Date: 20130808

File: 566-02-5699

Citation: 2013 PSLRB 95

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

DONALD JAMES SATHER

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as

Sather v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: William H. Kydd, adjudicator

For the Grievor: Michael J. Prokosh, counsel

For the Respondent: Barry Benkendorf, counsel

Decided on the basis of written submissions,
filed May 22, June 12 and 24, and July 2, 2013.

I. Interim award

[1] This interim award deals with applications by both the grievor and the respondent for the pre-hearing production of documents.

II. Context

[2] On April 26, 2011, Donald James Sather, ("the grievor") filed a grievance challenging the April 20, 2011 decision of the Correctional Service of Canada ("the CSC") to terminate his employment for allegedly sexually assaulting another employee of the CSC. The grievance was referred to adjudication under paragraph 209(1)(*b*) of the *Public Service Labour Relations Act* ("the *Act*"). The grievor was represented by the Union of Canadian Correctional Officers (CSN), ("the union").

[3] The adjudication was initially set down for a hearing in Saskatoon, Saskatchewan, from March 12 to 15, 2013.

[4] On March 4, 2013, a pre-hearing teleconference was held to discuss the sharing of documents and procedural issues. During the teleconference, counsel for the union advised that before the grievor's termination the respondent had completed and relied on a disciplinary investigation report, ("the report"), dated March 9, 2011. The grievor was given a copy and union counsel advised that the vast majority of the 53 pages of the grievor's copy had been significantly redacted. Union counsel said that the respondent had refused requests made by the union for an unredacted copy of the report and its appendices as well as complete unedited copies of video footage, telephone records, and emails and messages referred to in the report. He submitted the principles of natural justice entitled the grievor to unredacted and complete copies. He had been retained two and one-half weeks before the teleconference and stated he would need time to review the unredacted documents. He requested that the hearing be postponed until the latter part of August. In response, the respondent's counsel stated that it would be able to send the unredacted version of the investigation report and its appendices to union counsel by March 5. However, the respondent's counsel stated that he would not be able to send the videos immediately as they were currently not in a transferable or deliverable format, and counsel did not know when the respondent would be able to deliver them. He said that he was not aware of any other potentially relevant documents that the respondent possessed. The respondent opposed the requested adjournment.

[5] I advised the parties that I would be willing to revisit the issue of an adjournment later in the week and that I was going to schedule another teleconference for March 8. In the interim, I issued a production order on March 4. It ordered the respondent to produce and provide copies of the following documents to the union by March 5, 2013:

> *1) a complete/unredacted copy of the March 9, 2011 Disciplinary Investigation Report regarding Donald Sather;*
>
> *2) complete unvetted/unredacted copies of all appendices to the above Disciplinary Investigation Report;*
>
> *3) complete unvetted/unredacted copies of all SaskTel records referred to in the Disciplinary Investigation Report;*
>
> *4) complete unvetted/unredacted copies of all emails and/or messages sent via mobile devices referred to in the Disciplinary Investigation Report.*

[6] The production order further ordered the respondent to produce or provide copies of the following documents no later than the date to be set at the March 8, 2013 teleconference:

> *1) complete unedited copies of all video surveillance of Rogue's Tavern in Prince Albert Saskatchewan (inside the Tavern and outside the Tavern) for January 12 and 13, 2011;*
>
> *2) complete unvetted/copies of the video footage of the January 20 and 27, 2011, investigation meetings with Donald Sather;*
>
> *3) any other documents which may be relevant to the above matter.*

[7] On March 7, the union wrote the Public Service Labour Relations Board ("the Board") advising that it had received the unredacted version of the report on March 5 and that it disclosed information relevant to the grievor's ability to properly prepare his case. That information included the names of witnesses; relevant observations made by people on the night and morning in question about the actions, demeanour and statements of the person who made the allegations against the grievor; the name of a restaurant allegedly visited by the accuser on the night in question; a statement from a witness allegedly contradicting the accuser's version of events and observations; and statements made by other individuals that allegedly supported the grievor's case.

[8] The union submitted that that information, combined with the fact that it still did not have a copy of the video surveillance footage, would not allow it time to make sufficient inquiries into the accuracy and completeness of the video surveillance or to track down and interview potential witnesses disclosed by the unredacted documents and video footage. Therefore the union reiterated its request to postpone the hearing scheduled for March 12 to 15 and asked for the immediate disclosure of the three categories of documents referred to in latter part of the March 4 production order.

[9] On March 8 I granted the union's request for a postponement of the hearing, subject to the following terms, as agreed to by the parties, paraphrased below:

> 1. The hearing was rescheduled for August 26-30, 2013 and would be heard in Prince Albert, Saskatchewan;
>
> 2. My order of March 4, 2013 was still in effect and the union would review, as soon as possible, the six CDs/DVDs of information received earlier in the day from the respondent to see if that order has been fully complied with, and would advise the respondent of the same as soon as possible;
>
> 3. Within six weeks of confirming that the March 4 order had been complied with, the union would disclose to the respondent all of the non-privileged documents in its possession, upon which it intends to rely at the hearing (which was to occur no later than eight weeks from March 8, barring some extreme problems/malfunctions with the six CDs/DVDs received from the respondent today);
>
> 4. Nothing in the agreement precluded either party from applying for additional disclosure; and
>
> 5. The parties agreed to advise the PSLRB, as soon as possible, as to whether the five new dates in August were sufficient, or if additional dates are required.

[10] On May 22, 2013 the union applied to the Board for the following orders:

> *A) A declaration that all of the following 3 categories of documents are covered by the Public Service Labour Relations Board's March 4, 2013 order:*
>
> *All documents in the respondent's possession that may be relevant to the above-noted matter, including but not limited to the following:*
>
> *1) All documents (letters, notes, memoranda, emails, text*

> *messages, BBMs etc.) to/from the Saskatchewan Penitentiary's Human Resources department and/or to/from Correctional Service Canada, which may be relevant to:*
>
> *a) Any questions, comments, guidelines or directives that were communicated with respect to how the March 9, 2011 Disciplinary Investigation Report should be vetted/redacted, prior to it being provided to the grievor;*
>
> *and*
>
> *b) The manner in which the March 9, 2011 Disciplinary Investigation Report should be vetted/redacted, prior to providing a copy to the grievor.*
>
> *2) Complete unvetted/unredacted copies of all notes, memoranda and letters, that may be relevant to the discussion on January 26, 2011, which the CSC Disciplinary Investigation Board/investigation team had with Police Constable Ratt (referred to at page 35 of the March 9, 2011 Disciplinary Investigation Report); and*
>
> *3) Complete unvetted/unredacted copies of all notes, memoranda and letters, that may be relevant to the April 12, 2011 Disciplinary hearing regarding The grievor.*
>
> *(Collectively, the "Potentially Relevant Documents")*
>
> *and*
>
> *B) That the Respondent disclose copies of all of the Potentially Relevant Documents to the Union (c/o Michael J. Prokosh), by no later than 7 calendar days following the date of the PSLRB's decision on this Application.*

[11] The union submitted that its application should be determined on the basis of written submissions. The respondent replied, requesting an oral hearing, and submitting that that was the usual practice. At the same time, it indicated it intended to bring its own application for production from the union. I directed that given the length and complexity of the applications, I would hear them by way of written submissions.

[12] On June 12, 2013 the respondent filed its written submissions, replying to the union's application. The respondent attached a number of documents pertaining to disciplinary investigation report vetting; discussions with Cst. Ratt, and the April 12, 2011 disciplinary hearing. At the same time, the respondent included its own application for production from the "union/employee". It submitted that the key issue in the adjudication was whether the grievor sexually assaulted a female CSC employee.

It stated that as a result of the allegations the grievor was charged criminally and the matter had been subject to a preliminary inquiry. Therefore it says the grievor would have received disclosure pursuant to *R. v. Stinchcombe* [1991] 3 S.C.R. and the provisions of the *Criminal Code* R.S.C. 1985, c. C-46. The respondent stated that it therefore wrote to union counsel on April 5 requesting the full criminal disclosure package, along with any documents that arose during the testimonies of witnesses during the preliminary inquiry.

[13] The respondent's position was that due to the grievor's participation in the criminal process, he was likely to possess a great deal of information that CSC and the respondent did not have. The respondent stated that the union took the position that it should have to produce only those documents that it intended to rely upon at the hearing. The respondent acknowledged that that was one of the terms of the order of March 8, but stated that in light of anticipated bad faith arguments by the union, it was asking that the union should be required to produce documents on the same basis as it had to, i.e. documents that "may be relevant." As an example it stated that the union taped many of the meetings in the disciplinary process but did not produce them.

[14] Therefore the respondent asked that the following order be issued by the Board:

> *1. That the union and Mr. Sather are required to produce any and all documents that may be relevant.*
>
> *2. That the order for production will specifically include any criminal disclosure that Mr. Sather received, directly, or through counsel, during the course of the criminal proceedings wherein he was charged with sexually assaulting Kristen Anderson;*
>
> *3. If there is any legal impediment to the disclosure of any potentially relevant documents by Mr. Sather, he will provide specific details relating to any legal impediment through counsel for the union.*
>
> *4. Should the respondent require a further application to overcome any legal impediment to the disclosure of the Mr. Sather's documents, it shall be free to bring the application upon proper notice to any parties that may have a legal interest in the documents.*

III. Summary of the arguments

A. Production of additional documents by the Respondent

1. Between the Saskatchewan Penitentiary HR Department and the respondent relevant to how the March 9, 2011 report should be vetted or redacted

[15] In its May 22, 2013 submissions the union said that when it received the unredacted version of the report pursuant to the March 4 order, it immediately became clear to it that much of the redacted information was relevant and that, in numerous instances, it supported the union's case. It said the information included the names of certain witnesses who gave statements during the disciplinary investigation of two years earlier; relevant observations made on the night and morning in question about the actions, demeanour, and statements of the person who made the allegations; the name of a restaurant visited by a number of people including the accuser, and observations as to who consumed alcohol; and observations and the statements made by a witness whose name had previously been redacted, who stated that she observed the accuser and the grievor shortly before the misconduct supposedly took place. The union alleged that that witness's observations and statement supported the grievor's case. That witness stated that based on her observations she did not believe the accuser's version of events. It said the information also included observations and statements during the night and morning in question, made by other individuals, which also supported the grievor's case.

[16] The union stated that, based on the extent of the redacted information, it intended to argue that the investigation conducted by the respondent and the manner in which it terminated the grievor amounted to bad faith and malicious conduct. It submitted that the respondent deliberately redacted the investigation report in a manner that withheld far more information than was required. It said that 53 of the 72 pages of the report were redacted. It said that based on that fact it would submit at the hearing that the respondent ". . . acted deliberately and with malice towards the grievor . . ." citing *Robitaille v. Deputy Head (Department of Transport*), 2010 PSLRB 70 at para 346; [2010] C.P.S.L.R.B. No. 79, at para 346 (QL).

[17] In its June 12, 2013 response to that part of the union's application the respondent appended to its submission a number of documents that it stated it hoped would satisfy the union and the Board so that no further production order would be

required of the employer. The respondent attached a copy of a covering memo from the Saskatchewan Penitentiary to the Access to Information and Privacy (ATIP) Division of the CSC that stated that it was enclosing the report and requested that a "vetted copy" be provided that could be shared with the grievor. Also attached to the respondent's submission was a memo from the Deputy Director, NHQ-ATIP, stamped "received March 30, 2011," attaching a vetted copy of the report. The memo stated that the report had been reviewed under the provisions of the *Privacy Act*, R.S.C. 1985, c. P-21, and that ". . . some personal information concerning other individuals has been removed." It continued as follows: "Thus, the release of this information ensures that the principles of 'due process' and 'natural justice' are being respected allowing Donald Sather an opportunity to receive all the facts and circumstances surrounding the allegations and findings."

[18] The respondent also attached a letter dated April 12, 2011 to the grievor's counsel at that time, from the acting warden of the Saskatchewan Penitentiary that stated in part as follows:

> *All information relating to the disciplinary investigation was forwarded to the Access to Information and Privacy branch as per required protocol for sharing information. The information you are requesting in your correspondence was vetted in accordance with sections 22 and 26 of the* Privacy Act*… I cannot authorize the release of further information.*

[19] The respondent also attached to its submission a series of emails, dated March 18, 2011, through March 31, 2011, between the Saskatchewan Penitentiary and the ATIP office, following up on the progress of the vetting. The respondent submitted that based on the documents that it produced with its submission, there should be no doubt that the documents were vetted pursuant to the provisions of the *Privacy Act* and that they were released pursuant to ATIP considerations. The respondent continued, stating that it had difficulty with the notion that the method of vetting could lead to an argument of bad faith and that unless the union could provide further detail on how a bad faith argument could be made based on vetting, pursuant to ATIP considerations, it was impossible to see any basis upon which further documentation on that point could be potentially relevant. Accordingly, it asked that that aspect of the application be considered fulfilled or dismissed.

[20] In its June 24, 2013 response to the respondent's reply, the union pointed out that the respondent did not state that the documents that it produced with its

submission, amounted to all the documents falling within what it, in this response, referred to as the "first category" of the documents that it requested. For ease of reference, that first category is repeated as follows:

> *All documents in the Employer's possession that may be relevant to the above-noted matter, including but not limited to the following:*
>
> *1) All documents (letters, notes, memoranda, emails, text messages, BBMs etc.) to/from the Saskatchewan Penitentiary's Human Resources department and/or the to/from Correctional Service Canada, which may be relevant to:*
>
> *a) Any questions, comments, guidelines or directives that were communicated with respect to how the March 9, 2011 Disciplinary Investigation Report should be vetted/redacted, prior to it being provided to the grievor;*
>
> *and*
>
> *b) The manner in which the March 9, 2011 Disciplinary Investigation Report should be vetted/redacted, prior to providing a copy to the grievor.*

[21] The union continued, stating that instead of confirming that all the documents which the respondent possesses which are covered by the first category had been disclosed, the respondent stated: "It is impossible to see any basis upon which <u>further documentation on this point</u> could potentially be relevant" (emphasis added). The union submitted that if anything, the statement amounted to an assertion by the respondent that it either does have, or at a minimum may very well have, additional documents falling into the first category.

2. Relevant to the discussion with Police Constable Ratt

[22] In its May 22, 2013 submission the union stated that notes taken at a discussion on January 26, 2011 between the CSC and Police Constable Ratt are relevant because an email referred to in the report, ostensibly from the accuser, stated that she was second-guessing some of the details leading up to what had happened and that she was confused to the extent that she had emailed Constable Ratt and had asked for the charges to be dropped. The report then continued, stating that ". . . on January 26 the investigation team spoke with Police Constable Ratt."

[23] In its reply to that portion of the union's application, the respondent stated in part as follows: “We have now had a chance to look for any documentation relating to the above entry, and it appears only one page exists.” It attached that page to its submission, and continued as follows: "In any event, it would appear that it was a brief conversation and that it would not reasonably have resulted in anything significant in the way of documentation".

[24] The union responded to that reply as follows:

> *With all due respect to the Employer, either it has other documents within its possession which are potentially relevant to the second category, or does not. Comments such as "it appears only one page exists…" and "it would appear that", do not amount to written confirmation that the Employer has no more potentially relevant documents in its possession.*

3. Documents that may be relevant to the April 12, 2011 disciplinary hearing and all other documents in the Respondent’s possession that may be relevant

[25] In its May 22, 2013 submissions, the union submitted generally that the test at the pre-hearing stage for production, is whether a document is arguably relevant or potentially relevant, citing *Zhang v. Treasury Board (Privy Council Office)*, 2010 PSLRB 46. It also submitted that the test for arguable relevance is a broader test than the test of relevance at the hearing stage. Therefore its position is that all documents related to the April 12, 2011 disciplinary hearing or other documents in the respondent’s possession that are arguably relevant or potentially relevant as to the issue of whether the respondent acted deliberately and with malice towards the grievor should be produced.

[26] In reply, with respect to the disciplinary hearing, the respondent attached to its submission a memo written by Laura Macadam, the chief of human resources, Saskatchewan Penitentiary, outlining what happened at the disciplinary hearing; a letter to the grievor with respect to the report, and Ms. Macadam’s notes from the meeting.

[27] In its response on June 24, 2013, the union similarly submitted that the respondent had not provided written confirmation that it possessed no more documents that were potentially relevant to the disciplinary hearing. It reiterated its request for an order that the respondent confirm in writing that it does not possess

any other documents that are potentially relevant to the April 12, 2011 disciplinary hearing.

B. Production of additional documents by the union

1. Documents that the grievor received from the Crown in the criminal proceedings

[28] In support of its application for production of documents that the grievor received from the Crown, the respondent stated that the key issue in this grievance is whether the grievor sexually assaulted a female CSC employee. It stated that as result of the allegations, the griever was charged criminally and the matter was subject to a preliminary inquiry. Therefore the grievor would have received disclosure from the Crown. Thus the respondent stated that the grievor likely possesses a great deal of information that the respondent does not have. The respondent had requested that information from counsel for the union, who declined to produce it, stating that any documents the Crown may have disclosed would in all likelihood have been disclosed under certain strict conditions. The respondent subsequently asked counsel for the union to speak to the grievor to determine if they were any actual bars to disclosure and to provide the respondent with the union's position with respect to obtaining the documents either by way of court order or directly from the Crown. The respondent said that union counsel did not respond.

[29] The respondent stated that it was aware that the accuser gave a video statement and submitted that the production of the police investigation would help the Board determine the central issue. The grievor was not immune from any requirement to produce documents.

[30] The respondent acknowledged that one of the terms of the order of March 8, 2013, agreed to by the parties, required the union to produce only those documents it intended to rely upon at the hearing. However, the same order specifically stated that nothing in that agreement precluded either party from applying for additional disclosure.

[31] The respondent argued that in light of the anticipated bad faith arguments outlined by the union, the union should be required to produce documents on the same basis as the respondent, i.e. documents that "may be relevant."

[32] In terms of union counsel trying to differentiate the union's obligation to produce documents in its possession from documents in the grievor's possession, the respondent said that in the recent production of documents from the union, a number of documents relating to potential damages were produced, including tax records. Those documents would not normally be in the union's possession and presumably the grievor had provided them to the union. The respondent argued that there was no reason it should be made to produce all its records while the grievor and the union kept theirs private.

[33] In reply, the union said that the March 8 order required it to disclose the documents upon which it intended to rely at the hearing. It complied, and the respondent confirmed that the union had done so. The union was not required to disclose any more documents.

2. All other documents in the union's possession that may be relevant.

[34] The respondent stated that it was aware that the union taped many of the meetings held during the disciplinary process. It anticipated that the union would likely criticize the meetings, but the tapes had not been produced. Additionally, the respondent presumed that notes taken by the grievor or someone from the union exist about those meetings. It submitted that all those documents, including the tapes, should be produced.

[35] In reply the union said that in 2009 the respondent and the union signed an agreement that is still in effect, which it attached to its submission. It stated in part the following:

> *The objective of the present agreement is to clarify the rights of the employee representative and the employee with a disciplinary hearing or investigation, with an administrative inquiry, hearing or investigation conducted by the employer.*
>
> *. . .*
>
> *[T]he person assisting the employee and the employee do not have to provide a copy of their notes to the investigating body.*
>
> *The person assisting the employee or the employee have the right to tape record any inquiry and this tape recording is their property. Advance authorization to bring recording*

> *equipment into the institution to record the interview must be obtained from the institutional head.*
>
> *The person assisting the employee and the employee do not have to leave a copy of the tape recording with the investigating body.*

[36] The union submitted that it and the respondent had clearly reached an agreement that reflected that the grievor and the union, as the grievor's representative, were entitled to take notes and record meetings and were not required to disclose those notes or recordings. The respondent's request for an order requiring the disclosure of any such notes and recordings was inconsistent with the agreement and should be denied.

[37] The union submitted that because this was a termination case the onus was on the respondent to prove its case. It cited the following, which highlights that principle, noted in *Riverside Forest Products Limited, Armstrong Division v. Industrial Wood and Allied Workers of Canada, Local 1-423*, [2000] B.C.C.A.A.A No. 31 (QL):

> *The panel also stated it is "the substantive misconduct alleged by an employer which must be proven on the balance of probabilities, with or without an explanation from the employee"…*
>
> *This is a termination case. It is for the employer to prove the facts on which it relied for the dismissal. The union is entitled to remain silent until the employer has made a case.*

[38] Additionally, the union submitted that this Board's main task at the hearing will be to review the Respondent's decision in the context of when it was made, based on the information it had in its possession at the time, in 2011, citing *Cie miniere Quebec Cartier v Quebec*, [1995] 2 S.C.R. 1095 ("*Quebec Cartier*"). It argued that the respondent had acknowledged that it did not possess the criminal disclosure package at the time that it decided to terminate the grievor in 2011; and it still does not possess that information. Therefore the union submitted that any information in the criminal disclosure package that the respondent did not possess when it terminated the grievor in 2011 could not be relied upon by the respondent at the hearing, as per *Québec Cartier*.

[39] In response to the union's reply the respondent suggested that a fundamental difference of opinion existed between itself and the union as to the nature of the upcoming adjudication. It said that the union was relying upon *Québec Cartier* to state that the board's task will be to ". . . review the respondent's decision in the context of when it was made, based on the information it had in its possession at that time, in 2011." The respondent suggested that if that were the case, the upcoming hearing would be essentially a judicial review of the decision of the CSC's deputy head and there would be little or no need to call evidence other than to have the decision-maker explain his or her decision. It submitted that the union's position was wrong, citing *Basra v. Attorney General of Canada*, 2010 FCA 24, at para 26: "The respondent bears the onus of proving the underlying facts which are invoked to justify the imposition of discipline . . . ."

[40] In this case the respondent said it would be incumbent upon it to prove that the grievor sexually assaulted the accuser. The Board will be required to assess credibility and perhaps accept some evidence and reject other evidence. In this case, a number of the key witnesses were interviewed in the course of the respondent's investigation, and statements were taken from them that the respondent has produced. Many of the same witnesses would probably have provided evidence during the course of the criminal investigation which is relevant as it would assist in assessing their credibility.

[41] The respondent did not ask the Board to make a decision as to what evidence would be admissible at the hearing. This is a preliminary application for disclosure. Disclosure at this stage will allow all the parties to better understand the evidence of proposed witnesses and will prevent surprises at the hearing.

[42] The respondent submitted that *Québec Cartier* actually helped its position. At paragraph 13, that decision states as follows:

> *This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent-event evidence in ruling on a grievance concerning the dismissal by the Company of an Employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time that it was implemented. . . .*

[43] The respondent did not seek subsequent event evidence as contemplated in *Québec Cartier*. It sought statements and documents about the same set of transactions that were at issue during the disciplinary investigation.

[44] As for the respondent's request for tapes and other documents, it argued that while it and the union might have agreed that copies of notes of tapes did not have to be provided to the investigating body, that was for purposes of the disciplinary investigation. The grievance process is underway and the union outlined that it intended to challenge the disciplinary process and to raise arguments about the respondent's bad faith during this process. No doubt one or more witnesses will be required to testify as to what took place at the various disciplinary meetings. It submitted that for the Board to make a finding with respect to what happened, while not being provided with the best evidence such as notes and audio recordings, would be contrary to the fundamental underpinnings of our justice system.

IV. Reasons

[45] I have authority under section 226 (1) (*e*) of the *Act* to: ". . . compel, at any stage of a proceeding, any person to produce the documents and things that may be relevant . . ."

[46] The test of relevancy is quite broad in the case of the pre-hearing production of documents, as explained in *Zhang v. Treasury Board (Privy Council Office)* 2010 PSLRB 46, at para 27 to 29 :

> *[27] … In Canadian Labour Arbitration (4th edition), authors Brown and Beatty expose as follows the parameters to be applied to determine whether an order for production should be issued:*
>
> 3:1400 Pre-hearing Disclosure
>
> . . .
>
> . . . the requirements of natural justice require that one party not unfairly surprise the other, and accordingly, some arbitrators require pre-hearing disclosure of information and documents that are necessary to enable a party to participate properly in the adjudicative process.
>
> . . .

> 3:1420 Production of documents
>
> The purpose of production of documents is somewhat different from the requirement that particulars be provided, in that production of documents assists a party in actually preparing its case, whereas particulars simply inform the other side of the case it will be required to meet. . . .
>
> 3:1422 Ordering production
>
> The basic criterion for ordering production of documents is a determination of whether they may be relevant to the issues in dispute. And in that regard, the test at the pre-hearing stage would appear to be either "arguably relevant" or "potentially relevant". . .

[28] In Toronto District School Board [Toronto District School Board v. C.U.P.E., Local 4400, [2002] O.L.A.A. No. 992 (QL)], arbitrator Owen Shime endorsed the well-established principle that a liberal view should be taken with respect to the production of documents at the pre-hearing stage. He expressed the following at paragraph 24:

. . .

> (iii) All documents which are arguably or seemingly relevant or have a semblance of relevance must be produced. The test for relevance for the purposes of pre-hearing is a much broader and looser test than the test of relevance at the hearing stage. A board of arbitration, at the pre-hearing stage, is simply not in a position, and ought not to lay down precise rules as to what may be relevant during the course of the hearing.

[29] In Malaspina University College [*Malaspina University College v. Malaspina College Faculty Association* (1996), 53 L.A.C. (4th) 93]*, the arbitrator stressed that ". . . whether the [documents sought] are in fact relevant and what weight [to] attach to them are not the issues at this stage. . . ."*

Production order pertaining to the Saskatchewan Penitentiary HR Department relevant to how the report should be vetted or redacted

[47] The first issue for consideration is the union's request for the production by the respondent of all the documents between the Saskatchewan Penitentiary HR Department and the CSC relevant to how the report should be vetted or redacted.

[48] The respondent produced with its submission a number of documents between those parties that it submitted should satisfy the union and the Board, adding that in any event it disputed that the method of vetting could lead to an argument of bad faith. The union cited *Robitaille* as an example of a case in which damages were awarded after an employer's representatives acted deliberately and with malice towards the grievor in that case. The union suggested that in the present case the extent of the redacting and the relevant nature of some of the material disclosed when the unredacted report was produced suggests that bad faith might have been involved, to the extent that the documents are relevant.

[49] At the prehearing stage, there is no need to go beyond a finding that the documents have arguable relevancy. In my opinion the documents relevant to how the report should be vetted or redacted that are sought by the union meet this test. The union pointed out that the respondent's counsel never stated in his submission that all the documents sought were produced. He stated only that the contents of those documents that were produced should be persuasive in themselves. Therefore I order the production of all such documents in this category, which have not yet been produced. The *Privacy Act* has no bearing on the respondent's duty to provide full disclosure and production of documents in compliance with the Board's order. The Board has a broad power to compel production which is rooted in the requirement for natural justice.

Documents relevant to the discussion with Police Constable Ratt

[50] The next issue is the union’s request that the respondent produce all documents relevant to the discussion on January 26, 2011 with Police Constable Ratt and the April 12, 2011 disciplinary hearing.

[51] The respondent has produced one document relating to that request, which its counsel commented on, stating that "it appears only one page exists." Again union counsel commented that such a statement did not amount to written confirmation that the respondent possesses no more potentially relevant documents. I take the statement by the respondent’s counsel as a representation by him that he believed that the only document in the respondent’s possession was the produced document, and I accept that representation. However the union, perhaps through an abundance of caution coloured by the suspicion of bad faith, is asking for an order binding on the

respondent, which I think it is entitled to, to ensure that if there are any additional documents, it is the respondent's duty to produce them.

Documents relevant to the April 12 disciplinary hearing

[52] The same comments apply to the documents relevant to the April 12 disciplinary hearing. The implication is that the three documents appended to the respondent's submission in reply were all the documents in its possession that were potentially relevant to the disciplinary hearing. However, there is no written confirmation that there are no additional documents. The union is entitled to an order that the respondent confirm that there are no more or that it produce any such remaining documents.

Documents that the grievor received from the Crown in the criminal proceeding

[53] The next issue is the respondent's request that the union produce all the documents that the grievor received from the Crown in the criminal proceeding.

[54] The union submitted that the March 4 order required it to produce only the documents that it intended to rely on. There is no dispute that it has produced those documents. However, the agreed terms of the March 8 order provided that it did not preclude either party from applying for additional disclosure.

[55] In its submission the respondent said that the Crown disclosure likely contained the statements of witnesses, which would be relevant and of assistance in weighing credibility, and that was likely to be an important issue during the adjudication hearing. I am satisfied that the Crown disclosure documents meet the arguable relevancy test.

[56] However the union also took the position that the Crown evidence was not relevant, because the respondent did not possess it and did not rely on it when it decided to terminate the grievor's employment. In support of its submission it relied on *Quebec Cartier*. I disagree. In *Quebec Cartier*, the respondent had dismissed one of its employees because he had a serious alcohol problem. Following the dismissal, the union filed a grievance and the employee underwent a treatment program for alcoholism. The arbitrator in the original case found that the respondent had been justified in dismissing the employee when it did, but in the light of the subsequent successful treatment, it was appropriate to annul his dismissal and order his

reinstatement. The Supreme Court of Canada held that the arbitrator had erred in considering the evidence that the grievor had been successfully rehabilitated after he was terminated. At paragraph 13 the court commented, as follows:

> *This brings me to the question I raised earlier regarding whether an arbitrator can consider subsequent event evidence in ruling on a grievance concerning the dismissal by the Company of an employee. In my view, an arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review at the time it was implemented. . . .*

[57] The Supreme Court was commenting on the relevance of events that occurred subsequent to the termination. In this case, the respondent is asking for the production of evidence relevant to proving events that occurred before the termination. In its July 2, 2013 reply, the respondent noted that, in fact, it is seeking statements and documents regarding the same set of transactions that were at issue during the disciplinary investigation. The court did not proscribe the use of additional evidence that was not considered when the decision to terminate was made but that was relevant to disproving or proving the factual issues that resulted in the termination.

[58] The union also suggested in an earlier submission that there was "likely some restriction" imposed by crown counsel when disclosure was made that prevented the grievor from giving the disclosed documents to anyone else. The respondent's counsel invited the union to provide details of any such restriction, but none have been received.

[59] The test for arguable relevance is a broader test than the test of relevance at the hearing stage. The union also stated that because this was a termination case the onus lay on the respondent to prove its case and it suggested that the respondent should not be able to prove its case by using documents that the grievor was compelled to produce. This submission is rejected. It is not in issue that the onus of proof in this case lies on the respondent. However the onus of proof has no bearing on the duty to produce arguably relevant documents..

[60] *Riverside Forest Products, Armstrong Division* referred to by the grievor related to a request for particulars, not a request for disclosure. The purpose of a request for

particulars, referred to earlier in my reasons in the quotation from *Canadian Labour Arbitration* in *Zhang,* is different than the test for disclosure. In addition, in *Riverside Forest Products, Armstrong Division* the arbitrator made it clear (at paragraph 15) that there were situations where defences raised on behalf of the grievor may "necessitate a direction for particulars in order to satisfy the right to a fair hearing as well as to expedite the arbitration and avoid an adjournment."

[61] The union also suggested that the documents in the grievor's possession are not in the union's possession, that the grievor is not one of the parties to the adjudication, and that an order to the union to produce documents would therefore not apply to documents in the grievor's possession. However the respondent stated that the union had produced income tax records of the grievor, which would have had to have come from him and that will presumably be used as evidence of alleged damages claimed by the grievor. The respondent suggested that the grievor should not be entitled to pick and choose which documents he will produce.

[62] As the union argued, the test for disclosure is broader than the test for relevance at the hearing stage. In my opinion, with respect to the pre-hearing production of documents, the grievor and the union are jointly responsible to produce arguably relevant documents in their possession. I point out that section 226(1)(*e*) of the *Act* states that an adjudicator may compel <u>any person</u> to produce the documents and things that may be relevant.

[63] I find that the Crown disclosure documents meet the test of arguable relevancy and should be produced by the grievor and the union.

The union's recordings and notes made during the disciplinary process

[64] The last issue is the respondent's request that the union be required to produce the recordings and notes it made during the disciplinary process. I agree with the union's submission that the intent of the 2009 agreement was that the notes and tapes made by the union were to be restricted to the private use of the union. I think that that is quite clear in the case of the notes. The statement that "[T]he person assisting the employee and the employee do not have to provide a copy of their notes to the investigating body" shows a clear purposive intent that the notes were to be restricted to the union's private use. If that was the purpose, those notes continue to be private. The respondent, by its representations, has agreed to forgo any right to see the notes.

The recordings are different as they merely recorded proceedings that both sides witnessed, so there is no issue of privacy. However there is still a representation made in the agreement that the tapes are the union's property and that the investigating body was not entitled to a copy of them. The investigating body and the respondent are synonymous for this purpose, as I think the implication is that if the respondent wanted a recording of the preceding, it would have had to make one. Therefore although the recordings might be relevant, the respondent by agreement precluded its right to be provided with a copy. Therefore I decline to order the production of those notes or of the recordings. I am exercising my discretion on the understanding that the union will not attempt to introduce the recordings or notes as evidence during the hearing.

[65] The Board emphasizes that its reasons above relate to the issuance of orders for the production of information and that it is not making a decision as to what evidence will be admissible at the hearing.

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

(The Order appears on the next page)

V. Order

[67] I declare that all the following 3 categories of documents are covered by the Board's March 4, 2013 order:

> All documents in the respondent's possession that may be relevant to the matter, including, but not limited to, the following:
>
> 1) all documents (letters, notes, memoranda, emails, text messages, etc.) to and from the Saskatchewan Penitentiary's HR Department or to and from the CSC, which may be relevant to the following:
>
> a) any questions, comments, guidelines or directives that were communicated with respect to how the report should be vetted or redacted, before it was provided to the grievor;
>
> and
>
> b) how the report should be vetted or redacted, before it was provided to the grievor.
>
> 2) complete unvetted and unredacted copies of all notes, memoranda and letters that may be relevant to the discussion of January 26, 2011, which the CSC Disciplinary Investigation Board and investigation team had with Police Constable Ratt (referred to at page 35 of the report); and
>
> 3) complete unvetted and unredacted copies of all notes, memoranda and letters that may be relevant to the April 12, 2011 disciplinary hearing for the grievor.

[68] The respondent is ordered to disclose and produce copies of all the foregoing documents to the union (c/o the grievor's counsel), by no later than 7 calendar days following the date of this decision. In addition, the respondent is ordered to confirm that it has produced all of these documents that are in its possession no later than 7 days following the date of this decision. If it has already produced all the documents in its possession pertaining to all of the foregoing documents, then the respondent is to confirm that it has produced all of these documents in its possession.

[69] The union is ordered to disclose and produce all non-privileged documents in its or the grievor's possession that may be relevant to this case, excepting the notes and recordings made by the union at meetings during the disciplinary process and acknowledged by the 2009 agreement between the CSC and the union to be the union's property. The documents to be disclosed and produced by the union include but are not limited to: any criminal disclosure that the grievor may have received, directly, or through counsel, during the course of the criminal proceedings in which he was charged with sexually assaulting the accuser.

[70] The union is ordered to disclose copies of the foregoing documents to the respondent (c/o its counsel) by no later than 7 calendar days following the date of this decision.

[71] If any legal impediment arises as to the disclosure of any potentially relevant documents by the grievor, he is provide specific details about it through counsel for the union.

[72] Should the respondent require a further application to overcome any legal impediment to the disclosure of the grievor's documents, it shall be free to bring the application upon proper notice to the parties that may have a legal interest in the documents.

August 8, 2013.

William H. Kydd,
adjudicator