Date: 20130107

File: 566-02-3889

Citation: 2013 PSLRB 2

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

LARINE FELL

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Beth Bilson, adjudicator

For the Grievor: Andrea Tait, Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN

For the Respondent: Karen Clifford, counsel

Heard at Saskatoon, Saskatchewan,
July 17 to 20, 2012.

Individual grievance referred to adjudication

[1] Larine Fell ("the grievor") was hired at the Correctional Service of Canada ("the CSC") as a Correctional Officer 1 ("CX-01") effective November 15, 2008. Her place of employment was the Regional Psychiatric Centre in Saskatoon ("the institution"). The institution is both a prison and a medical facility, offering psychological and psychiatric therapy and programming to inmates from across the country who are placed there on a temporary basis. The grievor was rejected on probation on December 18, 2009, and grieved the termination of her employment.

[2] In a letter dated December 31, 2010, the CSC raised an objection to the jurisdiction of an adjudicator to hear this grievance, and counsel for the CSC renewed this objection at the outset of the hearing. Counsel noted that section 209 of the *Public Service Labour Relations Act* (*PSLRA*), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, which provides for the referral of individual grievances to adjudication under certain circumstances, is subject to an exception under section 211, which reads in part as follows:

> ***211.*** *Nothing in section 209 is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to*
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> *(*a*) any termination of employment under the* Public Service Employment Act *. . . .*

[3] Section 61 of the *Public Service Employment Act* ("the new *PSEA*"), enacted by sections 12 and 13 of the *Public Service Modernization Act*, provides that employees appointed to a position from outside the public service will be subject to a probationary period. Section 62 of the new *PSEA* indicates that during the probationary period the CSC may terminate an employee by giving notice of a specific date of termination or by paying the employee in lieu of notice. Sections 61 and 62 read as follows:

> ***61.*** *(1) A person appointed from outside the public service is on probation for a period*
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> *(*a*) established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act *. . .*
>
> *. . .*

> *(2) A period established pursuant to subsection (1) is not terminated by any appointment or deployment made during that period.*
>
> ***62.*** *(1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> (a) *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act *. . .*
>
> *. . .*
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> *(2) Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*

[4] Counsel for the CSC argued that that section 211 of the *PSLRA* and sections 61 and 62 of the new *PSEA* make it clear that an adjudicator has no jurisdiction to adjudicate a grievance where an employee is rejected on probation. She conceded that the jurisprudence indicates that an adjudicator does have jurisdiction in the limited circumstance where the basis for the termination is not employment-related, and the account given is a "sham" or "camouflage" for improper reasons for termination, such as discrimination. She argued that the onus resting on the CSC is to show that the circumstances of the termination match the criteria set out in the new *PSEA* — that is, that the grievor was an employee at the time of the termination, that the termination occurred during the probationary period, and that the grievor was given appropriate notice of the termination or pay in lieu of notice. Although the CSC is not required to establish cause for the termination, counsel for the CSC conceded that in practice it is usual for the CSC to state some basis for the rejection on probation. The burden then shifts to the grievor to demonstrate that the basis cited by the CSC is merely a disguise for an illicit motivation.

[5] As the success of this jurisdictional objection depends on a determination of whether the grievor has been able to meet the onus of proving that the reasons for the

termination were not related to her suitability to perform the duties of her position, I reserved my decision on the objection until the hearing had been concluded.

Summary of the evidence

[6] The CSC called three witnesses in chief: Lynn McMurtry, who was the Executive Director of the institution when the grievor was working there; Chad Martin, the correctional manager who supervised the grievor; and Casey Sullivan, now a correctional manager, who was a Correctional Officer 2 ("CX-02") during the grievor's time at the institution. The grievor called three witnesses: Heather Giles and Mary Culbertson, both CX-02s, and the grievor. The CSC called two witnesses in rebuttal: Grace Chopty, a correctional manager; and Danielle Marshall, a CX-02.

[7] Ms. McMurtry, who had been employed at the CSC for 26 years at the time of the hearing, is currently the Assistant Deputy Commissioner of Corporate Services for the Prairie Region of the CSC. At the time of the grievor's employment at the institution, Ms. McMurtry was the Executive Director of that institution, a position equivalent to that of Warden in other correctional institutions; because the institution has both clinical and correctional dimensions, the senior executive position in the institution has a distinctive title to reflect this.

[8] Ms. McMurtry testified that she was fully familiar with the expectations associated with the correctional officer positions at the institution, as she had served in a correctional officer position there herself, and had worked in a number of managerial positions there. In her role as Executive Director, she did not directly supervise either correctional officers or correctional managers, but she had general oversight of human resources issues as part of her responsibilities. She was ultimately responsible for deciding to proceed with the rejection of the grievor on probation, and for signing the letter that advised the grievor of this decision. This letter (Exhibit E-2), dated December 18, 2009, advised the grievor that she would be paid one month of salary on termination.

[9] Ms. McMurtry noted that the rejection on probation occurred more than 12 months after the commencement of the grievor's employment, though the letter of offer of employment (Exhibit E-1) referred to a 12-month probationary period. The probationary period had been extended (Exhibit E-10) because the grievor was absent on sick leave from July 17 to August 31, 2009. Ms. McMurtry said that the absence of

the grievor on sick leave was not a factor in the eventual decision to reject her on probation.

[10] Ms. McMurtry testified that, before signing the letter rejecting the grievor on probation, she had taken advice from the chief of Human Resources, Caleigh Miller, and the grievor's supervisor, Mr. Martin, and understood their concerns to be focused primarily on the capacity of the grievor to respond in critical situations. They reported instances of the grievor seeming to freeze when confronting high-stress situations, and of her hands shaking. The instances they cited occurred primarily on the Churchill Unit, a unit for female inmates at the institution. A related concern was that, when the grievor was assigned to post PC36, she did not sufficiently engage in conducting patrols, but remained at the Main Control and Command Post; there was also a concern about her leaving the unit when conflict arose, rather than responding. An incident was also brought to Ms. McMurtry's attention in which the grievor had declined to accept the direction of a correctional manager.

[11] It was Ms. McMurtry's understanding that Mr. Martin had met a number of times with the grievor to discuss the grievor's performance, and that Ms. Miller had been present on at least one of these occasions; a representative of the grievor's bargaining agent, the Union of Canadian Correctional Officers – Syndicat des agents correctionnels du Canada – CSN, had also been present on at least one occasion.

[12] Ms. McMurtry said that the Churchill Unit usually had a number of highly complex cases in residence. Behaviours such as self-injury, assaults and threats of assault toward staff, altercations with other inmates and property damage were common, and correctional officers played a key role in dealing with these incidents. A capacity to respond immediately and effectively was critical to protect the safety of inmates and staff, and ultimately public safety. The incapacity of a correctional officer to respond in such a situation would be a major concern, and raise doubts about the suitability of the correctional officer for this work. Although the grievor as a CX-01 would not be posted to any particular unit, CX-01s are normally expected to act as "first responders" to critical incidents, and it is therefore important that they be able to act effectively anywhere in the institution.

[13] Ms. McMurtry said that the ability of employees to rely on their fellow correctional officers is a key feature in the culture of the institution, and establishing this confidence is important for new employees. She said that there were a number of

other new correctional officers appointed during the same period as the grievor, and she heard no concerns about their performance.

[14] In addition to the information she received from Ms. Miller and Mr. Martin, Ms. McMurtry said that she had been approached directly by several correctional officers who expressed a lack of confidence in the grievor's ability to react promptly in critical situations. Ms. McMurtry said that it was unusual to be approached directly by correctional officers wishing to comment on the performance of their co-workers. In her experience, they usually would go to someone lower in the line of command.

[15] Ms. McMurtry said that the CSC had made a significant investment in training, with a view to helping the grievor become an effective correctional officer. In addition to the 11 weeks of full-time training given to the grievor before her appointment, Ms. McMurtry pointed to a list of the training activities (Exhibit E-3) of which the grievor had taken advantage. Ms. McMurtry said that it is in the institution's best interest to see that its correctional officers succeed, and in her role as Executive Director, she was aware of the need for qualified correctional officers to perform the functions required to keep the institution operating. She was satisfied that reasonable steps had been taken to assist the grievor to meet the standards, and that expectations and concerns had been adequately addressed with the grievor before the decision to terminate her employment.

[16] In cross-examination, Ms. McMurtry acknowledged that she had not directly observed the grievor on the job, and had relied on the information supplied by others in making the decision that the grievor should be rejected on probation. She said that she had confidence that the grievor's supervisor and the human resources office had proceeded appropriately. In re-examination, she said that it is necessary for her to rely on correctional managers to carry out their duties properly; they are trained for these responsibilities, and in the absence of herself or other members of the senior management team, correctional managers become the senior managers in the institution. She further said that she had personal confidence in Mr. Martin, and had no qualms about relying on his assessment of the grievor.

[17] In cross-examination, Ms. McMurtry was also asked about the process for appointing correctional managers. She indicated that correctional managers are usually more experienced correctional officers, often drawn from the ranks of CX-02s. There is a regular competitive process for the selection of correctional managers, involving

examinations and interviews designed to assess their ability and personal suitability. She acknowledged that correctional managers are sometimes appointed on an acting basis without going through this competitive process and said there is sometimes a shortage of employees in the pool of qualified correctional managers.

[18] The grievor's representative asked Ms. McMurtry about the Employee Assistance Program (EAP) and the Critical Incident Stress Management procedure. Ms. McMurtry said that the EAP is available to employees on a self-referral basis if they feel that they need to access assistance with stress or other personal problems. The Critical Incident Stress Management team is composed of volunteers from a variety of positions in the institution. These volunteers are trained to provide support to employees following critical incidents. It is not management, but the team itself, that decides whether intervention is appropriate in any given instance. Ms. McMurtry was unaware whether the EAP had been specifically offered to the grievor, or whether the grievor had been involved in any intervention by a Critical Incident Stress Management team.

[19] Mr. Martin testified that he had been employed at the CSC for 16 years at the time of the hearing, and as of September 2012 will have been in the correctional manager position at the institution for five years. He testified that his primary duties in this position are to supervise correctional officers. This includes assigning them to their posts on a daily basis, briefing them on current circumstances, managing their daily routine, and managing any critical situations that arise. He said that in addition to daily briefings he and other correctional managers do regular walks around the institution, visiting the units and keeping up with what is going on. Correctional officers regularly come to the office to check with the correctional managers about something or to make arrangements for an outside escort. Correctional managers also have to maintain documentation and file regular reports.

[20] Mr. Martin explained that on the day shift, 08:00 to 16:00 from Monday to Friday, there may be five or six correctional managers in the institution. At other times there can be as few as one. It is imperative that correctional officers follow the directions of correctional managers, as all of the institutional information concerning what actions need to be taken flows through the correctional managers. The inmates at the institution include men and women, classified as minimum to maximum security offenders, with a wide variety of psychological or behavioural disorders. The occurrence of problematic situations in this environment is unpredictable, but at times

there may be two or three critical incidents in a day, including assaults on staff or other inmates, or self-harming behaviour like setting fires, slashing or head-banging. Counsel for the CSC presented Mr. Martin with a document produced by the grievor's representative (Exhibit E-4) that included a chart showing the number of critical incidents at various times. This showed that there had been 574 such incidents in 2009, or a little under two per day. Mr. Martin said that there were two female inmates at the institution during this period who had taken up a lot of resources, but that there had been incidents on other units as well. There had been two hostage-takings at the institution during Mr. Martin's time there.

[21] Counsel for the CSC showed Mr. Martin the work descriptions for the CX-01 and CX-02 positions (Exhibits E-5 and E-6). Mr. Martin said he was very familiar with the duties for both of these classifications. He had carried out these duties himself, and also supervised employees in both classifications. He noted in the work description for both classifications that correctional officers are expected to respond in a timely fashion when required, to remain calm in emergency circumstances, to be familiar with the use of security equipment, and to intervene in threatening or violent situations. He also noted that these are national work descriptions, and are not limited in their application to the institution.

[22] Mr. Martin testified that he arranged by email (Exhibit E-7) a discussion with the grievor on September 10, 2009, shortly after she returned from her period of sick leave. He said that they discussed her return to the institution. During this discussion, she indicated that she was unwilling to contemplate acting as a CX-02 assigned to the Churchill Unit, but that she could act as a CX-01. Mr. Martin indicated that as a CX-01 she would have to be ready to respond to situations in the Churchill Unit, and she said that she could do that. Mr. Martin testified that he asked her whether she would require any accommodation for her return to work; the grievor indicated that she would not, other than not to be assigned as a CX-02 to the Churchill Unit, which would require her to be there on a regular basis. Mr. Martin explained that CX-02s are posted to a particular unit, and are responsible for "dynamic" security and case management based on regular interaction with the group of inmates in the unit, while CX-01s provide "static" security, including monitoring the entrance, patrolling the institution and responding to calls for assistance in the units. Given that there is an ongoing shortage of CX-02s, it is quite common for CX-01s to be appointed to CX-02 positions on an acting basis; it seemed to be a concern of the grievor that she might be asked to

perform this role in the Churchill Unit. Mr. Martin said that he did not have any objection to the request made by the grievor.

[23] Mr. Martin said that he met with the grievor on October 7, 2009 to discuss her nine-month performance evaluation report, which covered the period from November 15, 2008 to September 14, 2009. The grievor was provided with a copy of the report and the accompanying annex (Exhibit E-8). Under cross-examination, Mr. Martin acknowledged that there would usually have been reports completed at the three-month and six-month marks as well, but that he had been too busy to complete those reports.

[24] At the meeting, Mr. Martin went through the issues covered in the performance evaluation report. The report referred to the request of the grievor that she not be assigned as a CX-02 to the Churchill Unit; it further indicated that one consequence of this might be that the grievor would lose opportunities to be assigned overtime hours. The report also referred to the fact that the grievor's absence on sick leave during summer 2009 had placed her sick leave bank in a deficit. Mr. Martin said that these issues were not included in the report as performance concerns, but as a record that these consequences had been brought to the grievor's attention. With respect to the grievor's use of leave hours to go to her chiropractor, Mr. Martin said that he wanted to indicate to the grievor that she might have attached this request to the wrong category of leave. Under cross-examination, Mr. Martin said that part of his supervisory responsibilities was to monitor hours of work and leave taken by employees, and he included these observations in the performance evaluation report for that reason.

[25] Mr. Martin said that Ms. Miller had told him that the grievor had taken sick leave following some incidents on the Churchill Unit; the grievor had filed a workers' compensation claim that had been denied, and had taken sick leave instead. At the meeting on October 7, 2009, Mr. Martin mentioned to the grievor that she might avail herself of the EAP in order to develop better coping skills.

[26] Mr. Martin testified that it would have been usual just to complete a performance evaluation report at the nine-month review point, but he had completed the annex document as well because of the performance concerns that had been raised. On the first page of the annex, there was a reference to the difficulty the grievor had reacting "in a calm manner," and a reference to her "panicked voice" when using the radio. Mr. Martin said that he described an incident when the grievor had

called for assistance from the Churchill Unit, and her voice on the radio was "high-pitched" and "unclear." Mr. Martin said that he stressed to her the importance of clear communication on the radio so that other correctional officers would know where they were required and what situation they should expect when they got there. On another occasion reported to Mr. Martin, the grievor had been "almost yelling" when she was calling to report that she was on her way to assist an officer. Mr. Martin said that he told the grievor that clarity of communication was a safety consideration, as correctional managers and others involved need to be able to monitor what is going on.

[27] Mr. Martin said that another concern was that the grievor seemed to struggle with making decisions. This seemed to have been one of the factors in the grievor's expressed wish not to be a CX-02 on the Churchill Unit; although there was nothing objectionable about this request in itself, Mr. Martin said that CX-01s have to be ready to make decisions as well. As he put it, all correctional officers "make a million decisions a day" and have to be able to make rapid decisions; although CX-02s may be in charge of particular units, CX-01s also have to make important decisions.

[28] Mr. Martin said that the grievor indicated that she agreed with the nine-month performance evaluation report, and admitted that she was struggling with some aspects of the work. She was given an opportunity to review the report, and she added her signature to it on November 20, 2009, indicating that she concurred with the assessment.

[29] A further meeting was held on October 15, 2009 to advise the grievor that her probationary period would be extended because of her absence on sick leave over the summer. Mr. Martin said that at this meeting the purpose of the probationary period was outlined to the grievor, and she was advised that failing to meet performance objectives could result in rejection.

[30] Mr. Martin said that he met with the grievor again on November 1, 2009, and outlined the course of this conversation in an email to Ms. Miller on November 3 (Exhibit E-11). He and the grievor had a general conversation about how she was doing, and she indicated that she was starting to feel more comfortable with things. They also discussed a particular incident that had occurred on October 9. In an email to Mr. Martin (Exhibit E-12), Ms. Chopty indicated she had phoned the grievor and asked her to search the courtyard of Mackenzie Unit, and then let the inmates into the

courtyard for their exercise period. Ms. Chopty said she told the grievor that maintenance had been called to clear the courtyard of glass from a broken window, and that all that was required was a "frisk" by the grievor to make sure all of the glass was gone. Mr. Martin was informed that the grievor had told Ms. Chopty she would only accept direction from the correctional manager on the desk, and would not take responsibility for searching the courtyard because there was snow on the ground. Mr. Martin said he was disappointed to hear that the grievor had responded to a correctional manager in this manner. In their conversation on November 1, he told the grievor that her response had been inappropriate. The grievor had responded that she did not know who Ms. Chopty was when she called; Mr. Martin said that she should have asked rather than responding the way she did. He advised the grievor that she should speak with Ms. Chopty about the situation. He later checked with Ms. Chopty to ask if the grievor had followed up on this.

[31] Mr. Martin said that, because of the concerns that had been raised about the performance of the grievor, he drew up a list of probation objectives in consultation with Ms. Miller. He shared the document (Exhibit E-14) with the grievor at a further meeting with her on November 12, 2009. The objectives included in the document were as follows:

> *1. Communicate effectively with your supervisors and or Managers, to ensure an open understanding of performance and duties.*
>
> *2. To effectively assist/intervene in conflict situations. As a CO-I you are required to respond to situations of conflict or self harm. You are not only required to respond but to assist in diffusing the situation in whatever means necessary according to the situation Management Module. Along with this objective you must be able to demonstrate that you can adapt to changing situations and take the necessary action. Also you must be able to deal with said situations in a healthy manner in order to maintain a healthy lifestyle at work and home.*
>
> *3. To be active in providing dynamic security/presence within the institution ie present at activities and on the units when not required at other security activities.*
>
> *4. To decrease the amount of breaks that you currently take to align with the Collective Agreement entitlements.*

> *5. To effectively communicate radio transmissions in high stress situations in order for fellow staff members to understand situation and respond accordingly.*
>
> *6. Demonstrate confidence in yourself and your decisions and be able to discuss actions in an open positive manner.*
>
> *7. To be able to utilize security equipment effectively ie handcuffs, OC spray, Pinel restraints etc… and to be able to assist others in applying said security equipment.*
>
> [*Sic* throughout]

At the meeting on November 12, the grievor appended her signature to show that she had been shown this document.

[32] On November 20, 2009, Mr. Martin sent an email to Ms. Miller (Exhibit E-15) indicating that he had received a report from a "senior officer" concerning an incident involving the grievor that had occurred on November 1. This report concerned the grievor's role in placing an inmate in the Pinel restraint system, which is used, on the authorization of a psychiatrist, to subdue inmates engaged in self-harming or other violent behaviour. Though the system can be used to confine an inmate to a chair or bed, in this case a Pinel board was being used. This is a board about seven feet in length, which provides for up to seven restraints to be attached, to arms, legs, chest and shoulders. The restraints are straps connected to the board with a magnetic clip.

[33] Mr. Martin said that from his conversation with Ms. Marshall, the CX-02 who had reported the November 1, 2009 incident, he understood that the grievor was one of a number of correctional officers who responded to an incident that ended with the inmate being placed in the Pinel restraint system. According to Ms. Marshall's account, the grievor was slow to step forward to perform a role in applying the restraints, and her hands were shaking. When she did attempt to assist, she struggled with applying the restraints, and another officer had to take over by leaning across the inmate, which put that officer at greater risk of being injured by the inmate. Mr. Martin said that the significant thing about this incident from his point of view was that it occurred so late in the grievor's probationary period, and he was concerned that she still seemed to be having difficulty responding effectively in this kind of situation. Mr. Martin alluded to an email sent out by Ms. Marshall following this incident, thanking her colleagues for their help (Exhibit E-16); he spoke to Ms. Marshall about it, and Ms. Marshall said she still had concerns about the performance of the grievor. She had included in the email

the statement, "If anyone has any questions, comments or concerns about yesterdays [*sic*] events . . . please feel free to discuss them with me." She told Mr. Martin that she intended this as an invitation to the grievor to discuss with her how the incident had unfolded.

[34] Mr. Martin said that he had a conversation in November 2009 with Mr. Sullivan, who reported that some correctional officers had approached him with concerns about the performance of the grievor. These concerns included the issue of the grievor's ability to respond effectively to stressful situations, but also complaints that she was taking smoke breaks in excess of her entitlement under the collective agreement. Mr. Martin said that he raised this specific concern with the grievor, who said she would try to cut down on the time she spent on breaks; she seemed, however, "a bit defensive" and said something to the effect of "Other correctional officers do it. Why shouldn't I?" Mr. Martin said that he found it somewhat difficult to coach or mentor the grievor, as she seemed reluctant to take responsibility for the concerns that had been raised.

[35] Mr. Martin met again with the grievor near the end of November 2009 to discuss whether she should take further training in the use of the Pinel restraint system. He indicated that she should repeat the full day of basic training. The list of training activities (Exhibit E-3) indicates that she repeated the basic Pinel training on December 6. Mr. Martin testified that, when he discussed with her the rationale for repeating the one-day program rather than the half-day theory "refresher" typically taken by experienced staff, the grievor argued that she did not need the full day, and should be allowed to take the half-day course. Mr. Martin said that he thought this showed she did not understand the extent to which she lacked proficiency in the restraint system.

[36] Mr. Martin arranged a meeting with the grievor for December 9, 2009, to share the final 12-month performance evaluation report (Exhibit E-18) with her. The report indicated that there were still performance concerns, including an ongoing concern about her capacity to respond to critical situations. At the meeting, the grievor said that she was aware she was not yet up to 100% of the standards, but thought she had reached 60-70%. Mr. Martin said that he was concerned that a correctional officer who had been there close to a year, and who had received considerable advice and

opportunities for additional training, would by her own admission still be at this level of proficiency.

[37] Mr. Martin gave the grievor some time to consider the performance final 12-month performance evaluation report. At a further meeting on December 14, 2009, she signed the portion of the form indicating that she did not agree with the assessment, though she did not, as permitted, attach a statement of her reasons for disagreeing. She told Mr. Martin that she disagreed with two points. One had to do with the description of the incident involving her interaction with Ms. Chopty; the grievor said that it should not be characterized as insubordination and disagreed having delayed unduly in offering an apology to Ms. Chopty. The grievor's second ground of disagreement was that she disputed needing an additional day of training on the Pinel system; she thought a half-day would have been sufficient.

[38] Overall, the assessment made by Mr. Martin was that the grievor was not a suitable candidate to become a permanent employee. He stated that, even if she had become completely proficient in the use of the Pinel restraint system, she would not have been suitable. Her reluctance to confront critical situations and her shakiness affected her ability to perform her duties. As a correctional manager, he felt it was important to have confidence in correctional officers when assigning them to duties, confidence that "everyone will go home safe" because people have made the right decisions. In the case of the grievor, he did not think she was able to perform to the expected standard, and he recommended that she be rejected on probation.

[39] Under cross-examination, Mr. Martin said that correctional managers act as interim crisis managers on such occasions, they are in charge until the executive director is called in. Correctional managers receive training to deal with crisis management. He could not recall whether the training included a specific discussion of when intervention by a Critical Incident Stress Management team might be appropriate. When he discussed the nine-month performance evaluation report with the grievor, he did suggest to the grievor that she might consult the EAP.

[40] Mr. Martin said that he would typically visit each unit once on a shift, and would try to go more often. If there was unrest on a unit, he would go to it more often.

[41] Mr. Martin said that an Officer Statement/Observation Report ("observation report") is completed after any incident in the institution, including inmate incidents,

security breaches and staff interactions. Observation reports are completed by everyone involved, not just correctional officers but all staff, and are sent to the correctional manager's office. The information in those reports is used as the basis for staff briefings.

[42] The grievor's representative asked Mr. Martin whether there were exceptions to the requirement that correctional officers follow the direction of a correctional manager. He answered that there might be limited exceptions where, for example, an inmate's life is in danger or where the right to refuse unsafe work is involved. In re-examination, however, he said that, in the case of the grievor's interaction with Ms. Chopty, no complaint was made under the *Canada Labour Code*, R.S.C., 1985, c. L-2, and there was no indication of any imminent danger to anyone.

[43] The grievor's representative also asked Mr. Martin whether it was the case that an additional correctional officer had been assigned to Churchill Unit after the incidents that had been the precipitating cause of the grievor's sick leave. Mr. Martin said that although he believed an additional correctional officer had been assigned, he could not recall the circumstances under which this had occurred.

[44] Questioned about the reference on the nine-month performance evaluation report to the grievor's willingness to intervene in critical situations, Mr. Martin said that he had been informed that she seemed to "freeze." Mr. Martin said that in his discussion of this report with the grievor, he told her that a number of correctional officers had registered this concern, and she did not ask for any specific examples at that time.

[45] With regard to the reference to the grievor's "panicked state" on the radio, Mr. Martin acknowledged the grievor was likely not the only correctional officer who had given an unclear message on the radio. With respect to her struggles with making decisions, Mr. Martin said he did discuss this issue with the grievor, and told her how the concern had come to his attention. He said this concern was not tied to her reluctance to act as a CX-02, as people might have a variety of reasons for stepping back from being a CX-02 to being a CX-01. He conceded that the term "freeze" was not used in the performance evaluation report, but he felt the nature of this concern had been captured in the document, and that he had conveyed adequately to the grievor the concern about her apparent inability to respond effectively. He said terms like "hesitate" were used, and in their discussion, the grievor acknowledged that she

continued to struggle with the issues laid out in the report. He said that although there would be videotapes of incidents in which the grievor had been involved, he did not review any of these tapes with her.

[46] When asked by the grievor's representative about the incident involving Ms. Chopty in October 2009, characterized in the 12-month performance evaluation report as "insubordination," Mr. Martin said that the grievor did ultimately perform the task Ms. Chopty had requested, and the grievor later had a conversation with Ms. Chopty about it. However, Mr. Martin felt there was still a concern stemming from the grievor's initial refusal to deal with Ms. Chopty or to carry out Ms. Chopty's wishes. Although it was a one-time incident, Mr. Martin did think it was of sufficient significance to be noted in the report.

[47] The grievor's representative asked whether it was inconsistent to note in the performance evaluation report both a failure to consult senior staff for advice and a reluctance to proceed without the advice of others. Mr. Martin said these were two slightly different concerns, one having to do with what seemed to be reluctance on the grievor's part to listen to the advice of others, the second having to do with her unwillingness to make her own decisions in pressing circumstances. Although CX-02s are "in charge" of particular units, CX-01s must be able to make quick decisions about how to respond when they are called upon to intervene in crisis situations.

[48] During the period of the grievor's employment at the institution, Mr. Sullivan, who is now a correctional manager, had been a representative of the grievor's bargaining agent. He testified that he was approached by four or five correctional officers who expressed concern about the grievor's performance in stressful situations. They said they had observed her shaking, and felt she was hesitant in making decisions. Mr. Sullivan said that it was very unusual for correctional officers to complain about their colleagues, as there is a culture among them that discourages "ratting out" fellow correctional officers. Mr. Sullivan testified that he did advise Mr. Martin of these complaints. Under cross-examination, Mr. Sullivan said having also communicated the concerns to the grievor.

[49] The grievor testified that she had worked as a mechanic in the Canadian Forces, and then in courthouse security with the deputy sheriff before becoming a probationary CX-01 at the institution in November 2008. She attended the 11-week Corrections Training Program before commencing work at the institution, and also had

two weeks of on-the-job training. She said she was informed that her performance would be reviewed at 3 months, 6 months, 9 months and 12 months, and that if she had any questions, she should go to a member of management.

[50] The grievor stated that she worked perhaps 85% on the Churchill Unit, responding to a variety of incidents, including assaults and self-harm by the inmates. She said that she enjoyed working with the women offenders in that unit. She developed a rapport with many of the inmates, and she served as a CX-02 for a time, doing case management.

[51] The grievor explained that working as a CX-02 on the Churchill Unit exposed her to many stressful situations, and she felt that there was not sufficient direction from management. She went on sick leave in summer 2008 after three stressful incidents occurred in the space of 20 minutes. After discussion with her doctor and one of the correctional managers at the institution, she decided to take leave. While she was away, she received emails from co-workers indicating that the Churchill Unit was still "shaky" and she came to the conclusion that she did not wish to be a CX-02 when she returned to work. Her recollection was that, when she went on leave, there was only one correctional officer assigned full-time to the Churchill Unit, but when she returned there were two; she suggested this was indicative of the high volume of critical incidents in that unit. When she returned to work, she indicated to Mr. Martin that she did not want to be posted to the Churchill Unit, but she continued to be called there as a CX-01.

[52] The grievor testified about her discussion of the nine-month performance evaluation report with Mr. Martin on October 7, 2009. She said that he indicated to her that many of the concerns outlined in the document had been raised by her co-workers, but he did not give her specific examples. She noted the reference in the report to the fact that on occasion her hands "visibly shook;" she testified that she has experienced hand tremors under stress since childhood, and that other members of her family also exhibited tremors. She said she had not told management this "until they made it an issue," following her termination. She agreed under cross-examination that if correctional officers reported seeing her hands shake, it could have been an accurate observation.

[53] The grievor stated that part of the discussion she had with Mr. Martin concerned her use of sick leave. There was also reference to use of other leave, which she thought

related to a chiropractic appointment she had attended and that was approved by another manager. She said that all of her leave had been properly documented. The grievor said that she had been notified of the option of consulting the EAP when she returned to work from sick leave, though under cross-examination she conceded that she had been provided with information about this program during the training course before she started work at the institution, and that there were posters about the program in the workplace.

[54] The grievor said that she and Mr. Martin had discussed the concerns mentioned in the nine-month performance evaluation report about her proficiency in the use of security equipment, notably the Pinel restraint system, and Mr. Martin had suggested she might take further Pinel training. The grievor said she indicated to Mr. Martin she was willing to take further training, and that she would also get advice from her co-workers. She wanted a better working relationship with Mr. Martin, and sought his advice about how she could do better.

[55] The grievor said Mr. Martin and her talked about the issue of the clarity of her radio calls; she said that she had been taught in the Canadian Forces to project her voice, and that she tends to talk fast when excited. She thought her calls on the radio were no different than the way she ordinarily talks. She said that Mr. Martin did not provide her with adequate examples of what was meant by the reference to her struggles with decision making. She said that she was aware of the seriousness of the decisions made by correctional officers in critical situations, and that if anything did happen "your ass would be grass."

[56] The grievor said that when the meeting concluded she felt that Mr. Martin had not provided her with enough specific examples to guide her in improving her performance, but resolved to seek advice from other correctional officers. She did not agree with the contents of the nine-month performance evaluation report, and did not sign it until November 20, 2009, some weeks after the meeting of October 7. Under cross-examination, she conceded that she had signified her concurrence with the assessment on the report, and had not submitted any statement rebutting the contents.

[57] The grievor proceeded to testify concerning the discussion of the 12-month performance evaluation report (Exhibit E-18). She said that she and Mr. Martin discussed the incident of October 9, 2009 when Ms. Chopty alleged the grievor had

been insubordinate. The grievor said that she did not know who Ms. Chopty was when the grievor was called on the phone. Ms. Chopty had been advised by the nursing staff that the courtyard might still be unsafe because of the broken window, and she thought a search would have to be made before the courtyard could be opened, which it was after about an hour. When Mr. Martin brought to the grievor's attention that Ms. Chopty thought the grievor had been insubordinate, the grievor said having had trouble making contact with Ms. Chopty to discuss it with her. When the grievor and Ms. Chopty met in mid-November, the grievor apologized, and the grievor thought the issue had been resolved.

[58] The grievor said that, during the meeting about the 12-month performance evaluation report, she asked if she could see the observation reports that she had filed concerning specific incidents, and whether she could see any of the closed-circuit television footage. She felt she was being "cornered" on the basis of hearsay from other correctional officers, and she did not know how to respond.

[59] The grievor explained that the 12-month performance evaluation report noted continued concerns about her proficiency with the Pinel restraint system. Mr. Martin had suggested that she repeat the day of training on the Pinel restraint system to reinforce her skills. The grievor recalled that she did say she thought she only needed the half-day refresher; she said that she thought it was more important that she be out in the institution working. She did ultimately repeat the one day of training. This was only a few days before the performance evaluation report was completed, so there was no opportunity to assess whether the training had assisted her.

[60] The grievor said that she did not agree with the evaluation outlined in the 12-month performance evaluation report, and she signified her disagreement on the report a couple of days after her meeting with Mr. Martin, though she did not attach any comments to the document. She said that she was upset after the meeting, as she thought she had not been provided with specific examples of her indecisiveness, failure to take responsibility and other concerns mentioned. She thought it was inconsistent to say that she failed to make decisions and relied too much on senior correctional officers, while at the same time saying she should consult senior correctional officers for advice. She said that she had on occasion waited for senior correctional officers to make decisions, as she thought that that was their responsibility; under cross-examination, she admitted that it is important for all

correctional officers to be able to make effective decisions in critical circumstances, and that effective decision-making is sometimes necessary to preserve life.

[61] The grievor testified having met with Mr. Martin and Ms. Miller on December 14, 2009. The grievor said having hoped for more positive feedback, but the feedback during this meeting was again negative. She specifically asked if she still had a job, and Mr. Martin said that she did. She said that she felt she had never been provided mentorship by Mr. Martin, and that she had had to arrange her own mentorship by consulting with a CX-02, Ms. Giles, who appeared as a witness at the hearing. In cross-examination, the grievor agreed having raised only two points of disagreement with the performance evaluation report at this meeting: the length of time she had waited before contacting Ms. Chopty, and the need for more than half a day of Pinel training. With respect to the latter, the grievor said still feeling that the half day of training would have sufficed, and being confident about her skills with the Pinel restraints.

[62] The grievor said that she had some discussions with Mr. Sullivan when he was acting as her bargaining agent representative. She said that he had not said anything to her about concerns raised by other correctional officers.

[63] In cross-examination, the grievor agreed that it is important for correctional officers to have confidence in each other, as they work as a team. She acknowledged that it is important for correctional officers to "step up" in critical situations, but she felt that no examples had been provided to her of her failure to do so.

[64] Counsel for the CSC asked the grievor to examine the list of performance objectives (Exhibit E-14) she had discussed with Mr. Martin on November 12, 2009. She agreed that they talked about the objectives related to communication with managers and supervisors, assistance in critical situations, dynamic security presence, use of breaks, radio transmissions, confidence in herself, and use of security equipment, and that these were appropriate objectives. She agreed that she had in total eight meetings with Mr. Martin at which various aspects of her performance were discussed.

[65] Counsel for the CSC also asked whether it was correct that the grievor had struggled with the use of Pinel restraints, notably in the incident on November 1, 2009. The grievor denied that she had been struggling. She conceded that the observation reports filed about this incident would merely summarize the incident and would not

likely indicate whether she was slow to apply the restraints or whether it was necessary for someone else to intervene. She reiterated that her recollection of the incident was that she had not been struggling.

[66] In cross-examination about Ms. Chopty's allegation of insubordination, the grievor said not having known who Ms. Chopty was when Ms. Chopty phoned, and denied having told Ms. Chopty the grievor would not take responsibility for opening up the courtyard. The grievor also denied that Ms. Chopty had asked the grievor to search the courtyard; the grievor said her recollection was to have initiated the concern about "frisking" the courtyard.

[67] Ms. Giles, testifying on behalf of the grievor, said being currently a CX-02 at Saskatchewan Penitentiary; Ms. Giles was a CX-02 at the institution during the grievor's probationary employment there. While at the institution, Ms. Giles worked on the Churchill Unit, which she said was "pretty chaotic," and that two inmates in particular had required a lot of staff intervention. She worked with the grievor on occasion, and provided copies of three observation reports (Exhibits G-5, G-6 and G-7, received in redacted form with the names of the inmates involved removed) describing particular incidents in which both she and the grievor had been involved. Ms. Giles said never having had any concerns working with the grievor, and having tried to provide the grievor with some guidance. As Ms. Giles described it to counsel for the CSC, she took the grievor "under her wing." Ms. Giles conceded in cross-examination that the three observation reports she submitted represented only a handful of the many incidents that occurred during the period the grievor was employed at the institution, and that Ms. Giles did not work with the grievor all the time. Ms. Giles acknowledged that there are strong pressures in the correctional environment not to "rat someone out," and that reporting to managers that another officer has done something wrong is not encouraged by correctional officers.

[68] As Ms. Giles explained, in one of the incidents described in the observation report entered as Exhibit G-7, there had been a callout for additional correctional officers, and a seven-point Pinel restraint had been authorized by the psychiatrist. As Ms. Giles recorded, the inmate was physically resistant, and attempted to bite the correctional officers who intervened. Ms. Giles recorded that she and the grievor entered the cell together, and that the grievor acted appropriately in assisting with applying the restraints. In cross-examination, Ms. Giles reiterated that she was certain

she and the grievor had entered the cell together and that the grievor had been involved in restraining the inmate.

[69] In cross-examination, Ms. Giles was shown a video, which she agreed to be a recording of the incident described in the observation report entered as Exhibit G-7. She acknowledged that the video did not show the grievor entering the cell with Ms. Giles, but showed the grievor remaining outside the door of the cell for most of the period covered by the video. Ms. Giles acknowledged that later in the video, the grievor was not among those correctional officers kneeling or squatting near the inmate and applying the restraint system. Ms. Giles identified Ms. Marshall as the lead officer during the incident. Ms. Giles said that Ms. Marshall began by giving orders, and then the participating correctional officers talked to each other to try to get their tasks accomplished in as short a time as possible.

[70] Ms. Culbertson, another CX-02 at the institution, also testified on behalf of the grievor. Ms. Culbertson testified that the culture among correctional officers is one of camaraderie and that there is an expectation that other correctional officers will "have your back" so everyone can go home safely. She testified that the PC36 post is that of a multi-function CX-01. That person does patrolling, may assist with getting inmates to showers and exercise, may provide relief to other correctional officers, may escort inmates to the gym or to meals, and may provide outside escort. The officer in this post might be found on occasion at the Main Control and Command Post, as a lot of correctional officers meet there for various purposes. She acknowledged that there was no explicit reference in the posting order for post PC36 (Exhibit E-19) to the need to assist those correctional officers posted to the Main Control and Command Post with opening doors, although she said this was something that happened. In cross-examination, Ms. Culbertson testified that at the time of the hearing she was an "unposted" officer at the institution, which meant that she did not wear a uniform and was not expected to respond to critical incidents.

[71] Ms. Culbertson said that, although senior correctional officers are in charge, correctional officers are not required to obey orders explicitly under all circumstances. There may be circumstances where safety is compromised, or where a right to refuse unsafe work under sections 127 and 128 of the *Canada Labour Code* is invoked; correctional officers may have to make independent judgments under these circumstances. At the institution, Ms. Culbertson testified that it is common for

correctional officers to question the directions of other correctional officers or clinical staff, partly because of the tension there between the clinical and operational functions of the institution.

[72] Ms. Culbertson said that she was acting as a CX-02 on the Churchill Unit on a temporary basis. At one point, she asked if she could become a permanent CX-02 on that unit, but was advised she did not have adequate qualifications. Ms. Culbertson said that she did not agree with that assessment, as she felt her experience was adequate preparation for this role. She did at one point step back to being a CX-01 for personal reasons, and she said this decision did not raise any questions from her supervisors.

[73] Ms. Culbertson testified that, during the grievor's time at the institution, the atmosphere in the Churchill Unit was quite stressful, and Ms. Culbertson "dreaded going there." Ms. Culbertson had worked on occasion with the grievor on the Churchill Unit and at the principal entrance, and said the grievor's performance seemed satisfactory. Ms. Culbertson had seen the grievor's hands shaking while applying restraints, and had offered her assistance, which the grievor had declined. Ms. Culbertson had heard no concerns raised by other correctional officers.

[74] In cross-examination, Ms. Culbertson said that in her experience safety is of paramount concern in correctional institutions, and it is to be expected that management takes it seriously.

[75] The CSC called two rebuttal witnesses, the first of whom was Ms. Chopty. At the time the grievor was at the institution, Ms. Chopty was an acting correctional manager. Ms. Chopty testified concerning her interaction with the grievor on October 9, 2009. A window had been broken in Mackenzie Unit the night before, and there was glass on the ground in the courtyard. A maintenance crew had been called in, and had reported after cleaning up the broken glass. Ms. Chopty's superior told her to have the correctional officer on the unit search the courtyard so it could be opened for the use of inmates. When the grievor answered the phone, Ms. Chopty said having identified herself as the day correctional manager, asked the grievor to search the courtyard to ensure that no broken glass remained. The grievor said in response that it had snowed the night before, and that the grievor would not take responsibility if there was glass there. Ms. Chopty said having made it clear that it only required a cursory search as the glass had been cleaned up, asked the grievor again to do the search. The grievor

then said the grievor would "only take orders from the desk CM" and asked if desk correctional manager could call the grievor.

[76] Ms. Chopty said that she interpreted the grievor's response as insubordination, as typically a correctional manager can expect orders to be followed. Ms. Chopty said being the day correctional manager, which meant that she was responsible for overseeing the work in the units, while another officer was the desk correctional manager, who monitored the overall operations of the institution. She did contact the desk correctional manager and described her exchange with the grievor; the desk correctional manager said that the grievor should obey Ms. Chopty, and suggested Ms. Chopty call the grievor back. Ms. Chopty did this, and the grievor did carry out the task as Ms. Chopty requested. In Ms. Chopty's view, this did not compensate for the fact that the grievor had been insubordinate. Ms. Chopty said the concern was that it might demonstrate that the orders of correctional managers did not need to be followed, and it is important for the chain of command to be effective in a correctional institution.

[77] Ms. Chopty testified that she and the grievor finally met face to face about a month after the incident. The grievor apologized and said not knowing who she was talking to when Ms. Chopty called. Ms. Chopty told the grievor having identified herself, and the grievor said, "I hadn't picked up on that." The grievor told Ms. Chopty having thought Ms. Chopty might be a nurse when Ms. Chopty called; Ms. Chopty said having thought this account did not make sense, and the grievor had specifically said that the grievor would not take orders from a "unit correctional manager." Ms. Chopty also disagreed with the grievor's statement that Ms. Chopty's opening words had been, "Hey, it's Grace. Open up the courtyard." Ms. Chopty said not to have phoned to say that, as there is a regular schedule for opening the courtyard. She only phoned to give specific instructions. Ms. Chopty said using her first name only with correctional officers she knew, not with someone she had never talked to before. She also said that it is common for correctional officers to ask if they are not sure to whom they are speaking. She was taken aback by the grievor's flat refusal to follow the direction; the grievor did not suggest alternatives. Ms. Chopty said that in her experience new correctional officers are often trying to make a good impression, and are compliant with directions from senior correctional officers. Ms. Chopty said having been "blown away" by the grievor's suggestion that Ms. Chopty had fabricated her account of the incident in her email to Mr. Martin (Exhibit E-12). There was no reason for Ms. Chopty

to make this up, as she had had little contact with the grievor to that point; Ms. Chopty also raised the question of why the grievor would "apologize" if the incident did not occur.

[78] The second reply witness was Ms. Marshall, who had worked at the institution for 15 years, and had been a CX-02 since 2001. In addition to normal CX-02 duties on a unit, Ms. Marshall said she had been involved in CX-01 on-the-job training, and had been a member of the women's cell extraction team and the federally sentenced women emergency response team.

[79] Ms. Marshall is an employee in the grievor's bargaining unit. Ms. Marshall was summoned to attend, and made it clear that she was not happy about giving testimony on behalf of the CSC. She described how the Pinel restraint system is used to subdue an inmate. She said that teamwork is important in this process, and CX-01s would generally be familiar with the role they would play. They would not need to wait for specific direction from the CX-02 in charge. Usually, there would be one officer for each of the restraint points. One of the objectives is to apply the restraints as swiftly as possible, so the more correctional officers who are in the cell, the better. The aim is to minimize the risk of injury to the inmate and others, and to allow the situation to normalize as fast as possible.

[80] Ms. Marshall testified that on November 1, 2009 an inmate had been engaging in self-harming behaviour. Ms. Marshall entered the cell and applied handcuffs. She then got psychiatric authorization for the application of the Pinel restraints, and the team of correctional officers proceeded to apply the restraints. Ms. Marshall testified that the inmate was placed on a restraint board in a sitting position, and restraints were attached to her ankles. The inmate was then placed in a lying position. Ms. Marshall's position was next to the inmate's left wrist, and Ms. Marshall applied the wrist restraint. There was a problem with the wrist restraint on the other side of the board, as the restraint had become detached from the Velcro cuff. In cross-examination, Ms. Marshall said that the grievor must have removed the strap with the magnetic lock from the Velcro cuff, which defeats the objective of being able to restrain the inmate quickly. Ms. Marshall said that the grievor was in a standing position at the right wrist point of the inmate, holding the detached magnetic strap. Ms. Marshall directed the grievor to assist in applying the right wrist restraint, but the grievor did not move. Ms. Marshall said having ended up reaching across the body of the inmate and showing

the grievor how the restraint should be applied. Ms. Marshall said having been highly uncomfortable with having to lean across the body of the inmate, as this exposed Ms. Marshall to the risk of being bitten or head-butted by the inmate.

[81] Ms. Marshall said all correctional officers are trained to respond effectively in crisis situations, and it is important that correctional officers be able to rely on the response of their colleagues. Ms. Marshall said she had no confidence in the ability of the grievor to respond. Ms. Marshall said that further training in the use of the restraints was not the solution. The problem was that the grievor froze and seemed to be unable to act. Ms. Marshall said having sent an email to all of the correctional officers involved (Exhibit E-16) after the incident of November 1, 2009 was over, to thank them for their assistance. She said that the last line indicating that she would be receptive to "any questions, comments or concerns" about the incident was in fact an invitation to the grievor, as Ms. Marshall hoped that the grievor and herself would be able to talk about what had happened. Ms. Marshall did talk to Mr. Martin about the incident, but never had any conversation about it with the grievor.

Summary of the arguments

[82] Counsel for the CSC argued that there is a single issue before me, which is the question of whether I have jurisdiction to decide this grievance. She argued that the authority of an adjudicator under the *PSLRA* does not extend to terminations covered by the new *PSEA*, and that this exclusion applies in the case of a rejection on probation.

[83] Counsel for the CSC said that the courts had accepted that this exclusion does not apply where the ground cited for rejection on probation is a "sham or a camouflage," citing the majority of the Court in *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.), at page 441, as the case that established the basic parameters for this concept:

. . .

> *The basic conclusion of the* [*Jacmain v. Attorney General*, [1978] 2 S.C.R. 15] *judgment, as I read it, is that an adjudicator appointed under the P.S.S.R. Act is not concerned with a rejection on probation, as soon as there is evidence satisfactory to him that the employer's representatives have acted, in good faith, on the ground that they were dissatisfied with the suitability of the employee for the position. . . .*

. . .

This point was expressed in the following terms in *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529, at para 45:

> *[45] However, as I see it, the adjudicator required only that the employer demonstrate the rejection was for an employment-related reason, i.e. a dissatisfaction with the suitability of the employee, and as such was acting in accordance with the provisions of the* PSEA. . . .

[84] According to counsel for the Correctional Service of Canada, both the courts and adjudicators under the *PSLRA* have affirmed this approach in a number of cases. In *Maqsood v. Treasury Board (Department of Industry)*, 2009 PSLRB 175, an adjudicator commented at para 37:

> *[37] . . . even if the employer makes errors in drawing the conclusions that lead to the decision to reject on probation, the rejection will still not be subject to challenge if the reasons for the decision relate to employment.*

[85] Counsel for the CSC pointed out that, in *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134, an adjudicator commented on the implications of the new *PSEA* taking effect in 2005, concluding that the new *PSEA* does not alter the basic approach to be taken to determine whether an adjudicator has jurisdiction to consider a grievance arising from rejection on probation; the most significant change is that the burden on the grievor has been made more onerous:

. . .

> *[111] . . . The grievor bears the burden of showing that the termination of employment was a contrived reliance on the new* PSEA*, a sham or a camouflage. . . .*

. . .

[86] Counsel for the CSC added that in *Premakanthan v. Deputy Head (Treasury Board),* 2012 PSLRB 67, an adjudicator confirmed the *Tello* approach at para 52:

> *[52] . . . In cases involving rejection on probation, it is not the role of an adjudicator to revisit the appropriateness of the deputy head's dissatisfaction with an employee's suitability to perform the duties of his or her position by reassessing the employee's performance or behaviour and by substituting the adjudicator's assessment for that of the deputy head; nor is it the role of an adjudicator to assess the*

> *employee's performance during his or her tenure or the validity of his or her justifications. The role of an adjudicator is to ensure that the rejection on probation is what it appears to be and that a deputy head's decision to end an employee's employment during a probationary period was not a contrived reliance on the* PSEA*, a sham or a camouflage.*

[87] Counsel for the CSC argued that all the CSC needs to demonstrate is that the grievor was terminated during the probationary period and that the appropriate pay in lieu of notice was given. Counsel argued that there was clear evidence to substantiate these points. The burden then shifts to the grievor to prove that the rejection on probation was not based on an ground of unsuitability, but that the CSC acted in bad faith, and stated that there were concerns with the grievor's suitability when in fact the basis for the termination was something else altogether.

[88] Counsel for the CSC pointed out that, in the letter rejecting the grievor on probation, the CSC had cited the grievor's inability to assess problem situations, identify possible solutions and take necessary measures. Counsel argued that the testimony of a number of witnesses confirmed the importance of these elements in the work of a correctional officer. The evidence, particularly that of Mr. Martin, showed how the grievor had failed to meet these elements. In order to meet the burden of proving bad faith, the grievor would have to show that the CSC made up its concerns about the CSC's performance. Counsel said that the evidence showed that the CSC did not fabricate these concerns, but made numerous attempts to assist the grievor in improving her performance, and in addition had provided her with extensive training opportunities. The grievor signed the 9-month performance evaluation report and registered only two concerns about the 12-month performance evaluation report (that there was an inaccuracy in the length of time it took her to meet Ms. Chopty, and that there was a difference of opinion about the need for the full day of Pinel training). Therefore, it must be taken that the grievor conceded that there were legitimate concerns with her performance. Indeed, counsel noted, in the grievor's final discussion with Mr. Martin, the grievor estimated that her performance level had reached 60-70%.

[89] Counsel for the CSC pointed to the grievor's testimony of having been put at a disadvantage because Mr. Martin did not provide the grievor with specific examples of events where the grievor's performance had not been adequate. Counsel said that in fact there were a number of specific examples given, such as the interchange with

Ms. Chopty on October 9, 2009 and the application of the Pinel restraints on November 1.

[90] Counsel for the CSC urged me to consider carefully the evidence of Ms. Marshall, whose reluctance to be a witness against a fellow correctional officer was clear. In a culture that discourages "ratting out" co-workers, counsel said that the fact a number of correctional officers had expressed concern to Ms. McMurtry and to Mr. Sullivan indicates that the CSC was not inventing the concerns about the performance of the grievor.

[91] In her argument, the grievor's representative conceded that an adjudicator does not have jurisdiction over a rejection on probation if an employer makes the decision in good faith. She argued that, however, the CSC in this case acted in bad faith, and that the evidence demonstrated this.

[92] The grievor's representative said that the letter rejecting the grievor on probation was signed by Ms. McMurtry, who had not observed the performance of the grievor directly and had not been present at any of the meetings between the grievor and Mr. Martin. Ms. McMurtry relied on the assessment of Mr. Martin, who in turn had accepted from others reports he was in no position to verify. In addition, Mr. Martin appeared to be influenced by the fact that the grievor had asked not to act as a CX-02, a request that had been made at least by Ms. Culbertson without any stigma being attached to it. The grievor's representative also argued that the use of sick leave and other leave had been held against the grievor, and that this was not indicative of good faith.

[93] The grievor's representative argued that the grievor had asked for guidance and assistance on numerous occasions. The grievor had asked Mr. Martin to give her specific examples of concerns about her failure to make decisions and her "freezing" and he had not provided any examples; the grievor's representative intimated that this was because Mr. Martin had no examples to provide. The evidence indicated that the environment in which the correctional officers worked, particularly on the Churchill Unit, was stressful and characterized by repeated critical incidents. Yet no effort was made to ensure that the grievor was offered the services of the EAP or Critical Incident Stress Management before her decision to take sick leave. Furthermore, although the practice is for performance evaluation reports to be completed at three-month intervals, the first report done by Mr. Martin for the grievor was at the nine-month

mark, which suggests that he must have been satisfied with her performance up to that point.

[94] With respect to the November 1, 2009 incident concerning the application of Pinel restraints, the grievor's representative argued that anyone in the grievor's position would have read the email sent out by Ms. Marshall as indicating no performance concerns about anyone on the team. Concerning the incident on October 9 involving Ms. Chopty, the grievor's representative said the evidence showed that this incident had been resolved to everyone's satisfaction as of the middle of November, and it was further indicative of the CSC's bad faith that the incident was still being referenced in the 12-month performance evaluation report document. The few events like this referred to in the performance evaluation reports should be seen as one-time incidents, and not supporting a major performance concern on the part of the CSC.

[95] The grievor's representative argued that the CSC wilfully withheld from the grievor information that might have helped the grievor. Further, when Mr. Martin and Ms. Miller met with the grievor on December 14, 2009, Mr. Martin and Ms. Miller assured the grievor she still had a job; the letter rejecting the grievor on probation arrived only a few days later. This sequence suggests that the concerns mentioned in the letter were invented at the last minute.

[96] With respect to corrective measures, the grievor's representative argued that the grievor should be reinstated to her employment and compensated for lost income and benefits. The grievor's representative argued that, however, it would not be appropriate to place the grievor back at the institution and that the parties should explore where the grievor might be located to ensure that she has a fresh start.

[97] In rebuttal, counsel for the CSC argued that it is well established that the manager who signs the letter rejecting an employee on probation is not required to witness all of the conduct that is the basis for the decision; in support of this, she cited *Sved v. Deputy Head (National Parole Board)*, 2012 PSLRB 16 at para 129, and *Premakanthan*, at para 48. In any case, there was input into the decision from a number of sources, including the correctional officers who spoke to Ms. McMurtry and to Mr. Martin, and the human resources officer.

[98] With respect to the argument made by the grievor's representative that the few events referred to in the performance evaluation reports should be seen as one-time incidents not supporting a major performance concern on the part of the CSC, which had to be taken into account in assessing the grievor's performance in the stressful environment in which the grievor worked, counsel for the CSC argued that there was another side to this argument. It was incontestable that the grievor, along with other correctional officers, faced numerous critical incidents, but these occurrences gave the grievor many opportunities to hone and demonstrate her skills.

[99] Counsel for the CSC admitted that the term "froze" or "freeze" did not appear in the performance evaluation reports. She argued that, however, the same substantive point was made in them by use of the term "hesitation" and by reference to the grievor's "inability to react in a calm manner."

[100] In response to the grievor's representative's argument that the grievor was not provided with specific examples, counsel for the CSC argued that the performance evaluation reports and the discussions with Mr. Martin were sufficiently specific that the grievor could be expected to understand the nature of the concern. Not only were specific incidents like that of November 1, 2009 referenced, but there were references to scenarios like "staff assaults" and "ligatures" that pointed to events in which the grievor had been involved. Counsel for the CSC argued that providing the grievor with copies of the observation reports would not have assisted the grievor with performance issues, as these documents are not designed to provide information about the performance of correctional officers.

[101] Counsel for the CSC said that the comments on sick leave and other leaves, and on the overtime question, were not included in the performance evaluation reports or in the oral comments of Mr. Martin as an improper reflection on the grievor. Rather, Mr. Martin was fulfilling his obligations as a manager by giving the grievor information about her status in relation to leave and overtime.

[102] Counsel for the CSC argued that, although it is the stated practice of the CSC to do evaluations of probationary employees at three-month intervals, the fact that the first performance evaluation report occurred at the nine-month mark is not indicative of the CSC's bad faith. In fact, an employer is not required to give written feedback at all or to warn an employee before rejecting him or her on probation, and Mr. Martin raised the concerns he was aware of with the grievor at the first opportunity. The fact

that some of these concerns arose from "one-time incidents" does not mean that the CSC is not entitled to consider them in assessing the grievor's suitability for permanent employment.

Reasons

[103] At the time of the *Penner* decision, subsection 28(2) of the former *Public Service Employment Act*, R.S.C., 1985, c. P33, read as follows:

> ***28.*** *(2) The deputy head may, at any time during the probationary period of an employee, give notice to the employee that the deputy head intends to reject the employee for cause at the end of such notice period as the Commission may establish for that employee or any class of employees of which that employee is a member, and the employee ceases to be an employee at the end of that period.*

In cases like *Penner*, the courts and adjudicators interpreted this provision as permitting an employer to take into account the purpose of a probationary period, the purpose being to test whether the employee will make a suitable long-term employee. In the case of a probationary employee, the general approach was not to view the term "for cause" in section 28 as signifying a requirement that the CSC establish "just cause" as that employer would have to do with respect to a permanent employee. Rather, the provision was interpreted to require employers to make a determination in good faith — that is, a determination related to the probationary employee's suitability for long-term employment — that the employment relationship should be terminated during the probationary period.

[104] Section 61 of the new *PSEA* provides that employees appointed to a position from outside the public service will be subject to a probationary period. Section 62 indicates that an employer may terminate the employee during the probationary period by giving notice of a specific date of termination or by paying the employee in lieu of notice. Sections 61 and 62 read as follows:

> ***61.*** *(1) A person appointed from outside the public service is on probation for a period*
>
> *(*a*) established by regulations of the Treasury Board in respect of the class of employees of which that person is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act . . .

. . .

> *(2) A period established pursuant to subsection (1) is not terminated by any appointment or deployment made during that period.*
>
> ***62.*** *(1) While an employee is on probation, the deputy head of the organization may notify the employee that his or her employment will be terminated at the end of*
>
> (a) *the notice period established by regulations of the Treasury Board in respect of the class of employees of which that employee is a member, in the case of an organization named in Schedule I or IV to the* Financial Administration Act . . .
>
> . . .
>
> *and the employee ceases to be an employee at the end of that notice period.*
>
> *(2) Instead of notifying an employee under subsection (1), the deputy head may notify the employee that his or her employment will be terminated on the date specified by the deputy head and that they will be paid an amount equal to the salary they would have been paid during the notice period under that subsection.*

It will be noted that in section 62, any reference to "cause" was removed, and the new provision simply states that an employer may notify an employee on probation that his or her employment will be terminated at the end of a specified notice period.

[105] In *Tello*, an adjudicator considered whether the change in the language of section 62 of the new *PSEA* altered the considerations an adjudicator must canvass when deciding the question of jurisdiction under section 211 of the *PSLRA*. The adjudicator also considered the impact of that part of the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, dealing with the broad legal obligations of public sector employers.

[106] The adjudicator in *Tello* concluded that the effect of the decision in *Dunsmuir* was to bring nearly all public sector employment within the paradigm associated with a contract of employment. However, the adjudicator also found at para 104 that:

> *[104] The employment relationship for public service employees such as the grievor is governed within the statutory framework of the PSLRA, the new PSEA and the*

> [*Financial Administration Act*, R.S.C., 1985, c. F-11] *(Penner). . . .*

The significance of this is that a public sector employer is not bound by the canons of procedural fairness from administrative law, but by the more minimal obligation to act in good faith that pertains to private sector employers. An employer's obligations can, of course, be altered by agreement, as they typically are for employees covered by collective agreements.

[107] The adjudicator in *Tello* held that an employer's obligations under the new *PSEA* and the principles in *Dunsmuir* must still be assessed in light of the purpose of the probationary period:

> . . .
>
> *[110] If a deputy head terminates the employment of a probationary employee without any regard to the purpose of the probationary period — in other words, if the decision is not based on suitability for continued employment — that decision is one that is arbitrary and may also be made in bad faith. In such a case, the termination of employment is not in accordance with the new* PSEA*.*
>
> *[111] In my view, the change between the former* PSEA *and the new* PSEA*, when viewed in the context of the recent jurisprudence of the Supreme Court of Canada on the appropriate approach to public employment, does not significantly alter the substance of the approach that adjudicators should take to grievances involving the termination of a probationary employee. . . .*
>
> . . .

[108] What has changed, according to *Tello*, at para 111, is the burden of proof for the parties:

> *[111] . . . The burden of proof on the deputy head has been reduced. The deputy head's burden is now limited to establishing that the employee was on probation, that the probationary period was still in effect at the time of termination and that notice or pay in lieu has been provided. The deputy head no longer has the burden of showing "cause" for the rejection on probation. In other words, the deputy head does not have the burden of establishing, on a balance of probabilities, a legitimate employment-related reason for the termination of employment. However, the Treasury Board* Guidelines for Rejection on Probation *require that the letter of termination of employment of a*

> *probationary employee set out the reason for the decision to terminate employment. The deputy head is still required to tender the letter of termination as an exhibit (normally through a witness) to establish that the statutory requirements of notice and probationary status have been met. That letter will usually state the reason for the decision to terminate the employment of the probationary employee. The burden then shifts to the grievor. The grievor bears the burden of showing that the termination of employment was a contrived reliance on the new* PSEA*, a sham or a camouflage. If the grievor establishes that there were no legitimate "employment-related reasons" for the termination (in other words, if the decision was not based on a bona fide dissatisfaction as to his suitability for employment:* Penner *at page 438) then the grievor will have met his burden. Apart from this change to the burden of proof, the previous jurisprudence under the former* PSEA *is still relevant to a determination of jurisdiction over grievances against a termination of a probationary employee.*

The burden is thus no longer on an employer to establish a legitimate ground of unsuitability for the termination; the burden is on the grievor to show that the decision of the CSC is a "contrived reliance on the *PSEA*, a sham or a camouflage." The approach outlined in *Tello* has been adopted by adjudicators in a number of subsequent decisions; see *Ducharme v. Deputy Head (Department of Human Resources and Skills Development)*, 2010 PSLRB 136; *McMath v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 42; *Boshra v. Deputy Head (Statistics Canada)*, 2011 PSLRB 97; and *Premakanthan*.

[109] The changes described by the adjudicator in *Tello* place an extremely heavy burden on a grievor challenging a rejection on probation. As the cases cited suggest, it is not sufficient to show that the CSC made mistakes, that not all of the reasons it gave for the decision are well-founded or even that the grievor was not given sufficient chances to respond to the allegations of shortcomings in performance. It is necessary for the grievor to show that the grounds related to her suitability to perform the duties of her position cited by the CSC were a disguise for improper and unacceptable reasons for the decision.

[110] The evidence presented in this case did show that there were instances in which the process followed by the CSC in assessing the grievor's performance was not flawless. Mr. Martin admitted that, for example, it would have been better if he had completed the grievor's performance appraisals at three-month intervals as the CSC's general policy with respect to the evaluation of probationary employees contemplated.

[111] Overall, however, the evidence shows that the CSC made efforts to bring concerns to the attention of the grievor and to give her opportunities to overcome the shortcomings that had been identified. Although not all of the eight meetings between Mr. Martin and the grievor were devoted to discussion of the performance evaluation reports as such, they all dealt with aspects of the performance of the grievor, in some cases with specific incidents.

[112] One specific incident was the exchange between the grievor and Ms. Chopty on October 9, 2009. There was an obvious conflict between the evidence of the grievor and that of Ms. Chopty concerning this incident. I have concluded that the version given by Ms. Chopty is to be preferred, in part because it is the more coherent and consistent version. For example, Ms. Chopty said that she identified herself when the grievor answered the phone, as Ms. Chopty would with any officer she did not know. The grievor said that Ms. Chopty had not identified herself, but had referred to herself by her first name. On the other hand, the grievor did not deny having said wishing to confirm that the "desk correctional manager" supported Ms. Chopty's direction, which does not seem consistent with a statement that the grievor had no idea who Ms. Chopty was. In any case, it does not seem unreasonable for the grievor's supervisors to interpret as insubordinate the grievor's refusal to take action without further instructions; if the grievor really was not certain who Ms. Chopty was or whether Ms. Chopty had authority over the situation, the grievor could have taken steps to clarify that. In her testimony, the grievor suggested that this incident should not be given too much weight, as the grievor did ultimately open the courtyard as requested, and she had resolved the matter in a face-to-face meeting with Ms. Chopty in mid-November.

[113] As an adjudicator pointed out in *Premakanthan*, however, it is not to role of an adjudicator to second-guess an employer's judgment about what conduct on the part of a probationary employee should be considered relevant to an evaluation of the suitability of the employee for long-term employment, or to decide how much weight should be attached to particular incidents. The grievor may have considered the incident to be water under the bridge, but the grievor's perspective on it does not disentitle the CSC to continue to take the event into account, or turn it into one of the grounds of unsuitability for its ultimate decision to reject the grievor on probation. The evidence of Ms. Culbertson was that correctional officers are entitled to make independent judgments if there are safety concerns in a situation, but the grievor did

not formally raise a concern for her safety or the safety of others in her response to Ms. Chopty.

[114] In the performance evaluation reports and other communications with the grievor, Mr. Martin reiterated a number of times the concern that the grievor did not seem decisive, and seemed to "freeze" in critical situations. The grievor testified that she did not think this was an accurate assessment, and said that one of the major signs people seemed to be basing their comments on — the tremor in her hands — was a congenital condition that did not interfere with her work. She did not communicate to the CSC that the tremor was related to a medical condition rather than stress until after the termination of her employment; it was not established that she ever provided any medical evidence showing that the tremor was congenital.

[115] The grievor also called two co-workers as witnesses to testify that they had not shared the concern of others about the ability of the grievor to react appropriately in critical situations. One of those witnesses, Ms. Culbertson, appears to have had only limited opportunity to observe the grievor. The other, Ms. Giles, testified having worked alongside the grievor in a number of critical situations, and had not had reason to question the grievor's ability to take the initiative or to perform as expected. Ms. Giles' testimony, however, was undermined by the video of the incident of November 1, 2009, which Ms. Giles described in an observation report and again in her oral testimony. Ms. Giles' recollection of this incident differed markedly from the evidence of one of the CSC's reply witnesses, Ms. Marshall, who said that the grievor had shown a hesitation to respond effectively and had also not shown proficiency in attaching the Pinel restraints. The video evidence indicated that Ms. Giles' recollection that she and the grievor had entered the cell together was mistaken. The video of the incident was more consistent with Ms. Marshall's remembrance, as it showed the grievor outside the cell when others had taken their places around the inmate, and also showed that Ms. Marshall did later lean across the inmate to deal with the Pinel restraint that the grievor was responsible for applying.

[116] The major thrust of the argument on behalf of the grievor was that, although they had a number of conversations, Mr. Martin failed to provide the grievor with specific examples or enough detail about the performance concerns for which the grievor could be expected to make the improvements necessary to pass her probation. While it is true that many of the statements in the performance evaluation reports took

a generic form, it is my view that they provided sufficient information to the grievor about the CSC's concerns to allow her to take corrective action. Her response at the hearing to the several references to her "shaking" in critical situations was not that her co-workers could not have observed her shaking, but that there was an explanation for it not related to stress, an explanation that she never provided to Mr. Martin. The concerns about her hesitating — and I accept that the references to "freezing" were captured in this language in the performance evaluation reports — were also stated generically. However, the context — critical incidents requiring timely decisions to be made — should have been sufficiently clear so that the grievor could understand what was being referred to. Mr. Martin said, in fact, that he and the grievor had discussed this issue during the review of the reports, and this was not one of the areas about which the grievor registered disagreement when she signed the documents.

[117] In any case, the performance evaluation reports and other communications also point to specific incidents and interactions. Although the grievor took exception to the way these were characterized, she clearly understood what events were being described: the interaction with Ms. Chopty, the grievor's radio communications, the use of the Pinel restraints, the discussion about how much training the grievor required on the Pinel restraints, and the incident of November 1, 2009 in which Ms. Marshall said having had to lean across the inmate to apply the restraints.

[118] The grievor's representative argued that the performance evaluation reports and the communications from Mr. Martin seemed to attach importance to the use of sick leave and other leaves by the grievor and to the request the grievor made not to be assigned to a CX-02 position, that raising these issues suggested that the CSC was holding it against the grievor to have made legitimate use of the leave to which she was entitled, and that the grievor had made the reasonable choice in not wishing to perform the duties of a CX-02. Mr. Martin explained that these items were included in the reports or in his verbal communication to the grievor because he wanted her to have accurate information about where she stood with respect to her leave situation and her entitlement to overtime. In the case of the grievor's use of sick leave, Mr. Martin was bringing to her attention that her bank of sick days was significantly overdrawn after she completed her leave, and was inviting her to consider how this could be redressed. With respect to the grievor's use of leave hours to go to her chiropractor, Mr. Martin said that he wanted to indicate to the grievor that she might have attached this request to the wrong category of leave. The reference to the

grievor's decision to step back to the CX-01 position and her request not to be given acting CX-02 duties on the Churchill Unit was made in order to alert her to the fact that she might lose some overtime hours.

[119] Mr. Martin was thus able to provide a coherent and convincing explanation for the inclusion of these issues in the performance evaluation reports. It might have been preferable to deal with these issues as part of a conversation separate from the review of the reports, but I am persuaded that Mr. Martin was not attaching blame to the grievor for the choices she made in connection with those issues.

[120] All of the witnesses who gave evidence at the hearing described the workplace environment at the institution as stressful and demanding. Critical incidents requiring a rapid response, intense concerns for the safety of inmates and staff, and tension between the clinical and the correctional missions of the institution were all mentioned as features of this workplace. The stresses at the institution took a toll on the grievor, by her own admission; after a particularly intense period early in her probationary period, she took a stress-related sick leave. When she returned, Mr. Martin asked whether she would be requesting any accommodation. Although the grievor asked that she not be assigned on a permanent basis to the Churchill Unit, she indicated that she would be prepared, as any other CX-01, to respond to situations in that unit if necessary.

[121] The grievor's representative intimated that the CSC had a responsibility to give the grievor an opportunity to receive the services of the EAP or the Critical Incident Stress Management team. The evidence indicated, however, that the EAP operated as a self-referral program, and that the grievor was aware of its existence as early as her pre-employment training program. The evidence also suggested that the Critical Incident Stress Management team makes its own decisions about when it is appropriate to intervene in a situation, and its deployment is not overseen by management. In any case, Mr. Martin's evidence, which was not contradicted by the grievor, was that he asked the grievor whether she would require any accommodation on her return to work, and whether she was prepared to resume her duties. At that point, the grievor said that, although she did not wish to be placed in the position of a CX-02 on the Churchill Unit, she was ready to resume duties as a CX-01 and to be called out to the Churchill Unit as required.

[122] I have noted earlier that the burden on a grievor in a case of this kind is a difficult one. It is not enough to show that the process followed by the CSC was imperfect or even that it was unfair. It is necessary to show that the CSC acted in bad faith and that whatever ground of unsuitability for the rejection on probation was given by the CSC is essentially a fabrication.

[123] I have concluded that in this case the grievor has not succeeded in meeting her difficult burden. The CSC cited several grounds of unsuitability for the decision to reject the grievor on probation, and the evidence does not establish that these were invented to disguise an improper and unacceptable basis for the decision. I therefore find that an adjudicator lacks jurisdiction to determine this grievance.

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

(The Order appears on the next page)

Order

[125] I declare that an adjudicator has no jurisdiction to hear this grievance.

[126] I order this file closed.

January 7, 2013.

Beth Bilson,
adjudicator