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File: 566-02-13841

Citation: 2018 FPSLREB 5

Federal Public Sector Labour Relations and Employment Board Act and Federal Public Sector Labour Relations Act

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

COLIN STANN

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Stann 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 Federal Public Sector Labour Relations and Employment Board

For the Grievor: Corinne Blanchette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada Confédération des Syndicats Nationaux

For the Respondent: Joel Stepstra, counsel

Heard at Victoria, British Columbia,
November 15 and 16, 2017.

I. Individual grievance referred to adjudication

[1] The grievor, Colin Stann, alleged that the employer, the Correctional Service of Canada, disciplined him without just cause on December 12, 2016, by suspending him without pay for one day. Subsequently, the employer rescinded the suspension and imposed a one-day financial penalty instead. Those actions violated article 17 of the collective agreement between the Treasury Board and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada – CSN, expiry date May 31, 2014 ("the collective agreement").

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and *the Federal Public Sector Labour Relations Act*.

II. Summary of the evidence

[3] The grievor is a correctional officer (CX), classified at the CX-02 group and level, at the employer's William Head Institution in Victoria, British Columbia ("the institution"). He was disciplined as a result of email correspondence with his correctional manager (CM), Kate McLean, which was alleged to have lacked respect for others in the workplace as required by the *Values and Ethics Code for the Public Sector* ("the Code") and the employer's standards of professional conduct. The grievor was also alleged to have been disrespectful in his response to a notice his CM sent him advising him that he was to meet with her to discuss his use of sick leave and family related leave pursuant to the employer's National Attendance Management Program (NAMP). The employer alleged that the grievor's tone, actions, and comments at a meeting with the CM and throughout the disciplinary process with Manager of Operations (MO) Brenda Kanzig were disrespectful, bullying, and unethical and that they breached the Code and his terms and conditions of employment.

On the other hand, the grievor stated that he expressed his disagreement with what his CM was telling him. He is entitled to disagree with management; doing so is not

insubordination. The employer had no clear, cogent, and compelling evidence to support its actions against him. Furthermore, the MO was biased against him throughout the process.

[4] Ms. McLean testified that she has been a CM at the institution since April 2016. Prior to that, she was a CM at the Fraser Valley Institute for Women. She supervises correctional staff, including the grievor. She provides guidance every day on the institution's operations and deals with leave, performance, and other CX-related issues. After reviewing the quarterly attendance reports, as required by the assistant warden of operations under the NAMP, she invited the grievor to a meeting to discuss his use of leave. She testified that her intentions were to chat with him to determine whether he needed some form of accommodation. She initiated the meeting by sending him an electronic meeting request in which she advised him that he was entitled to bring a union representative (see the email at Exhibit 8, tab 5, dated October 25, 2016). While she might have used the word "invite" or "invited" with respect to the meeting, according to her, she made it clear to him that he was to meet with her to discuss his sick leave usage. It was not an optional meeting; she used "invite" in politeness and courtesy.

[5] According to her testimony, the grievor's email response cited policy and the collective agreement (see the email at Exhibit 8, tab 5, dated October 30, 2016). He stated that he would not be harassed since he was within his collective agreement rights and that he would not attend without a union representative. Ms. McLean inferred that she was being told that she did not know the employer's policies. She also inferred "tone" in the wording of his reply. She felt that she was being told that she did not know what the policy was and how it applied to CXs.

[6] After she received the grievor's emails, Ms. McLean consulted with Ms. Kanzig on what to do next (see the email at Exhibit 9). The MO provided direction on what to say in response. In her reply (see Exhibit 8, tab 5, for the email dated November 10, 2016), Ms. McLean clarified the purpose of the meeting and the definition of "harassment". The grievor responded by stating, "Have it your way", and the meeting was scheduled (see the email at Exhibit 8, tab 5, dated November 10, 2016).

[7] The meeting in question occurred on November 19, 2016, from 19:00 to 19:15. The grievor attended with Jason Stewart, his union representative. Ms. McLean

described the very brief meeting as uncomfortable. Mr. Stewart referred to a labour board decision on CX sick leave to which, according to her testimony, Ms. McLean responded that it had no bearing on why they were meeting. The grievor responded by stating that she was not listening and that Mr. Stewart's comment was relevant to their discussion.

[8] According to Ms. McLean, the meeting deteriorated from that point. When she asked the grievor whether he required accommodation, he told her it was none of her business. When she told him that she was not asking about his personal life but that she was trying to help him, he responded with, "You all say that."

[9] According to her evidence, from the outset of the meeting, Ms. McLean determined that the grievor was disrespectful. His comments were made with such disdain that they were disrespectful and insubordinate. It was not what he said to her but how he said it. She testified that he was a large man who looked down on her physically when he addressed her. According to her evidence, she felt that he treated her as if she were "some unimportant entity that he had to deal with", which made her "feel like less than an ant". She expected that Mr. Stewart would intervene to prevent the discussion becoming heated. Rather, he supported what the grievor was saying.

[10] Since the grievor was being disrespectful towards her, Ms. McLean asked him if he had any respect for her. He responded as follows: "You feel you are being disrespected — you are being disrespected. No one [at the institution] respects you. You came in here on your high horse …". With that, she ended the meeting and told him that the next meeting would include a representative of senior management. She immediately called the MO and left a message to call her back and then sent a detailed email (Exhibit 8, tab 5, dated November 19, 2016, at 7:48 p.m.) in which she set out her version of the events of the meeting.

[11] After she called the MO and sent her email, Ms. McLean composed an officer statement observation report (OSOR) (Exhibit 8, tab 6) setting out the events of the meeting. She wrote a second OSOR the same day to describe the circumstances that arose on the following shift. On cross-examination, she admitted that she wrote both OSORs several days later, once the MO had initiated the disciplinary process against the grievor, to assist the MO with that process.

[12] After receiving Ms. McLean's voice message and email, the MO contacted her and told her that she was returning to the institution to commence disciplinary action against the grievor. She arrived at approximately 23:00 and left at 01:30 the next morning. While Ms. McLean waited for her to arrive, she completed the Deister wand download, which required her to enter the CM office. Ms. McLean described staff she encountered that night as being curt towards her; they only answered questions they were asked directly. Ms. McLean testified that she assumed that the grievor and Mr. Stewart had told them about what happened in the meeting earlier that night and that they were showing their support for the grievor. On the desk in the CM office, Ms. McLean discovered a DVD, the title of which she believed was significant. She concluded that the grievor had left it there to intimidate her, as only he and Mr. Stewart would have had access to the office at the time.

[13] Ms. McLean testified that she spent the remainder of her shift in her office. At approximately 05:00 on November 20, 2016, the grievor entered her office to deliver his Deister wand. According to her, he slammed it down on the desk then glared at her and left. After this encounter, she wrote the second OSOR, which as stated previously, she did not in fact write until the MO asked her to, about 10 days later.

[14] Ms. McLean felt bullied by the grievor during the evening shift of November 19, 2016, even though other than the two encounters, their paths did not cross again the entire shift. He was a large man with a booming voice who had power due to his facial expressions and size. She felt that he was a dangerous individual even though she also described him as amicable. She did not like her interactions with him or with Mr. Stewart. The grievor intimidated and bullied her, which his union supported, in the actions of Mr. Stewart.

[15] Ms. Kanzig testified that during their quarterly review of leave usage, Ms. McLean raised some usage that she thought should be addressed, including the grievor's. Ms. Kanzig did not direct her to address the grievor's leave usage but supported her in her role as a CM communicating with a CX.

[16] After reading the emails forwarded to her by Ms. McLean, Ms. Kanzig told her to arrange a formal meeting with the grievor. Ms. Kanzig did not know that the meeting had been set up until she heard Ms. McLean's voice message while attending a hockey game. Once it ended, she phoned Ms. McLean, who appeared upset. Ms. Kanzig read

the email after the call. Ms. McLean reported to her that the meeting had been very emotional and that she had been disrespected. Ms. Kanzig was concerned about Ms. McLean's emotional state.

[17] During the call, Ms. Kanzig decided to go to the institution and initiate disciplinary action against the grievor for his actions that night. Once there, she discussed what had happened in the meeting with Ms. McLean for 60 to 80 minutes, after which she issued the notice of the disciplinary hearing (Exhibit 8, tab 8). Based on the call, Ms. Kanzig believed that she had enough to discipline the grievor, which was confirmed by her discussions with Ms. McLean.

[18] On cross-examination, Ms. Kanzig denied that she had made up her mind to discipline the grievor even before she spoke to him. She testified that she preferred Ms. McLean's version of what occurred at the meeting, even though Mr. Stewart's version corroborated the grievor's version. Ms. Kanzig preferred Ms. McLean's version because she had also felt intimidated and bullied during her career. On the stand, Ms. Kanzig denied that she was biased against the grievor, even in the face of the audio recording of the disciplinary hearing that he submitted (Exhibit 11), in which she clearly admits to being biased. She testified that her bias did not interfere with her decision because she is professional.

[19] Ms. Kanzig testified that she decided to hold a disciplinary hearing only after speaking to Ms. McLean after the hockey game. However, in her email to Ms. McLean that she sent from the hockey game, Ms. Kanzig wrote that she would "do a disciplinary hearing letter up," when she got to the office, which indicates that she had already resolved to initiate a disciplinary process against the grievor.

[20] The disciplinary hearing was held on December 6, 2016. In attendance were the grievor and his union representatives, Mr. Stewart and Warren Campbell. Also present was the institution's deputy warden. The grievor stated that he did not feel that his email was disrespectful; neither did Mr. Stewart. Both agreed that there was no tone in what was written or in how it was written. The grievor said very little in the discipline hearing. According to Ms. Kanzig, that in itself was disrespectful. He admitted to those present that he had told Ms. McLean that she was not respected within the institution but qualified it by stating that it was a statement of fact and not of disrespect. Ms. Kanzig recorded the meeting (Exhibit 12) and prepared

a transcript of what transpired (Exhibit 8, tab 9).

[21] The disciplinary action was not based solely on the events of the meeting; it was also based on the email exchanges between the grievor and Ms. McLean and the DVD that was left on her desk, which Ms. Kanzig testified she believed he had put there, even though she could not prove it. The disciplinary hearing was full and fair, and all factors, including the OSORs, were considered when rendering the discipline. Ms. Kanzig did not share the OSORs with the grievor or his union representatives, even though by her own admission, she was aware that she was required to share documents to be used in the disciplinary process with the grievor, pursuant to the collective agreement. She testified that it was merely an oversight.

[22] During the disciplinary hearing, Ms. Kanzig testified that she was very emotional and frustrated. She felt disrespected and undermined by the union representatives. She admitted making sarcastic comments but testified that she did not intend to be disrespectful towards them or the grievor.

[23] When asked whether a CX is allowed to quote policy to a CM, Ms. Kanzig testified that he or she is if it is done in a respectful way and in a manner that does not negate the CM's authority.

[24] In arriving at her conclusion concerning whether disciplinary action was warranted, Ms. Kanzig considered the evident breakdown in communication and the grievor's lack of ownership or understanding that he was accountable for the negative interaction with Ms. McLean. She questioned what level of discipline was required to ensure corrective action. She concluded that a verbal or written reprimand was not sufficient to get the message across that his incivility and "micro-aggression" needed to stop. Ms. Kanzig considered the information in Ms. McLean's OSORs and the nature of the grievor's comments, which he justified by saying that she had made similar comments. The fact that he tried to excuse his comments by comparing them to Ms. McLean's had a big impact on the discipline that was imposed.

[25] The grievor's letter of offer (Exhibit 8, tab 1) requires him to comply with the employer's *Code of Discipline* (CD-060) (Exhibit 8, tab 4), the employer's *Standards of Professional Conduct* (Exhibit 8, tab 2), and the Code (Exhibit 8, tab 3). All three documents require him to be respectful of people in the workplace. Ms. Kanzig also considered the impact on Ms. McLean at a personal level of being told that she was not

respected. Ms. Kanzig testified that as a woman, she could relate to Ms. McLean's feeling about the meeting with a group of strong men.

[26] Ms. Kanzig convened a meeting with the grievor and his union representatives to deliver her discipline decision. When he was handed the letter of reprimand, the grievor smirked and then got up and left. Even at this point, he showed no ownership for his actions, according to Ms. Kanzig. The one-day suspension without pay initially imposed was later replaced with a one-day financial penalty.

[27] The grievor testified that he had no intention of being disrespectful in his correspondence with Ms. McLean. He was trying to share information that he was unsure she was aware of since she was new to the institution. His language in the emails (Exhibit 8, tab 5) was clear and matter-of-fact. The emails were intended only to convey information, not to be disrespectful. Her invitation to the meeting seemed open, and he felt within his rights to refuse it. The grievor testified that he refused to attend initially because Ms. McLean would not tell him why he was being invited. She had not identified a questionable pattern of sick leave usage. By referring to the NAMP in her header, Ms. McLean was being aggressive; she made the invitation sound disciplinary. This drove the grievor into a self-preservation mode, according to his evidence.

[28] The grievor met with Mr. Stewart before the meeting. They agreed that Mr. Stewart would speak on the grievor's behalf. During the meeting, the grievor testified that he sat with his hands crossed, staring ahead.

[29] Ms. McLean testified that at the beginning of the meeting, she tried to make a joke, which did not go over well. According to her, after that, Mr. Stewart took control of the meeting and asked why the grievor was being treated differently from others at the institution, particularly CMs who use up their sick leave before they retire. Ms. McLean began to argue with Mr. Stewart and cut him off, not allowing him to speak. The grievor testified that he interjected in a calm tone that she was not letting him speak. In response, Ms. McLean gave him a "stern look", according to his evidence.

[30] According to the grievor, Ms. McLean and Mr. Stewart continued to "squabble". She then asked the grievor why he was not speaking by saying the following: "You don't respect me enough to talk to me?" The grievor testified that he responded that he did not respect her. His intention was honesty. According to him, every

interaction he had with her was negative; she was condescending. When they had meetings concerning his casework, she wrote all over his files with a red pen. According to the grievor, she was always defensive, and she had something against him.

[31] As the meeting ended, Ms. McLean told the grievor that another meeting would be held, this time with the MO present. According to his evidence, at that point he stood up, told her that he would not meet with her without his union representative present and that all meeting requests were to be made to him in writing on paper, and then left. He testified that he made these requests because it was the safest way to interact with Ms. McLean.

[32] There was no disciplinary investigation as in the employer's normal process, according to the grievor. Ms. Kanzig went directly to a disciplinary hearing, even though she told him that a disciplinary investigation would take place. No one spoke to him about the events of that day before the disciplinary hearing on December 6, 2016. He was not provided with any of the documents that Ms. Kanzig considered in her deliberations, which was contrary to the collective agreement.

[33] The grievor testified that he did not believe that his emails were abusive or disrespectful. He cannot help how people react emotionally to emails. He was straightforward in the meeting. He was not abusive or loud; he did not curse or make faces at Ms. McLean. He did not smirk at her. He cannot help his size and the sound of his voice. On the other hand, like Ms. Kanzig, Ms. McLean is often sarcastic and condescending, according to the grievor. He did not have a sense that he could trust either of them. Ms. Kanzig's admission at the disciplinary hearing that she was biased did not surprise him.

[34] Mr. Stewart, the grievor's representative at both the meeting and the disciplinary hearing, testified that he and the grievor agreed that at the meeting with Ms. McLean, Mr. Stewart would do the talking. At the start, Ms. McLean set out her view of Mr. Stewart's role in the meeting. He advised her that he was there to represent the grievor. Mr. Stewart intended to establish that the rules on using sick leave were being applied differently to different people at the institution. Those in circumstances akin to the grievor's were not called to meet with the CM. Ms. McLean explained to him that Ms. Kanzig had identified the pattern and had directed her to meet with the

grievor, which was inconsistent with what the grievor had initially been told.

[35] During this discussion, the grievor remained silent; he just sat and listened. His behaviour was normal and relaxed, according to Mr. Stewart. After about five or six minutes, Ms. McLean addressed the grievor directly. She asked him if he respected her. According to Mr. Stewart, the grievor responded in a matter-of-fact way that she was correct; he did not respect her. There was no tone or agitation in this statement, according to Mr. Stewart.

[36] At the December 6, 2016, disciplinary hearing, Mr. Stewart tried to provide the true account of what had happened between the grievor and Ms. McLean on November 19, 2016. He described the meeting as cordial, collegial, and respectful, but Ms. Kanzig was not interested in hearing his version. She admitted to being biased against the grievor, and nothing would change her mind.

III. Summary of the arguments

A. For the employer

[37] This case is a question of what respect in the workplace means. The grievor was called to a meeting to discuss his leave usage patterns and was disrespectful in response. He was also disrespectful in a meeting when he replied that he did not respect his CM when he was asked whether he did. An employee is not allowed to say mean and hurtful things even though they are true. The grievor does not have to like his manager, but he must respect her. Telling people what he thought of his manager was not appropriate if he knew or ought to have known that what he was saying was hurtful.

[38] The grievor breached the Code and the employer's policies. The facts are not in dispute; his emails speak for themselves. It is not that he quoted policy in them but rather how he did it that is offensive. Furthermore, the semantics of whether he was directed or invited to attend a meeting are irrelevant. He refused to attend a meeting with his manager, which was disrespectful.

[39] The questions raised by the grievor's representative about the NAMP and the credibility of the employer's witnesses are red herrings. The bottom line is that Ms. McLean was acting within her CM role to speak to the grievor about his leave, and he felt justified in his actions because he was having issues with the institution's

management. He had a complete lack of appreciation for the impact of his actions. Another red herring he raised was the question of whether Ms. Kanzig was biased. There is no evidence to support this allegation, and it amounts to him attempting to turn the table and put the focus on her rather than on his wrongdoing.

[40] The grievor suffered no prejudice; Ms. Kanzig did not prejudge him. He was given the opportunity to fully express his side of the story. Even if she drew conclusions about who left the DVD on Ms. McLean's desk, since it did not form part of her considerations, it did not mean she could not be objective in assessing discipline. Ms. Kanzig wanted to send a message to the grievor that his conduct was unacceptable.

[41] The employer is less tolerant of an attack by an employee when it is addressed at a manager. Such attacks undermine the employer's ability to manage the workplace. The question is not whether the action was wrong but of determining the appropriate sanction for it. According to Palmer and Snyder, *Collective Agreement Arbitration in Canada*, 5th edition, at paragraph 11:53, abuse language directed toward a supervisor equals insubordination. The grievor in this case did not use vulgar or offensive language, but he did defy authority and expressed contempt for his manager. In a paramilitary organization such as the employer's, respect for hierarchy is everything.

[42] In *Nowoselsky v. Treasury Board (Solicitor General Canada)*, PSSRB File No. 166-02-14291 (19840724), [1984] C.P.S.S.R.B. No. 120 (QL), the adjudicator set out the test for insubordination at pages 8 and 9. Essentially the employer must establish that a direct order was given, that this order was clearly communicated to the employee, that the person giving the order had the authority to give it, and that the employee refused to comply with it. *Canadian Forest Products Limited, Chetwynd Sawmill Division v. IWA-Canada, Local 1-424* (1993), 36 L.A.C. (4th) 400 at 11 ("*Canadian Forest Products*"), states that abusive language aimed at a supervisor is insubordination.

[43] When an employee challenged management's authority to control his leave by arguing that his supervisor had no authority to check on his leave, the arbitrator in *Squamish Terminals Ltd. v. International Longshoremen Workers' Union, Local 514* (1998), 72 L.A.C. (4th) 5 at 8, stated that the employee's insolence

challenged management's authority.

[44] When there is no dispute, as there is in this case about whether the grievor mistreated another person or about the wrongfulness of his behaviour, the only issue to be resolved is the appropriateness of the penalty, according to Brown and Beatty, *Canadian Labour Arbitration*, 4th Edition, at paragraph 7:3430. This has been endorsed as the prevailing approach in Canada, according to *Northwest Waste System Inc. v. Transport, Construction and General Employees' Association, Local No. 66* (2007), 164 L.A.C. (4th) 311. Assuming that the language or behaviour can be characterized as disruptive or can be viewed as insulting or insolent and contemptuous of management, some minor disciplinary sanction would be warranted.

[45] The employer submitted that the Board has determined that a one-day financial penalty is minor. As in *Lortie v. Deputy Head (Canada Border Services Agency)*, 2016 PSLREB 108, the grievor's words are not of particular concern; the tone and intention behind them are. The grievor in this case has demonstrated a course of conduct through emails challenging his CM's authority and of expressing his opinion when he ought to have known better. He has demonstrated an ongoing pattern of defying management's authority. It is irrelevant whether he is correct in his beliefs; his behaviour is not justified. (See *Ferguson v. Treasury Board (Solicitor General - Correctional Service)*, PSSRB File No. 166-02-26970 (19961028), [1996] C.P.S.S.R.B. No. 79 (QL).)

[46] The statement the grievor made in the meeting with Ms. McLean was worse than refusing to attend the meeting. When he was asked a question about respect, he should have apologized and "cooled his heels". If he had concerns about how he was being treated, he had recourse elsewhere. His response was clearly damaging to his manager.

[47] If the Board determines that discipline was warranted, it should not attempt to fine-tune it. Unless the discipline was clearly excessive, the Board should not interfere. The question to be answered is whether the discipline was reasonable. (See *Northwest Waste System Inc.*). Whether or not Ms. Kanzig was predisposed to a finding of culpability in this matter is not a matter for consideration as this was a hearing *de novo*. There is no evidence of bias in the determination of the penalty.

[48] The purpose of discipline is to balance correcting behaviour and retaining some semblance of authority with the employee's rights. The question is whether the grievor had a fair process and whether he was able to explain his side of the story. There is no evidence that he was to be disciplined before the disciplinary meeting ended.

[49] In considering the appropriateness of the penalty, the Board should consider the grievor's complete absence of contrition. Overturning his penalty would amount to the Board condoning his behaviour.

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

[50] The onus was on the employer to establish through clear, cogent, and compelling evidence that discipline was warranted and if so that it was reasonable. The grounds for the discipline as set out in the letters of discipline (Exhibit 8, tabs 10 and 11) relate to the grievor's relationship with other staff and to his conduct and appearance. There was absolutely no evidence led concerning his appearance to establish this second ground. The first time this ground was raised was in the disciplinary letter; it is not mentioned in the notice of disciplinary hearing.

[51] The only ground left to consider is whether the grievor was disrespectful. An adjudicator may not uphold a disciplinary penalty without making a finding on all the allegations against the grievor (*Lloyd v. Canada (Attorney General)*, 2016 FCA 115 at para. 23). The reasonableness of the penalty must be examined in light of all the allegations, not merely one.

[52] The employer alleged that the grievor was abusive toward Ms. McLean. She testified that her perception was that he was being abusive. After she received his email quoting policy, which she testified was abusive, she consulted Ms. Kanzig, who told her to reply in kind by quoting policy to him. Ms. Kanzig testified that the grievor's email quoting the collective agreement and policy to a CM was disrespectful. The evidence of both Ms. McLean and Ms. Kanzig was that he had properly quoted the collective agreement and employer policy in the email in question. The only person who raised the harassment policy was Ms. Kanzig.

[53] The grievor never refused to attend the meeting with Ms. McLean. There is a difference between an invitation to meet and an order to attend a meeting. The evidence of everyone at the meeting was clear that Mr. Stewart did most of the

talking. The grievor cannot be held responsible for his size or how deep his voice is. He allowed Mr. Stewart to represent him at the meeting and spoke only once Ms. McLean asked him directly whether he respected her. The truth of the matter is that her issues were with the fact that Mr. Stewart did not step in between her and the grievor, who were "in the moment". Mr. Stewart allowed things to escalate to the point that it became personal between the grievor and Ms. McLean. She suffered no professional impact as a result of the meeting.

[54] The credibility of Ms. McLean and Ms. Kanzig must be examined. Ms. McLean replied to the grievor's email with her own email, which was in fact a cut-and-pasted version of the one she received from Ms. Kanzig. Ms. Kanzig was not objective throughout the discipline process, and she lied twice in her testimony. When she was asked when she decided to hold a disciplinary hearing, she claimed it was after she met with Ms. McLean, but the truth is that she sent an email from the hockey game saying that she would come in to initiate disciplinary action. That was long before she met with Ms. McLean. When she was asked about whether she admitted she was biased at the disciplinary hearing, she denied it. But when the recording of the hearing (Exhibit 11) was played, it was proven otherwise. She tried to explain this comment by saying that she was biased about who put the DVD on Ms. McLean's desk. But the truth was that she was biased against the grievor and that she should not have been involved in deciding whether he should be disciplined.

[55] As in *Comeau v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 50, Ms. Kanzig should not have been allowed to proceed with disciplinary action against the grievor. She and the CM were acting as one. The shared a fear of large male CXs with deep voices and were biased against the grievor. Ms. Kanzig could not explain why Ms. McLean's version of the events of the November 19, 2016, meeting were more credible than those of Mr. Stewart and the grievor. Mr. Stewart's evidence corroborated the grievor's description of his demeanour at the meeting and of the events. The grievor was guilty from the very beginning, in the eyes of Ms. Kanzig. In the notice of hearing drafted on November 19, 2016, she stated that his actions "are deemed to be" an infraction of the *Code of Discipline*.

[56] Ms. Kanzig was proven untruthful. The transcript she prepared of the recording of the disciplinary hearing (Exhibit 8, tab 9) makes no mention of her admission of bias, as expressed in the recording. Honesty and truthfulness are at the core of the

Code and the employer's *Standards of Professional Conduct*; Ms. Kanzig failed to meet these standards. The grievor tried to raise issues with Ms. McLean's management, which Ms. Kanzig refused to acknowledge. She admitted to being sarcastic toward him at the disciplinary hearing, but more than that, her tone was condescending.

[57] Ms. McLean's OSORs are suspect. They were submitted late, in violation of the employer's policy on OSORs, and no questions were asked. Contrary to what they contain, the grievor was not disruptive in the meeting, as Mr. Stewart corroborated. The grievor's comment might not have been diplomatic, but he was attempting to convey information that Ms. McLean was not interested in hearing. The inconsistencies in the emails submitted as exhibits and Ms. McLean's testimony and OSORs should be interpreted in the grievor's favour.

[58] The only misconduct before the Board is whether the grievor was abusive by word or action. Harassment is a separate allegation under the Code of conduct. There is no allegation of insubordination before the Board, and even if there were, the grievor never intended to be disrespectful. He intended to be honest. If he had not answered a direct question, he would have been in trouble for that. This was a no-win situation for him. His behaviour on the tape and at the hearing was the same as at the meeting. He might have lacked diplomacy in his response, but being unpleasant and lacking diplomacy is not the same as being abusive, which is defined by the *Oxford English Dictionary* as being extremely offensive and insulting.

C. Employer's reply

[59] The disciplinary letter must be read as a whole. There is no direct evidence of discredit to the correctional service, but the grievor's actions in general discredited it. This case is about his disrespect for the manager's authority. Throwing policy at the CM was only part of the offensiveness of his emails; the language he used was also offensive. The employer has the right to meet with its employees, and requesting to is not harassment.

[60] The issues of credibility raised by the grievor's representative were blown out of proportion. Any non-verbal communications between the employer's witnesses during Ms. Kanzig's testimony were merely signs of empathy.

[61] The question before the Board is whether what the grievor said demonstrated respect for his manager. If not, disciplinary action was warranted, and the penalty imposed was reasonable.

IV. Reasons

[62] The grievor's representative was correct that the onus was on the employer to prove on the basis of clear, cogent, and compelling evidence that the grievor committed the offences alleged and that as a result, the disciplinary action imposed was warranted and appropriate. The employer's representative was correct when he argued that this matter was a hearing *de novo*, but in my assessment, he was incorrect when he said that any bias on Ms. Kanzig's part or any questions of the credibility of his witnesses were of no consequence to my assessment. Contrary to what the employer's counsel argued, there is no agreement about whether the grievor mistreated another person or about the wrongfulness of his behaviour. In fact, this is the crux of the matter.

[63] Many of the things presented to me cause me concern with the credibility of both Ms. Kanzig and Ms. McLean. Non-verbal communication between them was obvious while Ms. Kanzig testified, including nodding and eye contact to which the grievor's representative objected and challenged the witness on. This observation together with other inconsistencies in her evidence leads me to conclude that she was not a credible witness. The inconsistencies include variations between her testimony that she decided to hold a disciplinary hearing only after returning to work and speaking with Ms. McLean, and the documentary evidence of her email from the hockey game where she clearly stated that she would be initiating disciplinary action. Her testimony that she was unbiased against the grievor was also contradicted by the recording of the hearing, in which she admitted being biased against the grievor.

[64] I also dismiss Ms. McLean's evidence, particularly the reasons she gave for filing the OSORs related to the events of the evening shift of November 19, 2016. Contrary to her evidence on direct examination, the OSOR's were drafted at the request of Ms. Kanzig ten days after the incidents in question just prior to the disciplinary meetings. I believe that these documents (Exhibit 8, tabs 6 and 7) were drafted and filed for the sole purpose of supporting the allegations of misconduct against the grievor. Their true purpose was not to document an incident which occurred on the evening shift of November 19, 2016, but rather to establish Ms. McLean's version of the

events to be used in the disciplinary process. That is not to say that I accept the grievor's evidence without hesitation. I have no doubt that he intended to challenge her authority in his emails, but his version of the events of the meeting with Ms. McLean and his description of his demeanour at that meeting, corroborated by Mr. Stewart, are more likely a true reflection of the events of that night.

[65] The adjudicator in *Robitaille v. Deputy Head (Department of Transport)*, 2010 PSLRB 70 at para. 287, stated the following:

> ***287*** *Assessing the credibility of a witness is not an exact science. The complex mix of impressions that comes from observing and listening to witnesses necessarily calls for a reconciliation of the differing versions of the facts. Giving credence to one witness over another is a matter of judgement.…*

[66] And, as stated at paragraph 233 of *Robitaille* (referring to *Faryna v. Chorny*, [1952] 2 D.L.R. 354):

> ***233*** *To assess a witness' credibility, the person hearing the evidence must not solely rely on the impression left by the witness but must base the assessment on an examination of how the testimony given fits into the evidence as a whole, taking into account other testimony, the facts established, a reasonable probability of events and the assessor's experience in human relations.…*

[67] Looking at the evidence as a whole, including the exhibits and the recordings, the grievor's version of the story appears truer to the probability of the events. As I said previously, I have no doubt that he intended to challenge Ms. McLean's authority to meet with him to discuss his use of leave at a time when the NAMP was a matter of dispute in the workplace as a whole (see *Bodnar v. Treasury Board (Correctional Service of Canada)*, 2016 PSLREB 71). In my opinion, the language of his email was not disrespectful and was certainly not abusive. He did not escalate the battle of words; rather, through Ms. McLean, Ms. Kanzig did it.

[68] Furthermore, Ms. McLean asked the grievor directly whether he respected her or not. No doubt, he should have refused to answer the question, with all due respect, but likewise, she should not have asked such a question if she did not want the answer. She could not have expected that he would respond in some dishonest and disingenuous manner, to appease her ego. The answer was of no consequence

to anything other than their working relationship, which has since been severed, as he no longer reports to her.

[69] I do not agree with counsel for the employer, who argued that the grievor owed Ms. McLean respect. Respect on a personal level is earned; what the grievor owed her was respect for her CM position. While he did not owe her respect on a personal level, he did not have carte blanche to conduct himself in a manner towards her that was deliberately rude, offensive, or hurtful. He had to respect her authority as the CM. When he was ordered to attend a meeting with her, he had to attend, which he did.

[70] When at the meeting with Ms. McLean, the grievor was obligated to conduct himself professionally, and when faced with a direct question posed by her in a closed meeting, he was required to answer it. We can all speculate as to how that question could have been better answered, but refusing to answer it would have likely been viewed as insubordination, given the relationship described in the evidence. As corroborated by Mr. Stewart, the response provided was factual and was delivered in a calm and professional demeanour. The answer might have been unpleasant for Ms. McLean, but in my assessment, considering all the circumstances, it was not abusive and certainly did not warrant disciplinary action. That is not to say that in different circumstances that response would not be worthy of discipline. Each case must be decided on its specific fact situation.

[71] Counsel for the employer spent much time arguing that the grievor was disciplined for insubordination. The employer is bound by the allegations put forward when initiating the discipline process, as a matter of natural justice. It cannot discipline an employee for an allegation that the employee has not had the opportunity to address, regardless of whether such a breach may be cured by a hearing *de novo* before this Board.

[72] Furthermore, the invitation to the meeting was not a clear order to attend and did not meet the test in *Nowoselsky*. There was no abusive language directed at a manager as in *Canadian Forest Products*. Citing policy and questioning whether a new manager was aware of recent Board case law concerning leave usage is different from the circumstances in *Squamish Terminals Ltd.*, in which the employee took a hard stand that the employer had no right to question his leave. Even if he had taken such a stand, I would not find that the grievor had been insubordinate in light of the

entirety of these circumstances. On the plain wording of the disciplinary letter, it is clear that Ms. Kanzig viewed insubordination only as an aggravating factor and not as an allegation of wrongdoing against the grievor.

[73] The grievor was not without responsibility for his plight, but his actions were truer in nature to a performance issue than discipline. If I am wrong, then any discipline imposed should have been of the lowest level in my opinion and should not have involved a financial penalty or a one-day suspension. The behaviour of both Ms. McLean and Ms. Kanzig in escalating the situation rather than taking the opportunity to diffuse it, the breaches of natural justice by Ms. Kanzig, and her unjustified bias and that of Ms. McLean against the grievor because of his size and the timbre of his voice present to me a situation that cannot be resolved through a hearing *de novo*, which only reviews the penalty imposed. The entire disciplinary process was flawed. As a result, the disciplinary action must be overturned.

[74] In his grievance, the grievor requested that the disciplinary measure be cancelled and that he be reimbursed, along with pension and Canada Pension Plan (CPP) adjustments. He also asked that all mention of the discipline be removed from his files and sought real, moral and exemplary damages, to be applied with legal interest. However, there was no evidence adduced to support the damage claim.

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

(The Order appears on the next page)

V. Order

[76] The grievance is allowed.

[77] The grievor shall be paid an amount equal to the sum withheld as a one-day financial penalty, and all related pension and CPP adjustments shall be made.

[78] The employer shall remove all documents relating to the discipline from the grievor's file.

[79] The grievor's claim for damages is dismissed.

[80] I will retain jurisdiction to deal with matters arising out of this order for a period of 120 days from the date of this decision.

January 29, 2018.

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