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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

SHERYL LEWCHUK

Grievor

and

TREASURY BOARD
(Solicitor General Canada – Correctional Service)

Employer

Before: [Francine Chad Smith, Board Member](#)

For the Grievor: [Lee Bettencourt, Representative](#)

For the Employer: [Asha Kurian](#)

Heard at Saskatoon, Saskatchewan
March 4 and 5, 2001

INTRODUCTION:

[1] On October 9, 1998, the grievor, Sheryl Lewchuk, a nurse at the Saskatchewan Penitentiary, was suspended for five days without pay for refusing to perform her duties during a time of crisis. On April 26, 1999 the Assistant Deputy Commissioner, Prairies, rendered a decision at step three of the grievance process reducing the suspension to three days because the grievance raised the issue of a safety concern pursuant to Part II *Canada Labour Code*. Nevertheless, the grievor chose to pursue her grievance requesting the suspension be set aside, that she be compensated for certified sick leave taken following the suspension, and that the record of the disciplinary action be removed from her file.

[2] At the beginning of the hearing, counsel for the employer raised an issue with respect to the jurisdiction of the adjudicator pursuant to section 91 of the *Public Service Staff Relations Act* because of the Part II *Canada Labour Code* issue raised on behalf of the grievor during the grievance process. In the course of opening statements, there appeared to be a question as to whether or not Part II of the *Canada Labour Code* had been invoked. This issue was canvassed at the beginning of the hearing and again during argument. Following the presentation of the evidence, the position of the representative of the grievor was that Part II had not been invoked by the grievor and accordingly, he accepted the jurisdiction of the adjudicator to address the issue.

[3] An order for the exclusion of witnesses was requested and granted.

[4] A significant piece of evidence in this case was three video tapes recording the activities on the range of the women's unit at the penitentiary throughout the evening and early morning hours in question. Although the tapes were tendered as part of the employer's case, the representative of the grievor also relied upon them and urged me to review them following the hearing, which I did.

FACTS:***The case for the employer:***

[5] The case for the employer was presented through two witnesses: Ms. Brinda Wilson-Demuth, a Unit Manager of the women's unit at the Saskatchewan Penitentiary, and Ms. Brenda LePage, the Warden at Saskatchewan Penitentiary.

[6] Ms. Wilson-Demuth described the incident that was underway in the women's unit on September 23, 1998, which ultimately led to her giving a direct order to the grievor, who is a registered nurse employed at the penitentiary, for the delivery of treatment to Inmate D, which the grievor refused to carry out.

[7] Ms. Wilson-Demuth received a telephone call at home from the Deputy Unit Manager, Mr. Eugene Stephens, advising her that a disturbance was underway. Ms. Wilson-Demuth decided to attend at the penitentiary. On her arrival, she received a briefing from the Deputy Unit Manager. According to the Deputy Unit Manager, the disturbance involved two female inmates. Apparently it arose because Inmate D's request to make a phone call had been denied. There was a suspicion at the time that she, and possibly Inmate P, were both in 'a state other than normal'. That is that one, or both of them, had ingested alcohol, drugs, or some other substance that was mood altering. The inmates had thrown items from their respective cells, lit small fires, and were shouting profanities. Inmate D had also broken her television, which resulted in glass being scattered in her cell and on the range.

[8] On her arrival at the range, Ms. Wilson-Demuth noted the air was still a little smoky - even though the windows had already been opened; and the two inmates were yelling obscenities and had made threats to slash themselves. At that point, Ms. Wilson-Demuth was not sure whether there had been any self-injury to the inmates. After requesting fans be brought in to clear more of the smoke, she walked down the range in front of the cells and assessed the situation with a view to determining the risk. She made visible contact with the women and spoke with Inmate D who was more upset than the other inmate. Both inmates were quite angry and told her, using obscene language, to leave.

[9] By this time there had been quite a number of staff gathering at the barrier, being the entranceway on to the range. Ms. Wilson-Demuth asked the staff to leave in order to facilitate establishing calm. She advised the remaining staff that for the time being no action would be taken and they would be engaging in passive intervention, hoping the passage of time would defuse the disturbance. At her request, the video camera continued to run in accordance with general operational procedure during disturbances. Ms. Wilson-Demuth concluded there was no immediate risk to either of the inmates, that the unit staff were safe behind the barrier, and accordingly, there was no need to take action.

[10] Because the disturbance continued, Ms. Wilson-Demuth subsequently requested native elders be brought in to assist. Two elders arrived at the range at 9:52 p.m. to work with the two inmates. At the time Ms. Wilson-Demuth's concerns were that it appeared the two inmates had already slashed their arms with glass during the evening, and they were threatening to slash themselves again. However, there was no immediate concern about the inmates' self-inflicted injuries, the slashes being only on their forearms. There was some concern about whether the two inmates had glass on their persons. The elders spoke with the two inmates about that issue and reported back to Ms. Wilson-Demuth that they did not have glass on their persons, although glass still remained on the cell floors. After about an hour or an hour and a half, the elders reported back to Ms. Wilson-Demuth that in their view the incident was over and there would be no more trouble for the rest of the evening. Ms. Wilson-Demuth testified that she had determined this was the case even before the elders reported to her.

[11] It is particularly significant to note that a few minutes after the elders arrived on the range everything became very quiet. Therefore, the total period of calm was two hours before the request for the delivery of medical treatment was made to the grievor, which was immediately followed by the order for delivery of treatment. (This evidence was verified by the video tapes, Exhibit E- 1: tape # 2 at 9:52 pm to 9:54 pm. and tape# 3 at 12:03 am.)

[12] Appreciating the incident was over, Ms. Wilson-Demuth had to make a decision as to what she was going to do with the two inmates. Her primary concern was that they required some medical care. She did note the need for medical care was not too extreme; however, one of the inmates had a large and gaping wound. In discussing the situation with the elders, being particularly concerned about whether there was a risk of suicide, which would necessitate one or both of the women being placed in the observation cell, Ms. Wilson-Demuth was advised that both inmates did not want to be moved and definitely did not want to be placed in the observation cell. Following consultation with the Deputy Unit Manager, she decided the two inmates would remain in their cells; however, first they would individually be taken into the chaplain's office for medical attention and during that time, the staff would enter the cells and remove debris and conduct further inspections before the inmates were returned to their cells.

[13] This plan was communicated to the correctional officers who indicated they did not like the plan and felt the inmates should be strip searched and placed in the observation cell. Ms. Wilson-Demuth testified this was the first time she had met with resistance like this from the correctional officers and she was really taken aback. Comments were made to her that she would lose her credibility as a unit manager if she proceeded with her intended plan.

[14] The grievor advised Ms. Wilson-Demuth that she wanted the inmates to be strip searched and would only see them if they were strip searched and behind a barrier or bars. After discussing the situation further with the Deputy Unit Manager, who suggested that they should conduct a strip search to satisfy the staff, Ms. Wilson-Demuth testified she was initially thinking of changing her mind. However, ultimately she decided to remain steadfast with her plan for a number of reasons:

1. The opposition from the correctional officers did not appear to be well founded;
2. The types of comments being made that she would lose credibility and respect among the staff concerned her;
3. She really had serious concerns about the appropriateness of a strip search and placing the inmates in the observation cell in light of Correctional Service policies stemming from research done in relation to women offenders;
4. The staff's attitude disturbed her;
5. She had received information from one correctional officer on the unit that the other correctional officers were out to test her; and
6. She was a crisis manager and felt that she had made a full risk assessment taking into consideration the safety of the staff and the offenders.

[15] Ms. Wilson-Demuth then telephoned the Deputy Warden, who was Ms. LePage at the time, to brief her. During the briefing Ms. Wilson-Demuth mentioned the staff's opposition to her proposed plan and the concerns raised by the grievor. It was Ms. Wilson-Demuth's opinion that the staff's concerns were not valid from a health or

safety perspective but were raised because that was the way the staff had always handled these situations.

[16] The then Deputy Warden, Ms. LePage, approved of Ms. Wilson-Demuth's plan with one change: that prior to removing each inmate from the cells, they would be thoroughly patted down. That is, they would have their hair checked, their mouths checked, and their shoes removed, and then the thorough pat down would be conducted. During the conversation with the Deputy Warden, Ms. Wilson-Demuth raised her concerns about possible refusal by the staff to follow her instructions and the Deputy Warden briefed her in the procedure of issuing a direct order, including what to say and how to say it.

[17] Following that telephone discussion with the Deputy Warden, Ms. Wilson-Demuth briefed the staff. The briefing was conducted in the classroom with about ten to twelve staff present. The procedure was thoroughly explained and Ms. Wilson-Demuth also advised of the rationale for the procedure; specifically, that there was no need for a strip search and that strip searches were to be avoided because of the negative impact they had on women offenders. In this regard, she advised the staff of her training background, including research she had done with respect to the treatment of women offenders. Ms. Wilson-Demuth indicated that it was clear from the staff's body language at that time, and throughout the entire evening, that they were not happy with her. There was no indication of fear – just rebelliousness. No one said they were afraid or made any statements to that effect. A number of the staff did express concern about what would happen if the two inmates had glass in their hands or on their bodies, to which Ms. Wilson-Demuth responded that the thorough pat down would address the issue, and explained that even if glass were hidden internally in their bodies, a strip search would not have located it.

[18] She testified that at the time she was aware of the procedure to follow in the event a member of the staff refused to follow instructions relying on Part II of the *Canada Labour Code*.

[19] Just prior to the briefing, two staff members had approached her and said they were prepared to escort the two woman inmates, provided Ms. Wilson-Demuth gave them a direct order in front of their peers.

[20] Following the briefing, Ms. Wilson-Demuth requested the two officers who had approached her earlier to move Inmate D. They shook their heads in a negative fashion. Ms. Wilson-Demuth then said to them “I’m giving you a direct order” and the two officers then went to Inmate D’s cell, conducted the pat down as directed and escorted her to the chaplain’s office along with the elders. Once they were in the chaplain’s office, the elders advised Ms. Wilson-Demuth that they preferred to be alone with Inmate D and accordingly, the two correctional officers were asked to stand outside the chaplain’s office. Ms. Wilson-Demuth then left to speak with the grievor.

[21] She testified that both she and Deputy Unit Manager Stephens then spoke with the grievor in the correctional supervisor’s office. The supervisor’s office has glass windows which allow persons inside to observe what is happening outside. Ms. Wilson-Demuth told the grievor she wanted her to provide medical attention to Inmate D who had undergone a thorough pat down, and had been escorted by two correctional officers to the chaplain’s office where one of the elders was and where she herself would also be in attendance.

[22] The grievor responded by saying “No, I won’t do it”. She said she wanted the inmates to be strip searched and behind a barrier when the medical attention was delivered. Ms. Wilson-Demuth then asked if medical attention would be provided if Inmate D was just strip searched and the grievor responded no she would still require the inmate to be behind bars. At that point, Ms. Wilson-Demuth gave her a direct order stating, “I am giving you a direct order to provide medical care to the two offenders in the manner described and this order is coming from the Warden in consultation with the Deputy Warden”. The grievor’s response was “No”.

[23] Ms. Wilson-Demuth described her observations of the grievor during the foregoing exchange. She noted the initial refusal to comply with the request was made very quickly and without hesitation. It seemed to her that the grievor had a half smile or smirk on her face. The grievor did not appear fearful, anxious or upset. Ms. Wilson-Demuth testified she was a little taken back by the grievor’s nonchalance. Her observations were the same following the direct refusal and there was no explanation provided by the grievor for her refusal to comply with the direct order.

[24] Either Ms. Wilson-Demuth or Deputy Unit Manager Stephens advised the grievor she would be sent home and that a disciplinary procedure would be commenced. However, she was requested to remain on the premises until another nurse arrived.

The grievor cooperated in suggesting that they contact Ms. Lisa Elder, another nurse, who arrived approximately half an hour later.

[25] Ms. Wilson-Demuth briefed Ms. Elder on what she wanted her to do. She felt the briefing was not done as well as she would have liked because the grievor remained in the room and interrupted a number of times, commenting that the situation was unsafe and that Inmate D had slashed herself that evening. Ms. Wilson-Demuth asked the grievor to leave so that she could continue with her briefing. After the grievor left the office, there were a number of knocks on the door, which were ignored. Then there was a signal from the grievor that Ms. Elder had a phone call and Ms. Wilson-Demuth advised her to take the call. During the course of taking the telephone call outside the supervisor's office, Ms. Wilson-Demuth saw Ms. Elder speaking to the grievor. When Ms. Elder returned to the office, the briefing was completed and she was asked if she would provide the medical care requested. Ms. Elder agreed, although she testified that she did not like being placed in a situation where she was going against her colleague.

[26] Ms. Wilson-Demuth and Ms. Elder then went to the chaplain's office. Ms. Wilson-Demuth sat next to Inmate D while Ms. Elder provided the required care. There was no incident while the care was being provided and the inmate was subsequently returned to her cell.

[27] The second inmate, P, refused to leave her cell for medical care; however, she did agree to allow the nurse to approach her cell. Ms. Elder attended on the range outside Inmate P's cell and provided her with medical supplies to cleanse and bandage her wounds. Again, during this time all remained quiet.

[28] Ms. LePage, the Warden at the Saskatchewan Penitentiary since February 2000, testified. At the time in question, she was the Deputy Warden. She noted that the women's unit at the Saskatchewan Penitentiary opened in 1996 and is a high profile specialized unit. Therefore, it was not unusual for her to receive a call during an incident of this nature. She testified that she spoke on three occasions with Ms. Wilson-Demuth on September 23, 1998 regarding the incident.

[29] During the first call from Ms. Wilson-Demuth she was advised that the elders had been called in to de-escalate the situation. She described the status at that time as

being one of assessment and containment, and accordingly, it appeared the inmates could carry on all night unless there was a risk of grievous bodily harm.

[30] During the second call she received from Ms. Wilson-Demuth, she was advised that the elders were in and everything was calm. Ms. LePage indicated that it was clear from the phone line at the time that things were quiet and going well. When Ms. Wilson-Demuth called Ms. LePage the third time, the inmates were ready to come out of their cells and Ms. Wilson-Demuth wanted directions. In this regard, Ms. LePage indicated that it was clear throughout the evening that Ms. Wilson-Demuth was dealing with a lot of resistance from the staff, who were insisting on a strip search and other very restrictive measures. She indicated that Ms. Wilson-Demuth was concerned about the staff refusing to follow directions relying on Part II of the *Canada Labour Code*. Warden LePage explained in her testimony that it is often easier and clearer for everyone involved if the staff does utilize the Part II procedure; however, it appeared they did not on this occasion.

[31] Ms. LePage's opinion was that Ms. Wilson-Demuth was trying to manage the inmates and the staff. Ms. LePage indicated that it was not unusual for that particular unit to have this type of problem. They had had similar problems in the past because the staff didn't appear to understand that the procedure for treating federally sentenced women is very different from that of dealing with men. It was her view that the conduct of the staff was reflecting the institutional resistance, which had developed because the Saskatchewan Penitentiary had initially been a male only institution. Warden LePage addressed the philosophy of dealing with women inmates and indicated that it was her view, under the circumstances, that there was no risk that could not be managed given the measures she directed Ms. Wilson-Demuth to put in place.

[32] Although she was not at the institution during the incident, she rated it at its peak as a 2 or 3 on a scale of 1 to 10. Once calm had been restored and the staff was instructed to remove the inmates from their cells, it was her opinion that the incident rating was a 0 or 1.

[33] Warden LePage also testified that she was the person who imposed the five day suspension on the grievor and she explained the considerations and reasons for that decision.

The case for the grievor:

[34] Following the presentation of the case on behalf of the employer, the representative of the grievor presented his case through the evidence of the grievor and Ms. Lisa Elder.

[35] Most of the evidence of the grievor, Ms. Sheryl Lewchuk, describing the incident in question and the various phases of it throughout the evening, was consistent with that of Ms. Wilson-Demuth and the facts that were apparent from the videotapes. Accordingly, I shall proceed to focus on those portions of her evidence that were different from that of Ms. Wilson-Demuth and those portions that described her specific involvement, perception and concerns.

[36] The grievor had been employed as a nurse at Correctional Service Canada, Saskatchewan Penitentiary, for approximately 2½ years as of September 1998 when the incident occurred. Her shift started that day at 3:00 p.m. and she was called to the women's unit at approximately 6:00 p.m. to assess the condition of Inmate D. On her arrival in front of Inmate D's cell, it was very apparent that Inmate D did not want the grievor there. Inmate D asked the grievor why she was there and said, "you did this the last time". From that statement the grievor concluded Inmate D recalled her involvement in a similar incident four days previously. Inmate D refused to cooperate with the grievor, was belligerent toward her, and swore at her. The grievor concluded that Inmate D was in 'a state other than normal'.

[37] The grievor was called back to the range about a half hour later because the Unit Manager (or as I concluded, probably the Deputy Unit Manager) was discussing moving Inmate D to the music range. The grievor remained on the range for about 20 minutes at that time before Inmate D changed her mind and decided she would not go to the music range. During this time, Inmate D and Inmate P were yelling back and forth, Inmate P's stereo was turned up, and Inmate D was demanding a telephone call, throwing things out of her cell, being very vocal and screaming at the staff. Later in the evening, Inmate D told the grievor she wanted her off the range, swore at her, and threatened to kill her.

[38] When she was first called on to the range for the initial assessment, the grievor thought she would have a problem with Inmate D because Inmate D apparently did not like her. Later, after Inmate P slashed herself, when the grievor went near her cell to

assess her, accompanied by a guard holding a shield, Inmate D threw coffee at her. The coffee was cold; it hit the right side of her face and her white jacket. At this point the grievor felt that she had had enough; it seemed to her that this disturbance was just a continuation of the incident that occurred some four days previously. She remained on the unit and subsequently witnessed Inmate D breaking her television and saw the fires being lit. She testified she couldn't believe the disturbance was continuing.

[39] During a similar incident four days earlier, also involving inmate D, the grievor had remained on duty for 16 hours and there had been no debriefing following that incident. The grievor testified that she was scared. She had felt she had had enough and she didn't want to get too close to either inmate, particularly Inmate D, who continued to threaten her and shout that the nurse should get off the range.

[40] On a rating scale of 1 to 10, with 10 being the most extreme level, in light of the loud music, the screaming, the yelling and everything else, the grievor rated the incident as a 9. She indicated that she had never had liquid or coffee thrown at her before, nor had anyone made direct threats to her before. Sometime after the disturbance, the grievor pressed a criminal charge of assault against Inmate D, to which D entered a guilty plea. (See Exhibit U-16, copy of certified copy of Information and Endorsements.)

[41] The grievor testified with respect to the ongoing incident briefings, and the request and direct order to provide medical treatment to the inmates. Her evidence in this regard was disjointed and not as clear as perhaps it could have been. Accordingly, I carefully reviewed the totality of her evidence. I included in my review the hand written statement the grievor wrote following the incident, which was attached to her grievance (Exhibit E-8). While I appreciate the evidentiary value of that statement is questionable, it confirmed my independent conclusions regarding the facts she testified to. In addition, because of the discrepancies between her evidence and that of Ms. Wilson-Demuth, coupled with the fact Deputy Unit Manager Stephens was not called as a witness, it was necessary for me to review all potential sources of evidence, and weigh them, to arrive at findings of fact that provide the underpinnings for the issues of this case. My conclusions regarding her evidence of the critical sequence of events follows.

[42] Initially, the briefings were informal, on a one-to-one basis. Her understanding of the instructions received at one point from Ms. Wilson-Demuth was that there would

be a quick pat down and the inmates would be escorted to the chaplain area for medical attention. She expressed concern for her safety. She mentioned the coffee being thrown at her, that Inmate D made threats to kill her, that the correctional officers were concerned about glass being in the inmates' pockets, and that she felt the inmates were still in 'a condition other than normal'. When Mr. Stephens walked into the room, Ms. Wilson-Demuth advised him that the grievor wanted a strip search conducted and to provide treatment while the inmates were behind a barrier. She understood from Mr. Stephens that the strip search and delivery of treatment behind a barrier would not be a problem and accordingly, she assumed that was going to be the procedure.

[43] The grievor testified that although she didn't know what Inmate P had used to slash herself, she knew Inmate D had slashed herself using a piece of glass. She also testified that at one point in the evening three of the correctional officers told her they saw D put a piece of glass into her pocket.

[44] Just prior to the final briefing in the classroom, Deputy Unit Manager Stephens told the grievor she was not allowed to go in because the meeting was to address security. Everyone else went into the classroom while she sat in a side office. Following that last briefing meeting, she testified she was told by Ms. Wilson-Demuth and Mr. Stephens that there was going to be a quick pat down, arms and legs, and the inmates would be escorted one at a time to the chaplain's area where she was to provide medical attention. Upon Ms. Wilson-Demuth, requesting her to provide treatment in this fashion, the grievor replied no. Ms. Wilson-Demuth then gave her the direct order, to which she also responded no.

[45] The grievor testified she believed she could refuse if she felt the work conditions were unsafe. Following her refusal, one of the correctional officers gave her a card that had the *Canada Labour Code* Part II safety information on it; however, she did not take any specific action as a result.

[46] When Ms. Elder came on to the range the grievor advised Ms. Elder that she personally was in danger because of the coffee being thrown at her, the threats to kill her, the fact that Inmate D was in a condition other than normal, and because the inmates could have glass in their pockets.

[47] While Mr. Stephens and Ms. Wilson-Demuth were briefing Ms. Elder, Mr. Stephens said Inmate D needed medical attention now and Elder asked why, and then Ms. Elder asked whether Inmate D was cuffed, to which Ms. Wilson-Demuth replied no. The grievor said at that point she said, "I wasn't offered cuffs".

[48] The grievor testified that she was concerned for Ms. Elder, particularly because she had not been informed of the whole story. Accordingly, she felt she should explain it to Ms. Elder.

[49] She said Ms. Wilson-Demuth and Mr. Stephens told Ms. Elder there would be a thorough pat down, and the inmates would be escorted by two guards, the elders and Ms. Wilson-Demuth. Upon hearing that, the grievor said she stated, "I wasn't offered that". At that point, she was asked to leave the office and told to go home and that she would be under disciplinary investigation. She left the office and then a phone call came through for her, which turned out to be for Ms. Elder.

[50] The grievor testified she left for home around 12:30 a.m. on September 24, 1998. During the course of the evening and when she was leaving, no one asked her how she was. Upon her arrival at home, she wrote her report that was attached to the record of discipline. Following the incident, she testified she felt sick to her stomach for about three days and was unable to sleep or eat. She was off work during the investigation and then took additional time off. She said that she would have liked to have taken more time off but was told it was best to get back to work and her regular routine.

[51] In cross-examination the grievor testified that she had been on duty during a lot of incidents that occurred in the women's unit. She also testified that the correctional officers were not happy about the decision made by Ms. Wilson-Demuth to follow passive intervention. The correctional officers felt there should be active intervention and strip searches conducted, and she agreed with their position. She acknowledged that she heard the correctional officers talking about pulling a Part II and understood that was a refusal to work under unsafe conditions; however, she was not aware of what the procedure for it was. She acknowledged during cross-examination that she spoke with Ms. Brenda Cripps, who was an executive member of the bargaining agent for the correctional officers, to find out if she could refuse to work and was told she could if the conditions were unsafe. She also acknowledged that in incidents where nurses are required to give care, the inmates are escorted by two correctional officers;

nevertheless, she maintained she was still afraid for her safety but did not advise Ms. Wilson-Demuth or Mr. Stephens of that concern when she was given her direct order. Even when she was told to leave the workplace, and once she had received a card with section 128 of Part II of the *Canada Labour Code* on it, she still did not advise the supervisors of her specific concern or invoke her right to refuse work under unsafe conditions. She testified that at that time she assumed they knew why she had refused to carry out the direct order.

[52] The grievor also acknowledged during cross-examination that she had spoken earlier with Ms. Elder on the telephone because Ms. Elder was the president of the nurses' union local. She also said she gave the card to Ms. Elder before she left.

[53] Ms. Elder has been employed as a registered nurse at the Saskatchewan Penitentiary since 1991. She testified she received a telephone call from the grievor about the incident that was occurring in the women's unit and that the grievor expressed her concerns about safety. Later on she received a call from Mr. Stephens asking her to come in to check the arms of the inmates. Upon asking if there wasn't a nurse there already, Mr. Stephens replied there was no one who could check the arms. Ms. Elder then said she asked again if there wasn't a nurse there and was told there was not. This concerned her because she knew the grievor was there. Nevertheless, she went in worrying about whether everyone was okay and whether she would be able to deal with the situation.

[54] Upon her arrival, she went directly to the supervisor's office where Ms. Wilson-Demuth, Mr. Stephens and the grievor were. Ms. Elder was told that there had been a disturbance; that one inmate was ready to have her wound looked at but the grievor had refused to give medical attention; and Ms. Elder was asked if she would provide the medical treatment. At that point, the grievor pointed through the glass to the disarray on the range stating, that that, and the fact a strip search had not been conducted were the reasons she refused. The grievor said she was concerned about weapons, an inmate had spilled coffee on her and was still in 'a condition other than normal', and there was still yelling at the time.

[55] Ms. Elder was asked if she would treat the inmate. In response she asked if the inmate was cuffed and received a negative reply. She then asked if the inmate could be cuffed, and following a long pause, she was asked again if she would treat the inmate. She replied she could but would prefer the inmate to be cuffed. At this point,

Ms. Wilson-Demuth said the inmate would not be cuffed because we've been ordered to use the least force possible. There was a pause after which Ms. Wilson-Demuth and Mr. Stephens advised Ms. Elder that the inmate would be in the chaplain's office with an elder, two correctional officers, and Ms. Wilson-Demuth. At that point, according to Ms. Elder, the grievor stated, "Two security officers were never offered to me", and Ms. Wilson-Demuth responded, "Yes, they were". The grievor then said, "Well I didn't know that they were". Again there was a pause and Ms. Elder testified that she felt the tension between the grievor and the supervisors. Ms. Elder then looked at the grievor and said, "Well if there are two security officers there, let's do it". Mr. Stephens then replied in the negative saying that the grievor was to go home and was facing disciplinary action. Then the grievor left.

[56] There was some knocking on the door. Mr. Stephens said two or three times that the inmate needed medical attention now. Then there was more knocking and an indication that there was a phone call for Ms. Elder. The call was from Ms. Brenda Cripps who advised her that under Part II of the *Canada Labour Code*, she didn't have to do the work if it was unsafe. Ms. Elder testified that she did not know anything about Part II and that she did not know who Brenda Cripps was. In any event, she went back into the office and said she would treat the inmates if two officers were present and the inmate extended her arms between them.

[57] Ms. Elder then testified about going down to the chaplain's office to treat Inmate D. She was surprised to see that Inmate D already had a dry and intact dressing on her arm. She opened the dressing, cleansed it and then bound it with steri-strips. Inmate D appeared agitated, had glassy eyes and slurred speech, and fidgeted. Ms. Elder did not apply one steri-strip satisfactorily and wanted to remove it and do it again; however, Inmate D refused and told her to just leave it alone. It was Ms. Elder's opinion that Inmate D was in a condition other than normal, and she expressed her concern to the supervisors about returning D to a cell, thinking that perhaps she should be placed in the observation cell. Inmate D was returned to her cell and it was at that point that Ms. Elder said she didn't understand why she could not have done the dressing through the bars of the cell.

[58] Some time later Inmate P agreed to have treatment; however, she was only prepared to accept supplies to treat her own wounds. Ms. Elder gave her the supplies. Later on Inmate P allowed Ms. Elder to dress the wounds by extending her arms

through the bars. Ms. Elder acknowledged this was not the optimal way to deliver treatment but it was done where the inmate was volatile or demonstrated aggressive behaviour.

[59] The two inmates settled down and Ms. Wilson-Demuth and Mr. Stephens went home, but asked Ms. Elder to remain.

[60] Ms. Elder testified that the situation was awful and in giving her testimony she was still emotional about it. Following the incident she did not go back to work for a few days because she was unable to sleep or eat.

[61] Ms. Elder described the grievor that night as appearing pale, her eyes being huge. She also noted the grievor was biting her lip and was wearing a stained lab coat.

THE ARGUMENTS:

The employer's position:

[62] Counsel for the employer relied upon the following authorities: *Canadaian Labour Arbitration* by Messrs. Brown and Beatty, paras. 7:3610 to 7:3621; *Légère and Treasury Board (Solicitor General Canada - Correctional Services)*, [1989] C.P.S.S.R.B. No. 1 (Q.L.), Board file 166-2-17971; *Scott C. Montani and Canadian National Railway Company (CN North America)* (1994), CLRB Decision No. 10998, Board file: 950-292; *Sherbert and Treasury Board (Solicitor General Department)*, [1984] C.P.S.S.R.B. No. 54 (Q.L.), Board file 166-2-13696; *Stout and Treasury Board (Department of Solicitor General)*, [1982] C.P.S.S.R.B. No. 188 (Q.L.), Board files 166-2-13053, 13110 and 13114.

[63] She argued the case of insubordination was clear cut in this case. That being so, the onus to establish reasonable grounds for refusing to obey a direct order shifted to the grievor. Acknowledging that health and safety is one of the exceptions to the principle that direct orders must be obeyed, she argued the evidence failed to establish the grievor met the test required to justify a refusal to obey a direct order. That is the refusal must be based upon a reasonable belief that her health and safety were in jeopardy, and that reason must be communicated to the supervisor in a reasonable and adequate fashion.

[64] Counsel for the employer relied upon the fact the grievor had been involved in previous disruptive incidents of the same nature at the penitentiary, that she had not

been requested to provide treatment during the height of the disturbance, that the request had not been made until calm had been established for two hours, and that suitable safeguards were in place. The grievor was initially requested to provide treatment, and only ordered to do so after her refusal. Counsel invited the adjudicator to find the grievor's refusal was not *bona fide* and was made in the context of a power struggle between management and the other employees regarding the employees' preferences for handling the inmates. Furthermore, she suggested the intent to refuse to provide treatment was formed well before the request and the order were made.

[65] Counsel emphasized that while nurses and guards may have preferences for how medical treatment should be provided to inmates and how the inmates should be handled, it is not their prerogative to dictate or otherwise expect their preferences to be met. Lastly, counsel referred to the need to maintain strict discipline for staff in penal institutions because of the potentially serious ramifications that may otherwise occur.

Position of the grievor and union:

[66] The representative of the grievor argued the employer had failed to prove that a clear order was communicated to the grievor. The grievor did not understand a thorough pat down of the inmates would be conducted or that two correctional officers would be present during the administration of treatment. Furthermore, the concern for her safety was an exception to the requirement to obey direct orders and grieve later. The reasonableness of the grievor's position was reinforced by the evidence that the correctional officers resisted the proposed plan of action.

[67] Even though the representative acknowledged Part II of the *Canada Labour Code* had not been invoked, he dwelled on the grievor's concern for her safety. Emphasis was placed upon the high level of the disturbance, the fact the grievor was singled out by Inmate D for particular attention, and the fact there was no urgent need to deliver treatment to the inmates. He also criticized management's approach to the issue of treatment. That is, there was no reason why the concerns of the grievor and the correctional officers could not have been met; and more importantly, the managers failed to follow the employer's own procedures for transferring inmates.

[68] Authorities relied upon were: *Canadian Labour Arbitration* by Messrs. Brown and Beatty, paras. 7:3610 to 7:3621; *Re Steel Co. of Canada Ltd. and United*

Steelworkers, Local 1005 (1973), 4 L.A.C. (2d) 315; *Re Newfoundland and Telephone Co. Ltd. and Telecommunications, Electronic, Electrical, Technical & Salaried Workers of Canada, Local 410* (1987), 31 L.A.C. (3d) 104; and *Re Government of Province of Alberta (Department of Family & Social Services) and Alberta Union of Provincial Employees (Bonnett)* (1991), 19 L.A.C. (4th) 266.

ISSUES:

- [69] 1. Were there grounds for discipline;
- a) Was a clearly understandable direct order given to the grievor;
2. If so, did the grievor have a justifiable reason for failing to comply with the order;
3. If not, was the discipline imposed within the reasonable range for the conduct in issue; and
4. Is it reasonable and just under all the circumstances to substitute a lesser penalty.

REASONS FOR DECISION:

[70] The disturbance caused by the two female inmates on the range was described accurately by both Ms. Wilson-Demuth and by the grievor. The incident was recorded on video tapes between 7:07 p.m. and 12:03 a.m. (Exhibit E-1: Three Video Tapes). The tapes confirm many of the significant occurrences and captured the intensity of the incident in pictures and sound. The significant differences in the evidence are limited to three matters: how serious the incident was; what occurred in relation to the final briefing in the classroom; and how the events unfolded thereafter.

[71] I prefer the collective evidence of Warden LePage and the incident report prepared by Mr. Denis Dymond (Exhibit U-12) regarding the level of intensity of the incident. Although Warden LePage was not present during the incident, she testified that Mr. Stephens telephoned her once during the incident to brief her and that subsequently, Ms. Wilson-Demuth telephoned her three times to brief her. According to the evidence of Warden LePage, she was able to hear the level of noise on the range during the telephone calls. In addition, Warden LePage testified that overall she would

rate the incident at a two or three on a scale of ten. She went on to state that even if one regarded the incident as a ten at its height, then by the time the request to provide medical treatment was made, the incident would have been a zero. The incident report prepared by Mr. Dymond was prepared in the normal course of business at the penitentiary and was placed into evidence by the representative of the grievor during his cross-examination of Warden LePage. Under the heading "incident type" the report notes it was a "minor disturbance". I also viewed the video tapes. Lastly, it appeared from the grievor's own evidence, that she was suffering from a high level of stress that evening as a result of the incident and her recent involvement in a series of similar incidents, which I shall comment upon later on.

[72] Because of the marked difference between the key witnesses' testimony on the latter two matters (what occurred in relation to the final briefing in the classroom; and how the events unfolded thereafter), and a procedural irregularity, when the case for the grievor was closed and counsel for the employer elected not to call any rebuttal evidence, I ascertained from counsel for the employer that Mr. Stephens was still employed and would have been available as a witness. I advised counsel for the employer that in light of the procedural irregularity I would allow her to recall Ms. Wilson-Demuth to address the issues arising from the procedural irregularity. I also advised I was prepared to grant an adjournment if that was necessary.

[73] The procedural irregularity arose when the representative of the grievor introduced evidence that was contrary to that of Ms. Wilson-Demuth, without raising the contrary facts with her during cross-examination. This occurred with respect to two matters. The grievor testified that prior to the final staff briefing in the classroom by Ms. Wilson-Demuth, Deputy Unit Manager Stephens told her she was not allowed to attend it. Then the grievor denied that Ms. Wilson-Demuth had included a complete explanation of the circumstances under which she was requested, and then ordered, to deliver treatment.

[74] Counsel for the employer elected to close her case, noting Ms. Wilson-Demuth was on vacation and could not be reached.

[75] As a result of the presentation of the case, I was faced with a significant dilemma with respect to credibility on a primary evidentiary point - the nature of the request and the order. In addition I had a credibility issue on a secondary point that became more important in light of the primary evidentiary issue. The primary issue

was the precise nature of the request and the subsequent order by Ms. Wilson-Demuth. The secondary issue was whether the grievor had been instructed by Deputy Unit Manager Stephens not to attend the last briefing meeting in the classroom. Naturally, had the grievor been at that last briefing she would have been expected to know about the proposed procedure, understand the reasons for it, and have her specific concerns addressed.

[76] I regarded Ms. Wilson-Demuth as a very credible witness. She delivered her evidence in a calm, assured and forthright manner. Not only was she ready to acknowledge there were some questions she could not answer, she was very careful in qualifying statements of fact where there was some uncertainty in her mind. Ms. Wilson-Demuth has an educational background in psychology and she drew upon that education and experience in delivering her testimony. There was no doubt in her mind, and her evidence was supported by Warden LePage, that the staff on the women's unit that night were challenging her authority. The explanation given by Ms. Wilson-Demuth and the Warden for this challenge was that Ms. Wilson-Demuth was relatively new at the institution and was hired into her position of authority because of her psychology background, as opposed to on the job training or experience in the corrections field. In addition, both Ms. Wilson-Demuth and the Warden were of the opinion the staff preferred the old familiar procedures and were not happy with the employer's efforts to introduce new approaches to handling female inmates.

[77] According to the evidence of both Ms. Wilson-Demuth and Warden LePage, the employer's current approach to the handling of female inmates is to allow them as much dignity and respect as the circumstances will allow. More specifically, strip searches, which are regarded as particularly degrading to women, are to be avoided whenever possible. Confining women to the observation cell is similarly regarded as degrading and is to be avoided whenever possible. And the least amount of force against women is to be used at all times. In keeping with the inter-related themes of dignity and using the least amount of force necessary, delivery of medical treatment should be personal, whenever possible. While the current policy regarding women inmates has been in place since 1995, according to both Ms. Wilson-Demuth and Warden LePage, it has met with considerable resistance at the Saskatchewan Penitentiary. Notwithstanding the resistance, both women appeared to give the policy of utilizing the least amount of force necessary their complete endorsement. As Ms. Wilson-Demuth noted, in her job she must make decisions that are in the best

interests of the inmates while at the same time ensuring the safety of the staff. In crisis situations, as the manager in charge, she collects all the pieces of relevant information and then makes a decision based upon the totality of that evidence. Individual staff members on duty during the crisis may not have all the necessary pieces of information to make a rational decision or judge the decision made.

[78] Following a careful review of Ms. Wilson Demuth's evidence, including cross-examination and re-examination, I accepted her evidence - subject only to one small reservation commented on in the following paragraph. Accordingly, I find that after the last briefing meeting and after Inmate D had been patted down and escorted to the Chaplain's office by two correctional officers and accompanied by an elder, Ms. Wilson-Demuth and Mr. Stephens spoke with the grievor in the supervisor's office. Ms. Wilson-Demuth told the grievor she wanted her to provide medical attention to Inmate D, who had been moved to the Chaplain's office by two officers, had been thoroughly patted down, and that both she and an elder would also be there. The grievor responded, "No, I won't do it", and advised she wanted a strip search done and wanted the inmate behind a barrier. Ms. Wilson-Demuth then asked if she would provide treatment if a strip search was done and the grievor responded in the negative insisting upon a barrier. It was at this point that Ms. Wilson-Demuth advised the grievor, "I am giving you a direct order to provide medical care to the two offenders in the manner described and this order is coming from the Warden in consultation with the Deputy Warden". The grievor responded "No". Ms. Wilson-Demuth testified the grievor's refusal of the request was made very quickly. She offered no reason for her refusal and did not appear fearful, anxious or upset.

[79] Regarding Ms. Wilson-Demuth's evidence that during the exchange the grievor appeared to have a smirk or a half smile of her face, while I accept that to be a fact, I do not accept any negative inference should flow from it. I observed the grievor during the course of the hearing and it appears this is a common facial expression of hers. There was certainly no suggestion in the grievor's demeanour throughout the hearing that she was not taking matters seriously.

[80] The grievor's evidence was that following the final briefing in the classroom (that Stephens did not allow her to attend) she was told there was going to be a quick pat down of arms and legs, then the inmate would be escorted to the Chaplain's office where she was to provide medical treatment. She said she told Ms. Wilson-Demuth she

had had hot coffee thrown at her by Inmate D, that Inmate D had threatened to kill her, that the officers told her P had glass in her pockets, and that both inmates were in 'a condition other than normal'.

[81] It appeared that prior to the last briefing meeting, the grievor had understood there would be a strip search done and medical treatment could be delivered behind a barrier. As she had not been allowed to attend the last briefing meeting, the grievor understood this was still the plan. However, following the meeting, when she was requested to provide medical treatment following a quick pat down of arms and legs, she replied no and then replied no to the direct order. She testified that she thought she could refuse to perform unsafe work.

[82] Cross-examination of the grievor revealed she had been aware of the guards discussing work refusal under Part II (but she didn't know what Part II was) and that she had spoken on the telephone with both Ms. Elder and Ms. Cripps earlier in the evening about refusing to work under unsafe conditions.

[83] Upon reviewing the grievor's evidence, it was clear from both her testimony and that of Ms. Wilson-Demuth, that the assessment of the situation, including the steps to be taken and how medical treatment would be delivered, was an ongoing process involving a number of discussions between the managers and the staff.

[84] Overall I found Ms. Wilson-Demuth to be a more credible witness than the grievor. She was anticipating difficulty from the staff and had received explicit instructions from Warden LePage (then Deputy Warden) about how it should be handled. She testified she had never given a direct order to a staff member before and accordingly, the particular exchange between her and the grievor was very clear in her mind.

[85] Ms. Elder did confirm the grievor's testimony that she had not understood two correctional officers would be present during the delivery of treatment. Ms. Elder recalled the grievor saying "Two security officers were never offered to me", Ms. Wilson-Demuth responding that they were, and the grievor replying, "Well, I didn't know they were offered to me". Ms Elder also testified that upon her arrival at the unit the grievor was pale, her eyes were huge, she was biting her lip and had a stain on her lab coat.

[86] The first evidentiary issue with respect to this evidence is that the grievor's statements were made after she had been advised she would be subject to discipline and her statements were self-serving.

[87] With respect to the issue of two correctional officers being available during treatment by the grievor, in cross-examination, after she confirmed she understood the inmate would be escorted, the grievor acknowledged that the usual escort procedure involves two correctional officers.

[88] Even though I was more inclined to accept the evidence of Ms. Wilson-Demuth, I did not want to dismiss the evidence of the grievor too cavalierly. Some of the reasons Ms. Wilson-Demuth presented herself as a better witness were that she is well-educated, articulate and knowledgeable regarding the women centered policy for handling of female inmates, she appeared to be comfortable in crisis management, and she was confident and comfortable as a witness. In assessing the evidence of the grievor, her testimony that Mr. Stephens precluded her from attending the last briefing meeting was unsettling. Surely as part of the team she should have been there. In addition, I had concerns about why Mr. Stephens was not called as a witness.

[89] I appreciate an important aspect of planning a case is to limit the amount of evidence to that which is required, as time is always a critical element. However, the issue of insubordination in a penal institution is not a trivial matter. Therefore, the failure to call a key witness was unusual. There were only three people present when the request to deliver treatment and the direct order were made. This was the foundation of the case.

[90] If the grievor had been following what was happening, she would have seen inmate D being escorted to the chaplain's office by the two correctional officers and could have even looked down the adjacent corridor to then see the two officers standing outside the chaplain's office. More importantly, I would have thought a person in the grievor's position, who was genuinely interested in furthering the objective of providing treatment to the inmates, would have asked some questions following the request for delivery of treatment because the conditions of the request varied so dramatically from what she understood from Mr. Stephens would have been acceptable.

[91] Having made findings of fact and outlining my reasons for arriving at those findings, I shall now proceed to address the issues raised in argument.

1. Were there grounds for discipline

a) Was a clearly understandable direct order given to the grievor:

[92] The 'work now, grieve later' rule is well established and has been held to apply to a variety of settings, including hospital settings, and to professionals. Even though professionals have obligations pursuant to their codes of conduct and are expected to exercise some independent judgment, their refusals to comply with employers' work directives are subject to arbitral review. (See Brown and Beatty, para. 7: 3600).

[93] According to Brown and Beatty, at paragraph 7:3612, in order to sustain discipline based upon insubordination, the employer must prove:

1. an order was given;
2. the order was clearly communicated;
3. the person giving the order had proper authority; and
4. the employee refused to comply.

[94] The only issue presented by the evidence of this case was whether the order was clearly communicated to the grievor. There can be no doubt the grievor knew she was expected to deliver medical treatment to the inmates and that she refused to do so.

[95] I find the grievor knew the conditions under which she was requested, and then ordered, to deliver the treatment. Even if the grievor had not known what the proposed conditions were, she had sufficient opportunity to clarify the particulars following the request, and then again following the order. As an employee she has an obligation, or duty, to conduct herself in a responsible manner in relation to the operations of her employer. That responsibility, or duty, includes seeking clarification of instructions and orders. Collective bargaining agreements, employment legislation, and labour jurisprudence, are not tools to be utilized by either employers or employees to play games with each other. Those instruments are there to outline the respective rights, responsibilities and duties the parties have to each other. It is imperative that adjudicators, arbitrators and boards, as the initial and primary line of

review of what transpires in the workplace, ensure that all of those rights, responsibilities and duties are in fact adhered to. This is not a unique thought in the labour relations field. However, it is a vital thought for parties to bear in mind throughout the performance of their work and the supervision of the workplace. Furthermore, it is perhaps even more significant for parties to know and appreciate that while the adage about the law being slow to change is still a truism, in light of the dramatic changes in the level of sophistication of many workplaces, the rights, responsibilities and duties of both employers and employees are also changing. See generally *Caralynn Morris and Treasury Board (Correctional Service Canada)*, 2000 PSSRB 55; Board file 166-2-291120, where I concluded the grievor's conduct in failing to clarify her orders during a legal strike at a penal institution warranted the imposition of discipline under the circumstances. At paragraphs 31 and 32, I stated:

The issue then as it relates to discipline generally becomes did the grievor's failure to clarify her position following the delivery of the letter addressed to Officer Findlay with her supervisors or someone else in authority, justify the imposition of discipline. Although a responsible employee would be expected to do so, I am reluctant to make an abstract observation that failure to do so would automatically result in conduct deserving of discipline. However, the particulars of this situation were that the institution's usual operations were constrained because of a strike. Although specific evidence was not tendered with respect to how many less corrections officers the institution had to operate with, it was clear from the evidence of Deputy Warden Brown that the number was less than management thought necessary. Again, while there was no specific evidence, it was also apparent that other usual services were curtailed; and that management personnel excluded from the union and at least some correctional officers were required to remain on the premises to ensure their timely availability. While the institution was not locked down, the strike had a significantly negative impact on its operations requiring management to operate in crisis or near crisis mode. I find Officer Morris was aware of these facts or should have been aware of them.

Under those circumstances, I find her failure to clarify the issue of her status with her supervisor or someone in authority was conduct that could warrant discipline.

2. Did the grievor have a justifiable reason for failing to comply with the order:

[96] Given the conclusion that a direct order was given and the grievor understood that order, the question then becomes whether the grievor was justified in refusing to comply with the order. The grievor relies upon the ground that complying with the order would have endangered her health and safety. This is one of the few exceptions to the 'work now, grieve later' rule. As noted by Brown and Beatty, at paragraph 7:3620, the onus lies with the grievor to establish her circumstances fell within an exception to the rule and to demonstrate that she communicated her reasons for the refusal to the employer.

[97] The time for communicating the reasons for a refusal to work must have a nexus to the delivery of the order. This is especially so in this case because during the course of the evening, there were a number of thoughts relating to how the situation would be handled. In this case, the grievor did not provide a specific explanation for her refusal to comply with the order immediately after it was given. Nor did she even ask any questions about the order. In this regard, Palmer and Palmer in *Collective Agreement Arbitration in Canada*, 3rd Edition, provide the requisite authority, and a compelling explanation, for the requirement at paragraph 7.19:

The final requirement in this area is that the grievor must, at the time of the refusal, communicate the reasons for such refusal to his employer "in a reasonable and adequate manner". The justification for this is, of course, that unless employers know of the reasons for the refusal they cannot examine the question of danger to determine its existence or to attempt to put the grievor's mind to rest if, in fact, there is no danger. As has been noted [in Holland Hitch, 23 L.A.C. 378, at 382-83 (Brandt, 1972)]:

It is only common sense that an employee be expected to communicate in some way his reluctance to carry out an assigned order. If the reason for his reluctance relates to his belief that the task is unsafe then the only way the foreman can decide whether to relieve the employee of the task or to insist on its performance is on the basis of the employee's expressed beliefs. In the absence of such an expression the foreman is entitled to conclude

that the refusal is for reasons which are not legitimate.

[98] If the grievor was genuinely concerned about her safety, in light of her evidence that she had been precluded from attending the last briefing meeting, would it not have been reasonable to expect her to engage in a discussion with Ms. Wilson-Demuth upon initially being requested to deliver medical treatment? The grievor knew the correctional officers were discussing refusing to work relying on safety concerns according to her own testimony. She must have been aware of the numerous ongoing discussions between the managers and the staff about whether a strip search was necessary and whether the two inmates should be placed in the observation cell. Ms. Wilson-Demuth recalls her being present on at least one of the briefing meetings when these issues were being discussed. The grievor spoke with Ms. Elders and Ms. Cripps regarding refusing to work earlier in the evening. If both Ms. Wilson-Demuth and then Deputy Warden LePage knew the staff was challenging Ms. Wilson-Demuth's authority, surely the grievor was also aware of that fact. Following the grievor's refusal to comply with the initial request, even after Ms. Wilson-Demuth asked her if she would deliver medical attention if a strip search was done, the grievor refused.

[99] As Brown and Beatty note in para.7:3621:

... Fear for one's personal health and safety is perhaps the most common reason why employees refuse to obey a supervisor's instructions. In determining whether an employee falls within this exception, there appears to be a firm consensus among arbitrators that the appropriate scope of inquiry should include a determination of whether:

First, did he honestly believe his health or well being was endangered? Secondly, did he communicate this belief to his supervisor in a reasonable and adequate manner? Thirdly, was his belief reasonable in the circumstances? Fourthly was the danger sufficiently serious to justify the particular action he took?

While any of these factors may be put in issue in any given case, most commonly the dispute between the parties centres on whether the employee had a reasonable belief that the assignment was unsafe. Even in those jurisdictions which provide a statutory right for workers to refuse to perform work they have reason to believe will endanger themselves or other workers, that is the ultimate matter in issue. In no case will the liability of the employee to disciplinary sanctions depend on whether the assignment was in fact safe or not.

To the contrary only where an arbitrator or labour board, safety inspector, etc. (if the issue arises under the relevant Occupational Health and Safety legislation) concludes that the employee's fear for his health or safety was not reasonable, would his refusal to work justify the imposition of some disciplinary penalty.

[100] Am I persuaded on a balance of probability that the grievor was concerned for her health and safety? She was aware of the revolt among the correctional officers and may have been unduly influenced by them. She had spoken by telephone with Ms. Elders and Ms. Cripps about refusing to do work if she had safety concerns. The inmate in question had earlier demonstrated a specific dislike of the grievor, had sworn at her, had threatened to kill her, and had thrown cold coffee at her. As a result of that inmate smashing her television, glass was scattered in her cell and on the range. I accept the grievor did believe her health or well being might be compromised. However, the grievor failed to demonstrate, on a balance of probability, that she believed her health or well being were 'endangered'.

[101] As noted in *Collective Agreement Arbitration in Canada*, 3d, Palmer and Palmer, at paragraph 7.16:

Arbitration cases reveal that it is not all "dangers" which are sufficient to justify an employee's insubordination; the stated risk to health must be "serious", it cannot be mere "unpleasantness". Thus, if the grievor refuses an order because he fears some minor injury, this cannot form a basis for a successful defense to a claim of insubordination. Nor can an employee claim the full benefit of the health exception where he has failed to make appropriate arrangements for his own physical disabilities or can be shown to bear a personal responsibility or have his motive impugned.

In this regard some dangers are inherent in a job and, consequently, must be accepted by an employee normally doing that work. However, if an employee does not normally do such work and is unfamiliar with the methods of the operations, the situation may be different. In short, employees may only validly refuse to do work when they may subject themselves to serious injury not normal to their duties. Further, from a qualitative point of view, the "danger" must have been serious enough to justify the refusal. If this "danger" is not shown, discipline may be imposed.

[102] In the *Sherbert* case the grievor was asked to retrieve extra clothing from a cell block. The situation at the penal institution was that inmates had been hoarding

clothing and periodic cell searches were done to retrieve excessive clothing. The adjudicator noted at page 5 as follows:

Work in a penal institution involves a certain risk. It is my opinion that the risk incurred in making a search at 8:15 AM particularly when a guard would be present during the search was insufficient to make the grievor's fear for his safety reasonable.

The fact that the grievor did do the work later does not excuse his refusal to obey a direct order, nor does the fact that he is a clothing supervisor and not a prison guard. Discipline in a penal institution environment is essential and it is very important that direct orders must be obeyed immediately. If found to be unreasonable they can be grieved later unless the criteria of the "four questions" test are met. I do not find they were met in this case.

[103] In the *Stout* case, Board Member and Adjudicator Norman stated at pages 25 and 26 of his decision:

At the conclusion of a lengthy hearing, when all is said and done, the primary adjudicatory task to be faced is one of fact finding. A threshold question must be answered. Was self-preservation at the core of the grievors' refusal to obey the orders given them? I think not. My firm impression, indeed conclusion, is that the acts of insubordination arose in the heat of the moment. And, I use the word heat in both its literal and figurative senses. In all of the circumstances of that torrid morning; with inmates hurling abuse and rocks; openly defying not one, but two direct orders; and with line staff mobilized and ready to act placed in limbo for the best part of an hour, while meetings took place in the white trailer, it stands to reason that the Warden's 'volte face' struck a devastating blow to line staff's morale. I consider Mr. Montgomery's analysis to be representative. Instead of sticking to the original plan and thereby "showing the inmates who was running the jail", Warden Dhillon's decision demonstrated to line staff that "we had lost another one to the inmates". In sum, it was a combination of exasperation and loss of face which culminated in their refusal to obey Mr. Michaloski, and, ultimately Mr. Homer. I suspect that, as well, a contributing factor was a feeling that insubordination was the order of the day. The tone had already been set by the population of Tent City. Not once, but twice, they chose to defy a direct order. And such insubordination not only did not result in discipline, it achieved the very objective desired by the inmates. Perhaps line staff, and in particular the grievors, felt that "what was sauce for the goose, was sauce for the gander". In any case, I am satisfied that, on the whole of the evidence, the grievors' paramount purpose in refusing to carry out the orders given them had to do with matters other than self-preservation. Thus, the defence of justification is not open to them.

Based upon the above finding of fact, a case of deliberate insubordination has been made out by the employer and has not

been countered by the grievors. As to the penalty of two days suspension, I do not consider such a measure of discipline to be unduly severe for the integrity of management was certainly subverted by the actions of the grievors. This challenge to management's symbolic authority, especially in a penitentiary setting, is no trivial matter. A two day suspension is a clear signal to this effect and not inappropriate. See Liquid Carbonic Canada Ltd. and United Steelworkers, Local 12998 (1975), 9 L.A.C. (2d) 52, (Shime) especially at page 54 and argument of the representative of the grievors in Archambault, [PSSRB files 166-2-5141 and 5142 at page 11].

[104] The argument of the employer in the *Archambault* case, referred to in the last sentence of the quotation was set out previously, at page 26 of the *Stout* decision. It is as follows:

Prisons exist in order to protect society and someone must guard the inmates. In the case in question here, these people are the CX-COFs. The duties of these employees necessarily include inherent risks, particularly in a medium- security institution in which the inmates are allowed greater freedom of movement than in maximum-security centres. Risks exist in several locations in the Centre but these risks are normal and they are also accepted by those who are employed in this institution. To a certain extent, the situation of security officers is analogous with, for example, that of policemen, firemen and also employees who work at great heights.

[105] While persons employed in penal institutions, who are not correctional officers, may not have to assume the same level of risk as correctional officers are required to, nevertheless, risk is an inherent element of their job. Furthermore, when they rely upon the safety exception to the 'work now, grieve later principle', not only must they hold an honest belief that their health or well being is 'endangered', that belief must withstand an objective review. That is, the belief that their health or well being is endangered must be one that a reasonable person would hold under all of the circumstances.

3. Was the discipline imposed within the reasonable range for the conduct in issue:

[106] Insubordination is a serious infraction in the workplace because it undermines the authority of management and may interfere with productive operations. Although a penal institution does not have a productive operation in the same way that a manufacturing concern or other typical workplaces may have, insubordination in that setting is regarded as extremely serious because of the inherent dangers in the institutions themselves and because of the responsibility of management to protect

the staff, the inmates and the public, inside or outside the institution. In this case the insubordination occurred during the closure of a crisis. It could have had a negative effect on that closure. The initial penalty of a five day suspension, which might be regarded by some as being at the high end of what is reasonable under the circumstances, was certainly within the acceptable range for discipline in light of the grievor's conduct. In any event, as a result of the representations made at the third level of the grievance process, the employer reduced the suspension to three days, which is even more securely within the reasonable range of discipline in light of the grievor's conduct.

4. Is it reasonable and just under all the circumstances to substitute a lesser penalty:

[107] While I have found, on a balance of probability, that the grievor knew the proposed conditions under which she was ordered to deliver medical treatment, and that finding was contrary to her evidence, I have concluded this was so on the basis that I found other evidence was more compelling than that of the grievor, as opposed to concluding she had fabricated her evidence. As mentioned earlier in the decision, it appeared the grievor was suffering from a higher than usual level of stress during this incident. She testified that was the case. The facts regarding the specific abuse Inmate D directed at her, that she had frequently been on duty when similar incidents occurred around that period of time, and that her last round involving a similar incident lasted 16 hours only four days previously, all support that conclusion.

[108] It is understandable that at one time or another employees may suffer from unusually high levels of stress that impair their ability to cope. When this happens in the workplace, and employees are not able to alter their schedule or specific work to alleviate the situation, they should not be at work. This is particularly so in dangerous or potentially volatile workplaces such as correctional institutions.

[109] The fact the grievor was suffering from an unusually high level of stress specifically attributed to her working conditions is a factor that is proper to consider with respect to mitigation of penalty. If it were simply stress, as opposed to a higher than usual level of stress, the consideration may not factor as significantly in the mitigation equation. Stress is inherent to her job.

[110] Other mitigating factors considered from the grievor's perspective are that she had sufficient experience in the institution (2½ years); there was no evidence of a disciplinary record; the grievor's failure to utilize the two opportunities to raise her concerns about the safety issue; she cooperated with the managers after refusing to deliver treatment by suggesting Ms. Elder be called in and by remaining on the premises as they requested; and her health was adversely affected by the whole incident.

[111] Regarding her concern for her safety, though I found it to be an unreasonable one under the circumstances, she did have one - even if it arose in the context of her higher than usual level of stress.

[112] The facts relevant to mitigation from the employer's perspective include the rebellious context in which the refusal to comply with the order occurred; the requirement of *quasi*-military acceptance of following orders in a penal institution; and the fact the grievor was precluded from attending the last briefing meeting. Lastly, and of particular significance, was the fact the employer reduced the initial discipline of the five day suspension to three days at level three of the grievance process in light of the grievor's concern for her safety

[113] In reducing the penalty, the employer noted in its decision (Exhibit E-11: Decision of Authorized Employer Representative at Level Three):

... I am prepared to reduce the initial penalty to a three day suspension because you felt justified in refusing the direct order of your supervisor - which was clearly misconduct - because of Part II legislation, although it hadn't been invoked."

[114] It is a well-accepted principle of labour law that adjudicators, arbitrators, and such boards should not be involved in the actual management of the workplace because that is the prerogative of management. Accordingly, we are often reminded that it is not our role to be "tinkering" with the precise measure of discipline imposed by an employer. Would I then be "tinkering" with the employer's measure of discipline if I reduced the three day suspension to a two day suspension in light of my conclusions regarding the grievor's health at the time of the incident that gave rise to her discipline? Had the employer not already reduced the initial five day suspension to three days, I believe I would have reduced the suspension pursuant to my jurisdiction in light of her health and her belief that the proposed plan for treatment

was not safe. It is difficult to hypothesize at this stage whether I would have reduced the penalty to a two day suspension or to a three day suspension.

[115] The employer's decision to reduce the penalty for the reason stated was sensitive and I commend it for having taken that step. I do not wish to discourage employers from reducing initial penalties upon further review, and I am conscious of the wisdom of not getting involved in the management of the workplace by "tinkering" with the measure of penalties.

[116] In considering the facts of the case and all the mitigating circumstances, with particular regard to the fact the employer reduced the discipline at level three of the grievance process; nevertheless, I have concluded it seems just and reasonable in the circumstances, to further reduce the discipline from a three day suspension to a two day suspension. The primary reasons for so concluding are that I found the grievor's health had been undermined due to a higher than usual level of stress because of her involvement in an extended version of a similar incident only four days prior to the incident in question and the fact she worked a 16 hour shift on that occasion; she had been singled out by one of the inmates for specific abuse during the incident in issue; that she was precluded from attending the final briefing meeting where many of her safety concerns had probably been addressed; that she was distraught as a result of the incident and missed some work as a result; and that she did co-operate after being advised she would be subject to a disciplinary investigation by suggesting Ms. Elder be called in. I specifically did not consider the grievor's concern about safety because that issue had been addressed by the employer at level three of the grievance process.

[117] For all of these reasons, the grievance is partially upheld. The penalty of a three day suspension is reduced to two days, the grievor is to be compensated for lost wages and benefits as a result, and her record shall be changed to reflect this reduction. The balance of the grievor's claim for relief is dismissed.

Francine Chad Smith
Board Member

REGINA, July 19, 2001