respondent. The grievor has not presented any evidence that it was inappropriate for Ms. Westfall to rely on Health Canada's recommendations. The respondent had the right and obligation to require that the grievor be fit for work. On learning that the grievor was not fit to return to work at the CSC, it would have been inappropriate for the respondent to disregard the recommendation of the medical

experts. Nothing whatsoever in the letter is disciplinary in nature, and there is no indication of punishment for the grievor.

[86] After the grievor was placed on leave without pay, the CSC offered him assistance in securing a position elsewhere in the public service and provided some relevant suggestions and advice. The respondent adduced in evidence detailed information about the CSC's efforts to assist the grievor with his job search. The respondent submits that its willingness to assist the grievor with his job search is contrary to any suggestion that its actions were disciplinary.

[87] The grievor bears the burden of proof of establishing that placing him on leave without pay was disciplinary rather than administrative. In the absence of oral evidence, which can be tested in cross-examination, the grievor cannot discharge this burden of proof. Therefore, on the evidence that is before the adjudicator, it is clear that the Board does not have jurisdiction over this grievance. Accordingly, it would be appropriate to dismiss the grievance for lack of jurisdiction.

[88] In support of those arguments, the respondent referred me to the following decisions: *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109; *Shneidman v. Canada (Attorney General)*, 2007 FCA 192; *Delage v. Treasury Board (Department of Fisheries and Oceans)*, 2008 PSLRB 56; *Hanna v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2009 PSLRB 94; *Lee v. Deputy Head (Canadian Food Inspection Agency)*, 2008 PSLRB 5; *Canada (Attorney General) v. Frazee*, 2007 FC 1176; *Canada (Attorney General) v. Basra*, 2008 FC 606; *Garcia Marin v. Treasury Board (Department of Public Works and Government Services Canada)*, 2006 PSLRB 16; and *Rinke v. Canadian Food Inspection Agency*, 2004 PSSRB 143.

B. For the grievor

1. PSLRB File No. 566-02-800

[89] This disciplinary matter relates to findings of harassment against the grievor pursuant to harassment complaints filed against him by his coworkers at Bath penitentiary. Senior management was ordered to investigate the complaints, which management received for events that occurred some years before; the grievor was not given the opportunity to respond to the allegations. The information that the investigator considered was incomplete, and the grievor was never interviewed.

Notably, documentary evidence available to the investigator at Bath penitentiary was not considered.

[90] The formal complaints were signed in 2005 and cited incidents that occurred in some cases as early as summer 2003. The complaints were made at the behest of management at a meeting with the plant engineers held in the grievor's absence.

[91] According to the Treasury Board's harassment policy, something should have been done to address the several issues directly with the grievor before the harassment complaints against him were formalized. Articulating formal complaints against the grievor without following the necessary protocol for addressing the issues is unusual and appears to have been designed to elicit a disciplinary penalty. The timing and context of the harassment complaints must be questioned.

[92] Further, there is a lack of clear evidence to support the four incidents for which the grievor was found guilty of harassment. Mr. Holland did not remember the grievor making the derogatory comments that he is accused of having made to Mr. Holland. Mr. Clooney could not account for the contradictory evidence of Al Lewin about the washroom incidents. The investigator could not provide any specific date on which the grievor allegedly made discriminatory comments about the complainants.

2. PSLRB File No. 566-02-842

[93] The respondent disciplined the grievor for disseminating information about a harassment complaint that he had filed against Mr. Joyce. Specifically, the grievor was disciplined because he disseminated the information to persons who did not have a need to know about the complaint. Nowhere in the relevant policies cited by the respondent is there an indication of a "need to know basis" use for the CSC's email system. This is an important point since the respondent is not invoking a blanket prohibition against communicating complaints through email. Rather, a case-by-case analysis of the appropriateness of any email is required with reference to the governing policies.

[94] The respondent argued that clearly the grievor was made aware of the policies on Internet use at the CSC. However, it is not clear how the grievor's actions constituted a violation of the standards of professional conduct. There is no mention of non-disclosure of information to persons on a "need to know basis." Moreover, the

operative provision indicates that employees must not be critical of policy or operations in front of offenders or the public.

[95] There is no indication of how a complaint about workplace activities addressed to a supervisor constitutes disclosure of personal information. No personal information was disclosed, and to the extent that information was disclosed about operational matters at the CSC to CSC staff, no privacy or access-to-information legislation was triggered.

[96] The discipline notice was not framed as the harassment of coworkers or staff, and no indication was given that the grievor had no right to complain. It is submitted that, while Ms. Hoedicke thought that the grievor's communications were inappropriate, she was precisely the person who should have been informed of such a complaint. She did not report to Mr. Joyce and, in fact, held a temporary supervisor role over the grievor at the relevant time. There was no evidence that Ms. Gipson or Mr. Jackson made complaints.

3. PSLRB File No. 566-02-843

[97] Before the September 28, 2006 meeting, the grievor made his intention clear that he wanted advance notice of any meeting so that he could make adequate arrangements to attend or to arrange for a representative to attend. As stated in the audio recording, he had also asked for an agenda, which was not provided. Given the atmosphere of distrust between the parties, the meeting was recorded, which in itself is indicative of its strained nature.

[98] Even though the meeting was organized without giving the grievor advance notice, as he had requested, he agreed to attend. His stress was initiated when Ms. Westfall's refused to grant him a break when he began to suffer anxiety. Rather than assisting the grievor, Ms. Westfall and Mr. Joyce elected to continue, adding to the grievor's stress and discomfort. The meeting, which was held without notice and in a hurried fashion, stressed the grievor and directly impacted his state of mind and mental and physical well being.

[99] It was inappropriate to continue the meeting despite the grievor's protests. Accordingly, on the grounds of both lack of procedural fairness and failure to

accommodate, the grievor's conduct during the September 28, 2006 meeting should not be a basis for disciplining him.

4. PSLRB File No. 566-02-949

[100] Mr. Joyce arranged the visit with Mr. Ngai without informing the grievor that the tour would take place on November 1, 2006. Accordingly, on November 1, 2006, the grievor could not have been aware of the visit and did not know of Mr. Ngai's role or position. Further, there was no evidence that inmates overheard or witnessed the grievor's behaviour or statements.

[101] Mr. Ngai was not aware of the existing issues between the grievor and Mr. Joyce or that the grievor had filed a harassment complaint against Mr. Joyce. At the time, Mr. Ngai had no idea why the grievor acted as he did but admits that, had he had more information, his approach would have been different.

[102] As is evident from Health Canada's assessment of the grievor based on an evaluation in January 2007, he was under tremendous stress at the relevant time, so much so that it was recommended that he not return to the CSC. Accordingly, any untoward behaviour by the grievor is mitigated by his health condition. Neither Mr. Joyce nor Ms. Westfall provided any information as to why the grievor was not alerted to the fact that there would be a tour on November 1, 2006. Had some advance notice been provided to the grievor, the misunderstanding of that morning could have been averted.

[103] The November 1, 2006 meeting raises issues of both reasonable accommodation and notice, issues that are interrelated in this case. Mr. Joyce knew about the grievor's sensitivities, and he should have taken steps to properly accommodate him. Indeed, the meeting in question could have been a disciplinary meeting or something similar such that representation or some kind of record would have been available for the grievor.

5. PSLRB File No. 566-02-1268

[104] The respondent argued that this grievance, in both form and substance, relates to breaches of the collective agreement over which the Board has no jurisdiction. The grievance refers to the employer's bad faith in repeatedly failing to abide by Health

Canada's recommendations and in being unwilling to provide the grievor with required training opportunities.

[105] While the respondent pointed out that the nature of the grievance potentially engages provisions of the collective agreement, so too would any discriminatory firing or unlawful suspension. However, where the action in question results in a financial loss for the grievor, it is a permissible basis for referral to adjudication in the absence of approval from the grievor's bargaining agent. Compartmentalizing grievances as either disciplinary or violations of the collective agreement is false.

[106] From the content of the grievance of February 26, 2007, the respondent was clearly able to discern its substance. The grievance relates to the respondent's bad-faith refusal to accommodate the grievor, which resulted in an ongoing financial penalty. It is tantamount to firing the grievor. However, the fact that the grievor's employment has not been terminated does not render moot the bad-faith conduct and the deliberate failure to accommodate the grievor's needs.

[107] From the grievance, it is also apparent that the grievor is seeking the ability to access the CSC's employment search resources from its intranet. That is a reasonable request, and the respondent has not articulated any labour-relations reason for its denial. On the facts, the evidence shows that the respondent did not provide a single reference or opportunity for the first three months following Health Canada's January 25, 2007 letter.

[108] The grieved actions were disciplinary in nature. The articulation of the grievor's position on that point is clear from the grievance itself. The respondent's failure to provide any assistance or referral to the grievor in the first three months following Health Canada's recommendation substantiates the allegation of irregular and unwarranted conduct, which effectively disciplined the grievor. Moreover, it must be contextualized within an overarching and deliberate strategy by the respondent to discipline the grievor to termination.

[109] The grievor referred me to *Canada (Attorney General) v. Matthews*, [1997] F.C.J. No. 1692 (QL); *Toronto East General & Orthopaedic Hospital Inc. v. A.A.H.P.O.* (1989), 8 L.A.C. (4th) 391; *Canada (Attorney General) v. Grover*, 2007 FC 28; and *Olson v. Canada (Attorney General)*, 2008 FC 209.

6. Context of all the grievances

[110] The grievor submitted that the respondent was involved in a deliberate strategy, organized at the senior management level and involving management at the Joyceville penitentiary, to discipline him to the point of termination.

[111] On June 7, 2006, Mr. Sadler wrote to Ms. Westfall, referencing a strategy that would have “serious implications” for the grievor. The CSC’s strategy was designed to isolate and punish the grievor given the perception of him as a problem employee. In particular, Mr. Sadler wrote the following: “If I may be blunt, this matter has potential for very serious implications for the individual and I am sure Nancy requires the on-hands involvement of you EX types.”

[112] Even before the grievor began his assignment at Joyceville in July 2006, the warden of Joyceville was alerted that he was a problem employee on the verge of termination. Senior management was alerted to his case in terms of how to “deal with him” in a multi-party disciplinary strategy. Contrary to Ms. Westfall’s evidence, the objective was not to accommodate the grievor but to deal with him with a view to expedite his departure from the workplace by termination.

[113] On October 12, 2006, Ms. Westfall wrote an email to Mr. Sadler stating the following: “[d]o [word expurgated] proceed to demote or fire him. My understanding is that the human rights investigator has talked began [sic] their investigation, the issue of timing comes up again in relation to this.” As of October 12, 2006, before rendering her decision of October 24, 2006, Ms. Westfall was already contemplating measures to discipline or demote the grievor. Also significant is the timing of his discipline, which was being measured against the grievor’s human rights complaint. That is, the overall strategy was to continue to discipline the grievor in a careful and deliberate manner. Contemplating those actions without referring to either the grievor’s disciplinary record or the ostensible priority to accommodate him in the workplace suggests that management was acting in bad faith to impose discipline rather than to treat the grievor in a fair and objective fashion.

[114] In an email exchange between Ms. Westfall and Mr. Sadler on October 10 and 11, 2006, Ms. Westfall asked Mr. Sadler the following: “[W]as any consideration given to demotion since he apparently did well at DND as a shift engineer and once promoted did not do well?” In reply, Mr. Sadler stated the following: “That is exactly where I want

this to go and why we are on the conference call this week.” Here again, the same sort of analysis and momentum towards disciplining, demoting and punishing the grievor is apparent in a concerted management strategy without reference to any specific conduct or disciplinary offence. In other words, the punishment or result was being predetermined.

[115] On November 24, 2006, Ms. Westfall sent an email to Ms. Stableforth stating the following:

Within the next two weeks [Mr. Singaravelu] will be at the 10 day disciplinary mark and close to termination. The strategy is to have Mr. Singaravelu seen by Dr. Chernin from Health Canada as soon as possible prior to any consideration on termination.

What is surprising about the email is that, as of November 24, 2006, the grievor’s cumulative disciplinary record was only three days. How did Ms. Westfall know that in two weeks the grievor would be saddled with another seven-day disciplinary measure? It appears that Ms. Westfall had predetermined the discipline that would be imposed on the grievor.

[116] The grievor was subjected to a series of disciplinary measures between September and December 2006. While the respondent maintained that its priority was to accommodate him in the workplace, it approached the grievor aggressively and convened meetings without notice while strategizing on a global plan for imposing discipline on the grievor. In the context of Health Canada’s recommendation of January 25, 2007, it is submitted that the respondent’s pattern of behaviour was consistent with its previous treatment of the grievor and its failure to accommodate him in the workplace. Management’s priority was to discipline the grievor to the point of termination.

[117] Once the grievor’s departure from the workplace was under way, the respondent left him to his own devices. Health Canada’s recommendation was used as another disciplinary measure against him. The priority was to exclude the grievor from the workplace independent of the discipline that was merited under the circumstances. That discipline was not merited. A transparent and comprehensive accommodation plan consistent with the grievor’s abilities and Health Canada’s recommendations should have been implemented.

IV. Reasons

A. Abandonment of the grievances

[118] The respondent argued that, in refusing to attend the hearing scheduled for September 28, 2009, the grievor either abandoned his grievances or withdrew from the adjudication process.

[119] On August 26, 2009, the Board sent the notice of hearing to the grievor and to the respondent. On September 4, 2009, the grievor's counsel wrote to the Board indicating that the grievor was not prepared to continue with the scheduled dates unless the entire proceeding was video recorded. He also indicated that the grievor would not participate in further hearings if the Board refused his request to video record the hearing. The Board refused that request. On September 18, 2009, the grievor's counsel wrote to the Board, again indicating that the grievor had no additional submissions to make about the continuation of the hearing but that he maintained his grievances.

[120] In light of the correspondence received from the grievor, it was clear that he would not participate in the continuation of the hearing. It was also clear that he was not abandoning or withdrawing his grievances. Substantial evidence had already been presented during the six days of hearing. It would have been important to hear the grievor as a witness and to hear his interpretation of the facts that led to his five grievances. However, the grievor did not want to pursue the hearing.

[121] I could have concluded that the grievor abandoned his grievances as the adjudicators did in *Synowski* and *Jeewanjee*. In *Synowski*, the grievor advised the Board 18 days before the hearing that he would not attend because a certain adjudicator had been assigned to the case. The Board advised the grievor that it was going ahead with the hearing. The grievor did not show up. The adjudicator concluded that the grievor had abandoned or withdrawn his grievance from the adjudication process. In *Jeewanjee*, the grievor did not show up at the hearing, and the adjudicator decided to adjourn for one day in the hope of reaching him. At 08:33 the next day, the grievor sent an email to the Board asking for an adjournment. At 08:40, the Board advised that grievor that his request was refused and asked the grievor to be present at the hearing at 09:30. The grievor did not comply with the Board's instructions and did not show up at the hearing. The adjudicator deemed the grievance abandoned.

[122] The facts in this case differ from *Jeewanjee* in which the grievor did not give any notice that he would not participate in the hearing. In this case, the Board was well aware of the grievor's intention not to show up. That was the case in *Synowski*, where the grievor advised the Board before the hearing that he would not attend. However, in *Synowski*, the hearing had not yet started. In this case, substantial evidence had already been presented over the course of six days of hearing. In exercising his discretion, the adjudicator in *Synowski* decided to go ahead with the hearing. In this case, I decided differently, and I provided an opportunity to the parties to present written arguments in support of their respective positions.

[123] I cannot conclude that, as the respondent requests, the grievor has either abandoned his grievances or withdrawn from the adjudication process. The grievor clearly stated that that was not the case. He had a problem with the process, and he asked that the hearing be video recorded. I refused his request on the basis that the Board has never agreed to that practice, which would be counterproductive. However, I felt that the grievor should at least have a chance to present his arguments in support of his position.

B. PSLRB File No. 566-02-800

[124] Based on Mr. Chambers' investigation report, the respondent, on November 6, 2006, imposed a one-day suspension on the grievor to be served the next day. Mr. Chambers concluded that the grievor was guilty of harassment for the following actions: (1) accusing Mr. Clooney of breaking the butterfly valve and revealing that suspicion to an inmate, (2) following staff into washrooms, (3) referring to staff in a derogatory manner, and (4) stating to Mr. Holland that he was so mentally and physically unstable that he belonged in a hospital, not a central heating plant.

[125] The respondent presented oral evidence to support the fact that those incidents occurred, as stated in Mr. Chambers' report. The grievor, in his arguments, presented a different interpretation of what happened.

[126] I am very preoccupied with the sequence of events that led to the harassment complaint, to the investigation report and to the discipline. Most of the harassment incidents occurred in summer or fall 2003, and one incident might have occurred in fall 2003 - winter 2004. The employees filed their harassment complaint in March 2005, more than one-and-a-half years after most of the incidents occurred. The

applicable policy on the prevention and resolution of harassment clearly states that employees may submit a complaint within one year of the alleged harassment. The delegated manager screens the complaints that he or she receives. The first screening criterion is that the complaint must be filed within one year of the alleged harassment unless there are extenuating circumstances. No evidence was presented to me that such circumstances existed in this case.

[127] On April 18, 2005, the CSC Ontario Acting Deputy Commissioner mandated Mr. Chambers to conduct the investigation into allegations that, for the most part did not meet the timing criterion expressed in the policy. Mr. Chambers held all his interviews in April and May 2005. He tried to convince the grievor to agree to be interviewed, but the grievor refused. He sent his findings to the grievor on September 21, 2005, and the grievor provided his input in writing on September 30, 2005. The report should have been released a few weeks later but Mr. Chambers was instructed by the CSC regional office not to release it. In late April 2006, the instructions changed, and Mr. Chambers released his report. The report is dated May 1, 2006. It remains unclear to me why Mr. Chambers' superiors instructed him to delay writing the report by approximately six months.

[128] However, the issue of delay in this matter was not yet over. Ms. Westfall testified that she received Mr. Chambers' report in summer 2006. She waited until November 6, 2006, to discipline the grievor.

[129] The grievor served his suspension on November 7, 2006 for incidents that had occurred approximately three years earlier in summer and fall 2003. First, the respondent did not respect its own policy about investigating incidents that occurred more than one year before complaints were filed. Then, it took longer than one more year to complete the investigation report. After the report was issued, the respondent waited several months before disciplining the grievor. By that time, the grievor had been involved in three other incidents for which he was later disciplined.

[130] There is an obligation for a respondent to respect its own established policies, especially when those policies could lead to disciplinary action. It seems illogical to me that an employer would discipline an employee using as a basis a policy that it does not itself respect. This is aggravated by the fact that the respondent delayed the publication of the investigation report by several months and, after that, delayed again

in imposing discipline. Discipline loses a large part of its purpose of correcting behaviour when there is very little diligence in its application.

[131] Considering the above, I conclude that the respondent erred in imposing a one-day suspension on the grievor on November 6, 2006 for his behaviour in 2003.

C. PSLRB File No. 566-02-842

[132] In her November 7, 2006 letter, Ms. Westfall informed the grievor that he was suspended for one day for informing Mr. Oddie, Ms. Hoedicke, Ms. Gipson and Mr. Jackson on August 4, 2006 that he had filed a complaint against Mr. Joyce. Ms. Westfall blamed the grievor for communicating his complaints against Mr. Joyce to people who did not need to know, which had a negative impact on the work environment and undermined Mr. Joyce's authority.

[133] In August 2006, Mr. Oddie was acting as the assistant warden of administrative services at Joyceville penitentiary. In his substantive position, he was the regional administrator of technical services. According to the respondent's witnesses, Ms. Hoedicke was a unit manager at Joyceville, and she held no reporting relationship with the grievor. According to the grievor's written submission, she was acting in a temporary supervisor role over him at the relevant time. However, the grievor adduced no supporting evidence. Ms. Gipson and Mr. Jackson reported to Mr. Joyce. The respondent produced evidence to support that Ms. Hoedicke thought that it was inappropriate for the grievor to inform her that had he filed a harassment complaint against Mr. Joyce. No evidence was adduced that the three other employees complained. Mr. Joyce testified that he felt that it was unethical for the grievor to have informed other people of the complaint that the grievor had filed against him. For him, it was a serious blow that Ms. Gipson and Mr. Jackson were informed of the complaint because they reported to him.

[134] The grievor argued that it was appropriate to send the information to Ms. Hoedicke. He also argued that the other three persons did not complain about having received that email. The grievor also pointed out that, contrary to the respondent's argument, he did not violate the CSC's standards of professional conduct.

[135] I do not find it relevant that Mr. Oddie, Mr. Jackson and Ms. Gipson did not complain about receiving that email. The fact is that the email was sent to them, and

they did not need to know that the grievor had filed a complaint against Mr. Joyce. It was not trivial information. Harassment complaints normally contain serious allegations. They can lead to the termination of the alleged harasser. Even if the employee is “innocent of harassing until proven guilty,” no employee would want to be accused of harassment and have the alleged victim spread the news.

[136] I believe that Mr. Joyce was dealt a serious blow when the grievor informed Ms. Gipson and Mr. Jackson of his harassment complaint. Why would the grievor spread that information? What was his purpose? I do not know. There was no evidence adduced to explain why the grievor did what he did that could have led me to believe that there was a constructive reason to explain his behaviour.

[137] The evidence clearly shows that the grievor was aware of the CSC’s rules about using email. Specifically, he had been advised not to use the CSC’s network to disseminate information on the mistreatment that he believed the CSC was imposing on him. The grievor might be correct in arguing that he did not violate the CSC’s standards of professional conduct. In fact, there is nothing specific in those standards about what the grievor did. However, professional standards cannot cover every possible behavioural situation. An employer is fully justified in imposing discipline for cause even if it cannot relate the alleged infraction to a specific policy or to a particular standard.

[138] An employer’s electronic network exists to facilitate and expedite communications between people who work for it. It is surely not intended to be used to undermine a superior’s authority or to disseminate complaints and issues against the organization. The grievor was clearly advised in April 2006 not to use the corporate network for that purpose, but he did so in August 2006. Even if that infraction cannot be directly related to a specific standard of conduct, it still constitutes improper behaviour. Consequently, I find that the respondent had cause to impose a one-day suspension on the grievor for that improper behaviour.

D. PSLRB File No. 566-02-843

[139] On September 28, 2006, Ms. Westfall, Ms. Ronan and Mr. Joyce met with the grievor to discuss several work-related issues, including the fact that the grievor refused to perform some tasks that were assigned to him. The meeting was audiotaped, and the tape was adduced in evidence. I listened to it, and its content

confirms entirely the testimonies of Ms. Westfall and Mr. Joyce that the grievor's tone was very aggressive, that several times he yelled at Ms. Westfall, that he interrupted her while she was talking, and that he was extremely angry and disrespectful in his comments and tone.

[140] The grievor did not deny most of the facts. Rather, he argued that the meeting was organized without advance notice to him, as he had requested. He also argued that Ms. Westfall refused to grant him a break from the meeting when he became anxious. The meeting stressed the grievor and directly impacted his state of mind and mental and physical well being.

[141] In her testimony, Ms. Westfall said that she stopped the meeting because the grievor was stressed. No evidence was presented to support the grievor's argument that he asked for the meeting to stop because he was stressed and that Ms. Westfall refused. It was not a discipline meeting, and Ms. Westfall had no obligation to provide advance notice that a meeting would take place. She was the warden at Joyceville penitentiary, and she was Mr. Joyce's and the grievor's boss. Being in that position, Ms. Westfall could summon them to a meeting anytime without advance notice.

[142] The grievor's behaviour at the September 28, 2006 meeting was unacceptable. His rude behaviour and his disrespect toward his superior amount to insubordination. The respondent was fully justified in imposing a one-day suspension on him.

E. PSLRB File No. 566-02-949

[143] On the morning of November 1, 2006, Mr. Ngai and Mr. Joyce went to the grievor's office to give him a tour of the Joyceville penitentiary. The grievor met them at the door of his office, and he started to behave in an extreme manner. Mr. Joyce and Mr. Ngai testified that the grievor focused on tape recording the exchange, waved a tape recorder around, pointed his finger in Mr. Ngai's face, had an aggressive stance, and was loud and out of control. Ms. Westfall imposed a three-day suspension on him for this incident, taking into consideration that the grievor had previously been disciplined for abusive and insubordinate behaviour and that he had not corrected his behaviour.

[144] The grievor argued that he was not informed that the tour would take place on November 1, 2006, and that he did not know what Mr. Ngai's role was. Mr. Ngai was not aware that the grievor had filed a harassment complaint against Mr. Joyce. The

grievor also pointed out that, as evidenced by Dr. Chernin's assessment of January 2007, he was under tremendous stress at the relevant time. By providing some notice to the grievor in advance, the misunderstanding of that morning could have been averted. The meeting in question could have been called as a disciplinary meeting or something similar requiring representation or some kind of record.

[145] The grievor did not present any evidence to contradict the evidence adduced by the respondent that he acted in an inappropriate and aggressive manner with Mr. Joyce and Mr. Ngai on November 1, 2006. His explanation for his behaviour is that he did not receive advance notice that the tour would take place on November 1, 2006 and that he did not know why Mr. Joyce and Mr. Nagai showed up at his office that morning.

[146] The evidence shows that Mr. Joyce sent an email to the grievor on October 31, 2006 at 15:08 stating that the tour would take place the next day with a correctional manager. At 15:18, the grievor wrote an email to Mr. Joyce to advise him that the tour should be with a technical person. At 16:34, Mr. Joyce replied that a technical person was not necessary.

[147] Contrary to his argument, the grievor received advance notice that a tour would take place on November 1, 2006. Even had he not received advance notice, his supervisor was fully entitled to direct him to participate in a tour of the facilities so that he would be in a better position to perform the tasks that were assigned to him.

[148] The grievor reacted aggressively to the presence of Mr. Joyce and Mr. Ngai in his work area on the morning of November 1, 2006. He pointed his finger in Mr. Ngai's face, had an aggressive stance, and was loud and out of control. Considering that the incident was not the first in which the grievor acted aggressively with his superiors, Ms. Westfall was justified in imposing a three-day suspension on the grievor.

F. PSLRB File No. 566-02-1268

[149] On January 25, 2007, after assessing the grievor's health, Health Canada advised the CSC that the grievor should not return to work at the CSC but that he would be suitable for an alternative position in another area of the federal public service. As a result, the CSC placed him on leave without pay. The evidence shows that it offered him some help in his job search. However, it refused his request to access its intranet, which would have facilitated his job search.

[150] The respondent argued that I do not have jurisdiction to hear this grievance. The grievance was not referred to adjudication by the bargaining agent, and the grievor is not represented by his bargaining agent. If the grievance relates to the collective agreement, it must be referred to adjudication by the bargaining agent. The grievor now argues that the grievance is related to discipline, but that is not reflected in its wording. As per *Burchill*, a grievance cannot be amended.

[151] The respondent also argued that its decision to place the grievor on leave without pay is administrative in nature and not disciplinary. Consequently, the adjudicator does not have jurisdiction to hear the grievance.

[152] I agree with the respondent that this grievance, as worded, has nothing to do with disciplinary action. In his grievance (see paragraph 8 of this decision), the grievor first challenged the CSC's decision to place him on leave without pay. Then, he explained that that decision implied that he would lose money. Later, he argued that the CSC failed to abide by previous medical recommendations to assess his workload and to provide him with required training. In doing so, the CSC failed to accommodate his legitimate concerns and frustrations. The CSC created the circumstances under which it became unadvisable for him to return to work for the CSC. Finally, the grievor asked to be compensated for his financial loss, to be allowed on CSC premises and onto the CSC intranet to facilitate his integration into another federal government department. The grievance does not make any reference to discipline.

[153] The grievor cannot now argue that I have jurisdiction over this grievance because it deals with discipline when the grievance itself does not deal with discipline. As established in *Burchill*, a grievor may not change gears at adjudication and convert a non-disciplinary grievance into one that concerns discipline. That principle has been reconfirmed by the Federal court in *Shneidman* and by the Board in several decisions.

[154] If I were to consider whether the grievance refers to disciplinary action, I would conclude that the grievor was not disciplined or that there was no disguised discipline. Even though in *Matthews* the Federal Court stated that the adjudicator had jurisdiction, the Court also wrote that the grievor had to prove it. In this case, the grievor did not prove it. In *Toronto General East & Orthopaedic Hospital Inc.*, the adjudicator concluded that disqualifying an employee from stand-by pay or call back work is punitive and amounts to discipline. In this case, the grievor was put on leave without pay following a medical assessment that he could not work for the CSC. I

cannot conclude that the CSC acted punitively in complying with a medical assessment. The situation in *Grover* does not apply, the grievor in that case having been disciplined for refusing to see Health Canada for a medical assessment.

[155] The respondent had no choice but to place the grievor on leave without pay after it received the medical assessment that he could no longer work at the CSC. It was no longer a matter of accommodating the grievor but rather removing him from the workplace. Had the CSC not sent the grievor home, it would clearly have been at fault considering the medical assessment that it had received.

[156] The grievor argued that the respondent acted in bad faith and that it failed to accommodate him. I would have jurisdiction to deal with a grievance on the duty to accommodate as long as that grievance related to the application of the collective agreement or to its no-discrimination clause. For that to happen, the grievance must be referred to adjudication by the bargaining agent, which is not the case here. On that point, subsection 209(2) of the *Act* is clear as follows:

209. (2) Before referring an individual grievance related to matters referred to in paragraph (1)(a), the employee must obtain the approval of his or her bargaining agent to represent him or her in the adjudication proceedings.

[157] The respondent's decision to place the grievor on leave without pay is of an administrative nature, and I do not have jurisdiction to deal with it. Nor do I have jurisdiction to examine if the respondent failed in its duty to accommodate the grievor considering that the grievance was not referred to adjudication by the bargaining agent.

G. Context of all the grievances

[158] The grievor alleged that the respondent had a deliberate strategy to discipline him to the point of termination. He based his allegation on his interpretations of the intentions of several emails written by members of CSC management.

[159] The grievor put Mr. Sadler's comment of June 7, 2006 out of context. It can have several meanings when put in context, but no evidence was adduced to fully explain that context. Mr. Sadler was not called to testify to explain what he meant by his comments.

[160] The grievor argued that the CSC did not want to accommodate him; rather it wished to deal with him with the goal of terminating him. There is no evidence that could lead me to believe that allegation. Rather, the evidence showed that the CSC prepared a reasonable work plan to facilitate the grievor's progressive return to work.

[161] Based on email exchanges of October 10, 11 and 12 between Mr. Sadler and Ms. Westfall, the grievor argued that, at that time, Ms. Westfall was already contemplating disciplining or demoting him. I see nothing wrong if this were true. At that time, Ms. Westfall thought that the grievor had been doing a good job when he was at the HP-07 group and level. There is nothing wrong with giving some thought to that idea and exchanging emails about it with another manager. However, it does not mean that Ms. Westfall's plan was to demote the grievor. Also on those dates, Ms. Westfall possessed an investigation report that found the grievor guilty of harassment. She also had not yet dealt with the August 4, 2006 email incident and the September 28, 2006 meeting incident. There was nothing wrong with Ms. Westfall contemplating disciplining the grievor.

[162] Based on an email that Ms. Westfall sent to Ms. Stableforth on November 24, 2006, the grievor argued that Ms. Westfall had predetermined the measure in which discipline would be imposed on him because she was referring to the 10-day disciplinary mark. I do not agree with the grievor. There was nothing wrong with Ms. Westfall writing this to her superior. At that time, she had already imposed three suspensions on the grievor. A fourth one was coming, for which, incidentally, she imposed a three-day suspension on December 1, 2006. Further, Ms. Westfall, based on the grievor's behaviour, was anticipating that more suspensions would come.

[163] In essence, there is no evidence that the respondent was involved in a deliberate strategy to discipline the grievor to the point of termination.

[164] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[165] PSLRB File No. 566-02-800: the grievance is allowed. The respondent must reimburse the grievor one day of salary and benefits at the applicable rate within 60 days of this decision.

[166] PSLRB File No. 566-02-842: the grievance is denied.

[167] PSLRB File No. 566-02-843: the grievance is denied.

[168] PSLRB File No. 566-02-949: the grievance is denied.

[169] PSLRB File No. 566-02-1268: the grievance is denied.

December 22, 2009.

**Renaud Paquet,
adjudicator**