

Public Service Staff  
Relations Act



Before the Public Service  
Staff Relations Board

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BETWEEN

**MICHAEL D. SMITH**

Grievor

and

**TREASURY BOARD**  
**(Solicitor General - Correctional Service Canada)**

Employer

*Before:* Joseph W. Potter, Board Member

*For the Grievor:* Francine Cabana, Public Service Alliance of Canada

*For the Employer:* Judith K. Begley, Counsel

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Heard at Kingston, Ontario,  
September 8 and 9, 1997.

## DECISION

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On October 12, 1995, Mr. Michael Smith, a correctional officer (CX-1), grieved the revocation of his acting CX-2 assignment. He claimed it was a disciplinary action resulting in a financial penalty. The question I must answer is whether I have jurisdiction to hear the matter, as the employer stated it was an administrative matter only.

In illuminating this point, the employer stated that section 92 of the *Public Service Staff Relations Act (PSSRA)* defines an adjudicator's authority. As this case is not an interpretation of the collective agreement, nor a disciplinary matter, the employer's position was that I lacked jurisdiction to hear it.

The bargaining agent's position was that the action of revoking the acting assignment did result in a financial penalty and it was taken for disciplinary reasons, therefore I had jurisdiction.

I indicated I would reserve my decision on this issue pending receipt of the testimony.

The bargaining agent introduced Exhibits G-1 to G-6 through their first witness, Mr. Michael Smith. I then heard from Mr. Leslie Velej, the Regional Alliance Vice-President for Ontario. The employer's witness was Mr. Helgi Enjolfsson, the Warden at Joyceville.

### The Facts

In 1992, Mr. Smith commenced acting as a correctional officer (CX) level 2 at Joyceville, which was a medium security federal penitentiary. Prior to that, he was a CX-1 at the same location. The parties agreed there was no dispute as to the complementary nature of the performance reports for Mr. Smith at the time the acting assignment commenced. The same is true of the 1992-93 and 1993-94 appraisal reports (as contained in Exhibit G-2). The acting assignment was renewed without interruption until it was revoked by management in October 1995.

Another document titled "Candidate Personal Suitability Report for Correctional Officer II Positions" (as contained in Exhibit G-2) prepared by Mr. Smith's supervisor in August 1994 indicated concerns with "effective interpersonal relationships" as well as

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with “ability to deal effectively with people from other ethnic/cultural/religious/economic/language backgrounds”.

Then, in August 1995, a petition signed by some 150 inmates (as contained in Exhibit G-2) was forwarded to the Warden alleging that Mr. Smith was abusing his level of authority when dealing with inmates. In that same month, management became aware of two separate death threats to Mr. Smith as issued by two inmates. Due to the seriousness of these issues, an investigation was undertaken to assess the probability of danger to the grievor and to the Institution.

With respect to the allegations of abuse of authority, Mr. Don Pyke, Special Advisor to the Deputy Commissioner, was asked on August 24, 1995 to investigate. This he did and issued a report on September 26, 1995 titled “Security Investigation into Inmate Allegations of Abuse of Power and Performance of Duties by Acting CO II M. Smith” (Exhibit G-2).

Among the findings of the report were that the number of inmate complaints against Mr. Smith were excessive when viewed against the institutional average. However, the report also found Mr. Smith was not adequately managed in regards to his interaction with inmates. It was recommended, among others, that Mr. Smith be considered for transfer to another institution where it would be easier to improve his inmate interaction issues.

Following receipt of the report, Mr. G. Henderson, Correctional Supervisor at Joyceville, wrote to Mr. Smith and informed him that as of October 11, 1995 he was to return to his substantive position (Exhibit G-3). Mr. Smith felt the employer’s actions were disciplinary in nature and resulted in financial loss in that he went from a CX-2 pay grade to a lower CX-1 pay grade.

### Arguments

The grievor’s representative argued that the employer’s actions were punitive and caused financial harm to the grievor. The removal of CX-2 duties was tantamount to a suspension and therefore I could assume jurisdiction under subsection 92(1)(b) of the *PSSRA*. The evidence all pointed to the conclusion that the employer’s actions were disciplinary in nature. The Investigation Report (Exhibit G-2) clearly shows it deals

with abuse of power and this is a disciplinary matter. The grievor was removed from his acting assignment as a result of the report as stated in the October 11, 1995 memorandum he received (Exhibit G-3). Exhibit G-4 was a letter dated August 20, 1996 written by Mr. Karl Niemann, of Correctional Service Canada, to the Workers' Compensation Board and said that the investigation was disciplinary. I was urged to draw the conclusion that the action was disciplinary and to assume jurisdiction, setting down dates to hear the merits.

The grievor's representative referred me to the following decisions: *MacLean* (Board file 166-2-22580); *Guay* (Board file 166-2-24899); *Gaw* (Board file 166-2-3292); *Nolan* (Board file 166-2-25229); *Marchand and Segall* (Board files 166-2-25869 and 25870) and *Massip v. Canada* (1985) 61 N.R. 114.

Counsel for the employer stated that there was no misconduct involved in the employee's actions, nor were the employee's actions culpable in any way. Therefore, the employer's response could not be termed disciplinary. The issue concerned a performance problem dealing with Mr. Smith's personality and management dealt with it in an administrative fashion which it is entitled to.

The threats to Mr. Smith's life meant he could not return to his unit where he had contact with the inmates. Mr. Smith himself recognized that fact. As there was no evidence produced to show that there were other CX-2 positions available, and as the union carried the burden of proof in this case, it can not be concluded that a simple transfer was open for consideration.

The investigation recommended that Mr. Smith be transferred to another Institution, and in fact, this is what happened following the removal of the acting assignment. This was based on the report's finding that there was a widespread negative perception by inmates of Mr. Smith which would have implications on his safety. The report also found there was some concern about Mr. Smith's ability to deal effectively with offenders and this may have some impact on the situation.

Armed with this report, the employer was faced with a decision. Mr. Smith could not go back to a position involving inmate contact so the employer put him back to his substantive level in posts that did not entail contact with inmates. It was not up to the employer to create positions at the CX-2 level when it was open to them to revert

Mr. Smith to his substantive level. It was an administrative response and as such counsel urged me to conclude I lacked jurisdiction to hear the merits.

### Decision

In order to answer the question of whether or not I have jurisdiction to hear this matter, I must firstly look at subsection 92(1)(b)(i) of the *PSSRA*, which reads:

*92. (1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to*

...

*(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant to subsection (4),*

*(i) disciplinary action resulting in suspension or a financial penalty, or*

...

*and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication.*

This means I must find that there was disciplinary action taken and that this action resulted in a financial penalty.

After reviewing the facts of this matter, I find that I lack jurisdiction to hear the grievance. The employer's administrative procedure placed Mr. Smith in an acting CX-2 position initially. Nothing guaranteed that he would remain acting indefinitely. There had been some concerns noted with respect to certain aspects of Mr. Smith's performance but it was not until a petition signed by some 150 inmates was received that a review was undertaken. The petition alleged an abuse of authority.

The findings of the review showed that there were a higher than normal number of inmate complaints lodged against Mr. Smith. I accept that on the face of it, this could be a reaction to an extremely efficient and vigilant employee. However, in this case some of the complaints were found to be justified. It is noted that the review also finds that the management of Mr. Smith was lacking. It was recommended that he be transferred where these shortcomings could be better addressed, and in doing so, it

was open to the employer to find other positions at the CX-2 level, revert him to a CX-1 or any other action for that matter that would address the performance issue. Whether I agree or not with the employer's decision to revoke that acting assignment is not in issue unless it could be demonstrated that the action taken was disciplinary in nature. Nothing indicates this to be the case. Everyone, including the grievor, agreed he could not go back to his unit where the death threats had emanated from. The employer had to find other duties for Mr. Smith to do, and this it did by moving him back to his substantive level and also giving him assignments which did not place him in contact with inmates.

In Canadian Labour Arbitration, (Third Edition), by Messrs. Brown and Beatty, at p. 7-157, 7:4210, the views of discipline are outlined, saying:

*... the essential reason justifying disciplinary action is misconduct and the purpose is to punish. Other arbitrators have suggested that the term discipline is generally referable to "that type of action by an employer which constitutes its response to behaviour which is of a culpable nature and which may be amenable to correction through the institution of some kind of disciplinary penalty". ...*

In the instant case, I have not been shown that the grievor's behaviour was culpable. What I have been shown is that there was an administrative action taken by the employer to respond to two death threats as well as an allegation of abuse of power. This alleged abuse of power arose as a result of the grievor lacking the necessary managerial skills to effectively deal with the inmates. The employer's response involved moving Mr. Smith back to his substantive level and providing him with certain secure duties. While it may have been open to the employer to move Mr. Smith to another position which equated to his acting level, there was no obligation to do so. The evidence does not support the claim that the action taken was a disciplinary response on the part of the employer. Therefore, I cannot accept jurisdiction in this matter.

**Joseph W. Potter,  
Board Member**

OTTAWA, September 22, 1997.