

Date: 20161202

Files: 566-02-9863 and 9864

Citation: 2016 PSLREB 112

*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

BETWEEN

KALBANDAR DHALIWAL

Grievor

and

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

Respondent

Indexed as

Dhaliwal v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, a panel of the Public Service Labour Relations and
Employment Board

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

For the Respondent: Marc Séguin, counsel

Heard at Abbotsford, British Columbia,
May 24 and 25, 2016.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] The grievor, Kalbander Dhaliwal, grieved a one-day financial penalty imposed on him by the Correctional Service of Canada (“the employer”) for, among other allegations, leaving work 30 minutes early. He also grieved a two-day financial penalty that it imposed on him as disciplinary action for a comment he made, which he alleged the employer misunderstood and took out of context.

[2] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (“the Board”) to replace the former Public Service Labour Relations Board (“the former Board”) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 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) 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

A. Mark Bussey

[3] Mark Bussey is the assistant warden, operations, at the employer’s Matsqui Institution in Abbotsford, British Columbia (“the institution”). On November 20, 2013, he imposed the one-day financial penalty on the grievor for a series of allegations, which included the grievor failing to secure two loaded firearms as required by policy, leaving work without authorization 30 minutes early, and leaving the institution through its sally port rather than the principal entrance as required (see the letter of discipline at Exhibit 2, tab 1). The grievor did not follow the employer’s policy entitled *Standing Order – Matsqui Institution Control of Entry to and Exit from the Institution*, which requires that all employees swipe their identification cards at the principal entrance on entering and leaving the institution (Exhibit 2, tab 5).

[4] On July 16, 2013, Mr. Bussey received a phone call from Shelley Boyer, a correctional manager at the institution, who advised him that she observed the grievor

leaving early on July 15, 2013, a day on which she allegedly made a racial comment to him, calling him “Hindu” (“the Hindu comment”), which was offensive to him as he is Sikh. Mr. Bussey then reviewed this matter with the Warden and Deputy Warden, and they decided that Ms. Boyer was to have no role in the disciplinary process due to her alleged racial comment.

[5] The following day, Mr. Bussey reviewed footage from two cameras, showing the sally port and the parking lot outside the institution’s principal entrance. From them, he confirmed that the grievor had left through the sally port with his personal belongings. In the footage, he leaves the patrol vehicle he was assigned, which contains the loaded firearms, in the sally port; exits there; and proceeds to his personal vehicle. He then drives it past Ms. Boyer, at which point some type of verbal interaction occurs. Mr. Bussey also checked the swipe log for the day in question and discovered that there was no record of the grievor swiping in or out.

[6] Firearms are not to be left in motor patrol vehicles. At the beginning and end of each shift, officers sign them in and out according to the institution’s post standing order for each position (Exhibit 2, tab 6). According to the time code on the security footage, eight seconds elapsed between the grievor entering the sally port and exiting it with his personal belongings, which was insufficient time to properly secure the weapons. On cross-examination, Mr. Bussey acknowledged that occasionally in the past, there have been issues with the security video time and date stamp in the past.

[7] The grievor’s shift was scheduled to end that day at 19:15. In the footage, he leaves at approximately 18:45, or 30 minutes early. A disciplinary hearing was held on July 24, 2013, which he refused to attend. When he was advised that he was required to attend, he eventually did. At the start of the hearing, he advised Mr. Bussey that he refused to participate in the disciplinary hearing due to Mr. Bussey’s bias toward Ms. Boyer. However, the hearing continued with no meaningful participation from the grievor.

[8] Following the hearing, Mr. Bussey concluded that the grievor had violated the employer’s policies on securing weapons and on exiting the institution and its “Code of Conduct”. After consulting his labour relations advisor and the Warden, Mr. Bussey considered the aggravating and mitigating factors, including the grievor’s disciplinary record.

[9] Another meeting, to impose discipline, was scheduled for August 2, 2013. On that day, the grievor filed a harassment complaint against Mr. Bussey, which the Deputy Commissioner dismissed in late August, so the disciplinary process resumed in September 2013. A disciplinary meeting was scheduled for September 25, 2013, but did not occur either. Only on November 19, 2013, did Mr. Bussey meet with the grievor and impose the one-day financial penalty.

[10] At that meeting, the grievor wanted to address the allegations in the notice of the disciplinary investigation (Exhibit 2, tab 1). He explained that on July 15, 2013, he heard via cellphone that his son had been injured according to Mr. Bussey. Cellphones are not permitted within the institution. The grievor had to leave its perimeter to retrieve his phone from his vehicle and use it.

[11] He told Mr. Bussey that he had to leave work even though he had been unsuccessful at contacting Ms. Boyer. According to Mr. Bussey, the nature of the emergency that day was irrelevant. The employer requires employees to swipe their identification cards (PROXIMA cards) on entry and exit from the institution for the safety of the employees and the institution.

[12] The grievor acknowledged to Mr. Bussey that he should not have exited through the sally port and that he should have swiped his identification card at the principal entrance, as required by policy. He acknowledged that he had committed everything the employer had alleged he had done, but he tried to excuse everything on the basis of his family emergency. He denied seeing Ms. Boyer in the parking lot as he was leaving that day.

[13] In the course of the disciplinary meetings, Mr. Bussey and the grievor discussed the implications that the situation would have on other officers who would leave early. Mr. Bussey told the grievor that he would send an email advising all officers at the institution about the leaving work early policy. The day the email was sent, the grievor became very upset and called Mr. Bussey. Their conversation became very heated, and at one point, Mr. Bussey told the grievor to stop before he said something that would cause him more problems.

[14] Based on all the information, including the mitigating and aggravating factors, and considering the global agreement between the employer and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

(“the union”) (Exhibit 2, tab 9), Mr. Bussey concluded that a one-day financial penalty was appropriate. In the letter of discipline (Exhibit 2, tab 1), he made a goodwill gesture of offering to substitute a written reprimand for the financial penalty. As neither the grievor nor the union responded, the one-day financial penalty was imposed.

[15] On cross-examination, Mr. Bussey admitted that the grievor had a partner in the motor patrol on the day in question. That officer also left the vehicle without securing the firearms and left his post early. Although that officer was disciplined, he received only a verbal warning because the circumstances were not the same for him. Another significant factor when determining that officer’s penalty was that he accepted full responsibility for his actions and apologized.

[16] Ms. Boyer advised Mr. Bussey that she had been accused of calling the grievor Hindu. The grievor told Mr. Bussey that he did not see Ms. Boyer in the parking lot until he heard the alleged Hindu comment. Issues had existed in the past with Ms. Boyer being abrupt and with her direct, matter of fact management style. Mr. Bussey was aware that Ms. Boyer referred to south Asian male employees as the “brown crew”. He had worked with Mr. Boileau, a past warden, to address these types of comments and to stop them. The Hindu comment was investigated by Bobbi Sandhu, the institution’s acting warden when these incidents occurred; she had replaced Mr. Boileau. Mr. Bussey reported directly to her.

[17] However, in the absence of evidence that Ms. Boyer made the Hindu comment, Mr. Bussey concluded that the grievor fabricated it to avoid an investigation. When asked why he left as he did, the grievor told Mr. Bussey that he had not been aware of his actions as he was focused on getting to his wife and child.

[18] Based on an analysis of the video footage, Mr. Bussey concluded that it would have been physically impossible to do everything, including securing the firearms as required, in the time it took for the sally port gate to open and close and the grievor to leave. Regardless of what the practice may or may not be among the correctional officers (CXs) at the institution, the policies are clear, and the officers are expected to comply with them.

B. Ms. Sandhu

[19] Ms. Sandhu was responsible for issuing the letter of discipline to the grievor for contravening “Professional Standard #3”, about relationships with coworkers (Exhibit 2, tab 11). On January 2, 2014, she visited the segregation unit as she is required to daily. She encountered the grievor in a group of officers in the unit office and noticed that he had a bandage on his arm. When asked what happened, the grievor responded that “Shelli had bit [him],” which was inappropriate, according to Ms. Sandhu, as in her opinion it referred to Ms. Boyer and implied that she was a female dog.

[20] Ms. Sandhu concluded that she had to deal with the disparaging comment made in front of her and the grievor’s coworkers. She responded immediately that she could not believe that the grievor had just made that comment, and she left. A while later, the grievor went to her office and said that he could see that his comment had made her uncomfortable. He denied that it was about Ms. Boyer. His attempt at an apology was void of accountability, and it was clear to Ms. Sandhu that he was apologizing only to avoid trouble. No disciplinary action was taken at this meeting, although had the grievor accepted responsibility for his failure, the matter would have ended there. If she did say that the matter was over, she meant the conversation and not the possibility of discipline. However, she did not remember making any such statement.

[21] A disciplinary hearing was convened for January 20, 2014, concerning this breach of the employer’s code of professional conduct. Ms. Sandhu admitted that several issues had arisen at the institution related to Ms. Boyer’s conduct. As a result, the employer’s relationship with the union at the institution was fractured. The hearing was the grievor’s opportunity to discuss the events that had led to the disciplinary meeting and to clarify them. The union submitted a statement from a relative of the grievor stating that he owned a dog named Shelli (Exhibit 2, tab 13). With all the issues at the institution surrounding Ms. Boyer, Ms. Sandhu believed that the comment was made at Ms. Boyer’s expense.

[22] The grievor’s explanation was not credible. He claimed that he had been bitten by a dog named Shelli that belonged to a relative. He acknowledged that he knew that the comment had upset Ms. Sandhu and that it was counterproductive to her attempts to restore harmony to the institution. He accepted responsibility for making the comment but not for its reference to Ms. Boyer. Ms. Sandhu concluded that discipline

was warranted.

[23] When determining the nature of the disciplinary action to impose, Ms. Sandhu considered the dog bite explanation, the grievor's disciplinary record, and the impact the comment had on her efforts to resolve the interpersonal environment problem at the institution and that the comment was in poor taste and counterproductive. As a result, the two-day financial penalty was imposed on the grievor by a letter dated January 29, 2014 (Exhibit 2, tab 11).

C. The grievor

[24] The grievor has been employed as a CX-01 at the institution since July 1997. As part of his regular duties, he is assigned to the motor patrol post. When he is relieved, he drives into the sally port and switches posts with his replacement. When doing so, he removes his personal possessions and leaves firearms in the vehicle. The practice in 2013 was to hand the weapons over to the next officer by leaving them on the front seat for his or her inspection and use. The replacement officer signs out the weapons before entering the sally port to switch with the other officers. The guns are signed out every four hours.

[25] In 2013, the oncoming shift would relieve officers on shift after the shift briefing. If an officer on mobile patrol needed a break, he or she would call the Main Communications and Control Post (MCCP) and advise that he or she was taking a break. No relief was provided. When the break finished, the officer would notify the MCCP that the patrol was back in service. If officers wanted to leave their shifts early, they had to ask their supervisors for permission.

[26] On July 15, 2013, just before the grievor was to be relieved, he found out that his daughter, not his son as described by Mr. Bussey, had been hurt when he checked his voicemail while patrolling the perimeter of the institution. He had stopped at his personal vehicle to retrieve his cellphone and had checked his voicemail. At approximately the same time, he was called into the sally port to be relieved. He went there, and when the relief officer came out, the grievor took his gun off his duty belt and left it on the passenger seat. He then left through the sally port. In his estimation, there was no difference between exiting via the sally port or the principal entrance.

[27] While walking to his vehicle in the lot adjacent to the perimeter road, the grievor tried to reach the duty correctional manager by phone but was unsuccessful. Once in his vehicle, he called the MCCP and advised that he had an emergency at home, that he could not reach the keeper (the duty correctional manager), and that he wanted to book 45 minutes of family related leave, not 30 minutes as described by Mr. Bussey. He called the MCCP because that had been the practice until 2010, when Mr. Bussey had arrived. The MCCP told the grievor that it would try to find the correctional manager and let her know that he had left early. While the grievor might have intended to book family related leave, he could not remember doing so, and there was no evidence that he completed the paperwork the next day to register taking that leave.

[28] As the grievor drove past, he heard Ms. Boyer comment, "Where are you going, Hindu?" He thought about stopping to talk to her about the comment but did not, as he considered himself off shift. When he was halfway home, a call arrived for him from Ms. Boyer, which he did not answer. He returned the call from his home. She was very upset and "started in" on the grievor, according to his testimony, about leaving early. He tried to explain that he had booked off through the MCCP.

[29] Only once he arrived home did he realize what Ms. Boyer had said, and then he became upset. She denied making the Hindu comment during their phone conversation. He told her that he would deal with her the next day, at which point she hung up. The next morning, after the briefing, he was told that there was a letter in the correctional manager's office for him. It was from Ms. Boyer, and it advised him that a disciplinary hearing would be held about him leaving without authorization.

[30] At the disciplinary hearing, the grievor told Mr. Bussey that Ms. Boyer had called him Hindu. He explained his reasons for leaving and his attempts to notify Ms. Boyer before he left. He felt like management was ganging up on him. Mr. Bussey did not listen while he spoke. Following the meeting, the grievor discussed with his union representative filing a complaint against Mr. Bussey and Ms. Boyer. At a second meeting held that afternoon, the grievor explained how he had felt when Ms. Boyer made the Hindu comment. He also explained that he could not understand what he had done wrong. He had never used his PROXIMA card to swipe in and out of the institution in 2013. In his entire career, to his memory, he had used it only 20 times. According to him, the majority of officers do not use it.

[31] The grievor claimed that Mr. Bussey told him that he was in hot water because others had been caught leaving early. To prevent any backlash from the grievor's co-workers, Mr. Bussey agreed that he would delay for a few weeks sending a planned email about leaving early. However, he sent it the next day. The grievor called him about the email, and they spoke for approximately 20 minutes. Angry words were exchanged, and Mr. Bussey told the grievor to "shut his f---ing pie hole." Following this conversation, the grievor filed harassment and discrimination complaints against both Mr. Bussey and Ms. Boyer. Ms. Sandhu denied his request to remove Mr. Bussey from the disciplinary process.

[32] On January 2, 2014, the grievor was in the unit office with a group of other officers when Ms. Sandhu entered. He had been in the process of telling the other officers about his cousin changing his dog's name to Shelli. When asked why he had a bandage on his arm, the grievor told Ms. Sandhu that Shelli had bitten him. Everyone laughed initially, including Ms. Sandhu. When it dawned on him that it was an inappropriate comment, the grievor told Ms. Sandhu that it was a stupid thing for him to have said. An hour later, he was called to the Warden's office.

[33] When he arrived, Ms. Sandhu told the grievor that his comment had been inappropriate. He testified that he apologized and that he left, thinking that the matter was over. On January 8, 2014, while at home, he received a phone call from the Warden. Ms. Sandhu advised him that she was starting disciplinary action against him concerning his dog comment. The grievor again told her that he had referred to the dog named Shelli. The phone call surprised the grievor as he thought the whole issue was over and done with. There had been no indication on January 2, 2014, when he had left the Warden's office that there would be anything further.

[34] At the disciplinary hearing, the grievor went over the dog explanation and tried to explain that Ms. Sandhu had missed part of the conversation. He asked her why she was pursuing the matter after telling him on January 2 that the matter was over. The grievor was very upset at that hearing.

D. Maston Sahota

[35] Maston Sahota was the grievor's partner on July 15, 2013. He testified that the practice in 2013 when relieving an officer on mobile patrol was to meet in the sally port, where firearms were exchanged. It was also common practice in 2013 for officers

on mobile patrol to stop at their personal vehicles when making their rounds and for them to advise the MCCP that they were leaving early when and if the duty correctional manager was not reachable. Mr. Sahota testified that it was common for officers assigned to mobile patrol to leave via the sally port.

[36] Mr. Sahota was present on January 2, 2014, when the grievor made the dog bite comment. He did not recall the conversation before the Warden's arrival; nor did he remember any conversation about a dog named Shelli. He did remember that everyone, including the Warden, laughed when the grievor told her that Shelli had bitten him.

III. Summary of the arguments

A. For the employer

[37] The questions to answer are whether the grievor's conduct justified discipline and if so whether the discipline imposed was appropriate. The employer had the burden of proof, on the balance of probabilities (see *Paynter v. Deputy Head (Canada Border Services Agency)*, 2013 PSLRB 74 at para. 143). While it acknowledged that Mr. Bussey's evidence was not the best, as it contained discrepancies, it was clear that the grievor met with senior management to discuss a racial slur Ms. Boyer had made; she was then removed from the disciplinary process.

[38] The grievor did not have the authority or the permission to leave work before the end of his shift on the day in question. He might have been relieved from his post, but he was still on duty. To leave work early, a CX requires his or her correctional manager's approval. The MCCP may be the second in command during an emergency at the institution, but that does not extend to personal emergencies that may arise while a CX is on duty. The MCCP does not have the authority to grant or approve leave for a CX.

[39] It is clear that the grievor violated the employer's policies in several ways (Exhibit 2, tabs 5 and 6). No past practice has been established; it might have been common practice for CXs to leave without authorization or via the sally port, but there is no evidence that the employer accepted these practices such that a detrimental reliance occurred. In fact, the grievor testified that he was afraid of the email sent after the July 2013 incident at issue because he did not want to be blamed. If a past practice was in place, why was he concerned?

[40] The grievor admitted that he left early via the sally port on the day in question, which violated the employer's policies and was worthy of discipline.

[41] As to the question of the dog bite comment, the evidence is clear. Ms. Sandhu was a credible witness. The grievor intended through innuendo to refer to Ms. Boyer when he referred to being bit by Shelli the dog, which was a breach of the standards of professional conduct and was worthy of discipline.

[42] An adjudicator should interfere with discipline only when it is clearly unreasonable or wrong (see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119 at para. 13, and *McEwan v. Deputy Head (Immigration and Refugee Board)*, 2015 PSLREB 53 at para. 117). With respect to the one-day financial penalty, it was neither wrong nor unreasonable, given the number of infractions the grievor committed. When disciplining him for the second infraction, the employer used the principle of progressive discipline. Therefore, both grievances should be dismissed.

B. For the grievor

[43] The burden of proof was on the employer to show on a balance of probabilities that the grievor committed the infractions, based on clear, cogent, and convincing evidence. Mr. Bussey's evidence met none of these requirements. Furthermore, the process he followed when investigating the July 2013 infraction violated all rules of fairness, the relevant collective agreement, and common sense. He spun a web of assumptions and guesses as to what happened that day. In the absence of the video footage he used to draw his conclusions, his analysis is questionable.

[44] The disciplinary process that Mr. Bussey followed brings his impartiality into question. Why did he not question those working in the MCCP to see if they had been called? Mr. Bussey has no knowledge of the operational practices at his own institution. He relied on Ms. Boyer's information, even though he knew she was under investigation. The grievor took all the steps required to leave early and all reasonable steps to contact the duty correctional manager. When he was unable to, he contacted the MCCP, per the practice in an emergency. It was not an ideal situation, but the grievor did the best he could under exceptional circumstances.

[45] The grievor's unchallenged evidence is that officers handed over guns in the sally port and then exited from there without swiping their PROXIMA cards on the way

out. Rather than review the policy with him, the employer resorted directly to discipline, yet the disciplinary letter does not indicate what policy he violated. According to Mr. Sahota, at the time at issue, a practice was in place in which officers on motor patrol could access their personal vehicles when on the perimeter of the institution's reserve.

[46] Mr. Bussey's email to all officers (Exhibit 3) clearly established the ongoing practice of leaving early and that the grievor was singled out for excessive disciplinary action when others were given letters of reprimand. Mr. Bussey failed to identify the expectations and consequences for failing to comply with the employer's policies. It is troubling that in the disciplinary letter, he offered to replace the financial penalty with a letter of reprimand.

[47] An adjudicator must be concerned with procedural fairness. Mr. Bussey claimed that the grievor was guilty of a serious breach of policy and conduct but at all times covered for his and Ms. Boyer's misconduct. Excessive time passed between the offence and the imposition of the discipline. When evidence is not clear, cogent, and compelling, it is wrong. There was also an unreasonable delay completing the disciplinary process. The events occurred on July 15, 2013, and yet the grievor was not disciplined until November 20, 2013.

[48] When disciplining the grievor for the dog comment, the employer imposed a double penalty, disciplined the grievor twice for the same infraction, contrary to the rules of natural justice (see *Babineau v. Treasury Board (Correctional Service of Canada)*, 2004 PSSRB 145 at para. 20, and *Attorney General of Canada v. Babineau*, 2005 FC 1288 at paras. 11 and 13). The grievor was reprimanded orally in Ms. Sandhu's office on January 2, 2014. She identified what he had done wrong and what needed to be done in the future. That was a verbal reprimand, and a more severe penalty could not have been imposed later on (see *Saskatchewan v. Saskatchewan Government and General Employees' Union*, 2012 SKQB 35 at para. 33, and *Calgary Co-operative Association Ltd. v. Calco Club*, 23 L.A.C. (4th) 142 at paras. 32, 33, 35, and 36).

[49] After a second thought, Ms. Sandhu decided to hold a disciplinary hearing into the matter. Nothing she said on January 2, 2014, indicated that more was to come. She made no indication that she was reserving judgement. A reasonable person would have concluded that the matter was resolved.

[50] In the event that the grievor's actions warranted discipline, the two-day financial penalty based on his disciplinary record, was excessive.

IV. Reasons

A. The one day financial penalty grievance

[51] The grievor was alleged to have left work without authorization on July 15, 2013, and in so doing, he violated the employer's policy on securing weapons at the change of a post or shift and the policy on entering and exiting the institution. He also violated the employer's policy on using cellphones within the institution. While it is true that Mr. Bussey's evidence would not qualify as clear, cogent, and compelling, it is clear that he and the grievor have no dispute as to the events of that day.

[52] The grievor took the opportunity to check his voicemail when his mobile patrol took him past his personal vehicle, which was parked in the lot adjacent to the institution. At approximately the same time, the MCCP called him and his partner to return to the sally port, where they were to be relieved of their posts. The grievor and his partner entered the sally port, at which point the grievor got out of the vehicle, left his weapon on the passenger seat, and immediately left via the sally port, all of which were contrary to the employer's policies. While walking to his vehicle, the grievor attempted to contact the keeper to request leave. Being unsuccessful, he then called the MCCP and stated that he was leaving and would book family related leave to cover the remaining 45 minutes of his shift, according to his evidence, which he never did.

[53] While driving out of the institution's parking lot, the grievor passed by Ms. Boyer. Rather than stopping to tell her what was going on and explaining why he was leaving before the end of his shift and requesting family related leave, he continued on his way. Whether or not she shouted some sort of racial epithet at him is irrelevant to my decision, as is what happened in the days following as per the many complaints he filed. The grievor admitted to violating policy, which occurred before any alleged insult by Ms. Boyer. Regardless, any failures with the disciplinary investigation process were remedied by the hearing of these grievances (see *Maas v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 123 at para. 118, *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70, and *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.) (QL), at 2). Any delays imposing discipline occurred as a result of the complaints the grievor filed against others involved in the disciplinary process and were to be expected in the

circumstances. At no time did the employer lead the grievor to believe that there would be no disciplinary consequences for his actions.

B. The two-day financial penalty grievance

[54] I am faced with two different versions provided by Ms. Sandhu and the grievor with respect to this incident. I must therefore establish which of these two versions is more credible. In *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), the test to be applied when credibility is at issue is well-established (see p. 357):

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

[55] Ms. Sandhu's description of the events of January 2, 2014, is credible, while in my estimation, the grievor's is a complete fabrication. The story of a relative having a dog named Shelli has no odour of truth, particularly given the other evidence and the obvious disdain he has for Ms. Boyer. Furthermore, his own witness's testimony does not support the grievor's version of events. I give absolutely no weight to the written statement, which the grievor submitted during the grievance process, as proof that a dog named Shelli exists. It was not a sworn statement, the person who signed it did not testify and there is was no proof provided as to its authenticity. Given the environment at the institution and the number of harassment and human rights complaints the grievor filed involving Ms. Boyer, a practical and informed person would conclude that by saying that Shelli the dog had bit him, he was in fact referring to Ms. Boyer and was indirectly calling her a bitch.

[56] However, if she told the grievor after speaking to him about the comment, the matter was finished, was the penalty imposed double jeopardy?

[57] The principle of multiple penalties is enunciated in *Brown and Beatty's Canadian Labour Arbitration*, 4th edition at 7:4240:

It is a basic rule of arbitration law that an employer may not impose more than one penalty for the same offence. Arbitrators have taken the

position that when a member of management with the requisite authority chooses a specific sanction for certain misconduct and conveys that decision to the employee, it is not proper for higher levels of management, on being apprised of the events, to substitute a more severe penalty.

[58] Since I have only the testimonies of Ms. Sandhu and the grievor as to what was actually said in the meeting in her office on January 2, 2014, and since I have already determined that the grievor's version of the events of that day is not credible for the reasons stated earlier, I accept Ms. Sandhu's evidence that no disciplinary action was taken and what was over was the conversation that the two were having and that the case was not closed. Based on the facts and the evidence before me, I conclude that both disciplinary measures were warranted. The question before me then becomes whether the discipline was unreasonable, excessive or wrong. I view the reason for the grievor's abrupt departure from the workplace on July 15, 2013, as a mitigating factor; however, it does not excuse his failure to comply with the employer's policies on securing weapons at the change of a post or shift or his failure to follow proper procedure when exiting. PROXIMA cards are for the safety of everyone in the institution, and they provide the employer the wherewithal to know who is in the institution at any particular time. It is a reasonable expectation that the grievor follow this procedure when leaving the institution, no matter the reason for his departure.

[59] The grievor's evidence on his use of the PROXIMA card is insufficient to establish a past practice. When one party is unaware of the practice, it cannot be relied on as evidence of a consensus. There is no evidence before me that the employer was aware that CXs at the institution had a practice of entering and exiting the premises other than as specified by the written policy, which requires each officer to swipe his or her PROXIMA card on entering and exiting the institution. The grievor could not establish such a practice by flaunting his recurring violations of the policy as the sole proof of it.

[60] I understand that in many cases, years of service is usually seen as a mitigating factor; however, in this particular case I consider the grievor's years of service as an aggravating factor because he ought to have known about the employer's policies. (See *Pagé v. Canada (Attorney General)*, 2009 FC 1299.) In addition, his refusal to accept true responsibility for his actions, as well as the number of violations of the employer's policy are also aggravating factors in this case.

[61] Not only has the grievor shown a flagrant disregard for the employer's policies, but he also has demonstrated a level of contempt for the managers at the institution, which is reflected in his comments about being bitten by a dog. I agree with Ms. Sandhu's assessment that his comment was counterproductive to her efforts to improve the work environment at the institution.

[62] Based on the foregoing, the discipline imposed in both circumstances was within the realm of reasonable, in my estimation, given the grievor's conduct; his years of service, which can be an aggravating factor given his lengthy experience in the correctional service and his knowledge of the employer's policies; the exigent circumstances of his child's accident; his refusal to accept any responsibility for his actions; and the number of violations of the employer's policies I see no reason to interfere with the penalties.

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

(The Order appears on the next page)

V. Order

[64] The grievances are dismissed.

December 2, 2016.

**Margaret T.A. Shannon,
a panel of the Public Service Labour
Relations and Employment Board**