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File: 566-02-7192

Citation: 2014 PSLRB 87



*Public Service
Labour Relations Act*

Before an adjudicator

BETWEEN

CHRISTOPHER KUBINSKI

Grievor

and

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

Respondent

Indexed as

Kubinski v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Paul Love, adjudicator

For the Grievor: Harinder Mahil, Professional Institute of the Public Service of Canada

For the Respondent: Richard Fader, counsel

Heard at Vancouver, British Columbia,
June 10 to 13, 2014.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Christopher Kubinski (“the grievor”) grieved his rejection on probation from his position as a Clinical Social Worker (Discharge Planner) with the Correctional Service of Canada (“the respondent” or “CSC”).

[2] The grievor was hired in an indeterminate position on December 7, 2009. The letter of hire indicated that he was on probation for 12 months (Exhibit E-1, Tab 1). He worked at Ferndale Institution (since renamed Mission Minimum Security Institution) in Mission, British Columbia. The grievor was rejected on probation on December 1, 2010, by letter from Debra Gaskell (now retired), Regional Director, Health Services, Pacific Region, CSC (Exhibit E-1, Tab 4). In her letter, Ms. Gaskell raised concerns, as follows:

...

As a professionally licenced individual, with extensive work experience as a Social Worker, there existed the expectation that you would be able to carry out the duties of your position with a high level of proficiency and minimal direction. However, during your probationary period various supervisors and managers have raised a number of concerns in reference to following policy and procedure. During these discussions, and throughout the course of your probationary period, you met with both your direct supervisor, as well as the Assistant Warden Interventions. The scope of the issues addressed included their direction to you with respect to ensuring you follow policy and institutional procedures; their expectations with respect to meeting objectives, including those provided to you in writing; and your affirmation that you had a comprehensive understanding of what the interdisciplinary team’s mandate was with respect to what Ferndale Institution hoped to accomplish through the Mental Health Initiative.

You were provided with your performance objectives on more than one occasion and have resisted working towards meeting them. Furthermore, you have not provided written reports and documentation asked of you; you have required an inordinate amount of direction to conduct the very basic of discharge planning tasks (i.e. that of securing basic services for an offender about to be released); have presented yourself in a manner that did not promote a professional image when asked to meet and provide assistance with the Warden’s Performance Review; and outwardly displayed a lack of professionalism during meetings with offenders wherein your actions undermined the decisions made by management.

Your performance has not served to enhance the Mental Health Initiative at Ferndale Institution as was expected. Despite assistance, training and direction by management throughout your probationary period, your performance has not improved. Therefore, I have determined that you are not personally suitable to be employed a Clinical Social Worker with the Correctional Service of Canada.

...

[3] In his opening statement, the grievor stated that the decision was disguised discipline because the respondent believed that he would testify for an inmate who had initiated a court action against it. He seeks reinstatement to his position immediately and salary and benefits from the date of his termination to the date of his reinstatement and that he be made whole.

II. Hearing

[4] On behalf of the respondent, I heard testimony from Irvin Hammond, Assistant Warden, Interventions; Dr. Gurmeet Dhaliwal, Chief Psychologist, Mission Institution; Pierre Ouellet, Acting Chief Psychologist, Mission Institution; Bryan Williams, Acting Manager of Programs, Mission Institution; and Ms. Gaskell. The grievor testified on his own behalf, as did a former inmate, referred to in these reasons as the “inmate mentor,” and Bryan Nadeau, a former psychological associate at Ferndale Institution. In rebuttal testimony, I heard from Yvonne Hackett, manager of operations at Ferndale Institution. I note that the job titles of the witnesses were the ones they held during the grievor’s probationary period. I also note that Ferndale Institution is currently known as Mission Minimum Security Institution. I have referred to the institution as Ferndale Institution, which was its name during the grievor’s probationary period.

[5] During Ms. Gaskell’s cross-examination, the Professional Institute of the Public Service of Canada (“the bargaining agent”) attempted to introduce an email dated December 1, 2010, from Michele Lindlad to Beth Tyler, Regional Chief, Labour Relations, CSC carbon copied to Ms. Gaskell and Patricia Demers. The respondent objected to this document on the basis of labour relations privilege. I determined that the document would not be admitted because it was in the nature of advice by a human resources advisor given to the person charged with considering whether to reject the grievor on probation. At the time, I advised the parties that I would be giving more full written reasons but that I was not permitting the introduction of the document essentially for the reasons that I articulated in *Horne v. Parks Canada*

Agency, 2014 PSLRB 30. I will adopt the reasoning that I expressed at paragraphs 61 and 62 of that decision, as follows:

[61] A labour relations privilege extends to advice given by a labour relations specialist to a manager as it meets the “Wigmore conditions.” These have been expressed in Brown and Beatty, Canadian Labour Arbitration, 4th ed., at para 3:4340. (1) The communications must originate in a confidence that they will not be disclosed. (2) The element of confidentiality must be essential to the full and satisfactory relationship of the parties. (3) The relationship must be one which in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[62] . . . I note that managers ought to be able to seek out advice of labour relations advisors and be assured that the advice is confidential, in order to ensure that employees are fairly treated for example during investigations or in decisions arising from investigations. Likewise an employee ought to be able to seek the advice of his bargaining agent without fear of the risk that such advice will be compellable at a hearing. In my view the injury that would be caused by the disclosure of the information far exceeds the benefit of disclosure of advice which is not particularly relevant to the assessment of facts proven and law.

A. Background

[6] Ferndale Institution is a minimum-security institution. At the time the grievor was hired, part of his work involved working with offenders with mental health problems in the Facilitating Offenders with Cognitive Impairments Support Services (FOCISS) program. The FOCISS program was a pilot project developed at Ferndale Institution by a former warden in conjunction with the Regional Treatment Centre (RTC) to house mentally disabled inmates in a minimum-security environment, separate from the rest of the inmate population. Specialized services were provided to these individuals in a more therapeutic environment. The program involved high-functioning inmates without mental health issues mentoring other inmates. Some of these mentors lived in Houses 10 and 11.

[7] Ferndale and Mission Institutions are very close to each other and are served by one security gate. Mr. Hammond had concerns about how well controlled the FOCISS

program was, as many of the offenders had violent histories and serious psychiatric issues and were on medication, and Ferndale Institution is an open institution.

[8] A new program was being initiated by the CSC's National Headquarters, which was called the "Institutional Mental Health Initiative" (IMHI).

[9] In this decision, I have only identified the facts and personal information that is required to ensure an open and accountable decision. For that reason, the name of a witness, a former inmate, who appeared on behalf of the grievor is not in the decision.

B. Summary of the evidence

1. Mr. Hammond

[10] Mr. Hammond testified that he was in a generalist position and that he was responsible for a number of areas within Ferndale Institution; for example, the case management department programs. In April of 2010, he became responsible for all the psychologists in Ferndale Institution and for different inmate-related activities, such as hobbies and recreational activities.

[11] Mr. Hammond saw that there was an opportunity to bring in a discharge planner to work with the inmates in the FOCISS program, which would have taken some pressure off him as he would no longer have had to deal with that function in addition to his other job duties. Mr. Hammond was concerned with the mentors and the functioning of the program, and someone with expertise was needed to hit the ground running.

[12] Dr. Kubinski was hired, and Mr. Hammond was excited to have him on staff. Dr. Kubinski presented with excellent credentials. Over his probationary term, Mr. Hammond grew more concerned as Dr. Kubinski evidenced distrust of management and on a number of occasions gave the impression that management was out to get him. Mr. Hammond was concerned about the relationship between Dr. Kubinski and the inmate mentor, who had a history of aligning himself with and manipulating disenfranchised employees. The inmate mentor was originally paid to be a mentor. He had a long antagonistic history with management and had filed a number of grievances against it.

[13] Mr. Hammond said that for the majority of Dr. Kubinski's time at Ferndale

Institution, he was not the grievor's direct supervisor. Mr. Hammond supervised the programs, and initially, the grievor reported to the CSC's Regional Headquarters. Mr. Hammond relied on others to report to him. He said that his primary concern was the inability to hold Dr. Kubinski accountable for his actions, as the grievor was unwilling to sign performance objectives. Mr. Hammond testified that half-a-dozen attempts were made to get Dr. Kubinski to agree to performance objectives. Each attempt failed, and at the end of the probationary period, he still had not signed off on a set of objectives.

[14] Mr. Hammond testified about an incident in early March of 2010, when there was a potential for money to be available from CORCAN, part of the CSC, which had to be spent by the end of the fiscal year. Dr. Kubinski was asked to develop a project. Mr. Hammond said that this can be frustrating as often the money suddenly disappears as a result of someone else developing a use for the money that is considered a higher priority. When Dr. Kubinski's program was not approved, he raised issues, such as breach of contract. Mr. Hammond indicated that it is important not to alienate CORCAN, as it is part of the same department.

[15] At the end of March 2010, another incident arose about passes, vehicles and Dr. Kubinski's ability to take inmates out into the community. Dr. Kubinski expressed concerns that there were ". . . some deliberate actions towards his group of inmates" from correctional officers. Mary Daniels, Deputy Warden at Ferndale Institution, indicated in an email of March 30, 2010 (Exhibit E-1, Tab 2, page 000011) that ". . . it appears that he may be harbouring some beliefs that we need to address before they become a larger issue."

[16] In April of 2010, a matter arose related to an inmate experiencing difficulties (Exhibit E- 1, Tab 2, pages 000013 to 000016). This inmate had been identified as being capable of significant violence. He disclosed that he was concerned about anxiety, hearing voices and possibly becoming violent, and he was sent to the RTC. Ms. Daniels got in touch with Mr. Hammond, with a concern raised on how much contact Dr. Kubinski was having with difficult inmates as she had not heard him express any concerns about the inmate experiencing difficulties, who was part of Dr. Kubinski's group.

[17] In April of 2010, a matter arose related to release plans for another inmate, who was about to be released. (Exhibit E-1, Tab 2, pages 000017 to 000028). Mr. Hammond

testified that although Dr. Kubinski arrived late into the release, he made some volatile comments about the release planning, which prompted Joanna Moore, the parole officer involved, to respond that “Mr. Kubinski’s assessment of this case appears to expose his lack of experience in release planning and the realities of community supervision.”

[18] Mr. Hammond testified that Karen Sloat, Regional Coordinator, Mental Health Initiatives, CSC, called him about Dr. Kubinski and told him that she appeared to need to direct him on the simplest of things about inmate release and his job, which was surprising, given his qualifications. The particular incident related to an email he sent to her on April 28, 2010, about the guidelines on the formulation of treatment plans and who writes them. She referred Dr. Kubinski to the IMHI “Guidelines” and templates for the Offender Management System (“OMS”) reports on the CSC’s Health Services Sector webpage (Exhibit E-1, Tab 2, page 000065).

[19] Mr. Hammond stated that in March of 2010, he asked Dr. Kubinski to produce a monthly report on activities that had occurred, and a three-month calendar. Mr. Hammond stated that he received a one-month activity report, that that was the only one he received and that he did not receive a calendar of activities. Mr. Hammond stated that when he had the opportunity to ask Dr. Kubinski about the reports and calendar, he did.

[20] Mr. Hammond stated that one of the frustrating things that he found is that when he would ask Dr. Kubinski for something, Dr. Kubinski would always ask for time to think about it, and it would never come to fruition. Mr. Hammond ultimately became aware that the grievor refused to sign a set of objectives. There were a number of email interchanges during the year about objectives.

[21] On or about July 2, 2010, Mr. Hammond introduced changes in the FOCISS program, eliminating paid mentors. Mr. Hammond testified that there were a number of concerns about the mentors. He stated that some of them had no real experience or training in working with offenders with mental health issues. Some of the mentors were strong inmates, and there was a concern about having these inmates in a position of power and authority over weaker inmates. The new IMHI did not support the use of mentors and had other ways of dealing with or supporting inmates in the houses.

[22] One of the incidents prompting this change was a knife appearing in one of the

houses. When Mr. Hammond investigated, he was told different stories about it. One was that the knife was produced and used as a “talking stick,” with the person holding the talking stick having the right to talk without interruption. Mr. Hammond noted that one of the mentors was incarcerated because of what he did with a knife. As a result of this incident, Mr. Hammond made the decision to speed up the elimination of paid mentors and sent out memos on July 2, 2010 (Exhibit E-1, Tab 2, pages 000069 and 000070). The decision made was to get rid of paid mentors, to move mentors out of Houses 10 and 11, and to use volunteer mentors without any authority.

[23] On September 1, 2010, Dr. Kubinski requested a compressed work schedule (Exhibit E-1, Tab 2, page 000101). Mr. Hammond stated that his application started in the wrong process. He stated that such schedules were rarely granted, given the small group at Ferndale Institution. Mr. Hammond replied to the grievor’s request by email on September 2, 2010 (Exhibit E-1, Tab 2, pages 000100 and 000101), stating that his areas of responsibility would need to be up to date and that he must be meeting all his objectives before a compressed workweek could be considered. Mr. Hammond also stated that he took the opportunity to address the issue of the three-month calendar and monthly report in this email. Mr. Hammond referred to what he asked for in March — a three-month calendar and a monthly progress report. Mr. Hammond stated that he believed he was not given what he asked for or that the grievor was stalling him.

[24] Mr. Hammond was concerned about the lack of supervision of the grievor, which he pointed out in an email to Ms. Daniels and others when he was asked to review the grievor’s performance (Exhibit E-1, Tab 2, page 000102). At this point, the grievor was three months from the end of his probationary period, and no objectives had been agreed to. In this email, Mr. Hammond expressed concerns that he was not the grievor’s direct supervisor.

[25] Mr. Hammond explained that when he is away from his work, Mr. Williams covered for him in an acting capacity. Mr. Williams was asked to put together information for the warden’s performance review. This process reviews what the CSC’s Regional Headquarters has asked the warden to do, and the report responds as to how he has done those things and has earned an entitlement to performance pay. This requires all areas of Ferndale Institution to provide feedback. Mr. Williams attempted to obtain information from Dr. Kubinski and was unsuccessful. A bargaining agent representative had been involved. When Mr. Hammond returned to Ferndale Institution

and Mr. Williams apprised him of the incident, Mr. Hammond asked Mr. Williams why Dr. Kubinski was still employed. Mr. Hammond testified that it is unacceptable to physically remove a manager from an office. Mr. Hammond considered Dr. Kubinski's conduct inappropriate and could not understand why nothing was done about that conduct.

[26] In October 2010, concerns were emerging about keeping Dr. Kubinski after the probationary period. No one seemed to be able to get him to commit to a set of objectives, which were essential in order to measure his performance.

[27] Mr. Hammond stated that his participation in the decision to reject Dr. Kubinski on probation was limited to providing concerns to the CSC's Regional Headquarters. One of his concerns was that Dr. Kubinski had not committed to a set of objectives.

[28] In cross-examination, Mr. Hammond admitted that Dr. Kubinski had had a number of supervisors and that he was not reprimanded during the time he was employed at Ferndale Institution. None of his supervisors prepared a performance review for him. Mr. Hammond admitted that he never raised any performance-related concerns with Dr. Kubinski or any concerns that would interfere with the completion of his probation. Mr. Hammond admitted that all CSC employees have job descriptions.

[29] In cross-examination, Mr. Hammond stated that he did have a discussion with Dr. Kubinski about boundaries. In re-examination, Mr. Hammond explained that this discussion was in relation to Dr. Kubinski's disclosure that he was approached by the inmate mentor's lawyer.

[30] In cross-examination, Mr. Hammond admitted that he had concerns about the relationship between Dr. Kubinski and the inmate mentor, who had filed a number of grievances. Mr. Hammond swore an affidavit on February 23, 2011 (Exhibit G-1), which, at paragraphs 21 to 26, dealt with statements Dr. Kubinski had made in another affidavit. Mr. Hammond's affidavit related to an involuntary transfer of the inmate mentor from Ferndale Institution to Mission Institution and an increase to his security classification from minimum to medium.

[31] Mr. Hammond was cross-examined about statements he made in his affidavit about the FOCISS program.

[32] In the affidavit, Mr. Hammond identified a number of concerns about the

grievor's work performance. Mr. Hammond admitted that he did not discuss these concerns with the grievor but that he raised them with the grievor's manager. Any concerns that he had were addressed through the grievor's supervisor.

[33] Mr. Hammond was aware that the grievor was in a regulated profession. He did not take up any concerns with the grievor's regulatory body as he was not the grievor's supervisor.

[34] Mr. Hammond was asked whether he told Dr. Kubinski not to get involved in any actions concerning the inmate mentor; he denied doing it. Mr. Hammond advised that he told the grievor that he needed to exercise caution because the grievor was a CSC employee. Mr. Hammond stated that the grievor was being recruited by the inmate mentor and his lawyer to give information. Mr. Hammond stated that Dr. Kubinski needed to be careful about confidentiality as he was not at liberty to share some of the information he possessed. He advised Dr. Kubinski that the inmate mentor had a history of going after disenfranchised staff members and that he should exercise caution when dealing with him.

[35] Mr. Hammond stated that he was aware that Dr. Kubinski had received a telephone call from the inmate mentor's lawyer on September 21, 2010. Mr. Hammond understood that Dr. Kubinski had informed him that he had been contacted by the inmate mentor's lawyer and that he had not spoken with the lawyer.

[36] Mr. Hammond agreed that Dr. Kubinski was non-committal in his response, when he told the grievor that he needed to exercise caution in dealings with the lawyer for the inmate mentor. He denied that this was the reason Dr. Kubinski was fired and said that that would have made no sense and served no purpose.

[37] Mr. Hammond admitted that he was generally aware that the inmate mentor was filing applications in court, but he never reviewed these applications unless they directly impacted his work.

[38] Mr. Hammond testified that the inmate mentor had alleged in a Federal Court case that the warden had retaliated against him by taking actions, including abolishing the mental health program at Ferndale Institution, to justify firing him from his mentor position. Mr. Hammond said that there are no particular findings of the judge in that 2011 Federal Court decision, which concerned an application by the inmate

mentor for a judicial review of the denial of his third-level grievance about the warden's refusal to approve his nomination for a position on Ferndale Institution's inmate committee. In re-examination, Mr. Hammond testified that the mental health program was never abolished. There were adjustments made to it, and there was a discontinuation of positions for mentors, which was not a retaliatory measure against the inmate mentor. In his words, the reference to abolishing the mental health program was a "gross exaggeration."

[39] Mr. Hammond was questioned about the need for objectives, given that the respondent decided the scope of the grievor's job duties. The bargaining agent suggested that the crucial issue was whether he performed the duties and not whether he signed the objectives. Mr. Hammond explained that these are two different issues. Objectives were fundamental to an assessment of performance and to holding the grievor accountable for his work.

2. Mr. Ouellet

[40] Mr. Ouellet was the acting chief psychologist at Ferndale and Mission Institutions from February 15 to June 28, 2010, and from September 7 or 9 to October 9, 2010. He returned to his chief psychologist position at the Pacific Institution/RTC in October of 2010.

[41] Mr. Ouellet testified that he was identified as the direct supervisor for Dr. Kubinski on April 12, 2010. Before then, the grievor reported directly to Ms. Sloat. At the time that Dr. Kubinski was hired, it was the practice to have newly hired staff report to the regional manager. Direct supervision of Dr. Kubinski was transferred to Mr. Ouellet on April 12, 2010 (see the email of April 12, 2010: Exhibit E-1, Tab 2, page 00073).

[42] On April 21, 2010, Mr. Ouellet said that he had a fairly lengthy discussion with Dr. Kubinski, including an overview of what his work entailed, his role and the expectations of him. He attempted to develop a rapport and to obtain information about the grievor's background and skill set and to develop a general understanding of how the grievor thinks and works. Part of that practice was to put down work objectives and to follow up on them.

[43] Mr. Ouellet identified the following objectives in an email of April 21, 2010

(Exhibit E-1, Tab 2, page 000059):

...

1. *Contribute to the stability of the FOCUS program residences by assisting with conflict resolution and the maintenance of positive relationships between residents (e.g. house meetings, individual counselling, programming and group work)*
2. *Crisis management with FOCUS program residents and other referred inmates. Assist, intervene, consult with management when a resident or FOICISS [sic] program is experiencing a crisis situation.*
3. *Program develop: Develop programs assisting the residents of the FOCUS residences (e.g. Stress management, mood disorder, yoga pottery group , etc)*
4. *Contribute to the selection and admission process of offenders to the FOCUS residence from external CSC institutions*
5. *Discharge planning: As part of the CMT, active involvement in the social work related aspects of release/community reintegration panning. This is an area we should discuss more - to clarify roles.*
6. *Receive referrals (mental health) from IPOs and other CMP professionals at Ferndale for crisis intervention/assessment/maintenance/discharge planning.*
7. *Interdisciplinary Mental Health Team member: Actively participate as a member of the IDMHT at Ferndale institution. I added this one. Please review CD 843 for background)*

...

[44] Mr. Ouellet's general impression was that Dr. Kubinski did not have a very strong understanding of the CSC, which to some extent is normal when one joins the CSC. Mr. Ouellet spent part of the time explaining the corporate structure, missions and priorities and what the grievor's role would be.

[45] Mr. Ouellet was surprised by some of Dr. Kubinski's thoughts and judgements and stated that he presented them very idealistically, similar to a first- or second-year university student questioning practices and "the system." Mr. Ouellet thought that Dr. Kubinski had a very black-and-white attitude. He expressed a difference between

his views and those of the establishment.

[46] Mr. Ouellet stated that this was surprising given the grievor's many years of experience, and Mr. Ouellet stated that he was hoping that this was something that could be worked through. His initial impression was that Dr. Kubinski had judgement issues and thinking patterns that were inconsistent with the role, purpose and mission of corrections and that were contrary to best practices in a correctional environment.

[47] As an example, Mr. Ouellet stated that a social worker's role is to assist the client and provide advice but not to advocate for, position with or defend the client.

[48] Throughout Mr. Ouellet's interaction with Dr. Kubinski, he was concerned about the boundaries issue. One example was when a psychologist, who was doing a risk assessment on an inmate, became quite distraught when Dr. Kubinski attempted to sit in during the interview and to "soldier on" for the inmate. This is not a CSC practice. The psychologist's opinion was that Dr. Kubinski's judgement was compromised by the lack of a proper boundary with the offender. I note that the respondent did not call this psychologist as a witness. Mr. Ouellet saw this as inappropriate advocacy for an inmate which is not part of the role of a social worker.

[49] Dr. Kubinski has had boundary training through the CSC (Exhibit E-1, Tab 2, pages 000003 and 000004). Mr. Ouellet commented on its importance, stating that he did not have enough fingers to count the number of staff who had been compromised by offenders because of their inability to set boundaries, including developing romantic relationships and bringing contraband into Ferndale Institution. This is part of the new employee orientation program, and there is a session called "Responding to Manipulative Behaviours" (Exhibit E-2). Each employee must complete a self-learning module (Exhibit E-3). Dr. Kubinski completed the training sessions summarized in his student training summary (Exhibit E-4).

[50] Mr. Ouellet spoke to the importance of establishing objectives. He stated that Dr. Kubinski was hired to work with men housed in two residences as part of the FOCISS program. National Headquarters was initiating the IMHI. Mr. Ouellet explained that the CSC had the staff before they had clear policy and direction from National Headquarters. In his email of April 21, 2010, Mr. Ouellet set out seven work objectives. The grievor was to use casework records to document activities, as well as memos to file.

[51] Dr. Kubinski responded by email on April 21, 2010 (Exhibit E-1, Tab 2, page 000058), with a statement that he needed to reflect on the objectives before locking them in, and he proposed to meet the next week. There was an exchange of further emails on April 22 and 26, but there was no further meeting between Mr. Ouellet and Dr. Kubinski. Mr. Ouellet was surprised by Dr. Kubinski's email of April 21, 2010, and thought it was a done deal as there had been a clear and candid discussion about the objectives.

[52] Mr. Ouellet then was absent from Ferndale Institution but returned in September. He took over the grievor's supervision from Wayne Reardon. He recalled that there were some concerns with Dr. Kubinski's work, and on September 24, 2010, Mr. Ouellet wrote an email to the grievor (Exhibit E-1, Tab 2, page 000111) to get a sense of what was going on. This exhibit contains Mr. Ouellet's questions and the grievor's responses.

[53] Mr. Ouellet had serious concerns with the answers that he received from Dr. Kubinski. From the information provided by Dr. Kubinski, he was denied a request to fill out a triage form on all offenders in Houses 10 and 11; he had not started a review of the programs, as he said it was the responsibility of the psychology branch; he was documenting individual and group interactions with notes, CWR and Excel worksheets, rather than in the OMS; and he did not have a schedule of program activities taking place in Houses 10 and 11. He was not sending his information on interventions for input to the tracking database. He did not provide his input as to his own training plans for the next 12 months and asked Mr. Ouellet for input as to what was available. Mr. Ouellet described many of these concerns as "Social Work 101," which I took to mean that these were very basic requirements of the job that the grievor was not doing.

[54] In his testimony, Mr. Ouellet stated his concerns as of September 30, 2010. The evaluation period starts in September, and by October 30, he has to have all the performance evaluation reports in the system from the employee's supervisor. This involves writing a report and evaluating performance based on a set of objectives established the previous year. To write a performance evaluation, one has to have supervised the employee for more than six months.

[55] Mr. Ouellet stated that it often happens that someone is on an acting assignment and a memo to file is written by that supervisor, but the supervisor who

supervised the employee for six months is responsible for writing the assessment. Mr. Ouellet inquired of the CSC's Human Resources branch, and it was suggested that Mr. Hammond write the report.

[56] Mr. Ouellet testified that he presented the objectives to Dr. Kubinski for his signature at 10:00 on October 1, 2010. Mr. Ouellet came back to pick up the signed document at 11:00. Dr. Kubinski had not signed it and stated that he wanted more time. Mr. Ouellet expressed his frustration in that it was like trying to pin Jell-O to a wall. It was his view that Dr. Kubinski demonstrated unwillingness on his part to work together, to work collaboratively and to be accountable.

[57] On or about September 29, 2010, Dr. Kubinski requested that Joy Burke, a human resources advisor at Ferndale and Mission Institutions, provide him with his job description. It was provided to him on September 30, 2010 (Exhibit E-1, Tab 2, page 000120). He emailed Ms. Burke again on October 7, 2010 (Exhibit E-1, Tab 2, page 00120), expressing concern about a forthcoming nine-month review and the end of his probationary period in eight weeks. Dr. Kubinski expressed concern about reporting to five different supervisors with different objectives and about the objectives and the criteria that would be used to evaluate his performance.

[58] Mr. Ouellet found Dr. Kubinski's emails to Ms. Burke disconcerting given that he had tried to establish objectives and that he viewed Mr. Kubinski as a professional who was showing poor judgement and was distrustful of the process. He had not dealt with this kind of behaviour before, and it was concerning for him given the corrections environment, where there is a safety risk if individuals have boundary issues.

[59] Mr. Ouellet related his concerns about discharge planning for the inmate about to be released and about the types of questions that Dr. Kubinski asked Ms. Sloat in an email of April 28, 2010. Ms. Sloat referred Dr. Kubinski to the IMHI guidelines on the CSC's Health Services Sector website. Mr. Ouellet described discharge planning as having the key priorities of health, food and shelter. He characterized this as basic social work, and stated that Dr. Kubinski should have been familiar with these documents and should have had no difficulty finding the documents and developing a treatment plan. He said that this is basic work for a social worker, particularly one like Dr. Kubinski, who claimed experience working in corrections as a social worker for many years.

[60] In an email on June 2, 2010 (Exhibit E-1, Tab 2, page 000098), Mr. Ouellet raised with the grievor the importance of providing Mr. Ouellet with a weekly overtime report. The hours would be entered into the human resources management system as compensatory time. There had been issues with Dr. Kubinski working more hours than were approved and leaving the site without informing a supervisor.

[61] In his testimony, Mr. Ouellet referred to another situation pertaining to an interview of a potential intake inmate on September 16, 2010 (Exhibit E-1, Tab 2, page 000109), at the temporary detention unit at Matsqui Institution, which is off the Ferndale Institution site. Mr. Ouellet expressed concerns that he did not know Dr. Kubinski had attended somewhere off-site and about who had asked him to attend there. The email contained no information about the inmate's suitability for Houses 10 and 11, no information about his manageability if he were transferred, and no indication that Dr. Kubinski had consulted the RADAR database. Mr. Ouellet stated that if this was a proper referral, the grievor needed to gather basic information, establish facts and make a recommendation if a potential intake inmate was suitable for the mental health house at Ferndale Institution.

[62] Mr. Ouellet referred to an off-site trip Dr. Kubinski made on October 21, 2010, reported in an email (Exhibit E-1, Tab 2, page 000124), which simply referred to "Chris at RTC Monday AM - should be back noonish," and which contained no reasons for him being absent from the site. Dr. Kubinski provided further information later that day. He testified that he had no further contact with Mr. Ouellet on this issue after his email reply.

[63] Mr. Ouellet referred to a series of emails that discussed the grievor's requirement to take a mandatory course through the Canadian School of the Public Service. Rather than contacting the school, he contacted Ms. Sloat on how to register. Mr. Ouellet found it surprising that Dr. Kubinski would contact a senior manager about this.

[64] Mr. Ouellet highlighted his concerns about Dr. Kubinski's work performance and inability to meet minimum standards to Ms. Demers, Human Resources, National Headquarters, on November 25, 2010 (Exhibit E-1, Tab 2, page 000145). He documented his view of Dr. Kubinski's refusal to agree to objectives, including what he considered a deliberate avoidance of a meeting, scheduled for October 8, 2010.

[65] On October 8, 2010, Dr. Kubinski wrote an email to Mr. Ouellet (Exhibit E-1, Tab 2, page 000147), stating he was supporting an inmate at a national parole board hearing and that, if he did not feel better, he would go home after that. He apologized if the performance meeting had to be rescheduled. In cross-examination, Mr. Ouellet stated that this was the only day available to him as he had returned to his substantive position. Mr. Ouellet had no information to the contrary about Dr. Kubinski's illness, but Dr. Kubinski was at the parole board hearing and then absented himself when he was supposed to have a serious discussion with Mr. Ouellet about objectives. Mr. Ouellet believes that Dr. Kubinski had an ulterior motive for not attending. I took this to signify that Mr. Ouellet believed that Dr. Kubinski deliberately avoided attending the discussion of objectives.

[66] Mr. Ouellet expressed his concern that there was a basic attitudinal problem with Dr. Kubinski in which he saw himself as an advocate for offenders and he saw offenders as needing protection from his employer. He was concerned that Dr. Kubinski had boundary issues, which would lead to him eventually being compromised. He was given direction and support, which he failed to take advantage of.

[67] In cross-examination, Mr. Ouellet admitted that his physical office was at Mission Institution but that he also had an office at Ferndale Institution, which he visited regularly for meetings, and he would touch base with the staff there.

[68] Mr. Ouellet admitted that Dr. Kubinski made him aware of an incident in which a guard had had an intimate relationship with the inmate alleging a relationship with a correctional officer at a different institution in Alberta and that they were both then at Ferndale Institution. The inmate was sent to the RTC to be stabilized and was then shipped to Williams Head Institution in Victoria, B.C. Mr. Ouellet instructed Dr. Kubinski to proceed with the inmate to the living unit to retrieve letters and photographs. Soon after that, the inmate was placed in a holding cell next to the duty officer. It was alleged that Mr. Ouellet told Dr. Kubinski not to put anything in writing in the OMS. Dr. Kubinski had already posted some information to the OMS, and Mr. Ouellet told him not to post anything more. Mr. Ouellet stated that it was not appropriate to post this confidential information into the OMS, which is potentially accessible by 25 000 CSC employees. It should have been done by way of an officer statement observation report, which is what policy dictates, which would then have

been placed into the preventive security file.

[69] Mr. Ouellet agreed that he never had the grievor sign the national generic job description (Exhibit G-4). He wanted the grievor to sign the objectives previously provided to him.

[70] Mr. Ouellet was questioned about an email from Ms. Tyler, Regional Chief, Labour Relations, CSC, dated December 1, 2010 (Exhibit G-6), in which she asked whether anyone had ever advised Dr. Kubinski verbally or in writing that he was not doing his job correctly. Mr. Ouellet responded in an email dated December 1, 2010, with details concluding “. . . as far as I’m concerned, is yes, he was in many ways and in different occasions.”

[71] Mr. Ouellet denied the assertions of Dr. Kubinski’s representative that he did not spend much time interacting with Dr. Kubinski. Mr. Ouellet stated that a lot of the meetings were informal — 15 minutes here or there — and were in the context of case consultations. He did not document all his communications; if he did, he would be constantly documenting.

[72] When asked about boundary issues, Mr. Ouellet mentioned a situation in which Dr. Kubinski was conducting business in his office with the window open. Inmates will congregate outside an area like this to obtain information, which they will then use. Mr. Ouellet reminded Dr. Kubinski of this but did not document it in writing. Mr. Ouellet mentioned another boundary issue in which Dr. Kubinski sought to attend an assessment interview, taking on the role of advocate for the inmate, which occurred in April of 2010. He did not document this in writing, and he did not give a formal reprimand to or discipline Dr. Kubinski. Mr. Ouellet explained that it is important to be thoughtful and tactful and to strike the right balance. He said that it is difficult to recruit and retain mental health professionals in the corrections field. Mr. Ouellet said that he gave Dr. Kubinski directions, upon which he did not follow up, but no direct orders. He stated that unlike a clerk who requires specific orders, one should need to give only general direction to a professional as he or she should know what to do.

[73] In cross-examination, Mr. Ouellet identified two instances in which Dr. Kubinski inadequately documented dealings with inmates. They are set out in Mr. Ouellet’s email to Ms. Tyler dated November 25, 2010 (Exhibit E-1, Tab 2, page 000149). There was no OMS documentation of Dr. Kubinski’s visit to the RTC to two offenders on

October 1, 2010. His documentation concerning his interactions with the potential intake inmate on or about October 17, 2010, was generally substandard. I note that there was written feedback to Dr. Kubinski about these points but that no written warnings or reprimands were given to him.

[74] Mr. Ouellet was referred in cross-examination to the Treasury Board *Guidelines for Rejection on Probation* (Exhibit E-1, Tab 9) (“the Guidelines”). He had seen this document before but stated that he could not “recite it by heart.” He agreed with the following procedures:

...

Managers/supervisors should ensure that a probationary employee:

- *Knows the specific job duties and requirements of the position*
- *Is aware of the required standard(s) of performance and appropriate conduct*
- *Receives feedback when performance or conduct require improvement*
- *Receives the appropriate training for the position.*

...

[75] He also agreed with the Guidelines that “[t]he decision to proceed to reject on probation should be based on objective and demonstrable grounds and must not be made arbitrarily, in a discriminatory fashion or in bad faith.”

[76] In cross-examination, Mr. Ouellet stated that another supervisor, Mr. Reardon, assured him that Dr. Kubinski did not fill out the mental health triage forms for offenders in Houses 10 and 11, and it is a basic task. It appears that it is important to triage inmates in order to assess risk and provide appropriate services. It is also important to demonstrate that this work was done by documenting the work.

[77] Mr. Ouellet was referred to the following from page 10 of *A Guide to Performance Evaluation in the Correctional Service of Canada, August 2009* (“the Guide”: “During a probationary period, supervisors should meet with employees at regular intervals to discuss performance.” He conceded that no formal meeting was held but that each employee needs to be cooperative. He stated that he expressed a lot

of concerns and provided direction and that if he had stayed longer at Ferndale Institution, he would have met with the grievor about his performance.

[78] Mr. Ouellet agreed that he did not formally observe Dr. Kubinski's interactions with inmates. Mr. Ouellet agreed that he did not sit down in a formal way with Dr. Kubinski and advise him that he was not following policy. Mr. Ouellet stated that he did give direction to Dr. Kubinski on overtime and on filling out an officer statement observation report concerning the inmate alleging a relationship with a correctional officer.

[79] In re-examination, Mr. Ouellet explained that Ferndale and Mission Institution are co-located and have one security gate. Ferndale Institution is a two-minute drive from Mission Institution. Mr. Ouellet went there two to three days each week for operational briefings and would touch base with staff there.

[80] In re-examination, Mr. Ouellet explained the need for objectives when the grievor's position had a generic job description. That description speaks to key activities in a general manner, but the objectives were site-specific to the programs at Ferndale Institution.

3. Ms. Dhaliwal

[81] Dr. Dhaliwal became the acting chief psychologist for Mission and Ferndale Institutions at the beginning of October of 2010. Dr. Kubinski was working under the IMHI as the clinical social worker. She was the acting chief psychologist when the grievor was rejected on probation. At that time, he directly reported to her for supervision, but there was a different governance model.

[82] Dr. Dhaliwal stated that the IMHI was a new initiative. She was not warned about the grievor, and no specific concerns were identified about him, at the time she commenced in her acting position.

[83] Dr. Dhaliwal was asked to ensure that Dr. Kubinski sign off on a set of objectives. She stated that this was challenging, that she was never able to reach an agreement with him and that he never signed the objectives. She sent him a set of objectives for signature on November 15, 2010 (Exhibit E-1, Tab 2, page 000141).

[84] Dr. Dhaliwal reviewed the objectives attached to the November 15, 2010 email (Exhibit E-1, Tab 2, page 000142). She stated that she had very few on-site meetings with the grievor and stated that he did accomplish the following objectives:

- he developed familiarity with site routines and interdisciplinary team member roles and responsibilities;
- he attended appropriate institutional or community meetings (e.g., Institution Mental Health Team meetings, case conferences, staff meetings, etc.); and
- he contributed to the stability of Houses 10 and 11 by assisting with conflict resolution and crisis management and maintaining positive relationships between residents (e.g., house meetings, individual counselling, programming and group work, etc.).

[85] Dr. Dhaliwal identified that the grievor did not do the following:

- develop any primary mental health awareness sessions;
- develop programs assisting mentally disordered offenders, particularly those residing in Houses 10 and 11 (e.g., stress management, mood disorder help, yoga, pottery group, etc.);
- send her any draft reports for input into the OMS;
- complete the data collection for the mental health tracking database;
- provide a quarterly calendar of activities to be placed on Ferndale Institution's activity/operation calendar; or
- provide a monthly list of community partners or records of activities or contacts.

[86] Dr. Dhaliwal was unable to evaluate whether the grievor did the following:

- built and maintained a caseload from the existing institutional offender population;

- worked collaboratively with case management staff to promote team work in meeting the IMHI's objectives; and
- initiated and reintegrated planning for offenders with mental health issues.

[87] Dr. Dhaliwal said that she had very few interactions with the grievor. The key concerns were to move forward with the actual duties he was to do and to supervise them. The grievor would report that he was off-site, but there was no schedule or understanding of his day-to-day schedule. She described it as him just running off, doing things. Dr. Dhaliwal said that she reminded him to report and to obtain pre-approval for overtime and that he had some difficulties doing that. She noted that he was also supposed to be taking ongoing training and that for some reason, he did not.

[88] In cross-examination, Dr. Dhaliwal admitted that her office was at Mission Institution, not Ferndale Institution. She was unable to confirm the number of meetings that she had with the grievor during the period she supervised him. Dr. Dhaliwal confirmed that she never saw him interact with inmates. She stated that he never refused to undertake a task assigned to him. She did not recall any specific concerns with his work tasks. She had had no reason to reprimand him. She did not advise him of shortcomings in his performance. She did recall dealing with him concerning signing off on objectives and leave and concerning overtime policies.

[89] Dr. Dhaliwal did not recall a conversation that she had with the grievor's representative on January 4, 2011. Counsel for the grievor's notes of his telephone interview, as follows, were admitted into evidence by consent (Exhibit G-11):

I was dealing with him on his work objectives. It was a struggle. This was one of the issues MK has supervisors dealt with [sic]. I spoke to previous supervisor. I got nowhere with him.

RHQ became involved.

My role was limited. I was getting frustrated with it in some ways.

[90] Dr. Dhaliwal confirmed that she never received any draft OMS reports from the grievor. She did not put any instructions to him in writing. She confirmed that she did

not know what he did on a day-to-day basis. For example, he could have provided mental health sessions without her knowing about them.

4. Mr. Williams

[91] Mr. Williams currently is the acting manager of programs at Mission Institution. At the time relevant to this grievance, he was the manager of assessment and intervention at Mission Institution. During the period relevant to this grievance, he was at Mission Institution from October 2009 to November 2011. He supervised the parole officers and case management officers and oversaw the case management department at Mission Institution. He was not Dr. Kubinski's direct supervisor, but Dr. Kubinski worked with the parole officers he supervised.

[92] When Mr. Hammond was absent from work, Mr. Williams acted in the role of assistant warden, interventions. He had contact with the grievor in much of the day-to-day issues around the IMHI. He was directed to an email that he wrote to Mr. Reardon, Dr. Kubinski's supervisor, on Friday, July 30, 2010 (Exhibit E-1, Tab 2, page 000071). When he came into work, there was a voice mail message from Dr. Kubinski, stating that he was taking a day off due a dental appointment. There was no information in the call indicating that it was an emergency or urgent situation, and Mr. Williams referred it to Mr. Reardon for follow-up. He stated that non-urgent dental appointments were to be planned in advance, meaning the grievor's appointment was not an acceptable reason for his absence. That day, a mental health offender was arriving from the RTC, and a large case-management meeting had been set up to ensure that the offender was integrated smoothly into Mission Institution, which is minimum security and is open. In cross-examination, Mr. Williams conceded that it was possible that Dr. Kubinski had had an emergency dental issue, but his message did not contain information to justify the leave; whether the leave was legitimate was for Mr. Reardon to decide.

[93] It is clear that Mr. Williams did not explore with Dr. Kubinski the reasons for his absence that day. As Mr. Reardon, Dr. Kubinski's supervisor was not called as a witness, there is no evidence whether Mr. Reardon explored this with the grievor. Dr. Kubinski later testified that he broke a tooth, which caused him some pain, and that he needed to deal with it. His supervisor, Mr. Reardon, did not speak to him about this.

[94] Mr. Williams was tasked with preparing a briefing note for the warden's performance pay assessment. One of the warden's objectives related to mental health offenders. He needed information from Dr. Kubinski to complete this task.

[95] Mr. Williams had prepared a draft email and had Dr. Kubinski come to his office to discuss it.

[96] Mr. Williams documented his requests for information in a draft email (Exhibit E-1, Tab 2, page 000138), which he verbally discussed with Dr. Kubinski at Mr. Williams' office. He requested the following from the grievor:

- a three-month calendar outlining activities and meetings in the FOCISS houses;
- information about what had been accomplished in the houses;
- time frame and delivery date for screening procedures and the project implementation;
- his contacts.

[97] When Mr. Williams went over the draft email with Dr. Kubinski, the grievor became belligerent, stating that this was a discipline and performance matter. Mr. Williams continued to tell him it was not and that it was information required for the warden's performance pay assessment. Dr. Kubinski left his office.

[98] The next morning, Mr. Williams sent an email to Dr. Kubinski, asking for a meeting. He did not recall whether he received an answer, but he went to Dr. Kubinski's office. Dr. Kubinski would not come to the door and talked to Mr. Williams through the closed door. Dr. Kubinski informed Mr. Williams that he was too busy. Mr. Williams opened the door to Dr. Kubinski's office with a master key. Mr. Williams advised Dr. Kubinski that he would meet with him. Dr. Kubinski was four to five regular paces away. The door was opened about 60 degrees. Dr. Kubinski got up and attempted to push Mr. Williams out of the door by pushing the door closed on him. Mr. Williams left and got a bargaining agent representative. The meeting proceeded with a representative. However, Mr. Williams explained that he contacted a bargaining agent representative from the wrong bargaining agent.

[99] Mr. Williams said that he was surprised by the incident. He was not disciplining Dr. Kubinski, and he told him as much, multiple times. He stated that it was his observation as a manager that Dr. Kubinski was too close to inmates and that he had crossed boundaries. It was the most extensive interaction of a negative nature that he had with Dr. Kubinski.

[100] In cross-examination, Mr. Williams explained that he attended the morning briefings at Ferndale Institution. He described his position as “the bottom of the managers, between line staff and senior managers.” He stated that the inmate mentors were not a regular topic of discussion and that if his name came up, it was in relation to something being discussed.

[101] Mr. Williams said that getting physical with a manager is a fairly serious incident. He said that something probably should have been done about it as it was a disciplinary matter.

[102] Mr. Williams stated that at Ferndale Institution, because it is a minimum-security institution, staff are not encouraged to lock doors, particularly if there is an inmate in the office, as a locked door can be an impediment in the event of an incident. Inmates do not have immediate access to the area where Dr. Kubinski’s office is located.

[103] Mr. Williams did not recall whether he documented this incident in writing immediately after it occurred in February and noted that it was not in the exhibit book (Exhibit E-1). He wrote an email to Mr. Hammond about the incident on September 7, 2010 (Exhibit E-1, Tab 2, page 000138).

[104] Mr. Williams prepared an affidavit on behalf of the respondent in connection with a grievance brought by the inmate mentor. Mr. Williams testified that the mental health program was cancelled and that all the inmate mentors were removed from the house. He did not recall an incident in which the inmate mentor’s lawyer had contacted Dr. Kubinski in September of 2010.

[105] As it was unclear exactly what happened with the door, I asked Mr. Williams some questions. In response, Mr. Williams explained that he weighed 95 kilograms at that time and that Dr. Kubinski pushed the door into his body, causing him to be moved into the door frame.

[106] I gave both representatives the chance to question Mr. Williams on this further evidence. In response to a question from Dr. Kubinski's representative, Mr. Williams denied that there was simply a conversation and no pushing. The respondent's representative did not have questions on this point.

5. Ms. Gaskell

[107] Ms. Gaskell was at the relevant time Regional Director for Health Services, responsible for health services in the CSC's Pacific Region and was classified EX-02. She was also a member of the executive health team, which set the direction for Health Services. She has never met the grievor.

[108] Ms. Gaskell described that under the IMHI, Health Services owned the grievor's position, but had no accountability for the staff. There was no reporting relationship between the grievor and Ms. Gaskell.

[109] Ms. Gaskell wrote the letter offering employment to Dr. Kubinski and wrote the letter rejecting him on probation on December 1, 2010 (Exhibit E-1, Tab 4). The rejection on probation letter was signed on her behalf by another person, as she was out of the office, but she was familiar with and approved the letter's content. She was briefed on the issues by Ms. Sloat.

[110] Ms. Gaskell said that the decision to reject the grievor on probation was solely for the reasons set out in the letter. She did not reject him on probation because he filed an affidavit in a court action brought by the inmate mentor. She had no knowledge of that.

[111] In cross-examination, Ms. Gaskell admitted that she met the grievor at the first-level grievance meeting. She admitted that she relied on information provided by others when she wrote the rejection letter. She knew that the grievor had more than two to three supervisors during his period of employment. She agreed that a probation period allows the immediate supervisor to see if the employee is a good fit for the organization and with clients. She was referred to the Guide (Exhibit G-7) and agreed that it is the immediate supervisor's responsibility to evaluate the employee's performance during the probationary period.

[112] Ms. Gaskell testified that the grievor did not sign off on a set of objectives. She believed verbal performance evaluations were done with him but that Dr. Dhaliwal did

not do a formal evaluation.

[113] Ms. Gaskell agreed that she was not aware of any reprimands being given to Dr. Kubinski. She agreed that it was part of the Guidelines (Exhibit E-1, Tab 9) that an employee receive feedback and that it is important for employees to receive feedback. She believes that Mr. Ouellet spent a fair amount of time talking with the grievor about his relationship with clients and with the respondent. Ms. Gaskell said that she would be surprised if it were the case that the grievor received a job description only on September 20, 2010, but she stated that she knew from what had been reported to her by others that he was given directions from his supervisor.

6. Dr. Kubinski

[114] Dr. Kubinski was told on about February 9, 2010 that he would be working at Ferndale Institution. He said he was unclear who his supervisor was when he started working there. Ms. Sloat hired him. Dr. Kubinski stated that he met with Dr. Evan Lopez sometime in that February and that Dr. Lopez told him that he was his supervisor, but they met only once.

[115] Dr. Kubinski testified that he did not receive a job description during his first week of employment. He received one when he requested it in September of 2010. I note that the grievance before me is not a job description grievance.

[116] The grievor received an orientation for Ferndale Institution, which included a tour and meeting with inmates, the warden and Mr. Hammond. He understood from Ms. Sloat that he would be providing social work services to the program there.

[117] After about a month in his position, Dr. Kubinski requested a review of his rate of pay on appointment (Exhibit E-5). He reviewed his qualifications. He has a BSc, an MS and a PhD. He has 30 years of experience as a social worker. He has been a member of the BC College of Social Workers since 1996 and is bound by its code of ethics (Exhibit G-8). He has worked in Canada, Australia and the United States, primarily in community settings but also in corrections. As part of his social work degree, he worked in parole offices and in a correctional institution in Australia. In the United States, he was attached to a community college that offered programs in minimum-, medium- and maximum-security county jails throughout the Portland, Oregon, region. He was based in the jails and responsible for all the programs there, including staff

supervision. He said he served thousands of inmates during the course of his 11 or 12 years there.

[118] Dr. Kubinski explained his concept of boundaries. It related to what is shared and is not shared with clients. He said it is important in the correctional system because of the nature of clients, who can be manipulative.

[119] The grievor stated that he has 30 years of experience working with high-risk populations. He has never breached his boundaries, and no one at the CSC raised boundary issues with him.

[120] In relation to the CORCAN issue, Dr. Kubinski testified that he did not accept that Mr. Hammond had concerns about his interaction with CORCAN. He testified he was acutely aware of maintaining relationships between departments. He said that his communication was not copied to CORCAN and that neither Mr. Hammond nor his supervisor expressed any concern about his interaction with CORCAN people. His email of March 4, 2010, to Mr. Hammond reads in part as follows (Exhibit E-1, Tab 2, page 000005:

...

In reference to the Corcan grant - we were at the point Silvia Ehrke (social worker) and I were meeting today so as finalise the mental health programming. Our plan was to launch the program beginning next week. We have put a lot of work into this.

All indicators were that Corcan was providing the negotiated support they had agreed to. However, Laura Maddess (Corcan) wrote to a few hours ago; "We have decided not to fund this contract . . ." (see correspondence below)

My expectation is that when someone says they will do something, it will get done. It is impossible to function if we cannot rely on other areas and departments to step up to the plate.

The last minutes excuses provided do not appear legitimate and simply appear to be a means to opt out of their verbal and written agreements.

I have done what I can and now it appears that correspondence with Corcan has stopped from their end. I think this is now a management to management level matter.

What can we do?

...

[Sic throughout]

[121] Dr. Kubinski did not see an email from Ms. Daniels to Mr. Hammond and Mr. Ouellet dated March 30, 2010 (Exhibit E-1, Tab 2, pages 000011 and 000012), and was not aware of Ms. Daniels' concerns related to the cancellation of vehicle passes. However, he must have been aware of the situation as he had raised it with Ms. Daniels.

[122] The grievor's supervisor did not discuss issues with him related to an interview with the inmate experiencing difficulties on April 13, 2010 (Exhibit E-1, Tab 2, pages 000013 and 000014). The concern raised by Ms. Daniels to Ms. Demers at that time was that Dr. Kubinski, as the mental health worker assigned to this high-profile case with an offender with a potential for violence, had little or no information about the inmate experiencing difficulties.

[123] Dr. Kubinski testified that he was familiar with the inmate as he was on the grievor's long-term caseload. He stated that he would have had case notes and that they are not in the exhibit.

[124] In response to the incident involving Mr. Williams in February of 2010, Dr. Kubinski stated that Mr. Williams did not ask to meet with him. Dr. Kubinski testified that Mr. Williams came into his office and told him he felt that the grievor was being played by some inmates. Dr. Kubinski found that Mr. Williams was very aggressive; he stood over the grievor and spoke loudly to him. He said there was a discussion, the details of which he could not recall. He said that when Mr. Williams left the room, Mr. Williams stuck his foot in the door as the grievor attempted to close it. Mr. Williams' foot came into contact with the door. Dr. Kubinski denied pushing or shoving Mr. Williams.

[125] The grievor said that the next day, Mr. Williams let himself in, "which was his habit." He disagreed with Mr. Williams and said all doors should be locked in a correctional facility, particularly the doors of social workers' offices as sensitive file material is located there. The exception is when an inmate is being interviewed; then, the door should be unlocked.

[126] The grievor said that Mr. Williams told him he wanted to meet with him. Dr. Kubinski told him that it would be fine but that he wanted to have a support person or someone from the bargaining agent present as he felt that Mr. Williams was being aggressive towards him. The parties met after a shop steward was called. Dr. Kubinski stated that neither his supervisor nor anyone from management met with him to discuss this.

[127] Dr. Kubinski admitted that he had a lengthy discussion with Mr. Ouellet following an operational meeting on April 21, 2010, and that Mr. Ouellet's email accurately summarized the discussion (Exhibit E-1, Tab 2, pages 000059 to 000061).

[128] The grievor said that he met with Mr. Ouellet on April 26, 2010, and that the next time anyone discussed performance objectives with him was on September 1, 2010.

[129] Dr. Kubinski noted that he was on a summer break from June 18 to July 21, 2010. When he returned to work, there was a discussion about abolishing the mental health program and changing roles. He said that eventually, the program was abolished and mentors were fired and that the objectives Mr. Ouellet talked about on April 21, 2010, appeared redundant. He said that when he left on holidays, the program was going along without major issues and that there was nothing concrete about abolishing it.

[130] Dr. Kubinski explained his understanding of the FOCISS program. There were two ranch-style houses near the edge of the property, which housed in total 10 to 12 inmates with mental health problems. This was kept together by mentors — inmates without mental health disorders who had proven leadership skills and were compassionate. The inmate mentor was made a paid mentor sometime in February of 2010. He was a convicted murderer with a long history of taking management to task with grievances. The inmate mentor won numerous grievances and was not liked by management.

[131] Dr. Kubinski was asked to read an email from Mr. Ouellet dated September 24, 2010, which posed questions, which he answered under each one (Exhibit E-1, Tab 2, page 000111). He explained his answers by saying that he always triages persons on his caseload. He thought the question related to a new form, which he did not recall. He claimed he was told that he should not put all the information into OMS. He stated

that he was never asked to participate in a review of programs and that this was for the psychologist, and he was not invited to the meetings. He did not know why he was being cut out of the loop. He said that by that point, the inmate mentor had been removed from Ferndale Institution, and the grievor speculated that management thought he had information about the situation. Dr. Kubinski said he was provided with spreadsheets to keep track of his interactions with individuals and with his group contacts and for keeping track of his hours. He stated that he did document his contact with inmates. He said that sometimes, when he was working with parole officers, they would handle the documentation, as they were more senior. There was no need for him to write up exactly the same thing. He said that he assumed that Mr. Ouellet was happy with his response as Mr. Ouellet never met with him or contacted him.

[132] Dr. Kubinski testified that his question to Ms. Sloat about case management contained in his email of April 28, 2010 (Exhibit E-1, Tab 2, page 000065), was simply a clarification question as each correctional institution is different, and in the correctional community, different documents are used in different institutions.

[133] Dr. Kubinski stated that he complied with directions given by Mr. Ouellet on June 2, 2010 (Exhibit E-1, Tab 2, page 000098), about submitting a weekly overtime report and that no one raised any concerns about it after June 2, 2010.

[134] Dr. Kubinski stated that Mr. Hammond asked to speak with him about a performance review in mid- or at the end of October 2010.

[135] Dr. Kubinski could not remember that Mr. Ouellet said that he wanted to be kept informed each time the grievor left Ferndale Institution. He admitted that he went to the RTC every second week. He said he would generally let someone in Ferndale Institution know. He said that he often left with a parole officer or a nurse.

[136] On September 29, 2010, the grievor requested a copy of his work description from Ms. Burke. He received it on September 30 and wrote to Ms. Burke, indicating that he would sign it (Exhibit E-1, Tab 2, pages 000117 and 000118).

[137] Dr. Kubinski testified that he did not sign the work objectives Mr. Ouellet presented to him on October 1, 2010, as by this point, he had received five different sets of objectives from supervisors over the year and as each was vastly different. He

said he had some questions about how the objectives applied to the IMHI.

[138] On October 7, 2010, Dr. Kubinski expressed a concern about the criteria being used to evaluate his performance, given an upcoming nine-month review (Exhibit E-1, Tab 2, page 000120). He requested a meeting with Ms. Burke the next day, but he could not recall the substance of that meeting. I note that this was the day that he was supposed to meet with Mr. Ouellet concerning the objectives, which he said he cancelled because he was ill.

[139] Dr. Kubinski testified that he had no idea that he was not going to complete his probation. This testimony appears inconsistent with his email of October 7, 2010 (Exhibit E-1, Tab 2, page 000120), to Ms. Burke, in which he wrote that he was concerned about his nine-month evaluation, the end of his probationary term in eight weeks and the criteria that would be used to evaluate him.

[140] Mr. Kubinski stated that he received a call from a lawyer for the inmate mentor on September 21, 2010. The lawyer wished to speak to Dr. Kubinski about the inmate mentor's removal from Ferndale Institution. He passed this information on to Mr. Hammond, and he believes that Mr. Williams was there at the time.

[141] The grievor said that a meeting was held around October 27, 2010, which was supposed to be for his nine-month evaluation. He said that Mr. Hammond, Dr. Dhaliwal and a support person attended. He said that they did not talk about his review; the talk was about the inmate mentor. He said Mr. Hammond brought this up. He said that Mr. Hammond cautioned him about getting involved in the inmate mentor's lawsuit. He said at one point he was asked what he would do if the inmate mentor were returned to Ferndale Institution. Dr. Kubinski said he responded that the inmate mentor was not on his caseload and that he probably would not have anything to do with him. He said he was very non-committal in terms of the caution he was given. He said that the meeting ended abruptly. I note that these allegations were not put to Mr. Hammond, Dr. Dhaliwal or Mr. Williams in cross-examination.

[142] Dr. Kubinski said that he provided two affidavits about the inmate mentor's case after he was rejected on probation.

[143] With respect to the issue about the inmate about to be released, Dr. Kubinski said that he was concerned about him and his mental health concerns and the

placement he was going to. He said that his internal email to the team was forwarded to the parole officer at the CSC's Maple Ridge office. He said it was not his intent to be critical of the parole officer. He thought that his opinion was more accurate than the parole officer's opinion. He also noted that Mr. Williams invited his input but that Mr. Williams never discussed the case with him. I note that it was Dr. Kubinski's email response to Mr. Williams' email asking for his input that initiated the email from the parole officer complaining that the grievor lacked knowledge about release planning.

[144] In his testimony, Dr. Kubinski also said that the inmate alleging a relationship with a correctional officer had reported that he had had a relationship with a staff member at an institution in Alberta and that the staff member had transferred to Ferndale Institution. At Mr. Ouellet's direction, Dr. Kubinski retrieved documents from the living unit and brought them to Mr. Ouellet. He said that Mr. Ouellet told him not to make records concerning this incident. At that time, the inmate alleging a relationship with a correctional officer was being held in a cage and was later transferred out of Ferndale Institution. The grievor testified that he expressed his concerns to Mr. Hammond and Mr. Williams a couple of days later and said that the response did not appear to be correct and that there should be an investigation. They did not appear to be concerned. He stated that in his own words, "their response" was to "look the other way." I note that neither Mr. Hammond nor Mr. Williams were cross-examined by the grievor on this issue.

[145] On the issue of failing to follow simple instructions about registering for a course, the grievor admitted to checking with Ms. Sloat for a telephone number. He was unable to register for the course without first doing some on-line training. There was no subsequent discussion with any manager about this.

[146] On the issue of failing to provide a signed copy of his objectives to Dr. Dhaliwal, the grievor said he still had concerns, which he expressed as follows in his email of November 10, 2010 (Exhibit E-1, Tab 2, page 000144):

...

That said, a number of the 15 objectives and 11 sub objectives are new. As I have 17 working days to the completion of my probation, I am unsure if the objectives can be fairly assessed in this time period. I would also need clarification on several points

...

[147] The grievor did not recall meeting with Dr. Dhaliwal on November 17, 2010.

[148] Dr. Kubinski testified that he was sick on October 8, 2010, that he was not avoiding a meeting and that Mr. Ouellet never got back to him on that issue.

[149] In response to Mr. Ouellet's suggestion that he was an advocate for offenders as expressed in an email to Ms. Tyler on December 1, 2010 (Exhibit E-1, Tab 2, page 000148), Dr. Kubinski replied that his role was to advocate for mental health services at Ferndale Institution, not offenders. Although at one point he conceded the accuracy of Mr. Ouellet's notes in his email about the meeting in April, Dr. Kubinski testified that Mr. Ouellet spent no time with him clarifying his role in the organization. He said that he did not hold any faulty perceptions and that Mr. Ouellet did not spend time correcting these perceptions. He said that the April 21 meeting lasted 1.5 hours, and while he had 5- to 10-minute meetings that occurred when Mr. Ouellet walked past his office, he had no formal meetings with Mr. Ouellet until September of 2010. Dr. Kubinski did not agree that he was manoeuvring to avoid accountability. He said that he was pretty good at his job and that he did not require more advice and attention than was necessary. He said that nothing he writes is substandard.

[150] Dr. Kubinski referred to his third-level grievance response (Exhibit G-9, paragraph 14), in which he alleges that two weeks before his rejection on probation, his supervisor at the time (Dr. Dhaliwal) stated that there should be no problems with him successfully completing the probationary period.

[151] Dr. Kubinski said that there was no cause for the dismissal, as he noted in his third-level grievance response (Exhibit G-9, paragraph 27), in which he alleged that he was dismissed for the following reasons:

- he witnessed an improper management response concerning the inmate alleging a relationship with a correctional officer;
- the mental health program at Ferndale Institution was abolished; and
- he had too close of a relationship with the inmate mentor, who was fired and later transferred and segregated.

[152] The grievor said that there was a connection between his supervision of the

inmate mentor, the inmate mentor being fired, the program being cut and his termination.

[153] Dr. Kubinski confirmed that he believes that he was dismissed for the reasons set out as follows in his third-level grievance submission (Exhibit G-9, paragraph 31):

...

31. Because of the information and knowledge Dr. Kubinski had on the aforementioned case and what he believed to be other improper matters he was witnessed [sic] to, it is Dr. Kubinski's position that management became concerned that he would be subpoenaed. As such they feared he would provide information which would contradict managements' position on the habeas corpus case or speculatively he may disclose information on other questionable activities going on at the Ferndale Institution. In fact, Drs. Kubinski and the physiologist who was suspended did exactly that in their sworn submissions to the courts, soon after they were let go by CSC.

...

[154] Dr. Kubinski disputed Mr. Hammond's testimony that the mental health program was not abolished, and he referred to Mr. Ouellet's email of September 30, 2010, to him and others (Exhibit G-3), which states: "We agreed that we do not currently have a program." I note it is important to understand the context of this email as its text as a whole is supportive of Mr. Hammond's testimony. It reads in part as follows:

...

This e-mail documents the discussion I had with AWI Irv Hammond yesterday, in order to clarify issues that were raised at the IMHI meeting with respect to Houses 10-11.

We agreed that a formal program has to meet specific criteria and requirements to be considered as such.

We agreed that we do not currently have a program.

We agreed that what we have is Alternate Housing for offenders with mental health issues/disorders. A sheltered environment within a minimum security setting to assist with the gradual reintegration of such offenders in the community, an environment where we can provide targeted services to this specific population in an efficient manner.

...

We agreed that further discussions are needed with respect to “mentors” and their roles and responsibilities. Certainly, we agreed that the term “mentor” should be replaced.

...

[155] Mr. Ouellet was speaking to changes at Ferndale Institution and stated that the program with the mentors existed before the IMHI, and thus was not started under that initiative. It was a local program that had been modified to eliminate mentors, but the mental health inmates were still in Houses 10 and 11 and had continuing needs, as did other inmates at Ferndale Institution.

[156] Dr. Kubinski testified that he did the case management work properly. The respondent did not draw any deficiencies to his attention. He testified that he never violated CSC policy, including any human resources policies.

[157] Dr. Kubinski stated that he was never given any advance warning of the respondent’s decision to reject him on probation.

[158] In cross-examination, Dr. Kubinski was questioned about his relationship with the inmate mentor. Dr. Kubinski testified that the inmate mentor had been released from custody and was living in the Fraser Valley area of B.C. Dr. Kubinski said that he has met the inmate mentor once or twice for coffee over the last two to three years.

[159] Dr. Kubinski was vigorously cross-examined on his version of the events involving Mr. Williams. His evidence included a statement that Mr. Williams made a habit of opening doors and walking in with his master key. Dr. Kubinski qualified his evidence by stating he did not know if Mr. Williams knocked first before he walked through other doors.

[160] Dr. Kubinski was unsure whether there was any talk about amending the program before he left on his holidays on June 18, 2010.

[161] Dr. Kubinski admitted that he was not alleging that the program was changed as retaliation against him.

[162] Dr. Kubinski was confronted about his suggestion in his direct examination that Mr. Williams and Mr. Hammond told him to look the other way in that one incident. He changed his evidence to the effect that that was not something they said but that it was the message he received.

7. Mr. Nadeau

[163] Mr. Nadeau is a former psychology associate with the CSC, classified PS-02. He has filed a grievance against the CSC, the details of which are not before me.

[164] Mr. Nadeau was in a full-time position from 1999 to 2012, which he quit in November or December of 2012. He was largely employed at Ferndale Institution from 2002 to 2012. Between 2010 and 2012, he was mostly off on medical leave. Mr. Nadeau is familiar with Dr. Kubinski as he was a work colleague.

[165] Mr. Nadeau was part of the case management team at Ferndale Institution. During 2010, he had regular monthly meetings with Dr. Kubinski and might have seen him on specific cases in between. He saw Dr. Kubinski a couple of times in Houses 10 and 11.

[166] Mr. Nadeau did not note any boundary issues with Dr. Kubinski. He did not see him violating any policies. He was not told by any other staff members that Dr. Kubinski was violating CSC policies. He saw that Dr. Kubinski was professional and compassionate.

[167] Mr. Nadeau was aware but was not directly involved in the houses that were dedicated to offenders with mental health issues, who were supported by peer mentors.

[168] Mr. Nadeau recalls that in June of 2010, he was brought to a meeting with other mental health partners, and it was announced that the FOCISS program was to be terminated and replaced by a nationally developed and accredited program. He said that this did not occur. He was not aware that the program was abolished.

[169] Mr. Nadeau stated that he was familiar with the inmate mentor. He stated that the inmate mentor was housed at Ferndale Institution until August 13, 2010. He is aware that the inmate mentor was challenging to the management at Ferndale Institution and that he was removed from it.

[170] Ms. Daniels met with Mr. Nadeau about Dr. Kubinski. He was not sure of the dates, but he believes it was the early part of the period between the end of June and early October 2010. Ms. Daniels informed him that there were concerns about

Dr. Kubinski's professionalism and his boundaries. He was to be aware of this and to take notes on anything he observed.

[171] Mr. Nadeau was contacted by the inmate mentor's legal counsel in December of 2010. He reviewed material and provided affidavits in January 2011 in the inmate's claim against the CSC.

[172] Mr. Nadeau stated that when the FOCISS program was cancelled in June of 2010, the inmates were still living in Houses 10 and 11. He believes that the program was cancelled because its termination and replacement by a national program was discussed in two meetings.

[173] Other than cancelling mentors and the inmate mentor being moved out of the house, there were no changes from his perspective, but Mr. Nadeau stated that he was not the best person to ask about it. He said that in the fall there was no national program, that he was concerned about the process and that it was essentially the same program but the mentors were called something else.

[174] In re-examination, Mr. Nadeau stated that the program did not appear to end; it had people under the same titles doing the same things. Mr. Nadeau authored a note, which was used as a basis to transfer the inmate mentor. He stated that he has come to believe that he was not provided with factual information. Mr. Nadeau testified that the CSC has accused him of being unprofessional.

8. The inmate mentor

[175] The inmate mentor testified he was incarcerated at Ferndale Institution from November 2005 to August 13, 2010, serving a life sentence with eligibility for parole after 10 years after being found guilty of second-degree murder. He was released on July 1, 2012. He is currently in his mandatory period of day parole.

[176] The inmate mentor testified about the mental health program at Ferndale Institution. He said that it started informally in 2008. It connected high-functioning inmates with low-functioning inmates. Its purpose was to provide live-in peer support and one-on-one friendships. In 2009 and 2010, the program became more focused and structured. He said that Dr. Kubinski was brought on as a social worker to liaise between inmates and institutional management for inmates residing in the "mentor

houses.” He stated that these houses were referred to as Houses 10 and 11. I note that the term “mentor houses” appears to be phrase coined by the inmate mentor.

[177] The inmate mentor stated that he is a high-functioning individual and that he provided mentoring in ordinary life skills to others. His position became paid in January of 2010. Before that, it was a volunteer position. He stated that his position was eliminated and that he was fired from it on July 6, 2010. He referred to a memo from Mr. Hammond dated July 6, 2010 (Exhibit G-10), which stated as follows:

...

The paid mentor for the FOCISS Program is being deleted. Since the position is being deleted. Since the position is being deleted [sic] you will be provided two weeks to find other employment. Your pay will not be affected during these two weeks while you search for and secure another position.

There have been several changes to the FOCISS Program including now reporting to psychology through the social worker. The deletion of a paid mentor position is one of the changes that is occurring in the process of restructuring the program.

...

[178] The inmate mentor testified that he saw Dr. Kubinski three to four times per week at Ferndale Institution.

[179] The inmate mentor stated that as a result of the memo (Exhibit G-10), he left the house. He said the inmates suffered from the lack of support. There was dismay and verbal opposition from the inmates of Houses 10 and 11.

[180] The inmate mentor stated that he had a litigious relationship with the management of Ferndale Institution in 2010. He had filed grievances, with which he had achieved a high success rate, which resulted in animosity. He was moved from Ferndale Institution on August 13, 2010. His opinion is that he was moved because he was challenging decisions made by institutional management in grievances and in the courts. When he was moved, he was placed in solitary confinement, also referred to as “the hole” or “administrative segregation.” Sometimes there was double bunking. He commenced a *habeas corpus* (an inquiry into the cause for deprivation of liberty) application. He said that his lawyer tried to contact Dr. Kubinski at Ferndale Institution. He stated that Dr. Kubinski provided evidence in support of his

application. He stated that he was moved back to a minimum-security institution in June of 2011.

[181] In cross-examination, the inmate mentor stated that there was one instance of contact between himself and Dr. Kubinski in Mission Institution after he was released from segregation, with some communication occurring through a fence. Dr. Kubinski came and visited him twice when he was in Kwikwexwelhp Healing Village near Harrison Mills, B.C. These were social or personal visits. Since being released on parole, he has had coffee with Dr. Kubinski two or three times. Dr. Kubinski supplied his evidence to the inmate mentor's lawyer between December 10, 2010, and February 21, 2011. The inmate mentor counts Dr. Kubinski as a friend but does not see him very often.

[182] The inmate mentor said that the other mentors did not suffer the same fate as him in July as he was the only paid mentor. He was the only one moved out of the house. He said that other mentors left at a later time.

9. Rebuttal evidence of Ms. Hackett

[183] The respondent's application to call Ms. Hackett as a rebuttal witness was not opposed by the bargaining agent. She was the manager of operations at Ferndale Institution at the time of the events. She is currently the assistant warden of operations at Mission Minimum Security Institution.

[184] Ms. Hackett witnessed an incident between Mr. Williams and the grievor in February of 2010. She was in the administrative area. She walked down the hallway and noticed Mr. Williams at the entrance to Dr. Kubinski's office. She stated that it was evident that Dr. Kubinski did not want to talk to him. She observed Dr. Kubinski push Mr. Williams out of his office by closing the door using a considerable degree of force. She considered it unusual as in her words Mr. Williams is "quite a passive fellow" and as business is not normally done that way.

[185] Ms. Hackett described the force Dr. Kubinski used as considerable as Mr. Williams was in the doorway and was literally pushed out of it by the door.

[186] Ms. Hackett recalled a discussion the next day between Dr. Kubinski and Mr. Williams as Mr. Williams had asked her to attend as a witness. She stated that it is typical for another manager to attend a meeting as a witness or note taker.

[187] The meeting took place in a small boardroom. Dr. Kubinski and Mr. Williams got into a bit of a contest as to who was right and who was wrong. The subject of the meeting was the pushing incident. Ms. Hackett did not recall the rest of the conversation.

[188] Ms. Hackett was involved in an investigation of the allegations of the inmate alleging a relationship with a correctional officer. She was aware that this inmate had disclosed that he had been romantically involved with a correctional officer. Her role as the operations manager at the time was to look into it. She viewed the pictures and letters taken from his room. She determined that incidents did occur after she, the deputy warden and a security intelligence officer interviewed the correctional officer on two occasions. Initially, the officer lied. Ms. Hackett stated that the inmate alleging a relationship with a correctional officer was removed from Ferndale Institution. She said that an investigation takes time to go through reports, interview the relevant parties, and ensure the safety of the officer and the institution.

[189] Ms. Hackett strongly objected to a suggestion that there was anything inappropriate in how the inmate alleging a relationship with a correctional officer was dealt with. She stated that the inmate alleging a relationship with a correctional officer was not very stable psychologically and that there was a risk to public safety. Ferndale Institution is a minimum-security institution; it has no fences. That is why that particular inmate was placed in segregation while the CSC conducted its investigation.

[190] In cross-examination, Ms. Hackett stated that she did not interview Dr. Kubinski. She did not know if others had interviewed him. Ms. Hackett questioned why there was any need to interview him. While he retrieved the documents from the inmate alleging a relationship with a correctional officer's room, Ms. Hackett knew what was obtained as she had reviewed it. Eventually, the inmate alleging a relationship with a correctional officer was sent to William Head Institution, another minimum-security institution.

[191] Ms. Hackett did not recall the date or time of the incident in February of 2010 between the grievor and Mr. Williams.

[192] Ms. Hackett said that normally, she takes notes at meetings. She said that Mr. Williams and Dr. Kubinski shook hands at the end of the meeting. To her recollection, Mr. Williams did not ask her to put her observations in writing.

[193] Ms. Hackett disagreed with the bargaining agent's suggestions that Dr. Kubinski simply closed the door. She was seven or eight feet away from the door at the time at issue.

[194] Following the rebuttal testimony, the following three further documents were introduced by consent:

- Dr. Kubinski's curriculum vitae, as provided to the CSC (Exhibit G-12);
- counsel for the grievor's notes of his telephone interview with Dr. Dhaliwal on January 6, 2011 (Exhibit G-11); and
- an affidavit of an inmate, sworn September 27, 2010, which was admitted for the sole purpose of proving it was served on the Department of Justice on September 28, 2010, and not for the proof of its contents.

C. Summary of the arguments

1. For the respondent

[195] The respondent stated that this case is not about the reasonableness of the decision to reject the grievor on probation. Furthermore, the issue is not whether the Treasury Board policy as expressed in the Guidelines and Guide was followed.

[196] It stated that even on the whole of the evidence, if I were to find that Ms. Gaskell was mistaken, it would not make her decision disciplinary.

[197] If the grievor wished to challenge the reasonableness of Ms. Gaskell's decision, he should have brought an application for judicial review in the Federal Court.

[198] The respondent stated that the authority for rejection on probation can be found in the *Public Service Employment Act* (S.C. 2003, c. 22), ss. 62(1) ("the PSEA"). It is clear that the grievor could not refer to adjudication an individual grievance with respect to termination of employment under the PSEA unless he established that the respondent's conduct was ". . . a disciplinary action resulting in termination, demotion, suspension or financial penalty . . ."; see the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2), paragraph 209(1)(b). This is a heavy burden that the grievor had to discharge. The words "for cause" have been removed from the new section 62 of the PSEA; see *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134

para 94 and 111.

[199] The respondent submitted the following, *Canada (Attorney General) v. Penner*, [1989] 3 F.C. 429, at 438:

... once credible evidence is tendered by the Employer to the adjudicator pointing to some cause for rejection, valid on its face, the discharge hearing on the merits comes shuddering to a halt. The adjudicator, at that moment, loses any authority to order the grievor reinstated on the footing that just cause for discharge has not been established by the Employer.

[200] An employer has a choice of discharging an employee or rejecting a probationary employee. It is not required that it establish a *prima facie* case for just cause, just that it establish an employment-related reason; see *Canada (Attorney General) v. Leonarduzzi*, 2001 FCT 529.

[201] The respondent submitted that it comes down to a question of the employer's intent when the employment relationship is terminated.

[202] The respondent relied on *Owens v. Treasury Board (Royal Canadian Mounted Police)*, 2003 PSSRB 33, at para 74 and 75. Even if there are concerns about how the respondent assessed suitability and about how it likely did not have sufficient time to assess performance adequately or allow for the grievor to correct deficiencies, the question of whether its actions were a sham or camouflage is a very high standard to meet.

[203] An employer's concern over one incident may be sufficient to reject an employee on probation for an employment-related reason; see *Dalen v. Deputy Head (Correctional Service of Canada)*, 2006 PSLRB 73.

[204] If an employer establishes an employment-related reason for a rejection on probation, the adjudicator cannot substitute his or her judgement for that of the employer; see *Bilton v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 39.

[205] There is no obligation for an employer to meet with a grievor before the decision is made to reject the grievor on probation; see *Bilton*, at para 36.

[206] In a rejection-on-probation grievance, it is not necessary to adjudicate the quality of the training received by the employee; see *Dyck v. Deputy Head (Department of Transport)*, 2011 PSLRB 108.

[207] The respondent argued that there were five employment-related reasons supporting the grievor's rejection on probation, as follows:

- the grievor was presented with performance objectives and resisted working towards signing them off;
- the grievor did not provide written reports and documents as he was required to;
- the grievor required an inordinate amount of direction to provide basic discharge planning services; and
- the grievor failed to act in a professional manner in his dealings with Mr. Williams by refusing to meet with him on the first day and then by pushing him out the door on the second day; this was an assault and was not the worst type of assault, but it is disturbing.
- the grievor failed to act in a professional manner by advocating for an inmate in an assessment.

2. For the grievor

[208] The grievor provided a thoughtful 20-page written summary of his arguments. He submitted that the respondent's allegations in its rejection-on-probation letter have not been established. The main allegation was whether the grievor was working towards establishing objectives. It is management's responsibility to assign duties; nothing turns on whether he signed the performance objectives. What is crucial is whether he performed the duties and tasks assigned to him. There is no evidence to support that he failed to perform them.

[209] On the allegation that the grievor had not provided written reports and documents asked of him, had Mr. Ouellet not been satisfied with the documents kept by the grievor, he would have written to the grievor. The grievor's testimony that all reports and documents were completed as required should be accepted as there was

no evidence to the contrary from the respondent.

[210] The grievor disputed that he required inordinate direction to conduct very basic discharge planning tasks. As a new employee, he had minor and appropriate questions about the respondent's procedures in a new workplace. There is no evidence that the respondent ever notified or met with him about its alleged concerns.

[211] The grievor disputed the facts alleged by Mr. Williams. No one from management discussed the pushing incident with the grievor. It was not documented until September 7, 2010, some seven months after the February incident, which was not serious enough to warrant a discussion. It is now seen as an important justification for the rejection on probation but was not seen as serious at the relevant time.

[212] The grievor submitted that his dismissal was a sham, camouflage or disguised discipline.

[213] In less than a year, the grievor had seven separate supervisors. The person who supervised him the longest — for four months — did not send him a single email and was not called as a witness.

[214] The respondent granted the grievor five weeks of vacation, which cannot count against him, as the respondent approved it.

[215] The respondent violated the Guidelines for Rejection on Probation (Exhibit E-1, Tab 9).

[216] The grievor believes that he was terminated because of his support for an inmate who was a mentor in the mental health program. He was non-committal when Mr. Hammond directed him not to get involved in matters related to that inmate.

[217] The principles that apply to probationary employees in the private sector equally apply to employees in the public sector; see *Jacmain v. Canada (Attorney General) et al.*, [1978] 2 S.C.R. 15.

[218] Where the employer's decision to reject on probation was capricious and arbitrary it is a nullity. The determination of whether there is good faith or not has to be considered from all the surrounding circumstances: *McMorrow v. Treasury Board (Veterans Affairs)*, PSSRB File No. 166-02-23967 (19931119).

[219] An adjudicator should look at the probationary period, similarly to how it is viewed in the private sector, as an opportunity for an employer to assess an employee for continued employment. An employer that unfairly and prematurely terminates the employment of a probationary employee is liable to an award for reinstatement and compensation; see *Canadian Forest Products Ltd. v. Pulp, Paper and Woodworkers of Canada, Local 25* (2002), 108 L.A.C. (4th) 399.

[220] The respondent's failure to draw the grievor's attention to its specific concerns with his performance on an ongoing basis during the probationary period is a basis for overturning his rejection on probation; see *Canadian Union of Labour Employees v. Public Service Alliance of Canada*, [2004] C.L.A.D. No. 612 (QL).

[221] The grievor submitted that the respondent must prove that his performance was unsatisfactory in that it did not meet reasonable standards set by the respondent, and such an assessment must be made in a manner that is not arbitrary, discriminatory or in bad faith; see *British Columbia Telephone Co. v. Federation of Telephone Workers of British Columbia* (1977), 15 L.A.C. (2d) 310.

[222] The grievor submitted that when performance standards are not defined and obvious, an employer ought to draw the employee's attention to any deficiencies in performance. An employer need not apply progressive discipline to probationary employees, and ordinarily, arbitrators are reluctant to intervene with the employer's exercise of judgement; see *Barnes Security Services Ltd. v. Construction and General Workers' Union, Local 602*, [1996] B.C.C.A.A.A. No. 349 (QL), at para 186.

[223] The grievor referred to *Dhaliwal v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 109, at para 80 to 93, and to the Black's Law Dictionary, 7th Edition, definition of good faith and stated, "In my view, if a decision is a [sic] not made in good faith using the guidelines in the Treasury Board's own policy, the result is a decision made in bad faith."

[224] The grievor also provided a copy of *Attorney General of Canada v. Bergeron*, 2013 FC 365, at para 31, for the principle that the jurisdiction of an adjudicator is not removed simply because an employer calls a termination a rejection on probation.

[225] The grievor submitted that he was unfairly and prematurely terminated. The decision was not made in good faith, as the respondent did not follow its own policy.

He was not provided any constructive feedback. The respondent never informed the grievor of its concern with his conduct. The respondent acted in bad faith because the grievor supported the inmate mentor.

[226] The grievor is seeking reinstatement as an indeterminate employee. He asked that I refer this matter back to the parties, so that they may attempt to resolve other elements of corrective action, and that I reserve jurisdiction over the implementation of the decision.

3. Respondent's rebuttal

[227] The respondent submitted that there is a complete lack of a factual foundation for the conspiracy theory suggested by the grievor. The fact that it might have sloppily followed its own policies does not establish bad faith.

[228] The adjudicator should not be pulled into the merits of this case. Different principles apply when assessing probationary employees in the public and private sectors. The issue is not whether the respondent has proven the lack of suitability of the grievor but whether it has established an employment-related reason for rejecting him on probation. The respondent has met the low threshold of establishing an employment-related reason in this case, and the grievor has failed to discharge his burden.

III. Reasons

[229] A substantial difference exists between the grievor's testimony and the testimonies of other witnesses. I have considered and applied the following credibility test, found in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at page 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd

persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[230] I prefer the evidence of Mr. Williams and Ms. Hackett over the grievor's testimony in the incident in which the grievor pushed Mr. Williams out his door. I reject the grievor's testimony as, according to *Faryna*, it does not fit with the ". . . the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." Mr. Williams had legitimate reasons to pursue a discussion with the grievor as he was involved in the time-sensitive task of reporting about matters related to the warden's performance pay. He needed information from Dr. Kubinski, who has completely denied the incident and has no recall of the conversation or substance of the dispute.

[231] It is my view that the grievor's reaction in these circumstances, of refusing to meet with Mr. Williams and pushing him out the door, was bizarre, inappropriate and unprofessional behavior. The fact that the respondent did not take disciplinary action against him does not preclude considering this incident in assessing his suitability. In a rejection-on-probation case, I do not become engaged in a just-cause analysis. While the respondent might have problems relying on such undisciplined conduct in a dismissal grievance of a non-probationary employee, this incident clearly is an employment-related reason that can be considered in assessing the grievor's suitability for continued employment with the respondent. This is an employment-related reason, which alone would justify rejecting Dr. Kubinski on probation.

[232] Dr. Kubinski was not candid in his testimony on this issue, which raises concerns with the extent one can rely on any of his evidence when it conflicts with the

testimonies of other witnesses. I note that this incident pre-dates any discussion between the grievor and Mr. Hammond about the lawyer's telephone call from the inmate mentor's lawyer. I also note that Mr. Williams documented this incident in an email to Mr. Hammond on September 7, 2010 (Exhibit E-1, Tab 2, p. 000138) demonstrating that this remained a concern for the respondent prior to any discussion about the telephone call to Dr. Kubinski from the inmate mentor's lawyer.

[233] This incident is also a revelation into the grievor's confrontational attitude towards management. The grievor took Mr. Williams' request for information as discipline when in fact it was a request for information. This points to the grievor's inability to look at his own conduct and the manager's need to speak to him. Ms. Daniels noted the grievor's confrontational attitude in connection with a problem related to passes and vehicles on March 30, 2010 (Exhibit E-1, Tab 2, page 000011), and that Mr. Ouellet did too, in his talk with the grievor on April 21, 2010.

[234] The grievor improperly alleged misconduct against Mr. Ouellet, Mr. Williams and Mr. Hammond in connection with the incident involving the inmate alleging a relationship with a correctional officer. It is clear from his testimony that he does not trust these individuals, with whom he was required to work. I note that this supports the respondent's views as expressed by Mr. Ouellet, Mr. Hammond and Mr. Williams that the grievor was identifying with the inmates, rather than with management, and that it lends some support to their concern that Dr. Kubinski had boundary issues.

[235] I am concerned that the heart of the issues related to Dr. Kubinski's beliefs that management had improper motivations was never put to the witnesses in a thorough and proper way. I do not accept the grievor's testimony with respect to the following matters:

- As part of the grievor's allegation that his rejection on probation was disciplinary in nature, he raised the fact that there was a discussion about a call from the inmate mentor's lawyer on the day that he met for his nine month performance evaluation. As noted earlier in my reasons, the grievor did not put the full allegations to either Mr. Hammond in cross-examination and his testimony as to the conversation differs from that of Mr. Hammond. There is nothing to corroborate Dr. Kubinski's testimony that a conversation took place on a date scheduled for the grievor's performance review and one would have expected some documentation on this point by way of an email

inviting Dr. Kubinski to a discussion concerning his performance assessment. I note that Dr. Dhaliwal did not recall discussions about the inmate mentor in connection with a discussion of objectives on October 25, 2010. I prefer Mr. Hammond's testimony concerning his discussion with the grievor about the inmate mentor as Mr. Hammond testified in a very straightforward way about the details of the conversation and the grievor's version was not put to Mr. Hammond on cross-examination. I note that the grievor also retracted the comments that he made concerning a cover-up of situation involving the inmate alleging a relationship with a correctional officer. In preferring Mr. Hammond's testimony over the grievor's I rely on *Faryna*. I find that this did not occur on a date that was scheduled for the grievor's performance review. I am not satisfied on a balance of probabilities that a discussion about contact by the inmate mentor's lawyer with the grievor was a factor in the respondent's decision to reject the grievor on probation.

- I accept Mr. Ouellet's testimony that it was important for privacy reasons to document the allegations made by the inmate alleging a relationship with a correctional officer in a system separate and apart from the OMS, and I find that he did not suggest to the grievor that he not note it. I also find that it was contrary to CSC policy to record this type of information in the OMS and that it should have been recorded on an officer statement observation report and placed into the preventive security file. I do not accept the grievor's allegations that Mr. Williams and Mr. Hammond told him to "look the other way" concerning the allegations involving the inmate alleging a relationship with a correctional officer. This is an extremely serious allegation, which should have been put to Mr. Williams and Mr. Hammond in cross-examination. In the grievor's cross-examination, he changed his evidence, stating that he had a feeling that they wanted him to look the other way.

[236] In my view, Dr. Kubinski's allegations concerning a cover-up of the incident involving the inmate alleging a relationship with a correctional officer reveals an attitude towards management that is consistent with the one noted by Ms. Daniels and Mr. Ouellet. I do not accept Dr. Kubinski suggestions that there was a cover-up with regard to the inmate alleging a relationship with a correctional officer.

[237] It is trite that employees who are on probation have a lesser set of rights than do indeterminate employees. I note that the case law, even in the private sector, suggests a strong level of arbitral deference about an employer's decision to determine the suitability of a probationary employee for continued employment. I note that an employer of employees under the *PSEA* has greater latitude to accept or reject employees on probation in comparison with private-sector employers. In the context of the *PSLRA*, generally, there is no right to adjudicate a rejection on probation unless it can be characterized, on the whole of the evidence, as an action that resulted in a termination, demotion, suspension or financial penalty. That is enshrined in the test of whether the employee was rejected for employment-related reasons. If the rejection on probation was for a *bona fide* employment-related reason, an adjudicator has no jurisdiction to consider the merits of any grievance about that cessation of employment.

[238] The existing jurisprudence is well captured in *Bilton*, in which the adjudicator stated as follows at paragraph 33:

Even though an adjudicator does not have jurisdiction to hear a grievance about a termination while on probation, he or she must first, before coming to such a conclusion, examine whether the termination was employment related and whether the employer used the probation reason as a sham or camouflage to hide another motive for the termination. As stated in Leonarduzzi, the employer simply has to provide the adjudicator with some evidence that the rejection was related to employment issues or that it was dissatisfied with the suitability of the employee. In contrast to disciplinary cases, the employer does not have to establish just cause for its decision. The grievor's burden is then to demonstrate that the employer's decision to terminate her was not employment related and that, instead, it was a camouflage or a sham or was made in bad faith.

[239] The onus on the employer is relatively low, while the onus on the grievor is high.

[240] In my view, my task is not to assess whether the respondent has been reasonable in its assessment of the grievor's suitability for continued employment.

[241] The CSC is involved in delivering a complex set of programs. It has a management prerogative to manage the workforce and to implement programs under

its legislative scheme. If management considered that inmate mentorship of inmates with mental health issues was a service delivery mechanism that it wished to abandon, it was for management to so decide. As an adjudicator, it is not my prerogative to dictate services that the CSC must or must not provide to inmates. The fact that Dr. Kubinski held the view that the FOCISS program with mentors was working well is irrelevant to my task, which is to decide the rejection-on-probation issue. I note that there was a continuing need for Dr. Kubinski's services, regardless of whether the respondent eliminated mentors from interacting with the inmates in Houses 10 and 11. Workplace objectives remained that needed to be accomplished, irrespective of whether there were mentors in Houses 10 and 11.

[242] I note further from Mr. Ouellet's evidence that it is difficult to recruit and retain professionals in the corrections environment, and I note Mr. Hammond's testimony that he saw an opportunity to bring a discharge planner into Ferndale Institution and was initially happy to have someone with Dr. Kubinski's credentials on staff.

[243] In this case, the respondent has not proven each and every allegation in Ms. Gaskell's letter rejecting the grievor on probation. I am satisfied that Ms. Gaskell believed those allegations were true. In my view, that is not the end of the analysis of whether the respondent has established an employment-related reason to reject Dr. Kubinski on probation.

[244] I am not satisfied that the evidence rises to a level of cogency on certain allegations raised by the respondent in the rejection on probation letter (Exhibit E-1, Tab 4), as follows:

- *. . . have required an inordinate amount of direction to conduct the very basic of discharge planning tasks (i.e. that of securing basic services for an offender about to be released) . . . ;*
- *. . . outwardly displayed a lack of professionalism during meetings with offenders wherein your actions undermined the decisions made by management; and*
- *[y]our performance has not served to enhance the Mental Health Initiative at Ferndale Institution as was expected.*

[245] Dr. Kubinski was an employee who operated without much in the way of direct supervisory contact. He might very well have been providing services to inmates in a professional and compassionate manner, as opined by Mr. Nadeau. There is no

evidence before me that suggests that he was not providing services to inmates in a professional way.

[246] The grievor explained some of the respondent's allegations. I note that I accept his explanations related to the following:

- his absence from Ferndale Institution on Friday July 30, 2010, due to an emergency dental issue;
- him taking direction from Mr. Ouellet about the overtime reports; and
- the interview of the inmate experiencing difficulties.

[247] I think that some of the examples given by the respondent are simply examples of questions or of the absence of knowledge that a new employee to the CSC might have to the corrections environment rather than examples of an inability to work. Obviously, it takes time to become fully competent in a job. It must be remembered that Dr. Kubinski was an outside hire and that it was his first job at the CSC. Examples of these points are concerns the respondent raised about case planning for the inmate about to be released and correspondence related to taking courses and the recording of overtime.

[248] The respondent was not required to prove each and every allegation set out in its rejection-on-probation letter; it had only to establish an employment-related reason for the rejection. One employment-related reason may be enough; see *Dalen*. The respondent has proven a number of employment-related reasons for rejecting Dr. Kubinski on probation.

[249] I accept that Dr. Kubinski refused or neglected to sign off on performance objectives. While some language in the transmission of the documents suggests that the objectives were tentative, it is clear on the whole of the evidence that the respondent saw objectives as an important point to holding Dr. Kubinski accountable. At two points in time, the grievor did not deliver signed copies of objectives when asked. I find it surprising that Dr. Kubinski would not sign off, but the evidence is clear on that point. I do not find that this was a matter of little importance, given the respondent's overall prerogative to direct workers in its workplace, as the grievor suggested. It is clear that he received a job description, but it was generic, and it was important to the respondent to set out meaningful goals and objectives to hold

Dr. Kubinski accountable in his work at Ferndale Institution. Dr. Kubinski was a professional, and he was required to work independently and exercise professional judgement; however, the respondent did have the right to have him commit to objectives. I note that one aspect of suitability in corrections for which performance is assessed is whether the employee is prepared to commit to being accountable for his or her actions. The respondent had justifiable concerns. This is an employment-related reason.

[250] I do not accept Dr. Kubinski's excuses for not signing the objectives. He claimed different objectives were presented by different supervisors. The objectives were, in substance, the same objectives he was presented with after his April meeting with Mr. Ouellet. His explanation that his work was not producing widgets and that some of the performance objectives were unmeasurable were not reasons to refuse to sign off on them. He could have signed off under protest and then grieved the results of a performance assessment.

[251] However, it is clear that the respondent had concerns about the grievor's documentation of his work and activities as indicated by the following facts:

- he neglected to provide a calendar of his activities;
- he neglected to inform his supervisor about his absences from Ferndale Institution during the workday or provided inadequate details;
- he did not keep case notes in the proper form; and
- in certain instances, he did not properly and fully document his work, for example,
 - concerning a potential intake inmate on September 16, 2010 (Exhibit E-1, Tab 2, page 000109), and
 - in relation to no OMS documentation of his visit to the RTC to see two offenders on October 1, 2010.

[252] Documenting one's work in a corrections environment is important as it is a safety-sensitive environment. The grievor's notes of inmate interactions have to be available to others for review for the continuity of ongoing treatment and to address

any security concerns. The grievor's physical location would become important if incidents arose.

[253] In my view, these are all matters of importance, which go beyond simply adjusting to a new position at the CSC.

[254] All those points were brought to his attention, although he was not disciplined for them. I note that it is not necessary to discipline or warn an employee before rejecting him or her on probation. I am not required to analyze whether these failures on the part of the grievor amount to just cause. All those points are employment-related reasons.

[255] As expressed in the rejection-on-probation letter (Exhibit E-1, Tab 4), I am satisfied that there is cogent evidence of the following employment-related issues expressed in the letter:

- *You were provided with your performance objectives on more than one occasion and have resisted working towards meeting them;*
- *Furthermore, you have not provided written reports and documentation asked of you . . . ; and*
- *[You] have presented yourself in a manner that did not promote a professional image when asked to meet and provide assistance with the Warden's Performance Review*

[256] In examining the issues of bad faith, camouflage and disguised discipline, I note that the decision maker in this matter, Ms. Gaskell, appears to have honestly believed that there were employment-related concerns with the grievor. I note that while Ms. Gaskell was charged with hiring and firing the grievor, she had no independent knowledge of his performance. Therefore, I cannot simply rely on her letter and testimony without considering the testimonies of the other witnesses. I have considered the arguments raised by the grievor, including the impact of the inmate mentor, the issue pertaining to the inmate alleging a relationship with a correctional officer allegation, the failure to supervise the grievor and the failure to follow the guide and guidelines.

A. Inmate mentor

[257] It is unnecessary for me to express a view on the validity of the inmate mentor's interactions with management at Ferndale Institution. It is possible for the inmate mentor to have had legitimate grievances against the respondent and that he had an ability to manipulate vulnerable employees — these are not mutually exclusive concepts. In the short time I heard from the inmate mentor, he struck me as a bright, likeable, articulate and persuasive individual. However, his evidence did not add much to the evidence before me. It is clear that by at least September 28, 2010, the date on which the delivery of an inmate's affidavit was accepted (Exhibit G-13), the CSC was aware of a lawsuit brought by the inmate mentor against the warden of Mission Institution. It appears that Mr. Hammond was at least aware of a legal action when Dr. Kubinski informed him that the inmate mentor's lawyer had contacted him.

[258] I do not accept the grievor's theory that he was discharged because he supported the inmate mentor in his dispute with the respondent. Ms. Gaskell was unaware of this, and she wrote the discharge letter. There was no direct suggestion to any of the witnesses that they failed to brief Ms. Gaskell on this issue. I note that the grievor's support of the inmate mentor by swearing affidavits came after his termination, not before. I accept Mr. Hammond's version that he intended to warn the grievor, as clearly the inmate mentor's lawyer would be acting for the inmate and might not have the grievor's best interest in mind. I also accept Mr. Hammond's testimony that this particular inmate mentor had a history of exploiting marginalized or vulnerable employees. Mr. Hammond's testimony on that point was not challenged in cross-examination. As a probationary employee, Dr. Kubinski can be characterized as a vulnerable employee. I note further that there was no warning to the grievor that he would suffer consequences if he assisted the inmate mentor in litigation and there is no basis from which I can infer that there was an implied warning of consequences

[259] It is clear that Dr. Kubinski was approached by the inmate mentor's lawyer during his probationary period to assist the inmate mentor in his dispute with the respondent. I am not satisfied that the evidence shows on a balance of probabilities that this was a factor in his termination. I do not think it is probable or even plausible that Dr. Kubinski was rejected on probation because of the respondent's fear that he would help the inmate mentor in a legal action. This is counter-intuitive. Given the loyalties owed by an employee to an employer, the respondent would have been best

able to control Dr. Kubinski's conduct by maintaining his employment within the organization. Further, the respondent would have had no control over whether the inmate mentor chose to subpoena Dr. Kubinski. Once terminated, there was little control over the grievor's behaviour. I note that Dr. Kubinski took no action to support the inmate mentor until after he was rejected on probation. Generally, I would think that an employee would want to exercise considerable caution in supporting a party in litigation adverse to his or her employer's interests. I note that by this point in time the respondent had longstanding concerns about the grievor's failure to commit to performance objectives and concerns about his boundaries.

B. The issue pertaining to the inmate alleging a relationship with a correctional officer

[260] I do not think it probable or even plausible that Dr. Kubinski was terminated because of the concern he stated he raised over the respondent's treatment of the inmate alleging a relationship with a correctional officer. Obviously, when the inmate raises an issue of a romantic relationship with a correctional officer or parole officer, this needs to be investigated. While Dr. Kubinski had a role in that the inmate alleging a relationship with a correctional officer was on his caseload, in my view, the nature of the investigation would not have required the respondent to interview Dr. Kubinski. Other than continuity of evidence information, he would have had nothing to contribute as to whether the employee had a romantic relationship with the inmate, particularly when the incident, if it occurred, occurred in Alberta and not during Dr. Kubinski's probationary period. It makes sense that such an allegation has to be investigated quickly and sensitively as it raises security concerns. There might also be significant employment-related consequences for the officer, if the complaint of the relationship was true. In my view, it was not necessary for the respondent to inform Dr. Kubinski concerning the details or the result of the investigation. Privacy concerns with respect to the officer would likely prevent disclosure of the details of the investigation to Dr. Kubinski. Ms. Hackett stated it was standard procedure to place the inmate in administrative segregation during the investigation, given that Ferndale Institution was a minimum-security institution, without the usual hard boundaries of a medium-security institution. I note that this inmate was sent to the RTC to be stabilized shortly after the administrative segregation ended. The premise in Dr. Kubinski's testimony that "nothing was done" is in fact incorrect. The fact that he did not receive any details of it or its result does not mean that an investigation did

not occur. An investigation occurred, and the inmate was ultimately transferred. It was improbable for Mr. Hammond or Mr. Williams to have told him to “look the other way” when in fact Ms. Hackett was involved in an investigation along with the assistant warden and a security representative at the relevant time. His allegation is not in accordance with the “. . . preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions”; see *Faryna*. In fact, in cross-examination, Dr. Kubinski retracted his evidence on this point and indicated that it was a “feeling” on his part. It is of significant concern to me that Dr. Kubinski made a very serious allegation against Mr. Hammond and Mr. Williams, both of whom are managers, which he did not address with these individuals in cross-examination and that he appears to have retracted. I note that this lends some support to the views of both Mr. Ouellet and Mr. Hammond that the grievor was not able to maintain his neutrality and that he has a high distrust of management.

C. Multiple supervisors

[261] Dr. Kubinski had many supervisors during the probationary period. It is difficult to see how an employer could have properly assessed his progress over the almost one year before he was terminated. I also note that Dr. Kubinski was hired in a professional capacity because of his expertise. He should have required little in the way of supervision and monitoring. As Mr. Ouellet stated, he was not a clerk that required direction.

[262] In my view, having multiple supervisors does not lend to quality decisions about the suitability of employees and may impact the employee’s ability to establish that he or she can do the work. However, in my view, a situation with multiple supervisors, in and of itself, does not give rise to a finding of bad faith or disguised discipline or that there was a camouflage or a sham. In this case, there appear to have been legitimate changes in supervision for operational reasons, which were not designed to discipline Dr. Kubinski.

[263] However, I cannot say that having multiple supervisors led to an arbitrary decision, a bad-faith decision, or a sham or camouflaged decision. I note that the multiple supervisors were not a bad-faith targeting of the grievor. It does not appear to have been a respondent action that targeted the grievor but rather the result of changes to programs and personnel.

D. Failure to follow guidelines

[264] Dr. Kubinski has alleged that the respondent has failed to follow the Guidelines (Exhibit E-1, Tab 9) and the Guide. I accept that sometimes the failure to follow policy could result in a bad-faith or arbitrary decision. In my view, an adjudicator should focus on the substance of the matter in dispute and not procedural nuances in the application of policy. I reject the approach in *Dhaliwal*, which seems to suggest that a failure to follow policy means that the related decision was made in bad faith. I would also state that simply because the respondent has followed its policy does not mean that the decision was made in good faith.

[265] I note that the respondent rejected the grievor on probation for employment-related reasons, irrespective of whether the Guidelines or the Guide was followed.

[266] I find it difficult to accept the grievor's testimony that the rejection on probation took him by surprise. He knew he had not provided signed objectives, particularly on September 30, 2010, when Mr. Ouellet brought the objectives to his office and then came back an hour later to pick them up. In this same time frame, he also wrote to Ms. Burke about his job description and expressed concerns about his upcoming performance review. I note that he also refused to sign the objectives presented to him by Dr. Dhaliwal. Any reasonable person would appreciate that these were significant points for his employer.

[267] While sometimes the failure to follow guidelines with regard to rejection on probation or performance appraisals could amount to bad faith, or arbitrary conduct, I am not satisfied that the decision to reject Dr. Kubinski on probation was arbitrary or in bad faith. It appears grounded in employment-related reasons. In my view, his failure to commit to objectives was a significant factor in why he did not receive a formal appraisal. It is clear that he failed to provide documents that he was asked for repeatedly in terms of the calendar. He did receive some informal feedback during his probationary period. It is clear that there is no duty to warn an employee that he or she is not meeting objectives, and the failure to warn is not a bar to rejecting an employee on probation.

[268] I am satisfied that the respondent rejected Dr. Kubinski on probation for employment-related reasons. I find that Dr. Kubinski has not established bad faith, a

sham or camouflaged action by the respondent. He may not agree that the respondent had concerns, but it is not necessary that these concerns amount to just cause for the dismissal of probationary employee.

[269] As the employer has established employment related reasons to reject the grievor on probation, I therefore have no jurisdiction to further consider this grievance.

[270] I am concerned that some of Exhibit E-1, Tab 2 has information which relates to mental health issues involving certain named inmates, who may remain in custody or are on a supervised release. None of these individuals were witnesses at the hearing, but this information is part of the employer's case for rejecting Dr. Kubinski on probation. Neither party has applied for a sealing order. I am making a sealing order on my own motion, for certain pages of Exhibit E-1, Tab 2.

[271] The default position in a hearing before the PSLRB is the open court principle. That is that all the information before the PSLRB should be available to any member of the public, including the media. Hearings are conducted in a public way The Board has published its Policy on Openness and Privacy on the PSLRB's web-site. The PSLRB has stated:

...

The open court principle is significant in our legal system. In accordance with that principle, the Board conducts its oral hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings.

...

Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.

At the same time, the Board acknowledges that in some instances mentioning an individual's personal information during a hearing or in a written decision may affect that person's life. Privacy concerns arise most frequently when

some identifying aspects of a person's life become public. These include information about an individual's home address, personal email address, personal phone number, date of birth, financial details, SIN, driver's licence number, or credit card or passport details. The Board endeavours to include such information only to the extent that is relevant and necessary for the determination of the dispute.

[272] The *Dagenais Mentuck* test is the applicable test to consider in sealing information or exhibits: *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76. The elements of this test are:

(a) Is the order necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk?

and:

(b) Do the salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings?

[273] The Supreme Court of Canada has clarified that the party seeking a sealing order bears the onus of justifying its issuance based on sufficient evidence — a general assertion of potential harm is insufficient. In addition to considering the evidence adduced by the parties, the decision maker is legally bound to consider the constitutional protection that has been extended to the right of the public to access evidence, even if no party argues for that right.

[274] In applying the *Dagenais Mentuck* test, I am concerned that publication of the names or mental health particulars of inmates might impact on the rehabilitation of these inmates or raise security concerns as these individuals might be subject to manipulation by other inmates if the information becomes public. The publication of this information in the exhibit is not essential to a transparent understanding of this decision. I order that Tab 2 should be removed from Exhibit E-1 and sealed. I order that this tab be replaced with a redacted version of Tab 2, containing all the pages of Tab 2 with the redaction of the following pages for any inmate names, medical or treatment needs: p. 000017 - 000056; 000062 - 000064; 000084 - 000097; and 000109 - 000110.

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

(The Order appears on the next page)

IV. Order

[276] The grievance is dismissed.

[277] I order that Tab 2 should be removed from Exhibit E-1 and sealed. I order that this tab be replaced with a redacted version of Tab 2, containing all the pages of Tab 2 with the redaction of the following pages for any inmate names, medical or treatment needs: p. 000017 - 000056; 000062 - 000064; 000084 - 000097; and 000109 - 000110.

September 23, 2014.

**Paul Love,
Adjudicator**