Date: 20161223

File: 566-02-11319

Citation: 2016 PSLREB 121

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

JONATHAN RAHIM

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Rahim 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: Sheryl Ferguson, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Richard Fader, counsel

Heard at Kingston, Ontario,
July 5 to 8, 2016.

I. Individual grievance referred to adjudication

[1] The grievor, Jonathan Rahim, grieved that the termination of his employment, which resulted when he allegedly claimed and accepted benefits under the National Joint Council's *Relocation Directive* ("the directive") to which he was not entitled, was excessive and unjust. He also alleged that the investigation that resulted in his termination was biased and the report of the investigators was not a true and accurate reflection of statements he made to the board of investigation.

[2] The grievor contended that others who claimed benefits to which they were not entitled were not terminated. He stated that the sole reason for his termination was that Scott Thompson, the warden at WI at the time in question, was prejudiced against the grievor and his family, since he had worked with many of his family members at KP. The grievor also claimed he was discriminated against on the basis of his racial ethnicity.

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

[4] The grievor was a correctional officer ("CX"), classified CX-01 group and level, who had seven years of service with the employer, the Correctional Service of Canada, when he was terminated. Following the closure of Kingston Penitentiary ("KP") in Kingston, Ontario, around September 30, 2013, he accepted a transfer to Warkworth Institution ("WI") in Warkworth, Ontario. Since relocation was possible, the grievor was entitled to certain benefits under the directive.

[5] Throughout the investigation and the disciplinary hearing, it became apparent that the grievor never changed his principal residence and never relocated to the Warkworth area; he remained at his residence in Odessa, near Kingston, and commuted for his WI shifts. To be entitled to the relocation benefits he applied for and received, he would have had to either sell his residence in Odessa and relocate to Warkworth, or elect not to sell it and claim the "elect not to sell incentive" (ENSI). In either case, he was required to establish a new principal residence in the Warkworth area.

[6] The grievor did not relocate and applied for the ENSI for a home in Odessa, which he claimed to own but did not in fact own; his common-law spouse owned it. In Ontario, marital property does not attach to property owned by one common-law spouse. To qualify for the benefit, in addition to being the registered owner of the property in question, the grievor was required to submit an executed lease agreement, which he did. The other signatory to the lease was a co-worker who told the investigators that no money had exchanged hands and that he did expect to be paid for allowing the grievor and other CXs to stay at his home if they needed a place to "crash" due to bad weather or turn-around shifts. Also through the investigation, it became apparent that between November and December 2013, the grievor claimed interim accommodation benefits, meal allowances, and incidental allowances for the same days he claimed a commuting allowance for each shift, which constituted double-dipping.

[7] Vicki Liscumb was the relocation coordinator for the employer's Ontario Region and was responsible for auditing relocation files when they were closed. She testified that when a relocation file was opened, it was assigned to a third-party service provider, Brookfield Global Relocation Services ("Brookfield"), which then appointed an agent to work with the employee being relocated. All communications relevant to the move were between Brookfield and the employee. The Brookfield agent and the employee then had a series of conference calls, during which the move was planned and entitlements were identified and processed. The Brookfield agent would not have known if the employee owned the property listed as his or her original residence in Odessa. Once the move was completed, Brookfield sent its file to Ms. Liscumb to be audited. In the course of her audit of the grievor's file, discrepancies were noted.

[8] The grievor was offered and accepted a position at WI when KP closed. The letter of

offer he signed (exhibit 12) contained a link to the travel directive. He had the choice of either commuting the more than 40 km to WI and collecting travel entitlements or moving to the WI area and claiming relocation expenses. One of the relocation benefits was the ENSI related to his principal residence, which the grievor claimed. To claim it, he was required to relocate to the WI area as stated in a memo the employer sent to the Ontario regional relocation coordinator (Exhibit 5), which was communicated to the bargaining agent in July 2013 as a result of grievances filed about this interpretation (Exhibit 6).

[9] If an employee being relocated chooses the ENSI, he or she is then paid 80% of the real estate commission paid if his or her primary residence was sold. The grievor chose to claim the ENSI on April 29, 2014 (Exhibit 2, tab 9). To qualify for it, he was required to provide Brookfield and the employer with an executed lease for a property in the Warkworth area and an appraisal of his Odessa property, both of which he provided. He also submitted a mortgage document to demonstrate that he owned the home in question (Exhibit 2, tab 15). As a result, a credit of $12 000 was added to his relocation funding envelope in May 2014. Anything left in the personalized envelope is paid to the employee when the file is closed.

[10] The grievor was also entitled to three months of commuting assistance, from November 7, 2013 to January 2014, while he decided what he would do about relocating. The commuting allowance was $500 per month; he claimed only one month's entitlement. He claimed the interim accommodation allowance for the period from November 9 to December 8, 2013, and again for the period from December 9, 2013, to January 7, 2014. The interim accommodation allowance covers the cost of a hotel or private accommodations, meals, and incidentals while the employee is away from his or her home. The rates are set out in the directive. Commuting assistance is intended to defray the costs of commuting between the employee's place of residence and work for the three-month decision-making period. The grievor did not stay in the Warkworth area during the period for which he claimed the interim accommodation allowance but rather commuted between Kingston and WI, which is approximately 130 km one-way.

[11] The interim accommodation allowance would have been paid only for periods when the grievor worked at WI and not when he commuted from his principal residence to WI. Receipts are required to substantiate an interim accommodation

claim, while the commuting allowance is based on the mileage between the employee's principal residence and work location. No receipts are required for the commuting allowance;

[12] On closer examination of the mortgage document submitted by the grievor, it stated that the registered owner was a Ms. H. Woodhouse and that she was not a spouse. The MLS real estate listings reported that H. Woodhouse was the owner of the Odessa property. The grievor told Brookfield that H. Woodhouse was his common-law spouse but provided none of the proof requested of him. Having claimed the ENSI, he was expected to purchase or rent a single-family dwelling akin to the one he claimed he owned. No proof of such a purchase or rental was provided.

[13] As a result, a disciplinary convening order was issued directing Ms. Liscumb and Vicki Willis to conduct a disciplinary investigation into the grievor's relocation and overtime claims related to his move from KP to WI. He met with the investigators on November 21, 2014, in the company of Curtis Jones, his bargaining agent representative, even though the employer did not provide him with the required 48-hour notice. The investigators also spoke to the Warden and to John McLaughlin, from whom the grievor had ostensibly rented a room near WI.

[14] The investigators determined that the grievor was paid the interim accommodation entitlements on the same days he claimed and was paid the commuting allowance, as was confirmed by the travel claims he submitted for payment (Exhibit 2, tab 6). He also claimed and was paid overtime while commuting. He stated that his primary residence remained in Odessa and that he would sometimes stay at Mr. McLaughlin's house between shifts. He had a room-only arrangement, for which he paid Mr. McLaughlin based on the agreement he submitted as proof of the arrangement and the number of days he stayed with Mr. McLaughlin. To obtain the ENSI, the grievor told the employer that he had permanently moved to Mr. McLaughlin's residence, even though he provided little or no detail about the rental costs. At the end of the investigation interview, the grievor offered to repay any overpayment that he might have received.

[15] Based on all the discrepancies in the documents, the multiple claims filed, and the lack of specificity with respect to the arrangement with Mr. McLaughlin, the investigators concluded that the grievor did not relocate and that he had claimed and

had been paid benefits to which he was not entitled. As a result, he had breached the employer's "Code of Conduct" and the professional standards expected of all CXs. This conclusion was documented in the investigation report (Exhibit 2, tab 6) submitted to WI's warden.

[16] Amanda Schmatkow worked for Brookfield in 2013. Her role as a Brookfield agent was to administer the directive, counsel employees on benefits, and process the expense claims they submitted. Leah Spooner and Jason Tyre, the agents assigned to the grievor, reported to Ms. Schmatkow. Both were part of the training class in November 2012 at which changes to the ENSI were explained and at which it was made clear that an employee must relocate to qualify for the ENSI, contrary to the previous practice.

[17] The grievor's first planning session was held via phone on October 28, 2013. At that session, according to the notes on file (Exhibit 7), his intention to sell his principal residence was discussed; along with any benefits he would be entitled to if he chose not to relocate. On January 31, 2014, the Brookfield representative followed up with the grievor to obtain a property appraisal. On March 24, 2014, the grievor was told that if he chose the ENSI, he had to return the election form within 15 days of receiving the property appraisal report, which he did. This form was then sent to the national relocation coordinator for signing. On April 7, 2014, the grievor advised Brookfield that he disagreed with the property appraisal. He was advised that a second one could be conducted. He was also asked for his destination address. On June 2, 2014, the grievor was asked to provide a rental agreement to substantiate his new address, which he did (Exhibit 2, tab 10). The form he submitted was not created or provided by Brookfield. He was also required to provide proof of title to the property in question, which he did, in the form of a mortgage document (Exhibit 2, tab 15) that indicated that H. Woodhouse was the sole owner of the property.

[18] Mr. Thompson was the warden at WI from January 4, 2015, to April 4, 2016. When he arrived, several relocation claim investigations were underway, including the one into the grievor's claim. He reviewed Ms. Liscumb and Ms. Willis's report and was satisfied that it was clear and that a disciplinary hearing was required. The hearing took place on March 24, 2015. The grievor and his bargaining agent representative attended and were given the chance to provide further clarifications and to rebut the report's conclusions. The gist of the grievor's argument was that the employer was at

fault for approving payments to which he had not been entitled.

[19] The payments were approved based on forms submitted by the grievor. Mr. Thompson asked for clarification on the lease agreement between Mr. McLaughlin and the grievor. It was clear to Mr. Thompson that no money was exchanged; the rent was pizza, beer, or groceries when the grievor stayed there. Furthermore, it was clear that the lease agreement was not created until the grievor realized it was required to obtain the ENSI. When he was asked about when he stayed at interim accommodations, he was not able to provide dates and never did provide the information to Mr. Thompson. In Mr. Thompson's estimation, Mr. McLaughlin was not credible and could not say if or when the grievor ever stayed with him. Despite the Union of Canadian Correctional Officers Syndicat des agents correctionnels du Canada confédération des syndicats nationaux (the union) argument that it was clear that the grievor's actions indicated that he never intended to move, he actively pursued the benefits that he was not entitled to by submitting documents in support of his claim.

[20] Mr. Thompson described the disciplinary meeting as being based on establishing that the claims that the grievor submitted were not his fault. According to his representative at the meeting, the employer and Brookfield were at fault. The grievor showed no remorse for his actions. He offered to make restitution for any payments to which he was not entitled. There is a difference between remorse and restitution.

[21] The grievor remained on the job while Mr. Thompson made his decision. He addressed the procedural concerns identified by the union and considered them when making his decision, which was communicated to the grievor three-and-a-half weeks after the disciplinary meeting. In the interim, he provided no further information.

[22] Mr. Thompson stated that he was faced with an employee who had gone to great lengths to obtain benefits to which he was not entitled. He went to the extent of forging documents for a minimal amount of money, which caused Mr. Thompson considerable concern, according to his testimony. He questioned how far the grievor would go to get more. Given that WI was known at the time for having a great number of compromised officers, the employer's trust in the grievor was key to his continued employment. He was not forthright throughout the investigation or in the disciplinary hearing. At no time did he admit any wrongdoing but rather continued to blame

everyone else. Mr. Thompson questioned how the grievor could continue to claim he had done nothing wrong when it was clear that he had gone to great lengths to obtain benefits to which he was not entitled.

[23] Other officers involved in the move from KP to WI received disciplinary penalties as a result of audits of their relocation files. One submitted his resignation rather than being terminated. The grievor was offered this opportunity but refused. Another sold a property that his wife and children occupied. He provided a reasonable explanation for his claim and was given a written reprimand with a requirement to make restitution. A third, who used a lease agreement similar to that submitted by the grievor, did in fact relocate for a brief period. He had made it clear to Brookfield that he never intended to relocate permanently. This officer also received a written reprimand and paid restitution. The documents he created were not for the purpose of obtaining a benefit.

[24] Mr. Thompson testified that he was the assistant warden, operations, at KP when the grievor started working there. He was aware that the grievor's father and brother also worked at KP in the food services area. He did not recall the grievor being at KP and did not recall signing any of the grievor's performance reviews.

[25] When deciding whether to terminate the grievor's employment, Mr. Thompson considered the grievor's length of service, his discipline record, his history at WI, his lack of remorse, and his participation in the discipline process. The seriousness and the impact of the grievor's actions were key factors when he was making his decision. Based on all that, Mr. Thompson concluded that his trust had been broken beyond repair. No employee could regain his trust in these circumstances. The grievor had violated standards 1 and 2 of the standards of professional conduct and had violated the *Values and Ethics Code for the Public Service*. The fact that the amounts owed were recouped from money owed to the grievor was irrelevant.

[26] Mr. Jones was the grievor's union representative during the fact finding. On November 21, 2014, he advised the grievor not to proceed with a fact-finding meeting as he had not been given the 48 hours' notice required in the collective agreement. Nevertheless, the grievor agreed to participate and to cooperate with the investigators. Mr. Jones vaguely recalled some discussion about who owned the Odessa house but could not recall the answer. However, he did recall the grievor telling the investigators

that Ms. Woodhouse was listed on his insurance benefits as his spouse. Mr. Jones had no recollection of the grievor offering to repay anything to which he had not been entitled. Following the meeting, Mr. Jones spoke to the investigators. He told them he understood why they were investigating the grievor but that he could not understand why Mr. McLaughlin was also being investigated.

[27] Mr. McLaughlin was a CX at KP until its closure, when he relocated to WI and purchased a home in the Warkworth area. He offered rooms to his fellow officers who commuted to the area in exchange for pizza, groceries, and beer on the nights they stayed with him. He made the offer to 13 officers. No money ever exchanged hands. Mr. McLaughlin found the relocation process one of his most confusing experiences. He attended briefings, read directives, and talked to others to figure out his entitlement. He clearly remembered discussing the directive with the grievor.

[28] The lease submitted by the grievor in support of his ENSI claim (Exhibit 2, tab 10) was an agreement signed by Mr. McLaughlin at the grievor's request. He who remembered receiving a cash payment in exchange for signing the lease but testified that no rent was ever paid. He expected that the grievor would bring over pizza and beer on those nights he stayed with Mr. McLaughlin. Mr. McLaughlin had similar arrangements with other CXs and no lease had been required. The grievor asked Mr. McLauglin to sign this lease because he, the grievor, needed to provide it to Brookfield to support his ENSI claim. Despite having signed the lease, Mr. McLaughlin never intended to collect any rent from the grievor; they were good friends.

[29] Mr. McLaughlin testified that his sole purpose in providing evidence at the hearing was to help his friend, the grievor. As his friend, Mr. McLaughlin was aware that the grievor had left his home and was actually living in Kingston and not Odessa during the period in question. He discussed the lease with the grievor about three weeks before it was signed. The grievor indicated to him that he needed a signed lease to submit in support of his ENSI claims. Mr. McLaughlin testified that he left everything up to the grievor. He told the grievor to draw up whatever he needed and that he, Mr. McLaughlin, would sign it, in exchange for which the grievor paid him $300. Mr. McLaughlin also testified that he never intended to collect any rent from the grievor.

[30] The grievor testified that he has a trade school education and that he completed the core training program required of all correctional officers. He started his career

with the employer in the KP kitchen as a food service worker. He became a CX in 2010 and was assigned to KP, where he stayed until it was closed. Since being discharged, he has been unable to find permanent work.

[31] Initially, the grievor was to move to the Collins Bay Institution, which did not involve relocation. He did not attend the many briefing sessions the employer provided about the relocation process; it was not a priority for him. At some point, he agreed to switch places with another officer and took a position at WI. He spoke to his local union president, Mike Deslaurier, and discussed his entitlements to relocation assistance. According to the grievor, Mr. Deslaurier told him that the fact that he did not own the property in Odessa was not an issue and that he could still claim the relocation benefits as if he did own it because he was in a common-law relationship with the owner.

[32] On May 14, 2013, according to him, the grievor contacted the employer's regional relocation coordinator and inquired about his relocation benefits. He was advised that once he received a letter of offer, Brookfield would contact him. He then spoke to unnamed union representatives and co-workers who had attended the briefing sessions and had the relocation information. A Brookfield representative eventually contacted him. He described that representative as less than helpful.

[33] Mr. Tyre never told him to read the directive. There was no discussion about the ENSI; the grievor told him right away that his common-law spouse owned the property in Odessa. Mr. Tyre told him that an appraisal of the property was required regardless of whether he elected to sell it or take the ENSI. At Mr. Tyre's request, the grievor provided a copy of the lot survey, the deed, the tax bill, and the relocation checklist.

[34] All the information provided to Brookfield indicated that the grievor did not own the property. He elected the ENSI because the union and Brookfield representatives told him that that choice was open to him. He actively pursued the entitlement knowing full well that he was not the owner of the property and that he was not living there, since he had separated from his common-law spouse. He had to make a choice before the time to make one expired. In April 2014, he asked his Brookfield representative, who had changed, what was required for proof of the relocation address. He was told that he required a lease or some other proof that he had purchased another property but was never told that the destination address had

to become his permanent residence. He never intended to relocate permanently to the Warkworth area; he intended to stay near his children in the Odessa area.

[35] Having chosen the ENSI, the grievor claimed in his testimony that he went to great lengths to find out from Brookfield what was necessary to establish a new principal residence. He asked whether a month-to-month lease was acceptable. He was never told that a minimum amount of time must be spent in it to establish a new principal residence. He also claimed he told the Brookfield representative that he had an informal living arrangement with a friend but that he was told that to satisfy the requirements of his ENSI claim, proof of a formal arrangement was required. He drafted and submitted a room-rental agreement (Exhibit 2, tab 10), signed by Mr. McLaughlin, at Brookfield's request. The grievor testified that he had no intent to defraud the employer; he had meant to formalize the arrangement with Mr. McLaughlin at some point.

[36] The grievor filed the application for commuting assistance allowance (Exhibit 2, tab 6, page 19) after he received an email from Brookfield asking for it. He was aware that the form was required for it to process the payment for the commuting allowance. He also submitted a claim for an interim accommodation allowance based on private accommodations, in 30-day increments. Brookfield did not ask for any information about his claim for interim accommodation benefits or relevant to his commuting allowance claim. Since he claimed personal accommodations, no receipts were required to confirm his stay.

[37] When the grievor reported for his shift on November 21, 2014, his correctional manager advised him of the disciplinary investigation interview he was to attend. Before the interview, he had been unaware of the convening order. With his union representative on-shift that day, the grievor participated in the interview because it was explained to him that if he did not, the investigators would develop their findings without his participation. He answered all their questions honestly but felt that he had been blindsided. He found Ms. Liscumb and Ms. Willis off-putting. The tone of the meeting was accusatory. It is possible that the investigators perceived him as relaxed throughout the process. He asked them what they felt he owed and offered to pay it back. He agreed to provide a statutory declaration confirming his common-law status but did not.

[38] The grievor testified that he did not understand what the employer thought he had done wrong. Eventually, he realized that he had received benefits to which he was not entitled. He had made errors; he did not read the directive or keep records and signed claims without reading them. But he offered to repay anything to which he was not entitled, so he did not understand why his employer was so upset with him. He did not enter into the rental agreement solely to obtain the ENSI. Brookfield prepared his commuting and interim accommodations claims, and he just signed them without reading the certification on them.

[39] At the disciplinary hearing on March 12, 2015, the grievor provided Mr. Thompson with a letter that stated that he had a vested financial interest in the Odessa property. According to the grievor, it was a non-issue to the Warden; to the grievor, the rental agreement appeared to be Mr. Thompson's key concern. At the disciplinary hearing, the Warden was not open to anything the grievor had to say. He was distracted and dismissive of the grievor's responses and at one point turned to his computer and used it to check the grievor's records in the human resources management system. The grievor did not intend to use the directive for his personal gain. It is not possible that his mistakes caused the bond of trust to be irrevocably broken, in his estimation.

[40] In cross-examination, the grievor testified that he realized he did not qualify for the relocation benefits he was paid, which was why he did not fill out the paperwork. It was likewise for the commuting allowance and interim accommodations benefits. He never tried to obtain a copy of the commuting directive to determine to what if anything he was entitled. He took the form and indicated the days he worked in the hopes of being paid for the mileage from Kingston to Warkworth for those days. For some of those days, he also claimed the interim accommodation allowance because it was paid monthly. He claimed the interim accommodation allowance for an entire month even though he did not stay in Warkworth more than a couple of nights during the period in question. He travelled back to Kingston between shifts. He did find it odd that he would be paid $1600 for meals when he did not stay in Warkworth. He did not dispute that he received interim accommodation benefits, the commuting allowance, overtime mileage, and relocation benefits while commuting between Kingston and Warkworth, which was contrary to the National Joint Council travel and relocation directives.

[41] In addition to the witnesses mentioned earlier, Ms. Willis, Rob Campney, and Shane Dyer testified. The gist of their evidence is reflected in the testimonies of others, and for that reason, it would add little to this decision and therefore has not been recounted.

III. Summary of the arguments

A. For the employer

[42] The grievor had seven years of service with the employer, three of them as a CX. He committed serious acts of fraud for which he has shown no remorse. All the employer's witnesses testified as to this. In his testimony, rather than accepting responsibility and expressing remorse, the grievor chose to blame his actions on others and on his failure to read the policies. The letter of offer (Exhibit 12) he received for the position at WI contained a link to the directive. It also included information about his entitlement to the commuting allowance. He chose to ignore this information.

[43] It is obvious from the title of the directive that relocation from one principal residence to one closer to the new workplace is required. The grievor did not relocate; nor did he ever intend to, yet he pursued entitlements under the directive as if he did relocate. He submitted false documents in support of his claims, knowing that they were false and that he had no intention to relocate.

[44] The only defence the grievor provided for submitting his commuting assistance claim for a period when he was not entitled to it was that he did not read the form and that another form was required to trigger the payment. He claimed he never filed this form, which makes no sense, since he received the payment. He also claimed mileage during this period. When asked to explain this in cross-examination, he attempted to craft an answer that made no sense. What is clear is that he was double- or triple-dipping and receiving benefits under multiple programs and that if he were entitled to anything, it would have been under only one program.

[45] It did not stop with double- or triple-dipping; the grievor claimed accommodation and meal allowances for days he did not stay overnight near WI. He claimed the accommodation allowance 30 days at a time and could not remember when he stayed at Mr. McLaughlin's house, if at all. The grievor knew when he worked

and knew that he did not stay in the Warkworth area. It was a deliberate decision to claim these benefits at times when he would not have been entitled to them, even had he been staying in the Warkworth area when on-shift.

[46] If the grievor was commuting between Kingston and Warkworth, he was not entitled to the ENSI. To qualify for it, he had to have relocated. His evidence is not credible. Ms. Schmatkow's uncontradicted evidence is that a change of primary residence was required. The Brookfield representatives pursued the documents required to process the ENSI when he indicated his intention to apply for it. He provided those documents. He was not credible when he testified that he intended to commute and that he so told the Brookfield representatives. He provided a series of documents in support of his claim, including a fake rental agreement. Clearly, by providing the documents, his sole intention was to obtain the ENSI.

[47] The documents the grievor provided to prove his common-law status were useless. In fact, they proved that the property in Odessa was solely owned by Ms. Woodhouse and only in her own right. No evidence established that a common-law relationship existed. Furthermore, the Odessa area remained his primary residence, although it is unclear whether he resided with Ms. Woodhouse or his parents.

[48] The forms the grievor completed for the commuting and accommodation allowances and that he submitted for compensation were simple one-page forms that required him to check off the dates he was scheduled to work. Nothing was complicated about them; nor was a great deal of education or skill involved in interpreting them. He was aware of what he was doing, and he intended to carry out his actions. His behaviour at the hearing made it worse. He again took no responsibility for his actions but preferred to blame his misdeeds on everyone else.

[49] There was no evidence whatsoever of discrimination on the basis of ethnic origin. If there were, the principles in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.) apply as discrimination was never raised throughout the grievance process. It is a new ground of the grievance, which must not be considered. In addition, since the new Board has no freestanding human rights jurisdiction, the grievor cannot pursue a human rights complaint before it (see *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115 at paras. 121 and 122).

[50] As to the question of discriminatory discipline, the grievor had to establish that he was singled out and treated differently than others were who had done similar things. Like must be compared with like (see *Bridgen v. Canada (Correctional Service)*, 2014 FCA 237 at para. 59). In the circumstances before the new Board, three other individuals were disciplined: one chose to resign instead of being terminated, and two others, Mr. Dyer and Mr. Harker, participated fully with the employer and provided receipts and explanations for their actions. Unlike the grievor, they admitted to their actions and expressed true remorse.

[51] Regardless of whether or not the grievor thought criminal charges might have resulted from the employer's investigation and whether or not he consulted legal counsel, he was obligated to participate in an administrative process (see *Hughes and Titcomb v. Parks Canada Agency*, 2015 PSLREB 75).

[52] The policies under which the grievor sought benefits were clear; the forms were simple. Common sense should have told him that he could not claim multiple benefits for the same period. Common sense should be applied when determining whether he intended to seek benefits to which he was not entitled. Would a reasonable person in the circumstances expect to be paid for commuting and at the same time claim the benefits for staying overnight at the destination? Simply put, no. Would a reasonable person in the circumstances expect to be entitled to claim a benefit related to the sale of a property in which he or she had no financial interest? Again, simply put, no. The grievor carefully tailored his evidence to demonstrate that he did none of this, yet his explanations made no sense. Fraud is fraud, and anyone who steals from the Crown is not entitled to be employed by the Crown (see *Gannon v. Treasury Board (National Defence)*, 2002 PSSRB 32; *Gannon v. Canada (Attorney General)*, 2004 FCA 417; and *Juneau v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File No. 166-02-13118 (19820922), [1982] C.P.S.S.R.B. No. 160 (QL)).

[53] The grievor's actions are akin to those of the grievor in *Bristow v. Treasury Board (Canada Employment and Immigration Commission)*, PSSRB File No. 166-02-14868 (19850422), [1985] C.P.S.S.R.B. No. 114 (QL). The grievor in that case was discharged after an investigation showed that he had claimed travel funds for trips to non-existent places and trips that he had not made. The grievor's credibility in that case was a key part of the adjudicator's decision. In light of the fact that the grievor in that case denied all wrongdoing and that his work involved investigating fraudulent

employment insurance claims, there were no mitigating factors.

[54] Termination for fraud in the form of falsifying travel claims was upheld in *King v. Treasury Board (Citizenship and Immigration Canada)*, PSSRB File No. 166-02-25956 (19950125), [1985] C.P.S.S.R.B. No. 8 (QL), on the basis that the trust relationship had been irreparably damaged. The grievor in this case, as did the grievor in *King*, showed a pattern of deceit and intent to defraud his employer. Furthermore, the grievor's actions were not done on the spur of the moment but were clearly crafted towards obtaining benefits to which he was not entitled (see *Horne v. Parks Canada Agency*, 2014 PSLRB 30).

[55] Fraud is a very serious offence, which requires serious discipline (see *Pinto v. Treasury Board (Revenue Canada, Customs and Excise)*, PSSRB File. No. 166-02-16802 (19880411), [1988] C.P.S.S.R.B. No. 96 (QL); *Zakoor v. Treasury Board (Revenue Canada, Customs & Excise)*, PSSRB File No. 166-02-25882 (19941121), [1994] C.P.S.S.R.B. No. 138 (QL); *Ayangma v. Treasury Board (Department of Health)*, 2006 PSLRB 64; *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26; and *Mangatal v. Deputy Head (Department of Natural Resources)*, 2016 PSLREB 43). Indeed, some conduct is so unethical and so inconsistent with the employer's goals and objectives that it raises real doubts about the employee's capacity to meet the most fundamental rules of honesty. Furthermore, the grievor's refusal to accept any responsibility for his actions and to express any remorse is critical to assessing whether the employment relationship has been destroyed (see *Way v. Canada Revenue Agency*, 2008 PSLRB 39).

[56] Remorse must be true and must arrive in a timely fashion (see *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62). If it comes too late in the process, it cannot be considered a mitigating factor. Any remorse that the grievor expressed must be given skeptical consideration considering when it came and when it is paired with his attempts to blame others for his misdeeds.

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

[57] As soon as the grievor had any inkling his claims were not legitimate, he asked the employer what he owed it. He accepted responsibility at the end of the first disciplinary investigation meeting. He acknowledged to the new Board that he stayed in Warkworth only while on-shift. He admitted that he collected interim accommodation benefits when he stayed in his own home. Mr. McLaughlin and the

grievor had an arrangement; Mr. McLaughlin openly stated that they were friends. His testimony was the same as that provided in the course of the investigation. The grievor never denied that his principal residence was in Odessa.

[58] The employer established that there was just cause for discipline in this case. The question is whether the penalty imposed was appropriate. The grievor never read the directive (Exhibit 2, tab 19). The employer's witnesses were the subject matter experts in this area. The onus might be on the employee to be familiar with the directive, but it is also on the employer under section 2.2.1. It is clear from the evidence that paying the ENSI is not authorized without the departmental national coordinator's approval.

[59] The employer authorized paying the ENSI (see the approval form at Exhibit 2, tab 9) before it was provided with the rental agreement and when it had the property appraisal that indicated that the grievor did not own the property in question. Brookfield representatives told him that he could pursue the ENSI even though he did not own the property. He claimed the benefit based on what was listed in the employer's human resources management system as his principal residence. Even after he told the Brookfield representative the he did not own the property, Brookfield continued to process his claim. The grievor relied on the information Brookfield and his union provided to him to make his claim. The employer approved it based on the information Brookfield requested that he provide.

[60] The grievor never verified the directive. He acknowledged that he should not have claimed a commuting allowance twice and that he should not have claimed interim accommodation benefits when he stayed at his home. He did not challenge the assessment of what he owed and needed to repay. He was entitled to some type of reimbursement for his travel; this matter is not black and white.

[61] When the employer asked him to provide a statutory declaration of his common-law status, the grievor provided it to Mr. Thompson. He acknowledged that he never owned the property. He provided a statement that he had a financial interest in the property, which was not considered.

[62] The context of the grievor's relationship with Ms. Woodhouse must be considered (see *Kerr v. Baranow*, 2011 SCC 10). The grievor did not deny that he should not have applied for or accepted the ENSI. He admitted that he was not entitled

to claim the entire 60 days of interim accommodation for which he was paid. He should not have accepted benefits to which he was not entitled.

[63] The grievor's rationale for formalizing the rental agreement with Mr. McLaughlin was to establish to Brookfield that he had a destination address. Mr. McLaughlin testified that the grievor told him just that. The grievor admitted that he never relocated his principal residence as required and that he was not entitled to relocation benefits. He is guilty of carelessness and ignorance. He was not wilfully ignorant but was ignorant none the less.

[64] The employer changed the interpretation of the directive, as is outlined in the memo the departmental relocation coordinator sent to the regional relocation coordinator and the regional comptroller (Exhibit 5) after the employee information sessions. The information provided to the officers being moved to other institutions changed.

[65] The grievor could have elected to claim other benefits but chose to claim the ENSI because it saved him money. He is sloppy and was careless in his dealings with his relocation claim. His performance reviews showed that he was a good employee. He was available for overtime. He did his job. There was no indication from Mr. Thompson that there was a problem with the grievor's performance of his duties. He did nothing to put WI, his coworkers, or inmates at risk. He believes that he can still be an effective CX.

[66] The information he provided during the disciplinary investigation showed clearly that he accepted benefits to which he was not entitled. He participated in the discipline investigation, contrary to his union's advice. He did not say anything at the disciplinary meeting because he feared criminal charges, but his union representative did speak on his behalf. Mr. Thompson did not listen to the submissions presented to him at the disciplinary meeting.

[67] Correctional officers are in a position of trust, yet in the past, other correctional officers have been reinstated for breaching that trust (see *Matthews v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 38; and *Burton v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 74). Mr. Thompson is no longer at WI, so how could he assess the grievor's ability to return there?

[68] Discipline is to be corrective. The grievor admitted he was wrong to accept benefits to which he was not entitled. He accepted that he needed to repay them. The union proposed that he receive a lengthy suspension instead of having his employment terminated. The employer declined. The evidence concerning Mr. Dyer and Mr. Harker was submitted to show how similar situations were dealt with differently. Each relocation file was individualized. The fact that the grievor did not own the property he claimed the ENSI for is a significant difference.

[69] The grievor did not allege that he was the subject of discriminatory discipline or that he was discriminated against on one of the prohibited grounds. The *Bridgen* and *Burton* decisions do not apply to this case. The *Hughes* decision is also of no application as the grievor did participate in the disciplinary investigation and to a more limited extent at the disciplinary hearing.

[70] A common-sense approach must be applied. The grievor relied on experts to determine his benefits and followed their lead. The whole basis of the disciplinary process was an audit performed by Ms. Liscumb. She should not have been part of the disciplinary investigation; her participation was a breach of natural justice and constituted bias.

[71] At the heart of the grievance is discipline, which was not just, considering all the evidence. The grievor was not an auditor or manager who falsified an expense claim. In the words of the grievor's representative, the grievor was an "ignorant uneducated employee" who was negligent with respect to determining his obligations. He took the advice of those more educated than him; he signed forms without reading them. He claimed that there was no deliberate attempt to defraud the employer.

IV. Reasons

[72] Based on the facts before me, the grievor's conduct in pursuing entitlements under the directive to which he knew or ought to have known, he was not entitled is a clear violation of the employer's standards of professional conduct and the Code of Values and Ethics for the Public Service. Both parties agreed that some level of discipline is warranted in this case, the question is whether or not the grievor's termination was warranted or was it excessive. If it was excessive, what is an appropriate penalty in the circumstances?

[73] It is clear that the grievor was entitled to some benefits to defer the costs of his transfer to WI from KP, whether it was a commuting allowance or relocation expenses. Also clear is that he was not entitled to both. The directive provides a property owner with the possibility of selling his or her principal residence and relocating to the new location and receiving certain benefits that arise from that sale. That same directive also provides a property owner with the option of not selling his or her principal residence, in which case other benefits, like the ENSI, are payable. What is clear is that for either option, the employee must own or have a financial interest in the property in question, and a new principal residence must be established. Neither of which was the case here.

[74] There is no doubt that the grievor claimed and received benefits to which he was not entitled that were related to his relocation from KP to WI. He claimed and was paid interim accommodation benefits on days he commuted between his principal residence and WI. He claimed and received mileage on days he did not in fact travel. He claimed and was paid the ENSI related to a property that he did not own or in which he did not have a financial interest. There is no dispute about any of this; he acknowledged it in his evidence, and his representative pointed it out repeatedly in her argument.

[75] Both parties admit that discipline was warranted. The case law cited by the employer's representative was very persuasive that an employee claiming the payment of benefits to which he or she is not entitled warrants a serious penalty. The remaining question is whether the penalty imposed was excessive in the circumstances. The parties' representatives argued that a common-sense approach to determining the penalty should be applied. When applying this approach, I asked myself whether an ordinary person would think it excessive to claim a benefit related to the sale of a property that that person did not own or have a financial interest in. Would that same person not see the degree to which the grievor went to obtain the funds, knowing full well that he was not entitled to them, as an aggravating factor when determining whether the bond of trust between the employer and the grievor was broken? I believe that common sense dictates that actively pursuing a payment as the grievor did would be an aggravating factor when determining the measure of discipline.

[76] The grievor's representative tried to establish mitigating factors to justify a reduction to the discipline. First and foremost was the grievor's trade school education

and the core training program required of all correctional officers, which I dismiss. He completed the same core training program as other CXs and was fully aware of his need to act in the best interests of the employer and to conduct himself in a manner that served as a role model for the inmates in his care. Second was the grievor's ignorance of his entitlements. He did not attend the relocation sessions; nor did he ever consult policies and directives to determine his entitlements. He took no steps to determine what he was entitled to despite being provided with the necessary tools to assist him.

[77] His previous service record and his acceptable performance may be mitigating factors but their effect is insufficient in my opinion to negate the degree of dishonesty he has demonstrated in his dealings with the employer since he accepted the position at Warkworth Institution. He actively and willing sought benefits related to the sale of a property which he did not own and which at points was not his primary residence. This dishonesty of someone in a correctional officer role who is to be a model to the inmates he is charged with minding, goes straight to the heart of the employment relationship.

[78] Among aggravating factors, I find that the most significant are the seriousness of the misconduct, the grievor's intent, and lack of any acceptance of wrongdoing. I agree with Mr. Thompson; there is a difference between restitution and remorse. The lack of remorse demonstrated by the grievor is also a factor, which escalates the degree of discipline. The grievor's lack of remorse and his acknowledgement, without excuse, of his wrongdoing is determinate of the unlikelihood of any rehabilitation that would be necessary to restore the bond of trust, which is a critical factor when assessing whether discipline is excessive (see *Brazeau*).

[79] Ignorance is not and has never been a defence to misdeeds, particularly in my estimation when as here they demonstrate a determined course of action intended to obtain a benefit to which the person at issue was not entitled. The grievor's representative tried to establish a distinction without a difference, referring to careless and wilful ignorance. The grievor was not ignorant of the fact that he did not own the property for which he claimed the ENSI. He was also required to read the directive pursuant to section 2.2.2.1 of the directive.

[80] The grievor's representative argued that the grievor merely followed

Brookfield's directions and that he did so to save money. I ask what money he was seeking to save since he had no property at risk. With every request from Brookfield for further information, the grievor could have stopped pursuing his illegitimate claim and diminished the degree of wrongdoing, but he did not. He actively perpetuated a claim against the Crown and the taxpayer knowing full well that he was not entitled. This speaks volumes to his ethics and reflects abysmally on the employer and the public service in general. Such behaviour attracts significant discipline.

[81] As stated in *Bristow*, allegations of fraud by their very nature are serious. Honest mistakes are to be expected, but when the inconsistencies viewed collectively are consistent with a pattern of deceit and intent to defraud the employer, discharge is not excessive. The grievor's testimony that he merely did what was asked of him was not credible. His actions of obtaining the property assessment and fabricating a lease agreement to prove that he had established a new principal residence demonstrated a pattern of deceit and intent to claim a benefit to which he was not entitled.

[82] The grievor knew that he did not own the property for which he claimed the ENSI. He also knew that he had no financial interest in it. I do not believe that he made any attempts to clarify his entitlements knowing full well that he did not own the property in question. Finally, he knew that he had no intention of relocating and establishing a new principal residence in the Warkworth area. The common-sense approach advocated by his representative clearly established that he was not entitled to the ENSI. His actions and dealings with the employer and Brookfield, including concocting a rental agreement with Mr. McLaughlin, were geared to the single purpose of securing the ENSI.

[83] A critical issue when assessing whether the employment relationship has been irreparably severed is whether the grievor truly recognized and acknowledged his wrongdoing such that it can be concluded that he would not engage in such misconduct in the future. He has not accepted responsibility for his actions; nor does he recognize the impact that they had on the employment relationship. This is not a case in which the employer mistakenly made a payment to the grievor. He actively pursued the benefit and participated in deceit to ensure that he received it. When an employee is guilty of such deceit, the jurisprudence recognizes discharge as an acceptable penalty (see *Bristow*).

[84] As stated in *Mangatal*, the employer's failure to exercise proper supervision over expense claims may warrant a lesser penalty and might have corrected his behaviour, but the grievor's repeated actions to secure the benefit were not an isolated event or an inadvertent slip but rather indicate a determined pattern of behaviour intended to obtain a benefit to which the grievor was not entitled. He engaged in the same type of misconduct on a number of occasions over an extended period, for which he has never taken responsibility. His claims of remorse at the hearing of this matter rang more true to being sorry he had been caught not that he had attempted to fraudulently obtain a benefit. Even during the investigation and disciplinary hearing, he merely offered to repay anything to which he was not entitled. This is not remorse. Any failure on the employer's part pales in light of the grievor's conduct and would not be sufficient to reduce the penalty from discharge to some sort of lengthy suspension, as advocated by the bargaining agent.

[85] The fact that others who might also have claimed and received benefits to which they were not entitled received lesser discipline is not of any true consequence in this case. As stated in *King*, the seriousness of the misconduct, the aggravating factors, and the previous disciplinary record may warrant different penalties in each situation. There is no requirement that discipline progress by preordained steps. As stated in Brown and Beatty, *Canadian Labour Arbitration*, 4th edition, and as quoted in *Way*, some behaviour is so unethical and so inconsistent with the employer's goals and objectives that it raises real doubts about the grievor's capacity or willingness to adhere to the most fundamental rules of honestly and loyalty.

[86] In my estimation, whether or not Mr. Thompson is currently the warden at WI is irrelevant. The question I face is whether the grievor could re-establish the trust relationship with the employer; Mr. Thompson is not the employer; the Correctional Service of Canada is.

[87] The grievor argued that Ms. Liscumb was biased and that she should not have participated in the disciplinary investigation. In light of his admissions at the hearing, her participation is of little consequence to this decision. She had no role in determining what discipline was imposed. In any event, it is trite law that hearings before the Board are *de novo* hearings and that any prejudice or unfairness that a procedural defect might have caused were cured by the adjudication of the grievance (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).

[88] As the grievor's representative made clear, the grievor made no claim that he was the subject of discriminatory discipline. Therefore, I need not address this question though it was addressed by the counsel for the employer in argument.

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

(The Order appears on the next page)

V. Order

[90] The grievance is dismissed.

December 23, 2016.

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