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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

DARRYL HICKS

Grievor

and

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

Respondent

Indexed as

Hicks 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: Amelie Charlebois, Union of Canadian Correctional Officers -
Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Joshua Alcock, counsel

Heard at Saskatoon, Saskatchewan,
June 7 and 8, 2016.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Darryl Hicks, sought to have the 20-day suspension without pay imposed against him by the employer, the Correctional Service of Canada (CSC), on October 9, 2014, for his alleged excessive use of force and for allegedly having lied on an officer statement and observation report (OSOR) set aside.

II. Summary of the evidence

[2] The grievor is employed as a correctional officer (CX) at the Saskatchewan Penitentiary in Prince Albert, Saskatchewan (“the institution”).

[3] On July 1, 2014, he was involved in a use-of-force incident on Unit 6 of the institution involving an inmate whom the CXs on duty had asked to return to his cell after he had completed his cleaning duties. The CXs were of the opinion that the inmate was taking too long to complete his duties, and they directed him to put his mop and bucket away and to return to his cell. He became uncooperative and refused to follow the order.

[4] Five CXs attempted to escort the inmate to his cell. He turned to confront them. They attempted to stop him from confronting them and to get him to enter his cell. He then turned and punched one of the CXs. A scuffle ensued in which the CXs attempted to secure control of the inmate. According to the employer witnesses, the grievor, while involved in this scuffle, punched the inmate in the back and shoulder area at least six times. It was all recorded on the unit security video (Exhibit 2). The grievor’s act, done after the inmate was under control, was excessive, according to the employer.

[5] The grievor’s OSOR, completed shortly after the incident, lacked any detail about his actions, including that he had struck the inmate. On July 3, 2014, the grievor was asked to complete a second OSOR, in which he added more detail and admitted that he had punched the inmate once, as a distractionary tactic. He made no reference to the other times he struck the inmate during the scuffle.

[6] The employer completed a use-of-force review, which concluded that the grievor’s use of force had been excessive. Based on the review’s conclusions and the deficiencies in his OSORs, a 20-day suspension without pay was imposed on the grievor. It was a serious offence that justified a serious penalty, according to the employer. On the other hand, the grievor claimed that the penalty was unreasonable

and excessive.

Mark Anderson's evidence

[7] Mark Andersen was the acting assistant warden, operations (AWO), for the institution's maximum-security units at the time in question. His substantive position there was as the correctional manager, operations (CMO). As the AWO, he managed the day-to-day routine of the maximum-security units. As the CMO, he was responsible for reviewing every use-of-force incident at the institution. He is well versed in the use-of-force policies. At points in his career, he was the leader of the institution's emergency response team (ERT) and taught self-defence to CXs there. For a six-month period in 2012, he completed an assignment as the regional administrator, security, and the director of operations for the CSC's Prairie Region; he reviewed every use-of-force incident in the region.

[8] The July 1, 2014, use-of-force incident in question was brought to Mr. Andersen's attention by CMO Brenda Zimmer after her initial review of the OSORs. He reviewed the video of the July 1, 2014, incident as well as the OSORs that the CXs involved had completed. He reported his concerns with the grievor's use of force and his failure to report the incident. The Deputy Warden, who was the acting warden at that point, instructed Mr. Andersen to initiate a disciplinary inquiry to determine whether the grievor had used excessive force and whether he had failed to properly report his actions. The grievor was advised in advance of the disciplinary meeting of the requirement to attend and of his right to bring a union representative.

[9] Mr. Andersen reviewed all the relevant documents, including "Commissioner's Directive CD-567" (Exhibit 1, tab 4), which is the policy applicable to a use of force in an institution. The situation management model included in CD-567 is used to analyze inmate behaviour and to determine the appropriate level of intervention required to deal with that behaviour. Every CX is required by law to know and understand CD-567.

[10] The situation management model requires a CX to continuously assess the level of force being used and the inmate's response to that force. Tactics must be adjusted based on the inmate's behaviour, the location, and the risks to employees. CXs are trained in the use of force and in self-defence techniques as well as in how to apply the situation management model during the core training program (CTP), which every officer is required to complete. Officers are then required to complete refreshers in

these and other areas annually.

[11] CXs are to use force appropriately and proportionately, in a safe manner, while respecting the rule of law. The safety of the inmate and staff is paramount. When an inmate is non-compliant with a CX's direction, use of force may be required. Following each use of force, the CX involved must complete an OSOR, which the rotational correctional manager reviews, who may provide feedback to the CX involved or bring it to the warden's attention.

[12] The July 1, 2014, incident was recorded on video (Exhibit 2). The cameras that recorded it were located at the top of the range (a row of cells) in Unit 6 of maximum security. Two cameras were on the range, each pointing to the opposite end. The incident in question happened near the front and underneath and out of the sight of camera 2. As recorded by camera 1, the inmate is holding a broom and a dustpan. He is separated from the special handling unit and the CXs by a metal door. He speaks to a CX, following which other CXs enter the range through the door, which a CX in the control post operates. At this point, the inmate is refusing to return to his cell as directed.

[13] The door opens, and the CXs enter. The inmate puts his cleaning supplies in the closet. When the first barrier door is opened, he displays no immediate aggression. He is then escorted down the range, with the CXs walking behind him. When he reaches the second barrier on the range and is near cell 1, the incident occurs. The inmate is seen talking to the CXs. He then turns and tries to strike a CX twice. In response, the CXs approach to apply physical handling to the inmate. Their goal is to handcuff him, with his hands behind his back. To put the handcuffs on, the inmate is brought to the floor face down, and his hands are brought behind his back.

[14] CXs are taught arrest and control holds to be used on an inmate's arms, wrists, and elbows, as well as takedown holds to put an inmate to the ground. They are expected to use these techniques to control inmates and to safely apply handcuffs.

[15] The inmate goes from verbally to physically assaultive and then to physically uncooperative as seen on the video recording. The grievor moves around him to the arm that the inmate is using to strike the CX, to gain control of the inmate's left arm. Each CX has control of an arm or a leg of the inmate. The grievor then has control of both of the inmate's arms. While keeping his left hand on the inmate's forearm, the

grievor removes his right hand and strikes the inmate approximately five times. At the time of the punches, the inmate was in the defensive posture he assumed after he struck the CX and was no longer a physical threat.

[16] Strikes such as those the grievor used may buy an officer time and space when dealing with an assaultive and physically resistive inmate. However, repeated punches or strikes do not distract an inmate or allow a CX to regain control of him, according to Mr. Andersen. Punching an inmate in the head and back does not allow a CX to regain control of him. In this situation, the blows the grievor threw did not assist in regaining control of the inmate. His response to the blows caused him to be more defensive and to draw his arms in, making it harder to regain control of him.

[17] At his disciplinary hearing, the grievor told Mr. Andersen that he had not been in control, even after he had punched the inmate five times. Mr. Andersen did not agree, as from his viewing of the video, at that time, the inmate was against the wall of the unit and was no longer throwing punches. The officers had a degree of control over the inmate, who is a slight individual, weighing approximately 150 pounds.

[18] During the disciplinary hearing, the grievor stared at the video and made no comment. He asked his union representative why he could not remember hitting the inmate as shown on the video. He thought he had hit the inmate only three times, when in fact, the video showed that it had been five or six times. The fact that the grievor could not remember striking the inmate six times caused Mr. Andersen concerns about the grievor's truthfulness and his suitability to be an officer if he could not recall hitting the inmate as he had. Mr. Andersen wondered how the grievor could be genuinely trusted to report his actions if he could not recall them. The grievor's statements were inconsistent that he did not recall the events and that the inmate was not in control, so the strikes were required. The only memory lapse the grievor showed was related to the number of strikes.

[19] The grievor showed no remorse and accepted no responsibility for his actions during the scuffle on July 1, 2014. He told Mr. Andersen that "the use of force looked excessive, but was the inmate hurt?"

Justin Hope's evidence

[20] Justin Hope has been the institution's warden since 2009. Mr. Andersen told

him about the July 1, 2014, use-of-force incident involving the grievor. Following a preliminary review of the information, he convened a disciplinary investigation. After the disciplinary investigation and hearing, Mr. Hope imposed the 20-day suspension without pay on the grievor as outlined in the letter of discipline (Exhibit 1, tab 2). In coming to his decision, Mr. Hope considered the video of the incident, the OSORs, the use-of-force report, and the grievor's comments at the disciplinary hearing as reported to him by Mr. Andersen. He also considered the information he was given by his labour relations consultations and discussions with the Royal Canadian Mounted Police concerning the potential for laying assault charges against the grievor.

[21] The grievor violated the employer's code of conduct ("CD-060"). His OSOR did not articulate the events recorded on the video; nor did it reflect the "who, what, when, where and why" of the incident, which is why Mr. Hope concluded that the grievor had filed a false OSOR. The excessive use of force recorded on the video also violated CD-060. Using punches, whether he was emotionally charged or did not expect to use them, required the grievor to reassess the situation when the first blow did not work. Each blow after that was intended to be punitive.

[22] A CX is expected to remain focused throughout a use-of-force incident. During one, everyone focuses on the safety of staff and inmates and on minimizing injuries. The phenomenon of tunnel vision does not have an application in use-of-force incidents, according to Mr. Hope. It was not presented to the employer as a defence, and it would not preclude accurately reporting the details of an incident. The grievor omitted significant facts, and only after Mr. Hood prompted him did he file a second OSOR, which even still missed important facts.

[23] During his career, only three other use-of-force incidents have caused Mr. Hope concern to the same degree as this one.

[24] The grievor filed a second OSOR a couple of days after the incident (Exhibit 1, tab 8), which is not that unusual. The follow-up report was still lacking required detail. He mentioned striking one blow and not six as shown on the video. Initially, the grievor did not mention striking the inmate at all.

[25] During the disciplinary meeting, the grievor stated that he remembered three blows, even though he initially reported none and then reported only one. The grievor not recalling the number of blows he struck raised concerns for Mr. Hope, as it had for

Mr. Andersen, since CXs are trained to observe and respond to events. Mr. Hope also had concerns with the grievor's suitability to be a CX, since in that role; he could have to decide at any time whether to use lethal force.

[26] Mitigating and aggravating factors were considered. Particularly aggravating were the grievor's responsibility as a peace officer and his responsibility to carry out the CSC's mission. Also considered aggravating factors were his length of service and the significant investment the employer had made in readying him to perform his duties. Among the mitigating factors was that the inmate had struck an officer, which had precipitated the incident.

[27] The grievor showed no remorse, in Mr. Hope's opinion. He apologized to Mr. Hope, who felt that it was not a true apology. The grievor was sorry that he was caught and not that he had violated CD-060. He did not recognize his wrongdoing, which caused the employer's level of trust in him to diminish. The grievor stressed the fact that the inmate was not hurt, but that was irrelevant and indicated that the grievor did not recognize the seriousness of his actions.

[28] The other officers involved in the use-of-force incident on July 1, 2014, testified. Counsel for the employer requested that since the grievor was present throughout their testimony, his credibility had to be questioned when his testimony was consistent with theirs and contradicted or embellished the statements he had made in the disciplinary process.

Jay Skopik's evidence

[29] Jay Skopik is a CX-02 who had worked with the grievor for a year-and-a-half at the time of the incident. He found the grievor firm but fair with inmates; the grievor expected inmates to follow directions and institutional rules. Mr. Skopik completed the CTP and was trained in arrest and control, self-defence, and other techniques for dealing with resistive or assaultive inmates, as had been all the other CXs with whom he worked. At the CTP, Mr. Skopik received his only training in writings OSORs.

[30] On July 1, 2014, he was posted to the Unit 6 dome at the institution as the sector coordinator. He was responsible for verifying the count of inmates and for reporting the movement of inmates housed in Units 6 and 7. Also working there that day were Officers Hicks, Adrian Orynik, Leather, and Painchaud.

[31] At about 21:20, Mr. Skopik heard yelling in Unit 6, Range C. He heard Mr. Orynik give an inmate a direct order to return to his cell, which the inmate refused. The inmate was verbally resistive, so the grievor stepped in and attempted to negotiate with him. The inmate raised a broom handle in a threatening gesture, and the grievor convinced him to put it and the cleaning supplies in the closet. The inmate was compliant at that point; the officers started to escort him to his cell, when he struck Mr. Orynik in the face. It was not the first time this inmate had struck an officer. At a shift briefing some months earlier, it had been reported that he had struck an officer.

[32] After the inmate attacked Mr. Orynik, Mr. Skopik grasped the inmate's leg in an attempt to gain control of him, which was the most appropriate action in the circumstances as it is easier to gain control of an inmate if he is prone. He gave the inmate an order to produce his arms so that he could be handcuffed, but the inmate refused. Mr. Skopik ordered the officers present to produce the inmate's arms. They were eventually successful, and the inmate was handcuffed. During the incident, Mr. Skopik witnessed the grievor strike the inmate twice.

[33] Pepper spray was not deployed in controlling the inmate; it was not an option, given the number of officers whom it would have contaminated had it been deployed. No restraint equipment was used because the inmate was initially compliant with the officers' directions. Eventually, the inmate assumed a hunched-over position; the officers were concerned that he had a weapon in his waistband, which he was reaching for, as he acted as if he did. Mr. Skopik's focus throughout the incident had been on the threat.

[34] Eventually, the inmate was handcuffed and returned to his cell, following which Mr. Skopik wrote his OSOR while the incident was fresh in his mind. His OSOR was meant to document all salient information (Exhibit 1, tab 7). However, nowhere did he mention the inmate having a weapon. It recorded what Mr. Skopik recollected and what he did during the use-of-force incident. He did not record what the grievor did during the incident; he believed it was covered by his mention of physical handling. An OSOR is to focus on an officer's own actions; it is up to the other officers to report what they did in their OSORs.

Adrian Orynik's evidence

[35] Mr. Orynik was the officer struck by the inmate involved in the July 1, 2014, use-

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of-force incident. He has received the same training that Mr. Skopik described. On the shift in question, he was posted to the Unit 6 dome and was responsible for inmate movement. An officer in the control post asked him to direct the inmate in question to return to his cell. Mr. Orynik approached the barrier and directed the inmate to return to his cell many times, but the inmate refused. The grievor and Mr. Skopik then approached the barrier. The grievor spoke to the inmate and convinced him to put the cleaning supplies away, and the barrier was then opened.

[36] The officers then started to escort the inmate to his cell when the inmate stopped, spun around, and struck Mr. Orynik three times in the head. The officers responded with physical handling. The inmate resisted and was taken to the floor and handcuffed. After he was assaulted, Mr. Orynik was in the middle of the scrum. He tried to gain control of the inmate by grabbing his arm but was unable to until the inmate was on the floor.

[37] Mr. Orynik wrote his OSOR (Exhibit 1, tab 7) at approximately 21:45. In it, he stated he had been struck twice, but after seeing the video, he realized that it had been three times.

The grievor's evidence

[38] The grievor has been a CX for 10 years. This was his first disciplinary infraction. His performance reviews have all been good. He received the same training as other officers on use of force and on writing OSORs. On the day in question, he was assigned as an acting CX-02 to the institution's maximum-security unit. He was at the desk when he heard loud voices coming from C Range. He went to investigate. The officer in the control post gave him the order to lock up the inmate, who was on cleaning duty.

[39] Mr. Orynik was at the barrier ordering the inmate to return to his cell, but the inmate refused to cooperate and was being physically and verbally uncooperative. The barrier was opened, and the grievor managed to calm the inmate down. He complied with the order to put away the cleaning supplies. He was given at least two more orders to return to his cell, which he refused. The grievor assessed the inmate as cooperative physically but uncooperative verbally. The inmate started walking towards his cell. When he stopped at the top of the range, the grievor put his hand on the inmate's shoulder and told him to keep walking.

[40] The grievor and Mr. Orynik escorted the inmate down the range. Officers Skopik, Painchaud, and Leather walked behind them. Mr. Orynik told the inmate to keep walking when he spun suddenly and struck Mr. Orynik three times in the face. The grievor responded by pushing the inmate to the wall. He ordered the inmate to produce his arms, which the inmate refused to do. The inmate's hands were near his waistband, causing the grievor concern that he might have had a weapon.

[41] The grievor gave the inmate distraction blows to his shoulder while ordering him to produce his arms. After a number of blows, the inmate's arm came out. The grievor then used an arm bar to drive the inmate to the floor. He attempted to get a wrist lock on the inmate so that he could get his arms behind his back, for handcuffing. Once the inmate was handcuffed, he was stood up. The grievor then checked to see if everyone was alright. He also verified if any equipment had been lost in the struggle. He placed the inmate in a secure booth and then went and wrote his OSOR.

[42] The entire incident took approximately eight seconds, during which the grievor administered six distraction blows to the inmate's upper shoulder. He stopped the blows once the inmate was on the floor and handcuffed. The inmate received no injuries and was interviewed following the incident by the correctional manager and by the institution's healthcare branch, as required. The inmate made no complaint about the incident. The grievor wrote his OSOR at 21:30. He followed the instructions he had received in the CTP on how to write one (Exhibit 1, tab 8).

[43] The grievor went to see his correctional manager after he was told that there were concerns with his use of force. He asked the correctional manager about any problems and the employer's concerns. He ran through the events as he remembered them with the correctional manager, who advised him that it would be prudent to write a second OSOR. At the correctional manager's direction, the grievor mentioned only one blow in his OSOR; at the disciplinary hearing, he remembered striking the inmate three times. He commented at the disciplinary hearing that the use of force on the video looked excessive but that all uses of force look excessive.

[44] According to the grievor, an OSOR is to be short and relevant. When he wrote his OSOR following the incident, he believed that his description, which was that he had used physical handling, was sufficient and that he did not need to specify the

number of blows applied. He mentioned that he had landed only one blow, at his correctional manager's suggestion. The grievor did not remember the number of blows he had applied, but he knew that if he continued to strike the inmate, he would eventually comply with the direction to produce his arms, even though it meant that the grievor had to release one of his hands from the grip he had managed to acquire on the inmate's left arm to continue striking blows. Initially, he had both hands on one of the inmate's arms. He made no mention in his OSOR of a weapon, even though from the grievor's experience, inmates conceal weapons in their waistbands.

[45] The grievor was told that his OSOR was insufficient and that he was under investigation by his correctional manager. He was to have no inmate contact while under investigation and was escorted off the institution's premises.

Ryan Deback's evidence

[46] Ryan Deback is a CX-01 at the CSC's Regional Psychiatric Centre in Saskatoon, Saskatchewan. He has been a member of the institutional ERT for 14 years. As a member, he is involved in preplanned uses of force, such as cell extractions. He is a certified ERT instructor and has taught the personal safety and restraint training refresher course for the employer. According to Mr. Deback, strikes are taught at both that refresher course and the CTP. The strikes that are taught are not designed to incapacitate an inmate. They are intended to deflect, divert, and distract the inmate with momentary pain, which allows the officer to regain control. Punches are to be avoided as learning to punch properly takes a lot of time. However, they can be used to strike soft tissue, if necessary.

[47] A use-of-force incident is spontaneous, and the force used will depend on the inmate's history, where his hands are, whether he is standing or on the floor, the number of officers involved, their experience, the available escape routes, and whether there is time to formulate a plan. The size of the inmate may limit response options. Just because an inmate is small does not mean that he is incapable of causing harm. Pain and compliance are used to gain control. Pain is inflicted while giving verbal directions. The pain stops when the inmate complies. Pain can also be used to gain control of an inmate who is not compliant.

III. Summary of the arguments

A. For the employer

[48] The jurisprudence has established that excessive use of force and failing to file an OSOR are both worthy of discipline. As peace officers, CXs are in a significant position of trust. It is a difficult and dangerous job in which a use of force may be required at any time. CXs are required to make split-second decisions when at risk. A range of responses may be available, and CXs are expected to select that response appropriately. CXs are hired for their ability to work in these circumstances. They do not have unlimited discretion on how to act or respond in situations such as the one at issue in this decision. Their response must be based on law, policy, and training.

[49] On July 1, 2014, the grievor failed in his responsibility by using excessive force in response to a situation provoked by an inmate. He was trained in the use-of-force policies and on applying the appropriate use of force. Despite this, he struck the inmate six times.

[50] To determine this case, the adjudicator need only look at the video (Exhibit 2). The inmate comes onto the range, followed by five CXs. He turns and punches Mr. Orynik, following which the officers close the space, grab the inmate's arms, and try to get him to the floor.

[51] Initially, the grievor has one of the inmate's arms in both his hands. He is in a good position to administer pressure techniques. The inmate's whole left flank is exposed. The inmate is pushed up against the wall and assumes a defensive posture. Inexplicably, the grievor removes his right hand from the inmate's arm and starts punching him repeatedly. According to the grievor's testimony, this was a deliberate strategy of distracting blows and pain compliance, but it was not a reasonable approach to gaining control of the inmate.

[52] Mr. Deback testified that primarily, strikes with an open hand are taught. The objective of striking an inmate is to distract him with a momentary pain sensation and then move to something more appropriate. Six distraction blows were applied, with no time in between to reassess the situation. The grievor did not try any compliance holds. The use of force was not concluded until the other officers were successful in bringing the inmate to the floor after Mr. Skopik got around him and pulled his leg out

from under him. As the inmate goes down, the last of the six blows can be seen.

[53] No one other than the grievor is throwing punches. Mr. Orynik does not strike back after being punched. He pushes the inmate against the wall and tries to get him to the floor. Mr. Skopik runs around the grievor to get to the inmate's left flank, which had been exposed to the grievor throughout the incident. Mr. Skopik did what the grievor should have done in the beginning instead of punching the inmate six times.

[54] The justifications the grievor offered did not excuse his approach. He is under an obligation to make decisions in the time available. A lack of time does not excuse his actions. His concerns that the inmate had a weapon were not specific to this incident. At any moment, an inmate may have a weapon, and so CXs must be vigilant at all times. They are trained to assume that every inmate has a weapon. There is no justification or explanation as to how six punches would have resolved the situation had the inmate had a weapon.

[55] It is odd that none of the CXs involved mentioned a weapon or fear of a weapon in their OSORs, particularly the grievor, who filed two OSORs. Even knowing that he was under investigation, he did not mention a weapon or how his response had been appropriate to the threat. Furthermore, he did not mention either during the disciplinary investigation or at the disciplinary hearing how his response was appropriate in the circumstances.

[56] Inmate control covers a spectrum. It is not just when an inmate is handcuffed or secured that use of force becomes excessive. A use of force must be evaluated at the time it is applied, and in this case, it was used when the inmate was struggling to retain his balance. During the disciplinary investigation, the grievor admitted that the use of force looked excessive. His statement that all uses of force look excessive means that to a layperson, the video would look bad. He admitted in the course of the disciplinary investigation that he had crossed the line and that the force he used on July 1, 2014, had been excessive. It makes no sense that he would ask the adjudicator to conclude differently.

[57] The jurisprudence concerning excessive use of force is consistent. It is serious misconduct, which warrants severe discipline (see *Roberts v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 28 at paras. 285 and 286; *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services)*

(2008), 172 L.A.C. (4th) 385 at paras. 160 to 162 and 167; *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services)* (2008), 177 L.A.C. (4th) 1 at para. 189; *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services)* (2007), 159 L.A.C. (4th) 186 at paras. 45 and 51; *Ontario Public Service Employees Union v. Ontario (Ministry of Community Safety and Correctional Services)* (2013), 236 L.A.C. (4th) 91 at para. 122; *Ontario Public Service Employees Union v. Ontario (Ministry of Public Safety and Security)*, [2002] O.G.S.B.A. No. 58 at paras. 66 to 68 (QL); *Ontario Public Service Employees Union (Zolnierczyk) v. Ontario (Community Safety and Correctional Services)*, 2011 CanLII 17011 (ON GSB) at paras. 71 and 78; *Ontario Public Service Employees Union (Maude) v. Ontario (Community Safety and Correctional Services)*, 2016 CanLII 18935 (ON GSB); *Ontario Public Service Employees Union (Wild) v. Ontario (Community Safety and Correctional Services)*, 2016 CanLII 18942 (ON GSB) at paras. 81 to 83; *Rose v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 17; and *Legere v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 65).

[58] The grievor was disciplined not only for the excessive use of force but also for his failure to report the use of force. Reporting is part of a peace officer's role, and a failure to report is worthy of discipline (*Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88 at para. 840). CXs are trained to be brief and to report all relevant facts. The grievor's first OSOR was brief to the point of being cursory. Of particular concern is the omission of relevant facts, such as punching the inmate. A failure to report striking an inmate is serious misconduct (*Maude*, at para. 45).

[59] The grievor did not report the true facts of the incident at the first opportunity. Even after he spoke to his correctional manager and was counselled to file an additional OSOR with more detail, he admitted only to striking the inmate one time. He did not feel the other five times were relevant. He lacks credibility. He did not accurately report his actions on July 1, 2014. Mr. Orynik did not see the blows, which explains why he did not report them. Mr. Skopik saw them but did not report them; however, the grievor bore the largest responsibility for reporting them because he was the perpetrator.

[60] The grievor's excessive use of force was aggravated by his failure to report his actions. Both are serious offences, worthy of discipline. The 20-day suspension without pay was appropriate.

B. For the grievor

[61] The adjudicator must decide whether discipline was warranted and, if so, whether the discipline imposed was unreasonable. The employer had the burden of proving on the basis of clear, cogent, and compelling evidence that the grievor used excessive force on July 1, 2014. The grievor has shown that the force used was necessary and appropriate. Only when the inmate turned and assaulted staff did the grievor react with force.

[62] This case differs from *Legere*, in which a CX repeatedly struck an inmate without stopping to assess the situation; the grievor stopped his blows as soon as he realized that the inmate was under control. The inmate took considerable time to become compliant, according to Messrs. Skopik and Orynik. A use of force is never pretty to view, but one cannot decide whether the force used was excessive by how it looks. The employer's policies do not prohibit using punches.

[63] The nature of the inmate and the population must be taken into account (see *Stefenac v. Treasury Board (Solicitor General - Canada)*, PSSRB File No. 166-02-14528 (19850129) at 12; and *Dagenais v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-15767 (19870818) at 9). The inmate was not injured and refused a health care assessment that was offered to him. He did not complain about the use of force, so it could not have been excessive. At the disciplinary hearing, the grievor admitted that the use of force looked excessive; he did not state that it had been.

[64] The employer relied only on the video to conclude that the grievor should have been disciplined. According to *King v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 84 at para. 103, video surveillance footage is not reliable. In this case, there was no audio to accompany the video, which was based only on one angle, even though another was available. At least 12 OSORs were filed about the incident, but it is not known how many the employer reviewed. Also concerning is the fact that the employer did not interview the other officers involved the correctional manager who reported that the use of force had been reasonable, the nurse, or the inmate. No investigation was carried out; there was only a video, without context. Mr. Hope testified that it was evident that the use of force was excessive based solely on the video.

[65] The employer believes that at the disciplinary hearing, the grievor did not take

responsibility for his actions, but how could he have, if he thought that the force used was reasonable?

[66] The grievor did not falsify his OSOR; he did not alter information or evidence to mislead the employer. He had no interest in lying on his OSOR. He knew that the incident had been recorded and that it would be reviewed. He did not falsify his OSOR; he merely did not recall the events. It is difficult to remember every detail of a use-of-force situation. He wrote his first OSOR only minutes after the incident. The CXs were in a time crunch to complete their OSORs before the end of their shifts. It is not uncommon to miss certain details. The grievor took the initiative 48 hours later to write a more detailed OSOR.

[67] The only training CXs receive on writing OSORs is at the CTP. Further training on writing OSORs would be more appropriate in the circumstances than disciplinary action. Others submitted deficient OSORs, but only the grievor was disciplined. He is an experienced officer with no previous discipline and good performance reviews. The 20-day suspension without pay was clearly unwarranted and excessive.

IV. Reasons

[68] The grievor's representative focused much of her argument on what she viewed as deficiencies in the investigative process the employer used while concluding that the grievor's actions were worthy of discipline. It is trite law that hearings before an adjudicator are *de novo* hearings and that any prejudice or unfairness that a procedural defect might have caused is 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)).

[69] The grievor's representative also argued at length that the video (introduced as Exhibit 2) cannot be relied upon because it lacks audio and context. She relied primarily on *King* and its adjudicator's comments at paragraph 103. This case is not about context. Nor is it like one described in *Legere*, in which the employer alleged that the grievor in that case said something to an inmate, which instigated one inmate assaulting another. In both cases, without an audio recording, there was no evidence to support the employer's decision to discipline the grievors. This case rather would fall within the following comment of the adjudicator in *King*: "... there may be

circumstances in which a lack of audio on a surveillance video is not a problem ... ". I am also not concerned in this case that the video submitted was from only one end of the range as the employer's explanation for the lack of another view, that the events happened underneath and out of sight of camera 2, was sufficient to excuse the video from the other end of the range.

[70] Use of force is an unfortunate reality in the world of corrections. For that reason, the employer provides training to its employees and has promulgated policies related to the use and reporting of force in its institutions (Exhibit 1, tabs 6 and 7). Failure to comply with these policies constitutes a breach of the employer's code of discipline (CD-060; Exhibit 1, tab 3). As such, it is worthy of disciplinary action. The fact that others might not have been disciplined for failing to report the grievor's actions of striking an inmate did not negate his responsibilities under CD-060.

[71] The case law clearly confirms that excessive use of force when restraining an inmate is a serious disciplinary offence, as is a failure to accurately report the events in an OSOR (see *Roberts, Legere, Maude, Wild, and Newman*). The grievor's representative was correct that the employer bore the burden of proof in this case and that it had to establish on the balance of probabilities and on clear, compelling, and cogent evidence that the grievor violated CD-060 by using excessive force and by failing to properly complete his OSOR.

[72] I reviewed the video on numerous occasions in coming to my conclusion in this matter. I also considered Mr. Andersen's testimony and his explanation of what he saw on the video. It is clear that the inmate in question was non-compliant and that he struck Mr. Orynik, which gave rise to the use of force against him. The grievor is clearly in a position in which the inmate's flank is exposed, as described by counsel for the employer. The grievor releases one of his hands from the inmate's arm, to strike him. As argued by the employer's counsel, this action is inexplicable. The grievor provided no evidence to explain it; nor did he provide any sufficient evidence to explain why he continued to strike the inmate without stopping to assess the situation. From my viewing of the video, these blows served no purpose other than to further agitate the inmate and to put the other CXs at risk. Had the grievor stopped intermittently and assessed whether the blows he was inflicting were providing the desired compliance, he would no doubt have realized that they were ineffective.

[73] Of particular concern is that the grievor struck the inmate even after he was on the floor and being handcuffed. All his punches were aimed at the inmate's upper back, shoulder, and neck and head area. The grievor's witness, Mr. Deback, testified that punches are not taught to CXs and that they are to be avoided. They can be used to strike soft tissue if necessary, which in my assessment would not include the areas of the inmate's body the grievor struck.

[74] The fact that the inmate in question was smaller than the grievor is not of concern, particularly in light of Mr. Deback's evidence that the inmate's size may limit response options but does not determine whether he is capable of causing harm. This particular inmate had a reputation for striking officers, which was a reason for the officers to be particularly wary of him in the circumstances. However, that did not excuse the grievor using a violent response, which put his fellow officers at risk by further aggravating the situation. Mr. Hope testified that he considered the inmate's assault of Mr. Orynik as a mitigating factor when considering the appropriate level of discipline to impose on the grievor.

[75] I am convinced that the employer has discharged its burden of proof. The grievor provided no explanation that would excuse his actions on the day at issue. In fact, the evidence he provided at the hearing appeared to be another version of the events that was not completely consistent, for example the number of times he struck the inmate, with his previous explanations and that was completely at odds with his OSOR. His actions violated CD-060 and were worthy of discipline. The aggravated nature of his actions as seen on the video of the event and his failure to accurately report his actions, which are a fundamental part of his role as a peace officer, warranted severe discipline. I am satisfied that the employer has properly assessed the aggravating and mitigating considerations in this matter.

[76] The grievor's representative argued that since others were not disciplined for the quality of the OSORs they filed that day, the grievor should not have been. The others to whom she referred did not strike the inmate; only the grievor did. The combination of the two infractions warranted a severe penalty, which the employer determined was a 20-day suspension without pay. In my estimation, it was neither unreasonable nor wrong. In many of the cases cited by the counsel for the employer, the employees in them were terminated for such infractions, which would also have been reasonable in this case.

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

(The Order appears on the next page)

V. Order

[78] The grievance is dismissed.

September 30, 2016.

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