

**Date:** 20150325

**Files:** 566-02-7436, 7437,  
7989, 8666 and 9588

**Citation:** 2015 PSLREB 30



*Public Service Labour Relations Act*

Before an adjudicator

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BETWEEN

**GARTH KINSEY**

Grievor

and

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

Respondent

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

In the matter of individual grievances referred to adjudication

**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:** Talitha Nabbali, counsel

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Heard at Abbotsford, British Columbia,  
June 10 to 13, 2014  
and in Langley, British Columbia,  
September 9 to 11, 2014.

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

[1] The grievor, Garth Kinsey, alleged that the employer, the Correctional Service of Canada (CSC), disciplined him without just cause by imposing a financial penalty of \$380 on him on February 8, 2012 (the grievance in PSLREB File No. 566-02-7436), that he was also disciplined without just cause on January 30, 2012, for failure to follow an order to fill in leave requests (the grievance in PSLREB File No. 566-02-7437), that he was suspended without pay without just cause for 18 days on November 9, 2012 (the grievance in PSLREB File No. 566-02-7989), that he was placed on the employer's National Attendance Management Program (NAMP) and required to provide a medical certificate for every absence due to illness, in violation of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the bargaining agent") with an expiry date of May 31, 2010 ("the collective agreement") and the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6) (the grievance in PSLREB File No. 566-02-8666), and that he was terminated without cause on December 20, 2013 (the grievance in PSLREB File No. 566-02-9588).

[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 new Board") to replace the former Public Service Labour Relations Board ("the former Board") 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) as that Act read immediately before that day.

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

[3] The grievor, at the time of his termination, was employed by the CSC as a correctional officer 01 (CX-01) assigned to the Main Command and Control Post (MCCP) at the Pacific Institution in Abbotsford, British Columbia. The MCCP is adjacent to the principal entrance of the institution, which are both located in the principal entrance building. The MCCP, among other things, controls access to and egress from

the interior of the institution through the sally port, through which vehicles pass into and out of the institution. The grievor came to this position following a memorandum of agreement (Exhibit 7) between him and the CSC to resolve a series of grievances he filed related to disciplinary action taken against him by the employer while he was a CX-02 at Matsqui Institution (grievances 566-02-7436 and 7437) and allegations of harassment, which the grievor raised against his correctional manager (CM), Andrew Marshall; the warden, Vince Leblanc; and Mr. Busey.

[4] According to the memorandum of agreement, the grievor was to be transferred to Pacific Institution as a CX-01 for a period of 24 months, following which he was to be reappointed to a CX-02 position automatically. The transfer to Pacific Institution was intended to be a fresh start for the grievor, who had had significant difficulties dealing with his CM, Mr. Marshall, and Warden Leblanc at Matsqui Institution in 2012. Mr. Leblanc later became the warden at Pacific Institution and was responsible for terminating the grievor's employment on December 20, 2013.

[5] In the memorandum of agreement (Exhibit 7), the grievor agreed not to commence any further administrative action in relation to "this matter or any matter connected to or related in any way to this matter, including a grievance before the PSLRB" (at para 11). The memorandum of agreement was executed by the parties in May 2012. The references to adjudication for files 566-02-7436 and 7437 were filed with the former Board on August 8, 2012. The memorandum of agreement does not stipulate that any existing grievances would be withdrawn by the grievor and the employer raised no objection to their referral to adjudication on the basis of the memorandum of agreement.

[6] The grievor is obese and suffers from uncontrolled sleep apnea, insomnia, high blood pressure, anxiety and depression and had suffered a work-related knee injury, for which he was awaiting a second surgery, all of which required him to be accommodated in a non-response post at Pacific Institution. Such a position was found, and the grievor commenced employment at Pacific Institution on June 6, 2012. Warden Terry Hackett and CM Ian Clark met with the grievor on his arrival at Pacific Institution and described the move to Pacific Institution as a new start for the grievor. They were aware of the difficulties he had had at Matsqui Institution and of his disciplinary record and that the grievor was moved to Pacific Institution as a result of an agreement with the CSC.

[7] However, according to Mr. Hackett and Mr. Clark, the same behaviours that gave rise to the grievor's transfer to Pacific Institution continued after his arrival there. Prior to his transfer to Pacific Institution, the grievor had been disciplined by Warden Leblanc for requesting leave to which he was not entitled, making obscene gestures at the security camera in the principal entrances at Matsqui Institution and bringing unauthorized items into the workplace. Warden Leblanc had assessed a 15-day suspension without pay and a 24-month demotion from CX-02 to CX-01 as penalties. The suspension was later reversed under the memorandum of agreement. The disciplinary letter (Exhibit 6) was not provided to the grievor and actually postdates the memorandum of agreement that resulted in the grievor's transfer to Pacific Institution. The disciplinary letter was drafted by Meena Chima-Brar, a CSC labour relations advisor, who was not part of the negotiation of the memorandum of agreement and was not aware of its contents.

[8] CM Marshall had previously assessed a \$380 financial penalty against the grievor for violating Standards 1 and 3 of the employer's Code of Discipline for not responsibly fulfilling his duties by failing to record leave (disciplinary letter, Exhibit 4) and for failing to follow a direct order to fill in leave requests. Neither Mr. Leblanc nor Mr. Marshall testified concerning these or any other incidents. Representatives of the Regional Labour Relations Team present at the disciplinary hearing provided evidence of their involvement in the disciplinary hearing process, but no direct evidence relevant to the actual incidents grieved was presented by the employer.

[9] Mr. Clark was assigned to be the grievor's CM at Pacific Institution. Mr. Clark was aware of the grievor's disciplinary difficulties at Matsqui Institution; he and Mr. Marshall were friends. Mr. Clark documented every concern he had with the grievor from the time of his arrival at Pacific Institution and forwarded notice of these up his chain of command and to labour relations for their information, comment and direction. He tracked the grievor's comings and goings via Pacific Institution's security cameras and recorded times when the grievor was late or left early or was not at his post as assigned. Mr. Clark also kept emails he received from other CMs reporting on the grievor's attendance.

[10] Mr. Clark had repeated concerns with the grievor's dress and deportment during his time at Pacific Institution. Despite being directed to wear CX-01 rank bars and having been provided with a pair of used bars on two occasions, the grievor was seen

on several occasions without them while he worked at Pacific Institution. The grievor was also seen in the workplace with his shirt untucked, his pant leg in his boot and, on at least one occasion, his fly down. All of these dress and deportment issues were in violation of the Code of Discipline and the employer's dress code and were addressed with the grievor through the disciplinary process outlined in paragraph 13 below.

[11] The next issue Mr. Clark encountered with the grievor was related to improper storage of his pepper spray ("OC spray"). OC spray at Pacific Institution was to be stored in the officer's mailbox in the officers' locker room on the second floor of the principal entrance building. It was discovered following a regular audit of OC spray storage that the grievor had not stored his as required. When Mr. Clark asked the grievor, he was told that it was stored in the grievor's personal locker in the same room. The locker was secured by a cheap lock, which the grievor advised Mr. Clark that he was welcome to cut off in order to verify that the OC spray was in the locker.

[12] Mr. Clark consulted his labour relations advisor concerning the dress and deportment and OC spray policy contraventions. She relayed his concerns to the National Headquarters Labour Relations office at CSC headquarters in Ottawa, which advised that a disciplinary hearing should be convened. The disciplinary hearing was held on August 27, 2012, with Mr. Hackett presiding.

[13] The hearing was to deal with three issues: the grievor not wearing rank bars, contrary to "Guideline 351-1" (Exhibit 10), leaving early and improperly storing OC spray. The grievor admitted all the allegations but had an explanation for each. He did not wear CX-01 bars as he had none and had no points with which to obtain any. Rather than wear no bars at all, he wore his CX-02 bars. As to the issue of OC spray storage, he had stored it consistent with the policy at Matsqui Institution. He did not read the policy related to the proper storage of OC spray provided to him to sign by the security management officer (SMO) at Pacific Institution as at that time, the officer had been annoyed that the grievor was there. The reason the grievor provided for leaving early, without advising Mr. Clark, was that he was ill and that he had reported this to CM Photinopoulos, who was assigned to the CM desk that day.

[14] In the recording of the hearing (Exhibit 67(1)), in responding to the grievor's explanations, Warden Hackett reiterated his comments from the meeting on the grievor's arrival that in order for the grievor to be a success at Pacific Institution, he

had to overcome the problems from Matsqui Institution. In order to do so, the grievor had to be “CX-01 of the year.”

[15] As a result, an 18-day suspension without pay was imposed. In determining the penalty, the Warden considered that the grievor had been a correctional officer for 12 years, and he had consulted with labour relations on the mitigating factors. He also considered the grievor’s continued unwillingness or inability to follow CSC policy and procedures. This discipline is the subject of grievance 566-02-7989.

[16] Following the 18-day suspension without pay, Mr. Clark continued to receive emails from other CMs expressing their concerns about the grievor’s tardiness (Exhibits 39, 40, 41, 43, 44 and 45). Mr. Clark recorded the grievor’s arrival times, noting all late arrivals, no matter how little. Mr. Clark continued to have concerns with the grievor’s dress and deportment. He became aware that the grievor had left training early without approval and that he did not return to his post on April 30, 2013. This, in Mr. Clark’s opinion, constituted an absence without leave. In addition, the grievor was not regularly attending morning briefings and refused to provide medical certification for his sick leave usage, which resulted in authorized leave without pay.

[17] Another disciplinary hearing was convened in the summer of 2013 to deal with a laundry list of infractions by the grievor, which included filing a request for injury-on-duty leave, identified by Mr. Clark dating from the fall of 2012 (see the convening order, Exhibit 31). Since the previous disciplinary hearing, Mr. Clark had maintained a timeline (Exhibits 37 and 38) listing all the grievor’s alleged infractions that had culminated in the convening order (Exhibit 31) and outlining alleged infractions between October 2012 and July 2013. The hearing was initially scheduled for August 16, 2013, but did not occur until September 26, 2013. This hearing was also recorded (see Exhibits 67(2) and 67(3)).

[18] In October and November 2012, Mr. Clark received three emails from other CMs concerning the grievor’s tardiness (Exhibit 39). Each email indicated that the author had addressed the issue with the grievor, who was always apologetic and explained that he had issues with sleep and his medications. Mr. Clark was aware that the grievor was accommodated in a non-response post and was not to climb stairs. The employer was meeting these needs, which the grievor acknowledged, by assigning him to a static control post with no inmate contact. Offers of further accommodation of a straight day

shift were refused by the grievor. Mr. Clark was concerned that no improvement in attendance was noted (Exhibits 40 to 44), so he referred the grievor to the NAMP.

[19] Warden Barb Van Vugt was made aware of the grievor's disciplinary history upon her arrival at Pacific Institution. The Regional Labour Relations Office and Mr. Clark were concerned that the myriad of allegations against the grievor not fall between the cracks and remain unaddressed with the change of management at Pacific Institution. Ms. Van Vugt ordered the disciplinary hearing to proceed, and in her absence, the acting warden, Morgan Andreassen, presided.

[20] Mr. Andreassen was concerned by the timeliness of many of the allegations and brought this to Ms. Van Vugt's attention. Ms. Van Vugt consulted her labour relations advisor and determined that a lighter penalty was appropriate, given the lack of due process and timeliness. Ms. Van Vugt had intended to impose a suspension without pay in excess of 18 days but settled on a letter of reprimand instead (Exhibit 32). On cross-examination, Ms. Van Vugt was asked on what basis the penalty was assigned and indicated that the penalty was a global penalty for all the offences alleged and that she did not break the penalty down by infraction. When asked which of the allegations was founded, she was not able to recall.

[21] Claude Demers, Assistant Warden, Operations, at Pacific Institution, was responsible for the management of the NAMP when he was acting deputy warden. He was updated by Mr. Clark of his concerns with the grievor's attendance and tardiness.

[22] The grievor disagreed with the referral to the NAMP (see grievance 566-02-8666). He and a bargaining agent representative met with Mr. Demers to discuss this and to request assignment to a different CM. The grievor felt that he was not being provided the new start he was promised. After reviewing the conditions to qualify for placement on the NAMP, Mr. Demers determined that the referral was not warranted and revoked the grievor's NAMP status (see Exhibit 15). He also agreed to an extension of time for the grievor to get medical certificates when required. He did not, however, reassign the grievor to another CM. He also reminded the grievor of his obligations under "Commissioner's Directive 060 (CD 060)," Code of Discipline (see Exhibits 15 and 16).

[23] Mr. Demers had no further contact with the grievor, although he continued to provide advice and guidance to Mr. Clark, who continued to update him and share his concerns about the grievor's behaviour.

[24] In November 2013, Mr. Clark expressed his concerns about the grievor's involvement in an inmate being released from Pacific Institution to attend a medical appointment without a gate pass. The grievor, according to Mr. Clark, failed to ensure that the escort team had proper authorization to remove the inmate from the institution (in accordance with the post standing order; Exhibit 20) and failed to meet dress and deportment standards. Mr. Clark reported to Mr. Demers that when he was speaking to the grievor about the gate pass, he noticed that the grievor had his cell phone with him, which is prohibited by "Commissioner's Directive CD 566-1" (Exhibit 19).

[25] The grievor was suspended with pay pending a disciplinary investigation on November 27, 2013, into these allegations. He was advised by letter on November 29, 2013, that a disciplinary hearing was to be held on December 6, 2013 (Exhibit 22). The suspension with pay was extended until December 20, 2013, when the decision was rendered by Mr. Leblanc, who had become the warden. At the hearing, the grievor raised discrimination issues. He felt harassed and discriminated against by Mr. Clark, unduly scrutinized, and treated differently than other correctional officers. The disciplinary hearing, which was recorded (Exhibit 67(5)), lasted 10 minutes.

[26] According to Lucky Bal, another labour relations advisor from the Pacific Region, Warden Leblanc immediately consulted with National Headquarters Labour Relations and Compensation Branch following the disciplinary meeting. Ms. Bal then drafted the letter of termination (Exhibit 24) based on a review of the grievor's personnel file. On December 6, 2013, Ms. Bal sent an extensive briefing package to National Headquarters Labour Relations, which included Mr. Clark's timeline of the grievor's alleged infractions, a disciplinary summary sheet and many other documents seeking the authority to terminate the grievor's employment (Exhibit 33). The grievor was notified of the decision by letter (Exhibit 34).

[27] Mr. Leblanc did not testify, unlike the other wardens who had imposed discipline on the grievor. He was previously involved with the grievor when he was warden at Matsqui Institution.



[28] The grievor testified that in 2012 and 2013, his sleep apnea was not controlled. He regularly slept through the multiple alarms that he had placed in various locations around his bedroom. By June 2012, he was using five to six alarms a night. The employer and his supervisor, Mr. Clark, were aware of his medical conditions. He had attended at Health Canada for an evaluation, at the employer's request, and accommodation measures had been identified and implemented.

[29] The grievor was deployed to get away from the treatment he received at Matsqui Institution in response to and in settlement of his grievances and harassment complaints against Mr. Marshall, Mr. Leblanc and Mr. Busey. The new start he was promised, however, did not manifest; he was subjected to intensive scrutiny by his CM, Mr. Clark. Requests to be assigned to another CM were refused, without explanation.

[30] When he arrived at Pacific Institution, the grievor was given 3.5 days of on-the-job training concerning his posts. He was not provided a mentor to act as an ongoing resource for the particular workings of that institution as was the practice at Matsqui Institution. He was sent to his post on his arrival without notice to the others with whom he was to work. He was not informed of significant differences between Matsqui Institution and Pacific Institution, including the sign-out process at Pacific Institution, which required a CX to report to the CM's office before leaving shift, and the directive that OC spray was to be stored in the mailboxes at Pacific Institution. At Matsqui Institution, OC spray was stored in each CX's personal locker.

[31] Not being told any different, the grievor continued to follow the directives he was given at Matsqui Institution. Until he was told otherwise by Mr. Clark, the grievor was unaware that practices varied by institution and that he was to store his OC spray in his mailbox and not in his personal locker, as he had secured it. When the grievor picked up his equipment from the SMO, he was met by someone who appeared annoyed to be dealing with him. The equipment was shoved at him. He was told to sign to acknowledge the receipt of the equipment, which included the OC spray, following which the SMO turned his back to him and went about doing something else. No time was spent by the SMO explaining the storage requirements of the OC spray. The SMO did not provide the grievor with a copy of any of the documents he signed that day. The grievor signed them without reading them as he sensed his presence was annoying the SMO. The first time the grievor found out he had a mailbox was at the disciplinary

hearing on August 27, 2012, when Mr. Clark showed the grievor the key on the grievor's key ring.

[32] When he was at Matsqui Institution, the grievor was a CX-02; consequently, he had no CX-01 bars to wear when he arrived at Pacific Institution. Near the end of July, while he was conducting rounds, the grievor was approached by CM Ouellette, who questioned why he was wearing CX-02 bars if he was a CX-01. Following that encounter, the grievor removed all CX-02 bars from his uniform and set about finding CX-01 bars. In the meantime while he looked for CX-01 bars, the grievor went without rank bars on his uniform.

[33] Correctional officers' uniforms, including rank insignia, are provided by the employer to correctional officers on an annual point basis. The grievor had insufficient points to purchase CX-01 bars, so he asked his friends if they had any available for him to use. Mr. Clark gave him a set following the August 27, 2012, disciplinary hearing, which was dirty and in the grievor's opinion required laundering; he lost it. A second set was provided by Mr. Clark following the disciplinary hearing, which the grievor felt was too dirty to immediately put on. He took it home to launder and lost it as well. Following the September 2012 disciplinary hearing, the grievor received a set from a friend, and by the time he was terminated, he had sufficient sets for all of his uniform shirts.

[34] Following the August 27, 2012, disciplinary hearing, the grievor felt unwell. He was dizzy, seeing spots and suffering from an increase in his blood pressure. He felt he needed some time to recover before returning to his post, so he went to see Mr. Clark, who questioned him about where the shoulder bars he had been given were. Mr. Clark told him to go to the washroom, rinse the bars off, put them on and return to his post. The grievor explained that he was not well, was feeling dizzy and had to leave to CM Photinopoulos, who was working the CM desk at the time. She nodded, following which the grievor returned to his post until his relief arrived.

[35] It took several months for the grievor to be added to the Pacific Institution email distribution list, so he was not provided with the email on the new sign-out procedure promulgated after his arrival at Pacific Institution. Rather than explain the procedure, Mr. Clark chose to surveil the grievor by video camera and then discipline him. Like with the emails, the grievor was not provided access to the Pacific Institution post orders. The on-the-job training he was provided did not cover the OC spray

storage or the sign-out procedure at Pacific Institution. Mr. Clark was of the opinion that the grievor was unhappy with his new rank and his transfer to Pacific Institution, hence the disciplinary issues that were arising. This was not true. The grievor liked his role as a CX-01 at Pacific Institution and was considering staying at that level. The grievor stated this at the August 2012 disciplinary hearing, to which Mr. Hackett responded that “they” would see about that.

[36] The grievor denied that Mr. Clark addressed issues of dress and deportment with him as stated in his email of November 27, 2013 (Exhibit 17). Furthermore, it is impossible that he was seen in the workplace with his zipper down, as stated in the letter of suspension (Exhibit 18) dated November 27, 2013, as the grievor has a specific memory of his zipper being stuck in an up position that day requiring him to force his pants down over his hips in order to urinate.

[37] After being provided with the “Notice of Disciplinary Hearing” from Warden Van Vugt, the grievor checked its contents against his records, emails and the human resources management system. The grievor’s response to each item listed was provided as Exhibit 60. The reason provided by the grievor for missing morning briefings was related to his inability to climb stairs, of which Mr. Clark and the employer were aware. Morning briefings were of little relevance to the grievor’s post in the MCCP. He was briefed at his post on post exchange.

[38] When the grievor was not at work, he slept. If he took a sleeping pill to help him sleep, he was unable to drive for a couple of hours after he woke up. Most of his sick leave requests were related to sleep issues. The grievor consulted his doctor regularly, took pills for insomnia, consulted a sleep specialist, tried various machines to control his sleep apnea and attended a sleep clinic, none of which cured his problems. Each time he was going to be late or was unable to come to work, he reported in to the CM desk.

[39] The grievor denied leaving training early on April 30, 2013, as reported by Mr. Clark. He was not absent without leave as he had completed his day of training, which continued through his lunch break. He was given authority to leave by the instructor while the others in the class cleaned up. On May 10, 2013, he slept through his alarm and was late for training. He reported to Pacific Institution, dealt with the CM on the desk and then completed his training.

[40] The grievor submitted a claim for injury-on-duty leave for May 11, 2013, as a result of the training on May 10, 2013. The training involved a lot of kneeling and getting up and down, which caused the grievor severe pain. The next day, he could not walk. His request for injury-on-duty leave was refused by Mr. Clark as the knee injury that was aggravated did not occur while at work for the CSC and therefore constituted a pre-existing condition, even though the claim for the injury was accepted by the CSC. Mr. Clark ordered the grievor to retract the leave request, which the grievor did, and he then substituted a request for sick leave. Mr. Clark was angered by this.

[41] On May 20, 2013, a truck came to the sally port while the grievor was on duty. It required searching, which the grievor was unable to do because of his physical limitations. The CX-01 from the principal entrance, knowing this, went out to search the truck without advising the grievor. When the CX-01 from the principal entrance left her post, the grievor should have gone to cover her position, which he did not. When Mr. Clark discovered this, he began yelling at the grievor. The CX-01 who left the principal entrance went to explain because Mr. Clark did not believe the grievor's explanation of what had occurred.

[42] Mr. Clark claimed that the grievor was not clean-shaven as another example of the grievor's disregard for proper dress and deportment. The grievor testified that he does not shave everyday as it causes skin irritation. Mr. Clark never addressed this directly with the grievor. The Code of Discipline and the employer's policy manuals do not address beards or facial hair. It is not unusual, according to the grievor, to see correctional officers at Pacific Institution with several days' growth of facial hair. Being clean-shaven is a requirement if an officer is required to wear self-contained breathing apparatus, which the grievor is trained to wear but due to his blood pressure issues is not supposed to. Other officers who work the same post as the grievor have full goatees and have had them for many years.

[43] The grievor admitted to being involved in an incident with three other officers on November 27, 2013, which resulted in the release of an inmate for a medical appointment without a proper gate pass.

[44] Normally, the escorting officers pick up the information package for the transport from the CM. Included in the package are the gate pass and a weapons authorization form. The escort officers bring this package to the MCCP. The CX-01 and CX-02 working in the MCCP draw the firearms required. The inmate is secured and put

in the truck by the escort officers. Once the principal entrance officer verifies that the proper inmate is in the truck, the escorting officers provide the CX-01, the grievor in this case, with the gate pass. The grievor then logs in the release on the electronic movement sheet and changes the count board. He then calls the unit to advise them that the inmate has left Pacific Institution.

[45] The CX-02 in the MCCP controls the gates and the cameras. He or she authorizes the release of weapons and controls entrance and exit through the sally port. He or she is responsible for ensuring all required documents are received.

[46] On the day in question, the escort officers picked up only half this package and did not realize it. The escort officers provided the incomplete package to the officers in the MCCP in the full belief that the gate pass was included. At the time they arrived at the MCCP, there was another release also being processed, and a couple of other officers were drawing ballistic vests for use on the gun range. One of the other escort officers, who was having difficulty figuring out how to put her weapon on her belt, required assistance. All of this was going on while the grievor was trying to get the count recorded. There were at least six extra people in the MCCP in addition to the two posted there that day. When the first escort was ready to go, the grievor was busy with the second escort and was verifying the count.

[47] The grievor asked the first group for the gate pass and was told it was on the desk. The grievor looked at the desk, saw a gate pass and went back to helping the second escort group. The CX-02 opened the gate and let out the first escort. The gate pass was not verified.

[48] When both escorts were gone, the grievor discovered that the gate pass was for the second escort, not the first, as he had thought. Having discovered that a pass was missing, the grievor and his co-worker searched for it. Finding none, they concluded that the escort officers still had it with the rest of their paperwork. This escort was a regularly scheduled transfer, taking the inmate to the hospital for dialysis every other day.

[49] The grievor was going to advise Mr. Clark of this situation but forgot to until around 11:00, when Mr. Clark came to the MCCP to investigate the matter. Mr. Clark proceeded to grill the grievor about how he could have let an inmate out without a

pass. He completely ignored the CX-02 who was also there and the CX-02's claims that it was his responsibility and that he had failed to properly discharge it.

[50] During the grilling by Mr. Clark, the grievor's cell phone beeped. Mr. Clark asked him about it, and the grievor explained that he had brought it in inadvertently, intended to take it to his vehicle but had not had the opportunity. The grievor was aware that cell phones were not allowed past the inner gate but assumed it was acceptable in the entrance building, particularly since there was an iPhone docking station in the MCCP at the count desk.

[51] The grievor was advised of the disciplinary hearing of December 6, 2013, into the events of, among other things, the gate pass issue, by Mr. Demers. No other officers were summoned to a disciplinary hearing as a result of the same incident. Mr. Demers admitted on cross-examination that the employer's focus was on the grievor.

[52] The grievor attempted to explain this at the disciplinary hearing of December 6, 2013, but Warden Leblanc was not interested in hearing anything the grievor had to say. The grievor's bargaining agent representative at the disciplinary hearing was told to sit and be quiet and that it was not her place to be heard. On December 20, 2013, the grievor was advised that Warden Leblanc had decided that he was to be terminated for cause (Exhibit 34).

[53] Various officers testified at the hearing. CX-02 John Bruce, who was assigned to the front gate at Pacific Institution, testified that before November 27, 2013, it was common for CMs and other staff assigned to the front entrance and the MCCP to bring in their cell phones. Other staff brought them in and secured them in their lockers. His job was to ensure that cell phones did not enter the institution, and the principal entrance was not within the institution. Anyone bringing a cell phone into the institution, which started beyond the principal entrance building, required an authorization form signed by the warden. The front desk maintains a list of those who bring a cell phone into Pacific Institution.

[54] Shauna Baker, the grievor's bargaining agent representative at the December 2013 disciplinary hearing, described the tone of the meeting. According to her, Warden Leblanc was angry and barked at them to sit down as soon as they entered the room. She attempted to intervene on behalf of the grievor to explain that under

previous wardens, it had been acceptable to have cell phones in the principal entrance and to explain that certain CMs brought their cell phones in without authorization. Warden Leblanc was not receptive to her participation and reminded her of her role, in an aggressive tone. He advised her that it was not her role to speak but that he would allow her to comment at the end of the hearing, which lasted 10 minutes. Even then, the warden was not receptive to her comments.

[55] Ms. Baker spoke to the other correctional officers involved in the November 27, 2013, inmate release. According to her, the CX-02 who was working with the grievor that day, accepted full responsibility for the mistake. He was present when Mr. Clark interviewed the grievor and described it as a witch-hunt. No disciplinary action was taken against the other three officers involved.

[56] The dress code, according to Ms. Baker, is not equally applied at Pacific Institution, yet the grievor was the only one disciplined for violating it. She has seen officers with 12 to 15 years' service wearing recruit bars. She has also seen officers not wearing work shirts. It is a common occurrence to see larger officers with their shirts untucked. Pant legs regularly get caught up on the loop at the back of the work boots. No one has been disciplined for this.

[57] The grievor was scrutinized 95% more than any other officer, according to Ms. Baker. Other officers do not conform to the dress code. Others are late. Others were involved in allowing an inmate to be released without a gate pass, but only the grievor was disciplined.

[58] Michael Pardy has been a correctional officer for 12 years. He has worked at numerous institutions within the Pacific Region and was assigned to Pacific Institution between 2009 and 2013. He was one of the officers identified in Exhibit 36 as not having properly stored his OC spray. He was not met by his CM; nor was he disciplined concerning this infraction. He had taken his spray home that day, which was why it was not in his mailbox during the audit. The location designated for storing OC spray varies from institution to institution. At Matsqui Institution, he stored his spray in his locker.

[59] Mr. Pardy also admitted to going without rank bars on numerous occasions, for which he was never disciplined. When he left Pacific Institution and returned to Kent Institution, he wore recruit bars as a joke.

[60] Michael Page, who is currently the local vice-president for the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN at Pacific Institution, emailed the members identified in Exhibit 36 to determine what, if any, discipline these officers received for the improper storage of their OC spray. All responded that there had been no discipline. Mr. Page had personally been identified as having improperly stored his OC spray on six occasions. Sometimes it was at his home, sometimes it was in his personal locker. The only consequence was a follow-up from his CM asking where it was. As to the dress code, it was not unusual to see officers without proper uniform shirts or rank bars. None had been disciplined.

[61] On June 13, 2014, I took a view of the principal entrance and the MCCP at Pacific Institution in the presence of the grievor, his representative, counsel for the employer and an employer representative. The view included the locker room on the second floor, the principal entrance, the CM's office and the MCCP. The MCCP is approximately 20 feet long and 10 feet wide. It is divided by an island down the middle and has three workstations: the CX-02 monitoring station, the count desk and the counter where equipment is assembled. Firearms, ballistic vests, chains, handcuffs and other equipment required by escort officers are stored in this location. A prominent piece of electronic equipment was an iPhone docking station, as testified to by the grievor and his witnesses.

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

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

[62] This is a simple case. The grievor was given numerous opportunities to learn from his mistakes and did not. Progressive disciplinary action was taken, and with no improvement, the grievor was eventually terminated. The final disciplinary issue was a culminating incident from which the employer determined that the employment relationship was unsalvageable. The grievor had had sufficient warning that his conduct had to improve by the time the final disciplinary award was determined. He had a disciplinary record with six penalties on it (Exhibit 5).

[63] An 18-day suspension without pay was imposed by Mr. Hackett less than 6 weeks after the grievor commenced work at Pacific Institution. There was a continuation of the theme that prevailed over disciplinary action taken against him at Matsqui Institution. He continued to refuse to follow direction and to abide by the



CSC's standards of conduct. Mr. Hackett looked at both the aggravating and mitigating factors. The grievor was an experienced officer who was provided with rank bars by his manager on two occasions. He took no action to comply with his manager's directive to wear the appropriate rank bars. The grievor also failed to properly store his OC spray, despite having acknowledged in writing that he was advised of how it was to be stored. The grievor either misunderstood the directive or simply chose to ignore it. Regardless, he did not seek clarification from the SMO.

[64] The grievor, in August 2012, had 9 disciplinary penalties on his record: 4 financial penalties, 2 written reprimands, 1 oral reprimand, a demotion and a 15-day suspension without pay. He had a history of insubordination, misconduct and negligence in the performance of his duties. The only mitigating factor that Mr. Hackett could find was that the grievor had not received mentoring following his arrival at Pacific Institution. Mr. Hackett felt that a strong message was required, and for this reason, he imposed an 18-day suspension without pay.

[65] In October 2012, there were numerous occasions where the grievor failed to follow CM Clark's directions. He failed to report to work on time, he failed to wear his rank bars and he failed to attend briefings. The grievor admitted to many of these in his testimony. Warden Van Vugt felt that the issues deserved to be addressed, given the grievor's history.

[66] Considering the grievor's disciplinary record, Ms. Van Vugt felt that a lengthy suspension was required. Following discussions with Mr. Andreassen, who conducted the disciplinary hearing in her place, issues with the timeliness of the disciplinary action were raised. Mr. Andreassen felt that each incident should have been dealt with individually as it arose. For this reason, she imposed only a letter of reprimand, which is not within my jurisdiction to review.

[67] Mr. Clark's role throughout this time was to advise the warden of the grievor's misconduct. The issues raised by other CMs were summarized by him and provided to the warden.

[68] On December 20, 2013, Warden Leblanc terminated the grievor's employment for cause for the possession of a cell phone on post, the allowing of an inmate to be released without a gate pass, and the violation of the dress and deportment regulations. The grievor admitted to each and in so doing has demonstrated his

defiance of the employer's authority, insubordination, and lack of respect for the employer and its policies. Termination was reasonable, given the allegations and considering the grievor's disciplinary record and the continuing pattern of behaviour and that the November 27, 2013, incident was a serious security breach. The grievor worked the count desk that day, and it is the count desk that is responsible for ensuring that there is a gate pass for each inmate released (see Exhibit 34).

[69] The grievor's inability to follow the employer's rules was a violation of the employer's Code of Discipline and was subject to discipline under its paragraphs 6(f) and (g). (see *Stead and Weda v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 87). All disciplinary measures were justifiable and were the result of the grievor's failure to fulfill his duties in a diligent and competent manner. His attempts to excuse his behaviours by arguing that others were also culpable and that he did not understand or read the policy did not excuse his behaviour. Nor did his attempts to claim that he was targeted by CM Clark and that Mr. Leblanc did not like him excuse his behaviour as other CMs also had issues with his behaviour. Mr. Clark had no role in imposing the disciplinary action (see *King v. Canada (Attorney General)*, 2012 FC 488).

[70] The grievor blamed his medical conditions for his attendance issues, and yet he admitted that his accommodation needs were being met. He would not consider other options, such as a different shift schedule, when they were offered by CM Clark. His tardiness continued. There was nothing left for the employer to do but to discipline the grievor in the hope of changing his behaviour. Disciplinary action was used on numerous occasions, without results.

[71] A final culminating act of misbehaviour is sufficient in and of itself to warrant termination (see *Phillips v. Deputy Head (Canada Border Services Agency)*, 2013 PSLRB 67). Even if an adjudicator disregards everything that occurred before the grievor arriving at Pacific Institution, the grievor still has a lengthy disciplinary history. The grievor might have admitted fault, but the violations still exist (see *Phillips*). According to Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, negligence in the performance of one's duties, insubordination and a failure to follow policy are all acts worthy of disciplinary action. The acts worthy of discipline, which constituted the culminating incident in this case, were the events of November 27, 2013, which were of the very same nature for which the grievor had previously been disciplined.

[72] Disciplinary action was warranted in each of the cases before me. All previous discipline was imposed for the same reason. I should not interfere with discipline when it was clearly warranted (see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, at para 11). In the event that it is determined that the disciplinary action taken was unreasonable, it is the employer's belief that the employment relationship has been broken and that compensation in lieu of reinstatement is appropriate based on an assessment of the grievor's years of service.

**B. For the grievor**

[73] Contrary to what the employer said, this is not a simple case. It is complex, due to the poor record keeping and management of the file by the employer. In addition, two important witnesses were not called: CM Marshall and Warden Leblanc. To accept a discipline letter in lieu of their testimony without the right to cross-examine is prejudicial to the grievor. A failure to call witnesses cannot be compensated for by documentary evidence. Letters of discipline are not proof of their content (see *Oliver v. Canada Customs and Revenue Agency*, 2003 PSSRB 43).

[74] This case deals with three disciplinary grievances and two collective agreement interpretations. The grievor has chosen to pursue the three disciplinary grievances.

[75] The employer has changed its grounds for terminating the grievor from disciplinary reasons to a culminating incident. It is not open to an employer to combine culminating incidents as part of the progressive discipline process. There must be a clear connection between the previous misconduct and the culminating incident (see *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2008 PSLRB 61, at para 191). There is no record of the grievor ever having been disciplined for a failure to comply with the policies and procedures related to the escorted release of inmates.

[76] The employer has not proven that a clear direction was given to the grievor to report his leave immediately or that the grievor engaged in abuse behaviour in his dealings with CM Marshall (see the disciplinary letter of February 8, 2012; Exhibit 4). CM Marshall did not testify, so there is no direct evidence related to these incidents other than that provided by the grievor, which has to be preferred. The grievor claimed that he was not abusive in his dealings with CM Marshall, which was corroborated by the evidence of Mr. Joe, who witnessed the interactions between CM Marshall and the grievor.

[77] The discipline imposed by Mr. Hackett (see the disciplinary letter of November 9, 2012; Exhibit 8) was an 18-day suspension. This cannot be viewed as properly progressive when the previous discipline on record was a two-day suspension. Mr. Hackett testified that he considered a previous 15-day suspension, yet there is no evidence that it was disciplinary. It was an administrative suspension, as was the demotion, pursuant to the terms of the memorandum of agreement, which saw the transfer of the grievor from Matsqui Institution to Pacific Institution. This is supported by the evidence of Ms. Chima-Brar, who testified that the letter of discipline (Exhibit 6) was drafted by her after the agreement was entered into. Mr. Leblanc was not satisfied with the settlement, so he issued the letter. It was not grieved as the grievor never received it. Exhibit 6 cannot be included as proof of disciplinary action as it was outside the disciplinary process and violated article 17 of the collective agreement. It was inappropriate for it to form part of Mr. Hackett's considerations and to base future disciplinary action on it.

[78] In the circumstances, an 18-day suspension was excessive as discipline for the allegations against the grievor in August 2012. The grievor did not leave his OC spray unsecured. It was stored in a locked locker within Pacific Institution, which was consistent with the practice used for OC spray storage at Matsqui Institution. He did not know that the practice was different at Pacific Institution. Regardless of these factors, no one else who was noted in the OC spray audit in question for improper storage or missing OC spray was disciplined. It was only the grievor.

[79] The grievor admitted that he did not wear proper rank insignia when he started at Pacific Institution and that at times leading up to his termination, he might not have had his rank bars properly displayed. Others, however, are guilty of the same thing. The evidence related to whether the grievor left training early is unclear. The grievor's explanation of these infractions has been consistent throughout his time at Pacific Institution and the hearing. These issues are more properly classified as performance issues rather than culpable behaviours worthy of discipline.

[80] All disciplinary action that occurred at Pacific Institution was based on the previous 15-day suspension at Matsqui Institution, which was not disciplinary. The disciplinary letter imposed by Ms. Van Vugt was an inexcusable attempt to build a file against the grievor. She admitted in her evidence that she would have terminated the grievor at that point but for the fact that many of the incidents upon which she relied

had not been addressed in a timely fashion. A delay from October 2012 to July 2013 in order to pursue an alleged disciplinary violation is inexcusable. Ms. Van Vugt was incapable of identifying what allegations from the notice of disciplinary hearing (Exhibit 31) were proven and what were not. The letter of reprimand (Exhibit 32) was not specific. Nothing from the recordings of the hearing (Exhibits 67(3) and 67(4)) assists with this determination.

[81] The grievor was denied due process and could not address any issues of which he was not aware. Ms. Van Vugt admitted that she was briefed on the matters related to the grievor's presence at Pacific Institution. The use of a written reprimand, which is not adjudicable, was purely to ensure that the grievor's disciplinary file reflected these allegations as well. This letter formed part of the record submitted by labour relations to the National Headquarters Labour Relations to justify a termination (Exhibit 33). Clearly, this is a breach of natural justice.

[82] The employer is obligated to act fairly without padding an employee's disciplinary record to justify termination. Why did the warden who made the decision to terminate the grievor not testify and be subjected to cross-examination? If the grievor was late, as the employer alleged and for which he was disciplined, why were no time records submitted? Ironically, being late was not one of the allegations for which the disciplinary hearing was convened following the November 27, 2013, incident. It could not be used to establish a culminating incident.

[83] The simple part of this tale is that CM Clark never gave the grievor a chance. From the time he arrived at Pacific Institution, Mr. Clark sought out incidents upon which to base disciplinary action. He did not listen to the officer from the principal entrance who did not advise the grievor that her post was vacant and that he should come and cover it. He did not listen to the other officers involved in the gate pass incident. Mr. Clark knew before the inmate was released that he had the gate pass on his desk. The focus was on the grievor, which was confirmed by Mr. Demers on cross-examination.

[84] It has been established that there was a level of tolerance for the presence of cell phones in the principal entrance at Pacific Institution. The rule concerning cell phones within the institution is clear, but its application was not. The grievor was not flaunting the rules by bringing his cell phone into the MCCP on November 27, 2013. He knew that he was under very close scrutiny from Mr. Clark. There was, however, a

practice at Pacific Institution that precluded the employer from disciplining the grievor for having his cell phone with him that day. Mr. Leblanc, however, was not interested and was unwilling to hear any representations concerning this at the disciplinary hearing on December 6, 2013.

[85] Mr. Leblanc's tone at the disciplinary hearing on December 6, 2013, was emotional, aggressive and abrasive. Mr. Clark knew that there were cell phones in the principal entrance building and tried to divert a discussion of them (Exhibit 67(5)).

[86] As to the grievor's dress and deportment issue on November 27, 2013, it might have happened. Mr. Clark noticed it only when the grievor was walking out of his office. Given the grievor's size, it is a common occurrence for his shirt to come untucked, and given the nature of the boots that CXs wear as part of their uniforms, it is not uncommon for a pant leg to get hooked on the loop at the back of the boot. Rather than address the concerns at the time, Mr. Clark chose to report them to the warden.

[87] The proper remedy in this case is reinstatement. According to the Federal Court in *Lam v. Canada (Attorney General)*, 2009 FC 913, reinstatement is the rule, not compensation in lieu. Compensation in lieu should be reserved for exceptional circumstances. Reinstatement could be to a position outside the correctional officer classification. The employer has led no evidence of a breach of trust or that the employment relationship is irreparable. The grievor seeks a reduction of the disciplinary penalty and reinstatement with payment of all lost salary. He does not seek compensation for lost overtime opportunities. He does seek interest on the award of salary as the employer's treatment and behaviour warrants it. The grievor has been discriminated against because of his sleep apnea, which has been recognized as a disability, his size, and his physical disabilities. Mr. Clark's tone and approach toward the grievor was unacceptable. The grievor's performance reviews were generally good and did not mention issues with disrespect or insubordination. Tellingly, there is no performance review for 2012, the year before the grievor left Matsqui Institution.

#### **IV. Reasons**

[88] Clearly, the grievor did not have an employment career with the CSC that was smooth. He is no doubt one of those employees who fall into the category of the 10% of the employees who occupy 90% of a manager's time. This, however, does not mean

that he was not entitled to the benefits and protections of his collective agreement and the principles of administrative and labour law. He was entitled to be treated respectfully by his employer and given every opportunity to continue his employment. His employment could not have been terminated without reasonable cause proven by the employer on the basis of clear and cogent evidence.

[89] The testimony of key players cannot be substituted for by documentary evidence, the validity of which is the crux of the grievance (see *Oliver*). A letter of discipline is not proof of its content; nor is it proof of the considerations that went into making the decision. The evidence of labour relations advisors who were involved in an ancillary way cannot replace the direct evidence of the decision maker.

[90] Without the evidence of Mr. Marshall and Mr. Leblanc, the employer has not met its evidentiary burden to prove to me through clear and cogent evidence that on the balance of probabilities, the penalties imposed by the employer related to the grievances filed by the grievor before he left Matsqui Institution alleging that the employer, the Correctional Service of Canada (CSC), disciplined him without just cause by imposing a financial penalty of \$380 on him on February 8, 2012 (the grievance in PSLREB File No. 566-02-7436) and his subsequent termination from Pacific Institution were justified.

[91] With respect to the grievance in PSLRB File No. 566-02-7437, the grievor bears the burden of proof and I find that he has not met it. In the normal course of events, it is management's right to direct the workforce, and in the normal course of events directing an employee to fill in leave requests is part of the daily role of a manager, I have no reason to conclude that such an order is illegal. However, given the evidence provided by the grievor, describing the circumstances under which the order was given, the question remains whether or not the delivery of this otherwise legitimate order was an abuse of CM Marshall's authority. Regardless, it is the grievor's burden to prove that the alleged order was illegal and that CM Marshall abused his authority. The grievor has failed to discharge this burden by demonstrating that an order to fill in leave requests was illegal. The grievor has also failed to demonstrate on the basis of clear and cogent evidence how CM Marshall abused his authority in giving an otherwise legal order. Therefore grievance 566-02-7436 is dismissed.

[92] I reviewed the new Board's file and noted that summonses were requested by the employer for both Mr. Leblanc and Mr. Marshall. Both summonses were issued, so

it was clearly within the scope of the employer's contemplation that their evidence was required. The employer sought and was refused a postponement of this hearing on the basis of medical certificates for Mr. LeBlanc which clearly indicated that although he did have a medical condition, his participation at the hearing was not contraindicated. The duration of the hearing provided the employer ample time to produce Mr. LeBlanc and/or Mr. Marshall and yet it chose not to do so. The grievor's representative suggested that I should draw a negative inference from their failure to appear. Admittedly, given the nature of the evidence that I heard from the other employer witnesses, the grievor and his witnesses, I am perplexed as to why the evidence of these key players was omitted.

[93] Given the ambiguity of the poorly drafted memorandum of agreement (Exhibit 7), which addresses some of the incidents which prompted the grievances before me, and the grievor's demotion and transfer to Pacific Institution, it would have behooved the employer to proffer direct evidence of the document's intent and connection to the processes before me and any other relevant background. The document purports to revert a suspension without pay to other paid leave effective April 23, 2012, credit the grievor with lost vacation and sick leave entitlement, and deploy him to Pacific Institution, and the grievor agreed to a temporary demotion to the CX-01 level for a 24-month period, in exchange for which he agreed not to commence any further administrative action in relation to this or any matter connected to or related in any way to this matter. The only issues that existed at the time were disciplinary actions in which Mr. Marshall and Mr. Leblanc were both involved. Clearly, Ms. Chima-Brar, who drafted the letter of discipline dated May 28, 2012, had no actual knowledge of this, or she could have explained why the letter that forms part of the grievor's disciplinary record was drafted after the memorandum of agreement was signed. She stated that she was unaware of the contents of the memorandum of agreement and that she drafted the disciplinary letter based on the grievor's disciplinary file, at Mr. Leblanc's direction.

[94] The memorandum of agreement makes no reference to a full and final release; nor does it make any reference as to whether this agreement is intended to constitute a last-chance agreement. Counsel for the employer responded to my questions concerning the purpose of the document and stated that it was a last-chance agreement. The grievor's representative stated that it was intended to resolve issues related to allegations of harassment involving Mr. Marshall and Mr. Leblanc while the



grievor was at Matsqui Institution. The grievor confirmed this in his testimony by stating that he accepted the demotion and transfer to Pacific Institution in order to remove himself from the treatment he had received at the hands of his CM and the warden at Matsqui Institution. I find that in the absence of any direct evidence to the contrary, the memorandum of agreement is not a last-chance agreement and that the grievor's transfer and demotion to Pacific Institution were, as argued by the grievor's representative, administrative in nature.

[95] I also accept the grievor's uncontradicted evidence that he was subjected to unusual scrutiny, harassment and disciplinary action at the hands of CM Marshall and Warden Leblanc while at Matsqui Institution. This treatment became the subject matter of allegations of harassment against these men, which were addressed through the memorandum of agreement. The disciplinary action that arose during the period leading up to this agreement, including that of February 8, 2012 (see disciplinary letter; Exhibit 4), and specifically the \$380 financial penalty was tainted by the harassment allegations.

[96] The transfer to Pacific Institution was intended to give the grievor a new start. What exactly was said on that first day when the grievor met with Mr. Hackett is not known, but what is known is that at the disciplinary hearing on August 27, 2012, Mr. Hackett told the grievor that he had to be "CX-01 of the year" in order to overcome the legacy he brought with him from Matsqui Institution (Exhibit 67(1)). This expectation would have been extraordinarily difficult to meet and gave rise to the employer's unreasonable level of scrutiny of the grievor.

[97] There is no doubt that the grievor failed to wear his rank insignia; he admitted this. He also admitted that he had been provided shoulder epaulettes by CM Clark and that he did not wear them. There is also no doubt that the grievor did not store his OC spray as required by the policy at Pacific Institution. He admitted this as well. Discipline was warranted in this case. There is a discrepancy as to the facts surrounding whether the grievor left early following the disciplinary hearing on August 27, 2012, or whether he did in fact speak to CM Photinopoulos and ask to be relieved. Ms. Photinopoulos did not testify, so in the absence of any corroborating evidence to support CM Clark's claim that the grievor left the premises without authority, I accept the grievor's evidence in this regard. The grievor was a credible witness and should be given the benefit of the doubt. Mr. Clark did not provide any

evidence to contradict the grievor's assertion that he had consulted CM Photinopoulos prior to leaving that day or that Mr. Clark had followed up with CM Photinopoulos to verify if CM Photinopoulos has been consulted by the grievor.

[98] Based on *Cooper*, I do not believe that this is a circumstance where my intervention is appropriate. The grievor had a lengthy disciplinary record regardless of the matters overturned earlier in this decision. Discipline was warranted for two of the three allegations dealt with on August 27, 2012: the issue of OC spray storage, and the issue related to the rank insignia. While the grievor did testify that initially he had no CX-01 rank bars, this does not excuse his continued failure to comply with the required dress code. Rank bars were twice provided by the employer but the grievor claimed to have lost them each time. I find that the grievor's explanation for his failure to wear the proper rank bars is disingenuous and that his actions with respect to this issue were deliberate or careless. He also stated that he was not aware of the regulations for the proper storage of OC spray because he did not read the documents provided to him by the SMO. Ignorance of the regulations is not an excuse for violating them. While others may or may not have been disciplined for similar transgressions, given the totality of the facts in this case, and based on *Cooper*, I will defer to the employer's determination of the appropriate penalty. The grievance related to this disciplinary action (18 day suspension without pay) will stand, and this grievance is dismissed.

[99] While I would not have jurisdiction over the letter of reprimand issued by Warden Van Vugt on October 15, 2013 even if it had been grieved, I must comment on it as it formed part of the disciplinary record that was put before Mr. Leblanc in December 2013. The notice of disciplinary hearing outlined a total of 29 alleged infractions, which occurred over the period between October 16, 2012, and July 16, 2013, and is indicative of the level of Mr. Clark's scrutiny. The grievor's representative argued that it was an improper use of the disciplinary process, was meant to ensure that the grievor's disciplinary file reflected these allegations as well and was clearly a breach of natural justice.

[100] I have no doubt that when Mr. Andreassen raised his concerns that many of the allegations contained in the notice of disciplinary hearing were untimely and that the employer was intent on ensuring that a record of disciplinary action related to these events was put on the grievor's disciplinary file. Clearly, from her own evidence,

Ms. Van Vugt would have preferred to terminate the grievor's employment and would have done so had Mr. Andreassen not raised timeliness issues. What was clear from the employer's evidence was that regardless of the timeliness concerns, it was felt to be essential that the alleged wrongdoing be recorded for use at a later time. It is poor labour relations to allow allegations of wrongdoing to accumulate to the point that the right to discipline is impaired.

[101] On November 27, 2013, five people were involved in the release of an inmate without a gate pass, not four, as the employer stated. There were the two escorting officers, the CX-02 in the MCCP, the grievor and Mr. Clark. Mr. Clark, as the CM, bears the ultimate responsibility to ensure that inmates who are removed from Pacific Institution are removed in accordance with CSC policy and directives. He was the CM from whom the escort officers picked up the escort package. It was on his desk that the missing gate pass was found. Responsibility is to be found for all involved, including the grievor; however, only the grievor was disciplined. The principles of imposing discipline do require that like discipline be imposed for like offences; however, mitigating and aggravating factors must be taken into account. In this case, four people escaped disciplinary action completely for the same infraction for which the grievor was in part, terminated. Even taking into account his disciplinary record, which has no other such infractions, the disciplinary action imposed was unreasonable in the circumstances where others who were equally responsible went scot-free.

[102] I also find that the grievor has proven that the issue of the presence of cell phones in the principal entrance was accepted. As I noted on my viewing of the MCCP, there was an iPhone docking station in plain sight, which would lead one to conclude that iPhones were allowed on the premises. Others were not disciplined for the same events, but the grievor was. Any discipline related to these allegations is unwarranted.

[103] I am gravely concerned with management's attitude towards the grievor during his time at Pacific Institution and in particular with the microscopic surveillance of him by Mr. Clark. It is clear from the tone of the emails in which Mr. Clark details the many infractions committed by the grievor that Mr. Clark held the grievor in disdain. For example, he stated: "Twas the night before the hearing and Kinsey refuses to follow the rules ..." in an email to Mr. Hackett (Exhibit 38). Also in Exhibit 38, he stated: "It is unknown if or where his OC was stored and it is likely that it was removed from the institution," in a timeline used for tracking the grievor. Particularly disturbing is that

this document was submitted in advance of the disciplinary hearing before Mr. Hackett and that Mr. Clark knew this statement to be false. In his evidence, he testified that he contacted the grievor at home when it was determined that his OC spray was not in the proper location and that he was advised by the grievor that it was in his personal locker. The lock on this locker was cut off, and the OC spray was retrieved.

[104] It is also clear, based on Mr. Clark's evidence and the exhibits submitted, that the grievor was under surveillance by Mr. Clark. Mr. Clark admitted that he used Pacific Institution's surveillance cameras to determine when the grievor arrived at and left the institution. In essence, he used the surveillance cameras as a punch clock, noting the grievor's times of arrival and departure and noting discrepancies and reporting them up his chain of command in support of future disciplinary action.

[105] The NAMP was used by Mr. Clark to control the grievor's use of sick leave and illness-related absences when he clearly did not qualify for the program due to chronic medical conditions. The grievor grieved this action, which was corrected by Mr. Demers when he removed him from the NAMP, and for this reason, but did not pursue it before me, as he likely concluded that it was moot. However, I note that Mr. Clark's actions in placing the grievor on the NAMP when he did not qualify for it are further evidence of the surveillance of the grievor by Mr. Clark and his attempts to build a case against the grievor.

[106] Other CMs encountered situations where the grievor was tardy. The grievor addressed each with each CM (Exhibits 39 and 40). The grievor was late on these occasions between 5 and 30 minutes. The grievor has testified that he experiences difficulty waking in the morning due to his sleep apnea and insomnia. While tardiness is not acceptable, there is a difference between innocent and culpable disregard for the hours of work. In this circumstance, the tardiness was innocent and is properly classified as a performance-related or accommodation issue and not one for which discipline should have been imposed.

[107] No doubt, the grievor does not portray the epitome of a correctional officer. He is obese, which causes him problems with how he wears his uniform and how it fits. This offended Mr. Clark's by-the-book approach to management. However, obesity is a disability, which must be accommodated. Rather than help the grievor meet the portrait of a correctional officer that Mr. Clark envisioned, with a uniform shirt that did not come untucked, Mr. Clark chose to discipline the grievor rather than dealing

with this through the performance or accommodation routes. To discipline someone on the basis that a pant leg got caught up on a loop at the back of a boot trivializes the disciplinary process and creates a lack of credibility for the person imposing that discipline.

[108] The disciplinary hearing on December 6, 2013 which resulted in the grievor's termination, lasted exactly 10 minutes, during which the grievor's representative was chastised and denied her right to represent the grievor by Mr. Leblanc, who can be heard waving a piece of paper and aggressively advising the representative of how he viewed her role in the hearing. Mr. Clark can also be heard being aggressive and agitated during the brief encounter, particularly when discussing the presence of cell phones in the principal entrance of Pacific Institution (Exhibit 67(5)). Given the clear bias that Mr. Clark demonstrated against the grievor leading up to this disciplinary hearing, and given Mr. Leblanc's previous encounters with the grievor when they were both at Matsqui Institution, the grievor had little hope of an unbiased hearing. While bias, or a reasonable apprehension of bias, relates most often to a pre-existing relationship, it may also be exhibited in the manner in which a hearing is conducted (Brown and Beatty, at para 1:5210). The employer did not seek to minimize the impact of this bias and thereby denied the grievor his rights to natural justice. Given all of what I have noted above including the CX-01 of the year comment, the increased surveillance of the grievor by management, disciplinary action for infractions which were not pursued in timely fashion resulting in a written reprimand, and the aggressive approach taken in regards to the grievor by management, the disciplinary hearing which resulted in his termination was such that no reasoned or fair decision could be made. Discipline tainted by a breach of natural justice is inappropriate, and for this reason, the grievor's termination is overturned and a reasonable penalty imposed for his role in the prisoner release, the dress code infraction and the cellphone issue consistent with that imposed on others in the workplace and recognizing his previous disciplinary history imposed in its place.

[109] The employer argued that the doctrine of culminating incident along with the doctrine of progressive discipline worked together to support the termination. The grievor's representative argued that the employer could not rely on both doctrines at the same time and that they were in fact alternative arguments. Small infractions do not normally justify termination unless they can be considered to be a culminating incident which demonstrates that the employer is right to have no faith in the ability

of the employee to be rehabilitated and as a result the employment trust relationship has been destroyed. To be successful in arguing a culminating incident the employer must provide clear evidence which establishes on the balance of probabilities that there is no longer a viable employer-employee relationship as a result of the employee's repeated disciplinary infractions. The disciplinary letter (Exhibit 34) refers only to progressive discipline and imposes a global penalty for all three infractions for which the disciplinary hearing was convened. There is no evidence before me that would support the existence of a culminating incident sufficient to uphold the termination. There is no doubt that the employer does not want the grievor in the workplace and that he is difficult to manage. This is not a reason, in the absence of just cause, to justify his termination (see *Wentges v. Deputy Head (Department of Health)*, 2010 PSLRB 24).

[110] When considering the reasonableness of the grievor's termination, I am faced with the grievor's admissions that he failed in his duties as a correctional officer by allowing an inmate to leave Pacific Institution without proper documentation. While it is true that others, including Mr. Clark, must bear responsibility for their roles in this incident, a failure to account for inmates warrants discipline, and the grievor's previous disciplinary record must be considered as an aggravating factor in determining the appropriate disciplinary action to be taken and may justify treatment different from others. (See *Stead and Weda* and *King*.) He has on other occasions been disciplined for failure to follow directives and procedures. The grievor's representative argued in favour of a three-month suspension without pay followed by reinstatement. Reinstatement could be to a position outside the correctional officer classification. The employer argued that this is an appropriate case for me to exercise my discretion and to award the grievor payment in lieu of reinstatement, consistent with *Lam*.

[111] I have struggled for some time over whether it is in the best interests of the grievor that he be reinstated or whether reinstatement would merely put him in an untenable workplace situation where his every move would be subject to intense scrutiny. Likewise, realizing that the grievor is no doubt a very difficult employee to manage on many levels, is it in the best interests of Pacific Institution to have him reinstated? However, is it appropriate to deprive employment from an employee with 12 years of service who has been evaluated as having met standards, with the exception of the time when the grievor was supervised by Mr. Marshall and Mr. Clark, and who has many years of employment ahead of him of his future livelihood?

[112] According to the Federal Court in *Lam*,

*[5] [a]lthough there is no automatic right to reinstatement, as Mr. Justice Létourneau of the Federal Court of Appeal has noted, "[T]he presumption is, in my view, clearly in favour of reinstatement unless there is clear evidence to the contrary" (Atomic Energy of Canada Ltd. v. Sheikholeslami, 1998 CanLII 9047 (FCA), [1998] 3 F.C. 349 at paragraph 31 (C.A)). The authorities and jurisprudence cited by the parties confirm that reinstatement seems to be the rule and non-reinstatement the exception, which the adjudicator in the impugned decision seems to recognize. Based on the evidence in the record, it is clear in this case that the applicant was deprived of the opportunity to present evidence and arguments before a final decision was rendered on the issue of the applicant's potential non-return to the same workplace. It follows that those parts of the adjudicator's decision and order to the effect that reinstating the applicant is not a "reasonable or viable option in the circumstances" are flawed at the outset. Accordingly, it is unnecessary to ask whether the adjudicator's finding is reasonable in this case.*

[113] Given that the presumption is that the employee should be reinstated, and given that the grievor has opened the possibility of being reinstated outside the correctional officer classification, the employer should be able to reinstate the grievor with no difficulty. However, I will leave this to the parties to discuss. The grievor shall be subject to a three-month suspension without pay in recognition of his role in the release of the inmate without a gate pass and for his failure to wear his rank insignia, which were the subjects of the December 6, 2013, disciplinary hearing.

[114] If the grievor is reinstated to his position as a correctional officer it shall be at the CX-01 level for the balance of the agreed upon two years remaining as of the date of his termination. The period of suspension shall not be deducted from the agreed upon period of demotion. The demotion to CX-01 to which the grievor had agreed shall not be abbreviated by reason of his termination, the subsequent adjudication process, and the time required reinstating him to his employment. To be clear, the grievor will be reinstated to a CX-01 position for a period of 6 months, following which he is to be returned to the CX-02 level, unless otherwise agreed by the parties.

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

*(The Order appears on the next page)*

**V. Order**

[116] Grievance 566-02-7436 is allowed.

[117] Grievance 566-02-7437 is dismissed.

[118] Grievance 566-02-7989 is dismissed.

[119] Grievance 566-02-8666 is dismissed.

[120] Grievance 566-02-9588 is allowed in part.

[121] The grievor is to be reinstated to a CX-01 position at the Pacific Institution (or such other institution to which the parties mutually agree), consistent with his needs for accommodation, within 90 days of this decision, retroactively to December 20, 2013, without loss of seniority or other benefit.

[122] The grievor shall also receive any salary increases he would have been entitled to but for the fact his employment was terminated effective December 20, 2013.

[123] From any amounts due to the grievor shall be deducted an amount equal to the salary normally earned over a three-month period by that grievor based on his schedule immediately before December 6, 2013.

[124] Effective 6 months following the grievor's reinstatement to a CX-01 position, he shall be returned to a CX-02 level, unless otherwise mutually agreed by the parties.

[125] I will retain jurisdiction to deal with matters arising out of this order for a period of 120 days from the date of this decision.

March 25, 2015.

**Margaret T.A. Shannon,  
adjudicator**