

Library

Date: 20040127

File: 166-2-31800

Citation: 2004 PSSRB 3



Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

JAMES THEODORE MACKIE

Grievor

and

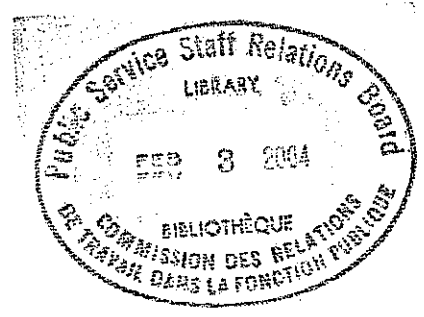
TREASURY BOARD
(Solicitor General Canada - Correctional Service)

Employer

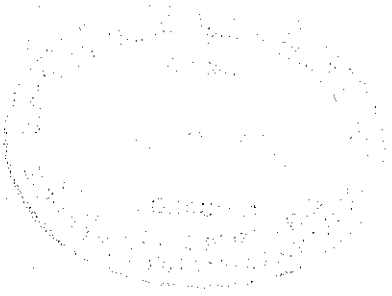
Before: Léo-Paul Guindon, Board Member

For the Grievor: Douglas MacAdams, Counsel

For the Employer: Richard Fader, Counsel



Heard at Abbotsford, British Columbia,
July 23 to 25, 2003.



DECISION

[1] The grievor, James Theodore Mackie, a correctional supervisor (CX-03) at Kent Institution in Agassiz, B.C., filed a grievance on April 17, 2000, against the financial penalty (equivalent to 20 days' pay) imposed on him on March 17, 2000.

[2] Harassment investigations were conducted following two complaints filed by Mark Olsen (CX-01) and Neil MacLean (CX-02).

[3] The harassment complaint filed by Mr. Olsen on November 8, 1999, specified harassment by abuse of authority on the part of the grievor. The Deputy Commissioner, Pieter H. de Vink, appointed Michael Gallagher as Assessor to review the allegations of harassment summarized as follows (exhibit E-10):

1. *That Mr. James T. Mackie (respondent) is alleged to have harassed - abuse (sic) his authority during the last three years by threatening Mr. Mark Olsen on three occasions with removal from the Regional Emergency Response Team.*
2. *That Mr. James T. Mackie (respondent) is alleged to have harassed - abuse (sic) his authority in May 1999 by threatening Mr. Mark Olsen in MCCP-Kent Institution with removal from the Regional Emergency Response Team.*
3. *That Mr. James T. Mackie (respondent) is alleged to have harassed - abuse (sic) his authority on October 19, 1999 by intimidating Mr. Mark Olsen in Admissions & Discharge - Kent Institution.*
4. *That Mr. James T. Mackie (respondent) is alleged to have harassed - abuse (sic) his authority in October 1999 by labeling Mr. Mark Olsen as a "rat" to follow (sic) staff members.*

[4] The harassment complaint filed by Mr. MacLean on November 10, 1999, alleged that he was harassed by Mr. Mackie, who abused his authority on that date, threatening to ruin his career and/or kill him during a conversation in the correctional supervisor's office.

[5] Michael Gallagher was appointed as Assessor by the Deputy Commissioner, Pacific Region (Pieter H. de Vink), to review the allegations of harassment made by the two complainants. He submitted his report to Kevin Morgan, Acting Deputy Warden at Kent Institution, who proceeded to conduct a disciplinary investigation regarding Mr. Mackie.

[6] Mr. Gallagher came to the conclusion that Mr. Mackie had harassed Messrs. Olsen and MacLean by abusing his authority and maintained the complainants' allegations. His report was submitted to Mr. Morgan, who proceeded to conduct a disciplinary investigation on the basis of Mr. Gallagher's findings. Mr. Morgan made a recommendation regarding a disciplinary decision to the Warden of Kent Institution, Paul Urmson.

[7] Paul Urmson, the Warden at Kent Institution, awarded a financial penalty equivalent to 20 days' pay to Mr. Mackie on March 17, 2000, after reviewing the disciplinary report completed by Mr. Morgan and the tape recording of Mr. Gallagher's interview. That decision was rendered after he held a disciplinary hearing in the presence of Mr. Mackie and found that he had harassed two subordinate staff members at Kent Institution.

[8] The facts at the basis of the decision of the employer to conclude that Mr. Mackie harassed Mr. Olsen can be summarized as follows from the evidence submitted by the parties at the hearing in the present case.

Mr. Olsen's First Allegation: Threatened on Three Occasions in the Past Three Years to be removed from the Regional Emergency Response Team (ERT)

[9] Emergency response teams are in place in each correctional institution and are under the responsibility of local management. In 1996, Douglas Richmond was assigned to reorganize the response teams on a regional basis. A regional Emergency Response Team (ERT) was established and correctional officers who were members of the local response teams were selected to be part of it. This regional ERT has no formal structure and the correctional officers remain employees of the local institutions, notwithstanding that they are members of the regional ERT. Mr. Olsen was a correctional officer and a member of the regional ERT. He was still under the supervision of Kent Institution for everything related to his work conditions, equipment and training needs.

[10] The role and responsibilities of the regional ERT team leaders and of the management representative was the subject of debate on the part of the team members. Mr. Mackie, Correctional Supervisor at Kent Institution, acted as a management representative on the ERT and was responsible for making recommendations to the Institution's management in relation to staffing, training and equipment needs. Each institution remains the decisional authority for the

correctional officers involved in the ERT. However, the team leaders for the ERT wanted to be the sole authority for the team members for whatever emergency situation (riot or hostage taking) or non-emergency situation (training exercises, equipment needs). Some team leaders, including Mike Price, made representations to Mr. Richmond in 1998 and 1999, requesting less interference from Mr. Mackie, the management representative, in the operation of the ERT. The team members themselves were also confused by the lack of clarity between the roles and responsibilities of the team leaders and those of the management representative.

[11] This debate also confused Mr. Olsen, an ERT member. He made representations to the Kent Institution Deputy Warden before or around September 1999, trying to get Mr. Yolland back on the regional ERT team. Mr. Mackie was not happy with Mr. Olsen's initiative and told him, in front of Mr. Yolland, that this went against the responsibilities of the management representative in question to recruit members for the ERT. During that conversation, Mr. Mackie made the following statement to Mr. Olsen: "With a stroke of a pen (he then snapped his fingers), I could have you removed from the team."

[12] Mr. Mackie admitted that he made that kind of statement but specified that he had no intention of threatening Mr. Olsen. Mr. Mackie explained that he wanted to clarify his role as the management representative on the regional ERT to Mr. Olsen. He stated that Mr. Olsen was, even prior to their conversation, aware that it was Mr. Mackie's responsibility to recommend to institutional management which officers should be recruited as part of the ERT and which officers should be removed from the team.

[13] The evidence submitted by the employer did not involve any other incident even though Mr. Olsen's complaint referred to being harassed over a period of three years. The employer concluded that Mr. Mackie did not deal in an appropriate manner with Mr. Olsen with respect to the incident that occurred in or around September 1999. According to the employer, the harassment by abuse of authority is founded on the perception of Mr. Olsen, who felt threatened by the statement made by Mr. Mackie. Management argues that this finding of harassment by abuse of authority is in compliance with the definitions stated in the following extract from the "Harassment in the Work Place Policy":

*Appendix A**Definitions*

Harassment means any improper behaviour by a person employed in the Public Service that is directed at, and is offensive to, any employee of the Public Service and which that person knew or ought reasonably to have known would be unwelcome. It comprises objectionable conduct, comment or display made on either a one-time or continuous basis that demeans, belittles, or causes personal humiliation or embarrassment to an employee.

...

Abuse of authority is a form of harassment and occurs when an individual improperly uses the power and authority inherent in his or her position to endanger an employee's job, undermine the performance of that job, threaten the economic livelihood of the employee, or in any way interfere with, or influence the career of, the employee. It includes intimidation, threats, blackmail or coercion.

Mr. Olsen's Second Allegation: Threatened to be removed from the Regional ERT in May 1999

[14] The second allegation is also related to the debate surrounding the "chain of command" for the ERT as outlined above. In May 1999, the conversation between Messrs. Olsen and Mackie revolved around the "chain of command" issue. Mr. Olsen's position at that time was that he reported to the regional team leader (Mike Price). For Mr. Olsen, it was up to the team leader to keep the management representative (Mr. Mackie) informed about the team. Mr. Mackie wanted to clarify to Mr. Olsen that he should get his authorization before advising the other ERT members that they had to be present for training or other matters falling under his responsibility as management representative.

[15] Mr. Mackie gave a clear warning to Mr. Olsen that he could be removed from the ERT if he did not abide by the chain of command. Messrs. Hubscher and Helgason, who witnessed the conversation, understood Mr. Mackie's statement as a warning to Mr. Olsen. The employer concluded that Mr. Mackie did not deal with Mr. Olsen in an appropriate manner on that occasion, for the same reason as the first allegation.

Mr. Olsen's Third Allegation: Harassed by Abuse of Authority by Intimidation on October 19, 1999

[16] An investigation was started with respect to Mr. Mackie in August 1999, after Mr. Olsen advised Michelle Rogers, Chief of SIS, that Mr. Mackie had taken a gas mask from the ERT supply for his personal use. Mr. Mackie was interviewed by K. Morgan (Unit Manager, assigned as a fact-finding investigator in this case) around October 10, 1999, on the allegation of misappropriation of ERT equipment.

[17] Mr. Olsen alleged that, on October 19, 1999, Mr. Mackie told him that he was under investigation and said: "Some fucking team member is trying to screw me over. I will find out who it is and let him know who they are fucking with."

[18] Mr. Olsen felt that the statement was a threat directed at him. For his part, Mr. Mackie stated that he made that comment without knowing on that date that Mr. Olsen was at the origin of the investigation against him and, consequently, had not directed his statement at Mr. Olsen. In his testimony, Mr. Mackie admitted that he was upset by the investigation, which put his career in danger because of a frivolous complaint. This allegation against Mr. Mackie was found to be groundless by the investigator, who concluded that there was no evidence to show that Mr. Mackie had abused his authority by misappropriating ERT equipment. The investigator noted in his report that he had some concerns about Mr. Olsen's action in this situation. According to his report, Mr. Olsen insisted to him that he had not made the allegations which had led to the investigation.

[19] On this third allegation, management concluded that the statement made by Mr. Mackie was inappropriate, whether or not he knew at the time he made it that Mr. Olsen was the subject of the statement. Since Mr. Olsen had a serious reason to feel that he was threatened by Mr. Mackie's statement, management concluded that Mr. Mackie was guilty of harassment by abuse of authority in that circumstance.

Mr. Olsen's Fourth Allegation: Harassed by Abuse of Authority by Being Labelled as a "Rat" on October 29, 1999

[20] On October 29, 1999, Mr. Mackie entered a unit at the Institution and gave details of an ongoing investigation against Rico Laidler, a correctional officer involved in the ERT as an armourer, to two correctional officers: Rick Peck and Sean Hubscher, both members of the ERT.

[21] The conversation was related to the investigation of Mr. Laidler following Mr. Olsen's statement to his ERT team leader that he found bullets and some pieces of ammunition in Mr. Laidler's bag after a training session. The evidence shows that the team members (Messrs. Peck and Hubscher), having heard about the investigation, asked Mr. Mackie what it was all about. Mr. Mackie gave them information about the investigation, explaining at the hearing that he had done so only because he believed that a high level of trust between members of the ERT was necessary. At that time, Mr. Mackie made a statement to the two correctional officers that Mr. Olsen had been the one to "rat out" Mr. Laidler. Mr. Hubscher reported this incident to Mr. Olsen.

[22] Messrs. Peck and Hubscher testified that Mr. Mackie made the comment concerning Mr. Olsen and Mr. Mackie admitted in his testimony that he did so. In his grievance, Mr. Mackie specified that Mr. Olsen had already been labelled a "rat" by his peers, prior to the October 29, 1999, incident. For Mr. Mackie, Mr. Olsen was labelled as such because he levelled the allegation against Mr. Laidler without just cause. A "rat", for Mr. Mackie, is a person who purposefully distorts the truth and/or lies to get someone else in trouble. Mr. Mackie described the statement that was made by him as "unprofessional", explaining that he should not have used those words and that "his tongue slipped" on that occasion and that he regretted voicing his opinion.

[23] Rico Laidler testified that Mr. Olsen showed up at his home to inform him that an investigation would be conducted against him after the Deputy Warden, Kevin Morgan, chose his bag to verify. Mr. Laidler said that he was disappointed when he learned that Mr. Olsen was at the origin of the investigation and did not understand why Mr. Olsen wanted to initiate something like that. Mr. Laidler was removed as armourer pending the investigation and was reinstated shortly after it was concluded that he did nothing wrong.

[24] The label "rat" in the correctional service is related to a "code of silence" inside the institution. Someone is called a "rat" when, rather than covering up or keeping silent about the goings-on within the institution, they break the code of silence and tell people. The label "rat" is put on someone who makes a declaration, whether the declaration is true or not, according to almost all of the witnesses who testified on this. Management of the correctional service have tried to break that code of silence and the Warden at Kent Institution, Mr. Urmson, testified that it is a serious issue.

[25] The consequences of being labelled a "rat" bring ostracism to the one labelled as such. The other officers will avoid talking to or taking care of the officer and will ignore this person. A correctional officer who is labelled a "rat" puts their security in jeopardy and at high risk; nobody will move to help them if they are in a dangerous situation or to prevent such a situation from occurring. It is well known that the security of correctional officers is primarily based on solidarity between them and the high level of confidence and trust they have for one another. In other words, the level of trust and confidence disappears when one is labelled a "rat".

[26] Mr. Olsen testified that he suffered ostracism following October 29, 1999, receiving threatening phone calls at his workstation and being the object of retaliation from co-workers who avoided talking to him. At one point, a green plastic cup was left at his workstation. That cup had a logo of a small weapons group and a hand drawing of a rat in the cross hairs of a scope. Mr. Olsen showed the cup to Ray Gill, a correctional officer, before he placed it in a plastic bag and took it out of the Institution. This drawing appeared to him as a direct threat to his life and he was afraid for himself and his family. Those incidents upset him and he felt almost dirty; his self-esteem and dignity plummeted for quite some time after. Mr. Laidler testified that the green cup with a drawing of a "rat" on it was his. He specified that the drawing was on his cup a long time before the complaint and that everyone in the Service laughed about this as a running joke.

[27] The employer considered as an aggravating circumstance the fact that a supervisor in charge labelled a correctional officer a "rat" despite clear efforts by management to banish that kind of conduct. To be labelled so by someone in charge of other employees has a bigger impact than when it comes from other sources. The employer concluded that the allegation had been proven and that Mr. Mackie was guilty of harassment by abuse of authority on that allegation.

Mr. MacLean's Allegation: Threatened to Ruin his Career and/or Kill Him on November 10, 1999

[28] The complaint filed by Mr. MacLean on November 10, 1999, is related to Mr. Olsen's complaints. Mr. MacLean is a union representative at Kent Institution. The president of the local union referred Mr. Olsen to Mr. MacLean, who was responsible for the harassment file. Mr. MacLean helped Mr. Olsen prepare and write his

complaint, which was received on November 9, 1999, by the Anti-Harassment Coordinator.

[29] On the same day, Mr. Mackie was notified by letter that he was being removed from his management representative responsibilities for the ERT pending the investigation of a harassment complaint filed against him. That letter did not please him.

[30] On November 10, 1999, Mr. MacLean reported to work in the correctional supervisor's office at about 7:10 a.m. The supervisor in charge was Mr. Mackie, who answered his greeting by saying that he was very mad because someone had filed a harassment complaint against him. At one point during the conversation, Mr. MacLean informed Mr. Mackie that he was the representative for Mr. Olsen's complaint.

[31] In his testimony, Mr. MacLean stated that the conversation between the two of them degenerated. Behind closed doors, Mr. Mackie requested that Mr. MacLean drop the case at that point because it would hurt his career. Mr. MacLean specified in his complaint that: "Mr. Mackie, while sitting in his chair, turned and smiled and stated, 'I have a long line of staff that will kill the both of you. All I would have to do is smile. I wouldn't say anything, just smile.'" He also stated that Mr. Laidler was very upset with both of them, and he was waiting to shoot them in the parking lot. Mr. MacLean perceived these statements as a serious threat and left the office feeling very tense, distressed and with shaky hands.

[32] Mr. MacLean went to the backroom and put the incident in writing (Exhibit E-14). He talked to the Deputy Warden, Diane Knopf, about the incident and via e-mail sent her a copy of his notes (Exhibit E-13). Following his request, she gave him permission to leave and not attend the training session planned for that day. Before leaving the Institution, Mr. MacLean went to the computer room and typed out his complaint (Exhibit E-11). John Romane, a Unit Manager, saw Mr. MacLean in the computer training room when he put the incident that had occurred with Mr. Mackie in writing. At that time of the day (around 11:00-11:30 a.m.), Mr. Romane noticed that Mr. MacLean did not look terribly distressed and talked very clearly about the facts. He was not crying and declined the possibility of mediation and support from the Employee Assistance Program (EAP).

[33] Mr. MacLean testified that he became very stressed by the incident. He felt very uncomfortable being caught in that situation. He considered Mr. Mackie to be a work friend with a well-established reputation.

[34] During the conversation with Ms. Knopf, Mr. MacLean was out of breath and testified at the hearing that he broke down and cried. He showed visible signs of disturbance after the incident, being sleepless at night with high stress for several months.

[35] In the afternoon, around 3:00 p.m., Mr. MacLean showed up at the Agassiz Royal Canadian Mounted Police (RCMP) station and talked to Constable E. Bernard. He advised her that he wanted to report a threat made against him and requested immediate assistance. Constable Bernard verified that it was not an emergency situation and gave him an appointment for the next day because she concluded that there was no immediate danger. Mr. MacLean declined to be referred to another constable to report his complaint.

[36] According to Mr. Mackie, Mr. MacLean informed him of his involvement in Mr. Olsen's harassment complaint in the office while the door was open. Two to four employees went in and out of the office during the conversation between the two of them. Mr. Mackie denied having raised his voice and denied making any threats or threatening anyone's life during the 10-minute conversation but clearly stated that he told Mr. MacLean that he was in for the fight of his life and that he would let no one ruin his career. He specified that he was upset because it was the second attack on his career within two months, the first one being the complaint relating to misappropriation of ERT equipment for personal use.

[37] Mr. Mackie denied that he ever verbalized the threats stated in paragraphs 4 and 10 of Mr. MacLean's complaint (Exhibit E-11). In the details of his grievance (Exhibit E-15), Mr. Mackie specified the following:

There was an unwitnessed discussion between only Mr. MacLean and myself ... When he advised me that he was Mr. Olsen's representative, I told him that we should not be talking and that he should leave my office. He didn't leave and continued to discuss Mr. Olsen's case. Although, it ended up being a heated discussion, which at no time did I threaten Mr. MacLean with any form of harm personally and/or professionally (sic). He came to me to discuss Mr. Olsen's complaint when all I was expecting from him was for him to

check in and attend his assigned training for the day. I believed the incident was a conversation between two friends with a ten year relationship, who had dealt with problems before, which had always been worked out amicably. (sic throughout)

[38] Mr. Mackie cooperated with the police investigation and renounced his right to a lawyer at the November 16, 1999, meeting with Constable Bernard. He told her that he had nothing to hide. The police investigation concluded that no recommendation for charges would follow Mr. MacLean's denunciation. This conclusion was reached on the basis that Mr. Mackie did not show a pattern of violence and that Constable Bernard believed his account. Constable Bernard advised Mr. MacLean of the outcome of her investigation and he accepted her conclusion that she felt there was no risk.

[39] Ms. Knopf interviewed Mr. Mackie after Mr. MacLean filed his complaint. Mr. Mackie testified that following this meeting he was not removed from his job but had taken it upon himself to request a transfer out of Kent Institution pending the investigation. On November 18, 1999, the Warden at Kent Institution advised Mr. Mackie in writing that he could not enter Kent Institution without his permission. Mr. Mackie was assigned to the Regional Supply Depot pending the investigation.

[40] Management concluded that Mr. Mackie had harassed Mr. MacLean. Mr. Urmson notified him by letter dated March 17, 2000, of the disciplinary penalty imposed on him in the following terms (Exhibit E-4):

Further to the disciplinary hearing with you on February 6, 2000 where we discussed the results of the harassment investigation into your conduct with subordinate staff. I have now completed my review of this matter. (sic)

As you requested, I have reviewed the tape recording of Mr. Gallagher's interview. I have also reviewed the disciplinary report completed by Mr. Morgan as well have taken into consideration your comments during my meeting with you (sic). I find that you have harassed two subordinate staff at Kent Institution.

The Harassment of subordinate staff by a supervisor is very serious misconduct and will not be tolerated. In coming to my determination on penalty I have taken into consideration the length of your service, your performance appraisals and your lack of any previous discipline. In view of the foregoing and in accordance with Section II of the Financial Administration Act, I am awarding you a financial penalty equivalent to twenty (20) days' pay.

You should be aware that any further serious disciplinary infractions may result in discipline, up to and including discharge.

[41] Mr. Urmson explained, during his testimony in the present case, that he had to deal with the alleged threat verbalized against Mr. MacLean differently from the RCMP. Notwithstanding that Constable Bernard came to the conclusion that Mr. Mackie had no intention of carrying out a threat, the employer had to make the evaluation of whether or not a threat had been made contrary to the Harassment Policy and Regulations, and more specifically on the definition of harassment. For management, the fact that Mr. MacLean thought or perceived as a threat the words he heard from Mr. Mackie on November 10, 1999, was at the heart of its decision. The Warden came to the decision that Mr. MacLean had a clear perception of a threat from Mr. Mackie on the basis of the preponderance of probabilities.

[42] Mr. Urmson took Mr. Mackie's unblemished record into consideration as a mitigating factor and did not look at incidents that took place more than a year prior to the complaints. He considered as an aggravating factor the fact that Mr. Mackie did not deal in an appropriate manner with Messrs. Olsen and MacLean within his responsibilities as correctional supervisor and abused his authority in a way which corresponded to the definition of harassment in the "Harassment in the Work Place Policy".

[43] Following the complaints, Mr. Mackie took approximately 70 days of sick leave and lost a lot of overtime opportunities in being transferred out of a maximum-security institution to the Regional Supply Depot.

[44] Following the decision on the harassment complaints and the disciplinary penalty imposed on Mr. Mackie, the Warden of the Institution reviewed the situation of his assignment to the Regional Supply Depot. Mr. Urmson notified Mr. Mackie of this administrative decision in the following terms on March 28, 2000 (Exhibit E-5):

In light of the recent Harassment Complaints that were upheld, I have reviewed the situation regarding your employment, specifically at Kent Institution.

The Commissioner's Directive on Harassment (CD 255), in paragraph 20, states that "Managers shall take all reasonable steps to restore harmony in the workplace when a complaint is resolved."

Considering that a number of witnesses to the harassment incidents and the fact that one of the complainants still works at Kent Institution, I feel that your return to Kent Institution would compromise the workplace. (sic)

After considering all the alternatives, I have concluded that you should continue to work at the Regional Supply Depot until such time as an alternate place of employment can be found.

Arguments

For the Employer

[45] The employer has to fulfill its burden of proof and demonstrate that the employee violated the "Code of Discipline" and/or the "Standards of Professional Conduct". In the present case, Mr. Mackie allegedly abused his authority as described in the "Harassment in the Work Place Policy" and acted against a workplace free of harassment.

[46] In the present case, the proof is contradictory and the adjudicator has to evaluate the credibility of the witnesses. The real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and those conditions (*Faryna v. Chorney*, [1952] 2 D.L.R. 354).

[47] Two actions carried out by Mr. Mackie were not in dispute. He admitted having said that with a stroke of a pen he could have Mr. Olsen removed from the ERT and that Mr. Olsen had "ratted" on Mr. Laidler. Mr. Mackie should have known that his statements could be understood as a threat to interfere or influence the career of the employee and were inappropriate behaviour and constituted harassment. Mr. Mackie should have known that the "rat" statement was inappropriate and damaging for Mr. Olsen when it was made in front of two correctional officers.

[48] In the complaint filed by Mr. MacLean, the proof demonstrates that Mr. Mackie was angry with Mr. Olsen and clearly asked Mr. MacLean to drop the case. It is not credible that Mr. MacLean filed the complaint just to destroy Mr. Mackie's career, when it is known that they were good friends at work.

[49] As related in *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, the Supreme Court of Canada at pgs. 95-96, cited with the approval the following extract from the U.S. Supreme Court:

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or [page 96] with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive, workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.

[50] This principle can be applied in the present case precisely because the supervisor, Mr. Mackie, was clothed with the employer's authority and was thus able to impose unwelcome harassment by abuse of authority on two subordinates, namely Messrs. Olsen and MacLean.

[51] The circumstances of the present case demonstrate that Mr. Mackie clearly acted in violation of the "Code of Discipline" and the "Standards of Professional Conduct". He did not show real remorse and the impact on the two complainants was very serious. The employer considered Mr. Mackie's unblemished record as a mitigating factor. In view of this, the 20-day financial penalty is reasonable and should be maintained by the adjudicator.

For the Grievor

[52] The five charges are all ones of harassment by way of abuse of authority. To succeed, the employer must establish the elements of harassment and abuse of authority as defined in the Treasury Board Manual, Appendix A (Exhibit E-6), and the Commissioner's Directive, paragraphs 2 and 5 (Exhibit E-7). The grievor asks the adjudicator to be mindful of paragraph 12 of the Commissioner's Directive. This paragraph codifies protection for the exercise of supervisory functions in the following terms:

This policy shall not restrict the authority of those charged with managerial and supervisory responsibilities in areas

such as counseling, performance evaluation, staff relations and the implementation of disciplinary actions.

[53] The grievor submits that the appropriate standard of proof is that set out in *Gale v. Treasury Board* (2001 PSSRB 85). The employer should be required to demonstrate by clear, convincing and cogent evidence that each of the allegations has occurred. The reason why this standard should be applied is that the allegations are serious. The grievor's reputation is at stake in all of them. In the case of allegation #4 (the ratted-out statement incident), the employer contends that within the prison context, the allegation is very serious. With the employer taking this position, it is appropriate that the employer be held to the more demanding standard. In the case of allegation #5 (the MacLean allegation), the allegation is one that gives rise to possible criminal sanctions and for that reason is very serious indeed.

[54] The standard of proof should be applied to each allegation taken separately. Counsel for the grievor submitted that to allow considerations applying to one allegation to spill over to considerations of another allegation would be a fundamental error.

[55] Two of the allegations involved unwitnessed events. Allegation #1 (1999 incidents in past three years) and allegation #5 (the MacLean allegation) were both without witnesses. *Gale v. Treasury Board (supra)* provides assistance in dealing with such circumstances, stating that the test to apply in assessing credibility is the preponderance of probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[56] The three incidents in the past three years should be found to be time barred. Mr. Urmson adopted Mr. Gallagher's findings and found that the extraordinary circumstance that permitted going back three years was allegation #4 (the ratted-out statement incident). Taken by itself, there is nothing extraordinary about allegation #1 to take it out of the time limitation. Mr. Urmson made a fundamental mistake in accepting Mr. Gallagher's mixing up considerations applying to one allegation and applying those considerations to others. This should be corrected.

[57] Counsel for the grievor submitted that the context of the allegations should be taken into account. Many witnesses, with Doug Richmond being the most significant, spoke of the wish of some ERT members, Mr. Olsen included, to get out from under the scrutiny of the management representative and in particular to get out from under

Mr. Mackie's scrutiny. There is no need to find there was a conspiracy of any kind or to find that Mr. Olsen submitted the grievances as part of an ongoing campaign to hurt Mr. Mackie. Counsel for the grievor did say that Mr. Olsen's evident resistance to Mr. Mackie's authority and supervision should lead the adjudicator to weigh carefully Mr. Olsen's evidence and that of his representative, Mr. MacLean. He stated that timing is of some significance. Mr. Olsen triggered the investigation in August 1999, regarding misuse of equipment by Mr. Mackie. Mr. Morgan interviewed Mr. Olsen on October 20, 1999. When Mr. Olsen filed his complaint on November 8, 1999, Mr. Morgan's report was underway, presumably with a delivery date in the next short while. In the overall context of not liking Mr. Mackie's presence or his supervision and of seeking to resist it and an impending report from Mr. Morgan (Exhibit G-3), the adjudicator can and should find that the perception of events on the part of the complainants became unreliable.

[58] Here is a thumbnail sketch of what counsel for the grievor submitted are the critical factual points in respect of each allegation.

- Allegation #1: These are unwitnessed events. Mr. Mackie denies them. Mr. Olsen cannot provide times, locations, circumstances or effects of the words he objected to. There was no timely complaint about them. In particular, the adjudicator should find there was no complaint about these events on the occasion when Mr. Olsen says he did complain, namely to Mr. Richmond in late summer 1999. The adjudicator should find that these allegations have not been proven to the required standard of proof.
- Allegation #2: This is a witnessed event. Mr. Mackie concedes he said the words. Two witnesses (Messrs. Helgason and Hubscher) say that the words were spoken in a normal tone of voice at a normal volume. They said they understood the words to indicate the exercise of a well-known and normal supervisory function, namely suspension by the management representative pending review of a member who was not complying with the standards required of response team members. From the evidence of Messrs.

Olsen and Mackie, it is clear that Mr. Olsen was resisting Mr. Mackie's supervision on response team matters. There was no timely complaint about this event. All in all, the employer has not met the standard of proof required to move these supervisory words into the category of being objectionable conduct or comment. Nor can the employer demonstrate that Mr. Olsen was demeaned, belittled or caused personal humiliation or embarrassment. The employees who were there thought nothing of the comments they heard.

- Allegation #3: This is a witnessed event. Mr. Mackie concedes he commented on the investigation he was undergoing and that he said he wanted to find out who had triggered it. He denies the words alleged. Mr. Yolland did not hear the words. Mr. Morgan testified and noted in his report (Exhibit G-3) that Mr. Mackie claimed not to have known at the time he spoke that Mr. Olsen had initiated the complaint about the equipment. In the circumstances, the comment was not directed at Mr. Olsen. Mr. Olsen perceived it as directed at him because he had knowledge that Mr. Mackie did not. In these circumstances, the employer has not met the burden.

- Allegation #4: This is a witnessed event. Mr. Mackie concedes saying the words and admits they were unprofessional. The words were not spoken in Mr. Olsen's presence. They were spoken in response to enquiries from ERT members about an issue that was known throughout the prison and was disturbing the functioning of the response team. What Mr. Mackie did was speak to two team members. Counsel for the grievor submitted that there is no link established on the evidence between the issue of the cup or the issue of the calls and the comments, which are the subject of allegation #4. Those in J-unit testified they spoke to no person other than Mr. Olsen about Mr. Mackie's words. In these circumstances, counsel for the grievor submitted that the

adjudicator should make no comment about the cup or calls, especially given the civil litigation that is underway.

- Allegation #5: In the complaint filed by Mr. MacLean, the adjudicator has to assess the sincerity of the complainant in his testimony. Mr. MacLean knew of Mr. Olsen's harassment complaint against Mr. Mackie and the timing of the events. The fact that Mr. MacLean stayed there notwithstanding that he said that he wanted to get out of the discussion and that Mr. Mackie offered him mediation to resolve the complaint goes against the complainant's perception of a threat. Mr. Mackie admitted that he was upset by the harassment complaint, which was the second one in a few weeks, and said to Mr. MacLean: "You're in for the fight of your life". Those words have to be understood not as a threat but as showing Mr. Mackie's determination to defend his career. The openness Mr. Mackie showed in the police investigation supports the assertion of innocence more than his culpability.

[59] Counsel for the grievor submitted that the employer did not fulfill its burden of proof when the allegations are related only to the words of one man. In those circumstances, the standard of proof has to be higher than just preponderance, as stated in the *Gale (supra)* decision.

[60] In the present case, Mr. Mackie admits that he made the statement that "Olsen ratted out Laidler" in front of two officers. He acknowledges that it was a mistake but that the mistake was not repeated. He acknowledges that the statement was unprofessional. In those circumstances, the financial penalty equivalent to 20 days pay is highly disproportionate and should be reviewed so as to be lowered by the adjudicator.

[61] The grievor specifies that he put emphasis on the following corrective action he requested in his grievance (Exhibit E-15):

1. *Return of all sick and annual leave time used by me from November 10, 1999, until completion of the grievance process due to the upset and stress this has caused me.*

2. Averaged overtime payment that I missed at my rate according to contract based on that received by all Correctional Supervisors employed at Kent Institution, missed by me since November 10, 1999, until completion of this grievance process.
3. Payment for all overtime missed by me for statutory holidays that I would have worked, from November 10, 1999, until completion of this grievance process.
4. Payment for all shift differential and weekend premiums missed by me, from November 10, 1999, until completion of this grievance process.
5. Payment of all legal and assistants fees incurred during this harassment, disciplinary, and grievance process.
6. Payment of overtime, at the applicable rates, for all meetings that I attended during this harassment, disciplinary, R.C.M.P. interview, and grievance process.

Reasons for Decision

[62] I agree with the parties that the allegations of harassment by abuse of authority are very serious. In the present case, some serious allegations, particularly relating to death threats and the labeling of "rat" against a staff member, support counsel for the grievor's argument in favour of a higher standard of proof to be required from the employer.

[63] The higher onus was canvassed in *Samra* (Board file 166-2-26543) as quoted in *Gale (supra)* as follows:

...The existing jurisprudence is rife with cases which support the notion that in cases of serious alleged misconduct, particularly where a person's continued employment and reputation is at stake, the employer must demonstrate by clear, convincing and cogent evidence that the allegation has occurred. While the standard is not that of criminal cases requiring proof beyond a reasonable doubt, it requires more than a mere preponderance of proof.

[64] The *Teeluck* (Board file 166-2-27956) case was one concerning the issue of sexual harassment and in that case, Adjudicator McLean expressly accepted that the higher onus applied. The existing "rat code" in the Renous Institution and its impact was the object of a comment in an addendum to his decision by Adjudicator MacLean.

By his comments, it is clear that Adjudicator MacLean felt that the rate code was entrenched enough in the institutional environment to merit "strong approbrium on his part." In the present case, this "rat code" was related to one of the allegations in Mr. Olsen's harassment complaint and certainly increased the seriousness of the complaints, along with the death threat allegations. Notwithstanding that the employer did not terminate the employee, I agree that the higher onus is an appropriate standard of proof in the present situation.

[65] In this case, some serious allegations concern incidents without witnesses other than the persons directly involved and such allegations require the application of the test of credibility as described by Justice O'Halloran in *Faryna v. Chorney*, [1952] 2 D.L.R. 354, as follows:

In short, the real test of the truth of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[66] Consequently, the employer should be required to demonstrate by clear, convincing and cogent evidence that each of the allegations has occurred. In respect of each allegation, it is necessary for me to review the evidence and see which facts lead me to a final conclusion.

Mr. Olsen's First Allegation

[67] Mr. Olsen complained that Mr. Mackie had threatened to remove him from the ERT on three occasions in the past three years. Only one incident, namely the one that occurred around September 1999 in relation to the return of Mr. Yolland to Kent institution and possibly to the regional ERT, was the subject of evidence. The testimonies of Messrs. Olsen, Mackie and Yolland clearly show that Mr. Mackie reproached Mr. Olsen for not respecting the chain of command. For Mr. Mackie, Mr. Olsen had by-passed him as the management representative responsible for the recruiting of ERT members when he talked to the Deputy Warden, Ms. Knopf, about the return of Mr. Yolland to the ERT. I have no doubt that Mr. Mackie gave a clear warning to Mr. Olsen to abide by the chain of command or be removed from the team. However, I now need to decide whether such a warning constituted harassment.

[68] The employer specified that in imposing discipline, it did not consider incidents that occurred more than one year prior to the complaints. The facts of the September

incident are not contested, the witnesses reporting the same events. The perception of a threat by Mr. Olsen was not shared by the other witnesses, who considered the conversation as a warning. On this issue, it is necessary to look at the definition of harassment in the "Harassment Work Place Policy" to conclude if the statement can be considered as harassment.

[69] The harassment definition includes comments made on either a one-time or a continuous basis. The comment relating to the respect of the "chain of command" can be harassment whether it was made on a one-time basis, as demonstrated by the proof, or three times in the last three years. The comment made by Mr. Mackie in front of another correctional officer (Mr. Yolland) was surely offensive and created personal humiliation or embarrassment to Mr. Olsen. The comment was clearly directed at Mr. Olsen and Mr. Mackie knew or ought reasonably to have known that it would be unwelcome by Mr. Olsen. Being part of the regional ERT is a very important recognition of the excellence of all-round standards for a correctional officer who considers the ERT members as an elite and highly skilled group. To be told in front of others that you might be removed from it if you do not abide by the rules is a very demeaning or embarrassing warning. In these circumstances, I conclude that the employer considered the facts properly as harassment by abuse of authority, Mr. Mackie having made those comments as an ERT management representative. This is not to say that management cannot advise employees of the consequences or possible consequences of their actions. However, I find that Mr. Mackie went further than merely advising Mr. Olsen regarding the respective roles of ERT members as he claimed to have done, implicit in his statement was a threat to Mr. Olsen to take reprisal action against him.

[70] The absence of circumstantial evidence regarding other incidents in the three years prior to the complaint does not change the characterization of the comment made as harassment and has no impact on the severity of the discipline, the employer not having taken into consideration any other incident than the one having occurred in September 1999.

Mr. Olsen's Second Allegation

[71] The incident at the origin of the second allegation is related to the May 1999 incident in regard to the ERT management representative's responsibilities. It is not contested that Mr. Mackie gave a warning to Mr. Olsen that he should get his

authorization before advising the other ERT members that they had to be present for training or other matters falling under his responsibilities as management representative.

[72] The conversation took place in front of two other correctional officers (Messrs. Hubscher and Yolland), who understood the statement as a warning to Mr. Olsen to get back in rank or face removal from the ERT. The considerations I specified for the first incident are still valid for the second one, and I conclude that Mr. Olsen had serious reasons to feel offended by the comments made by Mr. Mackie. Mr. Mackie ought reasonably to have known that his comment would not be welcomed by Mr. Olsen, who attached a lot of importance to being an ERT member.

[73] Consequently, I come to the conclusion that the employer properly considered that Mr. Mackie was guilty of harassment by abuse of authority against Mr. Olsen on the second allegation of his complaint.

Mr. Olsen's Third Allegation

[74] The comment at the source of the third allegation was made by Mr. Mackie, who was very upset that someone had made a false statement denouncing him. I understand and agree with the fact that Mr. Mackie took very seriously an allegation stating that he abused his authority by misappropriating ERT equipment. This kind of allegation could have a very serious impact on his career at the Correctional Service.

[75] From another point of view, I consider that the statement made by Mr. Mackie to Mr. Olsen was an emotional overreaction to the situation. Mr. Mackie knew that he was not guilty of such misappropriation and anticipated the conclusion of the investigation, which found the allegation to be unfounded. I can understand that Mr. Mackie felt that a conspiracy had formed against him by some members of the ERT, as well as team leaders, and as proof he pointed to the oral representations of team members to Mr. Richmond in 1998 and 1999. As a supervisor with a lot of experience in the Correctional Service and with an outstanding reputation at Kent Institution, he should have known that the conspiracy he suspected had no chance of being successful. I agree with the employer, who concluded that Mr. Mackie did not deal with the situation in an appropriate manner when he made the statement to Mr. Olsen.

[76] Notwithstanding that, I consider that Mr. Mackie did not know at that time whose statement had precipitated the investigation. I also consider that the violence of the language used by Mr. Mackie indicated a malicious intent to discourage the informer from pursuing the complaint. In my opinion, Mr. Mackie wanted the message to be forwarded to the one who put pressure on him and was a clear message to respect the code of silence in that kind of situation. That intent is an aggravating factor in the circumstances of the present case, especially since management has tried to break the code of silence within the Institution. A further aggravating factor is to be found in the fact that Mr. Mackie was a supervisor in charge. For these reasons, I conclude, that on the third allegation, the employer properly concluded that Mr. Mackie was guilty of harassment by abuse of authority.

Mr. Olsen's Fourth Allegation

[77] It is undisputed that Mr. Mackie, in the presence of two correctional officers (Messrs. Peck and Hutcher), stated that Mr. Olsen had ratted out Mr. Laidler on October 29, 1999.

[78] From the testimonies given before me, I understand the seriousness of such a statement, especially when it is made by someone in authority at Kent Institution. Kent Institution is a maximum-security penitentiary where the inmates are considered the most dangerous, with unpredictable reactions toward other inmates or correctional officers. In that institutional environment, the solidarity between correctional officers and other members of the staff is the foundation for security at the Institution, as much for the inmates as for the employees. For someone inside the correctional service to be labeled a "rat" means that the level of confidence and trust supporting this solidarity will simply disappear. When this statement was made by an experienced supervisor with an outstanding reputation in the Institution, the impact became all the more devastating.

[79] The comments made by Adjudicator MacLean in *Teeluck (supra)*, have a lot of pertinence in the present case. I agree with the following, which can also apply to Kent Institution:

The rat code is alive and kicking among correctional officers in Renous. That code tells everyone: If you rat on your fellow officer no matter how serious or blatant the charge, there will be hell to pay. We will make your life

miserable. We will not only "put you on the dummy", (not talk to you), we will be slow in answering your bells to go from one section to another, and watch out, we may be slow to respond, or we may even not respond to your calls when you need assistance. We will warn you by putting fish in your mailbox at home, by letting air out of your tires in the institution parking lot. And by the way, if the bolts on the tires of your car get loosened, or somehow the latch on your car's hood is released, those are just coincidences. Perhaps those were truly coincidences. However, after a while with the things that happen in the workplace, you will get the message: that we do not want you around, no matter how good you are as an officer. We do not want you! How much does it take to get you out of our midst? That is the message that flashes to the officer who dares to ignore the code. The person who goes to management, no matter how serious the incident, gets the shaft from fellow officers. That's what happened to Ms. Matthews and to Ms. McMullin in this case. It got so serious that they had to move away from the Miramichi.

Such Neanderthal thinking is no better than the infamous code for which the inmates are notorious at harbouring. For persons who are sworn to uphold and respect the law, such a reaction to serious incidents not only takes them down into the gutter, it turns them into barbarians who themselves decide what is right and wrong within the institution. It renders them subject to the base instincts that allows them to rationalize their actions on an us-versus-them level. It says "we can run this place by our rules." Heaven help those who get in our way. We will fix them!

Such twisted thinking is abhorrent to any right-thinking person whose duty as peace officers is to uphold the law. It is long past the time when any officer should allow such animosity to prevail and colour his thinking as to how he should act on the job.

This is not to say that they have take (sic) every allegation lying down. There are mediation, grievance and adjudication procedures that can ensure support for a fellow officer. That is where due process comes in.

The problem arises when they import that support into the workplace to the detriment of other officers. That should not happen. When an officer is on the job he knows that he has to rely on the professionalism of his fellow officers to back him up throughout the day. When his fellow officers decide to withhold that assistance out of solidarity for another fellow officer, that is when their professionalism goes out the window and hand in hand with it goes the rule of law. When that happens, nobody in the institution, or on

the outside, is safe. For, the safety of everyone becomes tethered to the whim of your partner on the shift, a very tenuous and frightening prospect at best. That is something no officer can afford to gamble with because the stakes on the betting line are the highest of all: the officer's life and limb. Nobody should have to take precautions in the workplace lest someone be inclined to retaliate against him. That is abhorrent to the proper operation of the institution. Such acts of retaliation must stop.

[80] Notwithstanding that the acts of retaliation specified by Mr. Olsen are different from the ones stated by Adjudicator MacLean, I agree with his rationale and with his conclusions. Such twisted thinking is abhorrent to the Kent Institution Warden, who clearly pointed out his willingness to get rid of such acts of retaliation inside the Institution. His testimony demonstrates that he has a will of iron on that issue, which is of high importance. I have to agree with Mr. Urmson on the fact that when the retaliation is started by a supervisor's statement, it has to be considered as aggravating. As a supervisor in charge, Mr. Mackie should be aware of the importance given by management to the banishment of the "rat code" or the "code of silence" in the Institution and should strongly support that issue.

[81] In these circumstances, I conclude that the employer properly considered that Mr. Mackie was guilty of harassment by abuse of authority when he made the statement that Mr. Olsen had ratted out Mr. Laidler. His explanation, that he had to tell the members of the ERT what was going on during the investigation of Mr. Laidler in order to protect the cohesion between the team members, is completely irrational. His statement that his "tongue slipped" is indicative of his strong personal conviction that he can run the place according to the old thinking of the "rat code". He convinced me of that when he tried to minimize the impact of his statement by stating, in his grievance:

Mr. Gallagher claims that I labelled Mr. Olsen a rat on October 29, 1999. If he had interviewed Mr. Laidler, another witness on my list, he would have found that Mr. Olsen had already been labelled a rat by his peers, a week prior to the incident involving me. Mr. Olsen was labelled a rat because of an action he took against Mr. Laidler. Mr. Laidler was forced to experience a difficult few weeks, without just cause. Mr. Olsen told Unit Manager K. Morgan that Mr. Laidler had inappropriate gear in his ERT kit bag. This caused an investigation to take place into Mr. Laidler's Security Maintenance Officer and ERT weapons instructor activities. Consequently, when I was informed of what the previous

officers were saying about Mr. Olsen I agreed. My definition of a rat is a person who purposely distorts the truth and/or lies to get someone else in trouble. [Emphasis added]

[82] In my view, this twisted thinking on the part of Mr. Mackie impaired his ability to act in a supervisory position in the correctional service and goes directly against the CSC goal to get rid of the "code of silence". Furthermore, I question his ability to be a peace officer and to uphold the law given his belief that it is acceptable to label someone a "rat". From my reading of his grievance, it is clear that Mr. Mackie "bought in" to the rate code mentality. Mr. Mackie's actions raise questions as to whether or not he can now be relied upon by the employer to promote and uphold its rules and policies.

Mr. MacLean's Allegations

[83] Mr. MacLean complained that Mr. Mackie harassed him on November 10, 1999. Mr. MacLean testified that Mr. Mackie asked him to drop Mr. Olsen's file because it would hurt his career to defend against this kind of case. Mr. Mackie admitted that the conversation "ended up being a heated discussion" and that he told Mr. MacLean that he was "in for the fight of his life", but he denied that he ever verbalized threats by telling Mr. MacLean that he could line up staff members to kill him and Mr. Olsen or that Mr. Laidler was waiting in the parking lot to kill Mr. Olsen.

[84] The versions of the conversation, as reported by Messrs. MacLean and Mackie, are contradictory on the issue of alleged "threats". That conversation was without witnesses other than the principals and the allegation of harassment by abuse of authority is a very serious one. In that kind of circumstance, the burden of proof to be applied is that the employer must demonstrate, by clear, convincing and cogent evidence, that the allegation occurred. The test to apply in assessing the credibility of the witnesses is the preponderance of probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[85] Mr. Mackie's counsel submitted in his arguments that Mr. MacLean's version was not credible; nothing prevented Mr. MacLean from leaving the office when he felt that he should get out of the discussion. The conversation regarding Mr. Olsen's complaint was brought on by Mr. MacLean himself, who told Mr. Mackie about the complaint and that he was the representative of the union in that case. Under those circumstances, Mr. Mackie was upset because it was the second time in a few weeks that someone had

made a complaint against him and, as he saw it, tried to ruin his career. A practical and informed person would not recognize as reasonable that Mr. Mackie would make threats in those circumstances. Mr. Mackie knew the seriousness of a harassment complaint against him and did not want to aggravate the situation by making threats to the representative of the complainant. The police concluded that Mr. Mackie did not threaten Mr. MacLean and this also supports his assertion of innocence.

[86] Counsel for the employer submitted that the version of events as stated by Mr. MacLean should be preferred to Mr. Mackie's. Mr. MacLean considered Mr. Mackie a good friend at work and had no interest in provoking an incident against a well-established supervisor with a good reputation among the employees. Mr. MacLean, the employer argued, is an experienced union representative in harassment complaints and had nothing to gain from making up that kind of incident.

[87] The truthfulness of the differing versions of events can be determined through a thorough examination of the evidence. The evidence shows that the conversation degenerated between the two principals after a short period of time. The fact that Mr. Mackie admitted that he stated that Mr. MacLean was "in for the fight of his life" was an indication of his state of mind. Another one is that Mr. Mackie said that he was upset by the fact that he was facing the second attack on his career in a few months. Those elements lead me to consider that the conversation degenerated because of Mr. Mackie's frame of mind. I have no indication whatsoever in the evidence which would lead me to conclude that Mr. MacLean had reason to begin a forceful debate. To the contrary, I am convinced that Mr. MacLean told the truth when he specified that he was very uncomfortable with the situation and tried to find a way out of the conversation. Nothing in the evidence can bring me to deduce that Mr. MacLean had, at any moment during the conversation, an interest in allowing it to degenerate. Consequently, I conclude that the conversation degenerated as a result of the acts of Mr. Mackie, who had reason to be upset and to lose control of his emotions.

[88] In his testimony, Mr. Mackie insisted that the door of the office was still open during the entire exchange with Mr. MacLean. He stated that two to four employees entered and left the office during that conversation. This statement was contradicted in his "details of grievance" where Mr. Mackie specified that "there was an unwitnessed discussion between only Mr. MacLean and myself". This contradiction is an indicator for me to give credence to Mr. MacLean's version, which was without contradiction.

[89] I have to decide if Mr. Mackie made statements that can be considered direct death threats to Mr. MacLean or indirect threats toward Mr. Olsen. Mr. Mackie denied formally that he ever verbalized the threats alleged by Mr. MacLean and he submitted that the police findings support his assertion of innocence. The fact that Mr. Mackie expressed to Mr. MacLean that he was "in for the fight of his life" is indicative that he attached a very high importance to the allegations against him. For Mr. MacLean, who is the union's expert on harassment cases, nothing indicated that Mr. Olsen's file was one of a higher importance than normal. He testified that had Mr. Mackie talked to him before he was contacted by Mr. Olsen, he surely would have represented Mr. Mackie, who was a good friend from work, even though Mr. Mackie was not a union member. I believe Mr. Mackie's testimony on this point. I also come to the conclusion that overall Mr. MacLean's version of the conversation fulfilled the test of the preponderance of probabilities that a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

[90] The conclusion of the RCMP investigation, which stated that Mr. Mackie had demonstrated no intention to carry out a threat against Mr. MacLean, is not relevant in the adjudication of the present case. I agree with the employer that I have to approach the issue from a different angle than the RCMP, which had to evaluate whether Mr. Mackie was guilty of an offense under the Criminal Code. I have to determine if Mr. Mackie was guilty of harassment by abuse of authority on the basis of the "Harassment in the Work Place Policy".

[91] The evidence in the present file showed that Mr. Mackie made a statement during the conversation he had with Mr. MacLean on November 10, 1999, in the supervisor's office. This statement was understood by Mr. MacLean as a threat to his life and I conclude that Mr. MacLean had good reason to perceive it as such. This comment might reasonably be expected by Mr. Mackie, who is an experienced supervisor, to cause offence to Mr. MacLean.

[92] The comment made by Mr. Mackie, made on a one-time basis, created clear embarrassment to Mr. MacLean. Mr. MacLean's testimony on the embarrassment he felt can also be deduced from his reaction after the fact when he decided to write down the details of the incident (Exhibit E-14) and to type his complaint (Exhibit E-11) a few moments after the verbal altercation. Management of the Institution gave Mr. MacLean permission to go home and not participate in the training he was scheduled

to take part in on November 10, 1999. I have to consider that management did not give that permission without having what they believed to be a valid reason. Briefly put, if the employer allowed Mr. MacLean to leave work for the day, it was because the employer, having witnessed his reaction and having heard his version of events shortly after their alleged occurrence, found his story to be credible. Mr. MacLean's testimony, in which he specified that he was unable to participate in the training because he was under too much stress due to the confrontation, has to be considered as the more credible one in the circumstances.

[93] I have considered Mr. Mackie's argument with respect to paragraph 12 of the Commissioner's Directive which codifies protection for the exercise of supervisory functions, but I find it less than persuasive. Mr. Mackie's actions do not fit within the parameters of this directive as there was no element of counselling, performance evaluation, staff relations or the implementation of disciplinary action involved in the incidents as outlined and proven by the employer. Even if his actions could loosely be defined as some sort of managerial or supervisory responsibility with respect to staff relations, I find that his actions crossed the line and became harassment.

[94] For these reasons, I come to the conclusion that the employer fulfilled its burden of proof and demonstrated that Mr. Mackie was guilty of harassment by abuse of authority on a preponderance of probabilities.

[95] Consequently, I conclude that the employer had valid reasons to discipline Mr. Mackie, having shown that he was guilty of harassment by abuse of authority against Messrs. Olsen and MacLean.

[96] The employer demonstrated that it took into consideration Mr. Mackie's unblemished record after almost 22 years of service with the CSC and also the aggravating circumstances of his supervisor's duties, in imposing the penalty for the misconduct. For these reasons, I see no grounds to revise the financial penalty equivalent to 20 days' pay imposed on Mr. Mackie by the employer on March 17, 2000.

[97] Consequently, I dismiss Mr. Mackie's grievance and maintain the penalty imposed by the employer.

[98] Given my decision, I also find that I must deny the grievor the other redress which he has requested. With respect to his claim for the return of all sick and annual

leave, such claim must be denied since it is my finding that the employer acted correctly with regard to the investigation of Mr. Mackie's actions. With respect to his claims for overtime (whether it be for regular overtime or overtime for statutory holidays), shift differential and weekend premiums, I must also reject this claim. I would also point out that such losses are the result of Mr. Mackie's transfer to the Regional Supply Depot, a move which he himself suggested to the employer. As for his claims for legal and assistants fees and the payment of overtime for all meetings he attended during the investigative and disciplinary process, these are not compensable in light of my decision to deny the grievance.

**Léo-Paul Guindon,
Board Member**

OTTAWA, January 27, 2004.

