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Files: 566-02-8094, 8095
and 8575

Citation: 2015 PSLREB 16

Public Service Labour Relations Act



Before an adjudicator

BETWEEN

PETER PETROVIC

Grievor

and

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

Respondent

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

In the matter of individual grievances referred to adjudication

REASONS FOR DECISION

Before: Steven B. Katkin, adjudicator

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

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Abbotsford, British Columbia,
November 5 to 8, 2013.

I. Individual grievances referred to adjudication

[1] Peter Petrovic (“the grievor”) was at all material times employed by the Correctional Service of Canada (“the employer” or CSC) as a correctional officer, classified at the CX-02 group and level, at the Kent Institution (“the institution”) in Abbotsford, British Columbia.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the Board”) to replace the Public Service Labour Relations Board (“PSLRB”) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) as that Act read immediately before that day.

[3] On November 1, 2012, the grievor was placed on indefinite suspension without pay pending a disciplinary investigation for having accessed the employer’s Offender Management System (OMS) without authorization and for sharing the information with other individuals. On November 10, 2012, the grievor filed two grievances against the suspension, which were referred to adjudication under paragraph 209(1)(b) of the *PSLRA*.

[4] In one of the grievances (PSLREB File No. 566-02-8094), the grievor alleged that the suspension constituted discrimination on the basis of family status under the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6; *CHRA*). On February 4, 2013, the grievor provided notice to the Canadian Human Rights Commission (CHRC) pursuant to section 210 of the *PSLRA*. By letter dated February 19, 2013, the CHRC informed the former Board that it did not intend on making submissions in this matter.

[5] The employer raised an objection that the grievance challenging the suspension without pay could not be referred to adjudication under section 209 of the *PSLRA* as it was an administrative measure and was not disciplinary in nature.

[6] The second grievance (PSLREB File No. 566-02-8095; “the suspension grievance”) alleged that the grievor’s suspension was unwarranted and excessive. As corrective measures, both of these grievances requested the cancellation of the suspension, compensation for missed salary and missed overtime opportunities, premiums for work on statutory holidays, shift differentials, week-end premiums, interest on amounts owing, and the adjustment of the grievor’s pension.

[7] On March 1, 2013, the grievor was demoted to a CX-01 position for a period of 24 months. He filed a grievance against his demotion on March 24, 2013 (PSLREB File No. 566-02-8575). The corrective measures requested were the same as for the first two grievances.

[8] The applicable collective agreement is that concluded between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) (“the union”) having an expiry date of May 31, 2010 (“the collective agreement”).

[9] The former Board consolidated these three grievances for the purposes of the hearing. During the course of the hearing, the grievor’s representative advised that the union was withdrawing the grievance alleging discrimination under the *CHRA* (PSLREB File No. 566-02-8094) and confirmed this by letter to the former Board’s registry following the hearing.

[10] The employer agreed that the grievor was neither investigated nor disciplined for any actions before 2012.

II. Summary of the evidence

[11] Eight witnesses testified during the hearing. The employer’s witnesses were Shawn Huish, deputy warden; Mark Langer, labour relations advisor; Mark Noon-Ward, deputy warden; and Bill Thompson, warden, all of whom were employed at the institution at the relevant time. The following individuals testified on behalf of the grievor: the grievor himself; John Randle, union local president; Rob Cater, correctional manager at the institution and the grievor’s supervisor; and Darrel McKamey, CX-02 and shop steward at the institution.

[12] The disciplinary letter issued to the grievor on March 1, 2013, reads in part as follows:

...

You failed to protect the personal information of inmates in the performance of your duties and misused this information. Furthermore, you disclosed some of this information without inmate consent. . . In some cases you accessed OMS and RADAR files of inmates incarcerated in other institutions and other Regions.

...

During the disciplinary investigation and the disciplinary hearing, you readily admitted to accessing inmate OMS and RADAR information without authorization, and with sharing information regarding an inmate's birthday with your [family member]. During the disciplinary investigation, you admitted to sharing information from your [family member's] OMS file with [family member], and sharing information on a Community Assessment done on [another family member] with [that member].

A. For the employer

1. Testimony of Mr. Huish

[13] Mr. Huish was the deputy warden at the institution beginning in December 2010 and acting warden from mid-September to November 26, 2012. In mid-October 2012, he was contacted by the warden of an institution in eastern Canada, where the grievor's family member was incarcerated. The warden informed Mr. Huish that it had come to his attention that a family member of the grievor's had received certain information from the grievor and that the grievor had accessed the files of other offenders. Mr. Huish stated that while deputy warden, he had been unaware that the grievor's family member was an inmate. Mr. Huish briefed Mr. Langer and regional headquarters (RHQ) concerning this information.

[14] Mr. Huish requested the CSC's national headquarters (NHQ) provide an activity record of the number of times the grievor had accessed the CSC's OMS from January 1 to October 15, 2012 (Exhibit E-1, Tab 5). Mr. Huish explained that the OMS is the employer's main database, which contains information about offenders. Each time the OMS is accessed, an electronic record is created. Mr. Huish said that it took about one week to receive the reports, which were in different formats.

[15] The reports showed that the grievor had accessed the OMS far more often than would have been expected. Mr. Huish said that part of a CX-02's job is case work, which includes looking up offender files. The usual caseload is about 12 to 15 offenders in the institution. The grievor worked in the institution's Main Communications and Control Post (MCCP). Mr. Huish stated that it would not be unusual for a CX-02 in the MCCP to look up more offender files than a CX-02 working in other units as those in the MCCP would also look up files of inmates transferring in and out of the institution.

[16] Mr. Huish said that the reports showed that the grievor's activity record was greater than would have been required for someone working in the MCCP. He looked up inmates who were not or had never been at the institution, were in other regions, or were at the institution where his family member was incarcerated. It was clear that the grievor went far beyond the scope of what he needed to know to perform his duties. Mr. Huish said that if a correctional officer has no need to know as part of the job, he or she is not to look up an offender's file.

[17] Mr. Huish said that a correctional officer obtains an OMS account through a coordinator, who introduces the officer to the OMS. The correctional officer signs a declaration, and each time the OMS is accessed, a warning appears on the screen, reminding the officer of the applicable rules. Mr. Huish explained that another system, called RADAR (Reports of Automated Data Applied to Reintegration), is a subset of the OMS. While both systems are accessed separately, the same warning appears on the screen for both. Mr. Huish stressed that significant personal information is contained in the OMS and that accessing files outside of the institution or of family members is against CSC rules.

[18] Mr. Huish received a staff audit report dated October 18, 2012, of offender files accessed by the grievor. The report contained some names of high-profile inmates with ties to motorcycle and street gangs. Mr. Huish received a second report prepared by the CSC's NHQ, which canvassed all national regions, namely, Pacific, Prairie, Quebec and Atlantic, and that presented a different breakdown of the information. As this report contained names that were duplicated, it was transferred to a spreadsheet, which eliminated the duplications.

[19] On November 1, 2012, Mr. Huish issued the grievor a notice of disciplinary investigation and a letter of indefinite suspension without pay pending the completion

of the disciplinary investigation. Mr. Huish said that at that point, the employer had serious concerns about the grievor and that he posed a risk to staff, inmates and the employer's reputation.

[20] In terms of risk to staff, Mr. Huish said that the employer considered the scope of the grievor's access to the OMS in other regions and that he had accessed information about inmates who had links to gangs. Given whom the grievor was looking up, management could not have known at that time whether he was a plant of organized crime elements, which might have put the institution's staff in jeopardy.

[21] With respect to the risk to inmates, as the grievor had shared OMS information with his incarcerated family member, management was concerned that he might have done the same for other inmates. The OMS contains sensitive information about inmates, such as the offences they committed and their history and gang affiliations. If the grievor was sharing information with his relative about inmates on his range, those other inmates could have been in jeopardy.

[22] Concerning the employer's reputation, Mr. Huish stated that there was a risk that the media and public would learn of a CSC employee having accessed information about almost 1000 inmates, which was a significant breach of privacy.

[23] Mr. Huish referred to the "Global Agreement" between the employer and the union, the provisions of which, as stated in its preamble, "... are intended to clarify the application of certain provisions of the Correctional Officers (CX) Collective Agreement." Section III-C of the Global Agreement deals with a suspension during an investigation, paragraphs 2 and 3 of which provide as follows:

2. However in circumstances where local management is satisfied that the continued presence of an employee presents a serious or immediate risk to staff inmates [sic], the public, or the reputation of CSC, the employee can be suspended without pay until the conclusion of the investigation and a decision has been rendered on the status of the employee.

3. In such case as identified in 2) above, local management shall review every three (3) weeks the status of the investigation and consider the possibility of reinstatement within a reasonable period of time provided there is no longer a serious or immediate risk. Every three (3) weeks the local management will inform the employee in writing of the decision with the applicable reasons. The reasons must be

sufficient enough to allow the employee to understand the rationale for the decision.

[24] Mr. Huish said that the document used by CSC management to set out the criteria justifying a suspension without pay based on an assessment of the risk to the institution's reputation, its staff, its inmates or the public is known as the "*Larson* criteria," the basis of which is found in the Public Service Staff Relations Board's decision in *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9. Mr. Langer prepared the initial *Larson* criteria assessment document, dated October 31, 2012.

[25] Concerning the information the grievor disclosed to his relative, Mr. Huish stated that the information provided to him during a phone call from the warden at the institution where the grievor's relative was an inmate was that the inmate had applied for a private family visit and that a community assessment report had been done. When a parole officer at the inmate's institution shared information about the assessment with him, he told the parole officer that he was already aware of the report's contents, as he had been informed by a family member in the CSC. The parole officer had prepared an observation report that Mr. Huish had seen.

[26] On November 5, 2012, Mr. Huish issued a convening order for a disciplinary investigation to be completed by January 3, 2013.

[27] On November 22, 2012, Mr. Huish issued the grievor a three-week *Larson* criteria review, which maintained the suspension without pay. In support, Mr. Huish said that he considered that the grievor was still a risk; Mr. Huish did not yet have a finalized report, and he believed that there were too many unanswered questions concerning the risk to staff and inmates.

[28] Between November 22 and November 26, 2012, the day on which Mr. Thompson became the institution's warden, Mr. Huish said he spent time with Mr. Thompson and briefed him on the issue of the grievor. Mr. Huish had no further involvement in the matter.

[29] In cross-examination, Mr. Huish said that the documents he consulted to impose the suspension without pay were the two files from the NHQ and the spreadsheet report prepared to make the information more manageable. He said that the grievor had consulted the files of 993 inmates. Asked whether the OMS distinguishes between

hits, screens or images, Mr. Huish replied that there were a number of screens on each inmate. When it was put to him that the staff audit report contained only 259 screens, Mr. Huish disagreed. Mr. Huish reiterated that he relied on the verbal report of the warden of the institution where the grievor's relative was incarcerated, as the parole officer's observation report had not been translated.

[30] Mr. Huish said that while the investigation was ongoing, the investigators briefed him on or about November 7, 2012. They did not believe that the grievor had criminal intent, was engaging in criminal activity or was selling information. They found him very naïve.

[31] Mr. Huish said that the RHQ had been asked to make a link analysis of common threads concerning organized crime or other criminal elements based on the names of inmates whose electronic files the grievor had most often accessed. No such links were found, and Mr. Huish was provided with that information several days after the November 7, 2012, briefing.

[32] When referred to an email dated November 2, 2012, from the employer's Prairie Region concerning the staff audit report and stating that the grievor did not pose a threat to staff, offenders or institutional security, Mr. Huish said that he had been made aware of this information. Concerning the Atlantic Region, it communicated that no links between the grievor and organized crime were found.

[33] Mr. Huish said that the grievor's emails for the previous six months were reviewed but that they did not disclose any sharing of information with inmates.

[34] Mr. Huish stated that at the relevant time, there were between 300 and 400 inmates at the institution. He said that most CSC personnel had access to the OMS and that such access could be suspended. When asked which positions at the institution had no contact with inmates, Mr. Huish said that most personnel positions do, except file clerks, correctional officers working in towers or mobile patrols around the institution's perimeter, and those working at the main entrance or the MCCP. He added that most positions in the RHQ do not have contact with inmates, including those in clerical positions and correctional officers on assignment at the RHQ or at the regional supply depot.

[35] When asked about the risk to the employer's reputation and whether the grievor's actions had been reported in the media, Mr. Huish said that he did not know and that nothing of that nature had been brought to his attention.

[36] Mr. Huish stated that he did not discuss the grievor's suspension without pay with his supervisor and that he did not look at the grievor's performance evaluation reports.

[37] In re-examination, when asked whether those occupying positions without inmate contact would require access to the OMS, Mr. Huish replied that some would and that others would not. He said that he considered whether the grievor could safely be put into such a position.

[38] When asked why he maintained the unpaid suspension on November 22, 2012, Mr. Huish stated that at that time, the information known to the employer was that the grievor had displayed poor judgment, was naïve and had disregarded privacy rules. He knew that the grievor had no criminal intent and that he had not engaged in criminal activity. While he knew what the grievor was not doing, Mr. Huish still did not know why he had accessed the inmate files, what he was doing with the information he had accessed and whether he was using the information for personal gain, whether financial or not. As of November 22, Mr. Huish could not trust the grievor. He was satisfied that there was no appropriate position at the institution in which to reinstate the grievor, as he needed more information.

2. Testimony of Mr. Langer

[39] Mr. Langer has been a labour relations advisor at the institution since 2003. He attended the grievor's disciplinary hearing held on January 8, 2013, at which his role was to record the proceedings and subsequently have a transcript prepared. He stated that at that time, the maximum pay rate for a CX-02 was \$70 131 and that it was \$66 088 for a CX-01.

[40] In cross-examination, Mr. Langer stated that CX-02s assigned to the MCCP work more overtime than the average correctional officer.

[41] When asked whether he was aware of correctional officers being assigned to positions in other areas, he replied there were some possibly in the RHQ and some in other institutions but rarely in other departments of the same institution. He added

that on occasion, correctional officers from the institution would be assigned to alternate duties, which included clerical duties.

[42] Concerning correctional officers engaged in inappropriate relationships with inmates, Mr. Langer said that in one case that occurred before his arrival, the individual was dismissed, and in a subsequent case, the individual was reassigned, but he could not recall to which duties.

[43] In a case of excessive use of force, the officer was assigned to a position with no contact with inmates.

[44] Concerning administrative duties, Mr. Langer said that it would depend on the officer's ability to perform such duties and whether that person could have access to confidential information.

3. Testimony of Mr. Noon-Ward

[45] Mr. Noon-Ward was both deputy warden and acting warden at the institution during the period in question. He was briefed on several labour relations issues at the institution, including that of the grievor.

[46] On December 13, 2012, Mr. Noon-Ward issued a *Larson* criteria letter to the grievor, maintaining the suspension without pay. He justified this on the basis of the risk to the institution, to the grievor and to inmates. At that point, the investigation had not been concluded, and the disciplinary hearing had not taken place. While there had been a finding that the grievor had no criminal intent, management did not then know of the depth or extent of information sharing by the grievor or why he had accessed the files.

[47] Mr. Noon-Ward had conversations with the grievor before the disciplinary hearing to express management's concerns. During the hearing, the grievor realized what he had done was wrong and admitted to his actions. However, he did not understand the seriousness of his actions or the potential consequences, which included potential legal action against the CSC for breach of privacy, the possibility of retaliation against the grievor, his relative or his family if information was relayed to inmates, and potential embarrassment to the CSC if the information became public.

[48] On January 18, 2013, Mr. Noon-Ward issued an email cancelling the grievor's access to the OMS and RADAR, as management was considering bringing him back to work from his administrative suspension. Since the most recent *Larson* letter, the investigation had been completed, and the determination had been made that the grievor had no malicious or criminal intent. While the risk to the institution and the CSC was diminished, the grievor's actions were wrong and violated CSC policy and privacy laws. There remained an issue of trust, as neither Mr. Noon-Ward nor Mr. Thompson felt that the grievor would not use the OMS inappropriately. While in their view, the grievor did still not understand the seriousness of his actions, at the disciplinary hearing, he admitted he was wrong, and his actions were not done for monetary gain. Management felt the grievor was a good officer, redeemable and manageable, within restraints.

[49] Mr. Noon-Ward said that the grievor's demotion for a period of 24 months was decided upon to give the grievor time to digest what he had done and to rebuild trust with management. The disciplinary measure worked out to six or seven weeks of monetary penalty, which was less financial pressure than a financial penalty or suspension. Management felt the grievor would not have learned from either of those penalties. The grievor's employment was not terminated because his managers supported him.

[50] In cross-examination, Mr. Noon-Ward said that he and Mr. Thompson were briefed by the investigators in December 2012. They were informed that the grievor had not shared actual files with criminal elements and that the investigators felt the grievor had no criminal intent and had not accessed the files for monetary gain. The investigation disclosed that while a number of files accessed by the grievor were work-related, there were a number of other files accessed of which the grievor had no need to know.

[51] When asked whether a correctional officer would be aware of a requirement to notify the privacy commissioner of a breach of privacy, Mr. Noon-Ward replied that correctional officers do not tend to get into that level of detail. If an officer breaches security, he or she is supposed to inform his or her fellow officers.

[52] Mr. Noon-Ward was referred to emails dated January 18, 2013, which he issued to correctional managers at the institution, directing that the grievor was not to work CX-02 posts or have access to the OMS, and was asked whether the grievor worked

CX-02 posts after the email. Mr. Noon-Ward said that it was possible, as not all correctional managers were aware of the email, and in the case of acting correctional managers, he did not share details of the grievor's case with them. When it was ascertained that the grievor was working in a CX-02 post, Mr. Noon-Ward had the situation corrected. Mr. Noon-Ward believed that the inmates concerned were not told that their privacy had been breached.

4. Testimony of Mr. Thompson

[53] Upon assuming the warden position at the institution, Mr. Huish briefed Mr. Thompson on several labour relations issues, one of which was the grievor's case. While Warden Thompson was on leave December 7 to 14, 2012, Mr. Noon-Ward acted for him.

[54] In a letter to the grievor dated January 2, 2013, Warden Thompson enclosed a vetted copy of the disciplinary investigation report, informed him that the disciplinary hearing would be held on January 8, 2013, and maintained his suspension without pay under the *Larson* criteria. Warden Thompson maintained the suspension because he had not yet determined whether it was safe to have the grievor back at work because of the allegations against him and determined he could not work in another position in the interim. He felt it important to meet with the grievor as he had adopted the investigation report and wanted to determine whether the grievor was redeemable. Warden Thompson already knew that the grievor had admitted to the allegations and that he had had no criminal intent. He issued another *Larson* letter, dated January 3, 2013.

[55] Warden Thompson said he felt that the grievor did not have a good understanding of his acts. He found him naïve and stated so during the disciplinary hearing. Although the grievor understood his actions were wrong, he did not understand the seriousness of having accessed the files.

[56] Warden Thompson stated that the disciplinary hearing of January 8, 2013, was very important to him because he had not yet come to a conclusion concerning a disciplinary measure. Following the hearing, he consulted several individuals within the employer's organization. As he felt that the grievor was redeemable and that the bond of trust with him had not been broken, he reinstated him at the CX-02 level

on January 18, 2013, on restricted duties, until he made a decision about the disciplinary measure.

[57] In a letter to the grievor dated March 1, 2013, Warden Thompson imposed on him a 24-month demotion to CX-01. He decided on that measure because he wanted the grievor to understand what he had done before he returned to a CX-02 position. He did not consider a suspension because it represented a monetary loss, and the grievor would not have learned from that. The demotion would give the grievor the opportunity to be mentored and to see what other CX-02s in different positions were doing.

[58] Warden Thompson said he considered a one-year demotion but did not think that was long enough for mentoring the grievor. He stated that he did not think in terms of months but only of yearly increments. When asked why, Warden Thompson replied that he could not say.

[59] Warden Thompson stated that the grievor's actions were in contravention of section 15 and paragraphs 18(a), (b) and (c) of the CSC's "*Commissioner's Directive CD 060 - Code of Discipline*" ("the *Code of Discipline*") The mitigating factors he considered were the grievor's eight years of service with good performance evaluation reports and no previous discipline.

[60] In cross-examination, Warden Thompson said that when Mr. Huish briefed him, he was aware of the RHQ reports of its analyses of threats to staff, offenders or the public and of inmate-to-inmate violence. He was also aware that the investigators had met with the Royal Canadian Mounted Police (RCMP) investigators, who said that they had not found any indication of breach of trust by the grievor, as defined in the *Criminal Code* (R.S.C. 1985, c. C-46; "*the Criminal Code*"). Warden Thompson was briefed by the investigators on or about November 27, 2012, at which time they had interviewed the grievor once. They advised him that the grievor had some curiosity in accessing the inmate files but that they had not discerned any criminal intent at that point.

[61] When asked how the grievor's mentoring would occur during his demotion, Warden Thompson replied that the grievor's supervisor would be the best placed to answer. It was not his role to set standards or objectives for the supervisor.

[62] When asked about the grievor's performance between January 18 and March 1, 2013, Warden Thompson said it was unremarkable in that he reported for work. He was informed of the grievor's attitude by Mr. Langer.

[63] Warden Thompson stated that to his knowledge, there had been no mention in the media about the grievor's activities.

[64] Warden Thompson acknowledged that the investigation report indicated that the grievor had used the OMS to give his relative information in April 2012.

[65] When asked if the sharing of the community assessment report of the grievor's other relative was raised at the disciplinary hearing, Warden Thompson could not specifically recall but said that the sharing of information was referred to. He acknowledged that the investigation report did not appear to contain a finding concerning the sharing of that report.

[66] In re-examination, Warden Thompson said he likely saw the RHQ analysis reports when he reviewed the draft investigation report on November 27 or 28, 2012. He was then referred to the report of threats to staff, offenders or the public, which found no indication of any such threat, and was asked why he did not bring the grievor back to work at that time. He said that he was not convinced that there was no safety issue, and he had not yet interviewed the grievor. He believed more analysis was required as the grievor had accessed the files of high-profile inmates, and Warden Thompson did not know what that meant.

[67] Warden Thompson was referred to an email from Mr. Langer to NHQ dated November 28, 2012, to arrange a teleconference to discuss whether the grievor's suspension should continue. He said that he was receiving conflicting advice and wanted to interview the grievor before making a decision.

[68] Warden Thompson said that the grievor's attitude during January to March 2013 played a role in his decision to demote the grievor rather than terminate his employment.

B. For the union**1. Testimony of the grievor**

[69] The grievor has been employed by the CSC since January 31, 2004. He began as a CX-01 at Matsqui Institution. In January 2008, he arrived at the institution as a substantive CX-02. He worked the courtyard and living units until July 2010, when he was temporarily posted to the MCCP for three to four months, after which he was reassigned to the courtyard for six months. He was then assigned to the MCCP until the date of his suspension.

[70] On November 1, 2012, the grievor was convened to a meeting with Mr. Huish that a union representative and a correctional manager also attended. He was informed that he was suspended without pay for misusing the OMS and that he had put the safety of the staff at risk. Mr. Huish did not ask him for an explanation about his OMS access during the meeting. He was asked if he had issues or fears about his or his relative's safety. The grievor did not understand why his safety was mentioned and thought it a misunderstanding. He said that he and his wife had last visited his relative on the weekend of October 26 and 27, 2012.

[71] The grievor said that the investigators interviewed him twice, first on November 8, 2012. They had a list of inmates' files he had accessed. The grievor said that initially he did not recognize all the names on the list but that later he pointed out that approximately 15 names were interregionals i.e. inmates transferred from one region to another. He said that the list contained the names of 34 inmates whose files he had accessed more than 10 times. Of those, 14 were on his caseload at the institution, 15 resided in units he had worked in, 3 were from a 96-man unit, and 2 had been paroled, 1 of whom he had supervised while working at Matsqui Institution. He admitted to the investigators that he had accessed some files out of curiosity.

[72] The grievor said that he disagreed with Mr. Huish's assertion that he had shared the community assessment for the purposes of a private family visit with his relative. The grievor said that he had completed the application for the visit and that the assessment was for his relative's post-release, as he had been supported for release in January 2013. His family member was in a medium-security institution and was being supported for transfer to a minimum-security institution. The grievor said the community assessment was done first and there was concern with how the interview

was recorded and with a possible negative effect it could have on their incarcerated relative.

[73] When the grievor was subsequently interviewed by a parole officer for an assessment, he mentioned these concerns, and the parole officer noted it on the file. The grievor admitted to the investigators that he had accessed his relative's file, on and off, to see how he was doing. The grievor was aware his relative had told the parole officer in his institution that the grievor had seen the report.

[74] The grievor stated that when he worked from January 18 to March 1, 2013, he was paid at the CX-02 rate. In the third week following his return to work, he was assigned to the MCCP.

[75] The grievor said that working at the MCCP required that he access files for inmate moves, such as cell assignments, transfers in and out of the institution, and temporary medical absences.

[76] Concerning his monetary loss, the grievor said that while working at the MCCP, he worked 2 to 3 overtime shifts per month, which amounted to \$4000 to \$5000 annually in shift differentials, in addition to his CX-02 salary. Since his demotion to CX-01, he had worked one or two overtime shifts. As a CX-01, it was more likely that he would be assigned night shifts for overtime, for which he received a shift differential.

[77] When asked to comment on the evidence of Mr. Noon-Ward and Mr. Thompson that he did not understand the seriousness of his actions, the grievor said that he had been at home for two months and that he took the matter personally. He had difficulty understanding their view of the privacy of inmates.

[78] In cross-examination, the grievor stated that as a CX-01, he was more likely to obtain night shifts for overtime assignments than he would as a CX-02.

2. Testimony of Mr. Randle

[79] Mr. Randle said that he and a shop steward met with Mr. Huish, who informed them that the grievor had been suspended without pay for a severe privacy breach. Mr. Huish was concerned for the grievor's safety as "he was afraid that the grievor was selling..." or being blackmailed for information by gang elements. Mr. Huish referred

to the grievor's relative, which was the first time Mr. Randle had learned that the grievor's family member was incarcerated. Mr. Huish asked that Mr. Randle contact the grievor to ensure he was well and to inquire whether he required anything for his safety.

[80] Mr. Randle attended the investigators' interview with the grievor. He said that when completed, both investigators told the grievor that he had a bright career ahead of him.

[81] Mr. Randle stated that he had not received any complaints from union members that the grievor presented a safety risk to them and that he had not received complaints from inmates about retaliation.

[82] Mr. Randle said that as a CX-01, he has access to the OMS because he works with inmates in living units, although he does not have an inmate caseload.

3. Testimony of Mr. Cater

[83] Although he was the grievor's supervisor, Mr. Cater was not aware of the allegations against him in the October-November 2012 period. Only through the grapevine did he learn that the grievor had accessed the OMS files of inmates who were not at the institution.

[84] During the period from October 2012 to January 2013, Mr. Cater was not made aware of threats of retaliation by inmates against the grievor or of threats to the grievor's safety. Furthermore, he was not made aware of any refusal by employees to work with the grievor as a result of the allegations.

[85] Mr. Cater said he was aware that the employer could remove an employee's access to the OMS but said he did not know of any circumstances in which that had occurred.

[86] Mr. Cater stated that he was not asked for his opinion about the grievor's suspension without pay by Mr. Huish, the deputy warden or the warden.

4. Testimony of Mr. McKamey

[87] In November 2012, Mr. McKamey was assigned to the MCCP and was a union shop steward. He and the then-union-local vice-president met with Mr. Huish on

November 9, 2012, who told them about the grievor accessing inmates' files. Mr. McKamey said that Mr. Huish justified continuing the grievor's unpaid suspension because management was not satisfied with the investigators' findings.

[88] Mr. McKamey stated that as a member of the MCCP team, he had no concerns about the grievor returning to work.

III. Summary of the arguments

A. For the employer

1. The suspension grievance

[89] The suspension grievance was referred to adjudication under paragraph 209(1)(b) of the *PSLRA*, namely, for a disciplinary action that resulted in a termination, demotion, suspension or financial penalty.

[90] To take jurisdiction, an adjudicator must be convinced that, on a balance of probabilities, the suspension without pay pending an investigation was disciplinary in nature and was not an administrative decision.

[91] The employer's authority to administratively suspend an employee indefinitely without pay pending an investigation is found in section III-C, paragraphs 2 and 3, of the Global Agreement.

[92] The initial *Larson* criteria assessment document dated October 31, 2012, was prepared by Mr. Langer. Mr. Huish provided reasons for issuing the November 1, 2012, letter imposing the indefinite unpaid suspension, namely, the potential of risk to staff, inmates and the employer's reputation.

[93] In support of maintaining the indefinite unpaid suspension in his November 22, 2012, letter, Mr. Huish said that he considered that the grievor was still a risk, he did not yet have a finalized investigation report and he believed that there were too many unanswered questions concerning the risk to staff and inmates. While he knew what the grievor was not doing, Mr. Huish still did not know why the grievor had accessed the inmate files, what he was doing with the information he had accessed, and whether he was using the information for personal gain, whether financial or not. As of November 22, Mr. Huish could not trust the grievor.

[94] When briefed by the investigators on November 7, 2012, Mr. Huish learned that the investigators had determined that the grievor had no criminal intent and no links to gangs. Mr. Huish still did not know why the grievor had accessed the inmate files, what he was doing with the information he had accessed, and whether he was using the information for personal gain, whether financial or not. The employer submitted that, therefore, it can be reasonably assumed that Mr. Huish did not have sufficient information to rescind the grievor's unpaid suspension.

[95] In a letter dated December 13, 2012, Mr. Noon-Ward maintained the grievor's indefinite unpaid suspension. While there had been a finding that the grievor had no criminal intent, management did not then know of the depth or extent of information sharing by the grievor or why he had accessed the files.

[96] In a letter to the grievor dated January 2, 2013, Warden Thompson enclosed a vetted copy of the disciplinary investigation report, informed him that the disciplinary hearing would be held on January 8, maintained the unpaid suspension because he had not yet determined whether it was safe to have the grievor back at work on account of the allegations against him, and determined the grievor could not work in another position in the interim.

[97] To Warden Thompson, the disciplinary hearing was critical, as he had only the investigation report and had not met with the grievor. He wanted to determine whether the grievor was redeemable. At the hearing, Warden Thompson stated that he understood that the grievor was naïve, and it seemed clearer to him that the grievor's actions were due to curiosity and a lack of judgment.

[98] Following consultations, Warden Thompson brought the grievor back to work under certain restrictions, pending his decision. The employer submitted that the evidence disclosed no trace of intent to discipline the grievor during the period of the investigation.

[99] In support of its submissions, the employer referred to *King v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 45, and *Cassin v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 37.

2. The demotion grievance

[100] Concerning disciplinary sanctions, an adjudicator must determine whether misconduct occurred; if so, the adjudicator must ask whether the misconduct warranted discipline, and if so, was the disciplinary measure imposed reasonable or appropriate in the circumstances. An adjudicator should not substitute his or her own view if it is found that the employer was reasonable.

[101] The employer's authority to impose a disciplinary demotion is set out in paragraph 12(1)(c) of the *Financial Administration Act*, (R.S.C. 1985, c. F-11; *FAA*), which reads as follows:

12. (1) Subject to paragraphs 11.1(1)(f) and (g), every deputy head in the core public administration may, with respect to the portion for which he or she is deputy head,

. . .

(c) establish standards of discipline and set penalties, including termination of employment, suspension, demotion to a position at a lower maximum rate of pay and financial penalties

[102] On the issue of whether misconduct occurred, the employer referred to the disciplinary letter dated March 1, 2013, and submitted that on numerous occasions, the grievor accessed the OMS without authorization and without the need to know. Concerning the sharing of information with his relative, the employer pointed out that this was not disputed, although it was nuanced by the grievor. The fact that the grievor was looking into his relative's file was unacceptable and wrong.

[103] The grievor looking up an inmate's birth date, even if trying to help his relative for the purpose of baking a birthday cake, was clearly wrong and was contrary to the grievor's oath of office and secrecy, which he signed on January 27, 2004. That oath provides in part as follows:

... I will faithfully and honestly fulfill the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment

[104] The employer stated that the grievor's actions contravened section 15 and paragraph 18(a), (b) and (c) of the *Code of Discipline*, which read as follows:

Protection and Sharing of Information

15. Staff shall treat information acquired through their employment in a manner consistent with the Access to Information Act, the Privacy Act, the Policy on Government Security, and the Oath of Secrecy taken by all employees of the Public Service of Canada. They shall ensure that appropriate information is shared in a timely manner with offenders, with other criminal justice agencies and with the public, including victims, as required by legislation and policy.

...

Infractions

18. An employee has committed an infraction, if he/she:

a. fails to properly safeguard all documents, reports, directives, manuals, or other information of the Service;

b. fails to observe the provisions of the Privacy Act and the Access to Information Act;

c. commits a breach or violation of the Policy on Government Security

[105] As to whether the grievor's misconduct warranted discipline, the employer submitted that a reasonable person would respond in the affirmative.

[106] Concerning the appropriateness of the disciplinary measure, Messrs. Noon-Ward and Thompson both said that they went against the NHQ's recommendation to terminate the grievor's employment. They consulted supervisors and management and felt that the grievor was redeemable and still of value to the employer. They concluded that the grievor made mistakes in judgment repeatedly over a lengthy period. Having rejected termination, the only other disciplinary option open to management was suspension or demotion.

[107] Mr. Noon-Ward and Warden Thompson shared the opinion that a suspension would not have had a corrective effect, as it would simply have involved a financial penalty. They believed that a demotion would have allowed the grievor to realize his mistakes and to learn from them, while benefiting from training and mentoring. They also felt that demotion would cause a lesser financial burden to the grievor. According to Mr. Noon-Ward, the difference in CX-02 and CX-01 salaries over two years would be

approximately equivalent to a suspension of six to seven weeks. Concerning overtime opportunities, the employer submitted the evidence was unclear. It submitted that in selecting the disciplinary measure, Mr. Thompson took the mitigating factors into account.

[108] In support of its arguments, the employer cited the following decisions: *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43; *MacArthur v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 90; *Hillis v. Treasury Board (Department of Human Resources Development)*, 2004 PSSRB 151; *Spawn v. Parks Canada Agency*, 2004 PSSRB 25; *Brecht v. Treasury Board (Human Resources Development Canada)*, 2003 PSSRB 36; *McGoldrick v. Treasury Board (Revenue Canada - Customs and Excise)*, PSSRB File No. 166-02-25796 (19941003); and *Gauthier v. Deputy Head (Department of National Defence)*, 2013 PSLRB 94.

B. For the union

[109] The union submitted that both grievances challenged disciplinary measures imposed by the employer. It cited the following decisions: *Basra v. Canada (Attorney General)*, 2010 FCA 24; and *Basra v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 131, and 2012 PSLRB 53.

[110] The union reviewed the chronology of the matters, the more significant of which were the following:

- 1) On September 10, 2012, the parole officer at the institution where the grievor's relative was incarcerated wrote an observation report concerning her discussion of the same date with that relative.
- 2) On October 17, 2012, Mr. Huish requested from the NHQ an activity report on the grievor's access to the OMS from January 1 to October 15, 2012.
- 3) On October 18, 2012, the NHQ's response showed that the grievor had accessed 259 documents, although it is uncertain whether those were files, screens or hits. Mr. Huish stated that 993 inmate files were accessed, although he was unclear as to how he had arrived at that number.

- 4) On the weekend of October 26 and 27, 2012, the grievor had a private family visit with his relative.
- 5) On October 31, 2012, the first RHQ report was issued, and Mr. Langer completed the *Larson* criteria document.
- 6) On November 6, 2012, Mr. Huish issued a convening order for a disciplinary investigation, and the grievor was suspended without pay pending the completion of the investigation.
- 7) Between November 2 and 5, 2012, responses were provided from the employer's regions concerning threat risks from the grievor's access of inmate files. Those reports indicated no evidence of threats.
- 8) On November 6, 2012, as indicated in the investigation report, the investigators met with the CSC's regional administrator of security for the Pacific Region, whose reports on the grievor's access to the OMS and RADAR concluded that there was no threat to staff, offenders or the public as a result of the alleged security breach. That same day, the investigators met with the RCMP investigators, who informed them they had not found any indication of breach of trust by the grievor, as defined by the *Criminal Code*.
- 9) On November 8, 2012, the investigators first interviewed the grievor.
- 10) On November 22, 2012, a *Larson* letter maintaining the grievor's suspension was issued.
- 11) In the period from November 22 to 26, 2012, Mr. Huish briefed Warden Thompson on the grievor.
- 12) On November 27, 2012, the investigators briefed Warden Thompson.
- 13) On November 28, 2012, the investigators conducted a second interview with the grievor.
- 14) On December 13, 2012, and January 2, 3 and 17, 2013, letters were issued maintaining the grievor's suspension.
- 15) On January 8, 2013, the grievor's disciplinary hearing took place.

16) On January 18, 2013, the grievor was returned to work.

17) Effective March 1, 2013, the grievor was demoted.

1. The suspension grievance

[111] The union submitted that Mr. Huish did not consult the grievor's supervisors or his performance reports. He had not previously met with the grievor or questioned him. The union stated that the grounds for maintaining the grievor's unpaid suspension were the same as expressed in the initial letter. There were no updates to the *Larson* criteria, which indicated management's lack of seriousness to find an alternate position for the grievor. The letters never mentioned that no complaints had been filed about the grievor from staff or that risks to inmates had not been identified, although management had evidence to that effect. The union pointed to Mr. Langer's testimony that in similar circumstances, alternate positions had been found for employees.

[112] The union submitted that a suspension without pay is *prima facie* (on its face) disciplinary. While such a suspension may be administered without disciplinary intent, it becomes disciplinary in nature with the passage of time. In support of this argument, the union referred to the following decisions: *Cabiakman v. Industrial Alliance Life Insurance Co.*, 2004 SCC 55; *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127; and *Basra*, 2010 FCA 24.

[113] The union asserted that the Global Agreement did not apply, as there is no issue concerning a violation of the collective agreement. Furthermore, there was no immediate risk when the grievor was suspended without pay.

[114] The union submitted that Warden Thompson's mind was changed by the disciplinary hearing. While he issued a letter on January 17, 2013, maintaining the grievor's suspension, he returned him to work the next day.

[115] The union submitted that the suspension should be declared disciplinary and that the grievor should be reimbursed for all lost wages and benefits, with interest.

2. The demotion grievance

[116] The union submitted that the two main grounds for the disciplinary demotion were the grievor's inappropriate access to inmate files and his sharing of confidential information. The union pointed out that the grievor admitted his actions, was remorseful and apologized.

[117] Concerning the inappropriate access to inmate files, the union stated that while serious, the grievor did not understand the implications of his actions. The employer did not establish the quantity of files he accessed.

[118] As for the grievor's actions reflecting on the employer's reputation, the evidence showed there was no publicity or media report about his actions. Moreover, Mr. Noon-Ward testified that no inmates were notified of the privacy breaches.

[119] While the grievor's statement that he acted out of curiosity was not the best excuse, he was found to have had no malicious or criminal intent.

[120] The union stressed that concerning the sharing of inmate information, Warden Thompson testified that the investigators made no finding about the information the grievor shared with the family member subject to the community assessment.

[121] The union argued that the employer's justification for a 24-month demotion was that the grievor would have time to learn from other CX-02s and would be mentored. However, Warden Thompson testified that the grievor's supervisor would be best placed to answer questions about mentoring and that he did not set standards or objectives for supervisors.

[122] The union further argued that Warden Thompson's testimony was unjustifiable in that in determining the length of the demotion, he considered only increments of one year.

[123] The union submitted that the 24-month demotion represented a financial loss of 6 to 7 weeks of the grievor's pay and lost overtime opportunities, since CX-02s at the MCCP have access to more overtime than other CX-02s or CX-01s. The union argued that while the grievor was deserving of discipline, the demotion of 24-months was excessive in the circumstances and should be reduced. In support of its

arguments, it cited *Naidu v. Canada Customs and Revenue Agency*, 2001 PSSRB 124, and *Foon v. Canada Customs and Revenue Agency*, 2001 PSSRB 126.

C. Employer's reply

[124] In response to the union's argument that the passage of time rendered the grievor's administrative suspension without pay disciplinary in nature, the employer stated that that may occur if the investigation process is drawn out over a lengthy period. In this case, the evidence demonstrated that the employer was gathering information throughout the period of the grievor's suspension.

IV. Reasons

A. The suspension grievance: PSLREB File No. 566-02-8095

[125] The employer objected to my jurisdiction to consider this grievance on the basis that the suspension without pay pending the disciplinary investigation was an administrative measure and was not disciplinary in nature. Consequently, the grievance could not have been referred to adjudication under section 209 of the *PSLRA*.

[126] In dealing with such an objection, the task of an adjudicator was set out as follows at paragraph 53 of *Cassin*:

53 Although an employer might characterize a suspension as administrative, an adjudicator is nonetheless required to look behind such a characterization to examine the circumstances of the employer's intent when it decided to suspend a grievor. This requirement was aptly stated by the adjudicator as follows in King, at paragraph 62

. . .

62. The essential point that I draw from *Frazer* and from the *Basra* decisions is that I am required to examine the specific circumstances of this case for evidence depicting the respondent's intent when it decided to suspend the grievor without pay and thereafter. If I am satisfied that the respondent has proven that, on a balance of probabilities, the intent underlying its "administrative" decision was non-disciplinary at the time of the decision and that it continued to be non-disciplinary during the resulting

suspension, I must decline jurisdiction. Conversely, if the respondent has failed in its burden, then I must find that its decision was disciplinary in its essential character regardless of how the respondent described it and that, as a consequence, I have jurisdiction to consider the grievance under paragraph 209(1)(b) of the Act.

[127] In his submissions, the grievor also relied on *Cabiakman*. In *King*, the adjudicator's analysis of that judgment was as follows:

...

63 The decision in Cabiakman, cited by the grievor, does not dissuade me from that view. The Supreme Court's ruling in Cabiakman concerned an individual contract of employment governed by the Civil Code of Quebec, S.Q. 1991, c. 64. In that context, the Court confronted the question "... as to whether an employer has a unilateral power to suspend the effects of an individual contract of employment for administrative reasons ..." (at paragraph 46). It ruled, in part, as follows:

...

61. The employer may always waive its right to performance of the employee's work, but it cannot avoid its obligation to pay the salary if the employee is available to perform the work but is denied the opportunity to perform it. By choosing not to terminate the contract of employment, with its associated compensation, the employer will, as a rule, still be required to honour its own reciprocal obligations even if it does not require that the employee perform the work.

...

The Court proceeded, as noted by the grievor, to outline exceptional circumstances in which the requirement to continue to pay in accordance with the contract of employment may be disregarded (at paragraph 62).

64 Apart from the clearly different statutory context in which the Supreme Court examined administrative suspensions in Cabiakman, its analysis does not directly consider the circumstances in which an administrative decision becomes disciplinary. It poses a quite different question than the courts answered in Frazee and in the Basra

cases. As such, I believe that Cabiakman can and should be distinguished.

...

[128] I agree with the adjudicator in *King* in that *Cabiakman* is distinguishable from this matter.

[129] The union submitted that the grievor's suspension became disciplinary in nature through the passage of time. I am not persuaded by that argument. The employer acted promptly in establishing and diligently carrying out its investigation. Once it became aware of the allegations against the grievor, the employer acted quickly.

[130] On November 1, 2012, Mr. Huish appointed the investigators, issued a notice to the grievor informing him of the disciplinary investigation and suspended him without pay for an indefinite period, pending the completion of the investigation. He issued a convening order on November 5, 2012, and the investigation began the next day, with the grievor's first interview with the investigators taking place on November 8, 2012.

[131] In a letter to the grievor dated November 22, 2012, Mr. Huish continued the unpaid suspension. He testified that he still considered the grievor a risk, the investigation report had not been finalized, and he did not know why the grievor had accessed inmate files or what he had done with the information or whether his actions were for financial gain.

[132] Mr. Noon-Ward maintained the unpaid suspension in a letter to the grievor dated December 13, 2012. While the text of that letter is identical to that of the November 22 letter, the justification provided by Mr. Noon-Ward in testimony was that the investigation had not been concluded and that management did not know the depth or extent of the information sharing by the grievor or why he accessed the inmate files. Furthermore, the disciplinary hearing had not yet taken place.

[133] In letters dated January 2, 3 and 17, 2013, Warden Thompson continued the grievor's unpaid suspension. He testified that he had not yet determined whether it was safe to have the grievor back at work and that he felt it important to meet with the grievor.

[134] Warden Thompson knew at the time that the grievor had admitted to the allegations and that the investigators had found no criminal intent on his part.

[135] While he was also aware that there was no indication at that time of threats to staff, offenders or the public, Warden Thompson was not convinced there was no safety issue and believed more analysis was required. Moreover, he had not yet interviewed the grievor, which he stated was critical to his decision-making process.

[136] Having interviewed the grievor during the disciplinary hearing of January 8, 2013, and having determined that the bond of trust had not been severed, Warden Thompson returned the grievor to work on restricted duties without access to the OMS and RADAR on January 18, 2013, pending his decision on the disciplinary measure to be imposed.

[137] While, as the union submitted, the different letters maintaining the grievor's unpaid suspension did not explicitly refer to the employer's reasons for continuing the suspension, I found the testimony of the employer's witnesses on that point sincere and convincing.

[138] While certain reasons for the grievor's actions had been eliminated by the investigators, such as his lack of criminal or malicious intent, based on the evidence, there remained sufficient unanswered questions about his actions in the minds of management to justify the continuation of the unpaid suspension until the investigation ended.

[139] In my view, the employer has demonstrated that, on a balance of probabilities, it had no disciplinary intent in suspending the grievor without pay, pending investigation. There was not a scintilla of evidence in the testimonies of Mr. Huish, Mr. Noon-Ward and Warden Thompson to the effect that the employer acted with disciplinary intent.

[140] In the circumstances, the employer's objection to my jurisdiction to consider this grievance on the ground that it does not consist of a disciplinary action within the meaning of paragraph 209(1)(b) of the *PSLRA* is sustained, and the grievance is dismissed for lack of jurisdiction.

B. The demotion grievance: PSLREB File No. 566-02-8575

[141] Warden Thompson imposed a disciplinary penalty of a 24-month demotion on the grievor effective March 1, 2013, to February 28, 2015. In considering this grievance, I must address the following questions: Did the grievor engage in misconduct? If so, did his misconduct warrant a disciplinary penalty? If so, was the disciplinary penalty imposed appropriate in the circumstances?

[142] The grievor acknowledged that his actions were such that he should have been disciplined. In any event, I have no hesitation in finding that the employer established that the grievor engaged in misconduct and that it had grounds for discipline.

[143] The investigation and analysis carried out by the employer concluded that on multiple occasions, the grievor, without proper authorization, accessed files of inmates incarcerated in other institutions and other regions through the OMS and RADAR that were unrelated to his work in the MCCP. In addition, he disclosed an inmate's information to his incarcerated relative and shared information on a community assessment report concerning another relative with that person.

[144] Such conduct is in clear violation of the employer's *Code of Discipline* and the grievor's oath of secrecy. There is no justification whatever for a CSC employee to access the files of inmates other than those related to his or her duties. In its submission, the union acknowledged that the grievor's curiosity was a poor excuse for accessing inmate files without authorization.

[145] I turn now to a determination of the appropriateness of the disciplinary penalty imposed by Warden Thompson.

[146] In the disciplinary letter, Warden Thompson stated that he took into account the following mitigating factors: the grievor's eight years of service, his clean disciplinary record and his positive performance evaluation reports. The letter also stated that Warden Thompson believed that the grievor did not have malicious intent.

[147] During his examination-in-chief, Warden Thompson was asked how he had arrived at a penalty of a 24-month temporary demotion. He replied that he did not believe one year was long enough for the grievor to be mentored. He said that he did not think in terms of months but only in one-year increments and that he could not

explain that reasoning. There is little doubt that Warden Thompson's approach may be portrayed as arbitrary.

[148] A 24-month temporary demotion may at first glance appear to be a severe penalty. However, when viewed through the lens of the difference in salary rates between the CX-02 and CX-01 positions in the applicable collective agreement, and as acknowledged by both the union and employer, the grievor's financial loss over the two-year demotion period was approximately six weeks' pay.

[149] The grievor submitted that as a result of his demotion, he had fewer opportunities to work overtime. The evidence was that as a CX-02 working at the MCCP, the grievor had more opportunities to work overtime than he did as a CX-01.

[150] However, the grievor was unable to provide a precise calculation of monetary loss due to reduced overtime opportunities. Moreover, the grievor did not allege nor argue that the employer had deliberately placed him in a CX-01 position where no overtime was available. Similarly, the grievor did not allege that he should have been placed in a CX-01 position where the duties to be performed were indoors only or that he should not be required to perform duties considered to be less desirable. The only restriction placed on the grievor as a CX-01 was that he was prohibited from accessing the OMS and RADAR. In the circumstances of this matter, I find that I need not consider the overtime factor in determining the appropriateness of the disciplinary penalty.

[151] Both Mr. Noon-Ward and Warden Thompson were of the view that a suspension would not have had a corrective effect, as it would have involved a financial penalty, whereas a demotion would allow the grievor to realize his mistakes.

[152] Nevertheless, had the employer presented the disciplinary penalty as a six-week unpaid suspension, I would have found that a reasonable response, given the seriousness of the grievor's misconduct.

[153] In the circumstances, I decline to intervene, and the grievance will be dismissed.

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

(The Order appears on the next page)

V. Order

[155] In PSLREB File No. 566-02-8094, the grievance was withdrawn, and I order the file closed.

[156] In PSLREB File No. 566-02-8095, the grievance is dismissed for lack of jurisdiction.

[157] In PSLREB File No. 566-02-8575, the grievance is dismissed.

February 3, 2015.

**Steven B. Katkin,
adjudicator**