Date: 20190311

File: 566-02-9117

Citation: 2019 FPSLREB 30

Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JAMES STEWART

Grievor

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
Stewart v. Treasury Board (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: François Ouellette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Andréanne Laurin, counsel

Heard at Abbotsford, British Columbia,
June 26 and 27, 2018.

I. Individual grievances referred to adjudication

[1] James Stewart ("the grievor") is employed by the Treasury Board (TB or "the employer") with the Correctional Service of Canada (CSC) in its Pacific Region as a correctional officer (CX), classified at the CX-01 group and level. At the relevant time, he was classified CX-02, and his position was located at Pacific Institution (PI) in the Matsqui Complex in Abbotsford, British Columbia.

[2] On June 19, 2013, the grievor filed two grievances. The first, which would become file 566-02-9117, stated as follows:

> *DETAILS OF GRIEVANCE / DESCRIPTION DU GRIEF*
>
> *I grieve the repeated failure of Corinne Justason, deputy warden of Pacific Institution to provide me with the order convening the investigation although I have been advised in writing that I am subject to a disciplinary investigation and despite the objection of my union representative. Her actions are abusive and contrary to the collective agreement.*
>
> *CORRECTIVE ACTION REQUIRED / MESURES CORRECTIVES DEMANDÉES*
>
> *- I request that a copy of the convening order be produced immediately;*
>
> *- I request that the removal from my regular duties be cancelled until the convening order is produced;*
>
> *- I request to be paid all remuneration and benefits missed as a result of the reassignment without cause;*
>
> *- I request that any disciplinary action be declared* void ab initio*;*
>
> *- I request a written apology from the deputy warden;*
>
> *- I request that this grievance proceeds directly to third level given the employer's knowledge and inactions to rectify this breach*
>
> *And all other rights that I have under the Collective Agreement. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.*
>
> . . .

[3] The second grievance would become file 566-02-9118 and read as follows:

> *DETAILS OF GRIEVANCE / DESCRIPTION DU GRIEF*
>
> *I grieve that during my reassignment from my regular duties that I am not being paid my usual remuneration which includes shift differentials, week-end [sic] premiums, overtime, premiums for statutory holidays and any other benefits. This is contrary to the collective agreement.*
>
> *CORRECTIVE ACTION REQUIRED / MESURES CORRECTIVES DEMANDÉES*
>
> *- I request to be paid my full and complete remuneration from the time that I was removed from my regular duties*
>
> *And all other rights that I have under the Collective Agreement. As well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.*
>
> . . .

[4] Both matters proceeded through the grievance process, and on October 16, 2013, both were referred to the Public Service Labour Relations Board (PSLRB) for adjudication.

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the PSLREB") to replace the PSLRB as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by ss. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[6] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act*.

[7] On June 22, 2018, the grievor's bargaining agent representative wrote to the Board, advising that the bargaining agent was withdrawing the second grievance (file 566-02-9118).

[8] The terms and conditions of the grievor's employment are in part governed by a collective agreement between the TB and the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN; "the bargaining agent") for the Correctional Services Group that was signed on June 26, 2006, and that expired on May 31, 2010 ("the collective agreement").

II. Summary of the evidence

[9] The grievor commenced his employment with the TB at the CSC in October of 2002. He began working at PI in or about 2010.

[10] Corinne Justason is currently a deputy warden (DW) employed by the TB with the CSC in its Pacific Region. At the time relevant to the events related to this grievance, she was the DW of PI. She commenced her employment with the CSC as a CX in 1995, and after about four years in that role, she became a parole officer. Two years later, she moved into management in a number of different roles, and approximately 10 years ago, she became a DW. During her DW tenure, she acted for 14 months in a regional investigator role. She stated that approximately one-third of her time as a DW has been spent as an acting warden.

[11] Ms. Justason stated that as the DW, she is one of two who report directly to the warden. The DW is responsible for everything related to an inmate (IM) in an institution, including programming, education, chaplaincy, parole services, and operational security. With respect to operational security, she stated that this includes all CXs, all correctional managers (CMs), and all equipment, along with the emergency response team.

[12] On May 28, 2013, the grievor was working at PI on the psychiatric unit and was assisting with the supervision of an inmate ("IM A") who had been problematic. At some point, IM A had taken a shower, and upon exiting the shower, while unclothed and handcuffed, he engaged the grievor in a discussion, the details of which were not made known to me.

[13] The details of what followed were also not entirely clear. However, a confrontation of sorts ensued, and the grievor sprayed IM A with OC spray and then

struck him in the head or facial region with the hand that was holding the OC spray canister, which caused a laceration. The grievor and four other CXs dragged IM A out of the shower area and left him unclothed, handcuffed, and lying bleeding on the floor of the psychiatric unit ("the May 28 incident").

[14] OC spray is a weapon, used as a defensive tool at the CSC, which contains oleoresin capsicum (similar to pepper) that is propelled from a canister to incapacitate a person.

[15] Ms. Justason testified that whenever there is a use of force in an institution, a review process occurs. The first level of review is done by the correctional manager (CM) on duty. According to Ms. Justason, the May 28 incident was reported up the chain of command by the CM to the Assistant Warden Operations (AWO), who in turn reported it to her. She stated that the AWO's report to her was that the grievor's use of force on IM A might have been excessive or inappropriate.

[16] Ms. Justason said that she reviewed both a video of the incident and the grievor's incident report and that she was not convinced that his actions had been appropriate in the circumstances. She said that she then consulted the local labour relations (LR) advisor and that she shared her concerns with the Assistant Deputy Commissioner for Institutions and with the Acting Director General of LR at the CSC's National Headquarters in Ottawa. She said that she was required to consider the following two things:

1. whether to conduct a disciplinary investigation; and

2. how to meet her obligation to keep inmates safe.

[17] With respect to her obligation for the safety and security of the inmates, Ms. Justason stated that she had to consider whether the grievor should return to work or whether he should be removed from his CX duties. She said that she decided that he should be temporarily removed from his CX duties pending an investigation into the incident.

[18] According to Ms. Justason, the grievor went on a series of rest days following the May 28 incident, and he was scheduled to return to work on June 4, 2013. She said that on June 3, he was contacted and advised that he was on administrative leave pending further information, which kept him from working on June 4, 2013.

[19] Both the grievor and Ms. Justason testified that a meeting was held on June 4, 2013 ("the June 4 meeting"). LR Advisor Lakhbir Bal and a bargaining agent representative, Jack Palmer, also attended; neither testified.

[20] In his examination-in-chief, the grievor was shown a letter dated June 4, 2013 ("the June 4 letter"), addressed to him from Ms. Justason, which states as follows:

> ***Re: Reporting for Duty to outside grounds building at Matsqui Institution***
>
> *On June 4, 2013, I informed you that due to a disciplinary investigation being convened, you would be re-assigned to duties with no inmate contact. Management at Matsqui Institution has informed me that they can gainfully employ you pending the results of your disciplinary investigation. I am therefore directing you to report for duty to the outside grounds building at Matsqui Institution effective June 5, 2013 at 0800hrs. This is as per your current schedule.*
>
> *When you arrive at the grounds building you are to contact Barry Fooks. Your hours of work will be 0800-1600hrs from Monday to Friday.*
>
> *As well, you were given two choices for your schedule in your reassignment position so as to mitigate any further impact on you. Either waive your two week notice for change of schedule or be paid the appropriate rate of overtime as per your collective agreement on your first day of the new schedule. Please contact Lucky Bal, LR Advisor by end of day June 5th, 2013 at* [phone number omitted] *with your decision.*
>
> *You are reminded that you have access to the Employee Assistance Program for additional support during this process.*
>
> . . .
>
> [Emphasis in the original]

[21] Appendix G of the collective agreement deals with removing CXs from their duties pending the outcomes of disciplinary investigations into incidents involving IMs and states as follows:

> ***APPENDIX "G"***
>
> ***REMOVAL FROM DUTIES PENDING THE OUCOME OF DISCIPLINARY INVESTIGATIONS IN REGARDS TO INCIDENTS INVOLVING OFFENDERS***
>
> *1. When an employee is to be removed from his regular*

> *duties due to an incident involving an offender, the employee may be assigned other duties with pay or removed from his normal work site with pay pending the outcome of the disciplinary investigation provided he fully co-operate with the conduct of the investigation by attending interviews and hearings without undue delay. A refusal to attend interviews and hearings without undue delay shall result in the interruption of remuneration as long as the investigation has not been completed.*
>
> *2. The parties agree that the Managers Guide to Staff Discipline will provide direction regarding the reassignment of an employee to other duties or the removal from the employee's normal work site. The parties agree to engage in meaningful consultation in the event changes to the Managers Guide to Staff Discipline are being considered.*
>
> [Emphasis in the original]

[22] Matsqui Institution is a medium-security institution for men, which is co-located at the same CSC complex as PI, the Fraser Valley Institution for Women, and the regional supply depot. The entire reserve is known as the Matsqui Complex.

[23] The grievor was shown the June 4 letter and was asked if he recognized it. He said that it was the letter he was given at the June 4 meeting. He stated this twice. When he was asked about his initial reaction, he said that he had wanted to receive a convening order. He then said he asked why he had been placed outside on the grounds, with no IM contact. When he was asked about Ms. Justason's response, he stated that she said that it was not negotiable; he was being assigned there.

[24] Neither in her examination-in-chief nor in her cross-examination did Ms. Justason state that she provided the grievor with the June 4 letter at the June 4 meeting.

[25] When the grievor was asked about the concerns his bargaining agent representative raised, he said that Mr. Palmer raised the issue of the lack of a convening order being given and that being assigned to the grounds did not allow the grievor access to a computer to review his emails.

[26] Ms. Justason described the June 4 meeting somewhat differently. She stated that she told the grievor that he was being removed from his CX duties, that he was being reassigned, and that he would work on the Matsqui campus. She stated that the reassignment would be in effect until the disciplinary investigation was convened and completed. She then stated that she told him the options with respect to the lack of

notice of the change to his shift.

[27] The reference to the waiver of the two-week notice and to being paid overtime for his first shift on the new schedule deal with provisions (article 21) in the collective agreement are not at issue in this grievance.

[28] When Ms. Justason was asked what the grievor decided at the June 4 meeting about his shift issue, she said that he made no decision. She said that he was unhappy at the meeting and that at one point, he left, returning only at the prompting of Mr. Palmer. She said that with respect to his shift change choice under the collective agreement, he asked for more time to decide.

[29] Also on June 4, 2013, at 4:44 p.m., Ms. Bal emailed the following to Ms. Justason:

. . .

> *I called James Stewart at 4:30pm today and he has asked that I give the reassignment letter to Jack Palmer. I will email Jack and leave the enclosed letter at the CM's office for him to pick it up. He's currently off site.*
>
> *James asked me what the letter said and I read it to him. He also confirmed that he will waive the 2 week notice and just report tomorrow and be paid the appropriate overtime for his first shift on the new schedule.*

. . .

[30] When Ms. Justason was asked about Ms. Bal's email, she said that at the June 4 meeting, they discussed the May 28 incident, and that the purpose of the meeting was to discuss reassignment. She said that a number of times, the grievor asked for the convening order and was told that while an investigation would be convened, the regional investigators were not available, and that the convening order would be issued and given to him when the investigation was convened.

[31] On June 5, 2013, the grievor started his reassignment.

[32] On June 17, 2013, Ms. Justason sent a memo to Cindy Lewis and Nigel Harper, both CSC employees ("the June 17 Lewis memo"), directing them to launch a disciplinary investigation to establish the facts surrounding the grievor's involvement in the May 28 incident. That memo states as follows:

> *Subject* ***Mandate from the Delegated Manager to the Investigator to conduct a Disciplinary Investigation***
>
> *You are hereby directed to commence a Disciplinary Investigation to establish the facts surrounding Correctional Officer James Stewart's involvement on May 28, 2013 in an incident involving Inmate [name omitted] (FPS# [omitted]). The allegations are:*
>
> 1. *The method of intervention used was not necessary and proportionate to the situation, therefore failing to conform to any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates specifically but not inclusive to the Use of Force and the Management of Security Incidents.*
>
> *Furthermore, if, during the course of the investigation, you discover other misconduct that is significantly different from the misconduct under investigation, you are required to contact me to request an amended Convening Order pertaining to the same.*
>
> *Within the context of the investigation, I expect that you will reference the* Code of Discipline *and the* Standards of Professional Conduct *and follow the* Manager's Guide to Disciplinary Investigations *as it applies to this situation as well as the information gathered through other sources.*
>
> *I also anticipate that you will refer to the other relevant documentation as required.*
>
> *Your report is due by the close of business day on July 8, 2013.*
>
> *Thank you for your assistance in this matter.*
>
> *Corinne Justason*
>
> *Encl: Convening Order*
> *cc. J. Stewart*
> *RCLR & Labour Relations Advisor – PI*
>
> [Emphasis in the original]

[33] Also on June 17, 2013, Ms. Justason wrote to the grievor, also by way of a memo, advising him that a disciplinary investigation had been convened ("the June 17 Stewart memo"). That memo states as follows:

> *Subject* ***Notice that a Disciplinary Investigation has been convened***

> *You are hereby advised that a Disciplinary Investigation has been convened to establish the facts related to your involvement in a use of force on Inmate* [name omitted] *(FPS#* [omitted]*) on May 28, 2013. The allegations are that you:*
>
> 1. *Used a method of intervention that was not necessary and proportionate to the situation, therefore failing to conform to any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates specifically but not inclusive to the Use of Force and the Management of Security Incidents.*
>
> *Such action, if founded, constitutes a serious breach of CSC's* Standards of Professional Conduct *and/or CSC's* Code of Discipline. *Consequently, I have mandated* Cindy Lewis and Nigel Harper, Regional Investigators *to conduct an internal disciplinary investigation into this matter starting immediately.*
>
> *You will be advised shortly as to the date, time and place for your first disciplinary interview. You are entitled to representation during this interview as well as throughout the investigation process.*
>
> *Should the disciplinary investigation conclude that these allegations are founded, disciplinary action may be taken.*
>
> *Attached for your information is a copy of the convening order being given to* Cindy Lewis and Nigel Harper *giving them the authority to conduct this investigation.*
>
> *If, at any time, you require personal support, please contact one of the Employee Assistance Program (EAP) referral agents in the Region. EAP provides confidential assistance or short-term counselling to those who are experiencing personal or work-related problems.*
>
> *Corinne Justason*
>
> . . .
>
> [Emphasis in the original]

[34] Article 17 of the collective agreement is entitled "Discipline". Clause 17.05 states as follows:

> ***17.05*** *When notification in writing is given to an employee that he or she is the subject of a disciplinary investigation, the employee shall be provided concurrently with a copy of the order convening the investigation.*

[35] No witnesses testified as to the exact meaning of the term "convening order".

[36] In her evidence, Ms. Justason stated that neither the June 17 Lewis memo nor the June 17 Stewart memo was the convening order. She indicated that none of the documents presented to her in her examination-in-chief and cross-examination was the convening order; however, it was sent to the grievor with both June 17 memos. According to Ms. Justason, the notice of the disciplinary investigation and the convening order were given to the grievor on June 18, 2013 by the Assistant Warden of Management Services for PI, Scott Verwold.

[37] In his examination-in-chief, the grievor was shown the June 17 Stewart memo and was asked about his reaction. He stated that it was nice to be informed of the allegations even though he did not agree with them. The grievor did not say when he received the June 17 Lewis memo or the June 17 Stewart memo.

[38] He was then asked if between June 4 and 17 he raised any concerns. He said that it had been difficult to contact the person responsible for him and that every time he did speak with that person, he said that he had not received a convening order. When he was questioned about how many times he had asked, he answered that it had been about six times. When he was asked if he had raised it with anyone else, he said that he had done so with Derek Chin, the UCCO-SACC-CSN president at PI, and with Louise Weller, the CM at PI responsible for scheduling and deployment. Neither testified.

[39] In cross-examination, the grievor was shown the June 17 Lewis memo and was asked if it was the convening order. He stated, "that is what it says. It is possible. This was all five years ago".

[40] When he was asked in examination-in-chief about how management had justified the delay, he said it had not done so and then continued by saying that when he asked, "she [Ms. Justason] told me 'you will go where you are assigned'; that was the only explanation given".

[41] In cross-examination, it was suggested to the grievor that at the June 4 meeting, it was explained to him why the reassignment outside the perimeter of PI was necessary and why there would be an investigation. He responded that that had not specifically been done. When counsel for the employer queried about the grievor's suggestion that Ms. Justason did not explain that there had been a use of force,

the grievor stated that she had expressed concern about the May 28 incident. When he was pushed on this discussion, he admitted that her concerns were about his use of force in that incident.

[42] In cross-examination, the grievor was asked if his statement was accurate that he received no reasons at the June 4 meeting about the lack of a convening order. He said that he received no reasonable reason and stated that Ms. Justason had said that there were no investigators. He then said that he was not sure if it was at the meeting but that at some point, he was told that he would not receive a convening order until an investigator was available.

[43] In cross-examination, when it was put to the grievor that Ms. Justason would state in her evidence that on June 4, 2013, no one was available to carry out the investigation, his response was that it should be possible to make an accusation without an investigator being assigned.

[44] It was put to the grievor in cross-examination that the June 4 meeting had been held to discuss his reassignment. He answered, "yes, I was reassigned". When it was put to him that the reason for the reassignment had been addressed, he stated that "no convening order was given". When it was put to him that no disciplinary investigation had been convened at the June 4 meeting, he stated that he "would not agree; I was removed from my position". When that question was followed up with the proposition that a disciplinary investigation and a removal from his position are not the same thing, he responded that in his perception, "they are the same thing; I was accused of something and removed from my position".

[45] In examination-in-chief, the grievor stated that he did not have access to his email while at Matsqui Institution. When he was asked in cross-examination if he ever asked for access while outside PI, he stated that he did not know that he had that option, as he did not work at Matsqui Institution.

[46] When the grievor's representative asked him how the failure to receive a convening order affected him, he said that not knowing the accusations had been stressful, as had not having them in writing. He said that he had trouble sleeping and that he had ruminating thoughts. He then stated that if due process is not followed, it adds to the stress. He said that it affected his intimate relationship at the time. When he was asked how it had affected his professional life, he said that he had believed that it could affect his job; he had been concerned. When he was asked how

long he has felt this way, he stated that five years have passed without acknowledgment, that three formal opportunities for it had passed, and that he had done nothing wrong. It had been much worse in the four months after the incident.

[47] The evidence disclosed that the grievor was disciplined for an inappropriate use of force in the May 28 incident and that he received a written reprimand and was required to undergo remedial training.

[48] As of the hearing, John Randle was employed by the TB with the CSC as a CX-01 and was a regional vice-president of the UCCO-SACC-CSN for the CSC's Pacific Region. He stated that during the course of his involvement with the UCCO-SACC-CSN, in addition to his current position, he has been a local shop steward, local grievance coordinator, and local president. His current portfolio is about returns to work; however, he has been involved in some capacity in about 80 to 100 disciplinary matters.

[49] Mr. Randle was asked if he has many convening order issues. His response was that he does have concerns about them. When he was asked to elaborate he stated that the biggest issue as he saw it was that convening orders are very vague and that they do not contain enough detail.

[50] When Mr. Randle was asked why it is important to obtain a copy of a convening order when someone is given notice of it, he stated that it is because the bargaining agent negotiated it. He then stated that someone being investigated should know the timelines. When he was asked why it was important to follow the process, he replied that disciplinary investigations are very stressful, and the convening order provides those involved with information and facts about what the bargaining agent member has allegedly done.

III. Summary of the arguments

A. For the grievor

[51] The issue is whether the employer breached the collective agreement by giving the grievor the convening order two weeks after giving him written notice that he was being subject to a disciplinary investigation.

[52] Clause 17.05 uses the term "concurrent", which is defined in the *Concise Oxford*

English Dictionary, Tenth Edition, Revised, as "existing or happening at the same time."

[53] The grievor submitted that the employer breached clause 17.05.

[54] At the June 4 meeting, Ms. Justason informed the grievor that he would be reassigned pending the outcome of a disciplinary investigation, which occurred the next day. Both he and his representative raised the issue of the lack of a convening order at the meeting.

[55] According to Ms. Justason, the notice of the disciplinary investigation and the convening order were given to the grievor on June 18, 2013 by the Assistant Warden of Management Services for PI, Scott Verwold.

[56] The grievor stated that he received written notice as per clause 17.05 on June 4, 2013. The June 4 letter uses the word "inform"; there is no ambiguity. It was to inform him that he was being subject to a disciplinary investigation. He was being reassigned pending a disciplinary investigation. A decision to conduct one was made before June 4, 2013. As of that date, he was informed that one had been convened and that therefore, under clause 17.05, he was entitled to a copy of the convening order. Thus, the employer was in breach of clause 17.05.

[57] The employer attempted to justify the delay by referring to a protocol that the bargaining agent never agreed to, and there is no version of it in writing. It is rather informal and is to ensure that reasonable steps are taken so that disciplinary investigations are concluded in a reasonable time. The time for an investigation starts when an investigator is chosen. This protocol is not in writing, and while the employer may unilaterally follow it, it cannot override the collective agreement.

[58] The collective agreement breach was not without consequence to the grievor. An investigation is stressful. Clauses 17.05 to 17.09 of the collective agreement are safeguards that are to be followed. Clause 17.05 is a guarantee of fundamental procedural rights, which are the right to know how the disciplinary process will unfold and the employee's right to be informed of his or her rights. These are very important to an employee.

[59] The employer's disregard of clause 17.05 worsened the grievor's mental distress. He felt anxious and stressed and had trouble sleeping. His job was in jeopardy. It affected his personal relationships and his personal life, and he felt hopeless and helpless.

[60] The grievor referred me to *Canadian Pacific Railway Company v. Unifor*, 2014 CanLII 22982, for the proposition that damages can be awarded for a breach of the collective agreement. He also referred me to *Weber v. Ontario Hydro*, [1995] 2 SCR 929.

[61] The grievor referred me to *Canada Post Corporation v. Canadian Union of Postal Workers*, 2012 CanLII 97766, for the proposition that a breach of a collective agreement in the form of failing to disclose information can lead to an award of damages. Benefits were contracted; therefore, it was a reasonable contemplation of the parties that damages could flow if the contract were breached. The grievor submitted that the reasoning in *Canada Post Corporation* and the jurisprudence in it applies to this case and that damages for mental distress are appropriate. He stated that the convening order was important to him. He asked for damages for mental distress of $2500 for the breach of the collective agreement.

[62] The bargaining agent also asked for general damages, as a matter of principle. The employer cannot violate the collective agreement with impunity. Respect for the collective agreement is sacred; it is not optional. In this respect, the grievor referred me to *Western Canada Council of Teamsters v. Canadian Freightways*, 2013 CanLII 19947, in which the Arbitrator awarded general damages to the union for a collective agreement breach. On that point, the bargaining agent requests an award of $2500.

[63] The grievor requests interest on the amounts awarded.

B. <u>For the employer</u>

[64] On May 28, 2013, the grievor was involved in an incident in which he used OC spray and struck IM A, who had been handcuffed and naked in the shower. Ms. Justason risk-assessed the situation and decided to reassign the grievor to outside PI, with no IM contact.

[65] At the June 4 meeting, Ms. Justason met with the grievor and his representative. She discussed reassignment and advised them that an investigation was to be convened. The grievor asked for a convening order at that time. Ms. Justason explained that no investigator was available and that therefore, no convening order would be issued until an investigator was found.

[66] As of the June 4 meeting, the date on which the disciplinary investigation would commence was unknown, and it was impossible for the employer to establish a time frame for one.

[67] The employer completed the written notice of the investigation, and the convening order was made on June 17, 2013. Only at that point was the investigation convened. On June 18, 2013, the written notice and the convening order were provided to the grievor. The June 4 letter was to inform him of his reassignment. The notice of the investigation being convened and its convening took place on June 17 and 18, 2013.

[68] The employer submitted that it did not breach clause 17.05.

[69] There is no jurisprudence interpreting clause 17.05.

[70] The Board must rely on the generic principles of collective agreement interpretation, and its authority is limited to expressing the terms of the collective agreement. This is done by reviewing its words, to determine the parties' intent. In this respect, the employer referred me to *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2002 NBCA 30; and *Telus Communications Company v. Telecommunications Workers Union*, 2009 BCSC 1289.

[71] The employer referred me to *Wamboldt v. Canada Revenue Agency*, 2013 PSLRB 55 at para. 28, which states as follows:

> *[28] . . . parties to a collective agreement are generally considered to have attempted to arrive at an agreement that is easy to apply in daily practice . . . an interpretation that produces a clear result is generally to be preferred to one that produces a messy or uncertain result, if only because a clear result is more likely to produce and maintain the ". . . harmonious and mutually beneficial relationships between the Employer, the Alliance, and the employees . . ." . . . .*

[72] The intention of article 17, specifically clause 17.05, is to ensure a fair disciplinary process. The employer needs a reasonable amount of time to put that process in place and will have some form of administrative procedure to do so.

[73] If an incident occurs, the employer has to answer the following questions:

1. Can the employee stay in his or her position?

2. Does the employee need to be reassigned?

3. Is a disciplinary investigation required?

4. Should the employee be suspended, with or without pay?

[74] All those questions could arise from one incident, such as the May 28 incident.

[75] Appendix G of the collective agreement gives the employer the right to reassign employees. On June 4, 2013, it informed the grievor in person that he would be reassigned, pending a disciplinary investigation. On June 5, 2013, he was given the letter confirming his reassignment. At that point, the investigation had not yet been convened. On June 18, 2013, he received formal notice that the disciplinary investigation had been convened, and he received the convening order.

[76] Ms. Justason explained that a convening order gives investigators the mandate for the investigation. It must be addressed to the investigators. It explains what needs to be investigated and specifies the time frame for the investigation. The employer did not know all that information on June 4, 2013, so it could not have been provided to the grievor or his bargaining agent at that time.

[77] The grievor received written notice of the disciplinary investigation and the convening order itself on either June 17 or 18, 2013. The employer submitted that he became subject to an investigation only when it was convened, and not before.

[78] The grievor originally filed two grievances. In the grievance he withdrew, he had claimed compensation for the loss of shift differentials, weekend premiums, and overtime as a direct consequence of the reassignment.

[79] The appropriate remedy in a collective agreement breach is to put the employee in the position he or she would have been had the breach had not occurred. In this respect, the employer referred me to *Horner v. Treasury Board (Department of National Defence)*, 2012 PSLRB 33. Whether the grievor received the convening order on June 4 or on June 18, 2013, does not affect the pay and benefits losses that he incurred. However, those claims were made against the employer in the grievance that he withdrew and were due to the reassignment and not failing to receive the convening order. Those losses are not a consequence of a breach of clause 17.05.

[80] With respect to the damages being claimed by the grievor, it is not sufficient to put it in small characters on the grievance that damages may be claimed. Damages need to be raised and dealt with during the grievance process. In this respect, the employer relied on *Scheuneman v. Treasury Board (Natural Resources Canada)*, PSSRB File No. 166-02-27847 (19981020), [1998] C.P.S.S.R.B. No. 93 (QL) (upheld in

[2000] 2 F.C. 365); and *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[81] The employer submitted that the grievor and his bargaining agent demonstrated no evidence of damages. No experts were called. Mr. Randle confirmed in his evidence that the discipline process is stressful. At the end of the investigation, the allegations were founded, and the grievor was given a written reprimand and remedial training.

[82] With respect to bargaining agent's damages claim, the employer submitted that the bargaining agent filed no evidence of any damages being claimed, and in any event, the grievance was filed by the grievor.

IV. Reasons

[83] The sole issue before me is whether the employer breached clause 17.05, and if so, what remedy should be afforded to the grievor due to the breach.

[84] For the reasons that follow, I find that the collective agreement was not breached. The grievance is denied.

[85] Clause 17.05 states as follows: "When notification in writing is given to an employee that he or she is the subject of a disciplinary investigation, the employee shall be provided concurrently with a copy of the order convening the investigation."

[86] "Convening order" is not defined in the collective agreement; nor did any witness give evidence as to what exactly it is.

[87] "Convene" is defined in the *Canadian Oxford Dictionary*, Second Edition, as "call or arrange (a meeting etc.); call together people for a meeting; assemble or meet together esp. for a common purpose; summon (a person) before a tribunal."

[88] "Order" is not defined in the collective agreement. It is defined in the *Canadian Oxford Dictionary*, Second Edition, as ". . . an authoritative command, direction, instruction, etc. (only obeying orders; gave orders for it to be done; the judge made an order)."

[89] "Convening order" is a term idiosyncratic to the CSC when referencing investigations into incidents or employee conduct. It is used to refer to instructions from a person who has the authority to order one or more persons to carry out an investigation, and it sets out the investigation parameters.

[90] I was provided with no evidence that an order convening an investigation was required to be in writing. That said, clause 17.05 presupposes that the convening order will be in writing as it contemplates providing a copy of it to those subject to the investigation.

[91] The dispute lies in whether the June 4 letter was written notification that the grievor "is the subject of a disciplinary investigation" as contemplated in clause 17.05.

[92] While much of the evidence of both the grievor and Ms. Justason was similar, if not the same, at times, both of them had difficulty remembering certain things. This is not surprising as the events relevant to this matter took place some five years before the hearing before me.

[93] The grievor surmised that the June 17 Lewis memo was the convening order. On the other hand, Ms. Justason stated that it was not the convening order. However, no other document was entered into evidence as that order. Each party would have had a copy of it; the grievor admitted to receiving a convening order on or about June 18, 2013, and the employer stated that he was given one. I suspect that had the convening order been at hand, the parties would have provided it to the hearing. Neither party did; as such, I find that the June 17 Lewis memo was the convening order.

[94] The June 17 Stewart memo is clear that it is notice in writing that an investigation has been convened, and it sets out the same information as does the June 17 Lewis memo.

[95] The grievor submitted that the purpose of clause 17.05 is a guarantee of fundamental procedural rights, including the right to know how the disciplinary process will unfold and the right to be informed of his rights. While I agree with the sentiment of that submission, in that it is important for someone subject to an investigation to be made aware of the allegations being made against him or her and the details of who will conduct the investigation and what if any other parameters may be set out for the investigators, that is not exactly what clause 17.05 states.

[96] The collective agreement does not place an onus on the employer to provide a copy of a convening order to a CX, even if one exists and even if the CX has been told that it exists. The wording of clause 17.05 is such that a convening order will be given to a CX at the same time he or she is given written notice of being subject to

a disciplinary investigation.

[97] A convening order is not addressed to or created for anyone subjected to an investigation. It is an order to an investigator or team of investigators to carry out certain tasks. Clause 17.05 entitles CXs who receive written notice of an investigation to a copy of the convening order at the same time.

[98] It is trite to say that for a convening order to be given, it has to exist.

[99] The evidence disclosed that no convening order was in place on June 4, 2013. One came into existence on or about June 17, 2013. Therefore, it would have been impossible to give the grievor a copy of a convening order when one did not exist.

[100] The evidence of Ms. Justason was that after she had reviewed the video of the May 28 incident and the grievor's report, she determined that there would be an investigation and that the grievor would be removed from his duties as a CX and reassigned to work outside the perimeter of PI, on the Matsqui grounds. She also stated that as of June 4, 2013, she had not convened an investigation, because no investigators were available.

[101] The evidence disclosed that June 4, 2013, was to be the first day on which the grievor was to be back at work after the May 28 incident as he had been on rest days since then.

[102] Ms. Justason stated that the purpose of the June 4 meeting was to alert the grievor to his reassignment pending the investigation, which was to be convened. Indeed, both she and the grievor confirmed that his assignment to outside duties was discussed. In cross-examination, he admitted that the reassignment was discussed and that so was his use of force, as it related to the May 28 incident.

[103] Later in cross-examination, when pressed, the grievor admitted that Ms. Justason discussed the reassignment in the context of an investigation that would take place into the May 28 incident. He also admitted that she provided him with reasons that there was no convening order, which were that no investigators were available to whom she could assign the investigation. He felt that those reasons were unreasonable.

[104] When he was shown the June 4 letter, the grievor twice said that it was given to him at the June 4 meeting, which the evidence does not support. The first line of the letter states: "On June 4, 2013, I informed you that due to a disciplinary investigation being convened, you would be re-assigned [*sic*] to duties with no inmate contact." That suggests that the letter was written after the meeting, to confirm the discussions that had taken place.

[105] This is supported by Ms. Bal's email to Ms. Justason, also dated June 4, 2013, in which, at 4:44 p.m., Ms. Bal stated that she had just spoken to the grievor on the phone at 4:30 p.m. and that he had asked her to provide the reassignment letter to Mr. Palmer. Ms. Bal then stated that she would email Mr. Palmer and then leave the letter at the CM's office as Mr. Palmer was off-site. The email then stated that the grievor asked Ms. Bal what the letter said; she stated that she had read it to him.

[106] Based on the evidence, I do not believe that at the June 4 meeting, the grievor was given the June 4 letter. Had Ms. Justason given it to him at the meeting, then why would Ms. Bal have called him that same day at 4:30, and why would he have asked Ms. Bal to do the following:

1. Read him the letter, which he already possessed?

2. Give the letter to Mr. Palmer, who had attended the June 4 meeting?

[107] The final part of the email Ms. Bal sent to Ms. Justason on June 4, 2013, states that the grievor told her that he would waive the two-week notice, report on June 5, 2013, and be paid the appropriate overtime for his first shift on the new schedule.

[108] According to that email, Ms. Bal said that she would leave the letter with the CM, as Mr. Palmer was not on-site. There is no evidence that he received the letter on June 4, 2013, or on any other day or that he gave it to the grievor.

[109] Even if I accept that Mr. Palmer received the June 4 letter at some point after Ms. Bal said she would leave it for him with the CM on duty, and even if I accept that he gave the letter to the grievor, I do not accept that it was written notice of a disciplinary investigation, as contemplated by clause 17.05.

[110] The June 4 letter dealt with the grievor's reassignment. When read as a whole, it is clear that that was its purpose. According to his evidence in cross-examination, the grievor was aware that an investigation would take place and that it had to do with his actions involving IM A and the May 28 incident. This was discussed at the June 4 meeting and was not a mystery. The purpose of that meeting was not to advise him of the convening of the investigation into the May 28 incident but to address his return to work after that incident and to move him into the alternate work arrangement, with no IM contact. He was being reassigned because of his conduct in the May 28 incident. Had his conduct not been in question, it is highly unlikely that Ms. Justason would have reassigned him to outside work, with no IM contact. It is difficult to see how she could have conveyed her reasoning to him in writing without referring to the May 28 incident and the pending investigation, which was the purpose of the letter.

[111] I have no doubt that at the June 4 meeting, the grievor and his representative asked for a convening order. This would make sense, since there is no dispute that an investigation was to be convened; however, if an investigation has not been convened and no convening order exists, one cannot be given. Until it is convened, the grievor is not subject to an investigation. If Ms. Justason did not convene an investigation, it follows that the grievor could not have been given written notice of an investigation that did not exist.

[112] I find that as of June 4, 2013, the grievor was not yet subject to an investigation nor had he been given written notice that he was the subject of a disciplinary investigation, because there was none. As such, there has been no breach of the collective agreement.

[113] As of June 17, 2013, the grievor was the subject of an investigation, a convening order did exist and from the evidence before me it appears that he was given both written notice of being subject to the investigation and the order convening the investigation on June 18, 2013.

[114] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[115] The grievance is dismissed.

March 11, 2019.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board