

**Date:** 20170523

**File:** 566-02-10040

**Citation:** 2017 PSLREB 56

*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

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BETWEEN

**DAVID J. SEAMARK**

Grievor

and

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

Respondent

Indexed as

*Seamark 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:** Michel Bouchard

**For the Respondent:** Caroline Engmann, counsel

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Heard at Kingston, Ontario,  
October 4 to 6, 2016.

## REASONS FOR DECISION

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### Individual grievance referred to adjudication

[1] The grievor, David J. Seamark, is a correctional officer (classified CX-2) at Millhaven Institution in Bath, Ontario (“the institution”). He has been employed by the Correctional Service of Canada (CSC) since 2001.

[2] On January 21, 2014, an incident occurred with an inmate that resulted in the grievor receiving a financial penalty of one day’s pay for excessive use of force, which is contrary to the CSC’s “Standards of Professional Conduct” and the “Values and Ethics Code for the Public Service”.

[3] On May 15, 2014, the grievor grieved that discipline, and on September 11, 2014, the grievance was referred to adjudication to the former Public Service Labour Relations Board (PSLRB).

[4] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force, creating the Public Service Labour Relations and Employment Board (“the Board”) to replace the PSLRB as well as the former Public Service Staffing Tribunal. The Board continues the work of the PSLRB; consequently, this decision was rendered by a panel of the Board.

[5] Having considered all the circumstances, I find that the grievor did use excessive force, that discipline was warranted, and that the financial penalty of one day’s pay was not excessive.

### Background

[6] I heard testimony from the following individuals:

- Kirk Driscoll, a correctional manager (CM), operations, at the institution;
- Larry Ringler, currently the warden at Warkworth Institution in Campbellford, Ontario; he was the deputy warden at the institution at the time of the incident;
- Jack Coimbra, the assistant warden at Joyceville Institution in Kingston, Ontario; he was the assistant warden, operations, at the institution at the time of the incident;

- Robert Lounsberry, a correctional officer, classified CX-1, at the institution and the grievor's shift partner at the time of the incident; and
- the grievor.

[7] I viewed video evidence from a stationary camera on 2B range in the institution, which recorded much of the incident in question.

[8] The incident occurred when the grievor and Mr. Lounsberry were conducting a stand-to count on 2B range in a living unit at the institution. While conducting the count, they noted that the inmate was not compliant as he was not standing.

[9] Upon completing the count, the officers left the cell area and met briefly in the range kitchenette. Then the grievor returned to the inmate's cell while Mr. Lounsberry approached the secure control post to brief the staff that the cell door would be opened.

[10] The grievor and Mr. Lounsberry later indicated in their reports that they had decided to search the inmate and his cell due to his non-compliance with the stand-to count.

[11] At the officers' direction, the inmate exited his cell into the hallway and handed his phonebook to Mr. Lounsberry. He then compliantly took a position on the range wall to submit to a frisk. When that ended, he turned and stood while looking at the officers.

[12] The grievor then threw the inmate's phonebook into the open cell, and the inmate immediately re-entered the cell to retrieve it. The two officers observed him through the open door; however, because he had re-entered the cell, the officers decided to carry out another frisk.

[13] The inmate was directed to exit the cell a second time. The grievor then subjected him to physical handling by placing his hand in the middle of the inmate's back and guiding him to the wall.

[14] The inmate took a position against the wall. While Mr. Lounsberry frisked him a second time, the grievor stepped around behind Mr. Lounsberry and grasped the inmate's hand from the range wall in an attempt to once again obtain his phonebook.

The inmate did not release it, and he turned his head and upper body to the left, where the grievor was grasping his hand.

[15] The grievor then used an unauthorized headlock-style manoeuvre and knee strike to the inmate's midsection, twisted the inmate's body, and brought the inmate to the floor over his knee. The grievor went down with the inmate with his knee on the inmate's back.

[16] When the inmate landed face down on the range floor, his hands were brought behind his back, and handcuffs were applied. He was then escorted off the range, in handcuffs, by eight officers, and was then subjected to a strip-search. The inmate was interviewed by a CM and then was admitted to segregation.

### **Analysis of the incident**

[17] The officers' decision to leave the inmate's cell and then return to open it for a search was contrary to the institution's policies and procedures. It was not a routine cell search; it was carried out without authorization and with no indication of reasonable grounds. It was initiated based on inmate behaviour rather than on suspicion of unauthorized or contraband items.

[18] As the inmate was already secured in his cell and was not reported to be in any distress, proper steps should have been taken. This would have included staff presence, verbal intervention, attempts at negotiation, and ultimately an action plan. The action plan would have included prior consultation with the healthcare unit, the activation of a video camera and a staff briefing as to their roles, coordinated through a CM. The officers took none of these steps.

[19] Furthermore, the grievor entered the cell before the inmate exited. The camera shows Mr. Lounsberry standing with his hands on both sides of the door while the grievor enters the cell. Normally, an officer does not enter a cell containing an inmate for a cell search; rather, the officer first orders the inmate into the hallway and frisks the inmate to minimize the risk of access to a weapon. Neither officer reported that the grievor entered the cell with the inmate present or attempted to explain why that occurred.

[20] The grievor later reported that the inmate had exhibited intimidating and threatening behaviour before the cell was opened and entered. If intimidation was

present, CSC's view was that that would be all the more reason why the grievor should not have entered the cell. He should have withdrawn and left the inmate isolated and controlled in his cell, which would have allowed action plans to be properly coordinated through the CM.

[21] I also heard evidence that previously, on October 29, 2013, the grievor had opened this inmate's cell for a routine search and had reported that the inmate had grasped two writing utensils in an aggressive manner, which resulted in the grievor spraying the inmate with OC (oleoresin capsicum or pepper spray) and securing the door again.

[22] That recent incident with this inmate makes it even more difficult to understand why the grievor chose to enter the cell before the inmate exited and why he did not assess it as a situation rife with potential for negative behaviour. The prior incident should have caused the grievor to carefully follow all procedures designed to ensure the safety of staff and inmates during cell searches. Instead, he flouted all procedures and did the opposite.

[23] Upon the completion of the cell search, the grievor engaged in disrespectful and uncalled-for behaviour by throwing the inmate's phonebook into the cell. The grievor could have held the phonebook, seized it, or returned it after the search was completed, but instead, he chose to throw it in a disrespectful manner.

[24] The inmate's immediate and understandable response, upon seeing his phonebook tossed into the cell, was to enter the cell and retrieve it. The officers then used that as a reason for another frisk, despite that the inmate had remained in their line of vision during the cell re-entry.

[25] Despite remaining compliant with the second search, the inmate was subjected to mild but unnecessary physical handling when the grievor applied hand pressure to the middle of his back to guide him to the wall.

[26] While Mr. Lounsberry carried out the second frisk, the grievor stepped around behind him to a position on the opposite side to try to pull the phonebook from the inmate's hand. As the grievor had already had the phonebook before he threw it back into the cell, it is unclear why he felt the need to search it again. He had watched the inmate from the time he threw the book until the inmate exited the cell the second

time. His action appears to have been unnecessary and antagonistic.

[27] The grievor's attempt to grab the phonebook out of the inmate's hand was followed by what the officers described in their reports as the inmate "coming off the wall" and being "physically uncooperative in a threatening manner". Neither report clearly describes the alleged actions. On the video, the inmate's movements do not appear threatening.

[28] CSC's view was that the grievor's actions of throwing the phonebook and attempting to take it a second time were antagonistic and were the main contributors to the inmate's movement away from the wall during the second frisk. I agree. It is understandable that at the very least, the inmate would turn to the left to see what was happening behind him. It is also likely that he was unwilling to surrender his phonebook a second time since the grievor had already had it, searched it, and tossed it into the cell.

[29] I agree with CSC's assessment that this incident did not result from the inmate being noncompliant with the routine stand-to count. Rather, the grievor's response to this reported non-compliance seems to have been designed to escalate and to provoke a situation. This is completely contrary to what the grievor is expected to do, which is to try to calm and de-escalate any situation with an inmate.

[30] The grievor's actions that were provocative and antagonistic to the inmate include the following:

- conducting (contrary to regulations) an unauthorized, non-routine cell search when there was clearly time to follow the appropriate procedures, which are to seek authorization and to make an action plan. There was no indication of the presence of contraband or of any urgency to search the cell other than the reported indication that the inmate had refused to stand for the count. Opening the cell in those circumstances suggests a preplanned use of force;
- unnecessarily entering the cell rather than having the inmate exit first, especially given a prior incident with this inmate in similar circumstances;
- throwing the inmate's personal property into the cell in a disrespectful and unprofessional manner;

- using the inmate's re-entry to his cell to get his phonebook as a reason for a second frisk, despite that the inmate had remained in the officers' line of vision at all times;
- applying unnecessary physical handling to guide the inmate to the wall for the second frisk, when the inmate was being compliant;
- approaching the inmate from behind while the other officer was frisking him and unnecessarily attempting to pull the phonebook out of his hand; and
- using the movement of the inmate's head and body towards him as a reason to apply an unauthorized (see "Security Bulletin 99-04") headlock manoeuvre, a knee to the inmate's midsection, and a twisting motion to get him to the floor.

[31] My opinion is that this regrettable incident was not handled professionally. Indeed, the evidence revealed no legitimate purpose to the grievor's actions beyond provoking the inmate and attempting to justify what appears to have been a planned use of excessive force.

[32] Clearly, discipline was warranted, and I do not find the financial penalty of one day's pay excessive in the circumstances.

### **Confidentiality Order**

[33] The Board's policy on Openness and Privacy is available on its web-site. Board hearings are conducted in public in accordance with the open court principle, a fundamental and constitutionally protected aspect of our legal system. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency, accountability and fairness in its proceedings.

[34] In some instances, however, mentioning an individual's personal information during a hearing or in a written decision may negatively affect an individual's life. Where the information is not essential to the transparency of the decision, the Board may tailor its decision to accommodate the protection of an individual's privacy. The *Dagenais/Mentuck* test is the relevant test to consider in protecting information or exhibits - see *Dagenais v. Canadian Broadcasting Corporation*, 1994 CanLii 39 (SCC).

[35] The *Dagenais/Mentuck* test is essentially a balancing exercise as between the rights of litigants to a fair trial, the effect on free expression including the public interest in open hearings and an individual's privacy.

[36] In the circumstances of this case, the DVD footage documenting the interaction of the grievor and other correctional officers with the inmate is not relevant to understanding this decision in a transparent way. The DVD footage will be sealed to protect the identity, the dignity and the privacy of the inmate.

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

*(The Order appears on the next page)*



**Order**

[38] The grievance is dismissed.

[39] The DVD footage will be sealed.

May 23, 2017.

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