

Date: 20030828

File: 166-2-31031

Citation: 2003 PSSRB 72



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

BRIAN ENGLISH

Grievor

and

TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

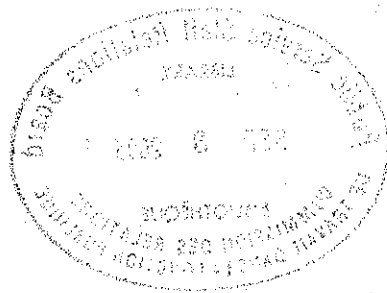


Before: Léo-Paul Guindon, Board Member

For the Grievor: Giovanni Mancini, Counsel, UCCO-SACC-CSN

For the Employer: Robert B. Lindey, Counsel

Heard at Abbotsford, British Columbia,
April 15 and 16, 2003.



DECISION

[1] The grievor, Brian English, was employed as a correctional officer I, (CX-01) at Kent Institution since his appointment on December 24, 1991.

[2] On August 28, 2001, the Correctional Service advised him that a decision to terminate his employment was taken, effective on the same day, for the reasons outlined further in the present decision.

[3] Mr. English filed a grievance against his disciplinary termination on September 13, 2001, and requested the following corrective actions:

1. *I want to be made whole by being re-instated to my previous position as a substantive Correctional Officer I.*
2. *I want all the benefits and monies that I am entitled to as per the Collective agreement restored to me.*
3. *I want punitive damages awarded to me for wrongful termination. Amount to be disclosed at a later date.*
4. *I want all records, notes, documents, or any other thing, which was used, in relation to my disciplinary investigation, and termination provided to my representative or me. (Full Disclosure)*
5. *I want an apology in writing.*
6. *I want all records, including any notes, emails, or any other thing in relation to my termination/investigation removed from my personnel file and destroyed in my presence.*
7. *I want a hearing at each level of the process.*
8. *I want a representative from the UCCO-SACC-CSN, or its legal council [sic] at each hearing.*

[4] The reference to adjudication was received by the Board on December 17, 2001.

[5] In June 2001, Paul T.L. Urmson, Warden at Kent Institution, received information from Headquarters who found that Brian English did not disclose a criminal offence when he filled out the Personnel Screening Request and Authorization form necessary for the renewal of his security clearance. A mandate for disciplinary investigation was entrusted to Dave Dick, Assistant Warden, Management Services, and Todd Yolland, Correctional Supervisor, on June 22, 2001, on five allegations that Brian English breached the Standards of Professional Conduct and the Code of Discipline by:

1. *Failing to disclose criminal charges and convictions;*
2. *Falsifying the Declaration Regarding Criminal Convictions form;*

3. *Failing to possess a valid B.C. Driver's License as per the Conditions of Employment for Correctional Officers;*
4. *Driving a government vehicle without a valid B.C. Driver's license as required by law and policy; and*
5. *Driving non-government vehicles while in CSC uniform.*

(Exhibit E-3)

[6] Mr. English received a copy of a memorandum informing him that a disciplinary investigation would be performed to assess his involvement in the five allegations (Exhibit E-4).

[7] On July 8, 2001, Neil D. MacLean, Pacific Regional President, UCCO-SACC, asked the Deputy Commissioner to replace the board of investigation with a non-biased board for inappropriate actions by Dave Dick and Todd Yolland in the progress of the investigation (Exhibit G-3). The request was denied and the disciplinary report (Exhibit E-1) was completed on July 6, 2001.

[8] The investigation disclosed that Mr. English was charged with impaired driving and for having more than 80 mg of alcohol in his blood on February 3, 2000. Mr. English advised William Schiewe of the incident and was directed to inform management. Mr. Schiewe believed that he received the information as an employee assistance program referral agent and not as a correctional supervisor. Mr. English believed he was speaking to Mr. Schiewe in both roles. Dianne Knopf, Deputy Warden at Kent, was advised of the situation by Mr. English but took no further action, as she was under the impression that he had told his supervisor. Mr. English said that he advised both Mr. Schiewe and Ms. Knopf that an automatic 90-day driver's license suspension went with the impaired driving charge.

[9] Mr. Graydon G. Gillette, who was Mr. English's supervisor, was not informed of the impaired driving incident, or of the 90-day driver's license suspension, or of the later conviction and prohibition to drive. He appointed Mr. English to escort inmates and for some of those escorts, the grievor had to drive a service vehicle.

[10] Mr. English pleaded guilty to the count of driving with more than 80 mg of alcohol in his blood on January 15, 2001. He was sentenced to a prohibition to drive for 2 years, 1-year probation and a \$1,200 fine. Mr. English did not advise

management or his supervisor of his conviction and the sentence, stating that management should have followed up after he advised them of the charges.

[11] Mr. English was assigned to escort inmates on single-officer escorts on February 13, May 8 and 18, 2001, and had to drive the institutional vehicle. He also drove institutional vehicles on escorts with CX-02 officers on February 23, March 28 and April 30, 2001. In his testimony, Mr. English admitted that he drove an institutional vehicle on those occasions.

[12] Mr. English assumed that the supervisors were aware of the prohibition from driving and felt it was not his responsibility to inform everybody of his situation every time he was asked to do an escort. At the hearing in the present case, he stated that he accepted part of the blame because he did not tell the supervisor at the time of the escort assignments and did not refuse to drive an institutional vehicle when asked to do so.

[13] On a previous conviction for impaired driving in 1994, Mr. English was advised by Dick Cawsey, Unit Manager, that he has an obligation, according to the Code of Professional Conduct, to inform the employer if and when a situation of this nature occurs; this had not taken place (Exhibit E-14). J. Sexsmith, Deputy Warden, did not take disciplinary measures against Mr. English and accommodated the situation by suspending him from the Institutional Emergency Response Team (IERT) for the reason that a valid driver's license is essential to an IERT member (Exhibit E-13).

[14] Mr. English was advised, in the letter of offer dated December 10, 1991, that he must provide proof that he was in possession of a valid driver's license and that a condition of employment is to maintain a valid security clearance (Exhibit E-5). Furthermore, the Qualification Standards for correctional officers require possession of a valid provincial driver's license and enhanced reliability security clearance (Exhibit E-6).

[15] Mr. English applied for a routine 10-year renewal of his Enhanced Reliability Clearance (ERC) on April 9, 2001. The original ERC was dealt with in 1991 upon his appointment as a correctional officer. On that occasion, he declared two previous convictions for driving with more than 80 mg of alcohol in his blood in 1984 and 1986 and one conviction for assault in 1991. The conviction dated May 1994 for driving

with more than 80 mg of alcohol in his blood was known by the employer, as stated previously.

[16] A personnel screening request and authorization form was completed and signed by Mr. English and he also completed and signed a declaration regarding a criminal convictions form when he applied to renew his ERC (Exhibit E-4). On the first form, Mr. English consented to the disclosure of six items, including a criminal record check, and put his initials before the information he agreed to disclose. On the second form, he answered "no" by crossing a square, to the following question:

Have you ever been convicted of a criminal offence for which you have not been granted a pardon, or an offence for which you have been granted a pardon and such a pardon has been revoked.

(Exhibit E-4)

[17] He explained at the interview during the disciplinary investigation that he did not read the forms, which were presented to him with little explanation when he was in the Personnel department on another matter. He signed them just to have them out of the way. At the hearing in the present case, Mr. English stated that it was wrong not to declare the criminal convictions on the declaration regarding criminal convictions.

[18] Mr. English's disciplinary record shows that he was disciplined for inappropriate use of his employer's network system and fined the equivalent of 8 days' pay on June 7, 2001 (Exhibit E-7).

[19] The Performance Evaluation Report shows that all objectives were met or exceeded all of the time (Exhibit G-4). He received a memorandum for his participation in the First Nation Equity Career Day Fair in 1993 (Exhibit G-7), for his volunteer work for the Family Day in 1997 (Exhibit G-8), for his contribution to the Segregation Audit in 1999 (Exhibit G-6) and for his action in saving an inmate who attempted to commit suicide in 1999 (Exhibit G-5).

[20] Mr. English received a copy of the Standards of Professional Conduct and the Code of Discipline on July 9, 1993, and did not return the declaration page to Personnel (Exhibit E-16).

[21] The disciplinary investigation came to the conclusion that Mr. English failed to disclose criminal charges and convictions; that he falsified the Declaration Regarding Criminal Convictions form; that he did not possess a valid driver's license as required by the Conditions for Employment (Qualification Standards) for correctional officers and that he drove government vehicles without a valid driver's license as required by law and policy. No corroboration or substantiation was found in relation with the allegation of driving a non-government vehicle while in Correctional Service uniform (Exhibit E-1).

[22] Under the heading "Relationship of the findings with the Standards of Professional Conduct and Code of Discipline", the report sets out what follows:

[...]

Based on the findings on the specific allegations, the Board finds that Mr. English has violated Standard One - Responsible Discharge of Duties and Standard Two - Conduct and Appearance of the Standards of Professional Conduct and the Code of Discipline.

STANDARD ONE - RESPONSIBLE DISCHARGE OF DUTIES

"Staff shall conduct themselves in a manner which reflects positively on the Public Service of Canada, by working co-operatively to achieve the objectives of the Correctional Service of Canada. Staff shall fulfil (sic) their duties in a diligent and competent manner with due regard for the values and principles contained in the Mission Document, as well as in accordance with policies and procedures laid out in legislation, directives, manuals and other official documents.

"Employees have the obligation to follow the instructions of supervisors or any member in charge of the workplace and are required to serve the public in a professional manner, with courtesy and promptness.

"An employee has committed an infraction, if he or she:

- fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates to his or her duty;*
- willfully or through negligence, makes or signs a false statement in relation to the performance of duty."*

Mr. English did violate this standard by signing the Declaration Regarding Criminal Convictions, stating that he had no criminal convictions.

Mr. English did violate this standard by driving a government vehicle in the course of his duties while prohibited from driving.

Mr. English did violate this standard by failing to possess a valid driver's license as required by the Qualification Standards for Correctional Officers.

STANDARD TWO - CONDUCT AND APPEARANCE

"Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their work and in their actions. Employee dress and appearance while on duty must similarly convey professionalism, and must be consistent with employee health and safety.

"An employee has committed an infraction, if he or she;

- acts, while on or off duty, in a manner likely to discredit the Service;*
- commits an indictable offense or an offense punishable on summary conviction under any statute of Canada or of any province or territory, which may bring discredit to the Service or affect his or her continued performance with the Service;*
- fails to advise his or her supervisor, before resuming his or her duties, of being charged with a criminal or other statutory offense."*

Mr. English did violate this standard by failing to advise his supervisor of his conviction on 2001-01-15 and subsequent sentence imposed on 2001-02-05.

Mr. English did violate this standard by failing to acknowledge and provide details of his criminal record on the Declaration Regarding Criminal Convictions form.

Mr. English did violate this standard by driving a government vehicle while prohibited from driving contrary to a court order, law and policy.

[...]

[23] The union representative acting on behalf of Mr. English pointed out at the conclusion of the disciplinary interview that there had been no wilful misconduct in Mr. English's past. He noted that Mr. English did not deny the facts and accepted responsibility and that he had an alcohol problem known to the employer and asked for accommodation and help for him. The same submission was made to Mr. Urmson on behalf of Mr. English by his union representative at the disciplinary meetings on August 16 and 28, 2001.

[24] Mr. Paul T.L. Urmson, Warden, held a disciplinary hearing on August 16, 2001, and accepted the findings of the Disciplinary Investigation Report. His decision dated August 28, 2001, reads in part as follows:

[...]

Having examined all the information before me, I must advise you that I accept the findings of the Disciplinary Investigation Report. Specifically, that you: failed to disclose criminal charges and convictions; that you falsified the Declaration Regarding Criminal Convictions form; that you failed to possess a valid BC Driver's License as per the Conditions of Employment for Correctional Officers; and that you drove a Government of Canada Vehicle without a valid BC Driver's license as required by law. I also note you have not accepted responsibility for your actions.

Your actions constitute a violation of the Standards of Professional Conduct and the Code of Discipline which cannot be tolerated by the employer and is wholly incompatible with your role as a Correctional Officer with the Correctional Service of Canada.

I have concluded that the bond of trust that is essential to the continuance of your employment has been irreparably breached. In light of the seriousness of your actions and consistent with the authority delegated to me pursuant to Section 11 of the Financial Administration Act, I have decided to terminate your employment with the Correctional Service of Canada effective immediately.

[...]

(Exhibit G-2)

[25] In his testimony, Mr. Urmson stated that Mr. English admitted the bare essentials of the facts but did not accept the responsibility for his actions. In his view, Mr. English shows a continuous pattern from 1994 to 2001 and does not recognize

having an alcohol problem. He added that Mr. English broke the law when he drove without a valid permit and tried to hide it.

[26] In his testimony, Mr. English submitted that after the February 2000 incident, he was referred to an Alcoholics Anonymous group by Mr. Schiewe. He also underwent therapy with Susan Gold-Smith, a psychologist in Abbotsford, and was referred to the Chilliwack alcohol and drug center for an 8-week course. He was seen by Dr. David Wong, a psychologist, during 2001 and 2002.

[27] Mr. English stated in his testimony that he realized, with the help of the therapist, the need to gain control of his alcohol problem. He attended counselling following the probation order of February 1, 2001 (Exhibit G-10) and, with the help of therapists, he controls his alcohol consumption. He has not searched for work since he lost his employment, but followed courses at Vancouver Community College (February to July 2002) in meat processing and a course for bridge watchman in August for 3 months at BCIT.

Arguments

[28] The employer's counsel submitted that a correctional officer should behave with the highest integrity to reflect positively on the CSC in and out of service.

[29] All grounds for termination were founded and counsel for Mr. English admits that he falsified the declaration on criminal convictions, that he lost the driver's license, that he drove a service vehicle without a valid driver's license, and that he did not disclose his criminal conviction to his employer.

[30] In 1994, Mr. English was formally advised by Mr. Cawsey that he should inform his employer and he did not do so in 2001. He drove the vehicles of the CSC on six occasions without a valid driver's license and knew that he was breaking the law. He understood his obligations and his role as peace officer but showed no respect. He stated that he understood the implications of his actions but accepted responsibility for it only at the present hearing. He admitted having an alcohol problem going back to 1991 and gave no clear explanations for his actions.

[31] In *Copp v. Canada Customs and Revenue Agency* (2003 PSSRB 8; Board file 166-34-31431), Board Member D.R. Quigley denied a grievance presenting similar circumstances when the grievor was terminated after he lost his Enhanced Security

Clearance and did not have a valid driver's license. In *Champagne and Les Aéroports de Montréal* ([1994] C.P.S.S.R.B. No. 127; Board file 166-2-25767), Board Member M.-M. Galipeau concluded that the termination was not unreasonable and the grievor was guilty of extremely serious misconduct when he hid from his employer for a period of three months the fact that he had lost his driver's license and he had driven an airport vehicle and his personal vehicle without a valid driver's license. Alternatively, the employer's counsel submitted that the employer should not be held responsible for the delay in processing his grievance through arbitration and that it is appropriate that each party bear a portion of the financial consequences of the delay. The Board has jurisdiction to assess responsibility for delay and in the present case the employer should not be prejudiced by the delay created by the union since September 17, 2002. The cases in *Re Retail Employees Union and Canada Safeway Ltd.* [1973] 41 D.L.R. (3d) and *IPSCO Saskatchewan Inc. and U.S.W.A., Loc. 5890 (Re)*, [1999] 83 L.A.C. (4th) 396 support this position.

[32] The employer should not be penalized for the whole period when the grievor went to school and did not search for employment.

[33] Counsel for the grievor submitted that the alcoholism problem is a central issue in the present case. The employer was clearly aware, since 1994, of Mr. English's alcohol problem. In February 2000, Mr. English informed Mr. Schiewe and Ms. Knopf when he was arrested for impaired driving, and the employer did nothing about the alcohol disease at the origin of his actions. Mr. English is not the only one to blame and the employer should follow up and not ask Mr. English to drive. The employer was informed of the criminal charges and the 90-day suspension of his driver's license.

[34] On the merits of the case, Mr. English admitted that he falsified the ERD form and drove without a valid driver's license. He admitted that it was wrong. The employer never wanted to hear anything about its responsibility with regard to Mr. English's alcohol problem. The alcohol problem was brought up at the disciplinary investigation and at a disciplinary meeting with Mr. Urmson, and the employer did not explain why it did not address the problem.

[35] Mr. English took his alcohol problem seriously and did his part to solve it by undergoing counselling and therapy.

[36] The absence of a valid driver's license can be accommodated by the employer as it did in 1994 and the enhanced security clearance can be given back to Mr. English. In 1994, he did not lose his ESC because he had his driver's license suspended.

[37] In the present case, the employee did not deserve to be terminated, but his wrongful actions deserve punishment. Mr. English should be reinstated with a four-month suspension without pay.

[38] The following decisions were submitted by counsel for the grievor: *Re Government of Province of Alberta (Department of Environment) and Alberta Union of Provincial Employees*, [1991] 17 L.A.C. (4th) 328; *Re Government of British Columbia and British Columbia Government Employees' Union*, [1978] 18 L.A.C. (2d) 164; *Re Municipal Tank Lines Ltd. (Trimac Systems Ltd.) and Teamsters Union, Local 880*, [1991] 23 L.A.C. (4th) 134.

Reasons for Decision

[39] Before addressing the main issue as to whether Mr. English's termination is justified in the circumstances, I will first deal with the allegation of bias submitted by the Pacific Regional President (UCCO-SACC) on July 8, 2001 against the Board of investigation which looked into the alleged misconduct of the grievor. In my opinion, this issue has been conclusively determined by the Federal Court in the case of *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818, where the Court states as follows:

[...] that procedural unfairness (...) was wholly cured by the hearing de novo before the Adjudicator at which the Applicant had full notice of the allegations against him and full opportunity to respond to them.

[...]

[40] After he was arrested for impaired driving on February 3, 2000, Mr. English informed Mr. William Schiewe that he had been charged. Following Mr. Schiewe's advice, he also gave the information to Dianne Knopf, Deputy Warden at Kent Institution. Ms. Knopf admitted that she was informed of that fact before the disciplinary board of investigation. She also stated to the investigators that she assumed that Mr. English also informed his supervisor of the situation.

[41] It was proven that Mr. English did not disclose to his employer that he pleaded guilty to impaired driving on January 15, 2001, and that he was sentenced to a

prohibition from driving for 2 years, one year of probation and \$1,200 fine. He falsified the Declaration Regarding Criminal Convictions form.

[42] Mr. English was guilty of misconduct when he did not inform his supervisor that his driver's license was suspended for 90 days because of his conviction for impaired driving, when he was asked to drive as an inmates' escort. He should have also notified his employer when he was sentenced to a prohibition from driving for 2 years later on, because he had received a very clear notification of that obligation in 1994. Mr. English was also guilty of serious misconduct when he did not refuse the assignment to escort at a time when he should not have been driving and when he operated the employer's vehicles on six different occasions without a valid driver's license.

[43] In doing so, Mr. English acted in violation of Standard One of the Standards of Professional Conduct and Standard Two of the Code of Discipline. The employer therefore has proven the allegations on which the disciplinary measure imposed on Mr. English on August 28, 2001 were based.

[44] The employer did not take into consideration that Mr. English's behaviour was related to alcoholism as submitted to the disciplinary investigation board and to the warden of Kent Institution at the disciplinary meetings of August 16 and 28, 2001. Mr. English recognized his alcoholism problem when he testified at the hearing before me and admitted his responsibility for his actions and showed remorse. The present case can be distinguished from the cases submitted by the employer's counsel principally because the grievors in those cases never admitted misconduct or accepted any responsibility. In the *Copp* case (*supra*), the grievor lost his security clearance for a number of serious infractions similar to fraud, which is distinguishable from the present case. I agree that the grievor was guilty of serious misconduct but I disagree with the severity of the penalty in the circumstances of this case.

[45] The arbitration board in *Re Government of Province of Alberta (Department of Environment) and Alberta Union of Provincial Employees* (*supra*) enunciated the considerations and principles that arbitrators take into account in cases related to discipline as it is applied to the alcohol-addicted employee as follows:

[...]

What emerges from these cases and the other material cited to the board is a recurring set of considerations and principles arbitrators take into account when dealing with discipline as it is applied to the alcohol and/or drug-addicted employee. These principles and considerations include the following:

- 1. Alcoholism is recognized as an illness albeit one with an element of volition, that can attract varying levels of justifiable disciplinary response from the employer up to and including discharge;*
- 2. An adjudication board is entitled to look at the rehabilitative progress made by an employee subsequent to the employer's decision to discipline and is likely to modify that discipline if the employee can demonstrate that he has been successful in his recovery;*
- 3. The discipline imposed by an employer should only be modified in "exceptional circumstances" and those circumstances exist where an employee has shown genuine prospects for recovery and the restoration of a productive employer-employee relationship;*
- 4. The employer is entitled to insist that the employee perform the work for which he is paid and is not obliged to bear all the costs and consequences associated with an employee's inability to perform his duties as a result of his alcoholism;*
- 5. An adjudication board should consider the extent to which and the duration for which an employee is unable to perform his employment obligations; [page338]*
- 6. That where reinstatement occurs in substitution for discharge arbitrators are prepared to attach conditions to such reinstatement. Recognizing that alcoholism and drug addiction are not curable and can only be arrested by total abstinence, one such condition often attached to reinstatement is the requirement that the employee remain drug and alcohol-free.*

[...]

[46] Those principles and considerations find application in the present case. Mr. English recognizes that he has a problem with alcohol and has shown prospects for recovery by following counselling and therapy. The impaired driving charge laid against Mr. English in February 2000 is more in my view in the nature of a relapse of

his alcohol problem after the 1994 incident than evidence of a continuous pattern, as believed by Mr. Urmson. Taking into consideration the therapies followed by Mr. English lately, I believe that he has a good chance to cure his illness and to restore a productive employer-employee relationship.

[47] The grievor has been a 10-year employee with only one disciplinary measure imposed on June 7, 2001, unrelated to his alcohol problem. All his performance appraisals indicated that he met or exceeded all objectives. He has taken concrete and substantive steps to deal with his illness and it appears, based on the evidence before me, that he has controlled his consumption of alcohol since his conviction on February 5, 2001.

[48] I see no valid reason not to reinstate him to his position of correctional officer (CX-01) at Kent Institution. The violations of the Standards of Professional Conduct and of the Code of Discipline are serious but I find in the circumstances of this case, that they are mitigated by the fact that they arise out of or are related to his alcoholism.

[49] In those circumstances, I conclude that the discipline imposed by the employer should be modified in accordance with the principles and considerations outlined above. Consequently, the discipline imposed by the employer will be altered and Mr. English is to be reinstated to his correctional officer position effective April 16, 2003.

[50] The reinstatement will be without any compensation, monetary or otherwise, for the period between the date of his termination and the effective date of his reinstatement. This lengthy suspension is justified because the actions of Mr. English were very serious and deserve strong discipline, and also because the employer should not be held to compensate him for the time he went to school and was not available for employment.

[51] The employer is directed to reinstate the grievor in his former position conditional upon the following terms:

1. That Mr. English attend Alcoholic Anonymous meetings at least once a week on a regular basis;

2. That he participate in the Employee Assistance Program, with the cooperation of the employer;
3. That he will produce, if requested by the employer, satisfactory evidence of compliance with the conditions of reinstatement;
4. If the grievor is found guilty of driving with more than 80 mg of alcohol in his blood or while his ability to operate a motor vehicle is impaired by alcohol, the grievor's employment shall, at the employer's option, be subject to immediate termination;
5. The aforesaid conditions will apply for two years following the date of the present decision.

[52] In the event that the prohibition to drive a motor vehicle, imposed on Mr. English by the Court in February 2001, is still in force at the time of the reinstatement, the employer should be able to accommodate that situation as it did following the May 1994 conviction.

[53] Consequently, the grievance is allowed to the extent described above and I will remain seized of this matter for the next 90 days should any problem arise in the implementation of this award.

**Léo-Paul Guindon,
Board Member**

OTTAWA, August 28, 2003.