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File: 566-02-3149

Citation: 2011 PSLRB 134

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

MARTIN LAPOSTOLLE

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Michele A. Pineau, adjudicator

For the Grievor: Éric Lévesque, counsel

For the Respondent: Josianne Phénix, articling student

Heard at Montreal, Quebec,
May 4 to 6, 2011.
(PSLRB Translation)

I. Individual grievance referred to adjudication

[1] When the grievance was filed, Martin Lapostolle ("the grievor") was an AC-02 correctional officer at the Ste-Anne-des-Plaines Regional Reception Centre ("the Reception Centre"). He has been employed by the Correctional Service of Canada (CSC or "the employer") since 1996. On April 1, 2009, the employer imposed a three-day suspension on him for speaking disrespectfully to a superior and for betting with an inmate on an arm-wrestling match.

[2] The grievor denied speaking disrespectfully. He admitted that he took part in a bet but said that he did not personally benefit from it. As corrective action, he requested the recovery of the financial penalty, the withdrawal of the disciplinary measure and the cancellation of the disciplinary report dated April 1, 2009. Alternatively, he requested that the disciplinary measure be reduced to a letter of reprimand.

II. Evidence for the employer

A. Testimony of Guy Bolduc

[3] Guy Bolduc has been a correctional manager at the Reception Centre for 13 years. He has 30 years of service with the CSC. The Reception Centre is responsible for assessing and placing inmates, after sentencing, in different institutions throughout the country. The Reception Centre permanently houses certain categories of inmates, including the most dangerous offenders, those representing a danger to the prison population and those needing protection.

[4] In fall 2008, Mr. Bolduc was instructed to have certain areas of the facility painted, including block D. He decided that inmates would do it. For each cellblock to be painted, Mr. Bolduc asked correctional staff to find four or five trustworthy inmates who could paint. At that time, the grievor was temporarily in charge of the inmates in block D. In a heated discussion between Mr. Bolduc and the grievor at the control post, the grievor said that he did not agree with the instruction to paint the cellblock because it had been painted recently and because it was not his job to find inmates to paint. Mr. Bolduc told the grievor that it was his job to find the inmates, regardless of whether he agreed with the instruction to paint the cellblock.

[5] On October 15, 2008, the day after the discussion, an inmate called to Mr. Bolduc while he was making his usual rounds. The inmate said that the grievor had called Mr. Bolduc all sorts of names the evening before. Another inmate asked him if a correctional officer was allowed to bet with an inmate, in this case over an arm-wrestling match for a can of Pepsi. The grievor had apparently won the bet, and the inmate had been forced to buy him a can of Pepsi. Each inmate submitted a letter to Mr. Bolduc supporting what they said. They allegedly asked Mr. Bolduc not to take action against the grievor until they were transferred to another institution because they feared retaliation from him and because they were afraid that they would lose their privileged jobs. Mr. Bolduc submitted the letters to his superiors. He stated that other inmates also told him that the grievor had made disrespectful comments about him.

[6] Mr. Bolduc testified that he had no reason to believe that the inmates had conspired against the grievor because his discussion with the grievor about the painting had taken place in an enclosed control post. A conspiracy is a serious matter, and in this case, the issue was trivial.

[7] After discussing the matter with his supervisor, Mr. Bolduc initially considered filing a harassment complaint. He then learned that the grievor had filed a harassment complaint against him, and Mr. Bolduc decided to drop that idea. The employer dismissed the grievor's complaint against Mr. Bolduc.

[8] Mr. Bolduc stated that the grievor's comments greatly offended him. He pointed out that the employer has a policy of courtesy and respect between staff members and with inmates. Mr. Bolduc said that he was the boss, that it was up to him to decide who would execute the painting contract and that the grievor needed to go along with his decision. When his shift ended on October 15, 2008, Mr. Bolduc prepared a report of the incidents that had occurred with inmates that day. Mr. Bolduc admitted that the grievor was "[translation] not one of [his] favourites." However, the grievor was not a bad employee. He was a "leader" and was always quick with an answer. According to Mr. Bolduc, the grievor's uniform looking dishevelled at times and his habit of putting his feet on the desk gave the impression that he did not care.

[9] In cross-examination, Mr. Bolduc testified that he noted the events of October 15, 2008 in his report, without discussing the contents with the grievor, and that he submitted the report directly to his superior. He admitted that the grievor was curt

and blunt, to the point of being disrespectful, and that he did not hesitate to say so when he disagreed with a task. Mr. Bolduc did not recall whether the grievor was against the task itself or the paint colour and did not remember whether the cellblock was recently painted. He recalled that the grievor was very unhappy about the painting job.

[10] Mr. Bolduc said that up to three correctional officers can work at the control post at the same time and that an inmate was cleaning the post at 08:30. According to Mr. Bolduc, the door to the cellblock D control post is always closed, even during cleaning. Inmates cannot overhear conversations at the control post, even through the slot used to speak to them. Mr. Bolduc could not say whether the bottom of the control room door touches the floor in a way that prevents the transmission of conversations.

[11] Mr. Bolduc admitted that the inmates' letters were not signed. He said that he could no longer identify one of the inmates. He did not follow up with the inmates because that was not part of his job. An AC-02 correctional officer's job is to make rounds and to search inmates in the cellblock. He intervenes and is obliged to prepare observation or infraction reports when the facility's rules are not being followed — smoking, for example. The reports are placed on the inmate's disciplinary file. AC-02 officers are generally quite aware of what the inmates are up to.

[12] Mr. Bolduc admitted that the grievor "[translation] put his heart into his searches . . . a bit too much at times" and that he had searched three of the inmates who reported the disrespectful comments. Mr. Bolduc also admitted that inmates are not afraid to file complaints against correctional officers for reasons that they feel are valid and that the complaints sometimes lead to a correctional officer leaving a given cellblock.

[13] However, Mr. Bolduc believed that the inmates' letters were not part of a conspiracy to get rid of the grievor. He did not check the inmates' files to see if they had filed complaints against the grievor in the past because that is not part of his job. His role is to punish inmates when he receives reports from correctional officers.

[14] In re-examination, Mr. Bolduc stated that inmates inform correctional officers about conspiracies.

B. Testimony of Alain Giguère

[15] Alain Giguère currently works as a correctional manager at the Drummond facility. In 2009, he was the assistant regional director at the Reception Centre and had been since August 2007. He has worked for the CSC for 27 years. He was responsible for employee and inmate safety and reported to the deputy warden.

[16] Mr. Giguère is the manager who signed the disciplinary action report adduced in support of the disciplinary measure made against the grievor. Mr. Giguère testified that Mr. Bolduc gave him the letters that he received from the inmates in November 2008. Mr. Giguère stated that betting is not permitted. The grievor's comments were degrading and were directed at a superior, making them even worse. Mr. Bolduc insisted on an investigation into the incident to clarify matters. Mr. Giguère said that he would find a way to validate what was reported to him. Mr. Giguère spoke to the warden to verify the inmates' reliability and to corroborate what they said. It was agreed that a preliminary verification would be carried out, since management did not have enough information to conduct an official investigation. The purpose of the verification was to determine whether the inmates had a reason to make up the grievor's comments about Mr. Bolduc.

[17] The grievor was called to a disciplinary meeting on February 6, 2009. He attended with a union representative. Mr. Giguère advised him of the inmates' complaints and gave him a copy of their two letters. The grievor categorically denied saying what he allegedly said about Mr. Bolduc. According to the grievor, the words he was accused of saying were not part of his vocabulary, and he never would have used the word "faggot." He also stated that, had he anything negative to say about Mr. Bolduc, he would have said it to his face.

[18] The grievor admitted that he bet on an arm-wrestling match. The goal was to obtain information about an attack that had occurred within the facility. Mr. Giguère replied that bets with inmates violate the code of ethics and that gathering information about attacks was not a correctional officer's job. Mr. Giguère told the grievor that, by using a bet to obtain information, not only did he risk his physical safety, he also exposed himself to possible blackmail. According to Mr. Giguère, the grievor did not seem to take the warning seriously.

[19] After the inmates were transferred to another facility, Mr. Giguère asked a security intelligence officer to meet with them. In Mr. Giguère's experience, inmates complain about a correctional officer for serious reasons, knowing that the consequences for the officer will be serious. Speaking disrespectfully does not necessarily lead to serious consequences, so it cannot be assumed that a conspiracy existed against the grievor.

[20] In Mr. Giguère's opinion, it is possible that the grievor made negative comments about Mr. Bolduc. Mr. Giguère had met with the grievor before and had asked him to change his attitude toward his superiors. The grievor had replied that, with one exception, all his superiors were incompetent and that they did not know how to do their jobs. Furthermore, the grievor had a disciplinary record, while Mr. Bolduc had 30 years of service. Mr. Giguère found no reason to doubt the negative comments reported by the inmates. After reading the reports from the security intelligence officers, Mr. Giguère decided that the comments reported by the inmates were not made up and that the grievor violated the Commissioner's directive on conduct and discipline in the workplace ("the *Code of Discipline*"). Mr. Giguère also felt that the betting incident was very improper behaviour, particularly in the eyes of the prison community. The grievor also admitted to committing that act.

[21] Mr. Giguère stated that the *Code of Discipline* policy dictates professional and respectful conduct between coworkers, the public and inmates at all times. The *Code of Discipline* represents the CSC's fundamental values and is part of a correctional officer's oath.

[22] Mr. Giguère testified that he chose a three-day suspension for the following three reasons: he did not have proof beyond any doubt that the grievor made the disrespectful comments about Mr. Bolduc; the bet was a serious infraction; and a three-day suspension was a standard progressive disciplinary measure as established in the agreement between the employer and the bargaining agent.

[23] When cross-examined, Mr. Giguère admitted that he did not meet with Mr. Bolduc after the report was submitted on October 15, 2008 but that they discussed the grievor's harassment complaint. He met with the warden shortly after that to determine the best measure to take. The inmates were transferred to other facilities between October 15, 2007 and February 6, 2008. The investigation was postponed until

after they were transferred because they had requested that nothing be done before their departures for fear of retaliation.

[24] The investigation was carried out as follows. Mr. Giguère asked the Reception Centre security intelligence officer to contact the security intelligence officers at the facilities to which the inmates were transferred to corroborate the information given in the letters. It was discovered that the inmates never made similar allegations in the past and that they had no reason to make up such a story, other than that the grievor had written up several infraction reports concerning them, as he had for others. The security intelligence officer at Ste-Anne-des-Plaines then analyzed the gathered information and prepared a report for Mr. Giguère.

[25] Mr. Giguère stated that he could not say whether the inmates were serving their first sentences or if they had security-related records at the facility, because that information is protected. Mr. Giguère inquired into whether the inmates had filed similar complaints against other facility staff. He did not inquire into whether the inmates had filed other complaints against the grievor.

[26] As for the three-day sanction imposed for the two incidents being disciplined, Mr. Giguère stated that he assigned a lump penalty because it reflected the grievor's overall conduct. However, the betting incident was very serious. He could not recall whether the grievor apologized for it.

III. Evidence for the grievor

A. Testimony of Pierre Chapleau

[27] Pierre Chapleau has been a correctional manager since 1989. He works in an AC-04 position at the Reception Centre and takes care of many areas, including the operational office.

[28] In 1999, Mr. Chapleau worked in an AC-02 position in the same unit as the grievor. He then worked with the grievor in block F, while in an AC-03 position for a year and two months between 2002 and 2003. Mr. Chapleau explained that an AC-02 employee plays a dynamic role within a facility. AC-02 correctional officers are always looking for information about the safety of inmates and staff, such as threats against other inmates, suicides and the interception of contraband, which affects the safety of inmates and regular employees at the penitentiary. An AC-02 officer prepares

observation reports about inmates and shares any information with his superiors. All information helps in detecting risks in handling more serious infractions, such as operating a distillery or building illegal or bladed weapons. The officers are in contact with the inmates while they are in the yard, in the cellblock, in the gym or even in their cells. They are involved in activities. For example, they may umpire a baseball game. Physical activities help relieve tension.

[29] Mr. Chapleau completed three performance evaluations for the grievor between 2000 and 2009. He was struck by the grievor's dynamic personality. He was able to quickly flush out information on illegal activities like smuggling tobacco and narcotics and making moonshine. The grievor did not make many friends among the inmates. He was congratulated three times by the external police force for his drive. His interventions led to many complaints by inmates who felt that he lacked flexibility with respect to the facility's rules.

[30] Mr. Chapleau stated that an inmate complains when an officer puts a stop to illegal activities — in other words, when he intercepts moonshine, weapons and tobacco. They threaten to "get rid of" the officer if he continues to submit observation reports. Mr. Chapleau said that the door to the control post is open when it is being cleaned (furniture removed, floors polished, etc.). Therefore, communications within the control post can be overheard since contact with inmates continues at that time.

[31] In cross-examination, Mr. Chapleau explained that the control post is not an armed post but a security post and that inmates can walk in anytime when they have freedom of movement. In general, inmates do not like correctional officers who do their jobs properly. Some officers tolerate inmate activities to avoid complaints. Mr. Chapleau admitted that betting is not allowed. Not all correctional officers are diligent about filing observation reports. Occasionally, inmates file complaints with the intention of getting rid of a correctional officer. Mr. Chapleau does not believe that a link exists between the number of observation reports submitted by a correctional officer and his competency. He was aware that complaints had been filed against the grievor but did not know how they had turned out. He could not comment on the letters that the inmates submitted through Mr. Bolduc.

B. Testimony of the grievor

[32] The grievor began his career with a six-month internship at the Leclerc facility, which started in 1996 and ended in 1997. He then won a competition and began working as a clerk in Montreal. Then, he was hired as an indeterminate employee into a case management role. He became an AC-01 at Port Cartier in 1997. He was appointed to a position at the Reception Centre in 1999. He worked as an AC-01 in cellblock F for approximately nine months and then became an AC-02.

[33] At the time of the disciplinary action at issue in this grievance, the grievor had been working in block D for three years. The inmates in block D include those requiring protection. They have committed sex crimes, have not gotten along in other cellblocks, have debts or have had problems with other inmates. They may be serving their first sentences if there is no room for them in other cellblocks. Some inmates are awaiting transfers to other facilities. Many repeat offenders are well known by the correctional officers.

[34] In 2008-2009, since he was one of the most experienced correctional officers, the grievor often worked at the control post when he was on the day shift. His job was to assign the inmates work, to assign rounds to the correctional officers and to generally manage the cellblock during the shift.

[35] The grievor explained the circumstances of the bet with the inmate as follows. An emergency erupted in block D. The cellblock was locked down, and the inmates were searched. One inmate struck another. An observation report was prepared about the incident. While being searched, one inmate involved in the incident told him to come to his cell to settle the matter. To relieve the tension and avoid going to his cell, the grievor suggested an arm-wrestling match for a can of pop. The grievor won the match and the inmate got him the can of pop, and the atmosphere was calmer. Later, another incident occurred with the same inmate, involving drugs. At that point, the inmate told the grievor's superiors about the bet.

[36] The grievor testified that he admitted to taking part in a bet and said that he would never do it again. He openly makes his rounds. He spends his days with the inmates but knows where to draw the line with respect to unacceptable conduct. He admitted that he has made mistakes but said that he has learned from them.

[37] The grievor stated that he was against painting block D because it had recently been painted. It had taken nearly two months to complete, and he had had to manage the resulting "mess." He did not want to go through the whole experience again so soon. He told Mr. Bolduc to take care of his own block and that he would take care of his. The discussion took place in the kitchen area beside the control post between 08:30 and 09:15. The general activities of the control post, including housekeeping, begin at around that time. Inmates were on hand, cleaning and cooking, and they could have overheard the discussion with Mr. Bolduc. The grievor believes that he made an announcement on the intercom about the project, asking for volunteers. No one volunteered, even though inmates are paid more for that type of work.

[38] The grievor denied the comments in the inmates' letters since they use language that he would not normally use. The grievor said that the comments attributed to him are hateful and that he does not hate Mr. Bolduc. The grievor stated that he knows the inmates who complained; one is a cook that he often caught smoking inside the facility, and the other was under surveillance.

[39] In cross-examination, the grievor admitted to telling Mr. Bolduc when no inmates were present that he thought that he was incompetent. He admitted to filing a complaint against Mr. Bolduc. The grievor stated that inmates always know where they stand with him and that he has no problem obtaining information about drug trafficking, which he shares with his superiors, who often ask him to search more thoroughly. He admitted that he was not a model employee and that Mr. Chapleau warned him about his absenteeism. The grievor said that he did not regret the betting incident because he acted based on the circumstances. However, he would not do it again. The grievor testified that correctional officers do not discuss situations in which inmates forced them to change cellblocks or facilities.

IV. Arguments

A. For the employer

[40] The employer claims that it did not need to establish evidence of misconduct beyond any doubt; it merely needed to establish reasonable evidence of the facts that led to the disciplinary action that was imposed on the grievor. In this matter, I should prefer Mr. Bolduc's testimony, who stated that he had no reason to doubt what the inmates said. The inmates' letters could not have been invented since they contained expressions common to the prison community.

[41] Mr. Bolduc stated how important respect and courtesy are to him. He mentioned how shocked and upset he was by the comments reported in the letters. There was no evidence of a conspiracy as alleged by the grievor. The facts were not serious enough. It was Mr. Bolduc's job to assign the painting project, and the grievor's role was simply to agree with him. According to Mr. Bolduc, no inmates were at the control post when he spoke with the grievor. The door was closed. The inmates contacted Mr. Bolduc of their own accord; they were not approached.

[42] Mr. Giguère stated that he had no reason to doubt Mr. Bolduc. He was visibly shaken by the comments. Mr. Giguère had met with the grievor before and had asked him to act more respectfully toward his superiors. The employer sought reliability indices before taking action. The inmates' files did not show any previous complaints against a correctional officer. Furthermore, the inmates were aware that they were at a reception centre for assessment. Why would they have wanted to create an upset when they were waiting to be placed? Why would they risk losing their paid jobs, which were a privilege?

[43] In a case such as this, it is not easy to obtain direct evidence of the grievor's actions. Mr. Giguère obtained the evidence he felt necessary by seeking a security intelligence officer, whose job was to meet with the inmates. Two inmates confirmed the contents of their letters, and another was prepared to testify. The inmates gained nothing by making their statements to Mr. Bolduc. They were even susceptible to retaliation from the grievor. The inmates were not called to testify for safety reasons and due to the lack of resources required to accompany them. According to the employer's counsel, in only one case has an inmate given a statement at an adjudication hearing. The adjudicator may consider any relevant evidence. When the evidence is contradictory, the adjudicator must make a decision on the basis of witness credibility. Mr. Bolduc is the most credible witness, since he submitted a statement immediately after receiving the inmates' letters. Mr. Chapleau did not witness either incident for which the grievor was criticized.

[44] Betting is serious misconduct. It violates sections 5 and 6 of the *Code of Discipline*. Through his conduct, the grievor tarnished the CSC's reputation. He violated section 7 by being abusive to another employee. Furthermore, he benefited from the bet. The three-day suspension imposed by Mr. Giguère considered aggravating and mitigating factors, along with the global agreement with the bargaining agent about

gradual disciplinary measures. The employer also considered the matter as a deterrent to other correctional officers. Correctional officers are subject to stricter standards of conduct than other federal employees. An AC-02 is considered a leader and must lead by example. The remorse shown about the bet was not enough to rule out a disciplinary measure. The infractions did not need to be serious to warrant a three-day suspension. Therefore, the penalty was fair.

[45] The employer cited the following decisions in support of its position: *Faryna v. Chorny*, [1952] 2 D.L.R. 354; *F.H. v. McDougall*, 2008 SCC 53; *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569; *Chénier v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 40; *R. v. O'Brien*, [1978] 1 S.C.R. 591; *R. v. Edwards*, [1996] 1 S.C.R. 128; *R. v. Salutin*, [1979] O.J. No. 806 (QL); *Alward et al. v. The Queen*, [1978] 1 S.C.R. 559; *Gale v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2001 PSSRB 85; *Bruce Power LP*, [2009] O.L.R.D. No. 2095 (QL); *Slicer c. Québec (Comité de déontologie policière)*, [1998] J.Q. No. 4303 (QL); *Way v. Canada Revenue Agency*, 2008 PSLRB 39; *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62; *Northwest Territories Power Corp. v. Union of Northern Workers (Melanson)*, [2004] N.W.T.L.A.A. No. 4 (Power) (QL); *Weyerhaeuser Co. (Drayton Valley Operations) v. United Steelworkers Local 1-207 (Greaves Grievance)*, [2007] A.G.A.A. No. 14 (QL); *Alcan Smelters Inc. and Chemicals Inc. v. Canadian Auto Workers, Local 2301 (Pegley Grievance)*, [1998] B.C.C.A.A.A. No. 596 (QL); *Hogarth v. Treasury Board (Supply and Services)*, PSSRB File No. 166-02-15583 (19870331); *Rolland Inc. v. Canadian Paperworkers Union, Local 310*, [1983] O.L.A.A. No. 75 (QL); *Scapa Tapes North America Renfrew v. United Steelworkers of America, Local 6946-1 (Gilbert Grievance*), [2003] O.L.A.A. No. 579 (QL); *Ferguson v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-26970 (19961028); *Union des chauffeurs de camions, hommes d'entrepôts et autres ouvriers, Teamsters Québec, (FTQ, section locale 106) c. Résidences Soleil - Manoir Saint-Laurent*, 2007 CanLII 9340 (QC SAT); *Commissaire à la déontologie policière c. Dussault*, 2001 CanLII 27914 (QC CDP); *Commissaire à la déontologie policière c. Gagnon*, 2008 CanLII 29837 (QC CDP); and *Parmalat Canada Inc. v. CAW (Canada), Local 462 (Leach Grievance)*, [2005] O.L.A.A. No. 385 (QL).

[46] In response to the grievor's arguments, the employer maintains that Mr. Bolduc's job was not to verify the inmates' information since he was the victim, and it would have been a conflict of interest. Mr. Bolduc's superiors had to investigate the

matter, which they did. The employer claims that no evidence supported the grievor's allegation that Mr. Bolduc solicited the inmates' letters.

[47] The employer asks that I dismiss the grievance.

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

[48] The grievor admits that, had he said the things that the employer is trying to prove, then he would have deserved the three-day suspension. However, the employer was required to prove on a balance of probabilities that the alleged misconduct occurred and that the penalty was proportional to the misconduct. The employer imposed a single suspension of three days for two incidents: speaking disrespectfully and betting.

[49] The grievor claims that the evidence showing that he spoke disrespectfully and insultingly to a manager was not preponderant. He has denied making the comments in the first place and has also explained why he could not have made such comments. According to him, the employer's evidence is based on hearsay. The grievor asks that I disregard the hearsay because the facts are contradictory.

[50] On October 15, 2008, Mr. Bolduc made his rounds at the penitentiary without verifying the accuracy of what was said. He received letters from inmates and prepared a written report of his perception of the incident. He described the situation to his superior. Mr. Bolduc stated that it was not important for the inmates to gain something from making a statement. There is a contradiction between Mr. Bolduc's testimony, who says that the discussion about the painting took place when the control post door was closed, and the grievor's testimony, who says that the control post door was open because the inmates were doing housekeeping. It appears that the inmates indeed overheard the grievor's angry statements about the painting project.

[51] Based solely on Mr. Bolduc's statement, Mr. Giguère quickly jumped to conclusions and issued the grievor a warning. He told the grievor to modify his behaviour, although he had not yet verified the facts alleged by Mr. Bolduc. Mr. Giguère then asked a penitentiary security intelligence officer to check the inmates' security files. Mr. Giguère's only interest was to establish whether the inmates had been involved in incidents of a similar nature with other correctional officers. It was not an open investigation but instead a validation of information that the CSC had already received. Nothing else was considered when assessing the grievor's file. The grievor

alleged that complaints against other correctional officers and the inmates' disciplinary files were not relevant. No cross-reference was made between the inmates' complaints on file against the grievor and their statements.

[52] The employer's evidence was based solely on compounded hearsay. Neither Mr. Giguère nor Mr. Bolduc personally verified the information. The inmate who agreed to testify was not heard. The employer's evidence was based solely on the following three elements: the seriousness of the alleged comments, the fact that they were made in front of several people and the fact that the grievor had two disciplinary measures on his file. The grievor argued that that evidence was insufficient to justify the actions taken against him and that public safety and a lack of resources did not justify presenting such poor evidence. In his opinion, there was no evidence.

[53] The grievor admits that a tribunal has the flexibility to accept hearsay evidence as a matter of convenience. However, the employer's evidence cannot be based solely on hearsay since it deprives the grievor of his right to cross-examine, which breaches the principles of natural justice and his most fundamental rights.

[54] The grievor disagrees with the employer's conclusion that the inmates had nothing to gain by making statements to Mr. Bolduc. On the contrary, Mr. Chapleau testified that the grievor was diligent with respect to searches and observation reports on tobacco and drug trafficking and on distilleries. Inmate statements always involve an exchange of information. Nothing is free. That was also true of the statements made to Mr. Bolduc.

[55] Contrary to what Mr. Giguère and Mr. Bolduc claimed, Mr. Chapleau testified that more than just major incidents provoke conspiracies. It is not unusual for inmates to attempt to get rid of correctional officers whom they feel are overly diligent.

[56] It is not relevant that the grievor previously got away with saying that he found certain managers incompetent. It does not lead to the inevitable conclusion that the grievor made the alleged comments. The grievor alleges that the employer wanted to discipline him by any means possible. He says that his blunt manner of speaking might disturb some people but that there is a chasm between what he might have said in the past and the rude comments for which he is faulted. The grievor argues that the employer has condoned his attitude.

[57] According to Mr. Giguère, the bet was a more serious offence than the disrespectful comments. The grievor admits that he took part in a bet. He recognizes that it was wrong even though it had seemed fine at the time. He states that he would not bet again.

[58] The grievor filed his harassment complaint against Mr. Bolduc after the incidents at issue; this cannot be properly considered as relevant. Moreover, Mr. Bolduc thought of filing one as well. It could even be supposed that Mr. Bolduc was attempting to gather evidence.

[59] The grievor argues that no direct evidence was adduced of his alleged actions; earlier discipline is not relevant. His admission should be considered a mitigating factor. If I decide that the employer was justified in imposing a disciplinary measure, the grievor requests that the disciplinary measure be reduced to a letter of reprimand.

[60] In support of his position that the employer cannot only present hearsay evidence, the grievor cites *Basra v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 70 (overturned for other reasons, see 2008 FC 606; an appeal before the Federal Court of Appeal was dismissed in 2010 FCA 24).

[61] The grievor asks that I allow the grievance.

V. Reasons

[62] When assessing a disciplinary grievance, an adjudicator must decide the following: a) Did the employee conduct himself or herself in a manner that justified a disciplinary measure? b) If so, did the conduct warrant the imposed disciplinary penalty?

[63] The employer must justify the discipline taken against the employee according to the ordinary civil standard of a balance of probabilities, as follows.

[64] On or about October 15, 2008, Mr. Giguère received a complaint from Mr. Bolduc about disrespectful comments that the grievor made about him. A couple of inmates reported the comments. Mr. Bolduc stated his complaint in a report and attached the two anonymous letters from the inmates. Mr. Giguère met with the grievor on November 27 and told him to immediately cease that behaviour. Mr. Giguère also indicated that he would meet with the grievor again to obtain more detail.

[65] On February 6, 2009, Mr. Giguère met with the grievor to obtain his explanation of the events of October 2008. The grievor denied making the insulting comments mentioned in the inmates' letters. His explanation was that he was not in the habit of making those types of comments or using that language. The grievor admitted to being part of a bet on an arm-wrestling match with an inmate in exchange for information from him.

[66] Mr. Giguère took further steps after the February 6, 2009 meeting. He wrote the following in his April 1, 2009 disciplinary report:

> [Translation]
>
> *After the meeting, the security intelligence officer (SIO) took further steps by contacting the SIOs at the facilities where the inmates involved were transferred.*
>
> *One inmate confirmed that you and Mr. Guy Bolduc had a conflict and that you made disparaging remarks about him, but the inmate was not interested in pursuing the matter further or testifying before anyone.*
>
> *A second confirmed that he wrote a letter, repeated all the comments in it, and said that he was prepared to meet with anyone to confirm your attitude and your comments.*
>
> *The third inmate did not agree to collaborate when he met with the facility SIO, stating from the outset that he did not remember anything and that he did not want anything more to do with what happened at the RRC and not to bother him anymore or meet with him again about this subject.*
>
> *The following aggravating and mitigating factors were assessed:*
>
> - *Considering the nature and seriousness of the comments that you made about a superior,*
> - *Considering that you made the comments before several people, particularly before the clientele,*
> - *Considering that you already had two disciplinary measures on file, a written reprimand and a one-day suspension,*
> - *Considering that, despite all our meetings over the past months to change your attitude toward your superiors, you continue to show a lack of respect for them,*

- *Considering that you agreed to mediation with Mr. Bolduc,*

I am imposing a disciplinary measure, a financial penalty equal to three days of pay, as stipulated in section III-A of the Global Agreement, for a third offence. Any subsequent offence on your part could lead to more severe disciplinary measures, including dismissal.

[67] The employer's only witnesses were Mr. Giguère and Mr. Bolduc. The employer did not present testimony by the security intelligence officers who conducted the investigation or by the single inmate who had agreed to testify. Therefore, I am left with only indirect evidence of the grievor's alleged misconduct.

[68] The investigation into whether the inmates had previously denounced other correctional officers or whether they had disciplinary files is not relevant and adds no weight to the inmates' statements. Most important was verifying the facts as they concerned the grievor. In my opinion, management did not seriously evaluate the grievor's mistaken conduct, i.e., disparaging comments about his superior. The employer has thus failed to prove that the grievor made the comments before several people or before the facility's clientele.

[69] Without the inmates' testimonies, I find that the employer's evidence is quite shallow. Of the three inmates who allegedly said that they overheard the grievor's comments, one did not wish to pursue his allegations, and another did not wish to collaborate. Consequently, the employer's evidence is based on one crucial witness, who was not heard.

[70] Paragraph 226(1)(*d*) of the *Public Service Labour Relations Act* (*PSLRA*) specifies that an adjudicator may accept any evidence, whether admissible in a court of law or not. Hearsay evidence is a relaxation of evidenciary rules; however, it cannot serve, by itself, to prove a fundamental material fact, particularly when the fact is contradicted by direct evidence. In addition to Mr. Bolduc's hearsay concerning what the inmates allegedly told him, I am faced with double hearsay (interview and verifications by security intelligence officers at the facilities where the inmates were transferred), triple hearsay (the Reception Centre security intelligence officer's report to Mr. Giguère about what the other security intelligence officers allegedly told him) and even quadruple hearsay (Mr. Giguère's testimony about what the Reception Centre security intelligence officer told him).

[71] I also find that accepting only hearsay evidence would negatively impact the fairness of the adjudication proceedings. In this case, given the repercussions, the grievor had the right to question the facts being held against him through cross-examination. In *Grunerud v. Treasury Board (Department of Justice)*, 2007 PSLRB 79, I studied the matter of gathering relevant evidence and the fundamental right to a cross-examination.

[72] To summarize, in *Grunerud*, the applicant grieved the retroactive date of her reclassification, and the employer objected to the timeliness of the grievance. The grievor submitted that her testimony was crucial to explaining the timeliness issue and requested permission to testify by telephone due to a medical condition. With no medical evidence to demonstrate her disabling condition and no compelling reasons associated with travelling to the venue, expense or delay, I found that allowing the applicant to testify by telephone would have deprived the respondent of the opportunity to cross-examine her and, consequently, would have negatively impacted the fairness of the proceeding, thus breaching the principles of natural justice.

[73] The following are the principles of that decision relevant to this case:

. . .

> ***21*** *In this regard I must be cognizant of the rule of* audi alteram partem*, that is, the right to be heard. The fairness and credibility of the adjudication process requires that parties have a complete opportunity to be heard. This includes the obligation for the adjudicator to receive all the relevant evidence that a party wishes to bring forward and to decide a case based on that evidence. An adjudicator will have breached the rules of natural justice if he or she denies a party a complete opportunity to be heard.*
>
> ***22*** *While the context of labour adjudication is to provide a forum to have matters resolved promptly and informally, this must be balanced with the need to respect the rules of natural justice. In* Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, Justice Lamer made the following statement in this regard (at pages 488 and 489):*
>
> > The difficulty of this question arises from the tension existing between the quest for effectiveness and speed in settling grievances on the one hand, and on the other preserving the credibility of the arbitration process, which depends on the parties' believing that they have had a complete opportunity to be heard. Professor Ouellette speaks in this regard of the

> [TRANSLATION] "…perpetual contradiction between freedom of operation and its necessary procedural aspects" (Y. Ouellette, "Aspects de la procédure et de la preuve devant les tribunaux administratifs" (1986), 16 R.D.U.S. 819, at p. 850) . . .

23 *Justice Lamer also cites with approval the following extract from Prof. Ouellette's article (at page 489):*

> [TRANSLATION]. . . the major decisions which formulated the principle of the independence of administrative evidence from technical rules have in the same breath made it clear that this independence must be exercised in accordance with the rules of fundamental justice. It is not sufficient for administrative tribunals to operate simply and effectively; they must attain this high ideal without sacrificing the fundamental rights of the parties.

24 *In* Université du Québec à Trois-Rivières, *the employer sought to introduce evidence about an absence of funding that had led to the termination of two research assistants. The union objected on the grounds that the employer was trying to modify the grounds relied on in the notices of termination. The arbitrator sustained the objection and subsequently allowed the grievances. The Superior Court of Québec allowed the motion in evocation by the employer on the ground that the arbitrator had exceeded his jurisdiction by refusing to hear relevant and admissible evidence. The court ordered a new arbitration before another arbitrator. The Court of Appeal affirmed this judgment. The appeal to the Supreme Court of Canada was primarily to determine whether the arbitrator's refusal to allow the employer to introduce evidence was a decision subject to judicial review. The Supreme Court held that the arbitrator had indeed failed to comply with a rule of natural justice by failing to consider relevant evidence.*

25 *While the facts of this case are not identical to those in* Université du Québec à Trois-Rivières, *the general principles set out by the court certainly are. Justice Lamer, speaking for Justices La Forest, Gonthier and Iacobucci, recognizes the wide latitude given to an arbitrator in determining the scope of an issue presented to him or her and that only a patently unreasonable error or a breach of natural justice can constitute an excess of jurisdiction and give rise to judicial review. The majority of the court, at page 471, states that "a grievance arbitrator is in a privileged position to assess the relevance of the evidence" that is tendered by the parties. Nonetheless, an arbitrator will be found to have exceeded his or her jurisdiction where evidence is excluded "<u>that has such an impact on the fairness of the proceeding, leading</u>*

> *unavoidably to the conclusion that there has been a breach of natural justice" (emphasis added, at page 491).*
>
> ***26** Justice L'Heureux-Dubé, in concurrent reasons, states this view (at page 495):*
>
> > Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence . . .
>
> ***27** In this grievance, the employer has raised the fact that cross-examination will be difficult, if not ineffective, if there is no possibility to deal with exhibits. In this regard, the purpose of cross-examination is relevant. Cross-examination of a witness centres not only on the facts elicited during examination-in-chief, but on all the facts in dispute, whether or not raised by examination-in-chief. Consequently, cross-examination is also a means of obtaining additional information or of testing a witness' credibility. In this case, given the importance of the grievor's testimony, her absence from the proceedings significantly limits the employer's ability to cross-examine her and, consequently, has an impact on the fairness of the proceedings just as in* Université du Québec à Trois-Rivières*. Therefore, I must allow the employer's objection that the grievor's testimony given by means of a teleconference does not effectively fulfill the requirement of providing the employer with the complete opportunity to be heard. Accordingly, this consideration prevails over any inconvenience for the grievor in attending the hearing.*

. . .

[74] In this case, I find that accepting only hearsay evidence, without giving the grievor an opportunity to cross-examine the facts in dispute, would represent a denial of natural justice. I find that the inconvenience factors cited by the employer to explain the lack of direct evidence, namely, public safety and a lack of resources, cannot override the grievor's right to have his point of view fully heard. Consequently, I give no weight to the hearsay evidence submitted by the employer, and I conclude that the comments that the grievor allegedly made were not proved on a balance of probabilities. Therefore, the grievance is allowed in part.

[75] As for assessing the disciplinary penalty, the employer imposed a single three-day suspension for the two misconducts allegedly committed by the grievor, which were making disrespectful comments and engaging in a bet. The disciplinary report

did not detail the balance between the penalty and either misconduct. Mr. Giguère testified that the grievor's conduct with respect to the bet was more serious than his disrespectful comments about Mr. Bolduc. However, the evidence presented focused solely on the disrespectful comments. For the bet, I found that the grievor admitted to it and that he said that he would not bet again. The employer did not adduce any evidence of a repeated offence of a bet and did not adduce any evidence that would persuade me to separate the consequences or appropriate measures in penalizing either misconduct. I have before me only one element of evidence filed in support of an earlier disciplinary measure about attendance. The grievor contested its relevance.

[76] I share the employer's opinion that the grievor's bet with an inmate was a serious offence. I also find that an experienced AC-02 correctional officer should be aware that engaging in a bet is against section 8 of the *Code of Discipline*. The grievor did not convince me that the reason for the bet was justified. I find that he merited a disciplinary penalty for taking part in the bet.

[77] Since the employer imposed a three-day suspension for both the disrespectful comments and the bet, and since the employer indicated that taking part in a bet was a more serious offence, I conclude that the bet represented two of the three days of the suspension. That portion of the penalty must be maintained. Given the failure to prove on a balance of probabilities that disrespectful comments were made, I cancel the third day of suspension. Therefore, the disciplinary penalty is modified according to the order that follows.

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

(The Order appears on the next page)

VI. Order

[79] The grievance is allowed in part.

[80] The disciplinary penalty consisting of a three-day suspension is cancelled and replaced with a disciplinary penalty consisting of a two-day suspension.

[81] I order the employer to refund the grievor one day of pay equal to the suspension.

November 28, 2011.

PSLRB Translation

Michele A. Pineau,
adjudicator