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Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

JAMES BRIAR, JOSEPH HENNEBERRY, ROOP AUJLA, ROBERT GARRETT AND JASON FINLAY

Grievors

and

TREASURY BOARD
(Solicitor General Canada – Correction Service)

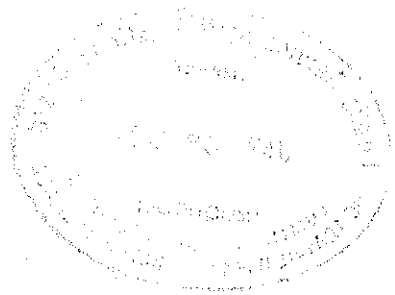
Employer

Before: Colin Taylor, Q.C., Board Member

For the Grievors: Daniel Feist

For the Employer: Richard E. Fader

Heard at Abbotsford, B.C.,
November 19 to 21, 2002.



[1] This adjudication arises out of grievances filed by James Briar, Joseph Henneberry, Roop Aujla and Robert Garrett. At all material times, they were employed as correctional officers at the Kent Institution in Agassiz, British Columbia. A fifth grievance, filed by Jason Finlay, was resolved

[2] All of the grievances were filed in June 2001 and all grieve:

> *...the disciplinary sanctions imposed on me June 09 2001 [June 07 in the case of Mr. Henneberry]. The discipline was related to my alleged misuse of the CSC corporate email system.*

[3] In all cases, the letters of discipline are dated June 9, 2001, and are signed by Paul T.L. Urmson, the Warden of Kent Institution.

[4] The first two paragraphs of the letters of discipline are identical in all four cases and read as follows:

> *I have now completed a full review of the investigation pertaining to your inappropriate use of the corporate network. I have taken into consideration your comments at the disciplinary hearing on May 10, 2001 [May 07 in the case of Mr. Henneberry].*
>
> *I consider this matter a serious breach of the Correctional Service of Canada's Code of Discipline, specifically, Standard One, paragraph seven: `Fails to conform to or apply, any relevant legislation, Commissioner's Directive, Standing Order or other directive as it relates to his or her duty' and Standard Two: `acts, while on or off duty, in a manner likely to discredit the Service. The findings conclude that you failed to adhere to the Commissioner's Directive 226 on the Use of Electronic Networks. The document(s) depicted on your system involved causing congestion and disruption of networks and systems which is in contravention of Annex B of CD 226 and documents whose main focus is pornography, nudity and sexual acts which is in contravention of Annex C of CD 226.*

[5] In the case of Mr. Briar, the balance of his letter of discipline reads:

> *In arriving at my decision I have taken into consideration that you have had no previous discipline, your admission of responsibility and your work performance. However, I also considered that you did not report this to your supervisor.*

> *In view of this, I have determined that your misconduct warrants a financial penalty of $928.68 which is the equivalent of six (6) days salary. This action serves as a warning that more serious disciplinary action will be taken if there is a repetition of misconduct.*
>
> *A copy of this letter shall be placed in your personnel file.*

[6] With respect to Mr. Henneberry, the balance of the letter of discipline which he received reads:

> *In arriving at my decision, I have taken into consideration that you have had no previous discipline and your work performance.*
>
> *However, I also considered that you did not report this to your supervisor and you did not accept responsibility for your actions in this matter.*
>
> *In view of this, I have determined that your misconduct warrants a financial penalty of 1,425.76 which is the equivalent of seven (7) days salary. This action serves as a warning that more serious disciplinary action will be taken if there is a repetition of misconduct.*
>
> *A copy of this letter shall be placed in your personnel file.*

[7] For Mr. Aujla, it is as follows:

> *In arriving at my decision I have taken into consideration that you have had no previous discipline, your admission of responsibility, your work performance and that you stated that you felt that your participation would help you to fit in at Kent. However, I also considered that you did not report this to your supervisor.*
>
> *In view of this, I have determined that your misconduct warrants a financial penalty of $1,011.15 which is the equivalent of seven (7) days salary. This action serves as a warning that more serious disciplinary action will be taken if there is a repetition of misconduct*
>
> *A copy of this letter shall be placed in your personnel file.*

[8] The letter of discipline issued to Mr. Garrett concludes as follows

> *In arriving at my decision I have taken into consideration that you have had no previous discipline and your work performance.*

However, I also considered that you did not report this to your supervisor and you did not accept responsibility for your actions.

In view of this, I have determined that your misconduct warrants a financial penalty of $773.90 which is the equivalent of five (5) days salary. This action serves as a warning that more serious disciplinary action will be taken if there is a repetition of misconduct.

A copy of this letter shall be placed in your personnel file.

II

[9] Following consideration of the evidence, I make the following findings of fact:

1, Kent Institution is a maximum security prison housing approximately 265 inmates. There are about 320 employees.

2. At all material times, the grievors were employed as correctional officers at Kent Institution.

3. Correctional Service Canada (CSC) maintains an electronic network. Authorized users include the employees at Kent Institution. Each employee has a separate email account on the CSC network, access to which is gained by an individual password.

4. The authorized use of the CSC network includes creating and transmitting electronic mail messages ("email").

5. On September 16, 1999, the Assistant Deputy Commissioner, Correctional operations, sent a notification to senior management in the Pacific Region advising that staff in each facility must be notified that originating or forwarding inappropriate email messages is unacceptable behaviour and could result in disciplinary action. Confirmation was received from all senior managers that staff at their respective facilities had been informed that sending and receiving inappropriate messages was not acceptable and could result in disciplinary action.

6. Between September 16, 1999, and June 16, 2000, five directives were issued setting out the authorized use of the CSC electronic network and specifically prohibiting its use for activity described as "illegal or unacceptable."

7. The "Policy on the Use of Electronic Networks" effective February 12, 1998, and circulated electronically on January 6, 2000, includes the following:

> *It is Treasury Board policy that authorized individuals use electronic networks to conduct the business of government, to communicate with public service employees and with the public, to gather information relevant to their duties, and to develop expertise in using such networks. Deputy heads have an obligation to promote the use of electronic networks in a working environment where unacceptable or unlawful activity is not permitted. They also have an obligation to deal quickly, fairly and decisively with any violations of policy or law.*

Unacceptable activity is described as including:

- *Causing congestion and disruption of networks and systems, through such means as sending chain letters and receiving list server electronic mail unrelated to a work purpose. These are examples of excessive use of resources for non-work related purposes. (Government Security Policy).*

- *Sending abusive, sexist or racist messages to employees and other individuals (Harassment in the Workplace Policy).*

8. Appendix C of that policy includes the following:

> *...authorized individuals are prohibited from conducting any of the unlawful or unacceptable activities listed in appendices A and B. Doing so exposes them to disciplinary measures and possible revoking of electronic network access. Furthermore, authorized individuals cannot use government electronic networks to access or download Web sites or files, or send or receive electronic mail messages or other types of communication, that fall into the following categories.*

- *documents whose main focus is pornography, nudity and sexual acts (however, authorized individuals may access such information for valid work-related purposes, and may visit sites whose main focus is serious discussions of sexual education and sexual orientation issues).*

9. A "Note to Staff" was circulated electronically on June 8, 2000. It said:

This is a reminder that the use of the electronic networks is for business purposes only. Any inappropriate use of the electronic networks, including email and distribution lists, may be investigated and may lead to further action being taken. The Commissioner's Directive (CD) 226 Electronic Networks will provide you with additional information on this topic. You can access this CD on the Infonet at http://infonet/cds/cds/226-cd.doc.

10. The reference to Commissioner's Directive (CD) 226 Electronics Network refers to a policy issued and circulated electronically on May 10, 2000. It includes the following:

APPROVED USES OF ELECTRONIC NETWORKS

7. Electronic networks shall be used for official business.

8. The personal use of CSC's electronic network by authorized individuals is permitted only when such use:

a. occurs on the individual's personal time within normal working hours;

b. does not incur any direct cost to the CSC;

c. observes the prohibitions against unlawful and unacceptable conduct outlined elsewhere in this policy;

UNLAWFUL AND UNACCEPTABLE CONDUCT

11. CSC's electronic network shall not be used to conduct any activity that, while legal, is unacceptable. A non-comprehensive list of unacceptable activities is included in Annexes `B' and `C'.

RESPONSIBILITIES OF INDIVIDUALS AUTHORIZED TO USE CSC ELECTRONIC NETWORK

12. *Individuals authorized to use CSC's electronic network are responsible for abiding by the law and government policies as set out by Treasury Board (Use of Electronic Networks) and the CSC by:*

d. communicating in a manner that reflects positively on the standards of the CSC;

DISCIPLINARY MEASURES AND SANCTIONS

14. *CSC may take disciplinary measures or sanctions in cases of unlawful and/or unacceptable use of its network. Disciplinary measures will be commensurate with the seriousness and circumstances of the incident.*

15. *Disciplinary measures may include:*

a. an oral or written reprimand;

b. limitations on access to the electronic network;

c. suspension or termination of employment.

MONITORING

24. *Normal routine analysis does not involve reading the content of electronic mail or files. However, if due to routine analysis or a complaint, there are reasonable grounds to believe that an authorized individual is misusing the network, the matter shall be referred for further investigation and action that may involve special monitoring and/or reading the content of individual electronic mail and files.*

MONITORING FOR UNLAWFUL ACTIVITY/ UNACCEPTABLE CONDUCT

30. *If there are reasonable grounds to believe that an authorized individual is misusing the network, monitoring without notice, including viewing the content of individual electronic mail records or other files, may occur.*

Annex `B'

UNACCEPTABLE ACTIVITY THAT IS NOT NECESSARILY UNLAWFUL BUT WHICH VIOLATES TREASURY BOARD POLICIES (Non-Exhaustive List of Examples)

1. e. Sending abusive, sexist or racist messages to employees and other individuals.

(Harassment in the Workplace Policy)

Annex `C '

UNACCEPTABLE ACTIVITIES RELATING TO ACCESS TO ELECTRONIC NETWORKS PROVIDED BY THE GOVERNMENT

1 Authorized individuals shall not use CSC's network to access or download Web sites or files, or send or receive electronic mail messages or other types of communication, that fall into the following categories:

b. documents whose main focus is pornography, nudity and sexual acts (however, authorized individuals may access such information for valid work-related purposes, and may visit sites whose main focus is serious discussions of sexual education and sexual orientation issues.)

11. With the issuance of Policy CD 226, the Employer installed the following log-on banner in both official languages:

WARNING - AVERTISSEMENT
This system is for the use of authorized individuals only and is monitored in accordance with Treasury Board and Correctional Service of Canada Policy on the use of electronic networks. Evidence of inappropriate or illegal conduct will be reported and disciplinary or legal action may follow.
OK.

Every time an employee logged on to his or her computer, that banner was displayed. To access the system, a user was compelled to acknowledge that "warning" by clicking 'OK".

12. On June 16, 2000, a "Note to Staff" read:

> *I would like to take this opportunity to clarify any confusion that may have resulted from my note of June 8, 2002, on this topic. While CSC's electronic networks are for official business purposes, Commissioner's Directive (CD) 226 on the Use of Electronic Networks does permit some personal use of CSC's electronic network. However, if there are reasonable grounds to believe that the network is being used for any unlawful or unacceptable activities, as defined in the Annexes to the CD, this may result in an investigation and further action being taken. You can access this CD on the Infonet at http://infonet/cds/cds/226-cd.doc*

13. In or about November 2000, a complaint was received by the employer that an employee at Kent Institution was using his email account to display offensive images. On November 14, 2000, the Deputy Commissioner (Pacific) authorized a "review" of the email account of the employee against-whom the complaint had been lodged for "possible pornography".

14. Examination of the suspected mailbox revealed numerous "inappropriate images" and indicated that other employees were similarly involved. On November 15, 2000, the Deputy Commissioner (Pacific) authorized the expansion of the review to the email accounts which had links to the email account of the person against whom the original complaint had been filed. The expanded investigation was linked to the first targeted employee. No random checks were conducted.

15. The review consisted of a "snapshot" of the alleged offending email accounts on November 14, 2000. It was determined that a total of 54 individuals had sent messages containing inappropriate images; 48 were CSC-Pacific users with the remainder being from the Prairie and Ontario regions and from various Internet sources. The images were sent to 245 individuals, 210 being CSC-Pacific users and the rest being CSC users from other regions and external Internet addresses. An investigation was commenced.

16. On December lst, 2000, the Deputy Commissioner (Pacific) issued a memorandum to all staff with respect to "Unacceptable content on the corporate network." Employees were notified that on or after December 8, 2000, all "unauthorized executables, images, video, or other such files" would be removed from the network and "quarantined". The memorandum went on to say that all unauthorized material had to be removed by December 8, 2000.

17. The first person instructed to investigate the November 14, 2000 snapshot was unable to continue after December. This necessitated the appointment of a second investigator who began her massive task early in January 2001. Interviews with the grievors were conducted by the investigator in February 2001; disciplinary investigation reports were prepared and submitted to Warden Urmson in March 2001. He provided those reports to the grievors and thereafter held a disciplinary meeting with each of the grievors in May 2001.

18. A total of 54 employees were disciplined for conduct deemed to be unacceptable with respect to the use of the email system. The discipline ranged from dismissal to verbal warnings. Financial penalties ranged from one day to eight days.

19. With respect to the employees at Kent Institution, the level of discipline was determined by Warden Urmson. To assist in his stated objective of disciplinary consistency, he prepared a chart ("Discipline Chart") on which is listed the 36 employees, including the grievors, falling within his jurisdiction. The chart identifies the following factors considered by Warden Urmson in reaching his decision on the disciplinary response in each case:

- Nature of the offending material;
- Volume of pictures/files stored;
- Number of files sent;
- Length of service;
- Employment record;
- Performance record;
- Acceptance of responsibility (apology, demonstration of remorse).

The Warden met with each of the grievors and provided an opportunity for each to respond to the disciplinary investigation report and the proposed disciplinary sanction. The Warden took into account the employee's explanation and whether or not there was an understanding and acceptance of wrongdoing and remorse.

20. Warden Urmson sought consistency and fairness in his disciplinary response. He submitted his proposed Discipline Chart to Maureen Hines, Regional Chief - Staff Relations and Compensation. He asked Ms. Hines to scrutinize the Discipline Chart and confirm that he had been even-handed and consistent in the imposition of discipline among the employees deemed by the employer to have conducted themselves in violation of the employer's email policies.

III

[10] James Briar began service with the employer at Kent Institution in January 2000. At the time of these events, he was a Correctional Officer I. Mr. Briar had no previous discipline record.

[11] A snapshot was taken of Mr. Briar's email account on November 14, 2000. A review of its contents was conducted and Mr. Briar was interviewed by the investigator on February 20, 2001.

[12] Mr. Briar had email in folders titled "Pam", "Inbox", "Sent Items" and "Deleted Items". The contents of each of the folders, as they would have appeared on the computer screen, were printed. Only a sample of files with attachments were opened.

[13] Two files of the "Inbox" folder were opened, namely "MOONWAR 2-2000", a cartoon character "mooning"; and "Ouch", a picture of a woman's foot in red high heels stepping on a man's genitals.

[14] The seven files of the "Sent Items" folder consisted of "Surprise", a quarantined file which could not be opened; "Punishment", an obese naked woman sitting on a man's face; "Carefully Open XXX", "My Gift to You", and "Gift #2" - all pictures of nude and seminude women in provocative poses; "These are all those MasterCard Ones",

series of pictures of nudity and sex acts; "Think Twice Before You Stop for the Call of Nature", a video of a partially undressed man pursued by an animal.

[15] Mr. Briar told the investigator that he was aware of the employer's policy with respect to the unacceptable use of the email system - agreed it was an inappropriate use of the network and apologized.

[16] The employer's disciplinary response was a financial penalty of $928.68, which is the equivalent of six days' salary.

IV

[17] Joseph Henneberry began service with the employer in 1992. At the time of these events, he was a Correctional Officer II with no previous disciplinary record.

[18] A snapshot was taken of Mr. Henneberry's account on November 14, 2000. A review of its contents was conducted and Mr. Henneberry was interviewed by the investigator on February 20, 2001.

[19] Mr. Henneberry had email in folders titled "Sent Items" and "Inbox". The contents of each of the folders, as they would have appeared on the computer screen, were printed. A sample of files with attachments was opened.

[20] The four files of the "Sent Items" folder consisted of: "Gay Frank", a textual joke and "Holiday Greetings", a cartoon, neither of which were deemed to be inappropriate in the context of the investigation; "Think Twice Before You Stop for the Call of Nature", a video of a man partially undressed chased by an animal; and "These are all those MasterCard ones", a series of pictures of nudity and sex acts.

[21] On November 19, 2000, five days after the so-called November 14 snapshot, Mr. Henneberry heard another Correctional Officer laughing at her computer. He inquired as to the cause of her mirth. She told him she had received a "gross" email. Mr. Henneberry asked her to send it to him. She told him again that the video was "pretty gross" and asked if he was sure he wanted to receive it. Mr. Henneberry replied in the affirmative and she sent the video to Mr. Henneberry. He testified that upon viewing it, he immediately deleted the video.

[22] The video in question is exceptionally vile, revolting and depraved and, by far, the most disturbing image of many disturbing images at issue in these proceedings.

[23] Mr. Henneberry argued that this particular email had nothing to do with him. He did not know of its content before receiving it. Had he known, he said that he would not have asked that it be sent to him. Moreover, argued Mr. Henneberry, this event occurred after the November 14, 2000 snapshot and was, therefore, not relevant to these proceedings.

[24] I accept that Mr. Henneberry did not know the utterly disgusting nature of the video. I also accept that, had he known, he would not have asked that it be sent to his email account. The fact is, however, that he was told twice that the video was "gross" and asked if he was sure that he wanted to receive it. Notwithstanding those warnings, he asked that the employer's network be used for the transmission of "gross" material. He cannot escape complete responsibility simply because he did not know the depths of depravity to which the video sank.

[25] That this event occurred after the November 14 snapshot does not render the video inadmissible: *Canadian Airlines International Ltd. and Canadian Airlines Pilots Ass'n.* (1988), 35 L.A.C. (3d) 66 (Munroe).

[26] This is not a case where the employer imposed discipline and then sought to rely upon a subsequent event to justify its decision. Nor is it a case where the employer has introduced new grounds at the adjudication and the grievor is caught by surprise. Mr. Henneberry was fully aware that the employer was relying on the video in question as part of its case against him. There is no denial of a fair hearing and no prejudice to Mr. Henneberry in the fair hearing context.

[27] The employer imposed discipline in June 2001. It was entitled to consider events which occurred prior to the imposition of discipline providing, of course, that Mr. Henneberry was given a full and fair opportunity to make full answer and defence. And, he has done that in these proceedings. Mr. Henneberry has explained the circumstances surrounding his reception of the impugned video and I accept that explanation. The explanation, however, does not absolve him from all responsibility. He used the email system for an improper purpose after twice being warned that the material was "gross" and asked if he was sure he wanted to receive it.

[28] I should add that Warden Urmson testified that the video in question did not influence his decision to impose upon Mr. Henneberry a financial penalty of seven days' pay. The circumstances surrounding the video, said the Warden, went to his perception that Mr. Henneberry's attitude towards and understanding of the use of the email system for unacceptable purposes were wrong and needed to be corrected.

[29] Mr. Henneberry did not offer an apology for his conduct to the investigator.

[30] Mr. Henneberry was of the view that the imposition of discipline was most unfair given what he considered to be the memorandum of "amnesty" dated December 1, 2000. He said he had complied with the "amnesty" conditions and should not be subject to discipline. I deal with this issue later in these reasons.

[31] The employer's disciplinary response was a financial penalty of $1,425.76, which is the equivalent of seven days' salary.

V

[32] Roop Aujla began service with the employer in August 1998. At the material time, he was a Correctional Officer I at Kent Institution with no disciplinary record.

[33] A snapshot was taken of Mr. Aujla's email account on November 14, 2000. A review of the contents was conducted and Mr. Aujla was interviewed by the investigator on February 20, 2001.

[34] Mr. Aujla had email in folders titled "Inbox", "Sent Items" and "Deleted Items." The contents of each folder as they would have appeared on the computer screen were printed. A sample of files with attachments was opened.

[35] The sampled files included: "Joke", three women performing oral sex; "Anyone Wanna Kick the Dog", a woman kicking a man in the genitals; "Beerholder - you like this", beer poured into a glass held in a woman's vagina; "Can't breathe", a man performing oral sex on an obese woman; "Who's Your Daddy", skimpy bikini-clad women; "Hell Yeah" and "Just For the Single Guy", nudity; "À tous ceux et celles", nudity; "My gift to you" and "Top 10 Reasons to Marry a Gymnast", nude and semi-nude pictures; "Think Twice Before You Stop for the Call of Nature", video of a partially dressed man chased by an animal.

[36] Mr. Aujla told the investigator he was aware of the policy with respect to the proper use of the email system and he apologized.

[37] Mr. Aujla received a financial penalty of $1,011.15 which is the equivalent of seven days' salary.

VI

[38] Robert Garrett began service with the employer in April 2000. At the material time, he was a Correctional Officer I. He has no disciplinary record.

[39] A snapshot of Mr. Garrett's email account was taken on November 14, 2000. A review of the contents of the account was conducted and Mr. Garrett was interviewed by the investigator on February 20, 2001.

[40] Mr. Garrett had email in folders titled "Sent Items", "Inbox" and "Deleted Items". The contents of each of the folders, as they would have appeared on the computer screen, were printed. A sample of files with attachments was opened.

[41] The Inbox files contained "World Cups", pictures of semi-nude women with painted-on t-shirts; "New20", picture of a fake $20 bill with a bare-breasted woman; "Watch Out-X", six cartoons of a sexual nature. Three pictures of a snake which had apparently swallowed a boy and a photo of a cat gesturing as if with a raised index finger were not considered by the employer, in the context of the investigation, to be inappropriate.

[42] The "Sent Items" file included a picture of the $20 bill with a picture of a woman naked above the waist and six cartoons of a sexual nature.

[43] Mr. Garrett told the investigator he was aware of the employer's policy with respect to the appropriate use of the email system and demonstrated remorse and accepted responsibility.

[44] The employer's disciplinary response was a financial penalty of $773.90 which is the equivalent of five days' salary.

VII

[45] I begin by flatly stating that the email material for which the grievors were disciplined is, at the least, "inappropriate" and, in most cases, that word does not fairly or adequately describe the images and pictures.

[46] I use the word "inappropriate" because that is how the employer chose to delicately describe the material.

[47] The grievors used their email accounts to send and receive material, the main focus of which is pornography, nudity and vulgarity. The images are demeaning to women, depicting them as sexual objects.

[48] I have no hesitation in concluding that the grievors used the employer's electronic network for the conduct of activity which is in violation of the employer's oft-stated policies and would tend to bring the employer into disrepute.

[49] Indeed, the "Abbotsford News" published an article on July 17, 2001, headlined "Guards learn lesson: No secrets in cyberspace", the sub-head "Two dismissals, disciplinary action for inappropriate use of corporate e-mail."

[50] The grievors argued that they were not made aware of the employer's policies with respect to the use of the email system and they complained of a lack of "training." Those arguments carry little, if any, weight.

[51] First, the employer's policies were repeated at least five times between September 1999 and May 2000. Second, from June 2000, the grievors were met with a "warning" every time they logged on to their email accounts and they were compelled to acknowledge that warning in order to obtain access to that account. Third, common sense must prevail. The grievors knew, or ought to have known, that the use of the employer's system for sexually explicit material was inappropriate.

[52] In *Consumers Gas v. Communications, Energy and Paperworkers Union*, unreported, August 5, 1999 (Kirkwood), the board at para.71 said:

> *Lack of knowledge of the policy, however, in this case does not assist the grievor. Common sense should have prevailed, and suggested to the grievor that the cc mail system and the computer's storage system is not for her own extensive use*

> *and that the transmission and storage of sexual material would not be acceptable to the business. Common sense dictates that Linda Primiani's use of the computer went well beyond acceptable means. This case is similar to the Insurance Corporation of British Columbia (supra) case. Arbitrator Weiler found in determining what a reasonable employee would understand to be an appropriate use of the email, that the criteria would be whether the receiver or sender would want the message to be made public at the workplace. This is a basic common sense test, which in this case, the grievor did not pass.*

VIII

[53] The Supreme Court of Canada has made clear that employers are obligated to provide a safe, productive workplace by removing undesirable conditions: *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84.

[54] The investigation in the present case was complaint-driven. The employer had a duty to act on that complaint and remedy the undesirable conditions found to exist. The grievors suggested that the employer had condoned their activities. That is a serious allegation for which no reliable evidence of knowledge by senior management has been advanced.

[55] The grievors invoked section 8 of the *Charter* and argued that the employer's action violated their right to privacy.

[56] The grievors must first establish that, in the circumstances, they had a reasonable expectation of privacy: *R. v. M.R.M.*, [1998] 3 S.C.R. 393.

[57] In *Smyth v. Pillsbury Co.* 914 F.Supp.97 (E.D. Pa. 1996), the plaintiff was terminated for sending unprofessional messages about his supervisor on the defendant's email system. The employer had given assurances to its employees, including the plaintiff, of confidentiality and privilege and assurances that emails could not be intercepted and used as grounds for termination. The plaintiff claimed that his termination was a violation of his right to privacy and a violation of public policy which gave rise to a wrongful discharge action. The Court held there was no reasonable expectation of privacy in email communications, notwithstanding assurances that they would not be intercepted by the employer.

[58] *In Camosun College v. Canadian Union of Public Employees, Local 2081,* unreported, November 15, 1999 (Germaine), an employee was dismissed for sending an email, highly critical of his employer and co-workers, to a union "chatline" over the employer's computer system. The union claimed confidentiality and privilege. At para. 21 of his decision, the arbitrator said any reasonably well-informed email user would know that messages could be monitored and the originator of email has no control over the circulation of the message. In these circumstances, the arbitrator concluded there was no right to privacy and no confidentiality attached to the message.

[59] In view of the employer's policy against the use of the email system for unacceptable purposes and a clear log-on warning that the system is monitored in accordance with such policies, it is difficult to see how, in these circumstances, the grievors can claim a privacy interest. Moreover, the employer's investigation was driven by a complaint on which it was bound to act. This is not a case of random surveillance. Nor is it comparable to urinalysis or personal property searches. These are email communications over which the grievors lost control once they pressed 'Send". There are some 1,600 users on the CSC network.

[60] There has been no intrusion on the person or personal effects. The employer acted on a complaint, which it was legally obligated to do, and discovered that the grievors were using the employer's network for activities which can only be described as highly offensive. There is, in these circumstances, no reasonable expectation of privacy.

IX

[61] The grievors submitted that the "quarantine" memorandum (*supra* p.8, number 16) was in the nature of an "amnesty." They argued that the memorandum should be interpreted to mean that, providing employees deleted all offending material from their mailboxes by December 8, 2000, they would be immune from discipline. The grievors said they had complied with the provisions of that memorandum and were therefore entitled to "amnesty."

[62] The word "amnesty" does not appear in the memorandum of December 1, 2000. Nor is there any suggestion that, upon compliance with the direction to dispose of offending material, employees would be shielded from discipline for prior misconduct.

The memorandum refers to "recent events" and the necessity to take certain steps including the "quarantine" of "unauthorized" material. It reminds employees of policy CD 226 and requires removal of such material by December 8, 2000. It does not grant an "amnesty." Moreover, the investigation into the complaint regarding "possible pornography" was then underway.

[63] The grievors submitted that the investigation into their conduct was flawed in that it was unreasonably lengthy.

[64] The snapshot of the suspected offending mailboxes was taken on November 14, 2000. An investigation was commenced in December 2000. It was a significant undertaking involving 54 employees and voluminous email messages. The initial investigator was unable to continue. A new investigator began in January 2001. She conducted interviews with the grievors in February 2001 and submitted disciplinary investigation reports in March 2001. The Warden considered the matter and conducted interviews with the grievors and issued letters of discipline in June 2001. That is a process the length of which ought to be discouraged. It is not, however, inordinately long and must be viewed in the context of the enormous amount of work which went into the investigation, along with the necessity to view the disturbing contents of the mailboxes in relatively short intervals over a lengthy period of time to avoid their numbing and demoralizing impact. The Warden testified that the images could not be viewed for long periods of time and, thus, this part of the investigation was conducted in short periods over many days.

[65] Most importantly, the grievors did not point to any prejudice they had suffered from the form and length of the investigation into their conduct. There is no evidence of unfairness or breaches of the rules of natural justice. The length of the investigation, in and of itself, does not amount to prejudice. There is no suggestion that the grievors were singled out for special treatment or were dealt with in a manner which was materially different from other employees. Nor is there any evidence that the length and form of the investigation impaired the ability of the grievors to make full answer and defence.

X

[66] Standard One of the 'Standards of Professional Conduct" requires employees to conduct themselves "in a manner which reflects positively on the Public Service of Canada" and to act in accordance with "directives."

[67] The conduct of the grievors in this case did not conform to the applicable directives nor did it reflect positively on the employer. The article in the Abbotsford News is evidence of that.

[68] It must also be said that the Correctional Service is an employer which must continuously strive for public confidence and respect. The activities engaged in by the grievors can only detract from that objective.

[69] In many respects, correctional officers must be seen as role models for inmates in the correctional system. Inmates are, among other things, reforming behaviour which is socially unacceptable. The type of activity engaged in by the grievors is not socially acceptable and is at odds with their positions as correctional officers.

[70] There is also the risk that the prevalence of sexually explicit images on the CSC network will create a hostile and sexually charged workplace. Common sense says that is detrimental to a correctional facility.

[71] In *Consumers Gas* (*supra)* an employee was dismissed for the inappropriate use of her computer by receiving and sending offensive material.

[72] The arbitrator accepted the grievor's argument that she was not aware of the employer's policy prohibiting pornography and that she had not been shown the policy on Internet usage. It was held that lack of knowledge of the policy did not assist the grievor. Common sense told her that the email system should not be used for the transmission and storage of sexual material and she had taken the risk of transmitting material which common sense dictated ought not to be transmitted.

[73] The arbitrator in *Consumers Gas* substituted a one-month suspension for the dismissal. Here, the discipline ranges from five to seven days' salary.

[74] The comments in *Consumers Gas* are relevant to the case at hand. I do not accept that the grievors were unaware of the employer's policies - indeed, they were reminded of them every time they logged on to the email system and were compelled to acknowledge them in order to gain access to the system. But even if it could be said they were unaware of the policies, they distributed material which common sense dictated was inappropriate to distribute at a workplace and, in particular, at a correctional facility where they are supposed to set an example of socially acceptable behaviour.

[75] In my view, the conduct of the grievors provided cause for discipline. Was the discipline imposed, in all of the circumstances, an excessive response by the employer?

[76] The discipline imposed was as follows:

- James Briar - financial penalty of $928.68, the equivalent of six days' salary;
- Joseph Henneberry - financial penalty of $1,425.76, the equivalent of seven days' salary;
- Roop Aujla - financial penalty of $1,011.15, the equivalent of seven days' salary;
- Robert Garrett - financial penalty of $773.90, the equivalent of five days' salary.

[77] I am persuaded that Warden Urmson understood and accepted his responsibility to impose discipline proportional to the misconduct. He approached this task with care and thoughtful consideration. He took into account all of the relevant factors:

- nature of the email material;
- whether it was a breach of policy CD 226 and the type of breach;
- volume of the offending material stored including Inbox;
- volume of offending material sent;
- length of service;
- previous discipline;

- performance record;
- acceptance of responsibility;
- apology/demonstration of remorse.

[78] Warden Urmson testified that he was conscious of the need to be fair and even-handed in the imposition of discipline and not to allow his subjective views about the nature of the offending material to cloud his judgment.

[79] To assist him in that task, he prepared a chart which contains the names of all of the employees disciplined, including the grievors, and columns which contain, beside each name, the information in response to the relevant factors listed above. The chart enabled him to compare the pertinent factors applicable to each employee and the discipline imposed. In this way, the Warden was able to check for balance and consistency across the entire number of employees, including the grievors, who were disciplined.

[80] As a further precaution, the Warden asked Ms. Maureen Hines, Regional Chief, Staff Relations and Compensation, to scrutinize the chart to see if he had achieved balance and consistency.

[81] There was some suggestion by counsel for the grievors, but no evidence, that there might have been inconsistencies in the discipline imposed among the 36 employees on the Warden's chart and that the investigation was flawed because it took too long to complete. I have previously dismissed that argument. There is no evidence which would strike at the basis for discipline. There is no evidence of selective discipline or random or indiscriminate discipline.

[82] In *Re Iron Ore of Canada and U.S.W.A. Local 5795* (1975), 11 L.A.C. (2d) 16 (Harris) cited in *Consumers Gas*, (*supra*), the arbitrator discussed those circumstances in which an employer might lose its right to discipline:

> *It loses those rights either when it can be shown that the selection of employees for discipline was indiscriminate or random; or when it can be demonstrated that, having identified a number of offenders, it chooses for discipline not all those so identified, but rather a selected number - perhaps for the purpose of setting an example, perhaps because of a prejudice against one or more employees, perhaps for any one of several possible reasons. If indeed an employer follows*

> *such a course of action, he will have acted in a discriminatory arbitrary, or capricious manner and most arbitrators would overturn his decisions. If on the other hand, he selects for discipline all those clearly identified as having been active as defined above and in whose cases available evidence clearly supports the identifications, and if he does no [sic] without prejudice, without exception, without favour; then his decisions could not be successfully challenged even though a number of equally guilty offenders have gone undetected. (p.15)*

[83] None of those exceptions applies in this case. The evidence is that the employer took into account all of the relevant factors before imposing discipline; that it did not act in an arbitrary, discriminatory or capricious manner. The discipline imposed was proportional to the employment offences and, given the nature of the offences, must be considered to be modest.

[84] There is no basis for interference in the discipline imposed upon the grievors.

[85] The grievances are dismissed.

Colin Taylor, Q.C.
Board Member

VANCOUVER, January 20, 2003.