Date: 20140924

File: 566-02-4848

Citation: 2014 PSLRB 89

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

JASBINDER RANU

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

REASONS FOR DECISION

Before: Margaret T.A. Shannon, adjudicator

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

For the Respondent: Caroline Engmann, counsel

Heard at Abbotsford, British Columbia,
May 13 to 15, 2014.

I. Individual grievance referred to adjudication

[1] The grievor, Jasbinder Ranu, seeks to have disciplinary action (a 30-day suspension without pay) taken against him by the Correctional Service Canada (the employer) overturned on the grounds that it was unwarranted, excessive, and unfounded in fact and law.

II. Summary of the evidence

[2] The question to be determined is whether the discipline imposed by the employer against the grievor was excessive in the circumstances. The grievor admitted that he failed to conduct two security rounds as required on May 14, 2010, but denied that he falsified unit logs or lied to his correctional manager (the grievor is a correctional officer). The grievor argued that in the circumstances, a 30-day suspension without pay was excessive.

[3] The grievor was assigned to the Matsqui Institution ("the institution") segregation unit in Abbotsford, British Columbia, between 23:00 on May 13, 2010, and 03:00 on May 14, 2010, and was responsible for conducting and recording security rounds for this period.

[4] Matthew Marshall was the correctional manager on duty on the morning shift of May 13-14, 2010. On May 14, 2010, he noted a deficiency in the "Deister wand report" for the segregation unit, which indicated that two rounds were missed during the period that the grievor was assigned there. He determined that those rounds were missed by reviewing the printout from the Deister system (Exhibit 18).

[5] The Deister wand report indicated that the grievor completed rounds at 00:32:20, 01:32:19 and 02:40:33. Missing were rounds at 01:00:00 and 02:00:00. Post orders for the segregation unit are specific in that rounds are to be done every half-hour and are to be recorded in the unit logbook as they are completed.

[6] At approximately 05:00 on May 14, 2010, Mr. Marshall contacted the grievor, who had by then changed posts, to determine whether the rounds had been conducted and whether they had been recorded in the unit log. The grievor stated that he had conducted the rounds and had recorded them as required in the unit log. Marshall then advised the grievor that the reports indicated that the rounds had not been

completed, to which the grievor responded that the rounds had been done and that the Deister reports were wrong.

[7] Mr. Marshall's relief, Gary Dosanjh, arrived at approximately 05:30 on May 14, 2010. Mr. Marshall advised Mr. Dosanjh of the missing rounds and asked him to secure the unit logbook and the videotapes of the period during which the rounds were ostensibly missed.

[8] The next night, Mr. Marshall received a phone call from the grievor, who made a point of insisting that he had not lied when he claimed that the rounds were not missed and that they were recorded in the logbook.

[9] After having secured the videotapes and unit logbooks, Mr. Dosanjh advised the deputy warden that there was suspicion that rounds were missed in the segregation unit on the morning shift. He then reviewed the videotapes, the logbooks and the Deister wand reports and confirmed that two rounds had been missed by the grievor, even though the grievor had recorded them as having been completed. All this information was then handed over to the deputy warden, who gave Mr. Dosanjh direction to contact the grievor and advise him that he was not to report to work until a disciplinary investigation had been completed. Mr. Dosanjh contacted the grievor as directed and relayed the information that same afternoon. The grievor responded that he was "pretty sure" he had conducted the rounds as required. Mr. Dosanjh did not recall the grievor telling him that he might have dozed off, just that he was "pretty sure" he did the required rounds.

[10] Lori McLennan, a member of the regional investigation team in 2010, was appointed to conduct a disciplinary investigation into the events of May 13-14, 2010. The convening order she received (Exhibit 9) mandated her to investigate three things: determine whether the grievor completed his duties in the segregation unit on May 14, 2010, in accordance with the Commissioner's Directives and institutional post orders and procedures; determine whether he falsified an entry in the segregation unit logbook; and determine whether he lied to the correctional manager when he was asked about the missing rounds. Her report (Exhibit 11) was due by May 26, 2010.

[11] Ms. McLennan interviewed the grievor, Mr. Marshall and Mr. Dosanjh. She also reviewed the videotapes and the logbook from the segregation unit for that night. On May 20, 2010, she met with the grievor and his two bargaining agent representatives.

He explained that he believed that he had completed the rounds as required and that he had written them in the logbook at the end of his shift in the segregation unit as having been completed. He admitted that he did not follow the usual reporting process, which requires that rounds be entered once completed, but rather he wrote them all down in the unit logbook as completed at the end of his shift. Based on this, Ms. McLennan concluded that the rounds were missed, that the logbooks were falsified and that he had lied to the correctional manager. Even when confronted by Mr. Marshall with the evidence that the rounds had not been completed as required, the grievor maintained his assertions that they had been completed and that the segregation unit logbook was accurate.

[12] Ms. McLennan's report was submitted to the warden of the institution, Mike Boileau, on May 26, 2010, as required. Mr. Boileau provided the grievor with a copy of the disciplinary report and convened a disciplinary hearing for June 7, 2010, at which time the grievor was provided the opportunity to raise any mitigating factors. The grievor's point of contention at the disciplinary hearing was the conclusion that he had lied to the correctional manager when he initially denied that he failed to conduct rounds on the segregation unit on May 14, 2010, as was required of him. He admitted to missing the rounds and to failing to enter them in the logbook as required upon the completion of each round. He provided no explanation but did offer that he might have dozed off.

[13] Mr. Boileau had a hard time accepting his explanation. If the grievor had fallen asleep, he should have notified the correctional manager and explained that he had missed conducting rounds as a result. The only time the grievor raised the possibility of having fallen asleep was at the disciplinary hearing. There was still no acknowledgement of wrongdoing on his part. Based on Ms. McLennan's report and the disciplinary hearing, Mr. Boileau concluded that disciplinary action was warranted and initially thought of terminating the grievor's employment because he felt that he could no longer trust him to perform his duties.

[14] This was not the first time that Mr. Boileau had had to deal with the grievor in a disciplinary manner. In December 2009, the grievor was investigated for failing to conduct his duties in the segregation unit at the institution according to the Commissioner's Directives, post standing orders and operational procedures and for failing to wear proper security or protective equipment. Throughout the investigation

into the December 2009 incident, the grievor was forthcoming, and he admitted that he was culpable of the allegations against him. As a result, he received a 10-day suspension without pay on March 5, 2010.

[15] This penalty was grieved. A grievance meeting was held approximately one week before the May 14, 2010, incident, following which Mr. Boileau reduced the 10-day suspension without pay to a 3-day suspension without pay. The grievor was advised of the decision to reduce the suspension by letter on May 14, 2010, the same day he failed to conduct rounds according to policy in the segregation unit. The morning shift of May 13-14, 2010, was his first shift following the grievance meeting.

[16] The grievor tried to call Mr. Boileau on May 14, 2010. However, Mr. Boileau did not speak to him. The grievor was advised that Mr. Boileau was not interested in speaking to him until the disciplinary investigation was completed. Mr. Boileau admitted that he was upset with Mr. Ranu and that he felt let down by the grievor, who he thought understood the importance of conducting rounds appropriately following the grievance meeting. Mr. Boileau described himself as feeling dejected rather than angered by the grievor's failure.

[17] Taking everything into consideration, Mr. Boileau determined that the trust relationship was not irrevocably destroyed. Rather than terminating the grievor, he suspended him without pay for 30 days. Mr. Boileau has disciplined other correctional officers for missing rounds and admitted that not all had received the same penalty as the grievor. Mr. Boileau did not assign a penalty for each of the three allegations but rather imposed one overall penalty.

[18] The grievor testified that he did his rounds as usual on the half-hour as required on May 13-14, 2010, and that he wrote them all down at the end of his shift in segregation in the unit logbook. He admitted that policy required him to note rounds as they were completed in the unit logbook and not all at one time at the end of the shift. Despite the policy, his practice was to enter all the rounds and to indicate that they were completed on the required schedule at the end of his shift.

[19] After the morning count, at approximately 05:15:00 on May 14, 2010, the grievor received a call from Mr. Marshall advising him that he had missed two security rounds in the segregation unit. The grievor replied that the rounds were in the logbook and that he was positive he had done them.

[20] The grievor's shift ended at 07:00. He left the institution with the intention of talking to Mr. Marshall at the start of his next shift at 18:30. At approximately 14:00, the grievor received a phone call from Mr. Dosanjh, who advised him that he was not to report for work that evening as he was under investigation for missing rounds. In the course of their conversation, the grievor was adamant that he had not missed any rounds. He might have dozed off, but he did not remember missing any rounds. Mr. Dosanjh advised the grievor to speak to the warden and transferred the call to Mr. Boileau. It went unanswered.

[21] According to the grievor, he intended to tell Mr. Boileau that he truly believed that he had done the rounds but that if the video recording showed otherwise, he would accept that he had not done them. He never got the chance to tell that to the warden. The grievor called Mr. Marshall next to explain that he truly believed he had conducted the rounds as recorded in the log. He apologized to Mr. Marshall, who, according to the grievor, responded that he knew that the grievor would not lie to him.

[22] At the disciplinary hearing, the grievor admitted that he made an error when he wrote in the logbook that all the rounds had been completed. He had had no intent to falsify the records; he truly believed that he had done the rounds as required when he entered them in the logbook.

[23] The grievor testified that he is willing to take his punishment for missing the rounds. However, he stated that he did not lie or falsify any documents and that he is not willing to accept punishment for that. At the disciplinary hearing, when Mr. Boileau asked the grievor if he had falsified the logbook, he also asked whether writing down inaccurate information in the logbook is a falsification. The grievor had an honest belief that the information was true at the time the entries were made and consequently does not believe he falsified the records. As for lying to Messrs. Marshall and Dosanjh, the grievor stated that he told them the truth as he believed it.

[24] The only explanation that the grievor could give as to why he missed the rounds was that he might have dozed off. He stated that he was not prepared for the graveyard shift, having missed his afternoon nap. He did not call in sick for his shift as he was not ill. He recognized his responsibility to be prepared and fit for his shift and recognized that failing to be alert on the morning shift is a serious issue as it poses a risk to his colleagues, the inmates and himself.

III. Summary of the arguments

A. For the employer

[25] To support disciplinary action, an employer must establish that misconduct occurred that gives it reason to impose discipline, that the discipline is reasonable in the circumstances, and that if it is excessive, an appropriate alternative measure (see *Wm. Scott & Company Ltd.*, [1977] 1 Canadian LRBR 1). The employer has established and the grievor has admitted that he missed two security rounds on the segregation unit at the institution on the morning shift of May 13-14, 2010. However, the grievor has provided no explanation as to why he missed the rounds. He has maintained throughout the process that he honestly and genuinely believed he had done the rounds when he entered them in the logbook. Later, when confronted with the evidence, he admitted that he must have missed them.

[26] The grievor provided no explanation for missing the rounds. He merely stated he was not ready for his shift (see the transcript of the disciplinary hearing in Exhibit 13). Furthermore, the grievor maintained throughout the investigation and disciplinary process that he honestly believed the rounds had been done when he entered them into the segregation logbook as having been done at the end of his shift there on May 14, 2010. His behaviour on that day was negligent, bordering on reckless disregard for the obligation placed on him by virtue of being a correctional officer. Paragraph 5(f) of the employer's *Code of Discipline* (Exhibit 6) states that it is an infraction if an employee fails to take action or otherwise neglects his or her duty as a peace officer. Paragraph 5(g) of the *Code of Discipline* identifies it as an infraction if an employee fails to conform to or apply applicable legislation, Commissioner's Directives or Standing Orders. Paragraph 5(j) of the *Code of Discipline* makes it an infraction for an employee to wilfully or through negligence sign a false statement in relation to his or her duties.

[27] The basis of the grievor's argument that he did not lie or make a false statement in relation to his duties is that he had an honestly held belief that he had completed the rounds as required and that he had noted this honestly held belief in the segregation logbook. The test to establish the existence of an honestly held belief is two-fold: there must be a subjective belief that he did the rounds and objective evidence that they were done. To believe that the grievor had an honestly held belief, he must explain a few things, following which his testimony must be assessed for

credibility using the factors identified in *Faryna v. Chorney*, [1952] 2 D.L.R. 354. Even if the grievor had no intent to deceive, was it reasonable for him to hold on to this belief in light of the objective evidence before him?

[28] Clearly, it was unreasonable for the grievor to maintain his belief that he had completed the rounds as recorded, in light of the Deister reports and videotape evidence. As it was unreasonable for him to maintain his position, applying the principles in *Faryna*, a reasonable person would determine that he was untruthful. When he initially told Mr. Marshall that he had done the rounds, the grievor might have had an honest belief that he had done them. However, when he continued to maintain this stand despite the objective evidence before him, he could no longer have had an honest belief. Therefore, the employer has established misconduct worthy of discipline. The next question to be determined is the appropriateness of the 30-day suspension without pay imposed by the employer.

[29] When determining the appropriateness of the penalty imposed, consideration must be given to the fact that a similar situation had occurred not long before the May 13-14 incident for which the grievor received a 10-day suspension without pay (which was subsequently reduced to 3 days; see Exhibit 15, "Notice of disciplinary action"). In the employer's opinion, the gesture of reducing the penalty for the initial incident of misconduct in the performance of rounds by the grievor did not send a strong enough message. Within hours of having his earlier suspension reduced, the grievor again failed to conduct his rounds on the segregation unit as required and then proceeded to lie to management by asserting he had done so. The 30-day suspension without pay is intended to drive home the message that the employer expects the grievor to perform his duties in accordance with policies and procedures. This is not a situation in which the adjudicator should exercise her discretion to interfere with the discipline imposed.

[30] The decision *Stead and Weda v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 87, at para 72, provides a summary of decisions related to penalties imposed on correctional officers who have failed in their duty to carry out rounds as required. At paragraph 75, the adjudicator lists the mitigating factors to be considered when assessing the appropriateness of a disciplinary penalty.

[31] Similar to the fact situation in *Buchanan v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 91, this matter deals with serious matters

that posed a threat to the institution, to the inmates and to the grievor's fellow employees, which are not matters of little consequence. The significance of the suspension without pay clearly indicates the seriousness of the grievor's contravention of rules and policies.

[32] This is not a situation in which an adjudicator should interfere with the penalty imposed, even if the adjudicator may think a slightly lesser penalty might have been sufficient to send the message that the grievor's behaviour would not be tolerated (see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, at para 13). The message the employer needs to send is primarily meant for the grievor, but there is also a broader impact of sending a message to correctional officers in general at the institution. Any reduction in the penalty will not send a message and will not provide a quantum on which to base remedies for future cases. The onus was on the grievor to persuade an adjudicator that it is just and reasonable to substitute a lesser penalty (see *Natrel Inc. v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647* (2005), 136 L.A.C. (4th) 284, at para 66). The grievor has provided no argument that would support a reduction in the penalty other than his denial that he is culpable of lying and falsifying documents.

[33] Ample jurisprudence from the Public Service Labour Relations Board upholds lengthy suspensions without pay in the event that a correctional officer is found culpable of negligence in the performance of his or her duties by violating Commissioner's Directives or employer policy. In support of her argument that the penalty imposed by the employer was appropriate in all the circumstances, counsel for the employer cited several cases based on similar fact situations: *Stead and Weda*; *Buchanan*; *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70; *King v. Deputy Head (Canada Border Services Agency),* 2010 PSLRB 125; *Pike v. Treasury Board (Canada Border Services Agency),* 2011 PSLRB 1; *Natrel*; and *Maksteel v. C.A.W., Local 252* (2010), 197 L.A.C. (4th) 130.

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

[34] The grievor admitted that his conduct warranted discipline; however, not all of the grounds on which he was disciplined have been proven on the basis of clear and cogent evidence. He admitted that he was negligent in the conduct of his duties to the extent that he failed to complete all the rounds required on the night in question. Unlike the case of *Stead and Weda,* there was no extended period during which the

inmates in the segregation unit on the morning shift of May 13-14 were left unattended. The grievor missed two non-consecutive rounds.

[35] The employer has not proven that the grievor falsified the unit logbook or that he lied to the correctional manager when he stated that he had done the rounds as required. Falsification and lying require intent to mislead and a knowledge that the information conveyed is false. The grievor's testimony was consistent with the statements made to Messrs. Marshall and Dosanjh and to Ms. McLennan. The grievor's statements and conduct throughout the investigation were consistent with someone who had an honest belief that he had conducted the rounds, as he noted in the logbook at the end of his shift in the segregation unit. There is no evidence that the grievor intended to mislead the correctional managers or that he knew the information he recorded in the logbook was false. The grievor's credibility, reliability and truthfulness have never been questioned as is evidenced in his annual performance reviews (see Exhibit 24).

[36] When the grievor realized that he might have dozed off, he wanted to explain why to Mr. Boileau, who refused to take his phone call. The grievor was remorseful and recognized his wrongdoing. He is willing to accept his penalty for the missed rounds. In his testimony, the grievor was very emotional when he addressed the issue of lying and falsifying records because he did not do either of these things. Correctional officers know they are monitored at all times. Why would he write something false in the logbook when he knew that it could be verified by reviewing the videotape?

[37] The grievor is forthright and honest. His evidence has not been contradicted. He admitted that entering the rounds at the end of his shift was poor record keeping. There is no evidence that this has reoccurred.

[38] Disciplinary action is intended to be progressive, corrective and objective and not an emotional response to a situation by the warden. A 30-day suspension without pay is an extreme increase in penalty when the only discipline on the grievor's record is a 3-day suspension without pay. Such an increase is inconsistent with what is normally accepted as progressive discipline (see *Natrel*, at para 63). The grievor was previously disciplined for similar but not identical reasons. He acknowledged the seriousness of missing rounds. If the issue is truly the risk of a death in custody, why was his previous penalty reduced from a 10-day suspension without pay to a 3-day suspension without pay?

[39] The employer has discriminated against the grievor by imposing a penalty inconsistent with that received by others who had also been disciplined for missing rounds. According to Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at 7:4414, similar cases must receive similar treatment, which is ". . . a universal precept of fairness and justice that has always been recognized in arbitration law." The employer has violated this principle by imposing a more severe penalty on the grievor than on others (see *Labadie v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 53; and *Stead and Weda).*

[40] The grievor did not falsify the logbooks. The fact that he wrote everything down at the end of his shift in the segregation unit is a question of timing and not of falsification. The employer had the burden of proving that on the balance of probabilities, based on clear, cogent and convincing evidence, the grievor lied and falsified the logbooks. This onus has not been met. A lie involves an intentionally false statement. The employer has not adduced any evidence that the grievor made a false statement intentionally. To the contrary, the grievor admitted he missed the rounds when shown proof; prior to that, he had an honest belief that he had conducted all his rounds on the night in question, as required.

IV. Reasons

[41] At issue in this case is the reasonableness of a 30-day suspension imposed on the grievor for negligence in the performance of his duties, falsifying documents and lying to his employer. While the grievor admitted that he was negligent in the performance of some of his duties, he denied that he falsified documents and lied to his employer.

[42] As the representative for the grievor has noted, lying and falsifying documents requires an intention to deceive. To determine if the grievor did have such an intention, I must assess his credibility. A mere denial is not sufficient in my opinion to support a finding that the grievor did not lie and did not falsify documents. *Faryna* sets out the basis for assessing the credibility of a witness. In particular, the principle noted at page 357 of that decision states as follows:

> *… 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 reasonably recognize as reasonable in that place and in those conditions….*

[43] I have no doubt that the grievor unwittingly fell asleep on the night in question and failed to conduct the rounds required on the night in question. I cannot, however, accept that he had no recollection of falling asleep and consequently missing rounds. Surely, he was aware of waking up at his post. I cannot help but note that had he entered the rounds as he was required to according to the post standing orders and not at the end of his shift, and had he noted the time when he woke up from his nap, he would have noted that a round had been missed. He could then have reported missing the round and corrected his behaviour, thus avoiding sleeping through a second round.

[44] As stated above, while I can accept that the grievor fell asleep inadvertently that night, I am unable to accept that he was unaware of that fact. While it is not unknown for people to doze off without meaning to, we are generally aware of having done so when we wake up, regardless of how long we have been asleep. The grievor's evidence never addressed this issue and I am unable to find on a balance of probabilities that he was unaware that he had slept. By recording the rounds at the end of his shift, knowing that he had fallen asleep, the sole purpose of his entries was in my opinion to avoid disciplinary action which would result from his negligence. I find that he did in fact intend to convince the employer that he had completed the rounds as required, in order to avoid disciplinary action. In my opinion, a reasonable person would conclude that it was an attempt to deceive in order to avoid the consequences of his actions. However, this deceit was short-lived as once he was faced with the video proof, the grievor admitted that he had missed the rounds.

[45] As I noted at paragraph 13 of *Cooper,* an adjudicator should reduce a disciplinary penalty only if it is clearly unreasonable or wrong. In these circumstances, the grievor was culpable of negligence in the performance of his duties and of being deceitful in order to cover up his negligence. This is tempered by his later acknowledgement and remorse over his wrongdoing. The employer determined that a 30-day suspension without pay was warranted based on the totality of the wrongdoings and based on the need to send a clear message to the grievor and others that negligence and deceit in the performance of their duties as correctional officers will not be tolerated.

[46] While I can empathize with the grievor that he does not want to be identified as the correctional officer who received the 30-day suspension without pay, this is not a

basis for reducing the penalty. Furthermore, Mr. Boileau testified that he did not assign individual penalties based on each allegation but rather an overall penalty for all the allegations of wrongdoing, with the intent of conveying a message to the grievor and to his colleagues. It was evident that in Mr. Boileau's opinion, the grievor did not learn from his previous suspension related to negligence in the performance of duties while conducting rounds.

[47] I agree with the comments of the arbitrator in *Natrel* at paragraph 66. The onus was on the grievor to persuade me that it is just and reasonable for me to substitute a lesser penalty. The grievor's negligence in this case goes directly to the heart of the employer's mandate. The employer had a legitimate business and public policy interest in imposing a penalty sufficient to send a clear message that the grievor must conduct himself consistent with the rules and regulations of the Correctional Service Canada and the institution to ensure the safety and security of that institution and the inmates in its charge.

[48] The basis of the grievor's argument in favour of reducing the disciplinary penalty imposed was that it was unreasonable for the offence of missing rounds and that he was discriminated against because other correctional officers who had missed rounds did not receive such a strong penalty. According to Brown & Beatty at 7:4414, the principle of equal treatment is applicable to two employees who commit the same offence and are alike in all relevant aspects. The grievor has not provided me with any evidence of another employee in the exact situation as his who had received a lesser penalty. An allegation of discrimination must fail if it is found that the penalty imposed on one person is based on materially different facts from another case.

[49] Given that the employer has proved that the grievor is culpable, of the offences for which he was disciplined, and giving full consideration to the mitigating factors that he outlined, a lesser penalty might have been sufficient to drive home the message. However, as stated in *Cooper*, an adjudicator should not intervene just because he or she feels that a slightly less severe penalty might have been sufficient. In these circumstances, and given the employer's legitimate concern that a strong message be sent in order to protect the institution and the inmates in its charge, I do not consider the penalty imposed unreasonable.

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

(The Order appears on the next page)

V. Order

[51] The grievance is dismissed.

September 24, 2014.

Margaret T.A. Shannon,
adjudicator