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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

JORN SOEGARD

Grievor

and

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

Respondent

Indexed as
Soegard 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: Corinne Blanchette, advisor, Union of Canadian Correctional
Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Joshua Alcock, counsel

Heard at Abbotsford, British Columbia,
October 18 to 20, 2016.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Jorn Soegard, was a correctional officer (classified CX-1). He was posted to Kent Institution in Agassiz, British Columbia, on June 5, 2004, after completing the correctional training program. He worked there until he was suspended without pay on January 27, 2015.

[2] On August 19, 2015, Mr. Soegard's employment with the Correctional Service of Canada (CSC) was terminated.

[3] On September 15, 2015, he grieved his termination as well as his suspension without pay during the investigation process. In addition, he wanted the record of the disciplinary investigation removed from his file.

II. Summary of the evidence

A. The incident

[4] On September 18, 2014, the grievor was driving his car when he spotted a woman he believed was a former intimate partner. He drove up beside her and exposed his genitals to her as she approached the car in response to his request for directions.

[5] The grievor indicated that the person he thought he was approaching was someone who, in his opinion, would have found that amusing. He realized too late that she was not who he thought she was; she was a stranger to him.

[6] The woman reported the incident to the Abbotsford Police in Abbotsford, B.C., and on November 24, 2014, nine weeks later, the grievor was formally charged with an offence under s. 173(1) of the *Criminal Code* (R.S.C., 1985, c. C-46), which deals with a person who wilfully performs an indecent act in a public place in the presence of one or more persons. His first court appearance took place on January 12, 2015.

[7] The grievor reported none of this to the CSC ("the employer"), even though he was required to by its "Standards of Professional Conduct" and "Code of Discipline".

B. Meeting with the employer

[8] However, on January 26, 2015, the Abbotsford Police contacted the employer and informed it of the charge and the court hearing. The next morning, January 27, 2015, the grievor was asked to attend a meeting with

Acting Warden Mark Noon-Ward to discuss the charge.

[9] At the meeting, the grievor acknowledged to the employer that he had been criminally charged for exposing his genitals to a female member of the public and that he had not reported it to the employer, even though he was required to. He was extremely embarrassed and remorseful about the incident.

[10] The employer explained that he was being suspended with pay pending a review, as required by the *Larsen* criteria (*Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9).

[11] On February 5, 2015, he was suspended without pay pending the completion of a disciplinary investigation into allegations that he had committed an indecent act in a public place and that he had failed to report that he had been charged with a criminal offence.

C. Board of investigation

[12] On March 6, 2015, Warden Bobbi Sandhu convened a board of investigation to establish the facts surrounding the allegations that the grievor had breached the employer's Standards of Professional Conduct and Code of Discipline by committing a criminal offence "... which may bring discredit to the Service or affect his/her continued performance with the Service ...", and by, before resuming his duties, failing to advise his supervisor that he had been charged with a criminal offence. Area Director Robert Clark was appointed as the chairperson of the board of investigation.

[13] On May 13, 2015, the grievor was interviewed as part of the investigation. In attendance were Mark Langer, acting regional manager, labour relations; John Randle, local union president; James Dunn, the grievor's friend and counsel; and the Chairperson. The grievor was asked to explain what occurred on September 18, 2014.

[14] He began by indicating that he was very embarrassed and ashamed for what he had done and that it was the lowest point of his life. The grievor described his emotional state leading up to the incident, indicating that he had hit rock bottom. He outlined a number of factors that he believed had contributed to the way he acted on September 18, 2014, including marital problems, alcoholism, his inability to problem-solve, depression, anxiety, and his inability to manage his emotions on his own.

[15] The grievor indicated to the investigator and the others present that the incident was a huge wake-up call, as he did not like the person he was becoming or had become, and he stated that he had realized that he needed to make some changes in his life. He recognized that not only he but also his family and his co-workers were being affected.

D. Evidence at the hearing

[16] The grievor gave evidence at the hearing to the same effect, which was that he was embarrassed and remorseful and that he viewed the incident as a serious wake-up call that had propelled him to start making badly needed changes in his life.

[17] After the incident, the grievor knew that he needed help but was unsure of where to access it. He was depressed and full of anxiety. He learned that he was an alcoholic after seeing a doctor in mid-February 2015. He had stopped drinking on September 18, 2014, after the incident, but had relapsed on a couple of occasions, once when he was finally charged nine weeks after the incident, and again when he was escorted off the Kent Institution grounds on January 27, 2014.

[18] Describing the incident, the grievor said that he pulled over to the side of the road for about three to five seconds and that he was not masturbating, as the charge had indicated. He thought that the woman he was approaching was someone he had had an affair with in the past and who, he felt, would find such an approach amusing. He was shocked to realize that it was not her and tried to quickly zip up his pants. The victim might have perceived that movement of his hands as masturbation.

[19] The grievor stated that he had been doing some yardwork at home and that he had been drinking from about 12:00 until 3:00 earlier that day but was unsure if he had been impaired.

[20] After the incident, the grievor sought treatment for his recently diagnosed alcoholism. He contacted his union and the Employee Assistance Program to see if any financial assistance was available, as finances were an issue.

[21] He began attending Alcoholics Anonymous meetings; however, he did not consider regular attendance a good option because of his employment as a correctional officer and what that would mean in the workplace if he became known as

an alcoholic. Although he tried a number of avenues to address his alcoholism, the lack of funds or available funding excluded him from doing so. Instead, he relied on several of his friends who provided support and advice. He has been sober for 20 months.

[22] The grievor has not been employed since the incident and has relied on CPP and his pension for income. He has not applied for other work since his suspension because he has been dealing with his sobriety and depression and has felt incapable of returning to work.

E. Failure to report

[23] The grievor explained that after the incident, Constable Reid of the Abbotsford Police informed him and his wife that the police were unsure whether charges would be formally laid; it was up to Crown counsel, who were very busy. The grievor knew that if they did proceed, he would need money for a lawyer. He also considered that, especially as time went on, the Crown might not proceed with charges. Accordingly, he decided to keep things confidential and not let anyone know unless or until that happened. He was fearful of the information getting out to anyone, as he was worried for his family and his reputation at work.

[24] However, when charges were formally laid in November, the grievor contacted his friend and sought help to retain a lawyer. He still did not advise the employer. When the board of investigation asked him why he did not report it at that stage, the grievor indicated that he was very naïve and that he did not realize that he needed to tell the employer, which contradicted his first responses on that issue. That response was not credible.

III. Reasons for decision

[25] *William Scott & Co Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1, sets out the process of analysis to follow with respect to a termination. I must decide if a disciplinable offence took place. If so, I must decide if the penalty of termination was excessive and, if so, decide on a reasonable alternate penalty.

[26] The grievor acknowledged that the offence took place. Despite that it occurred outside the workplace, it is clear to me (and to the grievor) that this kind of breach of

the Standards of Professional Conduct and Code of Discipline would have a direct and very negative reputational impact on the employer, both within the institution and in the community. In some circumstances, termination for such conduct would certainly not be excessive. However, in the circumstances of this case, I find that it was excessive.

[27] The grievor indicated that he mistook the victim of his extremely ill-advised conduct for someone with whom he had had a past intimate relationship; he was confident she would find his actions amusing. His intake of alcohol that day was likely at least partly responsible for those egregious lapses in judgment.

[28] The employer did not challenge this evidence, and I accept it.

[29] While obviously the conduct was regrettable, if the grievor thought he was approaching a former intimate partner who he felt would find this amusing, then that would be far different conduct from intentionally making such an approach to a stranger.

[30] As well, when he first met with his supervisor, and when the board of investigation interviewed him, the grievor was unreservedly remorseful. He did not wait for this hearing to express his remorse or his understanding that conduct of this nature negatively impacted not only him but also the employer and his family. He was mortified and understood that the incident was a wake-up call to deal with his previously undiagnosed alcoholism and other personal issues. He realized that he did not like the person he was becoming or had become and vowed to do something about it. He sought treatment for his alcoholism, and but for a few early relapses, he has remained sober to date.

[31] He also wrote to his victim to indicate that he had no excuse for his behavior, that he was very remorseful, and that he realized he had many problems.

[32] At the hearing, Mel Strangeland, PhD, a registered psychologist, testified about his assessment of the grievor. Among his findings, he stated that the grievor was an alcoholic and that it must be addressed. There is little evidence to suggest that he is more than a low risk to reoffend. He must resolve his marital situation. And the personal consequences that have ensued will serve as a strong deterrent.

[33] I also note that the Crown accepted that the grievor met the criteria for the court diversion program, part of which is based on an admission of guilt. Crown counsel accepted the alternative measures process to manage the grievor's case, and he was diverted from the court process without criminal charges proceeding.

[34] Alternative measures can be used in cases involving less serious offences. They usually involve offenders with no criminal history. The accused is given the opportunity to accept responsibility for the crime and to make amends to the community without going to court.

[35] The grievor did not advise his employer that he had been charged with a criminal offence, as he was required to, which is more problematic than the incident itself in that it raises an obvious issue of trust for the employer. It is understandable that the grievor clung to the hope that charges would not be laid, which was reasonable given the Abbotsford Police's advice that it was up to the Crown, which was very busy. Nor does the policy require reporting an incident before charges are laid. However, when charges were formally laid in November, the grievor had a clear obligation to report them. His explanations for failing to were inconsistent and were not credible.

[36] That was a clear violation of the Code of Discipline and was disciplinable conduct. However, while understanding that this kind of offence creates an issue of trust for the employer, I find that like the original conduct, failing to report it was also tied to the grievor's personal problems, marriage issues, depression, and alcoholism.

[37] Rather than seriously exacerbating those problems by adding the loss of his job to them, I believe the better approach is to support the grievor getting help with all these issues. The likelihood of success is vastly greater if he remains employed.

[38] The grievor was a relatively long-service and, by all accounts, good employee. He had worked for the CSC for 11 years at the time of the incident. He had five "Performance Evaluation Reports" on file, and he had scored threes (objectives met most of the time) in all areas of his performance objectives over the previous three years. Overall, his reports indicated that he had demonstrated proficiency in his duties and tasks, that he was a team player, that he had achieved consistently good results while at different posts throughout the institution, and that he had displayed a positive attitude.

[39] The grievor called five witnesses, all of whom were correctional officers he had worked with and with whom he had social relationships outside the workplace. They testified that they became aware of the grievor's actions that led to his termination and generally thought it was very out of character for him. They stated that they saw no impediment to him returning to the workplace and that they would welcome him back into Kent Institution as a correctional officer.

[40] The grievor has shown a sincere understanding of the seriousness of his behavior, with respect to both the original conduct and the failure to report. He has consistently expressed remorse, has openly acknowledged the personal issues that led to the incident, and has made a commitment and an effort to deal with them. I think he deserves a chance to, do so.

[41] The grievor also asks that his suspension without pay be overturned and that the investigation report be deleted from his file.

[42] The employer followed the *Larsen* criteria in determining that removing the grievor from the workplace and suspending him without pay was justified, and I find nothing amiss about the employer's conclusions. Neither am I of the opinion that the investigation report should be removed from the personnel file.

IV. Sealing order

[43] Exhibits 2, 3, 6, 7, and 8 contain personal and medical information that should remain sealed and should not be released. In addition, telephone numbers and addresses contained in the remaining exhibits are to be redacted.

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

(The Order appears on the next page)

V. Order

[45] The grievance is upheld in part.

[46] I void the termination dated August 19, 2015.

[47] I reinstate the grievor with full pay and benefits effective August 19, 2015.

[48] I am without jurisdiction to overturn the suspension.

[49] I dismiss the part of the grievance concerning the investigation report.

[50] I will remain seized of this grievance for 90 days from the date of this decision to resolve any issues arising from implementing this decision.

May 12, 2017.

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