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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

MICHAEL CARSON

Grievor

and

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

Respondent

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

In the matter of an individual grievance referred to adjudication

Before: Michael F. McNamara, a panel of the Public Service Labour Relations and
Employment Board

For the Grievor: Douglas Sanford

For the Respondent: Richard Fader, Counsel

Heard at Kingston, Ontario,
March 10 and 11, 2015.

I. Individual grievance referred to adjudication

[1] The grievor, Michael Carson, was employed as a Correctional Officer, classified at the CX-02 group and level, at the Warkworth Institution near Campbellford, Ontario.

[2] On July 22, 2011, the grievor filed this grievance which deals with his suspension without pay on July 6, 2011. It was referred to the former Public Service Labour Relations Board (PSLRB) for adjudication on June 25, 2012.

[3] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (the Board) to replace the former PSLRB as well as the former Public Service Staffing Tribunal. The Board heard this complaint and grievance under the authority of the related implementing statutory instruments.

II. Preliminary objections re: Jurisdiction

[4] The employer raised the following preliminary objections:

- that the Board was without jurisdiction to hear this case as it is about a collective agreement provision and not discipline and, therefore, requires the participation of the grievor's bargaining agent, which had withdrawn from representing him;
- that given the grievor's retroactive termination, the issue was moot because the termination stands and is no longer being grieved; and,
- that the Board was without jurisdiction to make a decision under the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6; CHRA), as requested by the grievance (see *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115).

[5] I advised the parties that I would hear the evidence and then rule on the jurisdictional questions.

III. Summary of evidence

[6] Christine Cairns, Assistant Warden (2009)/Deputy Warden (2010) testified that in 2009, the Security Intelligence Office of Correctional Services Canada provided information to the management group about an investigation it was launching into the introduction of contraband to the institution.

[7] In 2010, the scope of the investigation expanded, and the management team developed an action plan based on its information.

[8] In early 2011, the police became involved in the investigation. In a discussion which included the employer's Regional Headquarters staff as well as OPP representatives, Acting Warden Ryan Beattie, was briefed about the ongoing investigation which involved the grievor.

[9] On April 29, 2011, the grievor observed that someone had written 'Cocaine Cowboy' on his locker. He asked Pauline McGee, the regional employee assistance coordinator, to observe his locker, following which the grievor advised Ms. McGee that he was feeling harassed at work. The grievor's evidence was that this was the final straw of a series of incidents he regarded as harassment. He left the workplace that day, saw his doctor and went on sick leave.

[10] On June 16, 2011, the Ontario Provincial Police (OPP) advised the employer that they had arrested the grievor on charges of trafficking, possessing a narcotic, conspiracy to commit an indictable offence, and proceeds of crime. The grievor, who was still on sick leave, was placed on an indefinite suspension with pay.

[11] On June 30, 2011, a Board of Investigation was struck to investigate allegations of inappropriate conduct on the part of the grievor.

[12] By letter of July 5, 2011, the grievor was suspended without pay, effective July 6, 2011, pending the internal investigation. The letter sets out the reason for the suspension as follows:

Allegations that you have breached the standards of professional conduct which included the alleged introduction of contraband into a federal institution and may include other activities which will be subject to internal investigation; and the ongoing Ontario Provincial Police criminal

investigation regarding activities or action by you both in and outside of the workplace.

[13] Ms. Cairns testified that the criminal charges against the grievor were serious but that no conclusions of wrongdoing had been made at the time of the suspension. Ms. Cairns testified that the suspension was not disciplinary. It was an administrative decision based on the employer's need to carry out an effective investigation and to ensure the safety of the staff and inmates, including the grievor.

[14] On July 22, 2011, the grievor filed the subject grievance regarding his unpaid suspension.

[15] On March 3, 2012, the report of the 'Fact Finding Investigation into Allegations of Inappropriate Conduct of Correctional Officer II Mike Carson at Warkworth Institution 2009- 2011,' was issued.

[16] On April 3, 2012, Acting Warden, Ryan Beattie provided a vetted copy of the investigation report to the grievor.

[17] On April 27, 2012 a disciplinary hearing was held. The grievor was represented by two union representatives who requested that the hearing be delayed until after the grievor's criminal trial. The grievor was given an opportunity to comment on the investigation report, but chose not to, as advised by the lawyer handling his criminal case.

[18] On May 11, 2012, the grievor's employment was terminated, retroactive to July 6, 2011.

[19] On May 25, 2012, the grievor filed a grievance regarding his termination (566-02-7316).

[20] On December 17, 2013, the grievor's bargaining agent advised that it would no longer be representing the grievor in respect of either his unpaid suspension grievance or his termination grievance.

[21] On March 4, 2015 the grievor withdrew his termination grievance (566-02-7316).

IV. Finding on jurisdiction

[22] This grievance was referred to adjudication under s. 209(1) (b) of the *PSLRA*, which specifies that an individual grievor may refer a grievance relating to discipline resulting in termination, demotion, suspension, or financial penalty to adjudication.

[23] The grievance makes no mention of discipline. It refers to a collective agreement article dealing with entitlement to sick leave benefits. The grievor appears to be grieving his unpaid suspension. The grievor was on sick leave when suspended, therefore, the suspension resulted in the loss of sick leave benefits.

[24] The issue to be determined, therefore, is whether the grievor's unpaid suspension was disciplinary in nature. If so, the grievor would have the ability to refer the grievance to adjudication without the approval of his bargaining agent and the Board would have jurisdiction to hear the matter. If his suspension was not disciplinary, then the grievor could only refer the grievance to adjudication with the approval and representation of his bargaining agent, in accordance with s. 209 (2) of the *PSLRA*.

[25] The employer's evidence as to the administrative nature of the suspension was not contradicted and no evidence of disguised discipline was put forward.

[26] I find that the suspension without pay that began on July 6, 2011, was an administrative act by the employer to allow for a thorough internal investigation and to provide a measure of safety and security for the staff and inmates of the institution while the investigation was in progress. The employer had the right and the obligation to remove the grievor from the worksite while it conducted such an investigation.

[27] As this was not a disciplinary suspension, the grievor requires the approval and representation of his bargaining agent to refer the matter to adjudication. Although the grievor initially had the support of his bargaining agent, this ended on December 17, 2013 when the bargaining agent advised that it would no longer be representing the grievor. A withdrawal of support has the same effect as an initial refusal of support (see *Boivin v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 98, and *Cavanagh v. Canada Revenue Agency*, 2014 PSLRB 21).

[28] Given my finding that I lack jurisdiction to hear this grievance it is not necessary to deal with the employer's other arguments with respect to jurisdiction.

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

(The Order appears on the next page)

V. Order

[30] The grievance is dismissed

January 13, 2017.

**Michael F. McNamara,
a panel of the Public Service Labour
Relations and Employment Board**