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Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

**FRANÇOIS CLAVEL**

Grievor

and

**TREASURY BOARD  
(Correctional Service of Canada)**

Employer

**Before:** Sylvie Matteau, Deputy Chairperson

**For the Grievor:** John Mancini, UCCO-SACC-CSN

**For the Employer:** Raymond Piché, Counsel



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Heard at Mont-Orford, Quebec,  
May 26, 27 and 28, 2004.

## DECISION

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[1] This grievance contests a disciplinary measure imposed on the grievor, François Clavel, when he was a correctional officer at the CX-1 level at Cowansville penitentiary. At that time, he had 19 years of experience in this position. On the night of May 21 to 22, 2001, an inmate escaped during his shift. Following an investigation into this incident, a penalty equivalent to three days' salary was imposed on him. He is asking that this penalty be cancelled, that he be reimbursed for this amount, and that the incident be removed from his file.

[2] Four witnesses were heard, Mr. Clavel being one of them.

### Evidence

[3] The correctional system has established four security levels for its institutions (high-maximum, maximum, medium and minimum) on the basis of three criteria: (a) the risk that the inmate presents to public safety, (b) the risk that the inmate presents in the institution, and (c) the escape risk. Cowansville is a medium security institution, which means that inmates are in their cells from 10:50 p.m. to 6:50 a.m. and are free to circulate inside during the daytime. The security perimeter is on the outside.

[4] Correctional Service Canada's mission is to contain inmates in a safe place and to ensure that they are able to reintegrate into society as law-abiding citizens. The role of a CX-1 correctional officer like Mr. Clavel is to ensure the custody of inmates while ensuring static security. Accordingly, he is responsible for conducting inmate counts in accordance with the Commissioner's Directives. He verifies their presence and their condition. The Standing Order for Cowansville Institution has been filed as Exhibit E-1, along with the Post Order (Exhibit E-2) and the Commissioner's Directive (Exhibit E-3). These directives explain the procedure for the inmate count. Correctional officers are also subject to a Code of Discipline (Exhibit E-4).

[5] This count procedure constitutes the essence of the work of a CX-1 correctional officer working in a cellblock. There is a count in each of the institution's four cellblocks at every hour of the day. Some of these are formal in the sense that the correctional officer must prepare a written report on them, which he signs. He then contacts the Correctional Supervisor in the guardroom, the keeper, to inform him of the results of his count. The written report is collected by another officer, who then gives it to the Supervisor. These counts take place at 7:00 a.m., 12:50 p.m., 6:00 p.m., 10:55 p.m. and 11:15 p.m. when the staff changes, at 3:00 a.m. and finally at 5:00 a.m.

(Exhibit E-1, clause 11). Inmates are not authorized to move around during these formal counts.

[6] There are thus three formal counts during the night (subparagraph 9(H) of the Post Order - Exhibit E-2). In the meantime, at every other hour of the day there are checks that are in fact informal counts. These counts are compiled on a form and their results are given to the Supervisor by telephone. There is a total of eight counts during the night.

[7] Each cellblock has 102 cells. Most of them are individual cells, aside from a few double cells at the end of the range. During the night, the correctional officer is alone in the cellblock and cannot open the doors himself. The count procedure takes place through the cell window using what is referred to as a blue light (or night light) that is turned on from the outside, and a flashlight if necessary. If the officer is not satisfied with the check, he can have the door opened by asking the Supervisor at the guard post, with whom he is in contact by walkie-talkie or by telephone. The door is then closed by activating the remote control.

[8] The officer proceeds in accordance with the Standing Order governing inmate count (Exhibit E-1), and more specifically paragraph 5, which indicates that he is to ensure visually that the inmate is present. The Post Order is even more specific in stating that the officer on duty must be able to see the occupant's skin (paragraph 5, Exhibit E-2).

[9] During the night of May 21 to 22, 2001, inmate "M" escaped in the garbage container. At around 8:00 a.m. that morning, the contractor informed the Institution that he saw someone escape as he was emptying the container. The inmate was later caught but had had the time to commit a crime.

[10] The events are described as follows. The Correctional Supervisor, Charles Brouillard, indicated that on the evening of May 21, 2001, he had received a call from a security guard at Archambault Institution who had been trying to reach his counterpart at Cowansville. At around 10:45 p.m., Mr. Brouillard learned that the purpose of this call was to inform Cowansville Institution that an escape had been planned to take place through the garbage container within the next few days. It should be noted that the 10:55 p.m. count had already started.

[11] This information was then forwarded to the correctional officers who were arriving at work for the 11:00 p.m. shift. It was communicated to Mr. Clavel and one other officer personally, since they had arrived after the others. Mr. Brouillard gave the following instructions: [translation] "...We have information that one or more inmates may try to escape using the garbage container, so make certain not to count any dummies and that the inmates you count are in fact alive." These words are confirmed in his report (Exhibit E-5). Pierre Deshaies, the Correctional Supervisor who was to replace Mr. Brouillard, was notified of the situation by the latter at their shift change meeting and was informed more specifically that the suspects were "M" and "D".

[12] Mr. Brouillard explained in cross-examination that he had not informed the correctional officers in the cellblocks of the suspects' names in order to protect the source of the information. In his opinion, it was important to avoid placing the source in danger by revealing, directly or indirectly, the fact that the information was known, thereby identifying the source. It was also important to be careful, since the information could prove to be false or intended to divert attention onto false suspects.

[13] Mr. Deshaies stated that at around 4:15 a.m., he had officers check the container during their regular rounds. He reminded them of the possibility that the container might be used for an escape and instructed them to bring additional equipment such as pepper spray with them. The officers did not report anything abnormal. The subsequent investigation nonetheless revealed that the container was not locked.

[14] At around 4:45 a.m., Mr. Deshaies telephoned Mr. Clavel to ask him to perform an additional check of the suspected inmates' cells, one of which was a double cell. He was informed of the inmates' names and cell numbers at that time. Mr. Clavel then communicated the results of his check to Mr. Deshaies. The latter could not remember the precise words used by Mr. Clavel at that time. He then authorized the contractor to remove the container on the basis of Mr. Clavel's report.

[15] Mr. Deshaies stated in cross-examination that he received a written reprimand further to the inquiry in this case. He also acknowledged that Mr. Clavel had told him that he was 80% certain that one of the inmates in the double cell had been present. He explained as well that the correctional officers who work at night do not know the inmates by name and would not be able to recognize them, since they do not come into close contact with them as do the officers who work on the other shifts.

[16] Mr. Clavel, for his part, confirmed that Mr. Brouillard had instructed him to be more vigilant, since there was a possibility of an escape. However, he had not informed him of the suspects' names. He stated that he had conducted all of his counts as required, including the additional count. He had not noticed anything abnormal and indicated that he had seen skin at each of the formal counts, because that was what was asked. He also indicated that he did not know the inmates, that he changed shifts often, and that he would not have been able to recognize inmate "M".

[17] He stated that during the additional check of the double cell that Mr. Deshaies had requested, he had seen an inmate in a bed. In the other bed, he saw a human form that was breathing. He was 80% certain that this second inmate had been present, since he had seen skin during his previous formal count. That was the information that he gave to his supervisor.

[18] All of his night counts were consistent with the figures that had been provided to him. He tried to respond to the various hypotheses proposed by the employer's representative to explain how the count procedure could have been circumvented, assuming that he had performed his work as required. He still did not know how this had happened. He finally pointed out that in the morning, an automatic system opens all of the doors at the same time. This makes it impossible to check who is coming out of each cell, as is the case at high-maximum security institutions. The presence of a dummy in the cell in question or in any other cell is a possibility.

#### Employer's argument

[19] The employer argued that it had met the burden of proof in this matter. Mr. Clavel is an experienced officer who committed a disciplinary infraction that earned him a penalty equivalent to three days' salary (\$366.90). He was negligent in his work of ensuring that the inmates remain in custody in conjunction with the Institution's primary mission, that of ensuring the safety of society. Therefore, his most important quality thus had to be vigilance.

[20] During the night of May 21 to 22, 2001, Mr. Clavel was responsible for ensuring that the inmates were in their cells. He had to ensure that the counts were conducted as required in the cellblock for which he was responsible. In this case, Mr. Clavel in fact had three duties that night: a general duty of vigilance; a specific duty in light of the circumstances explained by Mr. Brouillard; and an additional duty in response to the specific request made by his supervisor, Mr. Deshaies, to check the suspects' cells.

[21] According to the employer, Mr. Clavel was confused in his testimony when he stated that he had seen one of the inmates in the double cell breathing, no longer knowing whether it was the top or the bottom bunk. In the employer's opinion, Mr. Clavel changed his story when he stated that he had informed Mr. Deshaies that he was 80% certain, since he had not indicated this in the reports (Exhibits E-8 and E-9) that he had written at the time. His testimony suggests that all of this was someone else's fault.

[22] When he was asked specifically to verify an inmate's presence in a particular cell, he should have made 100% certain that the inmate was present. Rather, he stated that he had relied on his other counts, of which he said he had been certain. Of all of the counts, the one he needed to be sure of was the additional count. He therefore made a mistake. He concluded that I should not intervene. The penalty is minimal and Mr. Clavel's record and experience were taken into account in deciding on the measure to be imposed.

[23] Finally, the decision in *Gagné and St-Pierre v. Treasury Board (Solicitor General Canada)*, PSSRB files 166-2-16697 and 166-2-16817 (1988) (QL), were submitted to me in support of the fact that this type of error clearly warrants a disciplinary measure.

#### Grievor's arguments

[24] According to the grievor's representative, the employer had information that inmate "M" was going to escape and even knew how he was planning to go about it. The inmate did in fact escape and [translation] "they want some heads to roll", but he questioned why it was Mr. Clavel's head, since he had done what had been asked of him. It is important to understand that a count does not mean identifying an inmate. More should have been done, and the argument that nothing more could have been done because it was necessary to protect the source was [translation] "smoke and mirrors".

[25] Mr. Clavel could have been given more detailed information. The container could have been checked more carefully. It was known at what time it would be leaving and it could have been searched before it left. These were easy measures that the employer could have taken. Consideration should have been given to the fact that, in order to escape, the inmate would have to take measures to circumvent the count procedure. A photo of the suspects could have been given to the officers who did not know the inmates, specifically Mr. Clavel, who was on duty in the suspects' cellblock

that night. Why was he not given the suspects' names when he came on duty that night? Once again, all that he was asked to do was to conduct an additional count, not an identification. If he was not given all the information and resources needed to do his job, how can he be blamed?

[26] Mr. Clavel indicated in his report to Mr. Deshaies that he was 80% certain that the inmate had been present, which was not contradicted. The latter could have required that he return to make 100% certain that the inmate was present. He was satisfied with this report and authorized the departure of the container. Now there is an attempt to cast this responsibility on Mr. Clavel, while making the excuse that the source of the information needed to be protected.

[27] A number of hypotheses were proposed with respect to the means that were used to circumvent the counts, but there is no evidence that there was only one inmate in the cell. It is still not known how the system was circumvented; the employer did not provide any evidence to that effect.

[28] In conclusion, it was not established that Mr. Clavel deserves such a disciplinary measure. The grievance should be allowed and the measure set aside.

#### Reply

[29] In reply, the employer's counsel noted that it was Mr. Clavel's responsibility to ensure that the inmates were present; this is his duty, his responsibility. He conducted the count as usual; this was a mistake since the special circumstances had been specifically explained to him. When he was asked to be more vigilant and to target someone in particular, he should have acted. He did not do so.

#### Reasons for decision

[30] I thank the representatives and witnesses for their collaboration and their brief and clear submissions. In the circumstances that were presented to me, and on the basis of the documents that were adduced, I must conclude that it was established that Mr. Clavel was negligent in the performance of his duties and responsibilities on the morning of May 22, 2001. However, I cannot agree that the penalty is fair and reasonable. Just as Mr. Clavel cannot place the responsibility on his superiors, the latter cannot cast the entire blame on the CX-1 correctional officer.

[31] It is known that the burden of proof does in fact rest on the employer in disciplinary matters. The employer must prove fault or negligence on the employee's part, but must also establish that the measure imposed is fair and reasonable in light of the seriousness of the error and the employee's record. The measure should be corrective rather than punitive.

[32] The disciplinary measures report filed as Exhibit E-6 clearly indicates the reproach against Mr. Clavel:

[Translation]

*... The board noted that you did not conduct the count in accordance with CD 566-4 para. 17: "The officers conducting counts shall ensure that a live body is counted." This requirement is also indicated in Standing Order 565 at para. 5, which indicates that all employees with responsibility for inmates must conduct the inmate count for their sector and must visually ensure that inmates are present. You were responsible for this duty and it was not performed in accordance with the CD or the SO. The board noted that there was proof of irrefutable misconduct (your recorded testimony) supported by your negligence that allowed an inmate to escape, thereby jeopardizing public safety. You were informed and had been asked to perform a double check by the Correctional Supervisor in charge and you neglected to make 100% certain that the inmate... was in fact present in his cell, despite the Correctional Supervisor's specific instructions. You admitted that you were only 80% certain that inmate "M" was present in his cell.*

[33] The report also indicates that his clean disciplinary record and his performance were taken into account. During his 19 years of service at the time, he had thus far met the requirements and sometimes even exceeded them.

[34] The primary responsibility of the CX-1 correctional officers on the night shift is to ensure that the inmates are present and alive in their cells throughout the night. To that end, they must follow the procedures set out in paragraphs 12 and 13 of the Standing Order, which specify how to conduct formal counts. Paragraph 8 provides that for a formal count, the officer on duty must ensure that inmates are **actually** present. The Post Order indicates that officers coming on duty are reminded to see the occupant's skin during a formal count.

[35] The evidence indicates that on the evening of May 21, 2001, Mr. Brouillard had clearly indicated to Mr. Clavel that he needed to be more vigilant than usual and to make certain not to count any dummies, since they had had wind of a possible escape.



In case of doubt, he could have had the cell opened. He stated that he had seen a human form. Is that not the very definition of a dummy?

[36] Moreover, Mr. Clavel had to be especially vigilant during the additional count requested by Mr. Deshaies. On that occasion, he needed to ensure that the inmate was actually present. In the context of a possible escape, Mr. Clavel had to know that the inmate would use certain subterfuges to circumvent the count procedure, which he knew as well as the correctional officers.

[37] A correctional officer's work must be taken seriously; the consequences of an escape can be serious. It was admitted that the inmate had committed a crime while he was at large. Despite the parties' admission that escapes are rare, they do in fact occur, as this case attests; correctional officers must remain vigilant.

[38] It was determined from all of the testimony that the correctional officers on the night shift, and Mr. Clavel specifically, did not know the inmates well enough to be able to identify them. It is the officers on the previous shift who are responsible for making a final identification of the inmates when they return to their cells for the night. I refer to subparagraph 16(b) of the Standing Order, which specifies that the correctional officer who conducts the final count at 10:55 p.m. is the one who places them in their cells and performs the count, cell by cell, making certain that the inmates are present and identifying them by looking in through the cell doors.

[39] We are told that at 10:45 p.m., it was too late to notify the officers on this shift about the possibility of escape that had just been communicated. However, nothing abnormal was reported. It therefore must be assumed either that all of the inmates were in their cells or that the officer in question was also fooled. In any event, if his doubt had caused Mr. Clavel to open the cell door, he would have immediately noted that either a dummy or an inmate was present. In the first instance, he would have helped thwart inmate "M"'s attempt by preventing the container from leaving. In the second instance, if it had turned out later that this inmate was not inmate "M", he could not have been blamed since he would have done his duty, which is to ensure that an inmate is actually present in a designated bed.

[40] In this instance, being 80% satisfied, as he indicated, Mr. Clavel made his report. Mr. Deshaies admitted in cross-examination that those were the words that Mr. Clavel had used. He accepted this report without asking Mr. Clavel to return so that he could

be 100% certain that the inmate was present. He decided to act based on this report, which was not conclusive.

[41] In short, a number of factors may have contributed to the inmate's escape: the late hour at which the information was communicated, which prevented the Supervisor from notifying the officers who conducted the final count at 10:55 p.m. (the one which identifies the inmates); the decision to keep the information communicated to the officers coming on duty at 11:00 p.m. to a minimum, if it was indeed a factor; the superficial check of the container during a regular round (the investigation having revealed that the container was not locked); the fact that the container was not searched before it left when there were suspicions that it would be used in the escape; the fact that the counts were not conclusive; and, finally, the decision to rely on this inconclusive report that the inmate was actually present in his cell to authorize the container's departure.

[42] Mr. Deshaies received a written reprimand further to these events. Taking into account the evidence and his responsibilities, as previously indicated, I do not see why Mr. Clavel, whose disciplinary record was clean at that time, should receive a harsher penalty. The decision in *Gagné and St-Pierre v. Treasury Board (Solicitor General Canada)* (*supra*), recognizes a letter of reprimand as sufficient in similar circumstances. It also establishes the principle that, regardless of the position of the employees involved, the disciplinary measure imposed should be the same for the same fault. Although in the present case the fault is not exactly the same, the principle can guide us in these circumstances.

[43] For all of these reasons, and taking into account the grievor's record, his responsibilities and his negligence in the performance of his duties on May 22, 2001, I allow the grievance in part. I cancel the disciplinary measure imposed on Mr. Clavel and order that the amount of \$366.90 be repaid as soon as possible, to be replaced by a letter of reprimand to be placed in his file.

**Sylvie Matteau,  
Deputy Chairperson**

OTTAWA, July 5, 2004

P.S.S.R.B. Translation