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*Public Service*
*Labour Relations Act*

Before an adjudicator

BETWEEN

**JASON FINLAY**

Grievor

and

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

Respondent

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

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** Margaret T.A. Shannon, adjudicator

***For the Grievor:*** Corinne Blanchette, Union of Canadian Correctional Officers - Syndicat des Agents Correctionnels du Canada - Confédération des Syndicats Nationaux

***For the Respondent:*** Joshua Alcock, counsel

Heard at Abbotsford, British Columbia,
January 29, 30 and 31 and February 1, 2013.

## I. Individual grievances referred to adjudication

[1] The grievor, Jason Finlay ("the grievor"), was suspended with pay pending an investigation for alleged violations of the Correctional Service of Canada's *Code of Conduct*. Upon his return to the workplace following a determination by the Correctional Service of Canada (CSC or "the employer") that there were insufficient grounds to find that the grievor was guilty of the allegations made against him, the grievor was transferred to the CSC's Mountain Institution without his consent. He claimed that that action by the employer was defamatory, discriminatory, unwarranted, excessive and unfounded in fact or law.

[2] When he returned to the workplace, he was not compensated for missed overtime shifts, statutory holiday pay, and shift differentials and weekend premiums missed while he was suspended during the disciplinary investigation. He claims that that action by the employer was disciplinary in nature.

## II. Preliminary Objection

[3] At the outset of the hearing, counsel for the employer raised a preliminary objection to the hearing of the grievances. He argued that the disciplinary investigation suspension without pay was administrative in nature, and therefore, the Public Service Labour Relations Board ("the Board") has no jurisdiction. As to the deployment without consent, the grievor's consent was not required under the *Public Service Employment Act*, S.C. 2002, c. 22, ss. 12, 13 ("the *PSEA*"). This Board has only limited jurisdiction under paragraph 231(*a*) of the *Public Service Labour Relations Act*, S.C. 2002, c.22, s.2 ("the *Act*") to review the employer's decisions on deployment when they are associated with the safety and security of other staff members or offenders or when there is a perceived conflict of interest.

[4] The employer argued that the grievor accepted that he could be deployed without his consent when he signed his letter of offer (Exhibit 6, Tab 9). Therefore, his consent was not required, pursuant to section 51(6)(*a*) of the *PSEA*. The deployment was made in good faith for reasons of the safety and security of the CSC's Kent Institution and did not amount to a sham or a camouflage.

[5] The grievor's representative argued that, where the allegations against the grievor were unfounded, the employer is obligated to pay all bonuses to which he would have been entitled but for the suspension. This Board has jurisdiction under

paragraph 209(1)(*b*) of the *Act* to determine whether the refusal to pay those amounts to the grievor amounted to disciplinary action. When allegations are determined to be unfounded, a refusal to make the grievor whole is disciplinary.

[6] As to the matter of the deployment, the grievor's representative argued that I must first determine whether the grievor's consent to deployment was required. If it was not, then I must determine whether the justification for the deployment amounted to a sham, camouflage or a subterfuge or whether the deployment was made in bad faith.

[7] I reserved my decision on the objections pending completion of the hearing.

## III. Summary of the evidence

[8] The grievor has been employed as a correctional officer since 1998, most recently as a CX-02. Until his suspension, he was assigned to the 96-man unit at Kent Institution, a maximum-security institution located in Agassiz, British Columbia. He worked what is known as a "6/5-6/4" shift schedule. This particular unit did not use a spare board, so overtime shifts were offered to those correctional officers scheduled to work within that unit.

[9] Kent Institution was described by Harold Massey ("Mr. Massey"), its former warden, as a maximum security penitentiary with higher-than-average occurrences of violence. The inmates who made up the institution's population were typically there because they had acted out at other institutions. The more violent and more volatile inmates in Canada were at Kent Institution. The warden's predominate responsibility was to ensure the safety and security of the institution, its staff and its population.

[10] Kent Institution has armed patrol posts, points of controlled movement, units smaller than the 96-man unit where the grievor worked and armed galleries. There are cameras on the ranges, in the corridors, walkways and outside. There is a Main Communication and Control Post (MCCP). Some of these areas do not require that a correctional officer have inmate contact, while others, particularly the living units, do.

[11] In the course of an investigation into allegations of misconduct by another correctional officer, Mr. Massey was made aware of allegations of misconduct by the grievor. As a result, he convened a disciplinary investigation into the allegations and,

on February 3, 2011, suspended the grievor pending the completion of the disciplinary investigation.

[12] The allegations against the grievor were that he was involved in unauthorized relationships with five inmates and that he was involved with bringing contraband and unauthorized substances into Kent Institution. He was advised that he was being removed from his duties and the worksite with pay, pending the outcome of the disciplinary investigation and that he was not to enter CSC premises without the warden's authorization (see Exhibit 6 Tab 1). The sources of these allegations included fellow correctional officers and inmates who were interviewed in the course of an investigation into the other correctional officer at Kent Institution. The grievor was not provided with the identities of any of the sources or of anyone interviewed in the course of the investigation.

[13] When the grievor was suspended, Mr. Massey anticipated that the investigation would be concluded and the report presented to him by March 16, 2011. He subsequently extended that deadline by an additional two weeks (see Exhibit 6, Tab 5).

[14] Mr. Massey testified on cross-examination that he had not considered assigning the grievor to a non-inmate contact post such as the MCCP, perimeter security mobile patrol, assignment to a tower or at the principal entrance; even though they were places he could have assigned the grievor where he would have no in-mate contact. He did not take into account the grievor's previous performance evaluation reports or the fact that he had recently held an acting position as a correctional manager. Nor did he take into account that there was no mention of disciplinary action in the grievor's personnel file. In fact, he had never even spoken to the grievor before directing the suspension.

[15] The evidence was that Mr. Massey decided to suspend the grievor based on the potential risk posed by having the grievor in the workplace during the investigation. The potential risk was too significant in his opinion to have the grievor remain in the workplace, although he testified that he was certain that there were administrative duties to which the grievor could have been assigned for the duration of the investigation.

[16] Due to the nature of the allegations against the grievor, Mr. Massey, in consultation with the deputy warden, the human resources advisor and the regional

labour relations office conducted a "threat risk assessment" and determined that the grievor could not work at any institution unless the allegations against him were proven unfounded. Mr. Massey wrote as follows (Exhibit 6, Tab 4):

> *These behaviours depict an individual who is, if facilitating the entry of contraband and unauthorized substances into Kent Institution, contributing to an unsafe, unsecure, and unhealthy living environment for Kent inmates, and a dangerous environment for staff and public visitors. Placing this individual in another position within CSC will not lessen the potential risk he poses.*
>
> *For all of the above reasons, unless the allegations against Mr. Finlay are proven unfounded, allowing Mr. Finlay to continue working at a CSC facility in any capacity would not be in CSC's best interests, not in the interests of the public.*

[17] When asked on redirect why he had not consulted the grievor's personnel file to review the performance and evaluation reports and why he did not take into account the grievor's past conduct in the workplace, Mr. Massey stated the they were irrelevant to assessing risk. He also clarified that, while non-inmate contact positions might have been available, they were not an option based on the allegations of inappropriate relationships with inmates and the introduction of contraband into Kent Institution

[18] Mark Kemball replaced Mr. Massey as warden of Kent Institution and assumed responsibility for the disciplinary investigation of the grievor in March 2011. He testified that, as warden, he expects correctional officers to maintain positive interactions with inmates that are respectful and professional and to maintain appropriate boundaries. Trust is an important component of that relationship.

[19] In March 2011, he had no knowledge of the grievor; nor did he recall ever meeting him. He had no knowledge of the grievor's employment or service record with the CSC. However, he was aware of the allegations against the grievor. He granted the second extension for completion of the disciplinary investigation report until April 15, 2011. He had been briefed on the progress of the investigation and the challenges faced by the two investigators.

[20] The length of the investigation and the need for the two extensions was due to a number of elements, including the complexity of the issues, the availability of the witnesses, travel required, the types of evidence received and how to corroborate and weigh it, the need to review files, and the sheer weight of the information that needed

sifting through. As the warden, Mr. Kemball had to balance the delay completing the written report and the need for a report that was of value.

[21] Mr. Kemball did not remember when he actually received the report but was certain that it was before the April 15, 2011 deadline as no further extensions were granted. However, the report that he received was not the same one provided to the grievor (Exhibit 7) as changes were required at labour relations' request and further changes were required after the report was reviewed by the grievor. This explained the delay in providing a final copy to the grievor. On cross-examination, it was proved that he actually received the report in July 2011 and not in April as he testified on direct examination. Mr. Kemball could not provide an explanation for the delay from April to July.

[22] The quality of the report received was not what was required or expected. It needed reworking to ensure that it was clear and concise. This took an additional four to six weeks. The original report lacked clarity, didn't focus on the allegations and contained some elements that were overly descriptive. Once the report was redrafted, Mr. Kemball worked with labour relations and the CSC's access to information branch to vet the report before releasing it to the grievor.

[23] From the investigators' standpoint, the allegations were founded (Exhibit 6, Tab 6). The next step was to schedule a disciplinary hearing and to provide the grievor an opportunity to address the report. The purpose of the disciplinary hearing was to determine if any aggravating or mitigating facts should be taken into account when determining the next step. The disciplinary hearing was scheduled for September 8, 2011. At the hearing, the grievor addressed the allegations and the investigators' findings. He also submitted a written response to the report (Exhibit 8).

[24] It was not Mr. Kemball's role to reinvestigate the allegations but to make a decision on whether or not discipline was required, and if so, what quantum based on the report and after having the grievor's input. He considered the rebuttal and comments, examined allegations from the investigators' standpoint, and in an "open-minded impartial" fashion, in his words, formed conclusions after consulting with the national labour relations office. He determined that discipline was not warranted. There was insufficient evidence to support the allegations of bringing contraband into the institution. While it was shown that the grievor did allow inmates unauthorized phone calls, a number of other staff members were also allowing

inmates unauthorized access to telephones. There was a culture or belief that the occasional unrecorded phone call, made without the approval of a correctional manager, was accepted at Kent Institution. Rather than discipline the grievor for doing what others also did, and what then had been accepted, Mr. Kemball directed that the protocols related to inmate phone calls be clarified for all.

[25] Mr. Kemball notified the grievor by letter of the disposition of the disciplinary investigation and hearing as follows (Exhibit 6, Tab 7):

> *On August 26, 2011, I accepted the finding of the subject disciplinary investigation, namely that you had:*
>
> - *Been involved in unauthorized relationships with four inmates; and*
>
> - *Been involved with bringing contraband and unauthorized substances into Kent Institution.*
>
> *On September 8, 2011, the disciplinary hearing was held. During the disciplinary hearing, you addressed the investigation report findings and submitted a lengthy rebuttal.*
>
> *I considered the statements you made during the disciplinary hearings, reviewed your rebuttal, and reviewed your disciplinary file. Consequently, I have no choice but to declare that the allegations against you are unfounded and that no further disciplinary action will be taken as a result of this disciplinary investigation.*

[26] Normally, after a determination that no discipline is to be imposed, the employee is returned to the workplace in the same role as he or she held at the time of the suspension. That did not happen in this case. Mr. Kemball testified that as a matter of due diligence given the nature of the allegations, the amount of time that the grievor was off, and the number of witnesses, a threat risk assessment should first be conducted to evaluate what level of threat, if any, returning the grievor to the workplace would pose to the safety and security of Kent Institution. Considering the serious nature of the allegations and that the witnesses interviewed by the investigators were both inmates and employees of Kent Institution, Mr. Kemball wanted to ensure that staff and inmates would be safe if the grievor were returned.

[27] Given the number of inmates who cooperated and who remained at Kent Institution and their perception of the grievor returning, their perception or fear for

their personal safety when interacting with the grievor was a threat to the grievor's safety and to that of others working with him. Inmates seeing the grievor back in a position of authority would feel the need to act out physically or verbally. The grievor's presence at Kent Institution could be perceived as a threat. Staff witnesses also had to be considered. How would they view his return in situations requiring they trust each other? The disciplinary investigation report was vetted and all inmate and staff witness identities were removed, but their concerns still needed to be considered.

[28] Mr. Kemball directed Deputy Warden Huish to conduct the threat risk assessment and to identify any safety issues or concerns related to the reintroduction of the grievor to Kent Institution. In his first report, Mr. Huish concluded, as set out below, that there was considerable vulnerability and legal implications should a serious injury result to an inmate or should further allegations be made against the grievor (Exhibit 6, Tab 10):

. . .

> *If he returns to Kent Institution, it is likely that Mr. Finlay will have to respond to a security incident involving one of the nine (9) inmates still at Kent who was involved in the allegations against Mr. Finlay. There is a chance that one of these inmates could become injured during a staff response, resulting in a clear vulnerability to Mr. Finlay and Kent Institution. . . .*
>
> *Furthermore, there is the potential for grievances from inmates who may perceive that they are being targeted or singled out by Mr. Finlay due to the statements they made during his disciplinary investigation.*
>
> *In addition to the potential risk Mr. Finlay represents to the inmates through potential response scenarios, there is also a risk to staff and to the institution. Staff members were interviewed by the BOI. Mr. Finlay was considered by staff to be somewhat volatile and was a strong personality among the Correctional Officers. His discipline for insubordination to the Deputy Warden in January 2011 is a direct result of this personality.*
>
> *There is a high degree of risk to the security of the institution associated with Mr. Finlay, if he is to return to Kent Institution … A return of Mr. Finlay to this milieu would in all likelihood lead to a negative work environment …*

. . .

> *The level of risk Mr. Finlay presents to safety and security of inmates, staff and the overall security of Kent Institution is high. Mr. Finlay should not return to Kent Institution. Upon Mr. Finlay's return to work, he must be placed within another Institution in the Pacific Region.*
>
> [*Sic* throughout]

[29] That report was shared with the grievor, who by that time had returned to work at Mountain Institution. He responded to Mr. Kemball by email on December 9, 2011 as follows (Exhibit 6, Tab 11):

> *From: Finlay Jason (PAC)*
>
> *Sent: Friday, December 09, 2011 8:46 AM*
>
> *To: Kemball Mark (PAC)*
>
> *Cc: Thompson Bill (PAC); Zimmerman Brian (PAC)*
>
> *Subject: Hard copy to follow*
>
> *Warden Mark Kemball*
>
> *This letter is to request review and amendment of the Threat Risk Assessment signed by Deputy Warden Mark Huish and which was submitted to the Warden of my new worksite, Mountain Institution. The document he prepared is prejudicial and unfair, and fails to objectively address any unmanageable threat or risk my return to work at Kent Institution would create.*
>
> *Your November 30, 2011 letter to me stated that the Board of Investigation's findings were not supported by sufficient evidence. You also stated unequivocally that, "I have no choice but to declare that the allegations against you are unfounded and that no disciplinary action will be taken as a result of the disciplinary investigation."*
>
> *In his Synopsis of Threat in the TRA, Mr. Huish stated: "Consequently, the Warden has issued a letter to Mr. Finlay exonerating him of the allegations." The definition of exonerate is:* To free from a charge; declare blameless or guiltless; exculpate. *I must question why, then, did Mr. Huish refer repeatedly in the TRA to the specious allegations made against me in a format which seems to suggest they are factual? He describes allegations in detail even though no evidence exists to support them, and you have concluded that they are unfounded. This TRA perpetuates those allegations to the extent that the Warden of Mountain Institution said that I was being transferred "under a cloud."*

. . .

> *The TRA contains several instances of damaging innuendo. Despite being cleared following months of investigation, Mr. Huish's TRA portrays me as a rogue officer …*
>
> *… I understand and accept that my return to Kent Institution would be complicated at this time, but it is certainly not because I pose a threat to anyone.*
>
> *… Mr. Huish's TRA is decidedly one-sided, aimed solely at speculating how I could be a threat to inmates, staff and the security of the institution.*

. . .

[30] Mr. Kemball had discussions with Mr. Huish about the concerns and the weighting of his report around discipline rather than the reintroduction of the grievor to Kent Institution. Many of the references in the threat risk assessment referred to the allegations. Mr. Kemball directed that the report be redrafted to focus on the reintroduction of the grievor to the workplace. Staff and inmates were not re-interviewed as part of the threat risk assessment.

[31] When asked why he did not consider returning the grievor to a non-inmate post for a cooling off period, Mr. Kemball replied that a static post would not allow the institution's management to measure the grievor's interactions in order to determine if it was appropriate to return him to his unit. When asked to explain why the grievor was deployed to Mountain Institution before the completion of the threat risk assessment, he stated that he had sufficient evidence to proceed with the deployment rather than wait for the completion of the threat risk assessment by Mr. Huish. He did not agree that the Board of Inquiry was discredited. In fact he had accepted the investigators' findings. He made his decision to deploy the grievor before he ordered the second threat risk assessment. The second assessment was ordered to address the concerns raised by the grievor in his December 9, 2011 email. The second threat risk assessment had no impact on Mr. Kemball's final decision.

[32] Deploying the grievor to Mountain Institution was in the best interests of Kent Institution. Mountain Institution was adjacent to Kent Institution and posed no significant impact on the grievor's daily travel. The warden of Mountain Institution was prepared to accept the grievor. The grievor was not precluded from applying to work at another institution using the process outlined in the collective agreement between

the Union of Canadian Correctional Officers - Syndicat des Agents Correctionnels du Canada - Confédération des Syndicats Nationaux and CSC.

[33] As to the matter of compensation during suspension, Mr. Kemball consulted with labour relations which advised him that the grievor was considered to be on administrative duties during that period as set out in Exhibit 3. According to the terms of his collective agreement he was therefore ineligible for any compensation other than an 8-hour shift, Monday to Friday.

[34] On cross-examination, Mr. Kemball was asked about what he considered in determining that Mountain Institution was a suitable deployment for the grievor. Mountain Institution is located in Agassiz, British Columbia as is Kent Institution. It is the only institution within 16 kilometers of Kent Institution. He looked at several options following the disciplinary hearing. He did not form any opinion until the threat risk assessment was completed. He asked his subordinate, Deputy Warden Huish, to examine security issues that would preclude his return. He discussed the possibility of the grievor's return to Kent Institution with national labour relations representatives Erin Saso and René Houle. He indicated his opinion as follows (Exhibit 9):

> *From: Kemball Mark (PAC)*
>
> *Sent: Monday, November 21, 2011 2:42 PM*
>
> *To: Saso, Erin (NHQ-AC); Houle René (NHQ-AC)*
>
> *Cc: Langer Mark (PAC); Boileau Michael (PAC0; Huish Shawn (PAC)*
>
> *Subject: TRA-Mr. Finlay*
>
> *The DW is presently completing a TRA on Mr. Finlay. Once completed we can share and discuss further. As you know my position is that it is in the Service's best interest that Mr. Finlay not return to Kent Institution. The TRA should assist in our discussion. I have had no direct involvement in the drafting of the TRA other than to provide Mr. Huish-DW with some parameters to cover.*
>
> *M.*
>
> *Mark Kemball*

[35] Mr. Kemball agreed that it was possible that any two correctional officers would never work together, given their schedules and shift exchanges. Nevertheless, no other

options were considered. The grievor was deployed to Mountain Institution effective December 5, 2011. Mr. Kemball does not recall having any discussions with the grievor about his status at Mountain Institution other than to advise him that he was being deployed to Mountain Institution.

[36] The last threat risk assessment update was done in February 2012. No further updates were required, as the grievor had been assigned to Mountain Institution.

[37] When asked if he was aware of the "Guideline to Assess Risk" (Exhibit 11), Mr. Kemball said "No". He did not complete the "Employee Protection Program Threat and Risk Assessment Report" (Exhibit 12) which outlines how risk is to be assessed because in his opinion there was no direct threat to staff. He assessed general risk to Kent Institution. He did not know if the grievor knew which inmates and staff were involved in the investigation (even though their names were never shared with the grievor). He was not even sure where these witnesses were as many have been moved to other institutions, and staff move around the units.

[38] Mr. Kemball was presented with Exhibit 10, an email which he sent prior to the first threat risk assessment, and with Exhibit 9. Exhibit 10 stated:

> *From: Kemball Mark (PAC)*
>
> *Sent: November 10, 2011 12:31 PM*
>
> *To: Saso Erin (NHQ-AC); Langer Mark (PAC)*
>
> *Cc: Lindblad, Michele (PAC), Houle René (NHQ-AC)*
>
> *…*
>
> *Please advise on Mr. Finlays deployment to another facility. I believe it is in everyones best interest.*
>
> *_____*
>
> *Sent from my BlackBerry Wireless Handheld*
>
> [*Sic* throughout]

[39] The response he received from René Houle at the national labour relations office was that there were three options to consider, one of which was to "… reassign him temporarily to other duties (and potentially different workplace) until a TRA is completed."

[40] When asked how it came about that the grievor was deployed to Mountain Institution, Mr. Kemball testified that he talked to the warden there, Bill Thompson, about that possibility and about the subject matter of the disciplinary investigation. Thompson was willing to accept the grievor, and things progressed from there. When asked if he had the authority to deploy an employee without their consent Mr. Kemball stated that when it is a condition of a correctional officer's employment that they may be deployed without their consent, he did. Mr. Kemball was presented with the Matrix of Delegated Authorities, Exhibit 15, which indicates at page 24 that deploying an employee without consent requires "authorization levels 1 and 2". According to page 5 of the exhibit, a warden is an authorization level 4 or a minimum of two levels below that required for the exercise of that authority. Mr. Kemball had no response to explain where or how he obtained the authority to deploy the grievor in apparent contravention of the Matrix of Delegated Authorities.

[41] When asked if he was required to seek labour relations' approval for the deployment, Mr. Kemball stated that he was not, as long as he acted within his delegated scope of authority. He was required to, and did consult with labour relations at national headquarters for matters of discipline beyond a certain level. When asked if he remembered a conference call with several people including representatives of the national labour relations office on November 7, 2011, when he expressed the opinion that he did not trust the grievor and did not want him back, he stated that he did not recall the statement. He claims he would have said rather that Kent Institution was not an appropriate placement for the grievor.

[42] Mr. Kemball denied saying that he wanted to fire the grievor because he did not trust him. His initial thoughts were whether the grievor could be terminated based on the evidence at hand. He would have terminated him but was unsure if he had grounds. When he was advised that he had insufficient grounds to terminate the grievor, he turned his focus to deploying the grievor outside of Kent Institution and commenced the threat risk assessment. He received the other recommendations. However, the grievor was not offered voluntary deployment as recommended by labour relations nor was he offered a temporary assignment.

[43] Mr. Kemball was familiar with the requirement for mandatory correctional officer national standards training. Training for Kent Institution and Mountain Institution is conducted jointly, given the proximity of the institutions. Sometimes it is

held at Kent Institution and sometimes at Mountain Institution. He did not issue a directive that the grievor was not to attend training offered at Kent Institution; nor was he aware that the grievor had been advised that he was not allowed to take training there.

[44] Mr. Kemball left Kent Institution on October 9, 2012 when he became the special advisor to the Regional Deputy Commissioner, Pacific Region, CSC.

[45] Jason Finlay, the grievor, testified about his career progression since starting with CSC in 1998, when he was employed as a casual correctional officer. He became an indeterminate CX-01 in August, 1999 and was promoted to CX-02 in 2000. He was assigned to Kent Institution from his start with the CSC up to his deployment to Mountain Institution in 2011. Initially, the grievor was assigned to the MCCP. He opted to leave the MCCP and was put on the permanent spare board until another assignment opened up in the 96-man unit.

[46] In the 96-man unit, the grievor worked a "6 on/5 off, 6 on/4 off" schedule. Unlike other units, his unit did not have a spare board which meant that only officers assigned to the unit worked there. On other units, when an employee worked only on one unit, it was due to an accommodation, an on-going investigation, threats against the officer or in the event that the officer was pregnant.

[47] The grievor was advised by the correctional manager of his unit that he would be a good fit for that unit, and he was recommended for the position. At that time there were internal problems on the unit which involved staff-on-staff issues and staff-on-inmate issues. He was told that with his personality, he would not be bullied by staff or inmates. He eventually was transferred there to clean up the unit. He remained there until February 3, 2011, when he was escorted from Kent institution.

[48] On February 3, 2011, his union representative Brian Zimmerman, advised the grievor that that the deputy warden was to meet with him. He followed Mr. Zimmerman to the deputy warden's office but instead ended up in the warden's office where Gord Madsen (deputy warden), Mark Langer (human resources representative), Don Trennaman (security and intelligence officer), and Derek Dubiellak (correctional manager) were all waiting for him. Mr. Massey was not present and the grievor assumed that Mr. Madsen was acting warden that day.

[49] The grievor was advised of the allegations made against him and that he was suspended with pay pending the completion of the disciplinary investigation. Messrs. Madsen and Langer presented him with the convening order and took his identification and badge. He was informed that he was to be walked out of Kent Institution. Instead, he was escorted by Mr. Dubiellak to his locker in his unit to retrieve his jacket and personal effects. In front of all staff and inmates, he was escorted out of the unit and off the property. He was humiliated, embarrassed and disgusted by this treatment. He was treated like an inmate. The principal entrance was notified that he was not allowed to enter the premises. He assumed that, since he had seen it done in the past, a photo of him would be posted at the entrance. Normally, if an officer is to be suspended, he or she is called in on a day off, not in the middle of his or her shift as was done in his case. To the grievor's knowledge, he was the only officer ever escorted off the premises mid-shift in front of staff and inmates.

[50] The grievor was eventually contacted at home by Doug Richmond, one of the investigators, who advised him that he had received orders to investigate him. The interview took place in the second week of April, two months after he was suspended. It was the first time he had the opportunity to reply to the allegations against him. He told the investigators that the allegations were false and that he was innocent. Three or four days before the report was due, he was interviewed a second time. Most of the information the investigators relied on at this interview was hearsay from inmates. He was not allowed to view the video evidence at either interview. At both interviews, he volunteered to take a polygraph test.

[51] The grievor was angry when he finally saw the disciplinary reports. No reference was made to anything he had said to the investigators at either interview. Any evidence he provided was ignored. In his opinion, the board of inquiry had made up its mind before even talking to him. The grievor was never provided with the information against him or the source of that information. The report was one-sided and unprofessional. At one point in the report, he was referred to as an inmate. He could not understand how evidence he provided was ignored and how the investigators could have found that he was not credible in his assertions of innocence.

[52] With the assistance of his father and Ken Hayden, a former CSC investigator, the grievor wrote a rebuttal to the disciplinary investigation report and forwarded it to Mr. Kemball, who had become the warden (Exhibit 8). He received no response from

Mr. Kemball. On September 8, 2011, he met with Mr. Kemball for a disciplinary hearing. Mr. Kemball acknowledged that he was aware of the document but said little else. Mr. Kemball advised the grievor that he had accepted the findings that the allegations were founded and mentioned that discipline could include termination. The meeting lasted less than 10 minutes.

[53] Less than 24 hours before the disciplinary hearing, the grievor attended a disclosure meeting, where he was allowed to see the memos and view the video evidence. He could not identify the inmate sources involved in the investigation. The names of anyone involved in making the allegations were not provided, and he was not allowed to face his accuser. Eventually he received a list of the staff interviewed through an access-to-information request two weeks before the adjudication hearing.

[54] On November 30, 2011, the grievor attended a meeting with Mr. Kemball, Mr. Langer, Roger Plantenga (assistant warden operations), Mr. Zimmerman and Marie-Pier Dupuis-Langis (Union of Canadian Correctional Officers-Syndicat des Agents Correctionnels du Canada - Confédération des Syndicats Nationaux representative). At the meeting, Mr. Kemball advised the grievor that there was no evidence to support the allegations and that they were unfounded. As a result, no disciplinary action would be taken. They then attempted to discuss the grievor's return to duty at Kent Institution, but it was clear that Mr. Kemball was very much against that idea and that he would not consider it.

[55] According to the grievor, Mr. Kemball encouraged him to explore opportunities outside of Kent Institution. The grievor expressed his desire to return to Kent Institution and rebuild his reputation. Mr. Kemball left the room with the other managers and returned approximately five minutes later. He advised the grievor that he was to report to Mountain Institution on December 5, 2011 and that he would be assigned to a Monday to Friday, 8-to-4 shift. A threat risk assessment would be conducted by Deputy Warden Shawn Huish, and the results would be shared with the grievor.

[56] The grievor testified that he did not understand why he was not being returned to his position at Kent Institution or the purpose or need for a threat risk assessment. He did not feel vulnerable returning to Kent Institution and could not foresee any problems. He acknowledged that some initial tension was possible, which he felt would disappear with time. He did not understand Mr. Kemball's concerns with the number

of use-of-force incidents at Kent Institution as no concerns had been expressed about his involvement in such incidents. It is not in his nature to seek revenge. It was clearly an attempt by Mr. Kemball to bar him from Kent Institution. Mr. Kemball would not consider any posts for him at Kent Institution. A posting to the MCCP, for which the grievor was already trained, until he and the warden were comfortable with full reintegration, was refused.

[57] On his arrival at Mountain Institution, the grievor was not assigned to a post, as the directive from Mr. Kemball was that the grievor was to work an 8-to-4 shift, a shift pattern that did not exist at Mountain Institution. Initially, he felt that people at Mountain Institution had concerns with the allegations against him. It took a while for him to be accepted, partly because of his anger at being forced to work there and at not being returned to his position at Kent Institution.

[58] The national training standards set out mandatory training for correctional officers. Training for officers at Kent Institution and Mountain Institution is normally done jointly. Employees of Mountain Institution would go to Kent Institution for self-defence, gas, self-contained breathing apparatus, and firearms training. The training is done in blocks and takes up to five days to complete. When the time came for training in February 2012, the grievor was directed to report to the Pacific Institution in Abbotsford as he was not to enter Kent Institution (Exhibit 20).

[59] The grievor was the only officer from Mountain Institution to attend training at the Pacific Institution. When the training was scheduled for 2013, he was initially told to return to Pacific Institution for training. He emailed Rose Bertolo, the training coordinator asking why he was being excluded from training at Kent Institution. She replied that she had been advised that he was not permitted to enter Kent Institution and that if she was misinformed, the grievor should let her know. Approximately 45 minutes later, Bertolo called the grievor and told him that, since the management at Kent Institution had changed, and Mr. Kemball was no longer the warden, he could take his training at Kent Institution. February 27, 2013 would be the first time he would re-enter Kent Institution.

[60] The grievor presented, as Exhibits 21 and 22, his performance evaluation reports for 2000 to 2011 and letters of commendation he received for his service at Kent Institution. They indicate that he is a professional and that he does a good job as a correctional officer. None indicates that he was a disciplinary problem, a violent

person or a threat to Kent Institution. The content of those documents is not reflected in the disciplinary investigation report; nor was it considered when he was deployed to Mountain Institution.

[61] The grievor described the financial impact of his suspension. On his regular pre-suspension shift, he would work 3 or 4 day shifts (16-hour shifts), and 2 or 3 evening shifts (10-hour shifts). On evening and weekend shifts, he received a shift differential. The grievor estimates that he lost approximately $20 000 in gross income as a result of his suspension. Exhibit 17 shows his income pre- and post-suspension. There is a difference of $16 159.00 of gross income between what he earned in 2010 before the suspension and what he earned in 2011 after it. The grievor stated that the difference was directly attributable to the loss of the shift differentials and overtime. In addition to the financial losses, the grievor lost friends as result of the investigation and was kicked off the Kent Institution hockey team. During his suspension, he and his family felt isolated.

[62] Exhibits 26 to 30 were put into evidence. They were all received by the grievor as a result of an access-to-information request. He was particularly surprised by the comments in Exhibit 30, a briefing note to the director general of Labour Relations and Compensation. Its subject line indicates that the discipline of Jason Finlay was the subject matter covered. Under "recommendations/comments", the author noted the following:

…

> *During a November 7, 2011 teleconference with NHQ Labour Relations, Warden Mark Kemball indicated that he believes that there is insufficient evidence to prove on a balance of probabilities that Mr. Finlay brought contraband into the institution. Further, he indicated that the allegation that Mr. Finlay was engaged in inappropriate relationships with offenders is tied to Mr. Finlay allowing inmates to make unsupervised phone calls. However, the report found that this behaviour was carried out by several officers and had been part of the culture of the unit at the time.*
>
> …
>
> *Although the Warden acknowledged that there was insufficient evidence for a termination, he indicated that he does not trust Mr. Finlay and would like to have discussions with senior management about not having Mr. Finlay return to Kent Institution.*

…

[*Sic* throughout]

[63] The grievor could not understand how Mr. Kemball could not trust him when the two had not met before September 8, 2011 at the disciplinary hearing. The factors that could have caused Mr. Kemball to distrust him were a mystery to the grievor.

[64] On November 29, 2011, according to Exhibit 28, Mr. Kemball agreed to offer the grievor a voluntary assignment to Mountain Institution. The plan was that, if the grievor did not agree to go to Mountain Institution voluntarily, he would be reassigned. That would have required an updated threat risk assessment every three months to assess the risk and the possibility of the grievor returning to Kent Institution.

[65] In Exhibit 29, in an email exchange between Beth Tyler of the CSC regional labour relations office and Erin Saso of the CSC national headquarters labour relations office, Tyler notes the following on October 24, 2011:

. . .

> *Given the findings of the disciplinary investigation and results of the displinary hearing the Warden believes that given the seriousness of the findings termination is the only option.*

. . .

[*Sic* throughout]

[66] In December 2011, while at Mountain Institution, Mr. Kemball appeared unannounced and presented the grievor with a letter of permanent deployment to Mountain Institution, which he was told he could sign or not. The grievor refused and left and never saw Mr. Kemball's letter.

[67] On cross-examination, the grievor testified that, in November 2011, he worked on a construction job and was paid approximately $1500 in cash. Asked why he did not work until November 2011, he stated that by then he had received the disciplinary investigation report and the disciplinary hearing had been held. All he was waiting for was the warden's decision.

[68] The grievor was initially offered a deployment to Mountain Institution on November 30, 2011. When he refused to accept it, Mr. Kemball ordered it. The grievor

was unfamiliar with Exhibit 6, Tab 8, the letter from Mr. Thompson, the warden at Mountain Institution appointing him under a selection process, which was sent to him by Mr. Langer at some point after the deployment.

[69] The parties submitted an agreed statement of facts on the matter of payment for missed overtime shifts and the payment of premiums. Exhibit 33 stipulates the following for the purpose of the hearing:

> *A. In some cases where a CX has been suspended with or without pay pending the outcome of a disciplinary investigation, the employee has subsequently been awarded lost OT, shift premiums, etc when the allegations against him\her have been deemed unfounded.*
>
> *B. In some cases where a CX has been suspended with or without pay pending the outcome of a disciplinary investigation, the employee has not subsequently been awarded lost OT, shift premiums, etc when the allegations against him/her have been deemed unfounded.*
>
> *C. In both of the above conditions (A&B) the parties recognize that a variety of factors, including the presence or absence of grievances and/or confidential settlements may have contributed to the specific outcomes that occurred.*
>
> *D. The parties agree that they do not have before them at this adjudication any reliable statistics on the percentage of matters that have been resolved in accordance with paragraph A or B respectively.*
>
> *E. The parties make this stipulation without prejudice to any position they may choose to take in the future.*
>
> [*Sic* throughout.]

## IV. Summary of the arguments

### A. For the employer

[70] There are two issues to be decided in this case: what is the appropriate compensation due an employee returned from an administrative suspension, and whether or not there was in this case a legitimate exercise of the authority to deploy an employee without the employee's consent.

[71] In cases of administrative suspensions, this Board has no jurisdiction. There is no *prima facie* evidence of discipline in the suspension. Therefore, the grievor is obligated to prove that the employer intended to punish him for bad behaviour. In the

matter of a deployment without consent, this Board has limited jurisdiction under paragraph 231(*a*) of the *Act*. The grievor had to prove that the decision to deploy him to Mountain Institution was not based on a *bona fide* safety concern but rather that it was a sham or a camouflage. The grievor had to demonstrate that there were no legitimate security reasons for his deployment. The employer had legitimate security concerns because of the disruptive nature of the disciplinary investigation into the grievor's alleged activities. The disciplinary investigation and its aftershock had a destabilizing effect on the workplace.

[72] For a suspension with pay to be reviewable by an adjudicator, an adjudicator must be convinced that it was disciplinary in nature. To make that determination, an adjudicator must examine the purpose and effect of the suspension to determine if the employer intended to correct inappropriate behaviour. The employer must have had the intent to discipline the employee for some perceived wrong. (See: *Attorney General of Canada v. Balkar Singh Basra*, 2008 FC 606, at para 17 to 19; *Attorney General of Canada v. Frazee*, 2007 FC 1176, at para 19 to 22.)

[73] When an employee is placed on an administrative suspension, certain terms are attached. The employee no longer works in the same circumstances, and the same entitlements do not apply. (See *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37, at para 65). If the employee is suspended without pay, he or she is compensated only for lost hours when reinstated.

[74] According to the Global Agreement negotiated between the parties, when suspended with pay pending an investigation, a correctional officer is considered on administrative duties and to be working a straight Monday to Friday, 9 to 5 shift (Exhibit 6, Tab 3, page 23). Consequently, there is no entitlement to shift premiums. There is no evidence that Mr. Kemball misunderstood or misrepresented administrative duties to punish the grievor. There is no purpose and effect as described in *Eden*.

[75] The fact that the decision to suspend an employee is ill-conceived or badly executed does not amount to disciplinary action (see: *Frazee,* at para 21). There was no evidence from the grievor that the investigation took an unduly long time to complete, although he expressed that opinion. Nor is there any evidence that the employer dragged its feet during the investigation. There is also no evidence of a change in the employer's intent vis-à-vis the suspension. (See *Basra*, at para 19). In essence there is

no evidence of disciplinary intent or effect in the employer's actions to suspend the grievor. Consequently, there is no reason to interfere with how the grievor was compensated during the period of suspension with pay.

[76] The agreed statement of facts (submitted as Exhibit 33) is insufficient to support a past practice. All it shows is a random pattern of payment based on the decision maker. Therefore, it is of no assistance in this case.

[77] When faced with the disciplinary investigation report, Mr. Kemball made the difficult decision to not impose discipline and to declare the findings unfounded, despite evidence supporting the allegations about inmate phone calls. When reaching his decision to deploy the grievor to Mountain Institution Mr. Kemball took into account the impact of returning the grievor to Kent Institution on the institution's safety and security. The grievor repeatedly stressed that he is not violent or prone to violence. Mr. Kemball's point was the risk that the inmates concerned could act out aggressively were the grievor reintroduced into Kent Institution. The presence of an officer can be threatening to inmates, particularly maximum-security inmates who are unpredictable and prone to violence. Mr. Kemball was concerned that returning the grievor to Kent Institution might incite inmate violence. Whether or not the grievor was violent is immaterial.

[78] Other risks must be considered when determining the appropriateness of returning a correctional officer to an institution following a disciplinary investigation. Liability and lack of trust are also factors. Trust is an important factor to the security of an institution, as is a concern over the introduction of a new variable into the institution. The harmony of the work environment is a legitimate concern (See: *Dubreuil v. Treasury Board (Correctional Service of Canada), et al.*, 2006 PSLRB 20, at para 87.)

[79] The grievor claimed that the deployment was a sham or camouflage because Mr. Kemball did not like or trust him and did not want him at Kent Institution. He claimed that the security issue was a pretext. The grievor's claim was based on hearsay from the training coordinator, who believed that the grievor was not allowed to attend training at Kent Institution. It might not even be factually accurate. The briefing note (Exhibit 30) is the worst type of hearsay, in that it purports to reflect Mr. Kemball's state of mind.

[80] The grievor also challenged the timing of events and actions as noted by Mr. Kemball. To believe the scenario postulated by the grievor, an adjudicator would have to accept that Mr. Kemball concocted ways of keeping the grievor out of Kent Institution. The timing is directly attributable to the time Mr. Kemball took to consider all the implications and risks associated with reintegrating the grievor. It would have been negligent not to consider all the implications and risks.

[81] Mr. Kemball was faced with a difficult decision. He chose to side with the grievor on two occasions, first when he concluded that there was insufficient evidence to discipline the grievor and second when he determined that the first threat risk assessment was inadequate. He has shown himself to be of high character.

[82] Paragraph 231(*a*) of the *Act* requires that an adjudicator go beyond a *pro forma* review of the fact situation. An adjudicator must look behind the evidence to ensure that a real reason existed or to determine whether the employer was guilty of a sham or a camouflage. The grievor's original letter of offer clearly states that the grievor may be deployed without his consent when " … necessary for reasons associated with the safety and security of other staff members or offenders or when there is a perceived conflict of interest." By accepting employment with the CSC, he accepted the possibility of being deployed to another institution without his consent.

[83] Guidance in deciding whether a sham or a camouflage exists in such a deployment can be found in the jurisprudence on rejection on probation. In *Boyce v. Treasury Board (Department of National Defence),* 2004 PSSRB 39, at para 64, the adjudicator stated that he had no jurisdiction to deal with the concerns of the grievor regarding the fairness of the process used to terminate his employment, including allegations of bias on the part of the decision maker. He concluded that an adjudicator has limited authority to determine whether a decision maker acted in good faith.

[84] It is clear from the evidence that the employer did not hide or conceal the reason that the grievor was deployed to Mountain Institution. The grievor was aware that his return to Kent Institution would cause tension. He was refused assignment to the MCCP because there would be insufficient time to assess his interactions and evaluate the level of tension. When the employer puts forward an employment-related reason for the deployment, the burden falls on the grievor to demonstrate that the reasons given are a sham or camouflage (see: *Maqsood v. Treasury Board (Department of Industry),* 2009 PSLRB 175, at para 38.)

[85] The employer cited security issues that ranged from minor in nature to the possible death of an inmate as its prime considerations for determining that the grievor was not to be reinstated to Kent Institution. It is the fundamental duty of a warden to safeguard his or her institution. The grievor did not have an equivalent duty. He was not thinking about the inmates and the institution. His primary concern is clearing his name. To reinstate the grievor, the adjudicator would have to declare that the security reasons cited by Mr. Kemball were a sham. The adjudicator should tread lightly when considering questions of security. (See: *Courchesne v. Treasury Board (Solicitor General)*, PSSRB File No. 166-2-12299 (19820719), at page 11).

[86] There is no evidence that Mr. Kemball was not forthright. If the grievor is allowed to impugn Mr. Kemball's credibility, the adjudicator must also consider the grievor's credibility. Mr. Kemball's lack of memory does not mean that he was not credible. Credibility becomes an issue only if his preoccupations about the security of the institution were invalid. On the other hand, the grievor testified that he worked a construction job while suspended and yet on his tax returns, he identified the CSC as his sole source of income. If he did not declare those payments as income, he made a false declaration when he filed his income tax return that year.

[87] The grievor should not be entitled to damages for hurt feelings. Damages are appropriate only if the act at issue was so vile or heinous that it exceeded what would normally be accepted as part of the employment relationship. This case does not reach that level; nor has the grievor established through evidence that it does so.

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

[88] When considering whether the grievor is entitled to payment for the lost allowances, the language of the collective agreement must be examined. Appendix "G" (Exhibit 6, Tab 2) states that when an employee is to be removed from his or her regular duties due to an incident involving an offender, the officer is reassigned with pay. The French version of Appendix "G" refers to reassignment "*avec rémunération*." Remuneration includes salary but is broader and includes allowances according to the definition in *Dictionnaire canadien des relations du travail*, 2nd edition. Allowances form part of the compensation package (see *Cabiakman v. Industrial Alliance Life Insurance Company*, 2004 SCC 55). The grievor should be made whole, which would include reimbursement of the approximately $20,000 gross income attributed to shift

premiums and overtime payments that he did not receive during his suspension with pay.

[89] The employer treated the grievor as if he were an inmate when it suspended him and escorted him from the workplace. There was no reason for that action. There was no evidence that he posed a threat to anyone or anything. The employer had the right to investigate, but natural justice requires that the grievor should have been allowed to address the allegations against him. Mr. Finlay had no idea what the evidence was against him. *Basra,* as cited by counsel for the employer, was judicially reviewed, and the Federal Court of Appeal ruled that the suspension in that case became disciplinary after a period of delay even if there was no intention to punish the grievor in that case (see *Basra v. Attorney General of Canada*, 2010 FCA 24). The employer's intention is not the sole or primary criterion in determining if a suspension is disciplinary. The adjudicator must also consider the length of time the employer took to reach a decision. In this case, Mr. Massey had all the information required, with the exception of the grievor's comments, when the disciplinary investigation was launched.

[90] Mr. Kemball demonstrated that he lacks credibility. On direct examination, he remembered everything, while on cross-examination, his memory was selective. His evidence is not to be believed. He testified that he drew no conclusion on the grievor's reintegration to Kent Institution prior to completion of the threat risk assessment when the evidence proved otherwise. He might not have directed the conclusion to be drawn in the threat risk assessment written by Deputy Warden Huish, but he raised his concerns about that possibility when he ordered the threat risk assessment. Mr. Kemball testified that he had the report in April, when it was proven to him that he received it only in July. He could provide no explanation for the gap between April and July.

[91] It was obvious that Mr. Kemball wanted to fire the grievor. He was angry and frustrated by the process. The decision to reintegrate the grievor rather than terminate him was imposed on Mr. Kemball. He then exceeded his delegated authority and deployed the grievor without his consent to Mountain Institution. The Matrix of Delegated Authorities (Exhibit 15) is clear that only someone two levels higher than Mr. Kemball has the authority to deploy without consent. In cross-examination, he admitted he did not have that authority.

[92] Mr. Kemball cited concerns over the security of Kent Institution in support of his decision. Nowhere is that listed as a reason to deploy an employee without consent. He was not interested in considering any other options within Kent Institution. His mind was made up before the CSC's labour relations section recommended that he conduct a threat risk assessment.

[93] The threat risk assessment was a pretext to justify his decision to deploy the grievor to Mountain Institution. When the first assessment was not up to standards, a second draft was prepared, which was no better than the first, as it included at least 70% of what had been included in the first draft which was based on conclusions that the grievor had violated the "Code of Conduct". The grievor was not consulted when the threat risk assessments were prepared. Deputy Warden Huish did not go back to staff members as required in the CSC's "Employee Protection Program Guidelines" and "Employee Protection Program (EPP) Threat and Risk Assessment (TRA) Report" (Exhibits 11 and 12). There is no indication of how Mr. Huish concluded that the level of risk was high except that Mr. Kemball had concluded as much and had shared it with Mr. Huish. The threat risk assessment states that a number of the inmates who participated in the disciplinary investigation were no longer at Kent Institution, and yet, it was still used as a reason to deny the grievor's reinstatement.

[94] Then, all of a sudden, once the wardens changed at Kent Institution, the grievor was now allowed to return there for training. The right to deploy an employee, when exercised by someone properly authorized to do so, is not unrestricted. The safety risk posed by the grievor was not properly assessed.

[95] This is quite simply a case about the employer's unwillingness to seek alternatives and examine the facts objectively. The employer's case rests on Mr. Kemball's actions and testimony. He was not truthful. Any concerns over the grievor's credibility should be limited only to the income issue. However, Mr. Kemball's lack of credibility extended to most of the issues put to him.

[96] The length of time required to complete the investigation report interfered with the grievor's right to work and earn a living and resulted in the loss of additional benefits. How he was suspended is also important to consider. He was treated as if he were one of the inmates he was assigned to guard. The grievor demonstrated a loss of $20 000 as a result of the employer's actions. It could have been mitigated had the

employer assigned him to the MCCP or to another non-inmate contact post rather than suspending him.

[97] The grievor seeks damages as a result of how he was treated. The degree of wrong does not reach the level in *Attorney General of Canada v. Tipple,* 2011 FC 762, but is similar to that in *Robitaille v. Deputy Head (Department of Transport),* 2010 PSLRB 70. The employer did very little to correct the flaws. Everything was within the employer's ability to remedy.

## V. Reasons

[98] The employer's preliminary objection to jurisdiction is well-founded in the jurisprudence. If I am to seize jurisdiction to deal with the matter of the grievor's deployment to Mountain Institution without his consent, I must find that the employer, through its agent, Warden Mark Kemball, perpetrated a camouflage or a sham and that the true motive for the deployment was not the stated legitimate concern for the safety of Kent Institution. As little has been written concerning a deployment without consent as a condition of employment, the best source of guidance on what constitutes a sham or a camouflage is found in the series of cases related to rejection on probation.

[99] The jurisdiction of an adjudicator of the Board over cases of rejection on probation is significantly circumscribed by legislation and by the decisions of the Federal Court (see: *Boyce,* at para 50).

[100] The Federal Court in *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529 at para 37 held that "the employer need not establish a prima facie case nor just cause but simply some evidence the rejection was related to employment issues and not for any other purpose."

[101] When the employer puts forward an employment-related reason for a rejection on probation, the burden falls on the grievor to demonstrate that the reasons for the rejection on probation were a sham or camouflage and that the employer acted in bad faith. The grievor is required to demonstrate not simply that a different judgement might have been made but that the employer was merely constructing the employment-related rationale to disguise motives that had nothing to do with his suitability for the job (see: *Maqsood* at para 38).

[102] The Federal Court of Appeal in *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429 (C.A.) adopted the following test first enunciated in *Smith v. Treasury Board (Post Office Department)*, PSSRB File No. 166-02-3017 (19771007):

. . .

> *In effect, once* ***credible*** *evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes to a shuddering halt. (*emphasis added*)*

. . .

[103] In this case the grievor challenged Mr. Kemball's credibility as a means of meeting the shifting burden of proof, which burden required that the grievor demonstrate that the employer's stated reasons for his deployment without consent was a sham or a camouflage. If Mr. Kemball's evidence on that issue is not credible, then the question of whether he acted in good faith in deploying the grievor without his consent falls within my jurisdiction.

[104] In the *Boyce* decision, at paragraph 58, the adjudicator quoted the following test from *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119):

…

> *… if it can be demonstrated that the effective decision to reject on probation was capricious and arbitrary, without regard to the facts, and therefore not in good faith, then that decision is a nullity. …*

. . .

> *It is trite to say that a determination of whether there is good faith or not must be gleaned from all the surrounding circumstances; there can be a multitude of sets of facts that may result in a conclusion of bad faith … keeping in mind of course that good faith should always be presumed. …*

[105] The adjudicator goes on to state at paragraph 63 that another aspect of bad faith is discriminatory or differential treatment of employees in similar situations. The uncontradicted evidence of the grievor in the case before me is that he was the only correctional officer escorted from his place of duty at Kent Institution during working hours and that he was never allowed to return. There is no evidence before me as to whether he was the only correctional officer deployed without his consent from Kent

Institution, or any other institution for that matter, although it was within the employer's capability to present that information through its witnesses. Without that evidence, I conclude that the grievor is accurate in his description of his treatment as being the only correctional officer at Kent Institution to be treated in that fashion. In fact, he was subject to differential treatment by Mr. Massey initially and subsequently by Mr. Kemball.

[106] As Mr. Massey's involvement with the grievor was peripheral to the final outcome, the employer's case relied primarily on the evidence of Mr. Kemball. The grievor asked that I find that Mr. Kemball is not credible and that I discount his evidence about rendering the decision to deploy the grievor to Mountain Institution.

[107] The adjudicator in *Robitaille* at para 287 stated the following:

> *287. Assessing the credibility of a witness is not an exact science. The complex mix of impressions that comes from observing and listening to witnesses necessarily calls for a reconciliation of the differing versions of the facts. Giving credence to one witness over another is a matter of judgement. …*

[108] During the course of his cross-examination, Mr. Kemball was visibly agitated. At one point, when asked to leave the room so that counsel could argue the relevance of a particular piece of evidence, he slammed the door on his way out. He was flushed, appeared to be suffering from a dry mouth and was often evasive. He claimed to have no knowledge or recollection of many details of this case on cross-examination. That was in contrast to his demeanour on direct examination, during which his answers were direct, focussed and definitive. He displayed no unease or frustration with the process while in direct examination; nor did he have memory lapses.

[109] Mr. Kemball's demeanour on the stand is not conclusive of a lack of credibility, but his inability to recollect emails in which he clearly stated that he wanted to terminate the grievor's employment, and his very limited recollection of comments he made to the effect that he did not trust the grievor and of meetings, which comments were later documented, is telling. It reflects his lack of ease with being challenged on the decision he made to deploy the grievor without his consent and the *bona fides* of the link of that decision to his claim that it was required for the safety of Kent Institution, and it demonstrates that his intention was to prevent the grievor from returning to Kent Institution. It is also reflective what I have found was Mr. Kemball's

intent to remove the grievor from Kent Institution, regardless of his conclusions concerning culpability for the disciplinary allegations.

[110] I should not rely solely on Mr. Kemball's demeanour in assessing his credibility. As stated at paragraph 233 of *Robitaille* (referring *to Faryna v. Chorny*, [1952] 2 D.L.R. 354):

> *233. To assess a witness' credibility, the person hearing the evidence must not solely rely on the impression left by the witness but must base the assessment on an examination of how the testimony given fits into the evidence as a whole, taking into account other testimony, the facts established, a reasonable probability of events and the assessor's experience in human relations.*

[111] Mr. Kemball repeatedly denied, in both cross-examination and redirect, stating that he did not trust the grievor and that he did not want him at Kent Institution. Counsel for the employer argued that Mr. Kemball was clearly not biased against the grievor because he ruled in his favour despite the conclusions of the disciplinary investigation. I do not accept that argument. It is clear from the email correspondence and other documents submitted as exhibits that Mr. Kemball did in fact state and put in writing that he preferred to terminate the grievor's employment with the CSC and that he did not trust the grievor (see Exhibits 9, 10, 29, and 30). It is also clear that Mr. Kemball pursued that course of action until he finally accepted advice from CSC labour relations that termination was not warranted (see Exhibit 28). Since termination was not an option, he pursued deployment without consent and a threat risk assessment was conducted. I question the validity of the threat risk assessment, as it did not follow CSC processes for assessing risk, and appears to me to have been written with a foregone conclusion as evidenced as follows (Exhibit 28):

> *From: Langer Mark (PAC)*
>
> *Sent: Monday, November 28, 2011 12:41 PM*
>
> *To: Saso Erin (NHQ-AC)*
>
> *Subject: Threat Risk Assessment – Kent Institution CX*
>
> *Hi Erin,*
>
> *Here is the proposed TRA justifying a decision to transfer the CX to another facility within Pacific Region:*

*<<TRA Finlay – November 2011 (2).docx>>*

. . .

[112] The author of the threat risk assessment (Exhibit 6, Tabs 10 and 12) claims to have completed it while referencing all relevant laws and policies. Yet it has been proven that he did not. Mr. Kemball's evidence was that the risk was not assessed using the CSC "*Employee Protection Program Guidelines"* (Exhibit 11) and the "*Employee Protection Program (EPP) Threat and Risk (TRA) Assessment Report"* (Exhibit 12). I find that both assessments were written with a foregone conclusion in mind. A proper assessment of the true risk was not completed.

[113] The tone of both threat risk assessments is consistent with the tone of the letter found at Exhibit 6, Tab 7 in which Mr. Kemball advised the grievor that "As a result **I have no choice** but to declare that the allegations against you are unfounded and that no further disciplinary action will be taken as a result of this disciplinary investigation." (Emphasis added). The threat risk assessment (Exhibit 6, Tab 10) states:

. . .

*It was decided that the evidence amassed by the Board of Investigation (BOI) wasn't sufficient to support a termination of Mr. Finlay's employment.* ***Lesser disciplinary measures cannot be considered, given that the seriousness of the allegations allow for nothing but a termination****.*

. . .

*Despite the allegations being unfounded, there remains a "corporate memory" among Kent Correctional Officers and inmates that could place Mr. Finlay or others in a vulnerable position.*

. . .

*When Mr. Finlay was suspended with pay on 2011-02-03, there was a shift in the culture at Kent.*

. . .

*If he returns to Kent Institution is it* ***likely*** *that Mr. Finlay will have to respond to a security incident involving on of the nine (9) inmates still at Kent who was involved in the allegations against Mr. Finlay. There is a* ***chance*** *one of these inmates could become injured during a staff response,*

> *resulting in clear vulnerability to Mr. Finlay and Kent Institution.*
>
> . . .
>
> *A return of Mr. Finlay to this milieu would in all likelihood lead to a negative work environment.*
>
> . . .
>
> *Upon Mr. Finlay's return to work, he must be placed within another Institution in the Pacific Region.*
>
> . . .
>
> [Sic throughout. Emphasis added.]

[114] That threat risk assessment was later revised to some extent, although the majority of the report remained unchanged. I am particularly disturbed by the document's stated purpose:

> *… the allegations have been described in order to provide the reader with a context within which the risk remains. Despite the allegations being deemed unfounded, the fact remains that the allegations were still made. It is the fact that the allegations were made, and both staff and inmates provided evidence supporting the allegations, that presents the risk.* ***It is the allegations being made that presents the risk not the validity of the allegations*** *…* [Emphasis added]

Had a true TRA been performed which revealed safety issues of any kind (either vis-à-vis the grievor, his colleagues or inmates), my decision might well be different. However, in this case, the employer's reliance on the RTA as justification for the deployment must be rejected.

[115] Clearly, the conclusion that a threat existed that would justify deploying of the grievor without his consent to Mountain Institution was drawn, based on the fact that allegations had been made against the grievor and on Mr. Kemball's stated preference that the grievor not return to Kent Institution, as evidenced by the exhibits. In Exhibit 29, Ms. Tyler, regional chief of labour relations advised the national chief, labour relations, that Mr. Kemball "… believes that given the seriousness of the findings termination is the only option."

[116] By November 10, 2011, the focus was on deploying the grievor to another institution (see Exhibit 10):

*From: Kemball Mark (PAC)*

*Sent: Thursday, November 10, 2011 12:31 PM*

*To: Saso Erin (NHQ-AC); Langer Mark (PAC)*

*Cc: Lindblad Michele (PAC); Houle René (NHQ-AC)Subject:*

*Re:* Redacted. . .

*Please advise on Mr Finlays deployment to another facility. I believe it is in everyones best interest.*

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*Sent from my BackBerry Wireless Handheld*

[*Sic* throughout]

[117] To support the deployment, a threat risk assessment was commissioned by Mr. Kemball: (Exhibit 9)

*From: Kemball Mark (PAC)*

*Sent: Monday, November 21, 2011 2:42 PM*

*To: Saso Erin (NHQ-AC); Houle René (NHQ-AC)*

*Cc: Langer Mark (PAC); Boileau Michael (PAC); Huish Shawn (PAC)*

*Subject: TRA-Mr. Findlay*

*The DW is presently completing a TRA on Mr. Findlay. Once completed we can share and discuss further. As you know my position is that it is in the Service's best interest that Mr. Findlay not return to Kent Institution. The TRA should assist in our discussion. I have had no direct involvement in the drafting of the TRA other than to provide Mr. Huish-DW with some parameters to cover.*

*M.*

[118] Given the plethora of documentary evidence that contradicts Mr. Kemball's evidence that the grievor's deployment was based solely on legitimate safety concerns, I conclude that on the balance of probabilities, Mr. Kemball's true motive for deploying the grievor to Mountain Institution was to accomplish what could not be done through the disciplinary process. It is clear from the testimony and the "Matrix of Delegated Authorities" that Mr. Kemball did not have the delegated authority to deploy an

employee without consent. No evidence was led that Mr. Kemball had been subdelegated by a higher level to follow through with the deployment without consent. It was driven by Mr. Kemball and his distrust of an employee he had never met until they came face-to-face at a disciplinary meeting. The only two options explored were termination and deployment. According to Mr. Kemball, no consideration was given to reintegrating the grievor to a non-inmate contact post within Kent Institution.

[119] It is telling that, once Mr. Kemball left his position as warden of Kent Institution, the ban on the grievor attending training with the other members of Mountain Institution who were trained at Kent Institution was lifted. Counsel for the employer asked me to ignore the grievor's testimony related to this allegation as hearsay. I reject the employer's contention as the grievor's testimony on this issue did not depend on what others had said to him they had been told regarding this issue, but instead depended on what he himself had experienced and been told first hand. The grievor testified to the fact that he had been directed to report to the Pacific Institution for training as he was not to enter Kent Institution and that he was the only officer from Mountain Institution to attend training at Pacific Institution. He also testified to a first-hand conversation that he had with Rose Bertolo in which she confirmed that as management had changed at Kent Institution, he could now return there for training. His evidence on this issue was not, I find, hearsay, and constituted direct evidence on the issue of his ban from Kent Institution. I find that his evidence also leads to the conclusion that this ban emanated from Mr. Kemball and is evidence of Mr. Kemball's disciplinary intentions towards the grievor.

[120] Counsel for the employer cautioned me that I must tread lightly when a finding was made that a threat to the security of a penal institution exists. While I accept that proposition, I cannot allow the employer to act in bad faith and use security concerns to camouflage disciplinary action. Therefore, I determine that, based on all the evidence before me, both documentary and testamentary, the lack of credibility of the employer's chief witness, and the uncontradicted fact that the grievor was the only correctional officer from Kent Institution treated as he was, his deployment to Mountain Institution was in fact disciplinary in nature. As it is a matter of disguised discipline, I have jurisdiction to dispose of this matter. Disciplinary action that is imposed after a finding is made that the alleged behaviour does not warrant disciplinary action is unacceptable.

[121] As to the issue of whether the grievor was entitled to the reimbursement of lost shift premiums and overtime suffered during the suspension with pay, the agreed statement of facts (Exhibit 33) demonstrates an inconsistent approach to paying such losses by the employer.

[122] Counsel for the employer argued that, since the grievor was deemed to have been assigned to administrative duties pursuant to the "Global Agreement", submitted as Tab 3 to Exhibit 6, and to an 8-to-4 Monday to Friday shift, he was not entitled to the payment of shift and weekend premiums "…as those are benefits that generally accrue for the inconvenience of actually working on those occasions" (see *Morris v. Treasury Board (Solicitor General Canada – Correctional Service),* 2000 PSSRB 55 at para 36). Since the grievor was not called upon to work overtime as a result of his administrative position, he is not entitled to overtime payments.

[123] The grievor's representative argued that a global agreement cannot override the terms of the collective agreement. Appendix G of the collective agreement refers to suspension with pay. The French version of Appendix G refers to "*rémunération*". Neither term is defined in the collective agreement. The *Treasury Board Secretariat Glossary of Terms and Definitions* defines "remuneration" as pay and allowances. Allowances include shift premiums and the payment of overtime. The grievor demonstrated through his T4s that he suffered a decrease in income of approximately $20 000 in 2011 due to the loss of shift premiums and overtime payments. When ordering the reinstatement of a correctional officer following a lengthy period of suspension as in *Basra v. Deputy Head (Correctional Service of Canada),* 2012 PSLRB 53, the adjudicator ordered the reinstatement of the employee with full pay and benefits.

[124] This is not the same type of situation as was dealt with in *Eden* in which the grievor was transferred to a non-operational position because he was no longer qualified to work in an operational capacity. The grievor could have continued to work as a correctional officer in a non-inmate contact post had the employer considered that option and in fact did work as a correctional officer at Mountain Institution. The evidence of both parties was that that option had been exercised for other correctional officers in situations in which complaints had been made against them.

[125] The resolution of this issue lies partially in the facts and partially in the terms of both the Global Agreement and the collective agreement. According to the Global

Agreement, the employer has the right to reassign an employee to administrative duties "with pay" when they are the subject of an investigation until such time as the investigation is complete and a decision has been rendered on their status. As the grievor's representative pointed out, the terms of Appendix G of the collective agreement also refer to suspension "with pay". I find that the employer had, initially, adequate reason to investigate the allegations of wrongdoing against the grievor and to reassign him to administrative duties "with pay". Given the seriousness of the allegations, the employer could do little else. I also agree with the employer's argument that the wording of both the Global Agreement and the collective agreement indicate that the grievor can be placed in a position that requires him or her to work only a standard workweek, without benefit of prior work-based incentives such as a night shift differential, weekend premium or access to overtime work. I draw support for my position from the fact that the work-based benefits accrue only to those employees who have worked the hours required for the payment of the extra benefit.

[126] However, the employer's right to reassign the grievor pursuant to the terms of the Global Agreement ended when it no longer met the terms of that agreement, which I find occurred when the employer notified the grievor on November 30, 2011, by letter of the dispositions of the disciplinary investigation and hearing, advising him that the allegations were unfounded and that no disciplinary action would be taken against him. Once that decision was made, the grievor was entitled to be returned to his prior position at Kent Institution and to benefit from the normal opportunities afforded to correctional officers there, such as overtime and weekend shifts. The grievor is therefore entitled to be reimbursed for the benefits he lost as a result of the employer's disciplinary action against him.

[127] However, I do not agree that damages are warranted. The case put forward by the grievor does not meet the criteria for an award of damages. There is no evidence that the allegations were made or investigated in bad faith or with the purpose of negatively impacting the grievor or his career. The employer received allegations of misconduct by the grievor, which allegations warranted investigation, and exercised its right to do so. I also find that the employer's actions after November 30, 2011, were not such as to give rise to a claim for damages. The grievor urged me to follow the decision in *Robitaille* as an example but I find that the facts of this case are far different from those in the earlier case. In that case, the evidence disclosed that the employer's actions had ruined the grievor, lead to the breakdown of his marriage and

caused him to suffer from depression. While the grievor testified to feeling hurt, isolated and humiliated, there was no evidence that the events following November 30, 2011 caused him exceptional distress. The employer's actions cannot be characterized as harsh, vindictive, reprehensible or malicious. The awarding of damages is discretionary and I find that based on the particular facts of this case, an award of damages is not warranted.

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

*(The Order appears on the next page)*

## VI. Order

[129] The grievor shall be reinstated to a CX-02 position at Kent Institution within 90 days of this decision.

[130] The grievor shall be paid shift and weekend premiums and lost overtime based on the average of such payments made to correctional officers employed in the 96-man unit at Kent Institution between September 6, 2011 and December 5, 2011.

[131] The grievor's claim for damages is dismissed.

[132] I will retain jurisdiction to deal with matters arising out of this order for a period of 120 days from the date of this decision.

May 27, 2013.

**Margaret T.A. Shannon,**
**adjudicator**