

Date: 20140919

Files: 566-02-7434 and 7435

Citation: 2014 PSLRB 84



*Public Service  
Labour Relations Act*

Before an adjudicator

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BETWEEN

**STUART KING**

Grievor

and

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

Respondent

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

In the matter of individual grievances referred to adjudication

**REASONS FOR DECISION**

***Before:*** Kate Rogers, adjudicator

***For the Grievor:*** Corinne Blanchette, Union of Canadian Correctional Officers -  
Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-  
CSN)

***For the Respondent:*** Talitha Nabbali, counsel

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Heard at Abbotsford, British Columbia,  
April 8 to 11, 2014.

## REASONS FOR DECISION

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### **I. Individual grievance referred to adjudication**

[1] Stuart King (“the grievor”) is a correctional officer, classified CX-02, employed in the Regional Treatment Centre at the Pacific Institution (“the institution”) of the Correctional Service of Canada (“the employer” or CSC). On April 16, 2012, he was reassigned to a position having no inmate contact pending the outcome of a disciplinary investigation into allegations that he used excessive force on an inmate. On May 18, 2012, following the disciplinary investigation, the employer imposed a financial penalty of \$760, equivalent to four days’ pay, on the grounds that the grievor committed severe misconduct and violated the CSC’s *Standards of Professional Conduct* and *Code of Discipline* by using inappropriate force on an inmate.

[2] The grievor filed two grievances on June 6, 2012, contesting the employer’s actions. The first grievance, PSLRB File Number 566-02-7434, challenged the employer’s decision to reassign him to another position pending the outcome of a disciplinary investigation. The second grievance, PSLRB File Number 566-02-7435, contested the financial penalty.

[3] The grievances were referred to adjudication on August 17, 2012. The employer denied them at the final level of the grievance process on April 4, 2014.

[4] The grievor withdrew the grievance in PSLRB File Number 566-02-7434, relating to his reassignment, at the adjudication hearing.

### **II. Summary of the evidence**

[5] The employer called Terry Hackett, Steven Cerant and Corrine Justason to testify and introduced 20 documents into evidence. The grievor testified and called Edgar Vianzon, Phil Johnson, Alan Scott and Tuan Nuyen to testify. He introduced 11 documents into evidence.

[6] The parties requested that the two inmates involved in the incident in question be identified only by initial. The inmates did not testify and are not affected by the decision. Therefore, I agreed to the request. In my opinion, their names are not relevant to the issue before me, and there is no overriding legal principle that suspends their right to privacy. Accordingly, the inmates will be identified as “M” and “N” when it is necessary to identify them specifically.

[7] At the time in question, the grievor worked at the Regional Treatment Centre,

also known as the Rehabilitation or Delta Unit. Mr. Hackett, who was Warden at the institution at the relevant time, explained that the Rehabilitation Unit houses offenders who are low functioning and who have cognitive issues. He stated that the offenders in that unit receive additional support and that they could be at risk if housed in the general inmate population.

[8] On April 13, 2012, the grievor, Mr. Scott and Mr. Vianzon were on duty in the Rehabilitation Unit during the meal period at about 16:00 and were at or near the console unit, which overlooked the unit's common dining area. Mr. Vianzon, who is a CX-01 and has been a member of the Emergency Response Team for 10 years, testified that he was assigned to work at the console and that he was responsible for overseeing the inmates, controlling the cell doors and monitoring the ranges. He stated that during the meal service, he noticed a fast movement. It appeared to him that inmate M had assaulted inmate N. In cross-examination, he acknowledged that he saw only the aftermath of the assault. He explained that he saw inmate N jerk back after he was pushed. He stated that both inmates were standing face to face, and it initially seemed to him that the confrontation between them might escalate.

[9] Two psychiatric nurses were on duty at the time. They witnessed the incident between the inmates. The grievor and his partner, Mr. Scott, who is a CX-02, testified that a nurse informed them of the incident. Mr. Scott testified that the nurse told him that inmate M had assaulted inmate N by knocking him off his chair to the ground.

[10] The grievor, Mr. Scott and Mr. Vianzon had a brief conversation at the console about how to handle the inmate situation. The grievor testified that the conversation lasted about 30 seconds. They decided that it was not necessary to call for backup. Mr. Vianzon explained that it seemed an isolated incident. The grievor stated that they felt that further staff presence was not required as the assault was over. He stated that calling for backup would have disrupted the meal hour through the whole institution because all inmates would have been restricted to their cells. He stated that a call for backup is usually made only in a higher-level emergency. In this situation, the assault was over, inmate N had moved away, and inmate M had returned to his own table.

[11] However, the correctional officers decided that inmate M had to be restricted to his cell. The grievor testified that it is standard procedure to lock an inmate who commits an assault in his cell. Having determined that inmate M had to be restricted to his cell, the grievor and Mr. Scott went to the table where he was eating his dinner and

ordered him to return to his cell. The grievor testified that it was not the first time that inmate M had been involved in an assault and that, therefore, he understood the routine. Nevertheless, the inmate refused to follow the order to return to his cell in spite of at least three clear requests.

[12] The grievor testified that he and Mr. Scott tried to persuade inmate M to return to his cell by telling him that he could take his dinner tray with him. The grievor picked up the tray and told the inmate that he would carry it. However, the inmate refused to go to his cell.

[13] The grievor, Mr. Scott and Mr. Vianzon, who was watching from the console, testified that inmate M was uncooperative. The grievor and Mr. Scott testified that the inmate was verbally abusive and that, several times, he told them to “go fuck” themselves. The inmate stood up, but even at that point, both the grievor and Mr. Scott testified that he gave them no indication that he intended to comply with the direction to return to his cell. Mr. Scott testified that the inmate continued to swear at them and to resist, saying to them, “What are you going to do about it?” In cross-examination, Mr. Scott reiterated his view that it was not a situation in which the inmate intended to cooperate. He stated that he had experienced situations in which inmates cooperated even though they continued to argue, but the situation with inmate M was different. He stated that the inmate did not present himself in any fashion as cooperative. Asked if the grievor consulted him about whether to use physical handling, he stated that it did not work that way. The progression in the grievor’s response was dictated by the inmate’s behaviour. Mr. Vianzon also stated in cross-examination that despite the numerous direct orders to return to his cell, the inmate clearly demonstrated that he was not going to cooperate.

[14] The grievor testified that when it became obvious that inmate M would not go voluntarily, he took the inmate to his cell. He described his actions in the observation report he filed on the day of the incident (Exhibit G-9) and in a more detailed statement he submitted on April 25, 2012 (Exhibit E-19). In both statements, he wrote that he escorted the inmate to his cell by holding the top and bottom of the back of the inmate’s shirt and guiding him there. In the April 25 statement (Exhibit E-19), he wrote that when they reached the cell door, which was partially open, he asked the inmate to open it. The inmate refused, so the grievor pushed it open with his left arm and shoulder. He stated that the inmate did not come into contact with the door. He

also stated that the inmate continued his verbal abuse throughout the whole process.

[15] The grievor testified that he believed that it was necessary to act fairly quickly with inmate M because it was the dinner period, and inmates were in the area. He stated that he did not want the situation to escalate. In cross-examination, the grievor testified that he used what he described as “dynamic security.” He stated that he and Mr. Scott followed the “Situation Management Model” (SMM), using what was described as “staff presence” first, and then negotiations, such as offering to carry dinner for the inmate, to try to persuade him to lock up. He said that once it was clear that the inmate would not respond to verbal orders, the grievor moved to physical handling. Although he acknowledged that the interaction with the inmate happened very quickly, he stated that it is important to understand that correctional officers have to respond quickly because things can rapidly get out of control. He stated that he did not feel threatened by the situation because he and Mr. Scott had it under control.

[16] The grievor testified that although he could have used physical restraints, he did not think that it was a viable option because it is hard to use handcuffs, for example, on a non-compliant inmate. He noted that, in any case, using restraints would also have involved some physical handling. He stated that he felt that given the situation, he could more effectively escort inmate M to his cell using physical handling. Furthermore, he noted that it worked because the inmate was restricted to his cell without disrupting the unit. In cross-examination, he was asked why he did not use O/C or pepper spray. He explained that it would have been dangerous to use such a spray with other inmates present.

[17] Once inmate M was in his cell, he was placed on “cell restrict,” which meant that he was not able to leave his cell at will because the door was locked. Mr. Vianzon testified that he placed the inmate on cell restrict at 16:00 and that he identified his notation to that effect in the unit’s log for that day (Exhibit G-8). The grievor testified that the decision to place inmate M on cell restrict was discussed with Mr. Vianzon before he and Mr. Scott approached the inmate. However, he stated that Mr. Vianzon would have done it even without the discussion because he is an experienced officer.

[18] The grievor, Mr. Scott and Mr. Vianzon were each questioned in cross-examination about how long the interaction between inmate M, the grievor and Mr. Scott lasted. Mr. Vianzon stated that he thought it lasted between 30 seconds and a minute, and Mr. Scott and the grievor both stated that they thought it lasted under

30 seconds. In cross-examination, Mr. Scott agreed that it might have lasted between 15 and 20 seconds.

[19] Following the incident, the grievor returned to his post, checking first with the nurse to ensure that inmate N had been checked by a nurse. He then wrote an observation report (Exhibit G-9). Mr. Scott also wrote one (Exhibit G-11). The grievor also prepared an observation report concerning inmate N, which was submitted to the correctional manager (Exhibit G-10). Mr. Vianzon testified that he wrote a report on April 13, 2012, and left it on the desk but that it was misplaced. He was asked to write another one when he returned from his scheduled days off. The second report was entered as Exhibit G-7.

[20] The grievor testified that in addition to writing his observation report, he called the correctional manager's office twice before actually reaching Mr. Cerant, the correctional manager, by phone at 18:50. He stated that both times he called, the line was busy, and that he could not leave a message because there was no voice mail. He eventually reached Mr. Cerant.

[21] Five surveillance video clips were entered into evidence (Exhibit E-18) through the testimony of Ms. Justason, who reviewed them when she conducted her investigation into the incident. The clips are in black and white, have no audio, and were taken from cameras placed in different locations in the unit. The clip numbered 156 shows the initial assault between inmate M and inmate N in the upper left-hand corner of the video. The clip numbered 158 shows the grievor moving inmate M down the hall to his cell, with Mr. Scott following behind. The image shows that the grievor has one hand on the back of the inmate's shirt at the collar and the other arm wrapped around the inmate's chest. Clip 160 shows the grievor and Mr. Scott in a discussion with inmate M at the table, but the image is obstructed by a staircase. It also shows the grievor and Mr. Scott taking the inmate to his cell. The clip numbered 162 shows the grievor moving inmate M down the hallway to his cell. All the video clips, except number 162, show other inmates sitting near inmate M and standing by the server or the medications wicket.

[22] The final video clip entered in evidence, numbered 176 (Exhibit E-18), provides the only largely unobstructed image of the interaction between inmate M and the grievor and Mr. Scott at the dining table. It is clear from that clip that the two correctional officers and the inmate are having a discussion, during which the grievor

picks up the inmate's tray. The video shows the inmate standing up. The grievor can be seen pointing. The inmate turns his body slightly. The grievor puts down the tray, takes the inmate's arm and the back of his shirt, and turns him in the direction in which they begin walking. It is not possible to see the inmate's lower legs while he speaks with the correctional officers at the table or when he stands up because the bottom of the image is obstructed by a table at which another inmate is seated.

[23] Mr. Cerant was the acting correctional manager on April 13, 2012. He was working the night shift and was the officer in charge of the institution. He testified that the grievor reported the use-of-force incident. His notation in the logbook was entered in evidence as Exhibit E-1 and showed that the grievor called him at 18:50.

[24] In cross-examination, Mr. Cerant confirmed that the extension number for the phone in the correctional manager's office is 7706 and that there is no voice mail. He testified that after receiving the grievor's notification of his use of force, his partner went to the Rehabilitation Unit to investigate. When she returned, they watched the video clips.

[25] Mr. Cerant testified that cameras are located throughout the institution. The video feed is a computer-based system. Monitors and equipment in the correctional manager's office are used to review footage, which is also recorded on DVD. Mr. Cerant did not view all five video clips entered in evidence (Exhibit E-18). He testified that he reviewed clips 158 and 176. He did not remember viewing the other video clips. In cross-examination, Mr. Cerant stated that he was familiar with the number of cameras in the Rehabilitation Unit. He said that there are more cameras than those from which the video footage in evidence was taken. He confirmed that he did not review the footage from any of the other cameras.

[26] Mr. Cerant testified that after he reviewed the video footage, he prepared a "Use of Force" report (Exhibit E-2). He filled in his portion of the report and sent it up the chain of command. He also reviewed the video footage with the grievor, to obtain his explanation of the events. Mr. Cerant testified that his concern was mainly with the technique the grievor used to escort the inmate to his cell, which he described as unusual. Mr. Cerant also completed an observation report (Exhibit E-3) on April 16, 2012, at the request of the Assistant Warden of Operations.

[27] In cross-examination, Mr. Cerant stated that he was familiar with the SMM,

which is part of *Commissioner's Directive 567 - Management of Security Incidents* (Exhibit G-1). He identified a "verbally resistive" inmate, as set out in the SMM, as one who is verbally abusive. A "physically uncooperative" inmate is one who resists direction or who fails to follow lawful orders. He explained that the SMM does not state how many times an order has to be given or how long a correctional officer has to wait before acting. He said that the SMM is a guide for officers to follow. It sets out the use-of-force options for physically uncooperative inmates, which are verbal intervention, negotiation, O/C or pepper spray, and physical handling. He explained that the model is not linear and that it allows correctional officers discretion because every situation is different.

[28] Officers are required to do everything that they can to isolate, contain and control a situation. Mr. Cerant explained that the first step is to isolate a situation to prevent it from spreading through the institution. To contain a situation, officers try to keep it in a small geographical area. The concept of "isolate and contain" could include ordering an inmate to return to his cell and lock up. In the case of an inmate who assaults another inmate, it would be appropriate to ask the aggressor to lock up. The decision about when to advise the Main Communications and Control Post (MCCP) and to call for backup is left to the officer's discretion and judgement because it depends on the situation.

[29] Mr. Cerant stated that officers do not necessarily respond identically to incidents. People react differently to situations. Two officers facing the same situation could respond differently, but that does not mean that one of the responses is wrong or that the other is better. He acknowledged that inmates' statements are relevant to assessing a situation. The tone of voice and words used are important in determining whether to use force.

[30] Mr. Cerant testified that his observation report (Exhibit E-3) was an accurate statement of his observations. In cross-examination, he acknowledged that the report made no reference to an inmate having spilled milk, and he stated that he did not remember anything about spilled milk. He stated that if his partner had said anything significant, he would have reported it.

[31] Mr. Johnson is a nurse in the Rehabilitation Unit. He was on duty the day of the incident in question. He testified that he conducted a post-use-of-force assessment on inmate M and that he found no injury. He did not file a "Classification of Injury" report



because there was no injury to report.

[32] Mr. Hackett was Warden of the institution at the relevant time. He testified that he learned of the grievor's use of force on Monday, April 16, 2012. He explained that the correctional manager informed Carole Chen, Assistant Warden of Operations, about the incident. She brought it to his attention. In cross-examination, Mr. Hackett acknowledged that there are many cameras in the Rehabilitation Unit and that, in particular, one is just above the kitchen area. He did not review any footage from that camera. The only footage that he reviewed was entered in evidence as Exhibit E-18. He stated that the clips that he reviewed were those that the correctional manager of operations pulled and identified as relevant. That person did not testify.

[33] Based on the concerns raised by the correctional managers and the Assistant Warden of Operations, in addition to his own review of the video clips (Exhibit E-18), he believed that the grievor's use of force warranted an expedited use-of-force review. He documented his concerns in an email exchange (Exhibit E-4). *Commissioner's Directive 567-1 - Use of Force* (Exhibit E-5) required him to advise regional and national headquarters to facilitate an expedited use-of-force review. It also required that the review be completed within 20 days, with multiple levels of institutional review. The use-of-force report (Exhibit E-2) illustrates the many levels of review, starting with the initial report by the officer who used force. Mr. Hackett testified that it was the first time that he had used the process for an expedited use-of-force review.

[34] Mr. Hackett testified that the use-of-force review is administrative and that it determines only violations of policy. Therefore, in addition to instituting the use-of-force review, he also initiated a disciplinary investigation, which was to determine culpability. In the interim, he reassigned the grievor to a position in the regional supply depot (Exhibit E-6), where he would have no contact with inmates. Mr. Hackett explained that he was sufficiently concerned about the grievor's use of force in the circumstances under review that he believed that the grievor should be removed from inmate contact, particularly because a correctional officer could be called upon to use force at any time.

[35] Mr. Hackett appointed Ms. Justason, a CSC regional investigator, to conduct the disciplinary investigation (Exhibit E-7). She was directed to establish the facts surrounding the allegation that the grievor used inappropriate force on inmate M on April 13, 2012. In cross-examination, he explained that he consulted with national and

regional headquarters about assigning an investigator and, in particular, about assigning Ms. Justason (Exhibit G-3). He stated that he confirmed that she was senior, experienced and qualified. He also spoke to her before appointing her to ensure that she was available. He acknowledged that he knew her because they had been on correctional officer training together in 1995. The grievor was notified about the appointment of the investigator (Exhibit E-8).

[36] Ms. Justason testified that at the relevant time, she was a part of the regional investigations team. She was appointed to the team in 2010 and received investigation training at the national level. The regional investigation team conducted disciplinary investigations as well as investigations into inmate assaults and drug overdoses. At the time of the investigation into the matter in issue, she estimated that she had conducted about 20 disciplinary investigations. She stated that she approached all such investigations by asking whether the behaviour in question actually occurred and if it did, whether it violated the CSC's *Standards of Professional Conduct* (Exhibit E-11) or *Code of Discipline* (Exhibit E-12). Because of the issues in this matter, she also consulted *Commissioner's Directive 567-1 - Use of Force* (Exhibit E-5).

[37] In preparing her investigation report (Exhibit E-9), Ms. Justason went to the institution to obtain the necessary documents and reports. It should be noted that the documents and reports that she consulted were not attached to the copy of her investigation report entered in evidence. She testified that the grievor's union representative had requested the phone logs for the phone extensions in the correctional manager's office (Exhibit E-17) and that she was given a copy of those records. She also reviewed each video clip (Exhibit E-18) several times.

[38] Ms. Justason testified that in addition to reviewing the video clips, she believed it necessary to interview the people that were relevant to the situation. She said that before video was available, interviews were the only tools available to investigators and that they were still the best means of determining context. Therefore, she interviewed the grievor, Mr. Scott, Mr. Vianzon, Christina Photonopoulos, who was Mr. Cerant's partner, Mr. Cerant, and Victoria Hammond, a nurse and clinical team leader in the Rehabilitation Unit. It should be noted that neither her interview notes nor the tape of her interviews with any of those she interviewed, including the grievor, were attached to the copy of the investigation report entered in evidence. Ms. Justason testified that she also reviewed the observation reports prepared by the officers involved as well as

the grievor's statement of April 25, 2012 (Exhibit E-19).

[39] Ms. Justason stated that in developing her narrative of events, she concluded that the grievor and Mr. Scott learned about the assault on inmate N from the person who took the phone call at the console. She stated that she believed that the grievor and Mr. Scott failed to take the time to gather any background information. They approached inmate M at his table and engaged him in a discussion that lasted 17 seconds. At that point, the inmate stood up, with his mug in one hand and a plastic utensil in the other. The grievor propelled the inmate down the range to his cell, using the inmate's body to open the cell door. Ms. Justason noted that the door was not locked when the officers left the inmate in his cell. She stated that the officers would have had to return to the console to lock the door because it did not lock automatically when it closed. The officers did not advise the correctional manager immediately of the use of force and did not check on inmate N's well-being, who had been the victim of the assault.

[40] Ms. Justason stated that she believed that the officers' failure to obtain background was relevant because the SMM requires an initial assessment of a situation to prevent officers from going in blind, which could be very dangerous. She stated that both the grievor and Mr. Scott told her that they did not stop to investigate before acting because they wanted to separate inmate M from the situation. She was concerned because if they were correct in their assessment, the grievor placed himself in close proximity to inmate M and was holding his tray and therefore would not have been able to defend himself in the event of a problem.

[41] Ms. Justason also believed that 17 seconds was too short a time in which to gather the necessary information to respond appropriately. She stated that in her interview with the grievor, he seemed unaware of a number of facts, including the speed of his response and the fact that inmate M was holding a cup and utensil. In her opinion, the grievor did not take enough time to collect information before acting. She concluded that neither the grievor nor Mr. Scott attempted to find out who the other inmate involved in the assault was, whether he had any injuries or whether a weapon was involved. She said that neither the grievor nor Mr. Scott put that information in their observation reports and that the grievor conceded to her that he did not gather it before acting. She noted that other inmates were on the range but that the grievor did not stop to consider whether engaging inmate M would prompt a reaction from them.

[42] Ms. Justason testified that once she had gathered all the available information, she analyzed the situation to determine if the grievor's physical handling of inmate M had been appropriate in the circumstances. She stated that the options for using force in the SMM are not linear because everyone analyzes and responds to events differently. The SMM is a pictorial representation of appropriate responses to different behaviours. In her opinion, the inmate's behaviour fell under the category of "verbally resistive." He was mouthy and verbally resistive, but he was physically responding to the officers' direction. He stood up, gathered his things and turned toward his cell.

[43] Ms. Justason testified that in their interviews with her, Mr. Scott and the grievor acknowledged that inmate M was responding and that he was simply verbally resisting direction. She said that given that fact, the officers should have tried conflict resolution or verbal intervention rather than physical handling, which was not required and therefore was contrary to policy and was excessive. She stated that she did not accept the grievor's explanation for his use of physical handling, which she detailed at page 14 of her report, because she believed that it had inconsistencies. In particular, she believed that the fact that he did nothing to ensure that inmate N, the victim of the assault, was treated indicated that he had no real reason to believe that force was necessary.

[44] Once Ms. Justason completed her analysis, she wrote the report and made three findings. First, she concluded that force was not required. Second, she concluded that the use of force was inappropriate and excessive. Third, she concluded that the grievor's physical handling of inmate M had been inappropriate and had not been in accordance with his training. She stated that she consulted with labour relations while the report was in draft form. Once it was finalized on April 30, 2012, she sent it to Mr. Hackett, and her role ended.

[45] In cross-examination, Ms. Justason acknowledged that she did not interview the nurses on duty at the time of the incident and that she did not interview inmate N or inmate M or any other inmates that were in the area at the time. She did not recall how many observation reports she reviewed in preparing her report, and she acknowledged that the report did not list them.

[46] Ms. Justason also acknowledged in cross-examination that she did not request any of the video footage from the other surveillance cameras in the Rehabilitation Unit. She stated that she believed that the footage that she reviewed was the only video

footage taken and that she was not aware of other cameras in the unit. Video clips 158 and 176 were shown to her in cross-examination, and objects that other witnesses identified as cameras over the servery and the medication wicket were also pointed out to her. Despite that fact, she would not acknowledge that they were cameras.

[47] Ms. Justason stated that she reviewed the video clips several times but could not say what software she used to view them or how many frames per second the cameras recorded. She determined the length of the incident by the time recorded by the cameras. She agreed that it was possible that the time could have been recorded incorrectly. She did not know how much time elapsed between the assault on inmate N and the officers' intervention with inmate M.

[48] Ms. Justason was asked about her conclusion that inmate M was responding to the officers' direction to him to return to his cell. In particular, she was asked about a statement at page 8 of her report (Exhibit E-9) to the effect that the inmate's feet were parallel and that he was turning toward his cell. When asked in which video clip it was possible to see his feet, she identified clip 176. However, after reviewing that clip, she acknowledged that it was not possible to see his feet. Nevertheless, she stated that he was turning and that his movement was suggestive of compliance. Asked if it was possible that the inmate was turning toward the servery, she stated that she had no reason to believe that and that neither the grievor nor Mr. Scott suggested that fact to her.

[49] Ms. Justason acknowledged that the order to inmate M to return to his cell was a legitimate direction and reiterated her conclusion that inmate M did not refuse that order. She did not agree that her finding contradicted the statements given by the grievor and Mr. Scott. She stated that Mr. Scott told her that the inmate was "not in a fighting stance," although she acknowledged that it was not necessary to be in one to refuse an order. She acknowledged that the grievor told her that he concluded that the inmate would not obey the order to return to his cell because he did not move toward it, but she did not agree with that assessment.

[50] Ms. Justason could not remember who told her that inmate M was not placed on cell restrict after he was put in his cell. She stated that she could say only that she was told that he was still able to leave his cell after the officers took him there.

[51] Ms. Justason was asked in cross-examination about her finding on page 10 of

her report (Exhibit E-9) that the grievor did not report the use of force until three hours after it occurred. In particular, she was questioned about her statement that a review of the logs of calls made from all the locals at the console in the Rehabilitation Unit to the correctional manager's office showed that the grievor called the office at 18:45. Asked to review the call log (Exhibit E-17), she acknowledged that two earlier calls were made the correctional manager's office from the Rehabilitation Unit, one at 16:23 and one at 16:29.

[52] Ms. Justason was questioned about her observation at page 13 of her report (Exhibit E-9), where she stated that the grievor and Mr. Scott failed to advise the MCCP of the situation. She stated that she relied on the evidence of the correctional officers in relation to the practice of calling for backup and that she reviewed the post orders. She was not aware that the grievor, Mr. Scott and Mr. Vianzon had decided that calling for backup was not necessary, and she had no idea from what part of the institution backup would have come had they called for it.

[53] When asked about her finding that the grievor did not check on the welfare of inmate N, Ms. Justason stated that her finding was based on what she was told. She said that the grievor did not tell her that by the time he returned to the console, a nurse had already checked over inmate N.

[54] Ms. Justason was questioned about her conclusion that the grievor should have known the applicable policies and commissioner's directives but did not. She was asked how many policies were in force, but she did not know. However, she stated that correctional officers are expected to know the content of all applicable policies, even though they may not necessarily know how many there are.

[55] Mr. Hackett testified that he reviewed Ms. Justason's report on receiving it. He understood from it that she believed that the grievor's use of force was unnecessary and that the method of force used was unnecessary. He accepted the report and accepted the facts it included. Therefore, he scheduled a disciplinary hearing with the grievor, who would then have been given an opportunity to respond to the report.

[56] The disciplinary hearing was held on May 11, 2012. Mr. Hackett testified that he reviewed the investigator's findings and that he then gave the grievor an opportunity to explain his actions. Mr. Hackett became concerned when it became clear to him that the grievor did not have a good understanding of the SMM and the use-of-force

options. In particular, Mr. Hackett noted that only 17 seconds passed between the start of the discussion with inmate M and the use of force. Inmate M was turning toward his cell when the grievor resorted to a use of force. Mr. Hackett wanted to understand why the grievor responded the way he did rather than using dialogue or other techniques, as set out in the SMM. The grievor could not answer his concerns. Mr. Hackett testified that he and the grievor had a good discussion about the situation and the way forward. He said that the grievor acknowledged that he had tunnel vision and that he might not have acted according to the SMM.

[57] Mr. Hackett testified that he concluded during the disciplinary hearing that the grievor had violated *Commissioner's Directive 567 - Management of Security Incidents* (Exhibit G-1), and in particular paragraphs 32 and 34 and Annex A, which is the SMM. Mr. Hackett stated that he determined that the use of force was not necessary because although inmate M was verbally aggressive, he was coming under control and was turning to go to his cell, as directed.

[58] Mr. Hackett also concluded that the grievor violated the *Standards of Professional Conduct in the Correctional Service of Canada* (Exhibit E-11), which applies to all CSC employees and is referenced in all letters of offer and initial training. The grievor also violated *Commissioner's Directive 060 - Code of Discipline* (Exhibit E-12), which relates to the proper discharge of all employees' duties.

[59] In consultation with the labour relations section, Mr. Hackett determined that the grievor was guilty of serious misconduct and that a disciplinary penalty was necessary. He stated that it was clear to him that the grievor understood too late in the process that his conduct had been incorrect. He was also concerned by the similarity of the incident to an earlier one, in which the grievor was given a written reprimand. Referring to the *Global Agreement between Correctional Service Canada (CSC) and the Union of Canadian Correctional Officers - Syndicat des Agents Correctionnels du Canada - CSN (UCCO-SACC-CSN)* (Exhibit E-13; "the *Global Agreement*"), he established that the appropriate disciplinary penalty for serious misconduct was the equivalent of four days' pay, or \$760, as set out a page 22 of that document. He advised the grievor in a letter dated May 18, 2012 (Exhibit E-14), of the grounds for discipline and the penalty. Following remedial use-of-force training, which Mr. Hackett believed was necessary, the grievor was returned to his substantive position in the Rehabilitation Unit on May 23, 2012.

[60] In cross-examination, Mr. Hackett confirmed that the escort tactic that the grievor used, although unusual, was not a factor in the decision to impose discipline on him. Mr. Hackett stated that he was influenced by the fact that the grievor never adequately explained why he felt it was necessary to use force. He believed that the grievor violated the SMM and that, by doing so, he put himself and others at risk. However, he acknowledged that other inmates visible in the video clips did not appear to react to the incident. He believed that the fact that inmate M was already turning toward his cell and was not in an aggressive stance when the grievor engaged in physical handling demonstrated that the use of force was not appropriate and that other techniques could have been used.

[61] Mr. Hackett acknowledged that inmate M's tone of voice and words during the incident would be relevant and were not clear from the video, which was why an investigation was conducted. He stated that it was evident that the inmate was verbally resistive. His concern was that the grievor went into the situation without knowing the background. The grievor's actions, as shown on the video, and his statements did not correspond to any legitimate concerns that he might have had about the incident. Asked if the grievor disputed the suggestion that the inmate was turning toward his cell, Mr. Hackett stated that the grievor had difficulty recalling events and referred again to the grievor's tunnel vision. He said that the grievor gave a version of events that provided no clear, consistent or justifiable explanation for his use of force.

[62] Mr. Hackett explained that he believed that the grievor acted in a manner that brought discredit on the correctional service. He acknowledged that Ms. Justason's report made no finding of that nature. He stated that he made an independent assessment to that effect because even though there was no public information or publicity about the incident, the potential for publicity was present. He acknowledged that a reputation for using excessive force could tarnish the reputation of a correctional officer with inmates but said that the grievor had a good reputation.

[63] In cross-examination, the grievor was asked whether he agreed with Mr. Hackett in that he could have done some things differently. He stated that in the disciplinary meeting, he was second-guessing his actions, and therefore, he might have said that he agreed with Mr. Hackett. He explained that Mr. Hackett was quoting rules from different commissioner's directives and that, at that time, he would have agreed with anything to get back to work in the Rehabilitation Unit.



[64] Mr. Nuyen is the correctional manager for the Rehabilitation Unit. The grievor reports to him. He was not present during the incident on April 13, 2012, but testified that the grievor had been reporting to him for the past year-and-a-half. He stated that the grievor is a hard worker, is good with inmates and is able to defuse difficult situations.

[65] Mr. Vianzon and Mr. Scott testified that they were not disciplined as a result of the incident in question.

### **III. Summary of the arguments**

#### **A. For the employer**

[66] The employer acknowledged that it bore the onus of establishing that discipline was warranted in the circumstances of this case and that the penalty imposed was reasonable. Citing *Basra v. Canada (Attorney General)*, 2010 FCA 24, the employer stated that discipline has been found warranted in cases in which employees have breached its *Code of Discipline* (Exhibit E-12) or *Standards of Professional Conduct* (Exhibit E-11). Because the grievor admitted that he was aware of both of those documents, the only questions to be answered in this case are whether the discipline was justified and whether the disciplinary measure was excessive.

[67] The letter of discipline (Exhibit E-14) articulated the reasons for the discipline imposed on the grievor. It specified the standards that were breached and explained the factors that were considered in that imposition of discipline. In his testimony, Mr. Hackett explained the process followed to determine whether discipline was warranted. He reviewed the video footage and established an expedited use-of-force review, which was conducted in accordance with *Commissioner's Directive 567-1* (Exhibit E-5). The use-of-force review was based on the use-of-force report (Exhibit E-2), which outlined the concerns about the grievor's actions. Mr. Hackett explained that he also convened a disciplinary investigation to gather all the facts surrounding the incident because he had seen only the video footage.

[68] Ms. Justason conducted the disciplinary investigation. She testified that she reviewed all the relevant documents, the video footage and the relevant Commissioner's directives. She concluded that the grievor's use of force was not required and was not consistent with the SMM found in *Commissioner's Directive 567*.

[69] Mr. Hackett held a disciplinary hearing and had an in-depth discussion with the grievor about his actions. He concluded that the grievor did not understand the requirements of *Commissioner's Directive 567*. He testified that he imposed discipline only after reading the investigation report and conducting the disciplinary interview. He concluded that the grievor had not acted in accordance with *Commissioner's Directive 567* and the SMM. He stated that he thought that the grievor was redeemable, and therefore, he arranged remedial training for him before he was returned to his position.

[70] The employer argued that the evidence showed that only 23 seconds passed between the grievor's first approach to inmate M and his use of physical handling. The evidence given by all the witnesses was consistent. Even though the grievor used responses set out in the SMM, such as verbal orders and negotiation, he did so in quick succession and left the inmate little time to comply. From the evidence of all the witnesses that were present at the relevant time, it was clear that the inmate stood up, holding his cup and utensil. The grievor testified that he believed that the inmate intended to go to the servery, but Ms. Justason believed that the inmate was being cooperative even though he was verbally resistive. While it is not possible to know what the inmate intended, it is clear that the grievor left him too little time to comply before engaging in physical handling.

[71] The employer argued that it must also be noted that the grievor made no attempt to use physical restraints, even though the SMM states that using them at the same time as using verbal intervention is appropriate.

[72] The employer argued that, given the information at hand, Mr. Hackett acted reasonably when he determined that the grievor violated the CSC's *Standards of Professional Conduct* and *Code of Discipline*. Furthermore, the disciplinary penalty that he imposed was reasonable. He testified that he considered the grievor's violations serious misconduct. He determined the appropriate penalty based on the *Global Agreement* (Exhibit E-13), which sets out the financial penalties agreed to by the employer and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) for misconduct. That agreement establishes a four-day suspension as the appropriate penalty for serious misconduct. Mr. Hackett chose to impose the equivalent financial penalty rather than a suspension. He also testified that he believed that he could have imposed a harsher measure, but

he believed that the grievor was redeemable and that with remedial training, he would act differently in the future.

[73] Citing *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88, *Roberts v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 28, and *Rose v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 17, the employer argued that a financial penalty equivalent to four days' pay falls at the low end of the spectrum in cases involving excessive use of force. Therefore, the disciplinary measure imposed was reasonable and should be upheld, and the grievance should be dismissed.

#### **B. For the grievor**

[74] The grievor argued that *Basra* sets out the three questions that must be answered in all disciplinary cases, as follows:

- 1) Was there reasonable cause for discipline?
- 2) Was the disciplinary measure an effective response?
- 3) Should alternative measures be substituted?

[75] Those questions comprise the test that should be applied to all disciplinary measures.

[76] Mr. Hackett relied on four grounds for discipline. Because he labelled the offence "serious misconduct," the employer had to establish, through clear and cogent evidence, each ground for discipline, which the grievor contended constituted a higher burden of proof.

[77] Concerning the allegation that the grievor acted ". . . in a manner that [was] likely to discredit the Service" (letter of discipline; Exhibit E-14), the grievor argued that no evidence was adduced to support the allegation. Mr. Hackett stated that the incident could have become known outside the institution but that he was not concerned about an investigation being launched by the Abbotsford, British Columbia, police force. Citing *Tobin v. Attorney General of Canada*, 2009 FCA 254, the grievor argued that the question of whether conduct is likely to bring discredit to the correctional service can be answered only through applying common sense and good

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judgment. Failing to adduce any evidence on that allegation is, on its own, sufficient to warrant reducing the disciplinary penalty.

[78] On the allegation that he contravened “Infraction (m)” set out in the *Code of Discipline* at page 3, the grievor argued that the employer adduced no clear and cogent evidence to suggest that he performed his duty “. . . in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service or to any other person(s), either directly or indirectly . . . .” The evidence that inmate M was not injured was uncontroverted, and Mr. Hackett’s testimony on this allegation was based solely on the creation of a hypothetical situation in which the incident could have escalated. Because there was no evidence to support that allegation, the disciplinary penalty should be reduced.

[79] Concerning the main allegation to the effect that he used excessive force against inmate M, the grievor argued that no suggestion was made that the order given to the inmate to return to his cell was not legitimate or appropriate in the circumstances. The employer did not dispute that in similar circumstances, an inmate that assaulted another inmate would be ordered to return to his cell. The employer did not dispute that correctional officers are required to isolate, contain and control in such situations.

[80] Inmate M refused to return to his cell. He told the grievor and Mr. Scott that he was not going to and said, “What are you going to do about it?” The employer did not challenge that evidence. Correctional officers are not obligated to be assaulted or injured before intervening. They have a duty to contain a situation. The grievor argued that even though the time between his order to the inmate to return to his cell and the inmate’s refusal of the order was short, it was sufficient for the inmate to make it clear that he was not going to comply. There was no need to give him more time because he had made his intention clear.

[81] Mr. Cerant testified that an inmate who refuses an order is considered physically uncooperative. He also stated that the time given to an inmate to comply with an order is left to an officer’s judgment and discretion and is not set out in the SMM. Mr. Cerant explained that the SMM is a guide and is not prescriptive on the time needed to progress through the responses it sets out.

[82] The grievor argued that Mr. Hackett’s opinion was not independent from that of Ms. Justason. However, her investigation was flawed. She did not attempt to obtain any

evidence outside of what was given to her. She did not understand the unit's routine, layout or work practices. She relied on the video evidence that was given to her, but it was incomplete, and she did not ask for recordings with better views of the incident. Her conclusions were drawn from hindsight. She determined what she thought would have been the best course of action in the circumstances facing the grievor and applied that standard to him. However, perfection is not the standard, and correctional officers are given considerable discretion in determining the appropriate response to a situation.

[83] The reliance on the video footage is problematic for a number of reasons. There was evidence that other cameras were in the unit, but no footage from them was reviewed. The images are obstructed in some of the clips. The video footage also has no audio. Citing *Crown in Right of Alberta v. Alberta Union of Provincial Employees*, 2013 CanLII 72918 (AB GAA), the grievor argued that the lack of audio in the video footage is a liability. Furthermore, Ms. Justason saw things on the video that no one else saw. For example, she testified that she could see inmate M's feet on the video footage, but in fact, they are not visible from any of the camera angles that she reviewed. The grievor argued that the direct evidence from the witnesses present must be preferred over the video evidence.

[84] Ms. Justason did not interview anyone who could have been helpful. For example, only inmate M could say whether he intended to return to his cell, but she did not interview him. She made her own judgments without the operational experience necessary to understand the issues. For example, she suggested that the officers could have called for backup without understanding the implications of such an action during the institution's meal period. She based her opinion on what she believed was the best course of action without acknowledging or understanding the discretion given to correctional officers, who are best placed to understand the context. Even though the grievor could have chosen a different response, it does not make the response he chose wrong. Citing *Penny v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-15652 (19860819), and *Parrett v. Vanderford et al.*, 2001 BCSC 23, the grievor argued that there must be room for correctional officers' judgment and discretion when they apply force.

[85] The grievor noted that *Commissioner's Directive 567* (Exhibit G-1) gives correctional officers the discretion to determine the appropriate responses to security

situations. In paragraph 17, it states that the SMM is to be used to assist officers in determining the appropriate response option. In paragraph 25, it uses the phrase “when necessary,” and in paragraph 38, it states that physical handling may be used when officers have determined that verbal intervention, for example, is “inappropriate” in the circumstances. Correctional officers are the day-to-day experts in assessing inmate behaviour. In this case, Mr. Vianzon and Mr. Scott, who were disinterested witnesses, testified that inmate M was being physically uncooperative. Mr. Hackett and Ms. Justason second-guessed the officers’ actions based only on hindsight.

[86] The grievor argued that on the evidence, his use of force was reasonable. He noted that although the employer argued that only 17 seconds elapsed from the time he began the verbal intervention to his use of force, clip 176 showed the elapsed time to be 22 seconds. A comparison of the times noted on the footage taken from each of the cameras demonstrates that recorded time was different, depending on which camera is reviewed. Whether it was 17 or 22 seconds, he was able to make a determination that inmate M was physically uncooperative.

[87] With respect to the employer’s allegation that he failed to apply the required policies and directives, the grievor argued that correctional officers have a generic knowledge of the policies and that there was no evidence that he was trying to be deceptive. That allegation related to his use of force and therefore should not stand.

[88] The grievor stated that the cases cited by the employer are not applicable to the circumstances of his case. In *Newman*, the grievor was dishonest, and therefore, the situation is not comparable. In *Roberts*, the grievor did not cooperate, the adjudicator questioned his good faith and the assault was more serious. In *Rose*, the grievor pleaded guilty to a criminal charge, the evidence established that the inmate involved was cooperative when force was used and the employer was concerned about an institutional culture that it was trying to change.

[89] The grievor stated that the direct evidence of the officers present during the incident is preferable to the video footage and hearsay. He also stated that correctional officers have been empowered to make quick decisions based on their understanding of a situation and that if their assessments are reasonable and made in good faith, they should be accepted.

[90] The grievor requested that I uphold his grievance, order the reimbursement of

the financial penalty with interest and order that his file be cleared of all references to the discipline. In the alternative, he asked that the quantum of discipline be reassessed, taking into account the fact that there was clearly no evidence in support of the first two grounds for discipline. He argued that a written reprimand, at most, would be the appropriate penalty. He also asked that I remain seized in case of any difficulty implementing my decision.

### **C. Rebuttal**

[91] The employer stated that the only people who can assess a use of force are those given that authority by the Commissioner's directives, such as the institution head, which is Mr. Hackett. Correctional officers have no role in such an assessment.

[92] Concerning the grievor's allegation that the investigation report was flawed, the employer cited *Turner v. Treasury Board (Canada Border Services Agency)*, 2006 PSLRB 58, at paragraph 102, and noted that an adjudication hearing is a hearing *de novo*, which corrects any flaws in the report. The question that must be answered is whether the discipline Mr. Hackett imposed was reasonable.

[93] The employer stated that Mr. Hackett was justified in finding that the grievor's actions were a discredit to the correctional service. Any violation of policy brings discredit to the correctional service. An inappropriate use of force violates the correctional service's purpose and therefore discredits it.

[94] The fact that not all camera views were considered and that there was no audio in the video clips is not a relevant consideration. Mr. Hackett was aware that camera evidence alone was not sufficient, which is why he called for an investigation.

[95] Although the grievor argued that a higher standard of proof is placed on the employer in cases of serious misconduct, the employer is required to establish its case on the balance of probabilities.

### **IV. Reasons**

[96] The grievor is a correctional officer (CX-02) who was disciplined on May 18, 2012, for having used inappropriate force on an inmate in an incident that took place on April 13, 2012. In the letter of discipline (Exhibit E-14), the grievor's behaviour was characterized as an act of severe misconduct and a violation of the

CSC's *Standards of Professional Conduct and Code of Discipline*, specifically, standards 1(g), (n) and (m) and 2(c). A financial penalty of \$760, the equivalent of four days' pay, was imposed.

[97] There is no dispute that the employer bore the burden of establishing that the discipline imposed was warranted and that the penalty was reasonable in all the circumstances. However, the grievor argued that a higher standard of proof is required of the employer in cases of serious misconduct and that the employer must establish by "clear, convincing and cogent" evidence that the grievor was guilty of the misconduct alleged.

[98] The notion that there is an intermediate standard of proof between the criminal standard and the civil standard in cases of serious misconduct has, I believe, been laid to rest by the Supreme Court of Canada in *F. H. v. McDougall*, [2008] 3 S.C.R. 41. The Court held in that case that there is only one standard of proof in civil matters, which is proof on a balance of probabilities. However, the Court did note at para. 46 of that decision that ". . . evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

[99] The issue in this grievance is not whether the grievor used force in handling an inmate on April 13, 2012. He readily admitted that he did. The issue between the parties is whether the circumstances warranted his use of force. The employer's position is that the grievor allowed the inmate too little time to comply with the direction given and that he used physical handling even though the inmate appeared to be responding to the direction given to him. In those circumstances, the employer argued that the use of force was excessive and unnecessary. It should be noted that although there was some suggestion that the method of physical handling the grievor used was also an issue for the employer, Mr. Hackett testified that it played no role in his decision to discipline the grievor.

[100] The employer's position that the grievor's use of force was inappropriate was based on its interpretation of the video surveillance clips it entered in evidence. The grievor did not object to the introduction of the video footage but argued that its value was limited. For the reasons that follow, I find the video surveillance evidence unreliable and find preferable the direct evidence of the grievor, Mr. Scott and Mr. Vianzon, who were present during the incident.



[101] The evidence established that the correctional manager for operations pulled the video footage in evidence from the camera feeds but did not testify at the hearing. Mr. Hackett acknowledged in cross-examination that there were multiple cameras in the Rehabilitation Unit but that the footage entered in evidence came from only some of them and that he did not review the footage from the other cameras. He stated that the only footage that he reviewed was the footage that the correctional manager of operations thought was relevant. Ms. Justason also acknowledged that she viewed only the video clips provided to her and that she had no knowledge of other footage and did not ask to review any footage from any of the other cameras.

[102] In my opinion, the failure of the person who pulled the footage from the cameras to testify is sufficiently problematic to justify rejecting the video evidence. There is no way of knowing what the footage from the other cameras would have shown. There was evidence that there were cameras over the servery and the medications wicket that overlooked the table at which inmate M was seated. Footage from those cameras was not entered in evidence. That fact is troubling, since they had unobstructed views of the incident in question. Although there might be sound reasons for not including that footage, in the absence of testimony from the person who made the decision about which footage to review, those reasons cannot be known. There was also no one to testify that the video footage that was entered in evidence was not edited or amended in any fashion or to explain why the times recorded on the footage entered in evidence differed depending on the camera from which it was taken.

[103] The video surveillance footage is also unreliable because it lacks audio. Although there may be circumstances in which a lack of audio on a surveillance video is not a problem, this is not one of them. This grievance is about context. The grievor, Mr. Scott and Mr. Vianzon all testified that inmate M was uncooperative to the point that they concluded that he was not going to cooperate. They testified that he was swearing at them and that he challenged them with, "What are you going to do about it?" None of that is evident on video footage without audio. Both Mr. Hackett and Mr. Cerant acknowledged that an inmate's tone of voice and words are important factors when determining use-of-force options.

[104] Without audio, the video footage is simply a series of images capable of different interpretations, depending on the viewer. For example, Ms. Justason reviewed

the footage and concluded that inmate M was turning to go to his cell, in compliance with the direction given to him. However, in a memo attached to the use-of-force review (Exhibit E-2), Richard College, a correctional manager who reviewed the same footage, wrote that “[M] is then seen on camera turning away from staff.” That seems to me a somewhat different conclusion from that reached by Ms. Justason. She also stated in her report that the inmate’s feet were parallel, as part of her finding that he was turning to go to his cell. Asked in which clip she saw it, she was forced to acknowledge that it was not possible to see the inmate’s feet in any of the clips, illustrating that people often see what they expect or want to see. Given those problems with the video footage, I believe that the direct evidence from the people who witnessed the event is to be preferred.

[105] Mr. Hackett testified that he relied not only on the video but also on Ms. Justason’s investigation report when he decided to impose discipline. The grievor argued that Ms. Justason’s investigation and report were seriously flawed and that they should be given little weight. He noted that Mr. Hackett simply adopted the reasoning in the investigation report as his own and therefore based his discipline of the grievor on a flawed report.

[106] It is well established that that an adjudication hearing is a hearing *de novo* (see *Roberts*, for example) and that the conclusions reached in a disciplinary investigation report must be proven at adjudication. The value of a disciplinary report is or can be that it often provides an explanation of the basis for the discipline imposed. Nevertheless, an employer who acts on the basis of a flawed investigation runs the risk of having the flaws exposed at adjudication and its conclusions overturned. That is so in this case.

[107] I find that the investigative process used by Ms. Justason was problematic. She acknowledged that she did not request any of the video footage taken from the other cameras in the unit. In fact, she did not acknowledge that there were other cameras in the unit, despite the evidence from other witnesses. She reviewed only the footage provided to her. She also acknowledged that she did not interview the nurses on duty in the unit during the incident, the inmates involved or any other inmates in the area who might have witnessed the incident. She reviewed observation reports but did not identify which ones she reviewed in the report, and in her testimony, she could not recall which ones she reviewed. The only face-to-face interviews she conducted were

with the grievor and Mr. Scott. The rest were conducted over the phone. Her report did not include the notes from her interviews, so it is not possible to determine the context of some of the statements she attributed to those she interviewed. Furthermore, her report includes statements made by people she did not interview, such as inmate M and the nurses, but she did not identify the sources of those statements.

[108] Furthermore, there are a number of factual inaccuracies or misstatements in the investigation report, which were identified through the grievor's cross-examination of Ms. Justason. She attributed any errors or misstatements to the grievor and other witnesses failing to provide her with the information. However, I note that in almost every example given, such as the issue of directing inmate M's cell to be locked or whether the grievor followed up to ensure that inmate N was attended to by the nursing staff, or whether the grievor and Mr. Scott approached inmate M in the absence of critical information, her conclusions were at odds with the statements the grievor and other witnesses provided in their observation reports. Although she had access to those reports and stated that she reviewed them, her report did not address the contradictions between her findings and the statements the correctional officers made in their observation reports.

[109] Ms. Justason concluded that the use of force was unnecessary and contrary to the SMM because she concluded that inmate M was verbally resistive rather than physically uncooperative. She found that the grievor did not allow the inmate enough time to comply with the direction to return to his cell before physical handling was engaged and that, in fact, the inmate was turning toward his cell, indicating compliance. She concluded that there was ". . . ample time for continued verbal intervention and conflict resolution to take place." Her conclusions were based almost entirely on her interpretation of what she saw in the video footage and were not supported by any direct evidence from witnesses to the incident.

[110] Correctional officers are required to know and to follow the Commissioner's directives. The grievor did not dispute that fact. His position at adjudication was that he did follow the directives and, in particular, the SMM. He, Mr. Scott and Mr. Vianzon all judged inmate M physically uncooperative, and for those circumstances, he argued, the SMM mandates the use of physical handling, among other possible responses.

[111] *Commissioner's Directive 567 - Management of Security Incidents* (Exhibit G-1)

provides at page 8 that correctional officers may use inflammatory sprays, chemical agents and physical handling to “. . . manage situations where offender behaviour is physically uncooperative.” It defines physically uncooperative behaviour at paragraph 28 on page 7 as follows:

*Physically Uncooperative - The inmate refuses to comply with staff directions or orders or refuses to move from an area or leave cell. The inmate may offer physical, but not assaultive, resistance by pulling, running away or resisting staff attempts to move him or her to a standing position.*

[112] Mr. Cerant, who testified on behalf of the employer and who was a correctional manager at the time of the incident, explained that the SMM, which is part of the *Commissioner's Directive 567 - Management of Security Incidents*, is not a linear model and that correctional officers are given discretion to determine the appropriate response to security incidents because every situation is different. He noted that correctional officers are required to do everything that they can to isolate, contain and control a situation and that in the case of an assault by one inmate on another, it would be appropriate to ask the aggressor to lock up. He also noted that the SMM does not state how many times a correctional officer has to give an order to an inmate or how long the officer has to wait before acting.

[113] Mr. Vianzon, who witnessed the April 13, 2012, incident from his position at the console, wrote in his observation report that inmate M “. . . appeared to be physically uncooperative to staff direction. Several orders were given to the inmate to proceed to his cell but he continued to be argumentative” (Exhibit G-7). Mr. Scott, who was the grievor's partner and who was involved in the incident, described the inmate's behaviour in his observation report (Exhibit G-11) as follows:

*. . . Inmate [M] became argumentative and then stood up and continued to argue with myself and my partner. Inmate [M] was then ordered again by both myself and my partner to return to his cell and lock up. Inmate [M] then stated “go fuck yourselves” and refused to leave the area. . . .*

[114] The grievor described inmate M's behaviour in his observation report (Exhibit G-9) as follows:

*When we arrived we requested inmate [M] to please follow us to his cell and please lock up. Inmate [M] did not comply and became argumentative. Both my partner and I again made requests for inmate [M] to go lock up immediately. Inmate*

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*[M] was being physically resistive refusing to comply and stated "go fuck yourselves".*

[115] At the hearing, the grievor, Mr. Scott and Mr. Vianzon maintained their position that inmate M had been physically uncooperative. Mr. Scott testified that the inmate gave no indication that he intended to comply with the direction given to him to lock up. He stated that the inmate continued to swear and that he resisted the direction to lock up even after he stood up, saying to them, "What are you going to do about it?" Mr. Scott was emphatic in cross-examination that the inmate did not present himself in any fashion as being cooperative. Mr. Vianzon also stated in cross-examination that despite numerous orders to lock up, the inmate demonstrated that he was not going to cooperate.

[116] Based on the observation reports written at the time of the incident or shortly after it, and based on the testimony at the hearing, I find that the inmate in question, inmate M, presented himself as physically uncooperative, as that phrase is defined in *Commissioner's Directive 567* (Exhibit G-1), in that he refused to comply with staff directions or orders. There was no evidence before me to suggest that the grievor was required to wait for the inmate to respond more aggressively or to threaten him or Mr. Scott. As noted by Mr. Cerant, the SMM does not set out directions as to how many times an order is to be given or as to how long the officer must wait before acting. It seems to me that once it becomes clear to the officers that an inmate will not respond to the direction or orders given, they must take action if they are to maintain their authority.

[117] *Commissioner's Directive 567* (Exhibit G-1) and the SMM give correctional officers the discretion to choose the appropriate response within a range of options, based on the circumstances. Having determined that inmate M was physically uncooperative and unresponsive to verbal intervention and negotiations, the SMM mandated the grievor and Mr. Scott to use restraint equipment, inflammatory agents or physical handling. The grievor explained that he judged that restraint equipment and inflammatory agents were not appropriate in the circumstances. As explained by Mr. Cerant, the SMM gave the grievor the discretion to determine the appropriate response within the range of options set out. Despite the employer's argument that the grievor could have used physical restraints, for example, I do not believe that he should be faulted for exercising the discretion given to him.

[118] I find that the decision to use physical handling was not contrary to the SMM. Accordingly, I find that the decision to use physical handling cannot be characterized as an unnecessary or inappropriate use of force and, therefore, cannot be considered an act of severe misconduct, as set out in the letter of discipline (Exhibit E-14).

[119] I find that the employer has not demonstrated by clear, convincing and cogent evidence that discipline was warranted and that, on the balance of probabilities, it has met its burden of establishing that the grievor used inappropriate force on inmate M. It necessarily flows from that finding that the grievor did not breach his obligations under the CSC's *Standards of Professional Conduct* or *Code of Discipline* and that any alleged admissions made in the disciplinary interview as to the grievor's understanding of the SMM do not support a finding of misconduct.

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

*(The Order appears on the next page)*

**V. Order**

[121] PSLRB File No. 566-02-7434 was withdrawn by the grievor at the hearing. I order the file closed.

[122] PSLRB File No. 566-02-7435 is allowed. I order the employer to reimburse the grievor \$760 within 30 days of this order, which was the amount of the financial penalty imposed on him on May 18, 2012.

[123] I also award interest with respect to the financial penalty at the rate set by the Bank of Canada on May 18, 2012, to be calculated and paid from that day until payment is made. The interest is to be compounded annually up to and including the day on which the payment is made.

[124] Any record of the financial penalty shall be removed from any of the files pertaining to the grievor.

[125] I will remain seized of this matter for a period of 60 days in the event that there are difficulties in implementation.

September 19, 2014.

**Kate Rogers,  
adjudicator**