

**Date:** 20150928

**Files:** 566-02-6867 and 6868

**Citation:** 2015 PSLREB 79

*Public Service Labour Relations  
and Employment Board Act and  
Public Service Labour Relations Act*



Before a panel of the  
Public Service Labour Relations  
and Employment Board

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BETWEEN

**BRUNO ALBANO**

Grievor

and

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

Respondent

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

In the matter of individual grievances referred to adjudication

**Before:** John G. Jaworski, a panel of the Public Service Labour Relations and  
Employment Board

**For the Grievor:** Himself

**For the Respondent:** Pierre-Marc Champagne, counsel

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Heard at Kingston, Ontario,  
February 17 to 19, 2015.

## REASONS FOR DECISION

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

[1] Bruno Albano (“the grievor”) is a Correctional Manager (CM) with the Correctional Service of Canada (“the employer” or CSC) who at the material time was a CM assigned to Kingston Penitentiary (KP) in Kingston, Ontario.

[2] On October 14, 2011, the grievor was placed on indefinite suspension without pay, effective October 13, 2011, pending a disciplinary investigation into an assault upon an inmate at KP that happened on October 4, 2011. On November 2, 2011, notwithstanding that the investigation into the assault was still ongoing, the grievor was returned to work, albeit in a role without supervisory duties. On November 25, 2011, the grievor filed a grievance against this suspension, requesting relief as follows:

1. To have his pay reinstated for the 14 days;
2. Receive credit for the sick leave, furlough leave and annual leave lost due to the suspension;
3. Reimbursement of all late fees and interest charges incurred as a result of the suspension;
4. Reimbursement of all lost overtime hours up to 56.75 hours;
5. Damages for undue hardship and negative impact.

[3] On December 8, 2011, the grievor was given a thirty (30)-day disciplinary suspension without pay for dereliction of duties under “Standard One” of CSC’s “Standards of Professional Conduct” and “Code of Discipline” and for violating the *Values and Ethics Code for the Public Service*. The 14 days of suspension served from October 13, 2011 to November 1, 2011, were counted towards the 30 days of disciplinary suspension, and the grievor served a further 16 days of suspension without pay between December 8, 2011 and December 29, 2011.

[4] On January 3, 2012, the grievor filed a grievance against the 30-day suspension he received on December 8, 2011, and requested that:

1. The Investigation Report be moved back to a draft stage such that the information that he provided in his rebuttal be considered and included in the final report;
2. He have his pay reinstated for the 30 days that was lost, and that he receive all annual leave, furlough leave and sick leave credits that he would have earned during this 30 days, which were lost;
3. He be reimbursed any late fees and interest charges incurred as a result of his suspension;
4. He be reimbursed for all hours of overtime that were available during the time he was suspended, totalling 171.5 hours;
5. He be awarded damages for undue hardship and the negative impact that the suspension has had on him;
6. He be given a letter of apology;
7. All record of the disciplinary proceedings, including the investigation, be removed from his file.

[5] 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 former Public Service Labour Relations Board (“the 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 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2, “the Act”) before November 1, 2014, is to be taken up and continue under and in conformity with the *Public Service Labour Relations Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

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

[6] The events that led to the grievor’s discipline arose out of the assault of a staff member by an inmate (IM) and the subsequent assaults by staff on two IMs at KP on October 4, 2011.

[7] The employer called three witnesses, and the grievor testified on his own behalf.

[8] Jay Pyke was the last Warden of KP. He is currently the Warden at Joyceville Penitentiary and has been in that position since October 2013. He was Warden at KP from April 2010 until it closed in September 2013. He has been with CSC for 16 years and has been at the management level as Assistant Warden, Operations (AWO), or higher since 2007. In addition to holding the position of Warden, he has worked as a correctional officer (CX), a CM, a unit manager (UM), parole officer, AWO and Deputy Warden (DW).

[9] Tim Hamilton was the AWO at KP at the time the events that led to the discipline took place. He is currently the AWO at Bath Institution in Bath, Ontario. He started his career with the CSC in 1988 as a CX-1 and was a CX-2 and a CM before becoming an AWO.

[10] Scott Edwards is currently the Assistant Deputy Commissioner, Integrated Services, for CSC. Prior to that, he was a Warden at both Pittsburgh and Frontenac Institutions in Kingston, Ontario, and prior to those postings, he was the Ontario Regional Director of Correctional Operations. His career with CSC has spanned 26 years, and he has acted in a variety of positions, including as a CX, a CM, an Assistant Warden and a DW.

[11] The grievor is currently a CM with the CSC at Joyceville Penitentiary, just outside of Kingston, Ontario. He started his career with the CSC in 1994 as a casual CX, becoming full-time indeterminate in 1998. He had been both a CX-1 and CX-2 before becoming a CM. He is a trained investigator. In the years 2011-2012, he had three letters of commendation placed on his file. He began working as a CM at KP in 2010.

#### **A. Events of October 4, 2011**

[12] October 4, 2011 was the grievor's first day back at work at KP after having spent two weeks in the CSC's Pacific Region on assignment.

[13] The grievor was the CM in charge of that portion of the living unit of KP, which included an area known as the "Upper B" range. The Upper B range consisted of two tiers, one on what is known as the third floor and one on the fourth floor. There were 39 cells divided between the two tiers. There is a secure control post or "bubble" that

controls access to the range and to each individual cell. The CM of the range (in this case, the grievor) has an office on the range.

[14] There were four other CMs working on October 4, 2011: CM Fransden, who was the Duty CM for the entire institution; CM Liggett and CM Brian Leeman, who were responsible for other portions of the living unit; and CM Craig James, who was responsible for the Segregation Unit (SU).

[15] Warden Pyke was away from the institution, and DW Mike Jensen was Acting Warden.

[16] At approximately 10:48 a.m., the grievor was off the Upper B range and was meeting with Mr. Hamilton in the AWO's office. The AWO's office is located in the administration building, which is a short distance from the living unit building. At this time, two CXs, including CX Colin Nagle, were doing their routine hourly patrol down the Upper B range, when IM "A" assaulted CX Nagle. When the assault occurred, a riot alarm was sounded. Upon being alerted to the riot alarm, the grievor immediately left the AWO's office to return to the Upper B range.

[17] The grievor testified that he did not immediately get back to the Upper B range, as he met up with several CXs and CM Liggett, who were escorting IM A from the Upper B range to the SU. The grievor stated that he asked CM Liggett if they required his assistance in bringing IM A to the SU, and when he was told "No", he proceeded instead to the Health Care unit (HC) to check on CX Nagle, as apparently no one had accompanied him to the HC after the assault.

[18] The grievor stated that he attended at the HC and checked on CX Nagle. While in the HC, CM James came in and asked the grievor to complete a post-use-of-force medical assessment (PUFMA) on IM A down in the SU.

[19] Prior to attending at the SU to carry out the PUFMA, the grievor stated that he went to the Security Intelligence Office (SIO) to view the video of the incident. After viewing the video, the grievor stated that he left the SIO and attended the SU, where he conducted the PUFMA together with an HC nurse, Catherine Leduc, who was attending to the injuries sustained by IM A in the scuffle that ensued after his assault on CX Nagle. The PUFMA was videoed, and at its conclusion, the grievor stated that he

instructed the camera operator to complete an “Officer’s Statement/Observation Report” (OSOR).

[20] Mr. Hamilton testified that after the riot alarm was sounded, his meeting with the grievor ended, and while the grievor departed to go to the Upper B range, he met up with Mr. Jensen, and they viewed both the live video and archived video of the scene and incident. Mr. Hamilton stated that after viewing the videos, he and Mr. Jensen attended the Upper B range, and then he went down to the SU to follow up and find out what had happened.

[21] The SU is about a one-minute walk from the Upper B range. Just inside the entrance to the SU are both a holding cell and an interview room.

[22] Mr. Hamilton stated that after seeing that the PUFMA was being conducted under the supervision of the grievor, he left the SU and proceeded to the HC to check on CX Nagle. Mr. Hamilton testified that he and CX Nagle then went to the SIO, where he left CX Nagle. Mr. Hamilton stated that he then left the SIO and went back to the Upper B range and instructed staff that the range was to remain in lockdown.

[23] Lockdown is when all the inmates on the range are locked in their cells.

[24] Mr. Hamilton stated that after he visited the Upper B range and gave his instruction to the staff about keeping the range on lockdown, he proceeded back to the SU. Upon arriving back in the SU, he noted that the PUFMA on IM A had been completed and IM A was to be transferred from the SU to the HC. Mr. Hamilton stated that he decided that prior to IM A’s move from the SU to the HC, he was going to interview him. IM A was placed in the SU interview room. Accompanying Mr. Hamilton and IM A in the SU interview room were the grievor and CM James.

[25] According to both the grievor and Mr. Hamilton, this interview with IM A was brief. The testimony of the grievor and Mr. Hamilton were not the same on some different aspects of this interview. Mr. Hamilton stated that the door was open, while the grievor said it was closed. According to Mr. Hamilton, there were CXs standing around outside of the interview room who would have been able to hear what was being said.

[26] Mr. Hamilton testified that when he asked IM A about the assault on CX Nagle, IM A stated that another IM, IM B, put him up to the assault. Mr. Hamilton also stated

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that IM A repeated IM B's name more than once and loud enough for the CXs in the hallway to hear. According to the grievor, IM A told the gathering that he was put up to the assault, and it didn't matter which CX he assaulted. Also according to the grievor, Mr. Hamilton asked the grievor if it was IM B, and the grievor testified that he heard IM A repeat IM B's name.

[27] After the interview of IM A in the SU interview room, Mr. Hamilton testified that he instructed the grievor to return to the Upper B range to conduct the search for weapons and evidence. He testified that he instructed that the range was to remain in lockdown and that no one was to be moved.

[28] IM B's cell is located on the Upper B range.

[29] During his testimony, Mr. Hamilton stated that when he was reviewing the video that contained the assault on CX Nagle, IM B was visible on the video and was seen entering his cell.

[30] The grievor testified that after the brief interview of IM A in the SU interview room, he went back to the Upper B range, where he stated that a search was already underway. The grievor confirmed that when he arrived back on the Upper B range, all IMs were locked in their cells. He stated that the IMs had covered their cell doors/bars with sheets or blankets to prevent staff from being able to see inside. In addition to him, CMs Leeman and Liggett were also present on the Upper B range as were several CXs. The grievor testified that upon his return to the range, he proceeded to the upper tier to speak with the IM range representative whose cell was on that level. According to the grievor, both CM Leeman and CM Liggett were on the lower tier.

[31] The grievor states that as he was coming down the stairs from the upper tier to the lower tier, three CXs were manually unlocking the door to IM B's cell, handcuffing him and removing him. According to the grievor, CM Leeman was at the bottom of the stairs standing directly in front of IM B's cell. The grievor testified that, at this juncture, he asked CM Leeman what was going on, and according to the grievor, CM Leeman responded that he did not know.

[32] The three CXs handcuffed IM B, removed him from his cell and moved him down the range to remove him off the range. The grievor states that he asked the three CXs where they were going with IM B, and they told him to the SU. The grievor testified

that he told CM Leeman that he would go with them. The three CXs, IM B, CM Leeman and the grievor all departed the range. The grievor stated that once outside of the range, it was his intention to ask the three CXs by whose authority they were taking IM B out of his cell and bringing him to the SU; however, he was interrupted by CM Leeman, who he stated told him that he would go to the SU with the three CXs and IM B and that the grievor should go back to continue with the search because it was “his range”.

[33] The three CXs took IM B to the SU.

[34] Sometime shortly after being escorted from the Upper B range and shortly after arriving in the SU, IM B was assaulted.

[35] The grievor stated that he watched the three CXs, IM B and CM Leeman until they were out of sight, and he then returned to the Upper B range and supervised the end of the search. He testified that after the search of the range was completed, he went to the third floor control post and attempted to call CM James in the SU; he stated that there was no answer in the SU. He testified that he then attempted to call the AWO in his office and received no answer there either.

[36] The grievor stated that when he received no answer either at the SU or the AWO’s office, he left the Upper B range and third-floor control post and went down to the SU. He stated that he assumed that CM Leeman, the 3 CXs and IM B were down there. The grievor testified that when he got to the SU, the only staff member there was CX Jason Lyons, who was in the control post. He stated that he asked CX Lyons where CM James and CM Leeman were, to which he stated that CX Lyons told him that he didn’t know. The grievor stated that he then asked CX Lyons if they had been there, and he stated that CX Lyons told him, “No”. The grievor went on to testify that he was immediately going to leave the SU area to find out why IM B was in the SU as the grievor stated he had no idea why IM B was there. He stated that IM B was in the observation cell and that IM B called out to him. The grievor stated that he went and looked into the cell and saw IM B sitting on the bench. The grievor stated that at that time he had no idea why IM B would have wanted to speak to him other than to ask him why he was there, and as such, the grievor states that it was important to leave the area and find out the answer to this question. The grievor stated that he said to IM B, “I have no idea why you are in segregation and I am going to find out and I will get back



to you.” The grievor testified that he then left the SU and returned to the Upper B range to his office where he again attempted to contact Mr. James, Mr. Leeman and Mr. Hamilton.

[37] The grievor stated that upon again not being able to get in touch with any of Messrs. James, Leeman and Hamilton, he left the Upper B range and proceeded to the Duty CMs office and spoke with the Duty CM Fransden, to whom he said he asked if she knew why IM B was taken to the SU, to which he stated she said, “No”. The grievor testified that CM Fransden had booked leave, and so he took over her job as the Duty CM. The grievor stated that he then attempted to again get hold of any of Messrs. James, Leeman and Hamilton from the Duty CMs office, and again, he was not able to reach any of them.

[38] The grievor testified that at 5:30 p.m., he received a call from DW Jensen, who instructed him to go to the SU and not allow anyone to speak with either IM A or IM B without a CM present. The grievor further testified that he asked DW Jensen what was going on, and it was at this time that he learned that staff had assaulted inmates. The grievor stated that he did not believe DW Jensen, and he said this to him. He stated that he followed the DW’s instructions, locked the Duty CM office and proceeded down to the SU. The grievor stated that on his way to the SU, he ran into CM Feeney, who was going to start his shift, so he gave him the keys and advised Mr. Feeney that he would call him from the SU. The grievor stated that after arriving at the SU, he called CM Feeney and advised him what the DW had told him. The grievor stated that he remained in the SU until he was relieved and then went home.

[39] None of CM Leeman, CM Liggett, CM James, CM Fransden, CM Feeney or CX Lyons testified before me.

[40] AWO Hamilton testified that at some point shortly after the meeting with IM A in the SU interview room, after he had returned to his office, he received a call that IM A was being transported from the HC to a hospital. According to AWO Hamilton, it was at this time that the grievor and CM Leeman attended his office and advised him that IM B was in the SU. AWO Hamilton testified that, at this juncture, he immediately sent the grievor down to the SU to observe IM B and ensure that no one either enters the cell he is in, or speaks with him. He states that he also called the CX who was in the SU control post and instructed him that no one was to enter or speak with IM B.

[41] The authority to place an IM in segregation is with the person who is in charge of the Institution. During normal daytime hours, that is the Warden. In the absence of the Warden, it is his Deputy or a designate. At this time of day, with Warden Pyke out of the Institution, this authority was with Acting Warden (DW) Jensen.

[42] There was no order from Acting Warden Jensen to place IM B in segregation. AWO Hamilton stated he did not authorize the transfer of IM B to segregation.

[43] AWO Hamilton testified that he left KP at approximately 3:20 p.m. that day, and at some point in the evening, he received a call from a local hospital that IM A had sustained a severe beating, and IM B had been sent to the hospital due to trouble with his vision.

[44] Mr. Pyke testified that he was in Montreal at the Special Handling Unit (SHU) when he received a call from Mr. Jensen advising him of the assaults. He stated that Mr. Jensen told him that IM B had trauma to 80% of his body. As it was too late for him to get back to Kingston that day, he left Montreal first thing the morning of October 5, 2011.

**B. October 5, 2011 and subsequently**

[45] Mr. Pyke testified that upon his return to KP on the morning of October 5, 2011, he immediately went to the SIO and met with the Coordinator of Correctional Operations and reviewed the video that was available. He testified that he was concerned by the lack of information available. He didn't have any OSORs; nor did he have any use-of-force reports.

[46] Mr. Pyke states that he called in a particular CM and asked him what had happened. He further stated that the CM advised him that he walked in on several CXs assaulting an IM in a cell, who was handcuffed. The CM wrote up an OSOR, which identified a number of individuals involved in the assault.

[47] Mr. Pyke determined that an investigation was required, and by a convening order dated October 14, 2011, he ordered an investigation into the assault of staff and resulting use of force on IMs A and B at KP on October 4, 2011 ("the investigation"). This convening order was directed to Mr. Edwards and William Garrick of Presidia Security Consulting, a private organization outside of CSC.

[48] Mr. Pyke testified that he does not recall when he first spoke to the grievor about what happened on October 4, 2011; however, he recalls that when he did, the grievor led him to believe that the grievor was not in the vicinity of IM B's cell when IM B was extracted from his cell and brought to the SU, where he was eventually assaulted. Mr. Pyke recalls reviewing the video footage of the Upper B range, which clearly showed that the grievor was in the area.

[49] Mr. Pyke testified that the process used by CSC management to determine whether an employee should be suspended without pay pending an investigation is based on what has become known as the "*Larson criteria*", the basis of which is set out in *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9. The CSC has created a document entitled "*Larson Criteria*", which document sets out a series of questions, based on *Larson*, as well as the "Guidelines for Discipline", to be considered by management.

[50] Mr. Pyke testified that in considering what to do with respect to the grievor, he was concerned about the grievor's lack of explanation as to why he let 3 CXs remove IM B from his range, shortly after IM B had been identified as the instigator of the attack on CX Nagle, and as well why the grievor did not stop and talk to IM B when IM B called out to him while in the SU shortly after he had been removed from the Upper B range. Mr. Pyke stated there was a lack of trust given that he felt the grievor knew much more than he let on and only divulged information when pressed to do so. A staff member and two inmates had been assaulted, and the grievor was not cooperative. As a correctional manager, he is held to a high standard; trust is everything. For the safety and security of the institution and the personnel within it, Warden Pyke felt it was best that the grievor be removed, pending more information.

[51] Mr. Pyke stated that he suspended the grievor on October 14, 2011, without pay, effective October 13, 2011, pending the investigation. The letter of suspension stated, in part, as follows:

...

... *The reason for the suspension is:*

*Your involvement in the assault of an inmate at Kingston Penitentiary while on duty on October 4<sup>th</sup>, 2011. You were present in your role as the Correctional Manager responsible for the range in question when an inmate was extracted by*

*correctional officers, without any indication of authorization. Despite direct orders from the AWO not to have anyone move on or off your range, you did not question the removal of this offender. Your subsequent role in disassociation cells after the incident in question presents some discrepancies. This is aggravated by the fact that you denied being in disassociation cells until confronted with evidence that placed you there. . . .*

. . .

[52] Disassociation cells are another name for the SU. “ASU”, which is an acronym for “Administrative Segregation Unit”, is also another name for the SU.

[53] Warden Pyke testified that on November 1, 2011, he reassessed the grievor’s indefinite suspension and, based on the *Larson Criteria* and information obtained both during the internal CSC investigation and the ongoing Ontario Provincial Police (OPP) investigation, determined that the grievor could be reinstated on modified duties pending the conclusion of the investigation (Exhibit E-2, Tab 5). The grievor was notified of this change in status by letter dated November 2, 2011 (Exhibit E-2, Tab 7).

[54] Mr. Edwards testified before me. Mr. Garrick did not.

[55] Mr. Edwards confirmed the steps he and Mr. Garrick took to conduct the investigation. A redacted version of his final investigation report is found at Exhibit E-2, Tab 8, a copy of which was sent to the grievor on November 10, 2011. An unredacted version of the investigation report was marked as Exhibit E-5 and was provided to the grievor during the course of the hearing.

[56] The investigation report contains summaries of several interviews conducted by the investigators. The investigation report also states that the investigators interviewed 30 people. Other than the grievor and AWO Hamilton, none of the other investigation report interviewees testified before me.

[57] Set out at pages 26 through 29 of the investigation report is a chronology of events for October 4, 2011. This chronology was based on information provided during the interviews as well as a review of closed-circuit television (CCTV) video footage. The chronology states that when it was impossible to confirm the actual time an event took place, it was listed in the chronology in the order that the event was described in the interviews; however, no time would be associated with that activity.

[58] The first event listed in the chronology is the assault by IM A on CX Nagle, which is recorded at 10:47:48 a.m. The last event listed in the chronology is timed at 13:03 hours, and the entry records that 2 CXs and a police officer identified as a member of the “Pen Squad” enter the SU. Mr. Edwards confirmed when cross-examined by the grievor that the times set out in the chronology were times shown by the CCTV video cameras.

[59] The following are key chronological events that took place in the late morning and early afternoon of October 4, 2011 as set out in Exhibit E-2, Tab 8 and E-5, and which have bearing on these grievances:

11:35:43 hrs	IM A exits the SU escorted by CMs James and Albano and AWO Hamilton and 2 CXs [note: one of the CXs is a CX who at 11:47:14 removes IM B from his cell on the Upper B range].
11:45 hrs	1 CX draws a key from the Upper B range control post/office and together with 2 other CXs removes IM B from his cell.
11:47:14 hrs	IM B, together with 5 CXs, enters the SU.
Unknown	IM is assaulted in an SU cell.
11:50:24 hrs	3 of the CXs who entered the SU with IM B exit the SU.
11:50:33 hrs	1 of the CXs who entered the SU with IM B exits the SU.
11:50:46 hrs	The last CX who entered the SU with IM B exits the SU.
11:56:23 hrs	CM Leeman enters the SU.
11:57:47 hrs	CM Leeman exits the SU.
12:01:34 hrs	CM Albano enters the SU.
12:03:27 hrs	CM Albano exits the SU.
12:21:59 hrs	CM James, CM Albano and 2 CXs enter the SU.
12:22 hrs	CM James exits the SU.

12:49 hrs                      CM James enters the SU.

12:56 hrs                      CM Albano exits the SU.

[60] Mr. Edwards testified that individual cells on living unit ranges including the Upper B range are opened and closed electronically from within the range control post. This control post is secure. When IM B was removed from his cell on the Upper B range, a CX had obtained a key and manually opened the cell door, which is not the normal procedure.

[61] CXs can be classified CX-1 or CX-2. A CX-1 is the entry-level correctional officer classification. A CX-2 is a higher-level classification than a CX-1. A CM is a management-level position, and CXs are subordinate to a CM.

[62] By letter dated November 17, 2011, the grievor was instructed to attend a disciplinary hearing scheduled for November 21, 2011. The grievor attended the disciplinary hearing on November 21, 2011, at which time he provided to the employer a six-page document entitled “Rebuttal of investigation report dated October 2011 and information for disciplinary hearing” (“the Rebuttal”), which is found at Exhibit E-2, Tab 10.

[63] In addition to the Rebuttal, the grievor had completed four OSORs with respect to the October 4, 2011 incidents: one on October 4, 2011, completed at 8:49 p.m.; a second one, completed on October 5, 2011, the time of completion being obscured; a third, completed on October 6, 2011 at 4:42 p.m.; and a final one, completed on October 11, 2011 at 8:00 a.m. The first three of these OSORs are found at Exhibit E-2, Tab 1, and the final one forms part of Exhibit E-3. The October 4, 2011 OSOR is very short and relates only to the completion of the PUFMA that was completed with respect to IM A.

[64] The October 5, 2011 OSOR states as follows:

...

*On the above approximate time and date this writer was given direction to have the upper B common area searched for weapons following an assault of CX Nagle. While on the range I walked the lower tier and instructed some of the inmates to remove their cell coverings. I then proceeded to the top tier and did the same. When I was finished on the top tier I went back down the stairs and spoke with CM Leeman*

*and asked if we had found anything yet. At that time three CX removed I/M [B] . . . and escorted him from the cell. At that time everything seemed normal, the inmate was compliant and no force was used. CM Leeman and I followed the CX off the range. I remained on the third tier and watched the CX escort him down the stairs. There were no concerns and I returned back on the range. I instructed two CX to search I/M [B]'s cell and CX Nichols found a sheet with what appeared to be old blood on it. I instructed CX Nichols to seize the sheet and fill out the necessary reports. The cell door was secured. When the search was complete I left the range.*

*. . .*

[65] The October 6, 2011 OSOR states as follows:

*. . .*

*Follow up OSOR - at approximately noon I attended Segregation to see if I was needed for anything as earlier I did the PUOFMA on i/m [A]. CX Lyons was there in the post and he had been the one to open the Seg barrier. No other person was visible. I asked CX Lyons if I was needed for anything and he replied no. As I was leaving i/m [B] called my name from the holding cell and I answered "no I did not want to speak with him at the moment" and walked away. I never stopped in front of the cell but did glance in and he was sitting normally on the cement bench. I did not notice anything else. I then left the area. Aproximately twenty minutes later I went back to segregation. I do not recall but I believe it was Tim Hamilton who instructed me to have a CM stay there and not allow any person to enter the holding cell unless it was a CM or higher. I stayed in the control post for a while, maybe thirty five minutes until CM James arrived and relieved me as he is the CM for this area. I left the area and returned to my office to finish of some work from earlier. At 1415 I relieved CM Fransden on the Duty Desk. At approximately 1745 I recieved a phone call from Mike Jensen. Direction was given to move [B] to Segregation informing me to have a CM posted to Segregation and to be present any time a CX went on range or to open the door. I went to the Seg/Health Care hallway and met officers and a CM coming from Healthcare and directed them to bring [B] to Segregation. We placed [B] in cell 8 I believe, closed the door and stayed in the Segregation control Post untill relieved by CM Fransden.*

*. . .*

[Sic throughout]

[66] The October 11, 2011 OSOR states as follows:

...

*I was present during an interview in the Segregation area with the Subject [Subject being referred to here is IM A], also present was CM James and AWO Hamilton. The Subject was being asked why he attacked an officer on Upper B range. At that time the Subject looked to be in a condition other than normal. The Subject stated that he assaulted the Officer because he was "fucked up". CM James interrupted him and said "no you told me it was because a couple guys told you that you had to do it." The inmate said yes and AWO Hamilton asked for a name. The inmate did not name anyone at that point. CM James continued questioning the Subject; at that point I was distracted by the morning's events. I did hear CM James say at one point "you should be dead if it wasn't for me". At that point I heard AWO Hamilton ask again for a name. The Subject replied "[B]" and AWO Hamilton repeated it. This could have been in reverse as I was still distracted from earlier events. At that point the interview was completed. I reminded AWO Hamilton that I believed I heard the Subject say it was a couple of guys who put him up to the assault and AWO Hamilton confirmed that. At that time AWO Hamilton directed me to deploy officers to conduct a common area search of Upper B for weapons. I then left the area and proceeded to Upper B.*

...

[67] Exhibit E-1 is an OSOR that AWO Hamilton completed on October 5, 2011 at 3:00 p.m., which states as follows:

...

*On the above date and time I was in my office 3rd floor A3 building. I was with Correctional Manager Bruno Albano . Received over his Radio was a call from Principle Entrance stating the Riot Alarm on Upper B control post was activated. Mr. Albano immediately left my office to respond to the area. I then went to my active Live viewer (Gemitec omnicast) to view what was happening on range. Acting Warden Mike Jensen then entered my office as he had knowledge of an ongoing incident. We then viewed officers securing all inmates in their cells on Upper B range. . Once all inmates were secured we went into archive viewer. We then viewed 2 CX doing Range lock up. As the CX were proceeding on the third tier apporox. Cell 4-3-B an inmate does strike the one CX in the face. The officer and inmate then engage in an altercation. The second officer, at first hesitant then engages in what appears to be an attempt in controlling the inmate.*



Shortly their after several CX are seen responding to the area. It appears the inmate is taken under control and escorted off the range.

Acting Warden and myself then proceed to the wing and cells area. Acting Warden advises he is going to speak with CX in the dome, I advise I am attending Segregation. Once in segregation I viewed several officers. I view down Range (West side) the inmate is I assume in the shower as an officer is placed outside the shower door with a video camera. I speak with Correctional Manager James for brief on situation. I am told inmate is in shower decontaminating as OC has been used. I am also told the inmate is making statements that he had to assault an officer or he would be stabbed. I ask the where about of the CX that was a assaulted. I was told health care. I then leave area and report to health care to see officer. Officer is then finished being seen by RN, I escort CX Nagle to the SIO boardroom. Present with us is UCCO Rep CX Steve Carson. I advise Mr. Nagle and talk with him about the incident. I ask if had any prior indications that may have alerted him of this assault. He stated no, that he was just doing the range walk. He was offered EAP and CISM as well CMO Pat Lavery did arrive with Form 7 WSIB paper work. I told the Officer I would like him to complete a detailed report of the incident if he felt he was able. The Officer confirmed that he was and that he would write his statement prior to leaving the Institution. At this time I requested that the range have an on scene controller as SIO was going to go on range and take pictures.

I then leave the CX and report to the wing and cells. I advise that the range is to remain locked at this time as SIO is going to take evidence pictures.

I then leave Wing and Cells and report to Segregation. At that time 2 RN's are finishing up Post Use of Force with CM B Albano. I am then told by the CM's that inmate is required to go to Health Care as advised by RN's. Inmate is taken out of shower. I advise CM's that I wish to speak with inmate in the open interview room adjacent from the control post. Inmate was questioned on his actions of assault. Inmate was coherent and responsive. Inmate had redness on his facial area and I noticed a scratch on his neck. Inmate had no bruising or swelling. Inmate stated that other inmates had put him up to this and he acted on the assault. Inmate as well stated he has being doing heavy drugs since the previous night and that he was stoned and under the influence. We spoke of the seriousness of the incident in a Maximum security setting and that he was fortunate that the reaction from the officers in the control post was not more severe. Inmate did state that inmate [B] and another had told him to do this assault. I then recalled seeing who I thought was inmate [B] on the Live viewer pushing past a CX almost

*shouldering to return to his cell. Inmate was then escorted by Correctional Manager James and a CX to KP health care.*

*I then leave Segregation to the Wing and Cells. I gave direction to Correctional Manager Leeman and Albano that I want them to take CX to Upper B once SIO is done with pictures and search common area for weapons. I advise that Range is to remained locked and no one is to move.*

*I then leave that area and return to my office in A3 to send update All Staff on assault and range lock down.*

*After returning to my office CM's Leeman and Albano arrive in my office. I am told that inmate [B] is in Holding Cell in Segregation. I questioned this. I advise that I want one of them to attend the area immediately and that no one is to talk to the inmate until SIO's can interview. As well I call the Segregation Unit Control Post and advise CX Lyons that the holding cell door is not to be opened and that no one is to speak with the inmate and that SIO's will interview.*

*Then I receive a call from Correctional Manager James in Health Care that the inmate [A] is Overdosing and that an ambulance has been called. I notify CM Fransden to prepare escort and that I want specific CX on the escort. I ask for A/CM Long, CX 1 Wynne and CX 1 Snider.*

*SIO's Blanchard and Malcolm then report to A3 for brief. They provide myself with quick brief that inmate [B] was not involved. They provide other inmates names that had been seen earlier with inmate [A] exchanging TV's and cell effects. It was also noted by SIO's inmate had an abrasions on his forehead. They questioned [B] on this and he stated he had fallen.*

*SIO's then briefed Acting Warden.*

*The decision was then made by Acting Warden [B] would remain in Segregation, Upper B range would remained locked down for the evening until further investigating could take place in am by SIO's.*

*I then left the Institution at approximately 1515 hrs. . . .*

*. . .*

*[Sic throughout]*

[68] Mr. Hamilton stated in his evidence-in-chief that after the interview of IM A in the SU interview room, he instructed that the Upper B range was to be locked down and no one was to be moved off of it and that the grievor was to conduct a search of the range for weapons and evidence. In his cross-examination of Mr. Hamilton, the grievor brought Mr. Hamilton to paragraph 3 of Exhibit E-1, which stated in part: "I advise that the range is to remain locked at this time as SIO is going to take evidence pictures." When brought to this paragraph, Mr. Hamilton stated that he told this to the grievor and Mr. Leeman.

[69] Exhibit E-4 is the OSOR dated October 4, 2011, at 1:00 p.m., of Nurse Leduc, who attended at the SU to look at the injuries sustained by IM A. The point of note from this OSOR is that it was completed at 1:00 p.m. and that it reported that IM A had been sent to the Kingston General Hospital (KGH) due to ingesting a large number of pills. The OSOR of Nurse Leduc was shown to have been reviewed and signed by the grievor on October 4, 2011.

[70] The Rebuttal is six pages in length. The first four pages set out points set out in the Investigation Report with which the grievor takes issue. The Rebuttal identifies these various points by setting out page number and point number references back to the Investigation Report. The final two pages of the Rebuttal set out the grievor's analysis of the Investigation Report.

[71] In the Rebuttal, the grievor addresses points from the Investigation Report that deal with the immediate facts surrounding the removal of IM B from his cell on the Upper B range. His points on these facts are as follows:

Page 2 of the Rebuttal, referencing Page 6, Point 5, of the Investigation Report:

*During the interview I indicated that I watched the three officers remove the Inmate from the cell on Upper B. I did not confront the officers on the range in front of the other Staff or Inmates. I was under the belief that the AWO or another Correctional Manager instructed the CX to bring the Inmate to Segregation. I was not in charge of the situation at that point and had no reason to believe that anything out of the ordinary was taking place, it is also noted that CM Leeman was there and also did not feel anything was out of the norm. It will indicate via the video that I did accompany the CX and the Inmate off of the range as well as CM Leeman. It was my intention at that point to accompany them to the ASU and determine what was going on, at this point CM Leeman stated that he would go instead so that I could continue with the range search as it was my range being searched in keeping with the original direction given to me by AWO Hamilton. CM Leeman then accompanied the Inmate and the three officers to the ASU while I returned to my supervision of the search*

Page 3 of the Rebuttal, referencing Page 12, Point 7, of the Investigation Report:

*AWO Hamilton confirms that I followed the officers off of the range when they removed the inmate from the cell on Upper B. He indicates that he viewed this on video but the*

*report does not indicate if he also viewed CM Leeman follow the officers off of the range. The video clearly shows this.*

[72] In his testimony, the grievor stated that on three occasions on October 4, 2011, after IM B was removed from his cell on Upper B range, he tried to get in touch with CMs Leeman and James and AWO Hamilton to find out why IM B had been removed from his cell and brought to the SU. There is nothing in the Investigation Report that makes any mention of any of these various attempts. The following is that portion of the Investigation Report that pertains to the investigators' interview of the grievor:

. . .

*At 1058 hrs, October 19th 2011, an interview was conducted with CM Albano, at the beginning of this interview CM Albano was provided a copy of the Convening Order and the Employee Rights, Privileges and Cautions form, which he read and signed. During this interview CM Albano provided the following salient information:*

- *As it pertains to Inmate [A] his main involvement was conducting the Post UOF Medical Assessment (PUFOMA [sic]), during which he noted that Inmate [A] had marks on his neck and face, however he did not note any injuries to his body. He felt that these injuries were conducive with a normal UOF incident;*
- *After he was finished with his OSOR on the PUOFMA he met up with AWO Hamilton and CM James who were going to interview Inmate [A]. He went with them but stayed quiet as he (Albano) was very angry and used "anger management techniques" to calm himself down;*
- *During the interview AWO Hamilton and CM James were doing the "good cop/bad cop" routine trying to get Inmate [A] to give information as to whether or not someone put him up to assaulting CX Nagle. CM James said words to the effect "We're tired of this shit, give us a name, if it wasn't for me you'd be dead". He is ninety nine percent sure that AWO Hamilton said Inmate [B's] name and that Inmate [A] confirmed it;*
- *After the interview he was tasked by AWO Hamilton to do a search of Upper B Range, he asked CM Leeman to help out. During the search he notes that three Guards were taking Inmate [B] off the range . . .*
- *He doesn't know how Inmate [B's] cell door was opened, however when they were taking Inmate [B] out of the cell he was handcuffed from behind. At the time he wasn't concerned about Inmate [B] being taken out as it happens often in Kingston Penitentiary*

where other Managers have told Guards to go and get Inmates out of cells and take them to Segregation. He watched them escort Inmate [B] down the stairs, it all seemed normal to him, no one seemed upset or angry and there were no marks on Inmate [B's] face;

- After he had completed the search he went down to the ASU to see if there was anything they needed him to do, he saw Inmate [B] sitting in the holding cell with the door closed, Inmate [B] called out to him, but he didn't want to talk to him so he walked past.
- He then received a call from AWO Hamilton who told him to go and sit in the "Bubble" and not to let anyone below the rank of CM in to see Inmates [B] or [A]. CM Albano stated he didn't ask anyone any questions or talk to anyone about the incidents because at this time "he wanted nothing to do with the stupidity". CM James showed up in the ASU and took over from him and he went on with his regular duties;
- At about 1745 hrs, October 4<sup>th</sup>, 2011, he received a telephone call from Mike Jensen who told him to ensure that Inmate [B] is moved to a cell in segregation, because "the guys kicked the shit out of those guys". He then moved Inmate [B] to a cell and noted that there was a small red mark over his left eye;
- He asked Inmate [B] what happened and he said that he "fell out of his bed", he asked Inmate [B] several times if he wanted to go to Health Care (including once on video) however Inmate [B] declined each time. He then carried on with his regular duties;
- He also stated that at no time was he told by AWO Hamilton to not let anyone off Upper B Range; and
- When asked about "distractionary techniques", he said that they were not taught to use "punches" or "kicks" as DTs, especially to the head.

...

[73] There is also nothing in the Rebuttal that makes any mention of the three occasions on October 4, 2011 that the grievor says he tried to contact CMs Leeman and James and AWO Hamilton about the removal of IM B from his cell on Upper B range.

[74] On December 8, 2011, Warden Pyke disciplined the grievor for his involvement in events which occurred on October 4, 2011 and subsequently, which concerned IM B. The letter setting out the discipline dated December 8, 2011 is found at Exhibit E-2, Tab 11, and states as follows:

...

*As the Correctional Manager responsible for the Upper B range, you were present when an inmate was extracted from his cell by correctional officers without any indication of authorization. By your own admission, you did not question the removal of this inmate from your range.*

*Your subsequent inaction after the inmate was taken to the disassociation cells is cause for further concern, as by your own admission you refused to speak with the inmate when asked and gave him nothing more than a glance. In doing so, you missed a key opportunity to identify the mistreatment of an inmate by correctional officers.*

*I have carefully reviewed the facts and circumstances of this case and based on the investigation and your own admissions, I have concluded that you failed to take appropriate action as either a Peace Officer or a Correctional Manager, which is especially disconcerting. In doing so, you have committed a serious act of misconduct which is in clear violation of the Correctional Service of Canada (CSC) Standards of Professional Conduct and Code of Discipline – Commissioner's Directive (CD) – 060.*

*Specifically, you have violated the following under CSC's Standards of Professional Conduct and Code of Discipline:*

*Standard 1, Responsible Discharge of Duties, as it relates to:*

- 6 (f) fails to take action or otherwise neglects his/her duty as a peace officer;*
- 6 (g) fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates to his or her duty;*
- 6 (k) as a supervisor, or as one in authority, condones or fails to take action when an employee has committed an infraction of the Standards of Professional Conduct, a breach of discipline or any other irregularity coming to his/her attention;*
- 6 (m) performs his/her duty in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service, or any other person(s), either directly or indirectly.*

*In addition, I find that your actions are a violation of the Values and Ethics Code of the Public Service in that you have contravened the ethical value of acting at all times in such a way as to uphold the public trust. As an employee of the Correctional Service of Canada, it is your priority to ensure the safety and security of our staff and offenders and your lack of action on October 4<sup>th</sup>, 2011 is a direct infringement of this fundamental priority. Furthermore, as a Correctional Manager and a Peace Officer, you are held to a higher standard of conduct than other public servants. You*

*are given a great deal of trust and are expected to conduct yourself in a manner that will bear the closest of public scrutiny.*

*Your actions, or lack thereof, on October 4<sup>th</sup>, 2011, are incompatible with that expected of a Correctional Manager of the Correctional Service Canada. In arriving at my decision, I have given due consideration to all mitigating and aggravating factors, including your years of service, your performance record and your statements made during the disciplinary hearing. I have also taken into account your ongoing failure to recognize your errors in judgement and that your lack of action enabled the assault of an inmate.*

*Given the severity of your misconduct, I have concluded that the bond of trust which is fundamental to the employment relationship has been severely damaged. Therefore, by virtue of the authority delegated to me pursuant to Article 12(1)(c) of the Financial Administration Act and by the authority delegated to me by the Commissioner, I am awarding a disciplinary sanction of a thirty (30) day suspension without pay. Your suspension without pay from October 13<sup>th</sup>, 2011 to November 1<sup>st</sup>, 2011, inclusive will count towards the suspension. The remaining period of your suspension will be served from December 8, 2011 - December 30, 2011 inclusive.*

...

[75] Warden Pyke's letter of December 8, 2011 contained an error in the calculation of the remaining days of suspension to be served, where it referred to "December 8, 2011 - December 30, 2011." That error was corrected by an amended letter dated December 10, 2011 (Exhibit E-2, Tab 12) where it states: "December 8, 2011 - December 29, 2011 inclusive."

[76] "Commissioner's Directive 060" (CD 060), the Code of Discipline, issued under the authority of the Commissioner of the CSC on August 2, 2011, sets out at paragraph 6, under the heading of "Professional Standards", under the sub-heading of "Responsible Discharge of Duties" and under the sub-sub-heading of "Infractions", the following:

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

...

*f. fails to take action or otherwise neglects his/her duty as a peace officer;*

*g. fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates to his/her duty;*

*. . .*

*k. as a supervisor, or as one in authority, condones or fails to take action when an employee has committed an infraction of the Standards of Professional Conduct, a breach of discipline or any other irregularity coming to his/her attention;*

*. . .*

*m. performs his/her duty in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service, or any other person(s), either directly or indirectly;*

*. . .*

[77] The investigation report was issued on November 10, 2011, and based on that investigation, Warden Pyke determined that the grievor had acted in a manner that was inappropriate and that amounted to misconduct and determined the seriousness of the misconduct justified a punishment of a 30-day suspension. As the grievor had already been suspended for a period of 14 days, pending the investigation, the grievor only spent a further 16 days suspended without pay.

[78] In essence, the grievor's initial suspension of 14 days starting on October 13, 2011, became subsumed into the 30-day disciplinary suspension.

[79] When asked by counsel for the employer what it was that the grievor did wrong, Mr. Pyke stated that the grievor had failed to determine why three correctional officers were on the Upper B range, the range he was responsible for, and why they were removing an inmate from his cell in a lockdown. The Upper B range was locked down, and no one was to be removed. Mr. Pyke went on to state that the grievor was in charge of this range, and as such, being in charge of the range, you would not allow someone onto the range to remove an inmate from their cell and remove them from the range. Warden Pyke said that this was especially true when an assault on an officer had just occurred and emotions are running high. In addition, Warden Pyke stated that when the grievor was down in the SU and IM B asked to speak to him, the grievor indicated that he was busy and walked away. The inmate who was in the SU was from his range and had just been removed from his range. IM B was the grievor's responsibility, and it



was a missed opportunity by the grievor not to speak to him as he could have noticed that damage was done or that something had gone wrong.

[80] The grievor testified about an incident that occurred in 2000, where an inmate was assaulted by staff, and when he had acted, he was ostracized and experienced harassment at the hands of his co-workers.

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

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

##### **1. Sealing of the unredacted Investigation Report, Exhibit E-5**

[81] The employer submits that the question that is to be answered in whether or not the unredacted version of the investigation report should be sealed is the test that is set out in *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, more commonly referred to as “*Dagenais/Mentuck*”.

[82] Counsel referred me to *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40, at paragraph 4, which states as follows:

*[4] As those employees were not part of the complaint before me, I have concluded that, after a review of the report, to allow it to be open to the public would cause harm to the others mentioned in it. The information, if left unsealed, could be harmful to the reputations of people who are not involved in the complaint before me and who have not agreed to the publication of the findings of the investigation into their activities or had the opportunity to defend themselves before me. . . .*

[83] Counsel also referred me to *Reddy v. Office of the Superintendent of Financial Institutions*, 2012 PSLRB 94.

[84] The employer argued that the information that was redacted from the report satisfies the *Dagenais/Mentuck* test and as such the unredacted version (Exhibit E-5) should be sealed.

##### **2. Board File No. 566-02-6867: suspension of October 13, 2011**

[85] This is an administrative suspension, pending the completion of an investigation, and cannot be referred to adjudication under paragraph 209(1)(b) of the Act. There is no evidence that this suspension was related to discipline.

[86] Mr. Pyke explained the reasoning behind the administrative suspension, which was to ensure the safety of staff and inmates pending the completion of the investigation into the assaults on both staff and inmates on October 4, 2011. Warden Pyke confirmed that once he had sufficient information, he ended the administrative suspension and brought the grievor back to work.

[87] The employer referred me to *Larson v. Treasury Board (Solicitor General Canada-Correctional Service)*, 2002 PSSRB 9, and *Petrovic v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 16.

[88] In any event, the matter is moot as the time spent on the administrative suspension was included in the disciplinary penalty (see *Gravelle v. Deputy Head (Department of Justice)*, 2014 PSLRB 61).

### **3. Board File No. 566-02-6868: suspension of December 10, 2011**

[89] The questions I must ask and consider are as follows:

1. Was there misconduct?
2. If there was misconduct, did it merit discipline?
3. If the conduct merits discipline, was the discipline appropriate?

[90] The grievor tried to minimize his involvement in the incidents that took place on October 4, 2011, and continues to do so to this date. He considered his involvement as peripheral. While the grievor was present during the events of that day, he doesn't recognize his responsibilities as the officer in charge of the range. He appears to slough this responsibility onto someone else, yet at the same time, when you hear his evidence at the hearing, he attempts to present himself as someone who was on top of the events and trying to get to the bottom of what occurred. He tries to state that on the one hand he was not involved, yet in the next breath that he was proactive and trying to get answers.

[91] Mr. Pyke stated both in his evidence in examination-in-chief and cross-examination that the grievor's failure to act led directly to the removal of IM B from his cell and the subsequent assault. He stated that not only did the grievor's inaction lead to the assault on IM B, but also, after the fact, he was unwilling to provide information or seek out information when required.

[92] The grievor's evidence is contradictory to other evidence. His memory may not be accurate. The grievor filed four OSORs, which contain little information as to what had happened on October 4, 2011, even when he wrote them on that day and the following two days. When he gave his evidence at the hearing, that evidence about his involvement was more fulsome, yet when pressed on inconsistencies, his response was that the event was three-and-a-half years ago, so he is not sure. Logic dictates that you are in a better position shortly after events to recall and recount them, whereas as time passes, your recollection is less accurate.

[93] Warden Pyke listed and repeated clearly what was wrong with the grievor's behaviour. He was a manager, in charge of the range that was locked down from which an inmate in his charge was removed by three CXs subordinate to him and subsequently assaulted. He failed to take any action to stop them. Warden Pyke, AWO Hamilton and Mr. Edwards all stated that this action by the three CXs was not a normal procedure. The authority to remove an IM from his cell and bring him to the SU can only be done under a specific authority, which is held by the Warden. In his absence, it is his designate, which was on this occasion DW Jensen.

[94] According to the grievor, he states that it sometimes happens that actions are taken which are not 100% by the book; for example, the CM may be called by the AWO and told that an IM is to be sent to the SU.

[95] It appears to be clear that the persons who were close to the situation on October 4, 2011 were aware of what was going on or it was simple for them to find out. In fact, it was their duty to know what was going on or to find out what was going on. The grievor always seemed to be blaming the other guy; when IM B was removed from the cell, there were two other CMs right there who did nothing and were more involved than he was. Warden Pyke was clear: the grievor was in charge of the Upper B range, and the other CMs were not.

[96] What is equally clear was that when it was convenient for him, the Upper B range was "his range", yet at other times, when it did not suit him, someone else was in charge or responsible. The most glaring of this was when he testified about the removal of IM B. The grievor alludes to his non-action when the grievor was removed from his cell due to the fact that two other CMs are present; yet, at the same time, he states he didn't accompany IM B with the three CXs to the SU because CM Leeman told

him that he would go instead because the Upper B was the grievor's range. When it came to removing IM B from his cell, the grievor suggests he is not in charge, yet minutes later, he doesn't follow him to the SU because he is in charge.

[97] The grievor testified that he was trying to find out what was happening; yet, at the same time, he suggested that the activities were business as usual. The grievor stated that when the three CXs took IM B out of his cell, he asked them where they were taking him, yet he stated he didn't ask them by whose authority. If it was regular daily business, why does he then testify at length about trying to find out after the fact why IM B is removed from his cell and brought to the SU? Why does he follow them off the range? Why does he go to the staircase and then return only when told to?

[98] The grievor, in his evidence, suggests that he and CM Leeman should be treated the same because both are CMs and both were on the Upper B range when IM B is removed and both accompany the three CXs off the range. What the grievor fails to grasp is that CM Leeman is not in the same position as the grievor because of the information that the grievor possessed (that CM Leeman did not) that IM A had fingered IM B as putting him up to the assault on CX Nagle.

[99] This information that was possessed by the grievor, which was not possessed by other CMs on the Upper B range, was key information, and it is information that any person, if they had it in their possession, would be able to assess and use to determine that IM B may be at risk. Any reasonable person, with the same information that was in the grievor's possession, would know that if IM B is in your charge on your range, you should keep your eye on him.

[100] While the grievor may have said that the situation was normal or business as usual, it was not.

[101] While the grievor's actions do not place him in the same position as the staff who removed IM B and those who subsequently assaulted him, the grievor's misconduct was his failure to act and failure to fulfill his duties. He had an obligation and duty to prevent the assault, and his behaviour allowed the assault of IM B to occur.

[102] The grievor also neglected IM B when IM B was in the SU and called out to him.

[103] The grievor's paperwork was inadequate for the information he possessed. The grievor tried to justify the lack of OSORs by stating he was too busy, yet there are large

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*Public Service Labour Relations and Employment Board Act and  
Public Service Labour Relations Act*

gaps of time that are unaccounted for that the grievor could have done up appropriate reports for. If you accept the grievor's account of things, he clearly knows by 5:45 p.m. that IM B has been assaulted. The grievor does not finish his shift until 8:00 p.m., yet he doesn't write up an OSOR on any of the information he possessed.

[104] The grievor testified that he was "overwhelmed", "stressed" and "in disbelief" over the events, yet he is not a new employee; he is a CM and has seen a lot. Was he really that frozen in disbelief that he could not fill out an OSOR? Why was it only when he was confronted by Warden Pyke that he remembered that he went to the SU on three occasions? Why did he have to be reminded that he was on the range when IM B was removed and didn't believe the Warden and ask to see the video footage?

[105] The grievor was in the middle of the events that occurred on October 4, 2011; he is suspended without pay pending an internal investigation and a criminal investigation by the OPP, yet there is testimony that he provided at the hearing of this matter that did not make it into his OSORs, the Investigation Report or his Rebuttal. The employer submits that this is just not believable. Would someone who is suspended without pay and subject to both an internal employer investigation and a criminal investigation not want to ensure the record is clear?

[106] The grievor wilfully closed his eyes and removed himself from a situation he knew was explosive on October 4, 2011, but as the CM in charge of the Upper B range, that was problematic for the safety and security of the staff and inmates of the institution. This is what Warden Pyke described as the failure to act and failure to provide critical information about the incident.

[107] With respect to the discipline of others involved in the October 4, 2011 incident, there is no evidence with respect to the other staff, especially Mr. Leeman.

[108] The employer submits that 30 days are appropriate in the circumstances. This was a serious incident, and a serious message must be sent. In this regard, the employer referred me to paragraphs 45 through 48 of *Ranu v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 89.

[109] The employer also referred me to *Gravelle*, and *Buchanan v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 91.

[110] With respect to the other relief requested by the grievor in both of his grievances, we heard no evidence as to any other damages to support any of his claims.

**B. For the grievor**

**1. Sealing of the unredacted Investigation Report, Exhibit E-5**

[111] The grievor took no position.

**2. Board File No. 566-02-6867: suspension of October 13, 2011**

[112] The suspension is covered in the discipline. Due to this, the grievor focused his arguments on the discipline grievance (Board File No. 566-02-6868).

**3. Board File No. 566-02-6868: suspension of December 10, 2011**

[113] The grievor is a long-term, committed and diligent employee with 20 years of service.

[114] The events of October 4, 2011 are both regretful and sad.

[115] The grievor submitted that he was not negligent and that if he had been aware of the danger that existed on that day, that inmates were going to be assaulted, he would have acted. He submits his goal is to prevent harm in the institution. The grievor explained an incident that occurred in 2000, where an inmate was assaulted by staff, and when he had acted, he was ostracized and experienced harassment at the hands of his co-workers. He submitted that this attests to his integrity and continued effort that he does not support harm, does not do harm and will not neglect situations which will cause harm.

[116] The grievor stated that he did not act with any malice.

[117] The grievor submitted that the punishment he received is inconsistent with that which was received by others and that others within the institution acted in the same manner that he did.

[118] The grievor submits that he did many things to contribute to the good of the institution, and he made the best decisions that any other person would have made at that time. The grievor stated that he has had exceptional performance reviews. He

follows policies and procedures in dealing with the public and inmates. He is a good decision maker and an example of what a trustworthy employee should be.

[119] The grievor submitted that Warden Pyke's interpretation of events is not appropriate. According to the Warden, it is the grievor's failure to question the removal of IM B from his cell that was a determining factor of the level of discipline given to the grievor. The grievor submits that he did take steps to determine why IM B was being removed from his cell.

[120] The grievor stated that it was a culture at KP that IMs were removed from ranges by CMs or the AWO without the range CM knowing. The video indicates that the process of removing IM B was already in progress when the grievor went down to the lower tier of Upper B range. Two other CMs were already present when the activity was taking place. The grievor submits that he asked CM Leeman what was going on, and CM Leeman stated to him that he "didn't know". The grievor stated that he felt at the time that his involvement of questioning what was going on could have "escalated" an already volatile situation with the IMs on the Upper B range.

[121] The grievor stated he was in the process of accompanying the three CXs and IM B to the SU when he was told by CM Leeman that he would go with them and that the grievor should stay on the Upper B range, which was "his range". The grievor submits that these acts by him were sufficient and reasonable in the circumstances to determine why IM B was being removed from the range.

[122] Mr. Pyke stated that the grievor did not act with due diligence in completing paperwork in a timely manner. The grievor submitted that he completed his paperwork either the day of the incident or the next day. He further submits that when he became aware of further information, he filled out follow-up OSORs.

[123] Mr. Pyke stated that the grievor missed a key opportunity to speak to IM B when he was in the SU. The grievor stated that he felt that CM Leeman would have followed through with finding out why IM B had been removed from his cell and brought to the SU. The grievor stated that he attended the SU to get information from CM Leeman; however, when Mr. Leeman was not there, the grievor made the decision to try and find out why IM B was transferred to the SU. The grievor states that although IM B called out his name, he did not go and speak with the inmate because he felt that he didn't

have the necessary information to carry on a conversation with him, and he stated he felt that anyone else in his situation would have done the same thing.

[124] The grievor submitted that Warden Pyke did not impose discipline in comparable situations. Warden Pyke's decision to impose a 30-day suspension was excessive, punitive and fails to be corrective in nature. There is nothing that suggests that the action of the grievor warranted a 30-day suspension. According to the grievor, both AWO Hamilton and CM James were in the same interview room with IM A when he mentioned IM B's name, and neither of them wrote up an OSOR that day. He submitted that it was not until Warden Pyke returned to the institution that OSORs were written up, even by the AWO, who due to his position, should be held to a higher standard.

[125] The grievor submitted that CM Leeman was not disciplined. Mr. Leeman was on the Upper B range when IM B was removed, and he also failed to fill out paperwork on the day the events took place. CM Leeman failed to question the CXs who removed IM B from the Upper B range and failed to follow the three CXs and IM B all the way to the SU as he said he would. If Mr. Leeman had done this, he would have prevented the opportunity to assault IM B. Mr. Leeman holds the same position as the grievor. The treatment of CM Leeman in comparison to the discipline received by the grievor shows an unfair treatment of the grievor.

[126] The grievor argued that the fact that Warden Pyke took into consideration that the grievor failed to speak with IM B when he was in the SU contributes to the excessive nature of the 30-day disciplinary suspension. According to the grievor, there were many missed opportunities and inaction by staff at KP that could have potentially prevented the assault on IM B that were greater in impact than identifying that an assault had already occurred.

[127] The grievor admitted that he could have improved in some areas, such as documenting in a more precise manner. He also submitted that any reasonable human being would take this as a learning opportunity.

[128] He stated that he did the best he could at the time.



[129] The grievor submitted that he did not act negligently, without due diligence or without integrity. He acted on reasonable assumptions that any person would have made at the time.

[130] The grievor submitted that he was without income for six weeks and was unable to support his family.

[131] The grievor submitted he should also be compensated for the loss of 171 hours of overtime that he missed out on over this period.

[132] The grievor submitted that the penalty of a 30-day suspension was harsh and excessive.

### **C. Employer's reply**

[133] There was no evidence whatsoever with respect to overtime. Damages are the burden of the grievor, and he led no evidence about this whatsoever, neither on the allocation of overtime nor the overtime he had worked during that year or the overtime that was or could have been available during that time frame.

## **IV. Reasons**

### **A. Sealing of the unredacted Investigation Report, Exhibit E-5**

[134] In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120, at paragraphs 9 through 11, the PSLRB has stated as follows:

*[9] The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the Canadian Charter of Rights and Freedoms; for example, see Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, 2001 SCC 76, Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (CanLII).*

*[10] However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and*

*administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as Dagenais and Mentuck. These decisions gave rise to what is now known as the Dagenais/Mentuck test.*

*[11] The Dagenais/Mentuck test was developed in the context of requests for publication bans in criminal proceedings. In Sierra Club of Canada, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:*

*...*

- a. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- b. the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

*...*

[135] The portions of the investigation report that were redacted contain the names of the two inmates that were involved in the incidents on October 4, 2011 and the names of staff members who were interviewed and investigated. In some places, the redacted portions relate to the safety and security of the correctional service, either its institutions or the persons who are there as inmates, work there as staff or as contractors, or those persons who would visit an institution. Other portions of the investigation report that are redacted are analyses and findings made against staff members, the facts of which may or may not be accurate and may be the subject of other proceedings, including criminal prosecutions.

[136] The right to a fair trial in a criminal prosecution, a person's reputation, and the safety and security of the persons who spend time in correctional facilities, be they the inmates, staff, contractors or visitors, are all widely recognized as important interests, and the confidentiality of the details of those facts are interests that outweigh the

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right to public access to portions of the investigation report. As such, in this matter, I order that the unredacted version of the investigation report, which was filed as Exhibit E-5, shall be sealed.

**B. Board File No. 566-02-6867: suspension of October 13, 2011**

[137] The grievance with respect to the suspension on October 13, 2011, was referred to adjudication under paragraph 209(1)(b) of the *PSLRA*. As such, as set out at paragraph 90 of *Petrovic*, to take jurisdiction, an adjudicator must be convinced that, on a balance of probabilities, the suspension with pay pending an investigation was disciplinary in nature and was not an administrative decision.

[138] The initial *Larson Criteria* assessment document was completed by Warden Pyke on October 11, 2011, and he testified before me about why he suspended the grievor shortly after. According to Mr. Pyke, the grievor led him to believe that his connection to the incidents on October 4, 2011 was peripheral. Upon his return to KP the day after the incidents, in his initial review of the incidents, Mr. Pyke found that the grievor was more involved than he had led the Warden to believe. In addition, Mr. Pyke was concerned about the grievor's lack of explanation as to why he let three CXs remove IM B from his range, shortly after IM B had been identified as the alleged instigator of the attack on CX Nagle, and as well why the grievor did not stop and talk to IM B when IM B called out to him while in the SU shortly after he had been removed from the Upper B range. Mr. Pyke stated there was a lack of trust given what had happened and that for the safety and security of the institution and the personnel within it, it was best that the grievor be removed pending more information. Warden Pyke, in making his determination to suspend the grievor, decided that there would be a follow-up assessment three weeks following the suspension.

[139] By letter dated October 14, 2011, Warden Pyke suspended the grievor without pay indefinitely pending investigations, which were being carried out both by the CSC and the OPP. Warden Pyke advised the grievor that the status of the indefinite suspension would be reviewed every three weeks to consider possible reinstatement and specifically that the grievor's file would be reviewed on November 3, 2011.

[140] In fact, on November 1, 2011, Warden Pyke reassessed the grievor's indefinite suspension and determined, based on the *Larson Criteria*, and on information obtained both during the internal CSC investigation and the ongoing OPP investigation, that the

grievor could be reinstated, however only to modified duties pending the conclusion of the investigation.

[141] The investigation report was issued on November 10, 2011, and based on that investigation, Warden Pyke determined that the grievor had acted in a manner that was inappropriate and that amounted to misconduct and determined the seriousness of the misconduct justified the punishment of a 30-day suspension. As the grievor had already been suspended for a period of 14 days, pending the investigation, the grievor only spent a further 16 days suspended without pay.

[142] In essence, the grievor's initial suspension of 14 days starting on October 13, 2011, became subsumed into the 30-day disciplinary suspension.

[143] The action of the employer by disciplining the grievor and giving him a suspension of 30 days, into which the 14 days he spent suspended from October 13, 2011 were incorporated, makes the suspension of October 13, 2011 moot. I agree with the reasoning contained in *Gravelle* that the action of the employer, by applying the time spent during the indefinite suspension to part of the disciplinary suspension, has rendered the total time suspended into one unique and single disciplinary measure.

[144] The grievance which is the subject matter of Board File No. 566-02-6867 is dismissed.

**C. Board File No. 566-02-6868: suspension of December 10, 2011**

[145] Adjudication hearings with respect to discipline under paragraph 209(1)(b) of the *Act* are hearings *de novo*, and the burden of proof is on the respondent.

[146] The usual basis for adjudicating issues of discipline is by considering the following three questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 CLRBR 1): Was there misconduct by the grievor? If there was misconduct, was the discipline imposed by the employer an appropriate penalty in the circumstances? If the discipline imposed was not appropriate, what alternate penalty is just and equitable in the circumstances?

[147] The first question to be determined is whether the actions of the grievor amounted to misconduct. The employer submitted that the grievor failed in the

performance of his duties, which failure led to the assault of IM B. The grievor, while he admits that if he had known more he would have done things differently, submits that he did nothing wrong and acted no differently than other staff who occupied the same or higher positions within KP.

[148] With respect to this first question of whether or not there is misconduct, some of the salient facts appear to be in dispute. The significant portion of the facts advanced by the grievor in support of his position came from his own testimony. There are many instances where the facts as submitted by the grievor in his testimony are in conflict with those submitted by the witnesses for the employer. Credibility is at the forefront of this matter.

[149] Issues of credibility are dealt with by the test articulated in *Faryna v. Chorny*, [1952] 2 DLR 354, where the British Columbia Court of Appeal stated as follows:

...

*If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility. . . A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.*

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

...

[150] The uncontested facts of the events of October 4, 2011 are as follows:

1. At 10:47:48 a.m., IM A assaults CX Nagle on the Upper B range of KP. IM A is restrained and brought to the SU;
2. At 11:09 a.m., the grievor enters the SU and while there, together with the aid of a CX and Nurse Leduc, conducts a PUFMA on IM A;
3. At 11:22 a.m., AWO Hamilton and CM James enter the SU;
4. Sometime between 11:22 a.m. and 11:35:43 a.m., AWO Hamilton, CM James and the grievor enter the SU interview room where AWO Hamilton and CM James interview IM A in the presence of the grievor. During this interview, IM A names IM B as the person who put him up to the assault on CX Nagle;
5. At 11:35:43 a.m., IM A departs the SU accompanied by AWO Hamilton, CM James, the grievor and two CXs;
6. At 11:45 a.m., IM B is removed from his cell on the Upper B range by three CXs. CM Leeman and the grievor are both present when this occurs;
7. At 11:47:14 a.m., IM B, under escort of five CXs, enters the SU;
8. One of the CXs who removed IM B from his cell and then escorted him into the SU at 11:47:14 was in the SU when the interview of IM A took place between 11:22 a.m. and 11:35:43 a.m. and departed the SU at the same time as IM A, AWO Hamilton, CM James and the grievor;
9. Sometime after 11:47:14, IM B is assaulted while in the SU.

[151] Between 11:22 a.m. and 11:35:43 a.m., an interview takes place in the interview room of the SU, wherein IM A names IM B as the alleged instigator with respect to the assault on CX Nagle. Between this time and 11:45, as little as under 10 minutes, three CXs arrive at the cell door of IM B on the Upper B range with a key and remove IM B from his cell, bringing him to the SU, where he is subsequently assaulted. According to the grievor, the door to the SU interview room (where IM B's identity is divulged) was

closed. Only three staff were in the room and would have heard IM A identify IM B as the alleged instigator; the grievor, AWO Hamilton and CM James. There is absolutely no evidence whatsoever from any source that this information was divulged to anyone else at any other material time. If this set of facts is taken to be accurate, then one of the grievor, AWO Hamilton or CM James would have had to divulge the identity of IM B to the three CXs who came and removed IM B from his cell. There is absolutely no evidence whatsoever that this is a fact; nor has this even been alleged.

[152] AWO Hamilton stated in his evidence and set out in his OSOR (Exhibit E-1) that when he and CM James interviewed IM A, the door to the room was open, and there were CXs outside of the room who could hear what was going on. I prefer the evidence of AWO Hamilton on this point, as his recounting of the facts coincides with the balance of the evidence in this regard. Sometime between 11:22 a.m. and 11:35:43 a.m., IM A divulges the identity of IM B as the alleged instigator of the assault on CX Nagle. Since one of the CXs who attended at IM B's cell and assisted in his removal was actually in the SU when the interview took place and actually exited the SU at the same time as the grievor, Messrs. Hamilton and James, and IM A, it seems more likely that this is the actual rendition of events, and it is far more likely than not that this is how the information was obtained.

[153] The grievor testified that he was not told of the lockdown by AWO Hamilton. AWO Hamilton testified, and it is also set out in his OSOR (Exhibit E-1), that he ordered the lockdown and search, and he specifically instructed the grievor in this regard. I prefer the evidence of AWO Hamilton with respect to this fact as well. An assault on a staff member has just occurred in a maximum security penitentiary. I have difficulty accepting that a CM who was working in KP and who had, at that time, approximately 17 years of service, would not know, as a matter of common sense, whether instructed or otherwise, that the section of the institution within which that assault occurred would be locked down. What makes the grievor's rendition even more difficult to accept is that he states that when he arrived back on the Upper B range after leaving the SU but before IM B is removed from his cell, he found all the IMs locked in their cells and that they had covered their cell doors/bars with blankets to keep staff from seeing what was inside. The grievor surely would have known that the range was locked down, whether AWO Hamilton told him or not. Indeed, the grievor testified that he was a trained investigator, and the AWO did instruct him to search the range for

evidence. What better way to secure an area than to lock everyone in it and, more specifically, lock the IMs in their cells?

[154] The most significant event in relation to the discipline of the grievor was what happened next, which is the removal of IM B from his cell. The employer's evidence was that three CXs obtained a key from the Upper B range control post and manually opened IM B's cell door and removed him. The grievor does not dispute this fact. The grievor states that he was on the upper tier of the Upper B range when the three CXs removed IM B from his cell, while CM Leeman was at the bottom of stairs (which led to the upper tier) and was just outside IM B's cell. The grievor, however, confirmed that he did arrive down the stairs while the 3 CXs had IM B outside of his cell and were still on the Upper B range.

[155] The only evidence of the discussion that took place at the time when IM B is removed from his cell comes from the grievor. The grievor testified that he asked CM Leeman what was happening, and CM Leeman told him that he had no idea. He then stated that he asked the three CXs where they were taking IM B and that they told him to the SU. The grievor then testified that he and CM Leeman accompanied the three CXs who were escorting a compliant and handcuffed IM B down the range and then off the range. Once the six of them were off the range, the grievor testified that CM Leeman told him to return to the range to continue with the search on the range because it was "his range".

[156] The grievor testified in his evidence before me that it was his intention to find out why IM B was removed from the range. He stated in chief that there was nothing unusual as IMs were often removed from the range to be brought to segregation. When cross-examined on this point, the grievor stated that he told CM Leeman that he would go with them to the SU. He also stated in his evidence-in-chief and again in cross-examination that he didn't ask the three CXs by what authority they were removing IM B because he didn't want to escalate things with the IMs.

[157] While there is CCTV footage of this, no CCTV footage was entered into evidence; nor was I led to understand that there was audio attached to the footage.

[158] None of these three CXs testified before me; nor did IM B or CM Leeman.



[159] There is no mention in the Investigation Report (the part that contains the summary of the interview with the grievor) that the grievor had a discussion with the three CXs and CM Leeman when IM B was removed from his cell and removed from the range. There is also nothing in any of the four OSORs that the grievor completed, including the one completed on October 5, 2011, which details the removal of IM B from his cell. In his Rebuttal (Exhibit E-2, Tab 10), while the grievor references the points about the removal of IM B from his cell, the grievor never makes reference to any discussions he allegedly had with the three CXs or CM Leeman. The only reference made to any discussion, in or about this time, is after all of them are off the range and CM Leeman allegedly tells the grievor he will accompany the three CXs and IM B to the SU. In fact, the grievor states in his Rebuttal on the second page at the reference of Page 6, point 5, that he “did not confront the officers on the range in front of the other Staff or Inmates”.

[160] I have set out at paragraphs 36 and 37 of this decision what the grievor, in his testimony before me, maintains he did after IM B was removed from his cell. The grievor testified that after the removal of IM B from his cell, he tried on several occasions over the course of a large portion of the afternoon of October 4, 2011, to contact AWO Hamilton and CMs Leeman and James. The grievor went to great lengths to describe exactly what he did and when. The Investigation Report, however, sets out a chronology of the salient events that took place on October 4, 2011, the times of the events having been referenced back to the CCTV footage. That chronology clearly identifies the grievor entering the SU at 12:21:59 p.m. together with CM James and two other CXs. It then shows CM James exiting and re-entering the SU at 12:22 p.m. and 12:49 p.m., respectively. The grievor did not leave the SU until 12:56 p.m.

[161] The grievor confirmed in his cross-examination that he saw the CCTV footage of himself entering the SU and that CM James and other CXs were with him. When this was put to him, he stated that he could not remember.

[162] The grievor’s testimony does not stand up to the test in *Faryna*. The grievor alleged in his testimony that he tried over the course of a number of hours without success, after IM B is removed from his cell at 11:45 a.m., to try and get in touch with Messrs. Hamilton, Leeman and James; yet the CCTV footage clocked him as entering the SU with Mr. James some 37 minutes after IM B is removed from his cell.

[163] The grievor also stated that when he went to the SU, he specifically asked CX Lyons where CMs Leeman and James were, to which CX Lyons allegedly said he didn't know. If the CCTV footage shows the grievor entering the SU with CM James at an exact time (12:21:59 p.m.), then this testimony cannot be correct.

[164] AWO Hamilton stated in his testimony and set out in his OSOR that after leaving the SU, he returned to his office, and shortly thereafter, CMs Leeman and Albano arrive in his office and tell him that IM B is down in the SU. According to the grievor, this did not happen. AWO Hamilton's evidence was that he told the CMs that one of them was to immediately go down to the SU and that no one is to speak to IM B until the Security Intelligence Officers interview him. He states that he then received a call from CM James in Health Care that IM A was overdosing, and he contacts the Duty CM to arrange for an escort to bring IM A to the hospital.

[165] AWO Hamilton's version of what happened coincides with two other pieces of evidence. First, there is Exhibit E-4, which is a copy of Nurse Leduc's OSOR. The key evidence in this OSOR is the statement that IM A had taken a large number of pills about an hour prior to attending healthcare and that he was transported via ambulance to the KGH emergency department. Nurse Leduc notes the time of the incidents at 11:30 a.m. and the time of her OSOR at 1:00 p.m. The OSOR is reviewed and signed off by the grievor. The information in Nurse Leduc's OSOR coincides with the information of the AWO regarding IM A. AWO Hamilton's evidence also coincides with the information found at the chronology of the Investigation Report, which registers the CCTV footage of the grievor entering the SU at 12:21:59 p.m. and not leaving until 12:56 p.m.

[166] The grievor stated in his evidence before me that when he went to the SU the first time (after IM B was removed from the Upper B range), when he was about to leave, IM B called out to him. The grievor stated that he looked into the cell and he said to IM B: "I have no idea why you are in segregation and I am going to find out and I will get back to you." In his OSOR dated October 6, 2011, the grievor recollected the event as follows: "As I was leaving i|n [B] called my name from the holding cell and I answered 'no I did not want to speak with him at the moment' and walked away." In the Investigation Report (Exhibit E-2, Tab 8/Exhibit E-5), under the summary of the interview of the grievor, the facts relating to this portion of the events states quite simply that the grievor did not want to speak to IM B, so he walked past the holding

cell. The grievor does not refer to this portion of the events at all in his Rebuttal. When the grievor was cross-examined on the reference in the Investigation Report, he conceded that he did not note in his Rebuttal that it was incorrect. In cross-examination, he stated that IM B spoke to him and he spoke to IM B.

[167] The grievor's rendition of what happened on October 4, 2011, does not stand up to close scrutiny. There are too many inconsistencies with regard to the key events. I therefore prefer the evidence tendered by Messrs. Pyke, Edwards and Hamilton. While neither Mr. Pyke nor Mr. Edwards were present on October 4, 2011, they were also not in any way involved in the incidents. Mr. Edwards was brought in to conduct the investigation. He is a senior employee of the CSC who has worked at all levels in the penitentiary system, including as a CX and CM. The evidence I have accepted from him as reliable includes those facts which were obtained by him via CCTV footage, and that which he has proffered based on his experience as a veteran of the CSC working in penitentiaries. In this regard, I have relied upon his evidence that the removal of IM B by way of the use of a cell door key rather than the ordinary remote opening and closing of the cell door was not a normal situation. This fact was unchallenged in the evidence.

[168] In my view, it is obvious to a reasonable person, let alone a manager who works in a maximum security penitentiary, that, given the facts the grievor possessed after the late-morning interview with IM A (that IM B was a person of particular interest) and when three CXs showed up unlocking his cell and removing him (within as little as 9 minutes of him being named by IM A) that he should have stepped in and stopped the removal. The grievor's excuses for not doing so are self-serving and simply not believable. The IMs on the Upper B range had not only been locked in their cells but had placed blankets and towels over the bars or windows of their cell doors so that the staff could not see in; IM B was compliant and handcuffed; and the only people who would have had an issue with the grievor asking by whose authority IM B was being moved would have been the three CXs, all of whom were subordinate to him.

[169] I believe that on the morning of October 4, 2011, when the three CXs arrived at the Upper B range, the grievor knew exactly what was happening and chose to turn a blind eye to what was transpiring. His failure to prevent CXs to remove IM B from his cell allowed the assault on IM B to take place. According to his evidence, he asked the three CXs where they were going and as well asked CM Leeman what was happening. If

Mr. Leeman told him he “didn’t know”, then the obvious question to be asked was: By whose authority were they taking IM B out of a locked-down range? The grievor could easily have stopped them. If he was concerned about returning IM B to his cell, he could have had all of them go down to his office. There were lots of staff about, and the IMs were all locked down.

[170] I also find that the grievor failed to perform his duties when reporting on the incidents of October 4, 2011. The grievor’s initial OSOR reporting on the initial aspects of the assault on CX Nagle are not a concern; however, his complete lack of any reporting after that fact until pressed by the Warden, coupled by his complete lack of candour when he finally did report, quite frankly, in my view, amounted to no more than an attempt by him to cover up his own misconduct during the course of the events of October 4, 2011.

[171] I find that the grievor breached CD 060, Code of Discipline, as set out by the Warden in his letter of discipline dated December 8, 2011 and amended December 10, 2011.

[172] While I was not provided with a copy of the *Values and Ethics Code for the Public Service*, my experience in working with and knowledge of this document, coupled with the simple fact that it is simply inappropriate and unethical to turn a blind eye to potential unprovoked violence against a human being, let alone one in your care, leaves me with no doubt that the grievor was, on the occasion of October 4, 2011, in breach of the value of acting in a manner that upholds the public trust.

[173] Much of the grievor’s evidence centred on the actions of others on October 4, 2011, and in particular those of CM Leeman. He submitted that he and Mr. Leeman were both CMs and both present when IM B was removed from his cell. He submitted that Mr. Leeman received no discipline, and as such, he should either not have been disciplined or his discipline should have been less severe. I disagree. While according to the grievor Mr. Leeman was not disciplined, the grievor asked Mr. Pyke about this, and Mr. Pyke could not recall. This is the only evidence on this point. Given my findings with respect to the grievor’s credibility, I place no weight on the evidence he has provided with respect to Mr. Leeman not being disciplined.

[174] If I am incorrect in this finding, and Mr. Leeman was not in fact disciplined, there is insufficient evidence to make any comparison with the grievor’s actions. If the

grievor wanted to compare and contrast Mr. Leeman's conduct on October 4, 2011 and the following days with regard to reporting, he should have called Mr. Leeman as a witness and provided other clear and cogent evidence of what Mr. Leeman knew and didn't know and what he did and didn't do. This information was not before me

[175] Given all of my findings, the grievances shall be dismissed.

[176] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page)*

**V. Order**

[177] Exhibit E-5, the unredacted version of the Investigation Report authored by Scott Edwards and William Garrick, is sealed.

[178] The grievance with respect to the suspension of October 13, 2011, being the subject of Board File No. 566-02-6867, is dismissed.

[179] The grievance with respect to the suspension of December 10, 2011, being the subject of Board File No. 566-02-6868, is dismissed.

September 28, 2015.

**John G. Jaworski,  
a panel of the Public Service Labour  
Relations and Employment Board**