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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

HAROLD PETERSON

Grievor

and

DEPUTY HEAD (Correctional Service of Canada)

Respondent

Indexed as
Peterson 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: Fiona Campbell, counsel

For the Respondent: Caroline Engmann, counsel

Heard at Moncton, New Brunswick,
February 9 to 11 and October 17 to 20, 2016.

I. Individual grievance referred to adjudication

[1] The grievor, Harold Peterson, alleged that his employment with the Correctional Service of Canada (CSC or "the employer") was unjustly terminated effective March 7, 2014 for off duty conduct which violated the employer's standards of professional conduct, in violation of article 17 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("the union") with the expiry date of May 31, 2014.

[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 as well as the former Public Service Staffing Tribunal. The Board heard this grievance under the authority of the related implementing statutory instruments.

II. Summary of the evidence

[3] The grievor was a correctional officer (classified CX-01) at the Atlantic Institution (AIR) in Renous, New Brunswick, a maximum-security institution operated by the employer. In February 2014, the police in Miramichi, New Brunswick, informed the employer that the grievor had been detained for alleged *Criminal Code* (R.S.C., 1985, c. C-46) offences and for violations of the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19; *CDSA).* It was reported to the employer that when the police entered the grievor's residence, they discovered unsafely stored firearms, large quantities of marijuana, and equipment required to operate a marijuana grow operation ("a grow op"). As a result of this discovery, the Miramichi police charged the grievor with three indictable offences under the *Criminal Code* and the *CDSA*, following which the employer suspended him and removed him from the workplace.

[4] Rather than proceed to trial on the indictable offences, the grievor eventually plea bargained and pled guilty to summary conviction offences. He made several court appearances before entering his guilty plea, all of which were reported in the local papers, which identified him as a prison guard. He pled guilty to the production of a controlled substance, the possession of cannabis resin, and the unsafe storage of firearms. He was sentenced to a term of probation and received a 10-year mandatory prohibition on carrying firearms as a result of his plea bargain.

[5] The employer embarked on a disciplinary investigation concurrent with the criminal court proceedings. The grievor refused to participate with the investigation, on the advice of his counsel. The employer made several attempts to obtain information from the grievor, but he refused to cooperate. The disciplinary investigation proceeded without his input and concluded that he had violated the employer's *Standards of Professional Conduct* and the *Code of Discipline (CD-060)*. The employer determined that his possession of a controlled substance and the quantity of it and his possession of grow-op equipment was incompatible with his status as a peace officer (all correctional officers (CXs) hold peace officer status) and with his continued employment. The employer considered the employment relationship no longer viable and terminated the grievor.

[6] The events related to him being charged with operating a grow op were widely publicized in the community, where AIR is one of the largest employers. As a result of the grievor's criminal charges, the employer's reputation was tarnished. As a CX, the grievor was responsible for supervising inmates, but once criminally charged, his supervisory role over inmates was compromised; a good number of the inmates at AIR were incarcerated for the same offences that the grievor had been charged with that he eventually plea-bargained down in exchange for a guilty plea to lesser charges. When it became known within AIR that the grievor had engaged in this type of criminal activity, he could no longer be effective in his role as a CX. For these reasons, his employment was terminated.

A. Evidence of Jody Whyte

[7] Officer Jody Whyte of the Miramichi police force testified that on February 24, 2014, along with other officers, he executed a search warrant on the grievor's residence. Inside the house, the police officers found and seized 4.22kg of dried marijuana. It was found throughout the house, in the kitchen, in the bedrooms, and in the basement. Grow op equipment was also seized, such as light ballasts, large fans, metal alloy lightbulbs, and potting soil. Strings used to support the marijuana plants while they grew were found hanging from the basement ceiling. Several large hockey bags were found, which are often used to transport the product of a grow op. Also found was a large quantity of marijuana shake (loose leaves from marijuana plants), which was not part of the calculation of the 4.22 kg, as it is useless unless it is used to produce cannabis resin. There was evidence that the grievor was in fact attempting to

produce cannabis resin; some was found in a pill bottle, as was a quantity of marijuana oil. There was no evidence of scales, transaction records, pagers, or calculators. Only a small amount of cash was found.

[8] Officer Whyte spoke to Kevin Hare, the security and intelligence officer at AIR, and told him of the grievor's arrest and the results of the search warrant because he felt that it was a security hazard for AIR to have someone working there who was involved in criminal activity. He spoke to Mr. Hare again on April 9, 2014, when Mr. Hare interviewed him about the events of February 23 when the police first responded to a call to check on the welfare of grievor and February 24 of that year.

B. Evidence of Lisa McFarlane

[9] Officer Lisa McFarlane of the Miramichi police assisted with executing the drug search warrant on the grievor's property. She later interviewed the grievor, and she asked him if the product found in his house was his and if he owned the seized equipment. He did not comment on who owned the product other than the small amount found in the kitchen cupboard. The interview lasted 30 minutes, including a call the grievor made to Legal Aid. He was uncooperative and refused to disclose the numbers and locations of the firearms in his residence. Later, after a secondary caution, the grievor told Officer McFarlane that he often smoked marijuana. He also changed his story from him owning everything found to owning only the small amount found in the kitchen cupboards.

[10] Mr. Hare also interviewed Officer McFarlane. He asked her about the number of weapons seized. She answered that question and told him where the cannabis was found. She told him that the grievor had admitted to smoking marijuana often and that 8 to 10 pounds of it was a lot for one person's personal use. The grievor had no medical marijuana prescription to legitimize possessing the illegal substance. Pictures of the buckets of marijuana seized appeared in the local newspaper. The buckets were clearly labelled as having been shipped to AIR.

C. Evidence of Mr. Hare

[11] Mr. Hare was also AIR's assistant warden, operations, in 2014. He had held the position since 2008 and had been employed with the employer for 33 years. According to him, CX-01s have a generic job description (Exhibit 2, tab 5). They are required to provide dynamic security within institutions, interact with inmates, do rounds, do

counts, walk the ranges, respond to emergencies, and escort inmates outside institutions, and during such security escorts, they are generally armed. CXs hold peace officer status under the *Criminal Code*. Some posts do not require a CX to carry a weapon, but they are areas where CXs are assigned for a period of their shift; they are not permanent positions. CXs rotate through posts.

[12] Officer Whyte contacted Mr. Hare at home on February 24, 2014. He was told that the grievor had been involved in an incident the previous night. The grievor had initially been detained under the provincial *Mental Health Act, R.S.N.B. 1973, C.M-10*. The police initially entered the residence to secure weapons when they were met by the obvious smell of cannabis. The house was placed under guard until a search warrant was secured. The police found seven unsecured weapons and a large amount of marijuana plus cannabis resin and hashish. The grievor was arrested and released on an undertaking to abide by the conditions of his release.

[13] The next day, Mr. Hare briefed the acting warden, Brenda Richard, who was replacing Edward Muise, the warden at the time. A human resources representative was also informed. The grievor never contacted the employer to advise it of his arrest. Mr. Hare instructed the grievor's supervisor to contact the grievor and advise him that he was being put on paid leave pending a decision on whether he would be suspended. This paid leave lasted for several shifts. The union was also advised of the situation.

[14] The grievor was suspended without pay on March 7, 2014. Mr. Hare met with the grievor and his union representative, Wade Jardine, on that day to advise them of the suspension. The grievor refused to sign the letter notifying him of the suspension; the union representative signed it instead (Exhibit 9). The suspension without pay was reviewed and assessed every three weeks after that to determine whether or not the suspension is still required (Larsen criteria). Each assessment concluded that the offences with which the grievor had been charged were serious enough to bring the employer's reputation into disrepute and to possibly put AIR at risk.

[15] The disciplinary investigation was convened on March 19, 2014. Mr. Hare, with Bob Taylor, conducted it and filed a written report with the Warden (Exhibit 1, tab 5). The grievor refused to meet with Mr. Hare on March 22, when Mr. Hare intended to provide him with a copy of the disciplinary investigation convening order. Instead, Mr. Hare gave the documents to the grievor's union representative on March 27. On April

9, the grievor did meet with Mr. Hare, at which point he was also given a copy of the terms of reference and the convening order.

[16] As part of their investigation, Mr. Hare and Mr. Taylor interviewed Officers Whyte and McFarlane, the grievor, and Angie St-Pierre, who worked in the kitchen at AIR. She had given the grievor the buckets he had used to store the marijuana he grew. The investigators reviewed newspaper reports and verified online news services. In the course of the interviews of the police officers, the investigators received a copy of the interviews the police had conducted of the grievor.

[17] The grievor did not attend the interview scheduled for April 22, 2014, but did attend on April 24, 2014, along with his union representative. The interview took between 40 and 50 minutes. The grievor's union representative objected to the employer's refusal to provide them with a copy of the police officers' statements. The investigators told the grievor on at least six occasions during the interview that the employer's investigative process was separate from any criminal investigation into his conduct. The grievor was very guarded in his participation and stated that he was following his lawyer's advice. He mentioned that he suffered from post-traumatic stress disorder (PTSD) and chronic back pain but provided no details. He asked the employer to contact his doctor for further information on his medical conditions.

[18] After the interview, Mr. Hare spoke to Mr. Jardine and told him that he would not seek the grievor's medical information since it was the grievor's responsibility to provide all relevant information to help the employer make its decision. Mr. Hare was sure that the grievor thought that the employer would obtain information to support him. Mr. Hare told the union representative that he would not "go on a fishing expedition".

[19] The grievor told the investigators that he was stressed and that he had seen a psychiatrist. The investigators were aware that he had been detained under the *Mental Health Act* because the police officers had reported as much in their interviews. No mention was made of a workers' compensation claim or a workplace incident, which in Mr. Hare's experience, was common when a CX claimed to have PTSD. There was also no evidence that the grievor had ever told his supervisor about his illness. Consequently, since no medical information had been provided, none was referenced in the final investigation report.

[20] The investigators completed their report and submitted it to the Warden in July 2014. A draft copy was given to the grievor, who refused to acknowledge receiving it. He disagreed with the comments it contained.

[21] The employer did not wait for the criminal trial to conclude to complete the investigative report. According to the employer, the discipline process and the criminal process were independent of each other. Mr. Hare followed the news reports on the trial throughout the process. Since the trial process was dragging on and since it was becoming increasingly difficult to stay in touch with the grievor, the employer decided to proceed with terminating his employment on January 7, 2015.

[22] The grievor's trial was initially set for January 2015, but the trial was delayed because his representation changed. His criminal matter finally concluded in October 2015, when he entered a guilty plea.

[23] Mr. Hare delivered the dismissal letter (Exhibit 1, tab 1) to the grievor in front of a sheriff's officer at the Miramichi courthouse on January 7, 2015. The union representatives were advised of Mr. Hare's intentions on January 5, 2015. Based on the investigators' conclusions that the grievor's behaviour was inconsistent with his role as a peace officer, and given that he had admitted to heavy drug use, that he had improperly stored firearms, that he had been charged with three indictable offences, and that he had violated the employer's *Standards of Professional Conduct*, *Code of Discipline (CD-060)*, and the *Values and Ethics Code for the Public Sector*, the Warden determined that terminating his employment was appropriate.

D. <u>Evidence of Tim Martin</u>

[24] Tim Martin was the grievor's correctional manager in 2013. He testified that he spoke to the grievor about his concerns with respect to the grievor's excessive leave usage. The grievor regularly used more sick leave than he accumulated and ran a negative sick leave balance, which was not unusual for a CX. Mr. Martin mentioned the National Attendance Management Program (NAMP), but because the grievor did not meet the threshold required to participate, he was never referred to it. When Mr. Martin spoke to the grievor about his concerns, the grievor denied having a drinking problem and blamed his absences on his marital and sleep problems. On August 18, 2013, Mr. Martin advised him to seek the help from the Employee Assistance Program (EAP) if any issues in his personal life were preventing him from regularly attending

work. He also told the grievor that options existed to help him improve his attendance, which would have led to a positive leave balance. He and the grievor agreed that they would meet in the fall of 2013 to work on evaluating these options.

E. Evidence of Mr. Muise

[25] Mr. Muise was the warden at AIR in 2014 and 2015. He made the decision to suspend the grievor without pay during the disciplinary investigation and ultimately to terminate his employment. Mr. Muise knew that the situation had trickled into the media, which caused him concern for the employer's reputation. In his opinion, the grievor's breach of the employer's *Standards of Professional Conduct* and *Code of Discipline (CD-060)* as well as the *Values and Ethics Code for the Public Sector* did not portray the CSC in a good light. When a CX is charged with a criminal offence, it is of serious concern to the employer, as CXs are held to a higher standard of conduct, given the reason they are employed.

[26] Mr. Muise read the disciplinary investigation report and annexes and accepted the findings in it. He questioned why no medical information was provided, and he intended to follow up at the disciplinary hearing to obtain it. If the grievor had mental health issues, Mr. Muise questioned how they would impact his suitability to return to AIR. References to PTSD did not cause Mr. Muise any concern, because he was not considering returning the grievor to the workplace at the time the report was issued. The grievor's mental health was to be a key component of the disciplinary hearing.

[27] The disciplinary hearing was convened for July 24, 2014. Mr. Muise asked Mr. Hare to contact the grievor and pass on the hearing date and time. It was very difficult to contact the grievor during this period. Mr. Hare was only successful getting the information to him through Mr. Jardine.

[28] In addition to providing the grievor with notice of the disciplinary hearing date, a copy of the investigation report was provided to him through Mr. Jardine. Mr. Muise expected that the grievor would provide him with comments on the report's content and explanations for his behaviour and that he would identify mitigating factors to be considered at the disciplinary hearing. Instead, the grievor did not comment on the substantive issues in the report, on his lawyer's advice.

[29] At the July 24, 2014, meeting, the grievor requested a postponement until after he saw his doctor on August 5, which was granted. Mr. Muise expected that the grievor would provide medical information to support his claims of PTSD after this appointment; he never did.

[30] The disciplinary hearing was rescheduled for August 27, 2014 (Exhibit 1, tab 3). A second request to postpone the meeting on the advice of the grievor's criminal lawyer was refused. Mr. Jardine appeared on behalf of the grievor. Mr. Muise received no further medical information from the grievor or his representative. Mr. Muise told Mr. Jardine that he would render his decision based on the information before him at that time.

[31] Mr. Muise made his decision shortly after the disciplinary hearing but was unable to find the grievor to give him his termination letter. Mr. Muise was eventually able to have the grievor served with a copy of the termination letter on January 7, 2015, at the Miramichi courthouse when the grievor made a court appearance. The termination date was set retroactively to March 7, 2014, the date of the grievor's suspension without pay.

[32] According to Mr. Muise, the disciplinary and criminal proceedings were separate. Because of the administrative nature of the disciplinary action, he wanted it dealt with in a timely fashion, which is why he did not wait until the criminal proceedings completed. It appeared to him that the grievor wanted the outcome of the criminal proceedings to be factored into the employer's final decision. In his opinion, Mr. Muise did not need to know the outcome of the grievor's criminal proceedings to make his decision. The information that the employer received from the police was sufficient and credible for Mr. Muise's purposes.

[33] It was sufficient for Mr. Muise that on the balance of probabilities, the grievor had breached the employer's *Standards of Professional Conduct* and *Code of Discipline (CD-060)* as well as the *Values and Ethics Code for the Public Sector*. The grievor knew the employer's expectations of a CX; he had completed the core training program required to qualify as a CX, including the modules on the *Code of Discipline*, the *Values and Ethics Code for the Public Sector*, and the employer's code of ethics. He knew what was expected of him when he accepted a deployment from Kingston Penitentiary (KP) to AIR and signed his letter of offer (Exhibit 1, tab 10).

[34] Possessing illegal drugs and improperly storing firearms means not respecting the rule of law, and doing so violates the employer's values and ethics framework (Exhibit 16). Its employees are expected to demonstrate acceptable law-abiding behaviour. When the grievor chose to ignore the rule of law, he demonstrated the same type of behaviour as did those persons incarcerated and in his charge.

[35] The grievor lost all credibility, in Mr. Muise's estimation. He concluded that the grievor did not operate within the values and ethics framework and that he lacked both professional and personal integrity. The grievor did not account for his actions or justify their appropriateness and took no responsibility for them. He compromised the employer's image before the public along with that of the public service in general.

[36] Mr. Muise considered the grievor's clean discipline record as a mitigating factor. The information provided by the police and what was found at the grievor's house and the resulting charges were aggravating factors. The grievor did admit to having some drugs in his house, but the information from the police about the quantity of it and the presence of grow-op equipment was significant to Mr. Muise's deliberations.

[37] The grievor demonstrated very serious criminal behaviour. His criminal process was covered in the press, which clearly identified him as a CX working at AIR. The inmate population was also aware that the grievor had been charged with drug-related offences and that he had pled guilty to lesser charges through a plea bargain.

[38] The reference to the firearms caused Mr. Muise less concern than the drug possession. The grievor placed himself on the same plane as the offenders he was employed to guard. This is one of the most severe breaches a CX can commit. He breached the *Standards of Professional Conduct* and *Code of Discipline (CD-060)* as well as the *Values and Ethics Code for the Public Sector* and could not be returned to the workplace and be effective in the CX role. He could easily have been targeted by offenders wanting him to smuggle drugs into the institution. This is one of the most serious concerns that the employer can have with the employment of a CX as it puts the safety of an institution at risk. CXs are role models for inmates. The grievor lost all credibility and could no longer be a positive influence on the inmates, to make prosocial changes.

[39] Given these conclusions and the nature of the breaches committed by the grievor, which were core to the employer, there was nowhere else for him to work with

the employer.

F. Evidence of Mr. Jardine

[40] Mr. Jardine testified on behalf of the grievor. He is a CX-01 at AIR. Between 2012 and 2015, he was the local union president, and he acted as the grievor's union representative throughout these events. According to Mr. Jardine, union members with mental health issues were directed to the EAP. Many CXs did not claim that they suffered from mental illness because they felt it was not macho; many times, mental illness was not reported. Those that did come forward took a long time to deal with their illnesses; the employer was just beginning to recognize the need to treat CXs who suffered from mental illnesses. Each CX is affected differently by the institutional environment, which is a very stressful workplace. CXs receive no training on dealing with mental health issues. In Mr. Jardine's opinion, the NAMP does not address mental health issues such as PTSD. As such, it is irrelevant to those with PTSD.

[41] Mr. Jardine was present at the disciplinary investigation interview with the grievor. It was a very lengthy process. He also attended the disciplinary hearing, but only as an observer. It was not his role to tell the grievor's story. The disclosure of the police information was raised at the disciplinary investigation. Mr. Hare would not allow either the grievor or Mr. Jardine to see what the police had provided him. Mr. Jardine eventually received redacted copies of these materials at the disciplinary hearing.

[42] The grievor did not answer questions posed to him during the investigation, but according to Mr. Jardine, "he would have been crazy to answer any questions" before the criminal proceedings concluded. Mr. Jardine felt it was unfair for the employer to proceed, given the grievor's situation. The grievor refused to answer Mr. Hare's questions because Mr. Hare could have been subpoenaed during the grievor's criminal trial.

[43] Mr. Jardine was unaware that the grievor suffered from mental health issues. The grievor did mention that he was using marijuana for his chronic back pain. He recognized that it was his responsibility to provide medical information to support this claim, but his physicians would not provide it unless the employer requested it. The grievor brought up that he suffered from PTSD and that he was undergoing testing for it. Mr. Hare asked if he was taking any medications to treat his PTSD. In addition to

PTSD, the grievor also indicated that he suffered from depression and anxiety.

[44] Mr. Jardine did not recall the disciplinary hearing. He received the termination letter before it was given to the grievor. The grievor grieved his termination but never received a response. Mr. Jardine believed that arrangements could have been made to reassign the grievor to a position that did not require using firearms or that the employer could have double-staffed his position when the grievor was on shift.

[45] When asked if he would have any concerns with the grievor being reinstated to AIR, Mr. Jardine admitted that he would be concerned for the safety of AIR and its staff were the grievor reinstated. Mr. Jardine was concerned about the possibility of the grievor being compromised or turned by inmates or reporting for duty while impaired and so being unable to respond to a call for assistance.

[46] According to Mr. Jardine, no CXs at AIR have criminal records or have been banned from possessing or using firearms. As a CX and as the local union president, Mr. Jardine would have concerns for his safety and that of the other CXs if they had to work with the grievor, who would be unable to respond to a situation if he were in an altered state. Marijuana is an illegal substance, and someone possessing it causes Mr. Jardine concern. The grievor could be blackmailed into bringing drugs into AIR. Illegal drugs within an institution compromise the safety of the inmates and staff. It is a CX's job to prevent drugs from entering an institution.

G. Evidence of Paul Smith

[47] Dr. Paul Smith is a general practitioner with 37 years experience in family medicine. He has seen approximately 1200 patients who suffer from PTSD. He has written an article on treating PTSD with medical marijuana. A significant number of sufferers respond favourably to medical marijuana when other pharmaceuticals have failed. Dr. Smith first met the grievor in January 2014. The grievor told him that he suffered from pain in his shoulder and back. He reported witnessing assaults, hangings, and other violence while working for the employer. Dr. Smith evaluated the grievor at a score of 9 out of 10 based on the grievor's self-rating on most categories, which indicated to Dr. Smith that the grievor was suffering from severe PTSD.

[48] The grievor reported to Dr. Smith that he had tried marijuana and that, he claimed, it helped him. He had received a prescription via Skype, an Internet-based

visual communication application, which was completely inappropriate, according to Dr. Smith's evidence. Dr. Smith gave the grievor a trial prescription with a ceiling dose of 10 grams. The grievor could use up to that amount, depending on his needs. The side effects of marijuana include impaired cognitive function, which dissipates over time. The grievor was also to continue with other therapies, such as psychotherapy. Dr. Smith also discussed lifestyle choices that the grievor should make to improve his recovery.

[49] Since the grievor's initial visit, Dr. Smith has seen him four times. His response to marijuana was excellent. The biggest problem he encountered was securing his supply of and the funds to purchase the drug. The grievor did not do well with tranquilizers and anti-anxiety medications. With a Health Canada prescription, the grievor would have been allowed to grow his own marijuana but would have been limited to possessing a maximum of 6 grams, which was equal to 12 outdoor plants or 30 indoor plants (and far less than he had in his possession when charged). The seeds for such plants must be provided to the patient by Health Canada.

H. Evidence of Krzysztof Wierzchoslawski

[50] Dr. Krzysztof Wierzchoslawski (known to his patients as Dr. Krys) has practised family medicine in Miramichi for 18 years and has treated the grievor since 2001. Beginning in 2012, the grievor raised mental health issues related to his marriage break-up, for which he was treated with several prescription drugs.

[51] By March 2013, it was clear to Dr. Krys that the grievor was travelling from clinic to clinic in search of opiates. On March 27, 2013, the grievor came into the doctor's office for an appointment drunk, complaining of back pain. He was prescribed Imovane (a sedative used to help with sleep problems) after he rejected the doctor's recommendation that he attend physiotherapy to relieve his back pain. The next day, he reported to the emergency room at the local hospital and was prescribed more Imovane. On March 30, he again reported to the emergency room complaining of chronic back pain and was prescribed Percocet, a form of oxycodone.

[52] In addition to these prescription drugs, the grievor was also self-medicating with marijuana, which he never divulged to his treating physicians. When questioned by Dr. Krys, the grievor denied using illicit substances because, as he told the doctor, he was worried about his job.

[53] On April 16, 2014, the grievor admitted to Dr. Krys that he was using marijuana. Dr. Krys advised him to stop, as marijuana precipitates anxiety and panic attacks. At an appointment on June 9, 2014, the grievor advised the doctor that he had stopped using marijuana, but by August 5, 2014, the grievor had obtained a prescription for medical marijuana, which Dr. Krys advised him not to fill.

[54] Dr. Krys never diagnosed the grievor with PTSD and doubted that he ever suffered from it. The grievor never reported any symptoms that indicated to Dr. Krys that he actually suffered from PTSD. The grievor told Dr. Krys that he had PTSD and that he was treating himself with marijuana.

[55] Dr. Krys referred the grievor to the mental health clinic, and on May 14, 2015, he again recommended that the grievor stop using marijuana. By then, the grievor was being treated by another doctor, but he did not provide any information about this to Dr. Krys.

I. Grievor's evidence

[56] The grievor began his career in correctional field in April 1999, when he became a provincial correctional officer working in the New Brunswick Youth Centre ("Youth Centre") in Miramichi. While there, he dealt with inmate assaults, self-harming inmates, hangings, and a fire. He was a member of the emergency response team for 8 of his 12 years with the Province of New Brunswick. During the 12 years he spent working in the provincial correctional system, he was never disciplined. In 2011, he joined the federal correctional system and became a CX-01. He was initially assigned to KP, where he encountered many of the same type of incidents he had experienced at the Youth Centre.

[57] In October 2011, the grievor was involved in a use-of-force incident at KP. It overwhelmed him, and as the days went by, he continued to feel anxious. His sleeping patterns became disrupted, and he began having nightmares about fighting inmates. Loud noises would make him anxious. He did not seek medical treatment; nor did he mention his symptoms to management. Over time, his symptoms increased, and he began having marital problems.

[58] In April 2012, the grievor transferred to AIR, where there was less inmate contact than at KP. He was overwhelmed by the move because he was now out of his

comfort zone. His anxiety level increased, and he began to feel depressed. He developed trust issues and became hypervigilant. Despite this, he had no performance or disciplinary issues.

[59] Eventually, the grievor did not feel that he could do his job because he was not sleeping. He began to call in sick and was off for a week at a time. His supervisor talked to him about his attendance. He was required to bring in a doctor's certificate for all absences due to sick leave after that discussion. He was given a referral to EAP but did not go. He did go to the mental health clinic when he was referred to it but did not go back because he did not feel comfortable with the clinic staff.

[60] The grievor does not remember going from doctor to doctor in search of medication. He did consult Dr. Krys in May 2012 and was prescribed medication but was not diagnosed with anything particular. As a result of a back injury suffered in a car accident, the grievor was left with shooting pain down his leg. He also was being treated by a psychiatrist, Dr. Khan, who prescribed more medication. When he felt no relief from these medications, the grievor began using alcohol along with the medications in the summer of 2012.

[61] In the fall of 2012, the grievor researched his symptoms on the Internet and concluded that he suffered from PTSD. He found that marijuana relieved his symptoms and asked Dr. Krys about it. According to the grievor, Dr. Krys was "dead against the use of marijuana". Despite this, the grievor decided to try marijuana and ordered seeds off the Internet in 2013. He planted the seedlings on his neighbour's property with the intention of harvesting his crop in the fall of 2013. He chose his variety of plants to grow based on the information he found on the Internet. The grievor testified that he knew there would be repercussions at work if he engaged in the use of marijuana because he was not legally authorized to grow or use it, which is why he chose to plant his crop on someone else's property. He did not research the law on cultivating and using marijuana.

[62] Despite knowing the risks of using marijuana, he persisted. He experimented with varieties and found that he obtained instant relief from his anxiety and pain when using marijuana. He used his product only for himself; he did not sell any of it. He used it before going to bed but never before reporting to work. He knew that he was engaged in an illegal activity that threatened his continued employment. After his

arrest, the grievor could not use marijuana, as the police took his supply. When he was asked at the hearing about the quantity of marijuana that was seized, he explained it by saying that he had been experimenting.

[63] The grievor did not deny owning equipment that could be used in a grow op. He could not recall whether he had purchased the equipment for growing marijuana or for some other purpose. He purchased the seven hockey bags because he had many things to carry related to growing the marijuana. Once he harvested his crop, he used the hockey bags to transport the plants to his house to be dried. The strings found hanging from the basement ceiling were used to dry the marijuana plants. The grievor started growing his plants indoors and transplanted them outside in the woods on a neighbouring property owned by someone else. He testified that he sowed the number of plants he thought he needed for the crop he required, "like any other farmer [would]".

[64] His legal counsel advised the grievor not to participate in the employer's disciplinary investigation and hearing. He was advised not to answer any incriminating questions. He told Mr. Hare and Mr. Taylor as much at the disciplinary investigation meeting. He also raised his medical issues and asked that Mr. Hare and Mr. Taylor obtain a copy of his medical file from Dr. Krys. He also disclosed to them that he was using marijuana to treat his chronic pain and his self-diagnosed PTSD.

[65] In February or March 2015, the grievor received a medical marijuana prescription after a Skype interview with a doctor in Ontario. He then began weaning himself off his prescription drugs. In June 2015, Dr. Smith tested him for PTSD and gave him another medical marijuana prescription.

[66] The grievor's criminal process went on for two years. His first lawyer recused himself due to a conflict of interest. The grievor fired his second lawyer because he did not agree with how he wanted to deal with the case. The third lawyer arranged the plea bargain. The grievor testified that he lost everything as a result of this criminal process, including his job. He professed to being remorseful for what he did because he made one decision, which ruined his life instead of saving it.

III. Summary of the arguments

A. For the employer

[67] The Board must determine whether the employer has established misconduct on a balance of probabilities and whether the penalty imposed was appropriate in the circumstances.

[68] The letter of discipline clearly identified the grievor's misconduct. He was found in possession of grow-op material and of a substantial amount of marijuana. These were serious acts of misconduct that contravened the grievor's conditions of employment, which included adhering to the employer's *Standards of Professional Conduct* (Exhibit 1, tab 9) and *Code of Discipline (CD-060)* (Exhibit 1, tab 8) as well as the *Values and Ethics Code for the Public Sector* (Exhibit 10). The grievor's terms and conditions of employment were set out in his letter of offer (Exhibit 1, tab 10). The evidence clearly established that the grievor breached his employment obligations and that the penalty of dismissal was appropriate.

[69] The grievor's misconduct falls within the category of off-duty conduct. According to Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at 7:3010, the employer has no jurisdiction or authority over what its employees do outside work unless it can show that its legitimate business interests were in some way affected. To justify disciplining an employee for misconduct committed while off duty, the employer must prove that the behaviour in question detrimentally affected its reputation, rendered the employee unable to properly discharge his or her employment obligations, caused other employees to refuse to work with that person, or inhibited the employer's ability to efficiently manage and direct its workplace (known as the *Millhaven* factors after *Millhaven Fibres Limited, Millhaven Works v. Oil, Chemical and Atomic Workers International Union, Local 9-670*, [1967] O.L.A.A. No. 4 (QL)). Public servants face additional restrictions on their off-duty conduct compared to regular members of the public.

[70] The employer had to establish a nexus between the activity and the employment relationship (see *Government of the Province of Alberta (Solicitor General Department - Correctional Services Division) v. Alberta Union of Provincial Employees* (2003), 124 L.A.C. (4th) 176 (referred to as "*Crepeau*")). The employer did not have to establish all of the *Millhaven* factors. The injury to its reputation was sufficient (see *Tobin v.*

Treasury Board (Correctional Service of Canada), 2011 PSLRB 76, and *Tobin v. Canada (Attorney General)*, 2009 FCA 254). Direct evidence of damage to the employer's reputation is not required. Nonetheless, in this case, the evidence of Officer Whyte, Mr. Hare, and Mr. Jardine showed that the matter was widely published throughout the small community where the employer is one of the primary employers. Mr. Muise also testified that the inmate population knew of the grievor's situation.

[71] Through his actions, the grievor rendered himself unable to hold peace officer status as set out in his work description (Exhibit 2, tab 5). As a peace officer, he was expected to uphold the law and to set a good example, which is also a requirement of the *Standards of Professional Conduct* and the *Values and Ethics Code for the Public Sector*. By the grievor's own admission, he knew that cultivating marijuana without a permit was illegal and that his career was in jeopardy. Despite this, he cultivated marijuana on someone else's property unbeknownst to them, to protect his job in the event that the crop was discovered. The grievor violated sections 4 and 5 of the *CDSA*. Even had he had a permit to grow marijuana, the quantity he possessed was far in excess of the amount allowed to be grown with a permit.

[72] The grievor's initial charges carried a mandatory custodial sentence. The fact that he plea bargained and entered a guilty plea to summary conviction offences is irrelevant. The trial judge recognized the gravity of the situation and clearly stated that he did not want the grievor's case quoted as a precedent (see the transcript of the sentencing, Exhibit 21, pages 19 and 20). The grievor acknowledged that he knew that his activities could jeopardize his employment.

[73] The essential facts of this case are not in dispute. The grievor admitted that he had engaged in illegal activity by cultivating marijuana in 2013. Officer Whyte testified that when the grievor's home was searched, the police found approximately four kilograms of marijuana, grow-op equipment, and a number of weapons, which was corroborated by Officer McFarlane's evidence. Officer Whyte is an experienced narcotics officer, so his testimony that there were indications of a grow op bears weight. Because marijuana loses its potency after a while, the quantity that was found in the grievor's possession was far too much for his personal use.

[74] The grievor testified that he purchased the hockey bags that were found in the basement of his home for transporting the equipment he used to cultivate the

marijuana and to carry the product. If the Board accepts his testimony that he was merely experimenting with marijuana, why then did he have all the equipment required for a grow op in his home? Everything he did raises questions, particularly since he worked in a prison. Red flags must have been raised, which he must have ignored. He had a clear intention to grow marijuana without authorization, contrary to the *CDSA*.

[75] Mr. Hare tried to obtain the information he required to properly draw his conclusions. He did follow up on the PTSD concerns raised by the grievor, but the grievor did not provide any medical information to support its existence (see *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127). The grievor had the burden of establishing a medical defence. The employer was not required to pursue the medical information to support his medical defence.

[76] The criminal and employment processes are separate and independent of each other. The employer was not obligated to wait until the criminal charges were dealt with to complete the disciplinary process. The grievor chose not to cooperate with the employer's process, and he must bear the consequences that flow from that choice (see *Hughes v. Parks Canada Agency*, 2015 PSLREB 75).

[77] The grievor had the obligation to fully cooperate with the administrative process. He waited until the adjudication to raise a medical defence even though throughout the process, he knew that Dr. Krys was concerned about his pattern of drug seeking and marijuana use and that he had consulted mental health professionals. Mitigating factors are to be identified at the front end of the disciplinary process, but in this case, they were not raised until the adjudication. If the grievor had been diagnosed with PTSD and required marijuana to treat his condition, why did he not raise it as a defence in the beginning? The reason is that he was self-diagnosed and self-medicating. He made a choice, knowing it was illegal, and pursued it illegally.

[78] At no point did the grievor request to be accommodated for his PTSD. He testified that he was dealing with it in his own way and that he had never raised it at either KP or AIR. Mr. Martin was willing to work with the grievor to develop an attendance strategy, but for no specific reason, it never happened. They were to meet in the fall of 2013, but by the summer of 2013, the grievor had embarked on his illegal marijuana cultivation. Even Mr. Jardine did not know that the grievor had PTSD. The

physicians who testified did not agree that he suffered from PTSD.

[79] Mr. Muise testified about the impact of the grievor's illegal activities on the employer's reputation. He was not provided with any medical information that would have mitigated this impact. Mr. Muise was concerned that the media had identified the grievor as a prison guard and that there was no place within AIR he could have worked, had he returned there, without being compromised. The public and the inmates were aware of his illegal activities and subsequent conviction. Mr. Jardine also testified about the risk of the grievor being vulnerable to being turned if he went back into the workplace. Mr. Jardine's evidence confirmed the testimony of the employer's witnesses.

[80] The medical evidence put forward by the grievor was irrelevant. If it was proffered as proof of mitigating factors, it was never raised during the disciplinary process, and so it was barred pursuant to the principles in *Burchill v. Canada (Attorney General)*, [1981] 1 F.C. 109 (C.A.). If the medical aspect had any bearing on the grievor's behaviour, the employer ought to have been given the opportunity to consider it during the grievance process (see *Shneidman v. Canada (Attorney General)*, 2007 FCA 192). If it was offered as a medical defence, it was insufficient to meet the burden of proof on the grievor. The employer was not aware of any of it.

[81] Dr. Smith's evidence post-dates the employer's decision. Dr. Krys' evidence might have been relevant to mitigation, but it should have been raised at the disciplinary hearing and not at the adjudication. Dr. Krys' evidence actually helps the employer since he was against the idea of using marijuana and never diagnosed the grievor with PTSD. To the contrary, he was concerned with the grievor's use of alcohol and marijuana and his drug-seeking behaviour.

[82] The grievor has expressed no true remorse, not even in his own testimony.

[83] The scope of the Board's review is to determine whether the discipline imposed was just and reasonable in all the circumstances or in other words, whether the penalty fit the crime (see Brown & Beatty, at para. 7:4100). Terminations of employment have been upheld on numerous occasions in cases involving off-duty conduct (see *Crepeau*; *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28; *Casey v. Treasury Board (Public Works and Government Services Canada)*, 2005 PSLRB 46; *Dionne v. Treasury Board (Solicitor General of Canada - Correctional*

Service), 2003 PSSRB 69; *Nicolas v. Deputy Head (Department of Fisheries and Oceans)*, 2014 PSLRB 40; *Simoneau v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2003 PSSRB 57; *Stokaluk v. Deputy Head (Canada Border Services Agency)*, 2015 PSLREB 24; and *Wells v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-27802 (19971125), [1997]. The grievor must have accepted the personal constraints placed on holders of public office when he accepted a position as a CX (see *Lapostolle v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 138 at para. 71).

[84] This is a serious case of a peace officer engaging in illegal activities, which brought his ability to carry out his duties into question. Given the community and the public nature of the grievor's offences, there had to have been an impact on the employer's reputation. His illegal activity was established on the balance of probabilities, and the termination was appropriate.

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

[85] *Burchill* does not bar admitting the grievor's medical evidence. *Burchill* stands for the fact that a grievor cannot bring a new grievance to adjudication that differs from the one dealt with during the grievance process. Grievances should be interpreted liberally. Form should not triumph over substance (see *Calabretta v. Treasury Board (Department of Public Safety and Emergency Preparedness)*, 2015 PSLREB 85). The essence of this grievance has remained the same throughout — the grievor's unjust termination.

[86] The penalty imposed by the employer was excessive given the mitigating factors, specifically the grievor's medical condition. Every mitigating factor and all the evidence to be relied upon need not be listed in the grievance or throughout the grievance process. The grievor did raise PTSD during the disciplinary investigation, but there was confusion over who was to be provided with that information. Post-termination evidence is admissible if it sheds light on the circumstances that existed at the time the decision to terminate was made (see *Cie minière Québec Cartier v. Quebec (Grievances arbitrator)*, [1995] 2 SCR 1095 ("*Cie minière*"); *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 SCR 487; *Spawn v. Parks Canada Agency*, 2004 PSSRB 25; and *Toronto Transit Commission v. Amalgamated Transit Union, Local 113*, 2016 CanLII 38888).

[87] The medical evidence shows that the grievor suffered from mental illness at least two years before his arrest. He was undiagnosed at the time. The pharmaceuticals prescribed to him might have aggravated his undiagnosed mental illness.

[88] The grievor does not dispute that misconduct occurred that warranted discipline. The sole issue is whether the termination was appropriate in the circumstances, considering the mitigating factors. There are differences in the interpretations of the events, and the facts must be put in context, including the grievor's mental illness, his unblemished record, and his sincere remorse.

[89] The grievor joined the federal correctional system in 2011 after an unblemished career with the provincial corrections system. This shows that his behaviour in 2013 was completely out of character. Following a use-of-force incident at KP in the fall of 2011, he developed anxiety and began having problems sleeping, which he tried to deal with on his own. His illness began to affect his personal life. When he began having suicidal thoughts, he started using alcohol, and saw Dr. Krys. According to Dr. Smith, this is not uncommon for someone who suffered from PTSD.

[90] The grievor visited emergency rooms and clinics on several occasions, in search of help. He saw Dr. Khan, a psychiatrist, but it was not a good fit. After the grievor was involved in a car accident, he began to suffer from increased pain. By the time he concluded that medical marijuana would alleviate his symptoms, he was taking a plethora of medications and perceived that his symptoms were getting worse.

[91] His coworkers must have noticed his distress. The grievor admitted that he was referred to the EAP but that he did not use it because he did not trust his supervisors. The employer had insufficient resources in place to help the grievor deal with and identify his problem. Employees, including the grievor, had little training on dealing with mental health issues.

[92] By 2013, the grievor had self-diagnosed his PTSD. Through his Internet research, he found that marijuana was used to treat both PTSD and chronic pain. His doctors did not support his use of marijuana, so he decided to grow his own. As a result, he successfully reduced his use of pharmaceuticals. He used the product he grew; he did not sell it to anyone else, so he was not involved in trafficking. The equipment the police found in his home was used to cultivate marijuana for his personal use.

[93] During the disciplinary investigation, the grievor's counsel told him not to discuss the pending criminal charges. He did disclose his health issues to the employer and assumed that it would seek the medical information from Dr. Krys. The grievor assumed that his doctor would not release any information unless the employer had requested it and the grievor had signed a release. He provided some information about his medical issues, but at the relevant time, he had no professional diagnosis. One came only when he was diagnosed via Skype by a doctor in Ontario, who prescribed him medical marijuana. This information was subsequently confirmed by Dr. Smith, but by then, the disciplinary process had been completed. The grievor is still not fit to work and requires accommodation.

[94] In October 2015, the grievor pled guilty to lesser summary conviction charges and was sentenced. Before being criminally charged, he had a clean record and had a very good performance history with the employer. Several mitigating factors must be considered, including that he lost everything including his job and that he was taking steps to address his health issues.

[95] According to the evidence, others who have been convicted of summary conviction offences are working for the CSC. The grievor is truly remorseful for his actions, which he carried out while his mental health was severely compromised. He had done nothing like it before or since. Marijuana was his last hope.

[96] Termination was not the only option open to the employer to discipline the grievor for his breach of the *Standards of Professional Conduct* and the *Code of Discipline (CD-060)*. Permanent demotion was considered an appropriate penalty in *Spawn* and in *MacArthur v. Deputy Head (Canada Border Services Agency)*, 2010 PSLRB 90.

[97] Similarly, correctional officerswere allowed to retain their positions in circumstances such as having pled guilty to assaulting a wife and daughter in *Government of Manitoba v. Manitoba Government Employees' Union* (1994), 39 L.A.C. (4th) 409. In that case, the employee had a previous disciplinary record.

[98] In *Nova Scotia Government and General Employees Union v. Nova Scotia (Department of Justice)* (2003), 125 L.A.C. (4th) 431, a provincial correctional officer's wife operated a grow op from their home. The CX admitted that he knew about it and that he had allowed it to go on. His termination was set aside, and a one-year

suspension without pay was substituted because of the employee's positive performance reviews, compassion for his wife, his sincere remorse, the economic hardship his termination caused, and his high potential for rehabilitation.

[99] Similarly, terminations were overturned in *North York (City) v. C.U.P.E., Local 94*, (1994), 43 L.A.C. (4th) 52; *Nova Scotia (Department of Justice - Corrections) v. N.S.G.E.U.*, 2012 CarswellNS 1056; and *Nova Scotia (Department of Justice - Corrections) v. N.S.G.E.U.*, 2003 CarswellNS 710.

[100] Conduct outside the workplace, including criminal activity, may be grounds for terminating employment, but the employer must establish that the employee's continued employment poses a serious risk to its interests (see *Oshawa General Hospital v. Ontario Nurses' Association* (1981), 2 L.A.C. (3d) 201). Mitigating factors, particularly the grievor's medical circumstances, must be considered. At his lowest point, he made a poor decision. He has taken responsibility for his actions and is in no danger of repeating them. The employment relationship has not been irreparably damaged.

C. <u>Employer's rebuttal</u>

[101] In his grievance, the grievor alleged that a violation of procedural fairness occurred as a result of procedural defects in the disciplinary process. Mitigating factors, which were not considered, were not raised throughout the grievance process and should be considered new grounds for the grievance. According to *Burchill*, a grievor cannot raise at adjudication new grounds for the grievance that had not been raised throughout the grievance process. Therefore, the Board should not accept this argument. At no point during the grievance process did the grievor raise medical evidence that would mitigate his behaviour. He had the burden of proof to produce this evidence; the employer was not required to search for it.

[102] PTSD did not cause the grievor's family to break up. His behaviour did. As for his PTSD diagnosis, Dr. Smith is not a PTSD expert. He is a general practitioner, and his evidence was contradicted by Dr. Krys. No evidence that the grievor actually suffered from PTSD was received from a psychologist or psychiatrist or any expert in treating mental health diseases. There was insufficient evidence on which to mount a medical defence as there is a serious question as to the validity of the PTSD diagnosis.

[103] The grievor was involved in an illegal activity over time. He researched, planned, grew, and harvested his illegal crop. This was not an aberration or a momentary lapse of judgement. The *CDSA* defines "trafficking", which includes transporting the illegal substance. The grievor transported his crop from his neighbour's property to his own home in hockey bags purchased for that purpose. Technically, that was trafficking.

[104] This is not a case in which reinstatement is appropriate. Even Mr. Jardine testified that he would be concerned were the grievor reinstated to his CX position. The case law cited by the grievor's counsel did not address the employer's legitimate concerns and is easily distinguished on the facts.

IV. Reasons

[105] At the outset of my reasons for dismissing this grievance, it is important to set out certain findings of fact that have had significant impact on this decision.

[106] The grievor had a lengthy career in the world of corrections but had been employed by the CSC only since 2011. On February 24, 2014, the Miramichi Police executed a search warrant on his residence and found and seized 4.22 kg of dried marijuana and grow-op equipment, including light ballasts, large fans, metal alloy lightbulbs, and potting soil. Strings used to support the marijuana plants when growing were found hanging from the basement ceiling. Several large hockey bags used to transport the grow-op's product were found. The grievor acknowledged all this as being true.

[107] There was evidence that the grievor was in fact attempting to produce cannabis resin from the marijuana shake found at his residence. Some resin was found in a pill bottle, as was a quantity of marijuana oil. In addition, a number of weapons were found unsecured in the residence. The grievor was charged with three indictable offences under the *Criminal Code* and the *CDSA*.

[108] The employer suspended the grievor and removed him from the workplace on March 7, 2014. He never returned to AIR.

[109] The employer properly constituted a disciplinary investigation into the allegations that the grievor had violated its *Standards of Professional Conduct* and *Code of Discipline (CD-060)*. He did not participate meaningfully in the disciplinary investigation; nor did he participate in the disciplinary hearing held on August 27,

2014. His employment was terminated effective March 7, 2014, the date upon which he was first suspended.

[110] The employer was unaware of any of the medical issues raised at the hearing, including that the grievor might have suffered from PTSD and that he was using marijuana to treat this illness, which at the time of his termination had not been diagnosed by any health practitioner qualified to make such a diagnosis. The grievor was the only person who had diagnosed that he had PTSD.

[111] The grievor was terminated for breaching standard 2 of the employer's *Standards of Professional Conduct*, which requires that an employee's conduct both on and off duty reflect positively on the CSC and on the public service in general. This standard clearly states that employees who commit criminal acts or other violations of the law fail to demonstrate the type of personal and ethical behaviour considered necessary by the employer.

[112] The second ground for termination was a violation of standard 2 of the *Code of Discipline (CD-060)*, which states that an employee commits an infraction if he or she commits an indictable offence or an offence punishable on summary conviction that may bring discredit to the employer or that may affect his or her continued performance with the CSC.

[113] The grievor eventually entered a guilty plea for a charge related to producing a controlled substance, possessing cannabis resin, and storing firearms unsafely, in a plea bargain deal in 2015. As a result, he received a conditional sentence, a term of probation, and a 10-year mandatory prohibition on carrying firearms.

[114] By his own admissions, the grievor knew that cultivating marijuana was illegal and that his job was at risk if he were caught. To this end, he undertook to disguise his activities by planting his illegal crop on his neighbour's property, unbeknownst to that neighbour.

[115] At no time has the grievor expressed true remorse, not even in his testimony. If marijuana was his last hope, as his counsel argued, steps were open to him to secure it legally. Rather than doing that, he took matters into his own hands and deliberately committed illegal acts, knowing full well that he was putting his continued employment at risk.

[116] I agree with the employer that the grievor's misconduct fell within the category of off-duty conduct and that to justify disciplining an employee for misconduct committed while off duty, an employer must prove, depending on the cirumstances, that the behaviour in question detrimentally affected its reputation, rendered the employee unable to properly discharge his or her employment obligations, caused other employees to refuse to work with that person, or inhibited the employer's ability to efficiently manage and direct its workplace (the *Millhaven* factors). I also agree that public servants face additional restrictions on their off-duty conduct as compared to regular members of the public (see *Lapostolle*).

[117] Not all *Millhaven* factors need be met to support a termination of employment as a result of off-duty conduct. It is sufficient to establish that the grievor's off-duty conduct caused embarrassment to the employer and damaged its reputation which the employer has clearly established. In this case however, it is also about more than the employer's reputation; it is about the safety of the staff, inmates, and the institution at which the grievor was employed. It is also about the public's faith in the correctional system.

[118] CXs are expected to conduct themselves in a manner consistent with the laws of the country and with promoting the rehabilitation of inmates. The grievor did not. I accept the evidence of the employer's witnesses that his conduct harmed the employer's reputation, that his behaviour rendered it impossible for him to act as a peace officer, and that his behaviour made it difficult for the employer to work safely and efficiently (see *Millhaven Fibres Ltd.*).

[119] The basis upon which the grievor was terminated included that his actions were unacceptable and brought the employer's reputation into disrepute and that he violated the employer's *Standards of Professional Conduct* and *Code of Discipline (CD-060)* as well as the *Values and Ethics Code for the Public Sector*, all of which resulted in the destruction of his trust relationship with the employer. The fact that he pled guilty to summary conviction offences through a plea bargain is not relevant to the appropriateness of the penalty the employer imposed on him for breaching those policies. The question is always whether the employer had just cause to discipline and whether the discipline was appropriate in the circumstances (see *Manitoba*, at para. 98).

[120] The employer established a nexus between the grievor's illegal activity and the employment relationship. The injury to its reputation was sufficient to establish the nexus (see both *Tobin* decisions and *McArthur*). Direct evidence of damage to the employer's reputation was not required, but nonetheless, a number of witnesses, including the grievor, testified that the matter was widely publicized in the small community where the employer is one of the primary employers. There was also evidence that it was known within the inmate population, many of whom were incarcerated for similar offences.

[121] The employer clearly established both grounds for termination. The embarrassment to its reputation was ongoing even after the grievor's dismissal. The resolution of the criminal process was prolonged due to the grievor's disagreements with his defence counsel. The criminal process received a great deal of media attention and identified the grievor as a CX before and after the decision was made to terminate his employment. This is sufficient to establish that the grievor's off-duty conduct reflected poorly on him as an employee of the CSC and, by extension, on the CSC. One must be mindful of a CX's role in the penal system and the impact on public opinion should a convict be placed in charge of supervising other convicts.

[122] It is irrelevant whether the grievor might be able to fill other positions that do not involve firearms. Through his actions, he made himself unsuitable to be a CX. The employer established just cause to discipline him and clearly demonstrated that his conduct destroyed the employer-employee relationship. The fact that in other situations employees convicted of criminal offences were reinstated, as is evidenced by the numerous cases the grievor's counsel submitted to this effect, does not negate the employer's legitimate concerns of protecting its reputation. This is not a case in which a demotion was suitable or even possible as was the case in *MacArthur*. CX-01 is the lowest level of the CX classification.

[123] The employer argued that all the medical evidence the grievor put forward is irrelevant. I disagree. The pith and substance of this grievance is whether the employer had just cause to dismiss the grievor and if so whether mitigating circumstances warranted a lesser penalty. The grievor is entitled to provide evidence which contradicts or mitigates the employer's evidence. The grievor's evidence amounts to a medical defence in my assessment, and it must be considered. Furthermore, since adjudication hearings are *de novo* hearings, grievors are entitled to enter evidence

which if known by the employer at the time of the disciplinary action or if not considered by the employer might have changed the outcome of the disciplinary process.

[124] If the medical aspect had any bearing on the grievor's behaviour in this case, the employer ought to have been given the opportunity to consider it in the grievance process (see *Shneidman* and *Spawn*); it was not given that opportunity. Had the grievor participated in the administrative process in any meaningful way as he was obligated to do, as the criminal and employment-related administrative processes were distinct and separate, the employer would have had this information to consider when making its decision. However, the employer would not have had Dr. Smith's opinion as he was involved only after the grievor had been terminated. The only opinion that would have been available was that of Dr. Krys, which did not support a PTSD diagnosis or the grievor using marijuana.

[125] The fact that the grievor was following his legal counsel's advice did not excuse his failure to participate in the discipline process or make the evidence relevant; nor did the grievor's expectation that the employer would search for such information. It was not the employer's burden to prove or disprove the existence of the medical defence. It was the grievor's burden to prove such a defence, which he did not do either before the employer or at this hearing. The employer was not aware of any of it and could not have considered it as a mitigating factor. Furthermore, there was no diagnosis retroactive to the period of the offence that gave rise to the discipline process. Therefore, it is not relevant in my deliberations (see *Spawn*, at para. 285).

[126] As the Supreme Court of Canada stated as follows in *Cie minière*, at para. 13:

> *13 . . . [A]n arbitrator can rely on such evidence, but only where it is relevant to the issue before him. In other words, such evidence will only be admissible if it helps to shed light on the reasonableness and appropriateness of the dismissal under review* ***at the time that it was implemented.*** *Accordingly, once an arbitrator concludes that a decision by the Company to dismiss an employee was justified at the time that it was made, he cannot then annul the dismissal on the sole ground that subsequent events render such an annulment, in the opinion of the arbitrator, fair and equitable. . . .*
>
> [Emphasis added]

[127] The evidence in this case established that the grievor, against the advice of his physician and without any legal right, undertook an activity that he knew was illegal. In order to secure a source of the illegal substance he began growing his own knowing that if discovered it would adversely affect his employment. To this end, he planted his illegal crop on his unsuspecting neighbour's property in the hope that if it were discovered, it would not be traced back to him. Also clear is that regardless of his medical situation, the grievor knew that what he was doing was illegal and that it would impact his employment if the employer discovered it. Regardless, he took steps to conceal his activities by creating a situation in which someone other than him would have been responsible had the plants been discovered before he harvested them. This disregard for the law and for others is contrary to the employer's *Standards of Professional Conduct* and *Code of Discipline (CD-060)* as well as the *Values and Ethics Code for the Public Sector*.

[128] The grievor demonstrated a flagrant disrespect for his neighbours in his attempt to disguise his behaviour in hopes that if found it would not have an impact on his employment and the laws of this country. He failed in his obligation to be the role model expected of CXs, as was the case for the teacher in *Ontario College of Teachers v. Bhadauria,* 187 O.A.C. 296. Furthermore, he has rendered any testimony circumspect that he might give related to infractions committed within the institution, should he be reinstated, as was the case in *R. v. McNeil*, 2009 SCC 3, in which the arresting police officer's testimony in the trial of an accused charged with drug possession lacked credibility because the police officer had been charged with similar offences. Peace officers are required to disclose to the prosecuting Crown all information related to misconduct by the officer involved in the case.

[129] The grievor was well aware of the implications of his illegal activities if they were discovered. His attempts to disguise them is proof of this and brings not only his suitability to be a CX into question but clearly indicates that the employer's trust in him was not warranted which renders the continued employment relationship untenable. As was said in *Bridgen v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 92 at para 106:

> *106. As general context for considering what is misconduct among correctional officers, the authorities are clear that correctional officers are to be held to a higher standard of conduct than employees who do other work (McKenzie v. Deputy Head (Correctional Service of Canada),*

> *2010 PSLRB 26 (CanLII), at para 80). The reason for this higher standard is because "[p]ersons who join the corrections service know that more is expected of them by their employer than would be expected of employees in other occupations" (Re Govt. of the Province of British Columbia v. B.C. Government Employees' Union (Larry Williams Grievance), [1985] B.C.C.A.A.A. No. 26 (Chertkow) (QL); cited in Government of British Columbia v. British Columbia Government and Service Employees' Union (Jaye Grievance), [1997] B.C.C.A.A.A. No. 813 (Hope), at para 28 (QL)).*

[130] There are no mitigating factors before me that would have warranted a lesser penalty had the employer known of them when it imposed the discipline. Contrary to what counsel for the grievor argued, the employer's failure to consider mitigating factors did not result in the grievor losing his family and his job. The grievor's actions were the cause of both. He lost his family because of his behaviour according to the evidence. He lost his job because of his illegal acts. There were no mitigating factors that the employer failed to consider.

[131] Before me is the fact that a peace officer charged with rehabilitating offenders did not act in the best interests of Canadians and failed to act at all times with integrity and honesty. He actively cultivated marijuana without Health Canada's authorization, knowing that what he was doing was a serious criminal offence, so much so that he attempted to conceal his activities by growing his crop on someone else's property, to preserve his employment should it have been found. A lesser penalty would trivialize the nature of his violation of the *Standards of Professional Conduct* and *Code of Discipline (CD-060)* as well as the *Values and Ethics Code for the Public Sector*.

[132] The grievor's allegations that he was denied natural justice and that the investigative process was flawed are equally without merit. He received an opportunity to participate in the process during the investigative stage and again when Mr. Muise called him to the disciplinary hearing. His decision not to participate in the disciplinary process in any meaningful way did not make the process flawed; nor did it equate to a denial of his right to be heard. As was stated in *Hughes*, the discipline process is an administrative process quite separate from any criminal process, which may run concurrently. The employer was not bound to await the outcome of the criminal process before commencing the internal discipline process. An employee who declines to participate in the employer's process must bear the consequences of that refusal, which in this case was that the employer based its decision to terminate the grievor's

employment on the information it had available at the time.

[133] Both sides submitted case law in support of their arguments. Given the true nature of the case before me, I have not addressed each case individually; rather, I have referred to those that directly address the true nature of the dispute between the parties.

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

(The Order appears on the next page)

V. Order

[135] The grievance is dismissed.

March 30, 2017.

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