Date: 20040624

File: 166-2-32675

Citation: 2004 PSSRB 74

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ROBERT BURTON

Grievor

and

TREASURY BOARD
(Solicitor General Canada – Correctional Service)

Employer

Before: D.R. Quigley, Board Member

For the Grievor: Himself and Andrew Schroeder, Counsel

For the Employer: John Jaworski, Counsel

Heard at Vancouver, B.C.,
December 9 to 12, 2003 and January 27 to 30, 2004.
(Written submissions filed April 13, 19 and 30, 2004.)

[1] This grievance concerns the termination of employment of Robert Burton, who at the time was employed as a Correctional Supervisor (CX-3) at Matsqui Institution, in Abbotsford, B.C.

[2] The reasons for the termination of Mr. Burton's employment, effective April 2, 2003, are stated in a letter dated April 1, 2003 from the Warden, Paul T.L. Urmson. The letter states, in part (Exhibit E-28):

> *I have now completed a full review of the contents of the two investigation reports and their findings that you have contravened the Standards of Professional Conduct.*
>
> *You were charged on October 27, 2002 to one (1) count of assault, contrary to Section 226 of the Criminal Code of Canada. On January 9, 2003, you pled guilty to this charge.*
>
> *The conclusion of the investigation into incidents that occurred in the Segregation Unit at Matsqui Institution on August 24 and 25, 2002 determined that you have contravened the Standards of Professional Conduct by:*
>
> …
>
> - *failing to adhere to the Use of Force Policy in the removal of inmates from the exercise yard, as per policy;*
> - *failing to ensure that the removal of the inmates from the exercise yard was videotaped, as per policy;*
> - *failing to take action to remove a derogatory comment directed at and visible to an inmate from the segregation office computer;*
> - *failing to correct the actions of staff who were responsible for placing the derogatory comment on the computer.*
>
> …

[3] The grievor originally represented himself at this adjudication hearing but then retained counsel, Andrew Schroeder, for the resumption of the hearing in January. He filed seven exhibits and testified on his own behalf. Counsel for the employer filed 73 exhibits and called 11 witnesses.

[4] A request was made by the grievor, and granted, for the exclusion of witnesses.

Setting the Stage

[5] Matsqui Institution is a medium-security facility located in Abbotsford, B.C. The Institution houses approximately 400 inmates, with a staff complement of approximately 285 employees. The Institution houses the Regional Reception and Assessment Centre (RRAC), the Regional Hospital (Pacific Region) and the Segregation Unit (commonly referred to as the SCU).

[6] The RRAC is in a separate building and is located on the ground floor, while the SCU is on the second floor. The inmates in the 25 cells in the RRAC are double-bunked and the inmates in the 23 cells in the SCU are single-bunked. The SCU consists of a single range that can be viewed from the main work desk in the office (bubble) that is located on the extreme west side of the range. The bubble has a computer and monitor, a video camera with a battery charger, several telephones, a first-aid kit, a fire extinguisher and a permanent video screen that scans the observation cell located adjacent to the bubble looking north. Looking east from the bubble, there is a sliding security door halfway down the range that can be opened or closed to divide the range into two components.

[7] Inside the bubble, there are windows on both the east and west walls that allow officers to observe the range and two exercise yards. There is a security door on the south side of the bubble adjacent to the office that leads from the range to the exercise yards. These yards are surrounded by high concrete walls and are separated by a chain link fence. At the front of each yard, there is also chain link fencing with two chain link fence gates. Each gate has an opening (slot) at waist level that is used to apply and/or remove handcuffs while an inmate is secure in the yard. The SCU is heavily staffed, as healthcare workers, case managers, psychologists, etc., need to enter the area to visit the inmates. With approximately 23 offenders at most given times in the SCU, there are three correctional officers on staff during the day shift (7:00 a.m. to 3:00 p.m.), two correctional officers on the evening shift (3:00 p.m. to 11:00 p.m.) and one correctional officer on the graveyard shift (11:00 p.m. to 7:00 a.m.).

[8] John Costello, who is currently the Warden of the Pacific Institution in Abbotsford, B.C., was the Warden of Matsqui Institution from March 2001 to February 2003.

[9] The witness described the hierarchy of the prison as follows. Under the Warden would be the Deputy Warden (2-IC - second in command); then there is the Assistant Warden (whose duties are mostly administrative); unit managers (who are responsible for the inmates' living area); correctional supervisors (CX-3s) (who organize everything from the delivery of medications, to providing escorts, implementing security procedures, preparing shift rosters, etc., from Monday to Friday; on weekends and after regular working hours, they assume the role of the Warden); CX2s (who have contact with the inmates and prepare reports and assessments); and CX-1s (who mostly man static or mobile posts and are least likely to interact with the inmates).

[10] The witness described the SCU as an area where inmates who have had serious discipline infractions (such as assaulting staff or other inmates, or who have been caught with drugs or weapons) are placed to be separated from the general prison population. The inmates in the SCU are locked in their cells for most of the day and are only allowed out to shower, make an occasional telephone call and spend a brief period of time in the exercise yards. All meals are served to them in their cells. As a consequence, the area is heavily staffed and there are special procedures that need to be applied in the SCU.

[11] The witness identified Exhibit E-6 as "Commissioner's Directive 567 - Management of Security Incidents". Annex A of the said document depicts a "Situation Management Model", which is a methodical approach to prevent, respond to and resolve situations using the safest and most reasonable intervention. The Model is dynamic, as it allows correctional officers to assess levels of intervention, from a verbal intervention to a possible intervention that might require the use of firearms. It also allows correctional officers to move forward or backward when assessing the type of force that might be required in a particular incident.

[12] The philosophy behind the "Situation Management Model" is to have the correctional officers held accountable for the type of force applied to an inmate and the reason for it. Safety is the primary goal, with the first priority being the public, the second the staff and last, but not least, the inmates. The accountability philosophy stems from a number of previous incidents where perhaps too much or too little force was used on inmates and videotaping was not standard procedure. In the last 10 years, correctional officers have been directed to record and videotape incidents to demonstrate who did what to whom and when.

[13] "Commissioner's Directive 567-1 - Use of Force" (Exhibit E-7) defines a <u>cell extraction</u> as "an incident during which an uncooperative inmate is physically removed from his/her cell <u>or an area</u> of the Institution by a process that <u>may</u> involve the use of force." [Emphasis added] Under section 6, "Reportable use of Force", it states:

> *a. all spontaneous incidents involving use of force where staff members respond to inmate behaviour consistent with the Situation Management Model.*
>
> *b. all pre-planned use of force including cell extractions and all employments of Institutional Emergency Response Team (IERT) where the Institution head has authorized the use of force when intervention by the crisis negotiator has failed or was deemed inappropriate. The deployment of a team is a use of force even if the inmate becomes compliant upon the arrival of the team.*

[14] According to the witness, cell extractions are usually pre-planned; unplanned cell extractions are in response to incidents such as a fire or where an inmate has slashed his wrists.

[15] The use of force may take on different levels. Normally, staff presence is enough; however, at times correctional officers need to proceed with a verbal intervention, call in additional resources, use chemical sprays and batons or even use deadly force. Regardless of what level of force is used to ensure that the inmates become compliant, it is the responsibility of the correctional officers to justify the means. Paragraphs 15 to 19 of Exhibit E-7 (the "Use of Force" directive) state, with respect to videotaping:

> *<u>When to Videotape</u>*
>
> *15. A videotape recording shall be made for every pre-planned use of force or potential use of force. It will include but not be restricted to:*
>
> *a. cell extractions;*
>
> *b. IERT deployment;*
>
> *c. major security incidents;*
>
> *d. strip searches where there is a belief that use of force may be necessary; and*

> e. *other incidents where the Institutional Head expects force may be used based on the inmate's past history, present behaviour and current placement.*
>
> 16. *Videotaping of incidents shall begin as soon as the potential for an incident to take place has been identified.*
>
> 17. *The camera operator shall begin the video by stating the date and time, and shall enter this information electronically on the videotape.*
>
> 18. *All briefings to staff shall be videotaped unless a delay would result in serious injury, loss of life or the destruction of evidence.*
>
> 19. *The camera operator during a strip search or shower of an inmate shall be of the same sex as the inmate.*

[16] The witness confirmed that there are video-recorders with spare batteries, battery chargers and videotapes throughout the Institution.

[17] Paragraph 26, "Reporting Requirements", states:

> *After any situation involving the use of force, the following documentation shall be completed and recorded in the Incident Report screens of the Offender Management System (OMS) as required.*
>
> a) *Use of Force Report (CSC/SCC 754);*
>
> b) *Officer's Statement/Observation Report (CSC/SCC 875), from each officer present during the incident.*
>
> …

[18] The "Use of Force Report" (Exhibit E-17) is completed by all staff members who use force during an incident. Tombstone data of an inmate are entered, as well as a description by the staff member of the incident and, if required, the registered nurse's examination of the staff member and/or inmate with the time, date and signature noted. The Report also specifically states that it must be completed before the staff member leaves the Institution and on the day the incident occurred. The Report also has a reviewing area that must be completed by the CX-3 acknowledging that the video has been reviewed and the inmate's signed version of the incident is attached.

[19] The Report is then reviewed by the Deputy Warden, who signs and forwards it to the Warden. The Warden in turn reviews and signs it and forwards it for review to the Assistant Deputy Commissioner, Operations.

[20] Exhibit E-8, "Commissioner's Directive 620 - Reporting and Recording of Security Information", indicates that staff must take part in pre-shift briefings and record observations and incidents in logbooks located in the control posts. These logbooks can form part of any investigation.

[21] Exhibit E-9 is "Standing Order Number 590.1 - Operational Directive", which delegates authority to the CX-3 to voluntarily or involuntarily segregate inmates during non-business hours. It states, at paragraph 23:

> ***VIDEO TAPING OF PLACEMENT***
>
> *The extraction, movement and administrative segregation of an inmate will be video taped. The preservation of evidence rules applies to videotapes. The Correctional Supervisor will attend, coordinate and monitor the placement of all inmates into administrative segregation, and complete the Segregation Checklist (Annex A).*

[22] At paragraph 25, "Special Security Procedures", it states:

> *The Associate Warden (RRAC) will determine whether an administratively segregated inmate is to be handled as a 3 staff member to 1 inmate basis, and will review the situation daily. During non-business hours, this authority is delegated to the Correctional Supervisor.*

[23] The witness stated that inmates who are disturbed or unpredictable are usually under the three-staff-member-to-one-inmate policy ("3-on-1"). The use of restraint equipment is left to the discretion of the CX-3. The restraint equipment used may be handcuffs, leg irons, body belts or flex cuffs. A correctional officer does not normally carry pepper spray unless authorized to do so. Authorization during normal business hours stems from the Warden; during non-business hours, the authority rests with the Correctional Supervisor.

[24] Counsel for the employer introduced four standing orders through the witness:

- Exhibit E-10: Use of Force;
- Exhibit E-11: Cell Extractions;
- Exhibit E-12: Shift-Reporting, Permanent Logs, and Post Orders;
- Exhibit E-13: Preservation of Evidence.

[25] The “Security Post Instruction Supplementary Document (SPI 831.11))” (Exhibit E-16) outlines the duties of correctional officers assigned to the SCU. Paragraph f) describes the procedure to be followed to ensure a legible signature is entered into the official visitors’ log when entering and leaving the SCU. Paragraph s) states:

> *Apply & remove handcuffs through food slots and yard gate openings when necessary for the control of unruly or violent offenders.*

[26] Paragraph 8 - “Immediate Response of Staff on Scene” - of said document states that correctional officers should attempt to quell a disturbance using force only if absolutely necessary, keep detailed notes of the incident, remain on post until directed otherwise, or until it becomes unsafe to do so, make an attempt to videotape the incident and turn over the tape to the Correctional Supervisor immediately after the incident has been resolved, and all written reports must be submitted on the same day the incident occurred and prior to the completion of the shift.

[27] The “Code of Discipline” (Exhibit E-18) and the “Standards of Professional Conduct” (Exhibit E-19) for employees of Correctional Service Canada (CSC) were acknowledged to have been read and understood by the grievor, whose signature appears on a declaration to that effect, dated September 15, 1993 (Exhibit E-20).

[28] The witness confirmed that correctional officers are also designated as peace officers (Exhibit E-22). Within their role as peace officers, they have certain responsibilities. As outlined in Annex A of “Commissioner’s Directive 003 (Peace Officer Designations)” (Exhibit E-22), the responsibilities of peace officers are as follows:

> *Responsibilities of peace officers*
>
> *Being given extensive powers, peace officers are compelled to exercise such powers lawfully. They must act on reasonable grounds, without abuse of their powers; furthermore, the power to act is in some instances coupled with an obligation to act, and peace officers can be held criminally responsible for a failure to intervene in certain situations. The following are concrete applications of the peace officers’ responsibilities;*

> *- Like any other person, a peace officer who is authorized to use force in a given situation is criminally responsible for any excess thereof [s. 26 of the Criminal Code]*
>
> ...

[29] The witness testified that he became aware of the incidents that occurred on August 24 and 25, 2002 through an acquaintance, as he was on annual leave at the time. Upon his return to the Institution, he heard rumours of alleged inappropriate behaviour by the grievor toward several inmates. In his mind there was a problem, as there had been damage to the infrastructure of the Institution and there were allegations concerning the safety of inmates and staff, improper conduct, legal liabilities, etc., that needed to be investigated to determine their merits.

[30] Regional Headquarters decided to enact a fact-finding process of the incidents. The witness, however, decided to convene his own investigation into all the events that occurred on August 24 and 25, 2002. He stated that the reason for his decision was that he believed staff had acted inappropriately.

[31] Through a memorandum dated November 8, 2002 (Exhibit E-25), the witness requested that Unit Manager Lin Wallin commence a disciplinary investigation to determine if the grievor had contravened the “Standards of Professional Conduct”. This was as a result of information received from the Vancouver Police Department that the grievor had been charged with one count of assault contrary to section 226 of the *Criminal Code of Canada*. The witness notified the grievor on the same day (Exhibit E-26) that Mr. Wallin would be conducting a disciplinary investigation into the assault allegation.

[32] By memorandum dated January 10, 2003 (Exhibit E-23), the witness directed Erwin Berg, of the Fraser River Institution, and Dave Dick, of Kent Institution, to conduct a disciplinary investigation to establish the facts into the disturbance in the SCU on August 24 and 25, 2002. Their report and findings were to be completed by January 31, 2003. Messrs. Berg and Dick were chosen as the investigators because of their expertise and knowledge in this field.

[33] The grievor was also notified by the witness on the same day (Exhibit E-24) that a disciplinary investigation had been convened to investigate the circumstances surrounding the incidents that occurred in the SCU on August 24 and 25, 2002.

[34] The witness testified that he moved to his current position as Warden of the Pacific Institution while the investigation was still ongoing. He stated that his last involvement in this matter was to grant Messrs. Berg and Dick an extension to February 17, 2003, to complete their investigation.

[35] During cross-examination, the witness stated that while he was on annual leave, Gerry Dewar was the Assistant Warden and agreed that during the incidents of August 24 and 25, 2002, Mr. Dewar was not available, as he had been called to Ottawa. The witness was not sure who was in charge, as his executive assistant would have made the arrangements. The witness stated that if there were a fire or a significant disturbance, he would expect to be called. He stated that he had a pager but the grievor never called or paged him.

[36] As of March 2003, David Dick is the Commissioning Officer of the CSC Pacific Women's Institution. He began his career with CSC as a CX-1 in October 1983.

[37] During his career, the witness has completed 20 to 25 formal security and disciplinary investigations. With respect to the disciplinary investigation of the grievor, the witness stated that he began by gathering documents, reports, copies of logs, statements from correctional officers and inmates and identified who was at the scene of the incidents and who filed reports. The witness began identifying policy structures in order to establish what standards, laws, regulations, Commissioner's Directives, and standing and post orders the investigation into the allegations against the grievor could be measured against. Entered into evidence were the SCU visitor log (Exhibit E-30), the SCU logbook (Exhibit E-31), pages of the CX-3s logbook (Exhibit E-34) and the Main Communication Control Post (MCCP) logbook (Exhibit E-35).

[38] The witness identified Exhibits E-36 and E-37 as "Genesis" reports. This is a system that records all incoming and outgoing telephone calls to the Institution. Exhibit E-36 is a list of phone calls from the RRAC, while Exhibit E-37 is a list of calls from the control bubble and the Correctional Supervisor's office. Exhibit E-38 is a list of emergency numbers (cell, pager and private telephone numbers) of the Institution's management team.

[39] Through a comparison of the "Genesis" reports, the witness drew a summary of the times and duration of telephone calls outgoing and incoming into the SCU, the Correctional Supervisor's office and the Regional Duty Officer's (RDO) office on August 24 and 25, 2002.

[40] The RDO is the person to whom the Correctional Supervisor reports if an incident arises and serious property damage to the Institution is occurring. The RDO will then determine, based on the information provided, the next step to be taken. Exhibit E-40 is a transcript of the grievor's report, as recalled by L. Edwards, the RDO on staff on August 24 and 25, 2002.

[41] The witness identified Exhibit E-42 as the grievor's typed statement of the disturbance in the SCU on August 24 and 25, 2002, and Exhibit E-43 as the grievor's handwritten statement. Exhibit E-44, dated February 6, 2003, is a typed report of notes taken by Mr. Dick during an interview with the grievor, while Exhibit E-45 is a copy that has handwritten notes and corrections made by the grievor.

[42] The witness stated that of the eight allegations he was to investigate under his mandate (Exhibit E-23), it was his belief that seven were founded. He also stated that it was not within his mandate to recommend discipline; any discipline rested with the powers that be.

[43] As well as interviewing the grievor and approximately 30 staff members, the witness stated that he and Mr. Berg interviewed five inmates with regard to the incidents of August 24 and 25, 2002.

[44] The witness described the interviews as follows. Each person interviewed was notified of the requirement to participate in the investigation, as well as entitlement to representation. The witness asked questions and Mr. Berg took notes. Following each interview, the questions and answers were typed out and sent to the person interviewed for feedback, and any corrections needed were made or comments noted. The person who was interviewed was then asked to sign the document.

[45] The witness delivered a "Disciplinary Investigation Report" (Exhibit E-41) to the newly appointed Warden of Matsqui Institution, Paul T.L. Urmson, in February 2003.

[46] Henry Braun has been employed as a CX-1 at Matsqui Institution since April 2000.

[47] Exhibit E-49 is a typed report of the notes taken during Mr. Braun's interview with the disciplinary investigation board members. The witness recollected seeing the phrase "I heard you are a pedophile" displayed on the computer screen located in the office in the SCU. The computer screen was positioned to face the west exercise yard, a locked area where an inmate (who will be referred to as "Inmate X") was situated. The witness also recollected seeing another phrase - "Your mother fucks guards." – later on during his shift. The witness stated that in both instances, the grievor and two other officers (Messrs. Van Vugt and Mikszan) were present. The witness stated he remembered seeing Inmate X at the window in the exercise yard that faces into the bubble. He stated that he did not take any action with regard to the phrases that appeared on the computer screen, as there were two senior supervisors on staff (one being the grievor) and his post was downstairs in the RRAC. When questioned as to why did he did not make anyone aware of the phrases displayed on the computer screen, he hesitantly replied: "I would not have told anyone unless I was specifically asked." Mr. Dick specifically asked the witness during his interview if he had seen any derogatory comments on the computer screen.

[48] The witness described a 3-on-1 scenario as three correctional officers escorting one inmate, whose wrists are handcuffed at all times.

[49] In cross-examination, the witness stated that he could not be absolutely certain that Inmate X had seen the phrases displayed on the computer screen but reiterated: "You really could not miss them, as the letters were approximately one and a half to two inches long." He also stated that he did not see who entered the phrases on the computer screen.

[50] The witness agreed that although he visited the SCU on at least three or four occasions on August 25, 2002, he never signed the logbook as required. He also stated that he was not disciplined for not having complied with that directive.

[51] In redirect, the witness identified page 49 of Exhibit E-31 as a written order in the SCU logbook that Rob Alcock, a correctional supervisor, made on August 24, 2002 that: "All I/M's involved in the disturbance are now 3 on 1 with cuffs."

[52] He also agreed that, at times, the grievor would act as his supervisor.

[53] John Creedy has worked at Matsqui Institution as a CX-1 since December 22, 2001. On August 25, 2002, he was assigned to the SCU, working the 7:00 p.m. to 7:00 a.m. shift.

[54] The witness testified that it was he who contacted Mr. Dick to arrange for an interview. Exhibit E-50 is a typed report of the notes taken during his interview on January 28, 2003, and a memorandum with comments/corrections that he added on February 7, 2003.

[55] The witness stated that on at least five occasions during the evening of August 25, 2002, he saw derogatory comments on the computer screen that were aimed at Inmate X.

[56] The first derogatory comment he observed was: "I heard you are a pedophile." Only Messrs. Mikszan and Van Vugt were present. The next derogatory comment he saw was: "I saw you sucking [Inmate Y's] cock." The witness stated that at that point he noticed that the grievor was standing between Messrs. Mikszan and Van Vugt in the bubble (control post). He explained that, in his view, the grievor participated in the harassment, as he was present while these intimidating and derogatory remarks were aimed at Inmate X. Inmate X was banging his shoe against the bubble window and yelling, but the witness did not hear what he said. The witness stated that he believed the derogatory comments were intended to get the inmate going. "It was like feeding time at the zoo", he stated.

[57] The witness testified that he was asked by Mr. Van Vugt to leave the bubble because Inmate X and Inmate Y were going to be escorted out of the exercise yards. Mr. Van Vugt stated that the inmates had had enough of the exercise yards and wanted to return to their cells. In an attempt to defuse the situation, Mr. Van Vugt felt that it would be a demonstration of good will on the part of the correctional officers if there were a minimum number of officers present. The witness stated that since Mr. Van Vugt was his supervisor, he obeyed the order. He also recalled Wendy Denis, a CX-1, saying: "It looks like we're out of here", as Mr. Van Vugt also asked her to leave.

[58] The witness explained the 3-on-1 protocol as follows. The logbook in the SCU, which every correctional officer must read upon entry, contains instructions to be followed with respect to any program, incident or protocol. The 3-on-1 is a system used by the correctional officers to protect themselves and the inmates. An inmate who is in the SCU must put his hands through the food slot in the cell door in order to be handcuffed before being escorted to the showers or exercise yards. Before the cell door is unlocked, the inmate is asked to step back. With a correctional officer on each side of the inmate and one behind, the inmate is escorted to his destination. Once the inmate arrives at either the showers or the exercise yards, he is locked in, asked to put his hands through the slot and the handcuffs are then removed. At all times, there are additional correctional officers in the bubble observing the movements of the inmate and the correctional officers.

[59] The witness stated that he never witnessed either Inmate X or Inmate Y throwing urine at the grievor but if an inmate were observed urinating into a cup, a correctional officer would consider the urine a weapon. The possibility of contracting an infectious disease, such as HIV and/or Hepatitis C, from an inmate's urine is of major concern. If an inmate attempts to throw urine at a correctional officer, it is usually a sign of an arranged set-up to get the correctional officer.

[60] The witness agreed that it was a part of his duties to ensure that a video-recorder with a fresh tape and batteries was available at the start of each shift.

[61] In cross-examination, the witness stated that one of his regrets is that he did not write a report of the incidents at the time. One of the reasons was that both his supervisors (Mr. Van Vugt and the grievor) were involved in the incident concerning the derogatory comments. He stated: "I was a spare at the time. I could have done something, perhaps informed the Warden. I did not call the Warden because I would have been labelled a rat."

[62] The witness stated that in the past, the grievor had always treated him and the inmates with respect and dignity.

[63] Rob Alcock has been employed with CSC since November 30, 1981, and on November 15, 1989, he was promoted to Correctional Supervisor (CX-3), the position he occupies today.

[64] The witness described the Correctional Supervisor's (CX-3) duties, in part, as follows. The primary duty is to ensure the safety and security of the Institution's operations. After normal business hours and on weekends, the Correctional Supervisor assumes the role of Acting Warden, monitors staff, notifies authorities (the RCMP, the local police, etc.) if any significant event occurs, assumes the role of the Crisis Manager or the On-Scene Controller and makes general rounds.

[65] The witness testified that a P-4 designation is given to a CX-3 who is the program officer, while a P-10 designation is given to a CX-3 who is the operational officer in charge on weekends and after normal business hours. Theoretically and practically, these designations are interchangeable. However, the P-10 is the one who assumes the duties of Acting Warden.

[66] The logbooks are usually maintained by the P-10, although the P-4 can and will make entries. The entries in the logbooks are usually about significant events, the inmates' behaviour, any concerns officers might have, a breach of protocol, or anything that is considered to be outside general routine. In the event of a crisis, the P-10 assumes command within the MCCP to assess the overall effect of the incident at the Institution while the P-4 assumes the On-Scene Controller role. In practice, however, the P-10 (who might be at the scene of an incident) assumes the On-Scene Controller role while the P-4 assumes the Officer-in-Charge role in the MCCP. The inter-changeability of the positions can be fluid at times and at other times can be static.

[67] According to Exhibit E-33 (the duty roster), during the evening of August 25, 2002, the grievor was the P-10 while Mr. Van Vugt was the P-4.

[68] The witness described his involvement in the "smash up" or disturbance that occurred on August 24, 2002. The grievor was in the SCU when the disturbance began but then he had to leave to take an institutional count of the inmates. The witness stated that he arrived in the SCU at approximately 10:20 p.m. The inmates had set a number of cells on fire and had also smashed out a number of windows in their cell doors. The inmates continued this disturbance until approximately 2:45 a.m. on August 25, 2002. They also broke off the heads of two sprinklers and, as a result, a number of cells were flooded. As well, five food slots were either broken open or extensively damaged.

[69] After the witness took a four-hour nap in the staff lounge, he reported to work at approximately 6:30 a.m. Immediately, he wrote out an order in the Correctional Supervisor's log (Exhibit E-34) that the inmates in the SCU were to be served their meals on Styrofoam plates until further notice and that all the inmates who had been involved in the smash-up were to be treated 3-on-1. The 3-on-1 order was a decision that he made after taking into account that the inmates involved in the smash-up were hostile and volatile and there was the potential that they might cause further damage to the Institution and/or threaten the safety of the correctional officers. "It was a staff safety decision", he stated. To ensure the order was conveyed to the correctional officers in the SCU, it was written in the SCU logbook (Exhibit E-31). The logbook must be reviewed by all the officers as part of their duties prior to starting their shift.

[70] The witness performed a risk-assessment evaluation and decided that in order to get the SCU back into a normal program, the inmates needed to be escorted to the exercise yards or showers 3-on-1 while the maintenance staff cleaned up the cells. The inmates were escorted back to their cells 3-on-1 and issued dry bedding and clothing, except for two inmates (Inmate X and Inmate Y) who refused to return. The witness stated that he felt that Inmate X and Inmate Y were safe and secure in the exercise yards and were not able to go anywhere (they were "camping out"); therefore, he decided to let them be. Inmate X was on the west side of one of the exercise yards while Inmate Y was on the south side.

[71] The witness testified that when inmates urinate into cups, it is either because they do not have access to a toilet or because they are storing urine to be used as a weapon.

[72] The witness stated he left the Institution at 6:00 p.m. on August 25, 2002, and handed over control of the Institution to the grievor.

[73] In cross-examination, the witness stated that on August 25, 2002, the inmates were not videotaped while they were being escorted from their cells to the exercise yards and showers, as he was trying to bring things back to normal and at that time there seemed to be little threat. He also stated that the 3-on-1 protocol could be amended by either rescinding the order or having it moved up to another level by a CX-3, who would have made his own risk assessment evaluation.

[74] When referred to paragraph (r) of the "Security Post Instruction Supplementary Document" (Exhibit E-16) where it states that: "Restraint equipment is only used as determined appropriate for the safety and security of the unit", the witness stated that if he was trying to deescalate a situation and an inmate was compliant, he would probably escort the inmate without handcuffing him. He further stated that he would not vary an order for a 3-on-1 if a senior manager gave it to him. However, if the order came from someone who was at his own level, then he would rely on his own judgement.

[75] In redirect, the witness agreed that an inmate who throws urine at staff is not considered compliant.

[76] Paul T.L. Urmson has been the Warden at Matsqui Institution since February 2003, and has been with CSC since May 1986.

[77] The witness' testimony can be summarized as follows. Matsqui Institution is a 45-million-dollar-a-year enterprise that operates 365 days per year, 24 hours per day. In fact, it can be described as or considered a small village. The role of the Institution is to incarcerate individuals and then attempt to reintegrate them into society after the completion of their sentence. The safety of the public and staff rests with the Warden. It is a management of relationships, a constant balance between staff and inmates, inmates and inmates, staff and staff, and management and staff. The inmates need to feel safe; if not, they can cause a riot. If the staff does not feel safe, they can decide to go on strike. The CX-3s are in charge of the Institution approximately 16 hours per day and on weekends.

[78] The witness stated that his decision to take disciplinary action against the grievor was supported by Exhibit E-56, a "Guide to Staff Discipline and Non Disciplinary Demotion or Termination of Employment for Cause". As well, the "Code of Discipline" (Exhibit E-18) and the "Standards of Professional Conduct" (Exhibit E-19) were relied on as key elements of what is expected of staff at Matsqui Institution. He also relied on consultations he had with regional and national headquarters personnel.

[79] The witness was not the Warden on August 24 and 25, 2002; however, he was briefed by Mr. Costello, who was the Warden at the time, and expected and did receive the "Disciplinary Investigation Report" (Exhibit E-41) from Mr. Dick some time in February 2003.

[80] The witness accepted the Report's conclusions but stated that in order to satisfy himself that it was completely accurate and what disciplinary action needed to be taken, three or four meetings were held with the grievor. The purpose of the meetings was to pose a series of questions (Exhibit E-58) to the grievor and cross-reference his answers against other documents and testimony he had previously given. Also, the grievor would have the opportunity to provide or share any additional information.

[81] As a result of interviews with the grievor, the witness decided that two allegations that were identified by Mr. Dick in the "Disciplinary Investigation Report" were unfounded and they were therefore dismissed and did not form any part in the decision taken to terminate the grievor's employment. However, the grievor had no reasonable explanation as to:

(1) why he had not used 3-on-1 with Inmate X and Inmate Y;

(2) why he considered Inmate X to be compliant even though the inmate had kicked a cup of urine toward him;

(3) why he decided to replace the original staff with more experienced staff if Inmate X was compliant;

(4) why there were no entries of the incident in the SCU log;

(5) why there was no videotape of the incident; and

(6) why he and Mr. Van Vugt, both correctional supervisors, were in the same location at the same time dealing with this incident.

[82] Videotaping an inmate after a disturbance usually calms the inmate down and also documents the events.

[83] The witness stated that if the inmates were compliant, the grievor should have requested that they overturn the cups of urine and ordered the inmates to put their hands through the food slots. If the grievor had followed the 3-on-1 protocol, there would have been no incident. He stated that the grievor admitted that he was annoyed with Inmate X and Inmate Y for holding up the exercise yards, as he was now responsible for dealing with the matter.

[84] Based on the investigation reports and interviews held with the grievor, the witness decided that the grievor had exacted revenge on Inmate X and Inmate Y for their behaviour toward staff, their involvement in the mini-riot of August 24, 2002, and their decision to take over the exercise yards by refusing to return to their cells. As well, he felt that the grievor deliberately provoked Inmate X into an altercation by watching or participating in the entry of the derogatory comments on the computer screen that were aimed at the inmate. He felt that this was not an error of judgement on the grievor's part but rather an opportunity to exact revenge.

[85] In reference to the grievor being charged with one count of assault against his then common-law wife, the witness referred to a report of an investigation conducted by Mr. Wallin into the allegations of contravention of the "Standards of Professional Conduct" (Exhibit E-64). The grievor pled guilty to the charge of common assault under section 266 of the *Criminal Code of Canada* for his actions against his then common-law wife. As a result, he received a conditional discharge, 12 months' probation and was ordered to attend and complete anger management courses. The witness stated that this incident contravened Standard 2 of "Commissioner's Directive 060 – Code of Discipline" (Exhibit E-64), which states:

> *An employee has committed an infraction, if he or she commits an indictable offence or an offence punishable on summary conviction under any statute of Canada or of any province or territory which may bring discredit to the Service or affect his or her continued performance with the Service.*

[86] The witness stated that while the grievor was being questioned by the attending police officer, he offered credentials identifying himself as a correctional supervisor with CSC. It was the witness' opinion that this brought immediate discredit to the image of CSC.

[87] The witness stated that this incident, as well as the incident in the SCU on August 25, 2002, demonstrated a pattern of behaviour that conflicted with the grievor's role as a peace officer and a correctional supervisor.

[88] He also stated that inmates will tolerate many things within an institution, but they will not accept someone who participates in a deliberate public assault against one of them. It was the witness' belief, after having met with the Internal Inmate Committee, that if the grievor were reinstated, he would face the risk of being assaulted, severely injured or possibly killed by the inmates at some point. The

witness was also concerned that if another staff member was working with the grievor, it could dramatically increase that person's risk of injury.

[89] Finally, the witness stated that he does not believe that the grievor respects the values and possesses the ethics that are mandatory to work in an institution and to interact positively with staff and inmates. Therefore, terminating the grievor's employment was the right decision.

[90] In cross-examination, the witness agreed that the foremost reason for his decision to terminate the grievor's employment was his involvement with respect to the derogatory comments aimed at Inmate X. However, the assault against his then common-law wife demonstrated to him that the grievor had a behaviour problem of violence.

[91] The Internal Inmate Committee approached the Warden soon after the incident in the SCU, as the Committee members were concerned about the way Inmate X and Inmate Y had been treated.

[92] The witness agreed that Inmate X was charged by the Abbotsford Police Department with assault against the grievor and the officers in the SCU on August 25, 2002.

[93] The witness stated that if the grievor believed that Inmate X was compliant (although he stated that it was not his belief) but still decided to call in more experienced officers to escort the inmate back to his cell and an incident erupted, then he could understand. However, he could not understand why the grievor and Mr. Van Vugt handcuffed Inmate Y, who was in the exercise yard in a "prone out" position (on his stomach with his arms and legs spread out), instead of taking him to his cell 3-on-1. Inmate X and Inmate Y were the driving force the night of the mini-riot. Inmate X had kicked a cup of urine toward the grievor earlier in the evening of August 25, 2002, and the grievor then decided to have more experienced officers brought into the SCU. The witness questioned why the grievor went into the exercise yard, as there were three officers available. The grievor broke his hand in the shuffle with Inmate X; therefore, it would seem all the more logical to have used 3-on-1 with Inmate Y.

[94] The witness stated that he believed that the grievor and other officers had also beaten up Inmate Y, although he conceded he had no medical evidence to support his conclusion. He stated that it was just his opinion as a result of his experience working at CSC.

[95] When questioned, the witness could not differentiate between a charge of common assault and one of assault causing bodily harm. It was his belief that there is no difference - assault is assault - and the reputation of CSC is a serious concern.

[96] The grievor's counsel stated to the witness that by identifying himself to the arresting officer as a CSC supervisor, the grievor was attempting to protect himself; if he were jailed (as he was), inmates from various institutions might recognize him and it could potentially affect his safety. In reply, the witness stated: "I don't have an issue or criticism. Perhaps it was not inappropriate", referring to the grievor's having identified himself as a CSC supervisor.

[97] Finally, the witness agreed that the grievor followed standard 2 ("Conduct and Appearance") of the "Code of Discipline" (Exhibit E-18) by asking the police to place a call to Matsqui Institution in order to inform senior management that he had been arrested.

[98] Richard Farrance's employment with CSC began in July 2002, as a CX-1. He started at Matsqui Institution on August 18, 2002. On August 25, 2002, his shift was from 7:00 p.m. to 7:00 a.m.

[99] The witness testified that it was either the grievor or Mr. Van Vugt who requested that he relieve another officer (Peter Stout) who was in the MCCP. The reason he was asked to leave the SCU was two-fold: (1) he had only been at Matsqui Institution for one week and no one knew him that well and (2) he was too inexperienced to handle a crisis situation. He stated that to the best of his recollection there was trouble in the exercise yards with inmates throwing urine at officers. He returned to the SCU at approximately 10:30 p.m. and was instructed by the grievor to videotape the examination of Inmate X and Inmate Y by the on-duty nurse (Exhibit E-48).

[100] The witness testified that during the briefing he received when he began his shift, he believes that he was advised that Inmate X and Inmate Y had thrown urine at an officer (whose name he could not recall). Although he remembered spending the majority of his shift in the bubble, he stated that he did not recall seeing any derogatory comments displayed on the computer screen.

[101] Wendy Denis began her employment with CSC in April 2001, at Matsqui Institution. On August 25, 2002, she was working the 7:00 p.m. to 7:00 a.m. shift in the SCU.

[102] Ms. Denis testified that at approximately 10:00 p.m. the grievor asked her to leave the SCU and report to the RRAC. She testified that the reason for this request was not because she was a woman, but rather that the grievor wanted to have more experienced officers handle the commotion.

[103] She also testified that she was made aware that Inmate X and Inmate Y were urinating in cups, although she never witnessed them doing so.

[104] It was also her testimony that she did not notice any derogatory comments displayed on the computer screen. She spent the majority of her shift in the bubble; however, she did leave the bubble to perform her rounds, which could last approximately one-half hour.

[105] The witness recalled her 45-minute interview with Mr. Dick (Exhibit E-69). When asked by Mr. Dick whether she had seen anything displayed on the computer screen that could be considered derogatory toward an inmate, she replied that she had not. Toward the end of the interview, he stated, in a very stern, aggressive voice: "Are you telling me that you remember everything that night and at no time while you were there you saw anything derogatory on the computer or are you telling me you can't remember if there was anything on the computer?" She replied: "I did not see any derogatory comments on the screen." Two weeks later, she was called into Warden Urmson's office; Ms. Mackenzie, the Chief of Personnel, and Dusty Pruden, a UCCO/SACC-CSN representative, were also present. The Warden questioned her about any comments displayed on the computer screen on August 25, 2002, and asked her if she was protecting herself under the auspices of the "rat code". She told the Warden that she had not seen anything displayed on the computer screen and knew nothing about the "rat code" or, for that matter, what it meant. The witness stated that she

believed she was being pressured by the Warden to lie or provide misleading information to help the investigation.

[106] She stated that she was very stressed by the Warden's allegation, as she had no past history of any wrongdoing in the workplace. She also testified that the Warden advised her that if she were lying she would face disciplinary action. It would not necessarily only be a fine or a suspension without pay, but could be termination of employment with CSC. The Warden guaranteed that if she told the truth, she would be totally protected. The witness commented that she had never felt unprotected in the past.

[107] It was the witness' belief that the Warden was attempting to have her change the evidence she had previously given to the investigators. This was her only dealing with the Warden and she informed him that she was telling the truth, that he did not know the type of individual she was and stated that he should speak to her supervisors to inquire about her employment ethics. At the end of the interview, the Warden indicated that he was taking three weeks of annual leave and during that time he would decide what he intended to do in terms of her employment at CSC. She was also advised that if she wished to change her statement, she should contact him immediately. The result of that meeting left her so stressed that she was unable to eat or sleep.

[108] Two or three days later, a message was left on her voicemail by Marie Shepard, the Warden's secretary, advising her that everything had been taken care of. She called Ms. Shepard back and requested that the Warden issue a letter to set the record straight. She subsequently received a letter from the Warden apologizing for any inconvenience but he never apologized to her in person. She felt that the letter was not enough to compensate for the stress she was forced to endure.

[109] In cross-examination, the witness agreed that there was no disciplinary action taken against her, nor was she implicated in the incident of August 25, 2002. She also stated that she did not file a harassment grievance against the Warden; in hindsight, she wished she had but stated that the stress she was under was too overwhelming.

[110] In redirect, the witness agreed that during her meeting with the Warden, he did not tell her what comments were displayed on the computer screen. However, she stated that she believed the Warden was attempting to have her say something

different, about seeing derogatory comments on the computer screen, from what she had originally told the investigators or he either just did not believe her. She also confirmed she spent the majority of her time in the bubble but stepped out occasionally.

[111] Peter Stout, a CX-1, has been working at Matsqui Institution for 31 years and on August 25, 2002, he was in the MCCP working the 7:00 p.m. to 7:00 a.m. shift.

[112] The witness' testimony can be summarized as follows. Mr. Van Vugt specifically asked him to report to the SCU because he wanted more experienced officers on hand. Mr. Farrance relieved him of his post at approximately 10:05 p.m. When he arrived at the bubble, there were four officers present – the grievor, Messrs. Van Vugt, Mikszan and Davis. He was ordered to man the bubble while Inmate X and Inmate Y were being escorted back to their cells; apparently, the inmates had agreed to be compliant.

[113] The four officers exited the bubble and assembled in the foyer with Mr. Van Vugt and the grievor in the lead and Messrs. Mikszan and Davis following. However, the officers quickly exited the foyer and went back into the hallway of the bubble. Mr. Van Vugt yelled at the witness: "Turn on the water for the fire hose." The witness complied with the order and returned to the bubble. Mr. Van Vugt had the hose and the witness heard him order Inmate X and Inmate Y to "drop the cups". The witness' assumption was that the inmates were using urine as a weapon by throwing it at the officers. The witness stated he was then requested to retrieve handcuffs and leg irons that were locked in the bubble. The handcuffs and leg irons were removed from the locked safe and given to Mr. Mikszan, who was in the west exercise yard. The witness stated he opened the door to cell #2 and the grievor and Messrs. Mikszan and Davis escorted Inmate X into that cell. The witness stated he locked the inmate in the cell and left the leg irons and handcuffs on. He returned to the bubble and heard Mr. Van Vugt telling Inmate Y to put down the cups and "prone out".

[114] The witness supplied Mr. Mikszan with another set of handcuffs and leg irons. Inmate Y was then escorted to a cell and locked in by Messrs. Mikszan and Davis.

[115] The witness turned off the fire hose and heard the grievor mention that he believed he had broken his hand. Mr. Mikszan had a red mark on his abdomen and stated that he believed Inmate X had stabbed him. The nurse was called to check the inmates and declared that they were fine; she was more concerned about the grievor's

hand. The witness stated he went back to the MCCP and wrote out his observation report (Exhibit E-70).

[116] The witness testified that he has used 3-on-1 hundreds of times; however, it was not used on this occasion.

[117] In cross-examination, the witness stated that upon his arrival in the bubble, he did not notice any derogatory remarks displayed on the computer screen. He also stated that during his interview with the investigators, he was not questioned about any derogatory comments.

[118] The witness stated that the incident with Inmate X and Inmate Y lasted approximately five minutes.

[119] Blair Davis has worked for 25 years at Matsqui Institution and has been a CX-2 since 1989.

[120] On August 25, 2002, his post was in the RRAC and he was working the 1:00 p.m. to 11:00 p.m. shift. He was asked by Ms. Denis to report to the SCU. Upon his arrival, he was met by the grievor and Messrs. Van Vugt, Mikszan and Stout, who asked for his assistance in removing Inmate X and Inmate Y from the exercise yards and escorting them back to their cells. He was briefed by the grievor that the inmates were now compliant and wanted to return to their cells. Mr. Stout was in the bubble at the time.

[121] As he entered the foyer with the three other officers, a liquid (which he assumed to be urine) was thrown at them. Mr. Van Vugt then began spraying Inmate X, who was in the west exercise yard, with the fire hose and then turned the hose on Inmate Y, who was in the south exercise yard. Mr. Mikszan and the grievor were at that time struggling with Inmate X. The witness pulled Inmate X's legs out from under him, sending them all crashing to the ground. Inmate X was then escorted to cell #2 and locked up by the witness and Mr. Mikszan. The grievor went to the south exercise yard and he and Mr. Van Vugt handcuffed Inmate Y.

[122] The witness stated that he left the SCU at approximately 10:30 p.m. after the arrival of Mr. Farrance and the nurse. He wrote out his observation report (Exhibit E-72) and he submitted it to the grievor.

[123] The witness also stated that he did not notice any derogatory comments displayed on the computer screen when he arrived in the SCU.

[124] Robert Burton's career with CSC began on December 27, 1992, as a CX-1; five months later, he began acting as a CX-2, and then became a permanent CX-2 in March 1994. As a result of a competition, he was appointed, on October 27, 1997, to a Correctional Supervisor (CX-3) position at Matsqui Institution.

[125] The events of August 24, 2002 are not in dispute and have already been summarized. The decision to terminate the grievor's employment was as a result of the events that occurred on August 25, 2002, and the assault charge against his then common-law wife. This is where the grievor's testimony for the record begins.

[126] The grievor stated he arrived at the Institution at 6:00 p.m. on August 25, 2002, and was briefed by Correctional Supervisor Alcock. He was informed that Mr. Alcock had begun a program in the SCU whereby the inmates involved in the mini-riot of the previous night were fed, had showered, were issued dry clothing and bedding and had received medical attention if required. However, there were two inmates (X and Y) in the west and south exercise yards, respectively, who refused to return to their cells. The grievor stated he found this amusing and troubling. The reason he found it troubling was that in order to run a normal program, inmates are only allowed into the exercise yards for approximately one hour per day and only one inmate at a time per yard. Since Inmate X and Inmate Y were in the two exercise yards and refused to return to their cells, the other inmates were being denied their right to have access to the exercise yards.

[127] The grievor stated that Mr. Alcock also briefed Mr. Dewar, the Assistant Warden, about the previous evening's incident. The Abbotsford police had been called and made an onsite visit to view the damage to the Institution. Mr. Alcock advised the grievor that he had decided that the best course of action was to leave Inmate X and Inmate Y in the exercise yards until they decided to return to their cells.

[128] According to the SCU log (Exhibit E-34), at 7:30 p.m. on August 25, 2002, the grievor noted: "To SCU – Rounds - Inmates [X & Y] refusing to come in from yard still." The grievor's next entry at 9:50 p.m. states: "To SCU – Inmates [X & Y] will come in from yard." Exhibit E-30 confirms that the grievor signed the SCU visitor log at 7:40 p.m. on August 25, 2002, and recorded the purpose of the visit as "rounds".

[129] At approximately 7:40 p.m., the grievor went into the exercise yards to talk to Inmate X and Inmate Y to determine if they were ready to return to their cells. Inmate X told the grievor to "fuck off-fuck you". They had bedding, dry clothes, were lying beside each other and chatting occasionally but were separated by a chain link fence. In essence, they were having a quiet protest. These were not high-profile inmates with a bad reputation. The inmates only became vocal and verbally abusive when an officer was within earshot.

[130] The grievor's 7:40 p.m. visit to the bubble lasted approximately 10 minutes. Mr. Mikszan was the officer in charge of that post; working with him were Ms. Denis and Mr. Van Vugt. The grievor could not recall if Mr. Creedy was in the bubble. However, he recalled that Mr. Farrance was only there when the inmates were being videotaped after the incident, at approximately 10:30 p.m.

[131] The grievor stated that on his first visit to the SCU at 7:40 p.m., he did not observe any derogatory comments displayed on the computer screen. The grievor also stated that he was not in the SCU between 8:00 p.m. and 10:00 p.m.

[132] The grievor received a call from Mr. Mikszan in the supervisor's office at 9:50 p.m., stating that Inmate X wanted to return to his cell. Upon his arrival at approximately 10:00 p.m., Messrs. Van Vugt, Mikszan and Davis and Ms. Denis were present; he was not sure, however, if Mr. Stout was present. It was his decision that if Inmate X was prepared to return to his cell, he preferred to have more experienced officers present. Mr. Van Vugt called Messrs. Davis and Stout, who arrived some time after the grievor. Messrs. Creedy and Farrance were not present and Ms. Denis was sent downstairs to the RRAC. The grievor signed the SCU visitor logbook at 10:00 p.m. and did not recall seeing any derogatory comments on the computer screen.

[133] While in the foyer adjacent to the west and south exercise yards, the grievor asked Inmate X if he was ready to come in and if he was going to resist. The inmate replied: "Ì am not going to be resistant." The inmate was asked to move to the centre of the exercise yard. The grievor then went back into the office and planned with the other officers that together they would go into the exercise yard and remove Inmate X and escort him back to his cell. Mr. Stout remained in the bubble. The grievor and the remaining officers assembled in the foyer. Mr. Mikszan unlocked the gate to the west exercise yard where Inmate X (who was in the middle of the yard) was standing still. The grievor was behind Messrs. Mikszan, Davis and Van Vugt. As they were

proceeding toward Inmate X, he threw a cup of urine at them. Inmate X then made a jabbing motion toward Mr. Mikszan. The grievor and Mr. Mikszan tried to subdue the inmate, who was resisting by thrashing and kicking. It was then that Mr. Davis pulled the inmate's legs out from under him sending the grievor, Mr. Mikszan and the inmate to the ground. Mr. Stout provided Mr. Mikszan with handcuffs and leg irons. Inmate X was eventually restrained with the use of these items and as a result became compliant. All the while the altercation with Inmate X was occurring, Inmate Y was dousing the officers with cups of urine from the south exercise yard. Mr. Van Vugt, on his own, took the fire hose that was lying in the range from the night before and used it to blow over the remaining cups of urine that were in the exercise yards.

[134] Mr. Mikszan and the grievor escorted Inmate X to cell #2, where he was left in handcuffs and leg irons and locked down. They then returned to the exercise yard, where Mr. Van Vugt had inmate Y lying in a "prone position". Inmate Y was handcuffed and escorted without resistance back to his cell. The time that elapsed during the whole incident was approximately three to four minutes. Since force was used on the inmates, the grievor immediately called the on-duty nurse, who arrived within five minutes. The nurse's examination was videotaped by Mr. Farrance (Exhibit E-48).

[135] As a result of the scuffle with Inmate X, the grievor suffered a broken right hand. The grievor left the SCU, returned to the Correctional Supervisor's office, made log entries and then telephoned Wayne Marsdon, the Assistant Warden, Management Services, at home since Warden Costello was on holidays and Assistant Warden Dewar was in Ottawa. The exercise yards were sealed off as a crime scene and at 11:50 p.m., the grievor was at the hospital seeking medical attention.

[136] The grievor stated that the reason for not handcuffing Inmate X was two-fold. First, the SCU had been through an intense couple of days (mini-riot) and Inmate X was initially responding to commands. Secondly, the grievor believed that with extra staff present, no videotaping and no handcuffs, Inmate X, who stated he would be compliant, could easily be escorted the 60 feet back to his cell without incident.

[137] Inmate Y had demonstrated a level of compliance by "proning out" and he was returned to his cell without incident.

[138] The grievor stated that if he had been aware of any derogatory remarks being displayed on the computer screen in the SCU and aimed at Inmate X, he would have acted as follows. The person or persons responsible for entering or condoning the remarks would have been immediately escorted from the Institution, interviewed to determine the reasons for such action, a written report would have been filed with senior management and an apology offered to the inmate for the conduct of the said person or persons. The grievor also confirmed that if he had known that Inmate X had been subjected to harassment by having to view derogatory comments, he would not have entered the exercise yard to remove him. It would stand to reason, he stated, that Inmate X would not be compliant.

[139] The grievor testified that he was annoyed with the officers who worked the dayshift since they should have dealt with Inmate X and Inmate Y in the exercise yards and not left the matter for the fewer number of officers working the graveyard shift. The grievor was concerned that if he had left the inmates out in the exercise yards throughout the night, his action might be viewed as cruel and unusual punishment and he would be criticized.

[140] The grievor confirmed that he was charged with one count of assault against his then common-law wife. He stated as well that he had indeed told the police that he was a correctional supervisor at Matsqui Institution. The reason for informing the police officer of his identity was to protect himself if he were arrested and detained. It was quite possible that if he were jailed he could come into contact with offenders he had dealt with previously throughout his career and thereby jeopardize his safety. Also, it was his understanding that peace officers should inform other peace officers of their status.

[141] The grievor also requested that the police officer call Matsqui Institution to inform senior management of his arrest. At no time did he offer resistance or argue with the police. He pled guilty to the charge as advised by his lawyer, Steve McMurdo. The result of the conviction was 12 months' probation, which expired on January 21, 2003, that he successfully completed.

[142] Besides the 12 months probation, as part of the conditions set by the presiding judge, the grievor completed, in December 2003, a 17-week relationship violence course and a 10-week relationship education course in July 2003.

[143] The grievor filed a number of certificates, citations of brave actions and letters of appreciation that he has received from CSC (Exhibit G-75 to G-81).

[144] In cross-examination, the grievor agreed that he was familiar with the “Code of Discipline” (Exhibit E-18), the “Standards of Professional Conduct” (Exhibit E-19) and “Commissioner’s Directive 003 - Peace Officer Designations” (Exhibit E-22).

[145] He also agreed that Mr. Van Vugt was acting as Correctional Supervisor (CX-3) on August 25, 2002, in the P4-position and was working the 10:00 a.m. to 10:00 p.m. shift.

[146] The grievor agreed as well that on his first visit to the SCU at approximately 7:40 p.m., Inmate X kicked a cup of urine in his direction, striking his right hand.

[147] The grievor, who in examination–in-chief stated that he had visited the SCU twice, at 7:40 p.m. and 10:00 p.m., was referred to Exhibit E-43, his handwritten observation report in which he stated that he visited the SCU on at least three occasions to deal with Inmate X and Inmate Y. His explanation for this discrepancy was that when he wrote his report at the hospital, his judgment might have been impaired because of the painkillers he had been given to treat his broken hand. The report states: “A short while later [after the 7:40 visit] I attended SCU and nothing had changed.” The grievor stated that this statement does not say he went into the bubble. He conceded it was possible that he had visited the inmates on at least two other occasions and might have talked to them from the foyer.

[148] When asked by counsel for the employer if he had checked on the inmates at least once an hour, he replied that he had not. However, the typed report of the notes of the grievor’s interview with Mr. Dick, that have his handwritten comments/corrections (Exhibit E-45), states: ”I would go up once an hour to check. They always said no.” When questioned by counsel for the employer, the grievor admitted that he might very well have visited the inmates at 7:30 p.m., 8:30 p.m. and 9:30 p.m.

[149] The grievor stated that the reason Messrs. Van Vugt, Mikszan and Davis, all seasoned correctional officers, were asked to replace Messrs. Creedy and Farrance and Ms. Denis was that Mr. Creedy and Ms. Denis were junior officers and Mr. Farrance had only been at the Institution for about one week.

[150] The grievor stated that Inmate X was responding to his commands and wanted to return to his cell. There were seasoned officers on the scene and he believed that by not using handcuffs, he would deescalate the situation.

[151] The grievor stated that he believed Mr. Mikszan was stabbed by Inmate X with a piece of the metal shielding from the night light in the west exercise yard. Although Mr. Mikszan's injury was reported to senior management, no evidence of the weapon was found.

[152] The grievor agreed with counsel for the employer that he could have had Inmate Y handcuffed and returned to his cell 3-on-1, as he was still locked in the south exercise yard and not able to go anywhere. He could provide no explanation, however, as to why he wrote "disturbance" in the box under "Purpose of Visit" in Exhibit E-30 at 10:00 p.m. on August 25, 2002, when at 7:40 p.m. he had indicated "rounds" as the purpose of his visit.

[153] The grievor stated that he "did not experience that experience" of viewing derogatory comments on the computer screen. He stated that Messrs. Braun and Creedy were obviously mistaken when they testified that he was present while the derogatory comments were displayed on the computer screen in the bubble. They were new CX-1s and the grievor reiterated that they were mistaken.

<u>Arguments</u>

<u>For the Employer</u>

[154] The grievor's employment was terminated because of his involvement in two incidents: the incident of August 25, 2002, in the SCU, and his being charged to one count of assault on his then common-law wife contrary to Section 226 of the *Criminal Code of Canada*.

[155] The grievor was in charge of the Institution when the Warden was absent during non-business hours. The buck stopped with him. The safety of the staff and inmates and the running of the Institution were his responsibility. As a result of his massive error in judgement, he and another officer (Mr. Mikszan) were injured, as well as two inmates (X and Y).

[156] The inmates at Matsqui Institution believe that the grievor beat up Inmate X and Inmate Y and therefore he has lost their trust. Counsel argued that if the grievor is reinstated, his safety as well as the safety of anyone working with him could be in jeopardy. He has breached the bond of trust with the employer by his deliberate act to exact revenge on Inmate X and Inmate Y who, the grievor believed, caused him and his staff grief and damage to the Institution.

[157] The grievor breached the "Code of Conduct" and the "Standards of Professional Conduct" expected not only of a correctional supervisor/officer but also of a peace officer when he was charged with one count of assault against his then common-law wife. Assault is assault, whether it is at the low end of the spectrum or not. It brings disrepute to the image of CSC. The CSC incarcerates individuals who have been charged with assault.

[158] Counsel argued that the grievance should be denied and the grievor not reinstated. However, if it is felt that the penalty is too severe but that the grievor cannot return to his duties, as the bond of trust has been broken, as an adjudicator I should consider only a minimal amount of compensation because the grievor received Workers Compensation benefits up to June 2003, and has since found alternative employment.

[159] Counsel for the employer submitted the following jurisprudence for consideration: *Brian William Kelly and Treasury Board (Correctional Service Canada)*, 2002 PSSRB 74; *Luc Rivard and Treasury Board (Solicitor General of Canada – Correctional Service)*, 2002 PSSRB 75; *Debbie Coté and Treasury Board (Solicitor General Canada – Correctional Service)*, 2002 PSSRB 103; *Richard Simoneau and Treasury Board (Solicitor General of Canada – Correctional Service)*, 2003 PSSRB 57; *Cottenoir* (Board file 166-2-27324) and *Flewwelling v. Canada*, [1985] F.C.J. No. 1129.

For the Grievor

[160] Counsel for the grievor argued that the grounds for dismissal stated in Exhibit E-28 hinge on "an all or nothing allegation". Did the employer meet the burden of proof that the grievor was a party to the incitement of Inmate X - the derogatory comments displayed on the computer screen - with the view that these comments would be the catalyst to give the grievor cause to exact revenge and beat up that inmate? The answer to that question is that the employer has not met that burden.

[161] If the grievor believed that Inmate X was aggravated by the derogatory comments, why then would he have entered the exercise yard when the inmate had a weapon (urine in a cup) ready to throw at him? Also, if this is the employer's theory, why was Inmate Y not beaten up as well? Inmate Y did not sustain any injuries.

[162] Based on the evidence, the employer has not proven that allegation; therefore, the rest of its case falls apart. There is nothing in the grievor's conduct that would justify disciplinary action. The grievor has an employment record free of any disciplinary infractions. If I conclude, however, that he did commit a serious infraction, he should have the right to progressive discipline.

[163] Counsel for the grievor did not agree with the employer's theory that the grievor deliberately participated in the harassment of Inmate X, by allowing derogatory comments to be displayed on the computer screen and aimed at the inmate, as part of a bigger scheme to bring in senior officers to beat up the agitated inmate in an attempt to teach him a lesson.

[164] Warden Urmson testified that he could have accepted the grievor's judgment call of escorting Inmate X without handcuffs if the grievor believed that the inmate was compliant.

[165] Mr. Alcock testified that he saw nothing wrong with substituting senior officers for handcuffs in an attempt to deescalate a situation. Mr. Alcock said he would have done the same as the grievor in an effort to re-establish normality.

[166] In closing, counsel for the grievor stated that the grievor has not misconducted himself and should be returned to his position as Correctional Supervisor (CX-3), without loss of benefits and pay.

Reply

[167] Counsel for the employer stated that Inmate Y did indeed suffer injuries, as may be seen by Exhibit E-48.

[168] Messrs. Creedy and Braun were adamant that the grievor was present while the derogatory comments were displayed on the computer screen. In redirect, Mr. Alcock stated that if an inmate had kicked or thrown a cup of urine at an officer, he would not

consider the inmate compliant. Other than the grievor, no one testified that Inmate X was compliant.

[169] The Internal Inmate Committee spoke to Warden Urmson about the abuse suffered by Inmate X and Inmate Y. This caused the Warden to be concerned, not only for the welfare and safety of the grievor should he be reinstated, but for any other officer working with him.

[170] After the conclusion of the hearing, the parties were requested to address the following issue:

(1) Does an adjudicator in his/her remedial powers have the authority to order a demotion?

(2) Would such a remedy be appropriate in the Burton case?

[171] Their written submissions are reproduced below.

For the Employer

Adjudicator's remedial powers/authority to order a demotion

Legislation

The Public Service Staff Relations Board ("Board") is a creature of statute. It derives its authority from various statutes, the principal statute being the Public Service Staff Relations Act ("PSSRA").

Section 92(1) of the PSSRA provides the authority to the Board to have jurisdiction over the hearing of a grievance as follows:

> *92(1) Where an employee has presented a grievance, up to and including the final level in the grievance process, with respect to:*
>
> *(a) in the interpretation or application in respect of the employee of a provision of the collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part I of Schedule I or designated pursuant subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*

> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
>
> *(c) in the case of an employee not described in paragraph (b), the disciplinary action resulting in termination of employment, suspension or a financial penalty*

Section 92(b)(ii) references a termination or demotion pursuant to paragraphs 11(2)(f) and 11(2)(g) of the Financial Administration Act ("FAA").

Sections 11(2)(f) and 11(2)(g) are as follows:

> *11 (2) Subject to the provisions of any enactment respecting the powers and functions of a separate employer but notwithstanding any other provision contained in any enactment, the Treasury Board may, in the exercise of its responsibilities in relation to personnel management including its responsibilities in relation to employer and employee relations in the public service, and without limiting the generality of sections 7 to 10,*
>
> *(f) establish standards of discipline in the public service and prescribe the financial and other penalties, including termination of employment and suspension, that may be applied for breaches of discipline or misconduct, and the circumstances and manner in which and the authority by which or whom those penalties may be applied or may be varied or rescinded in whole or in part;*
>
> *(g) provide for the termination of employment, or the demotion to a position at a lower maximum rate of pay, for reasons other than breaches of discipline or misconduct, of persons employed in the public service, and establishing the circumstances and manner in which and the authority by which or by whom those measures may be taken or may be varied or rescinded in whole or in part;*

Sections 11(2)(f) and (g) permit the Treasury Board in the exercising of its responsibility to establish steps of discipline and penalties, including termination (section 11(2)(f)) and provide for termination of employment and demotion for breaches other than discipline or misconduct.

The Treasury Board therefore has jurisdiction to determine discipline matters and prescribe penalties, such as suspension and termination of employment. It can also determine termination for non-discipline or demotion for reasons <u>other</u> than discipline and misconduct.

The final piece of legislation that has direct bearing on the jurisdiction of the Board is the Public Service Employment Act ("PSEA"). The PSEA establishes the "Public Service Commission". The powers and duties of the Public Service Commission are set out at section 5 of the PSEA which states that the Commission shall appoint or provide for the appointment of qualified persons to or from within the Public Service in accordance with

the provisions and principles of the PSEA. Section 8 of the PSEA states that the Commission has the exclusive right and authority to make appointments to or from within the Public Service of persons whose appointment there is no authority in or under any other act of Parliament.

Section 10 of the PSEA provides that appointments to or from within the Public Service shall be based on selection according to merit as determined by the Commission and shall be made by the Commission, at the request of the Deputy Head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interest of the Public Service.

Section 21 of the PSEA provides for appeals to the Federal Court Trial Division pursuant to section 18 of the Federal Court Act with respect to the appointments.

While the FAA at section 7 grants significant powers to the Treasury Board, acting on behalf of the Queen's Privy Council for Canada, including the administrative policies for the Public Service and the general organization and personal management of the Public Service, Parliament distinctly reserved the power to appoint persons to positions within the Public Service to the Public Service Commission pursuant to the PSEA.

The FAA clearly sets out in section 11(2)(f) that the Treasury Board can take certain disciplinary steps. It does not state that the Treasury Board can "demote" for disciplinary reasons. By comparison, section 11(2)(g) specifically refers to and grants the Treasury Board the specific authority to terminate or "demote" for reasons other than discipline.

The Federal Court of Appeal in Peach Hill Management Ltd. v. Canada stated that:

> *When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.*

This is known as the "presumption of consistent expression".

It is respectfully submitted that by specifically referring to "demotion" in section 11(2)(g) and by specifically omitting it's reference in the preceding section 11(2)(f), Parliament meant to "exclude" demotions from Treasury Board authority, in reference to discipline.

Since the Board's jurisdiction under Section 92(1) of the PSSRA is drawn directly from sections 11(2)(f) and (g) of the FAA, it is therefore respectfully submitted that the Board does not have the jurisdiction to alter the penalty of termination and substitute a demotion.

Jurisprudence

In the Tourigny v. Treasury Board series of cases, the jurisdiction of the Board to appoint a grievor upon reinstatement was discussed.

The initial decision of the Board (166-2-16434) made an order that the Treasury Board reinstate Mr. Tourigny to a PM-3 position at his specific job location effective a specific date. This was contained in paragraph 73 of the decision of Adjudicator Galipeault. At paragraph 74 of that decision, Adjudicator Galipeault presented to the employer the option and suggestion that it would be better for all concerned if Mr. Tourigny worked in a location other than the one he had previously worked. However, Adjudicator Galipeault went on to state that if the employer did not exercise this option, they were to reinstate Mr. Tourigny in his original position by a specific date.

The Employer reinstated Mr. Tourigny in his position at his original location, however, did not provide to him any work, and in essence he was left at home on leave with pay. Mr. Tourigny filed a Section 23 complaint (161-2-462) which came up for a hearing before Board Member Brown. The Section 23 complaint was allowed, however, Board Member Brown held that the Adjudicator's recommendation to find Mr. Tourigny another position was merely a recommendation and was obiter dicta and did not form part of the operative part of the decision. Board Member Brown held that an adjudicator under the PSSRA could not reinstate a discharged employee in a position other than the one in which he worked at the time of discharge. Such direction would involve an appointment, which is reserved to the Public Service Commission.

The Crown applied for Judicial Review of the Board Member's decision that the Employer had not complied with the Adjudicator's decision in reinstating Mr. Tourigny. The Court decision makes it clear that the Board made an order, which order granted the employer the option of transferring Mr. Tourigny to a location other than his original location. The court found that the adjudicator has the authority to offer direction to the employer. The Federal Court of Appeal however, stopped short of determining whether or not the Board has jurisdiction to make an appointment. Its decision clearly sets out that the Board has the jurisdiction to give direction and the suggestion in this case, which was an alternative. This alternative need not be followed by the employer.

The Tourigny series of cases has been followed by the Board and interpreted in the 1995 case of Del v. Treasury Board (166-2-25189); the 1998 decision of Fontaine–Ellis v. Treasury Board (166-2-27804); and the 1999 decision of Jalal v. Treasury Board (166-2-27992). None of these cases have proceeded to Judicial Review.

In all three of those cases, the Board referred to the Tourigny series of decisions. In all of these cases, the Board in essence followed the lead of Adjudicator Galipeault in the original Tourigny decision to allow for a reinstatement at the original place of work, but allowing the employer the option that the reinstated employee be assigned to work at a place other than the place in which the adjudicator is reinstating.

It is the respectful submission of the Employer that the Board, does not have the jurisdiction to order a disciplinary demotion and as such, the second question posed by Adjudicator Quigley in the respectful submission of the Employer is moot.

For the Grievor

Mr. Burton's position is:

1. *The adjudicator does have the authority (jurisdiction) to substitute a demotion from COS to CO2 for the termination of employment imposed by the employer.*

   In any event,

2. *The adjudicator has the authority to afford the employer the option of demoting Mr. Burton to CO2 rather than reinstating him in his COS position.*

3. *Depending on the adjudicator's finding of facts, a demotion to CO2 for a fixed duration for example, one year, may be appropriate discipline in this case.*

The adjudicator has authority to order a demotion

The adjudicator's authority to order a demotion is found in the following provisions of the Public Service Staff Relations Act:

> *"Adjudication of Grievances*
>
> *Reference to Adjudication*
>
> *92 (1) Where an employee has presented a grievance, up to and including the final level of the grievance process, with respect to*
>
> *(a) the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award,*
>
> *(b) in the case of an employee in a department or other portion of the public service of Canada specified in Part 1 of Schedule 1 or designated pursuant to subsection (4),*
>
> *(i) disciplinary action resulting in suspension or a financial penalty, or*
>
> *(ii) termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act, or*
>
> *(c) in the case of an employee not described in paragraph (b), disciplinary action resulting in termination of employment, suspension or a financial penalty,*
>
> *and the grievance has not been dealt with to the satisfaction of the employee, the employee may, subject to subsection (2), refer the grievance to adjudication."*

<u>*"Decision of the Adjudicator*</u>

97(1) Where a grievance is referred to adjudication, the adjudicator shall give both parties to the grievance an opportunity of being heard.

(2) After considering the grievance, the adjudicator shall render a decision thereon and

(a) send a copy thereof to each party, to the representative of each party and to the bargaining agent, if any, for the bargaining unit to which the employee, whose grievance it is, belongs; and

(b) deposit a copy of the decision with the Secretary of the Board.

(3) In the case of a board of adjudication, a decision of the majority of the members on a grievance is a decision of the board thereon, and the decision shall be signed by the chairperson of the board.

(4) Where a decision on any grievance referred to adjudication requires any action by or on the part of the employer, the employer shall take that action.

(5) Where a decision on any grievance requires any action by or on the part of an employee or a bargaining agent or both of them, the employee or bargaining agent, or both, as the case may be, shall take that action.

(6) The Board may, in accordance with section 23, take such action as is contemplated by that section to give effect to the decision of an adjudicator on a grievance but shall not inquire into the basis or substance of the decision."

The Supreme Court of Canada decision in Heustis v. New Brunswick (Electric Power Commission) [1979] 2 SCR 768 and the Federal Court of Appeal in Canada (Attorney General) v. Tourigny (1989) 97 NR 147 recognize the broad remedial powers of the adjudicator under the statute, including the authority to order a demotion in substitution for a discharge. In Heustis, the issue was the authority of the adjudicator to substitute a suspension for a discharge. The legislation at issue, Section 92(1) of the New Brunswick Public Service Labour and Relations Act is, for all intents and purposes, essentially the same as Section 92 of the PSSRA (page 8 of the Heustis decision). Dickson, J. (as he then was), writing for the Court, held that the statute conferred broad remedial powers on the adjudicator, including the right to substitute a suspension for the discharge:

> *"There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.*
>
> *.. If the process is to make any sense, a right to modify the severity of the discipline by imposing a lesser penalty must surely be inherent in the exercise of adjudicative authority...."*

A disciplinary demotion is part of the chain of progress discipline identified by Dickson, J. in Heustis. Indeed, it is the last step before the ultimate discipline of termination. The adjudicator's jurisdiction recognized by the Court in Heustis is not limited to substituting a suspension for the discharge. The Court recognizes the adjudicator's authority to utilize any and all aspects of progressive discipline. There is no basis in law or policy for excluding one type of discipline, demotion, from the adjudicator's jurisdiction.

In Tourigny, the adjudicator gave the employer the option of reinstating the grievor in another equivalent position (not a demotion). The Federal Court of Appeal upheld the adjudicator's decision. In subsequent decisions, such a Dell, Fontaine-Ellis and Jalal, cited by counsel for the employer, the adjudicators appear to treat the Federal Court of Appeal decision in Tourigny as limiting the adjudicator's authority to giving the employer the option of reinstating the grievor in another position. With respect, if these later adjudication decisions do stand for the proposition that the adjudicator's authority is limited to giving the employer the option, they incorrectly interpret the Federal Court of Appeal in Tourigny. In Tourigny, Pratte, J. cites Section 97(4) of the PSSRA as the legal foundation for the adjudicator's authority. The authority contained therein is not limited to action taken voluntarily by the employer. On the contrary, the provision is mandatory "the employer shall take that action". Further, the "action" directed by the adjudicator is not restricted or limited in any way by the words of the statute. A substitution of a demotion for the discharge fits comfortably within the type of "action" contemplated by the legislation, legislation the intent and purpose of which is to provide the grievor an avenue for full review and remedy of the discipline imposed by the employer.

In his submission, counsel for the employer cites the provision of the Financial Administration Act and the Public Service Employment Act in support of the employer's position that the adjudicator does not have jurisdiction to order a demotion. Generally, the provisions of the PSSRA 'sit on top of' these other statutory provisions, that is, the PSEA provides for appointment to the civil service, the FAA provides for management of the civil service and the PSSRA provides for the independent adjudication of a civil servant's grievance with regard to discipline imposed by the employer. Viewed thus, there is no conflict between these provisions and the authority of the adjudicator to substitute a demotion for a discharge. With regard to the PSEA, Mr. Burton has been properly appointed to his COS position. He was promoted to that position from his previous position as a CO2. There can be no question that he is fully qualified for the CO2 position.

With regard to the provisions of the F.A.A., this adjudication is pursuant to Section 92(1)(ii) of the PSSRA:

> *"termination of employment or demotion pursuant to paragraph 11(2)(f) or (g) of the Financial Administration Act.*

This provision focuses on the action "termination of employment", taken by the employer; it is not a description or limitation of the adjudicator's remedial authority. With regard to Section 11(2)(f) and (g) of the FAA, it empowers Treasury Board to establish standards and procedures for discipline and for termination or demotion for non-culpable reasons. These provisions do not affect or limit the jurisdiction of the adjudicator to hear, determine and remedy an individual discipline grievance."

Although, strictly speaking, it is not necessary to decide the scope of the Treasury Board's authority under Section 11(2)(f) to include demotion as a possible disciplinary measure, the fact is that Section 11(2)(f) of the FAA does allow the employer to include demotion as part of a progressive discipline procedure. Demotion falls within "financial and other penalties". Turning to the non-culpable setting in Section 11(2)(g), because termination of employment and demotion are extremely serious penalties, they cannot be implied or assumed in a non-culpable setting. Thus, in the non-culpable setting, "demotion" must be expressly provided for. The provision for "demotion" in (g), cannot be taken as intent on the part of Parliament to restrict the authority of the employer under (f) to include demotion as part of a progressive discipline program; and certainly cannot be taken as any basis to restrict the remedial powers of the adjudicator under the PSSRA

The adjudicator's authority to offer demotion as an option

The adjudicator has authority to offer the employer the option of a demotion rather than reinstatement in the predischarge position. Tourigny, and the other authorities relied upon by counsel for the employer, confirm the adjudicator's authority in this regard.

From a practical point of view, there is no significant difference between the adjudicator ordering a demotion and the adjudicator offering that as an option.

Is a demotion appropriate?

Arbitrators and adjudicators approach a disciplinary demotion with extreme caution. The concern is not interference with management rights; the concern is fairness to the employee. Demotion is a severe penalty. The employee suffers significant ongoing loss of income and other benefits, such as pension, that are tied to level of income. Advancement prospects are severely impaired. As well, there is the loss of additional pride and job satisfaction that come with performing the supervisor's duties.

In light of the severe consequences of a demotion, Mr. Burton asks:

1. *for consideration of other alternatives to demotion; and, in any event,*

2. *a fixed duration for any demotion or reassignment from his normal COS duties.*

Without the adjudicator's findings of fact and decision on the nature and seriousness of any misconduct, it is difficult to be completely precise in addressing the appropriateness of a demotion. Because demotion is such a severe penalty, in fact, the last step in progressive discipline before the ultimate penalty of termination, we can only assume, for the purposes of this submission, a finding by the adjudicator of serious misconduct by Mr. Burton, that is, that Mr. Burton was aware of the computer screen comments directed at the inmate.

In applying progressive discipline, the interplay of a suspension and a demotion must be considered. If Mr. Burton is reinstated without back pay and is demoted, he suffers a huge financial penalty. Mr. Burton has been off the job for over a year. If he is reinstated without back pay, he suffers a financial penalty in the neighbourhood of $60,000.00 to $70,000.00. If he is also demoted, he will lose, on an ongoing basis, approximately $2,000.00 per month. Under the circumstances, the question has to be asked, "Is the demotion necessary?" Mr. Burton has a clear discipline record and a 10-year record of commendable service. Normal application of progressive discipline might result in a suspension for something like one month. Certainly a suspension for over a year, resulting in a financial penalty in the neighbourhood of $60,000.00 to $70,000.00, more than adequately brings home the adjudicator's assessment of the seriousness of the misconduct.

What if the demotion is being considered, not so much as an additional financial penalty, but rather because of the adjudicator's concern that Mr. Burton has to rebuild management's trust in his ability to function in a supervisory capacity? If rebuilding the employment relationship is the principal concern, a demotion is not appropriate. Rather, Mr. Burton should be reinstated in the COS position (so he does not suffer further financial penalty), but reassigned, say for one year, to other non-supervisory duties. Mr. Burton is, for example, a certified program facilitator and has been assigned such duties in the past (these are programs on drug and alcohol abuse for the inmates). A period of reassignment would also allow for the supervisor training Mr. Burton had not been afforded prior to the events of August 25, 2002.

Any demotion or reassignment should be for a fixed duration, for example, one year. An indefinite demotion conflicts with progressive discipline. The goal of progressive discipline is rehabilitation, the rebuilding of the employment relationship. To facilitate rebuilding, the employee should be able to see the discipline as fair and reasonable. With an indefinite demotion, the financial penalty continues to grow over time. Understandably, the employee sees that increasing, open-ended penalty, as unfair. Indeed, there is a very real risk, that as the months go by, the employee develops a sense of grievance, that is, that he is being punished over and over again for any misconduct on the evening of August 25, 2002. Any such sense of ongoing grievance is counterproductive to the rebuilding process. Progressive discipline is for the benefit of the employer as well as for the employee. Mr. Burton is an experienced corrections officer. As demonstrated by his promotion to the supervisory ranks, Mr. Burton has significant skills and abilities to offer. It is very much in the employer's interest to see the employment relationship rebuilt, to return to full utilization of Mr. Burton's experience and abilities. In University of British Columbia and CUPE 116 (re: Brock) (2002) 106 LAC (4th) 289 at pp. 341 and 342, in a case similar to that of Mr. Burton's, arbitrator Gordon had this to say:

> *"At the same time, I accept the Union's submission that indefinite disciplinary demotions have often been viewed as extraordinary, and in some cases excessive, penalties. But where, as here, the duties of a sub-head electrician involve a high level of trust and call for an individual who can set an example for other electricians, a disciplinary demotion reflecting the individual's "unsuitability" for the position is an appropriate response re: Manitoba and M.G.E.U. supra at page 17 [p. 127 LAC]. Brock's misconduct has, at least temporarily, rendered him unsuitable for the sub-electrician position and he must contentiously re-establish his suitability for that position.*
>
> *A just and equitable substituted penalty for dismissal, which I've found to be excessive in all the circumstances of this case, is as follows. Brock is to be reinstated to his employment at the University effective the date of this award, but with no order for back pay. ...Upon his return to work pursuant to this award, and due to the fact that his misconduct relates to his suitability for the subhead electrician position, Brock is demoted to the position of electrician. However a disciplinary demotion should rarely be indefinite. Given Brock's unblemished discipline record, the principals of progressive discipline apply to him, the opportunity re-establish his suitability for the subhead electrician position. If, after a period of 12 months from the date of this award, his disciplinary record remains unblemished in terms of untrustworthy, dishonest or other serious misconduct, Brock is to be reinstated into his subhead electrician position."*

In our submission, any demotion or reassignment should be structured in the same way as the demotion ordered by arbitrator Gordon. The demotion should be to the CO2 position for a period of one year. If Mr. Burton maintains a clear discipline record during that year, he is entitled to reinstatement to his COS position.

<u>Reply</u>

This is further to Mr. Schroeder's correspondence of April 19, 2004 enclosing his submissions with respect to the request by Ms. Doherty on March 16, 2004.

I will not repeat the submissions I made in my earlier correspondence, however, address the issues raised by Mr. Schroeder in his submissions, if they have not already been addressed in my earlier submissions.

The Heustis v. New Brunswick (Electric Power Commission)[1] case cited by Mr. Schroeder does not fully address the issue and is distinguishable from the facts surrounding the case before you. The Heustis case was itself distinguished from the Port Arthur Shipbuilding Co. v. Arthurs et al.[2] case.

[1] *Heustis v. New Brunswick (Electric Power Commission)*, [1979] 2 S.C.R. 768
[2] *Port Arthur Shipbuilding Co. v. Arthurs et al.,* [1968] 70 D.L.R. (2d) 693

In Heustis (at page 3) there was a Collective Agreement. The Collective Agreement specifically referred to demotion in the same clauses as discipline, suspension, termination, or discharge, which the clauses also stated specifically, must be for just and sufficient cause.

With respect to Mr. Burton's case, there is no Collective Agreement and the governing legislation is as set out in my earlier submissions. Also, in Heustis, there is no differentiation between suspensions, demotions and terminations for discipline or non-disciplinary reasons.

At page 4 of his submissions, Counsel for Mr. Burton submits that Mr. Burton was promoted from his previous position as a CX-2 and that he is fully qualified for the CX-2 position. This is not the issue. Mr. Burton was also qualified for his COS position. Appointments are the exclusive domain of the Public Service Commission as delegated, pursuant to the Public Service Employment Act ("PSEA").

Mr. Burton may be qualified as a CX-2, he may also be qualified as a CX-1, however, "demoting" him to a position would be tantamount to an appointment and create a staffing problem. Any CX-2 position, which is otherwise vacant, is subject to lateral transfers, or promotion from a CX-1 position. It is these rules as set out in the PSEA and those regulations that govern. Placing Mr. Burton into this position would cause other persons to acquire rights of appeal under the PSEA and regulations. Those rights of appeal also have rights to Judicial Review to the Federal Court.

Section 92(1)(ii) of the Public Service Staff Relations Act ("PSSRA") does not give any more jurisdiction to the Public Service Staff Relations Board ("PSSRB") than is set out in paragraph 11(2)(f) or 11(2)(g) of the Financial Administration Act ("FAA"). A demotion is not referred to at all in paragraph 11(2)(f), the paragraph that sets out the power to discipline, and is specifically referred to in 11(2)(g) which provides for termination or demotion for reasons "other than discipline". The Heustis case, like the Port Arthur Shipbuilding Co. case, must be read in the context of the authorizing legislation and any collective agreement, which may govern the parties.

The UBC V. C.U.P.E. Loc. 116[3] case can be distinguished also in that again a Collective Agreement comes into play. Unfortunately in the UBC case, the wording of the Collective Agreement is not set out in that case and as such, the relief being sought, could well have been within the jurisdiction of the Adjudicator.

We reiterate our position that the Adjudicator is without jurisdiction to entertain a disciplinary demotion.

Reasons for Decision

[172] In the letter of termination (Exhibit E-28), the Warden advised the grievor that his employment was terminated because he contravened the CSC's "Standards of Professional Conduct" as a result of being charged and pleading guilty to one count of assault contrary to Section 226 of the *Criminal Code of Canada* and his involvement in the incidents in the SCU on August 24 and 25, 2002.

[3] *University of British Columbia v. C.U.P.E., Loc. 116 (Brock)(Re)*, [2002] 104 L.A.C. (4th) 289

[173] I will deal with the allegation of misconduct within the SCU and then deal with the allegation of misconduct as a result of being charged with one count of assault against his then common-law wife.

[174] During the evening of August 24, 2002, a number of inmates in the SCU were involved in a mini-riot. The inmates caused significant damage to the Institution by damaging cell door windows, cell door food slots, setting fires, damaging cells, breaking off sprinkler heads, etc.

[175] The inmates finally quieted down in the early morning hours of August 25, 2002. The maintenance staff began cleaning the damage while the inmates were in the exercise yards. As soon as a cell was cleaned and refurbished with dry bedding, an inmate would be escorted back to his cell 3-on-1.

[176] Mr. Alcock, the Correctional Supervisor on the day shift, testified that he wrote in the Correctional Supervisor's logbook (Exhibit E-34) that all inmates involved in the smash-up were to be treated 3-on-1. As well, the inmates were to be served their food on Styrofoam plates until further notice. The inmates were escorted from the exercise yards back to their cells, 3-on-1, after the clean-up, except for Inmate X and Inmate Y, who refused to return to their cells. Mr. Alcock chose to leave the inmates in the exercise yards, as they were, in his words, "camping out" and not able to go anywhere. After Mr. Alcock briefed the grievor, the grievor then assumed the duties of Acting Warden.

[177] It was the grievor's testimony that when he heard of the "camping out" by Inmate X and Inmate Y in the exercise yards, he was amused and troubled. The grievor stated he was "annoyed that the day shift staff had not dealt with Inmate X and Inmate Y by returning them to their cells, as there were fewer staff during the evening shift." It also disrupted a normal routine, as Inmate X and Inmate Y were denying other inmates the use of the yards by their presence alone in the exercise yards. It is the policy of Matsqui Institution to only have one inmate in a yard at any given time.

[178] The grievor stated that he visited the SCU on two occasions on August 25, 2002, once at 7:40 p.m. and the other at 10:00 p.m., after receiving a call from the SCU stating that Inmate X was ready to return to his cell. Later, he admitted that he might have visited the SCU on at least three occasions. His testimony was that at no time did he see the derogatory comments "I saw you suck [Inmate Y's] cock"; "Your mother

fucks guards"; "I heard you are a pedophile" displayed on the computer screen, which was allegedly in plain view of Inmate X who was locked in the west exercise yard.

[179] I believe that Messrs. Braun and Creedy are more credible than the grievor. Mr. Braun, a CX-1 subordinate to Mr. Burton, testified in examination-in-chief that on two occasions he observed the grievor in the bubble with Messrs. Van Vugt and Mikszan when the derogatory comments were being displayed on the computer screen. Although the witness could not be absolutely certain that Inmate X saw the comments, he did state: "You really could not miss them."

[180] Mr. Creedy, another CX-1, testified that he contacted Mr. Dick to arrange for an interview when he heard about the investigation. He testified that on at least five occasions during the evening of August 25, 2002, he saw derogatory comments displayed on the computer screen in the SCU and that at one point the grievor was standing between Messrs. Van Vugt and Mikszan. He also testified that it was his opinion that the grievor participated in the harassment of Inmate X by the mere fact of being present in the bubble while his subordinates displayed the derogatory comments on the computer screen.

[181] In taking a tour of the area, it was my observation that anyone who entered the bubble could not help but see the computer screen from any angle.

[182] Ms. Denis testified that she never observed any derogatory comments displayed on the computer screen. In her evidence, she stated that it was her belief that neither Mr. Dick nor the Warden believed her.

[183] It is my belief that she did not see the derogatory comments, as she testified that she made her rounds throughout her shift and the comments were most likely not present. However, it is also my belief that this witness and Mr. Braun only responded to the specific questions that were asked of them.

[184] When Mr. Braun was asked why he did not come forward and advise anyone about seeing the derogatory phrases on the computer screen, he replied: "I would not have told anyone unless I was specifically asked." Mr. Dick specifically asked Mr. Braun if there were any derogatory comments on the computer screen and Mr. Braun told him he saw the comment "I hear you are a pedophile." The question was specific and Mr. Braun answered it truthfully.

[185] Ms. Denis was never specifically asked by either Mr. Dick or counsel for the employer if she was aware of the derogatory comments, even though she had not seen them. Had she been asked such a question, I believe her answer may have been different.

[186] There is and was a concern for these junior officers. The concern, of course, is the “rat code” and/or future assignments under the supervision of the grievor and/or Mr. Van Vugt.

[187] At this time, I will comment on Ms. Denis’ interview with the Warden regarding her involvement as to whether or not she observed any derogatory comments displayed on the computer screen.

[188] Ms. Denis was not subject to any cross-examination by counsel for the employer with respect to her testimony.

[189] She testified that she advised the Warden during their meeting that she did not observe any derogatory comments displayed on the computer screen on August 25, 2002, and that the Warden, for his part, believed that she was protecting herself from fellow officers under the auspices of the “rat code”.

[190] In my view, the Warden’s offer to Ms. Denis to revisit her evidence regarding the derogatory comments and also to offer his protection if she decided to change her evidence was appropriate. However, stating to Ms. Denis that if she were caught lying about her evidence regarding the derogatory comments, she would face disciplinary action, up to and including termination of employment, pushes the labour relations envelope. Ms. Denis, who was a new employee, testified that the Warden’s statement put her in a stressful condition. It could be reasonably assumed that the Warden’s threat of termination of employment could have influenced her to change her evidence.

[191] The Warden, who took three weeks of annual leave after his interview with Ms. Denis, increased her state of stress. She was instructed to contact him immediately if she wished to change her statement. Two or three days later, the Warden’s secretary called Ms. Denis to advise her that everything had been taken care of. Although the Warden issued Ms. Denis a written apology, no face-to-face apology was ever offered.

[192] I consider these tactics to be intimidation by the Warden, which is totally unacceptable behaviour. If Ms. Denis felt intimidated enough to change her evidence, she would have committed perjury. I would like to remind the Warden that positions of power are positions of trust and those positions require those powers to be applied in a fair and judicial manner.

[193] Mr. Farrance had only been at Matsqui Institution for about a week. I am sure he was not involved in any way. I believe the offensive remarks were never displayed in his presence.

[194] Although Messrs. Stout and Davis were on the scene, as per Mr. Van Vugt's request through the grievor, they only arrived at approximately 10:00 p.m. to assist in escorting Inmate X back to his cell. It is reasonable to assume that the comments were no longer being displayed at that time.

[195] I find that the grievor seriously misconducted himself by participating in the harassment of Inmate X by failing to take any action to remove the derogatory comments directed at or visible by the inmate and by failing to correct the actions of the staff, as he was the Acting Warden.

[196] The grievor would have me believe that Inmate X could be escorted from the exercise yard without incident (use of force) because the inmate stated he was going to be compliant. It was only the grievor who testified that the inmate told him he wanted to return to his cell. If this is true, why then did the grievor write in his log "disturbance" as the reason for visiting the SCU when on his previous visit at 7:40 p.m. he wrote "rounds"? It is my belief that Inmate X had, in fact, become more and more agitated because of the derogatory comments.

[197] As Acting Warden, the grievor's assessment of the course of action to be taken for the removal of Inmate X was: (1) cancel the 3-on-1 protocol (no handcuffing of the inmate); (2) substitute three more senior and experienced officers for the junior officers in the SCU; (3) refrain from videotaping the procedure; and (4) being involved in the removal himself; it is against CSC policy to have two correctional supervisors in the same place at the same time. The grievor stated that the reason for this course of action and for violating the employer's policies was an effort to deescalate the situation in the SCU. According to his own log, there was already a disturbance and that was the reason for his visit.

[198] In reviewing the evidence, any reasonable person must wonder why the grievor, who was Acting Warden, believed that he could deescalate a situation involving an inmate who (1) had been an instigator in the mini-riot of the previous evening; (2) had refused to return to his cell and decided to camp out in the exercise yard; (3) had kicked a cup of urine toward the grievor, as well as using profanity only a few hours earlier; and (4) would be non-resistant and compliant after having being harassed and ridiculed by correctional officers who displayed derogatory comments on the computer screen and aimed it at him.

[199] It is preposterous to believe that an inmate who displayed this type of behaviour could be trusted. It is even more preposterous to believe that an inmate who was subjected to ridicule and harassment would not react violently against the instigators. If Inmate X wanted to return to his cell (and it is my belief that he did not), then why would he not be subject to the 3-on-1 protocol? After all, all the other inmates involved in the mini-riot were removed without incident using 3-on-1.

[200] Mr. Alcock agreed in cross-examination that any inmate who would throw urine at a correctional officer would not be considered compliant.

[201] As a result of the grievor's assessment and course of action, he compromised the safety of Inmate X and Inmate Y and of his fellow officers. Inmate X suffered a lacerated ear, bruises to his ribs and numerous lumps on the top and back of his head, Inmate Y had numerous lumps to his head and minor abrasions on his elbows and knees, Mr. Mikszan was a recipient of a cut to his abdomen and the grievor's right hand was broken.

[202] Therefore, the grievor's reasoning for removing Inmate X and Inmate Y from the exercise yards can fall under several assumptions. First, the grievor, in an effort to teach Inmate X and Inmate Y a lesson for their behaviour, chose to incite and provoke them into a situation where use of force could be used and justified. Based on the evidence given and the noticeable absence of testimony from Messrs. Van Vugt and Mikszan and Inmate X and Inmate Y, there is enough evidence to support that assumption. The second assumption is that the grievor, as Acting Warden, made a series of mistakes and used poor judgment and in doing so jeopardized the safety of the inmates and officers under his charge. The grievor failed to adhere to "Commissioner's Directive 567 – Use of Force" (Exhibit E-7).

[203] I find that the grievor did contravene the "Use of Force" directive in that he pre-planned the removal of Inmate X and Inmate Y with Messrs. Mikszan, Stout and Davis. Paragraph 15 of that directive states the following:

> *When to Videotape*
>
> *A videotape recording shall be made for every preplanned use of force or potential use of force. It will include but not be restricted to:*
>
> *a) cell extractions;*
>
> *…*
>
> *e) other incidents where the Institutional Head expects force may be used based on the inmate's past history, present behaviour and current placement.* [Emphasis added]

[204] Inmate X was in the exercise yard, which was in fact a holding cell. He was being extracted and escorted back to his cell. His behaviour had been noted earlier. The grievor could have followed the 3-on-1 without handcuffing the inmate but should have had one of the other officers videotape them. He chose not to do so thereby contravening the "Use of Force" directive and did not use common sense.

[205] The grievor admitted in his testimony that he did assault his then common-law wife contrary to Section 226 of the *Criminal Code of Canada* and plead guilty to the charge.

[206] The grievor admitted as well that he presented his CSC identification while he was detained by the police and requested that the arresting police officer notify senior management of his arrest.

[207] While adjudicators are generally of the view that employers are not the custodians of an employee's character, whether an employee is disciplined for "off duty conduct" will depend on whether the conduct is "work related". This involves a consideration of the nature of the offence, the employment duties and the nature of the employer's business. Did the employee's conduct (1) detrimentally affect the employer's reputation? (2) render the employee unable to properly discharge his/her employment obligations? (3) cause other employees to refuse to work with him/her? and/or (4) inhibit the employer's ability to effectively manage and direct the

employee's work assignments? In short, a connection must be established between the employee's actions and the employment relationship.

[208] The grievor pled guilty to assault (common, not assault causing bodily harm) of his then common-law wife. He completed 12 months of probation without incident and attended two mandatory relationship and violence programs. He also followed the employer's policy of reporting his arrest to senior management at the time it happened.

[209] I therefore conclude that although the employer was entitled to take into account the potential effect of the grievor's actions on its reputation, the employer adduced no evidence that the grievor's conduct was so notorious and so well known within the community that its reputation was damaged. As well, no evidence was introduced that other employees would not wish to work with the grievor or that the employer could not manage his work duties effectively. It was only the Warden's testimony that the inmates might retaliate against the grievor or any person working with him. I was not provided with any evidence to support his supposition.

[210] I understand, however, that the employer's expectations of the grievor as a correctional supervisor, a peace officer and at times the Acting Warden, are much higher, as set out in the "Code of Discipline" and the "Standards of Professional Conduct".

[211] In assessing the appropriate penalty, I have determined that the grievor did contravene the "Standards of Professional Conduct" by committing an act of misconduct by being present while the derogatory comments on the computer screen were directed at and visible to Inmate X and as a supervisor failed to take the necessary action against the person or persons responsible for the comments.

[212] I find that the grievor failed in his role as Correctional Supervisor by using extremely poor judgment in the removal of Inmate X from the exercise yard. He violated the "Use of Force" directive by failing to videotape the removal of Inmate X and Inmate Y and placing himself with the other correctional supervisor in a situation that jeopardized the safety of the inmates and officers and, in fact, resulted in injuries.

[213] I believe that the grievor, who has worked at CSC for eight years, has the required experience and knowledge to perform the duties of a CX-1, CX-2 or CX-3. It is my opinion, however, that the employer, who must have faith in a correctional supervisor who assumes the role of Acting Warden, is entitled to be able to trust that the correctional supervisor will conduct himself in a professional and exemplary manner when dealing with fellow officers, and especially junior officers, and inmates.

[214] The bond of trust between the grievor, in his role of Correctional Supervisor, and the employer has been breached. However, I do not believe that the employment relationship has been irrevocably broken.

[215] I am left to deal with the employer's legitimate concerns regarding the grievor's misconduct and, in view of his position as Correctional Supervisor, whether it is able to trust that the grievor can assume those duties.

[216] The grievor demonstrated through a number of certificates, citations of bravery and letters of appreciation from CSC (Exhibits G-75 to G-81) that he has been a valued employee. As well, he completed all the requirements imposed on him by the Court with respect to the assault charge.

[217] I find, therefore, that the penalty of termination is too severe. To make a determination as to the appropriate remedy, I asked the parties for submissions as to their views on the authority and the appropriateness of ordering a demotion.

[218] As set out in counsel for the employer's submissions, the jurisdiction of an adjudicator is prescribed by statute and set out in section 92 of the *Public Service Staff Relations Act* (*PSSRA*). An adjudicator's jurisdiction with respect to hearing disciplinary and non-disciplinary cases is drawn from paragraphs 11(2)(f) and (g) of the *Financial Administration Act*. However, counsel for the employer incorrectly concludes that "since the Board's jurisdiction under section 92(1) of the *PSSRA* is drawn directly from sections 11(2)(f) and (g) of the *FAA*, it is therefore respectfully submitted that the Board does not have jurisdiction to alter the penalty of termination". Counsel has confused the issue of an adjudicator's <u>jurisdiction</u> with an adjudicator's authority to render a decision and determine a <u>remedy</u>.

[219] Jurisdiction is not an issue in this case. The grievor was terminated pursuant to section 11(2)(f) of the *Financial Administration Act* and the matter was properly before me, pursuant to subparagraph 92(1)(b)(ii) of the *PSSRA*.

[220] The full extent of an adjudicator's remedial authority, however, is not set out in statute. Section 7 and subsection 96(2) are the only provisions in the *PSSRA* that limit the scope of an adjudicator's decision, neither of which is applicable in the instant case.

[221] A further limit to the scope of an adjudicator's remedial authority is that an adjudicator's powers cannot extend to matters that are provided for in another statute. Counsel for the employer has argued that to order a demotion is tantamount to ordering an appointment, which would be contrary to the *Public Service Employment Act*. However, I cannot agree. Not all methods of placing employees into positions are "appointments", within the meaning of the *Public Service Employment Act*. In fact, the employer has several means of placing employees into positions, other than by making an appointment. For example, an employee may be seconded into another position or may be deployed into another position. "Secondments" and "deployments" are not appointments within the meaning of the *Public Service Employment Act*. By providing for the power of the Treasury Board to demote pursuant to subparagraph 11(2)(g) of the *Financial Administration Act*, Parliament has clearly carved out from "appointments" yet another method to place an employee into a position. Accordingly, I find that a demotion is not an appointment, within the meaning of the *Public Service Employment Act*. While Parliament has not expressly provided the Treasury Board with the authority to order a demotion in disciplinary situations, the *Public Service Employment Act* does not constitute a limitation on my *remedial authority* to do so.

[222] The scope of an adjudicator's remedial authority was recently considered by the Supreme Court of Canada in *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 S.C.C. 28. At paragraph 41, the Court in that case noted "a trend in the jurisprudence toward conferring on arbitrators broad remedial and jurisdictional authority". The reason for this is straightforward, as stated at the end of paragraph 41: "[a]rming arbitrators with the means to carry out their mandate lies at the very core of resolving workplace disputes." More recently, the Federal Court in *Bedirian c. Canada (Procureur général)*, 2004 CF 566, explicitly recognized the broad remedial powers of adjudicators under the *PSSRA*.

[223] Labour relations disputes in the public service workplace vary from case to case, with different scenarios and mitigating factors. These disputes need to be assessed and decisions rendered that apply the best resolution. Adjudicators must use their remedial powers fairly and judiciously and render decisions that are cognizant of the principles of fairness, while not undermining the values and ethics of the public service.

[224] In this case, I believe that the employer-employee relationship has been strained but has not been irrevocably broken. The grievor's misconduct and poor judgement have damaged the trust component of the relationship; the Warden needs to be able to rely on the correctional supervisors to assume his duties and responsibilities in a professional manner during his absence.

[225] It is my belief that by demoting the grievor to a CX-2 position (which I find him to be fully qualified and competent for), the opportunity exists to rebuild the employer-employee framework. After all, the grievor rose very quickly through CSC ranks to become a correctional supervisor. Perhaps in the future he might be able to apply and compete for a correctional supervisory position.

[226] I order that the grievor be demoted from his CX-3 substantive position at Matsqui Institution to a CX-2 position at either Matsqui Institution or any other institution upon which the parties can agree, to be implemented within two weeks of the date of this decision. As he will no longer be a CX-3 (Correctional Supervisor), he will no longer assume the duties of Acting Warden. Also, given the serious nature of the misconduct, he is not entitled to receive any pay and/or benefits from April 2, 2003, to the date of this decision.

[227] I hope that the grievor recognizes that this is an opportunity for him to demonstrate to the employer that he is capable of working with inmates and fellow officers and respect the policies and standards of professional conduct that Canadians expect from a correctional officer/peace officer and a public service employee.

D.R. Quigley,
Board Member

OTTAWA, June 24, 2004.