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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

CLAYTON SHAW

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Shaw v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: Margaret T.A. Shannon, 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: Joel Stelpstra, counsel

Heard at Saskatoon, Saskatchewan,
January 8 to 10 and July 9, 2019.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Clayton Shaw, grieved the decision of the employer, the Correctional Service of Canada (CSC), to terminate his employment as a correctional officer 2 (CX-02) at the Regional Psychiatric Centre (RPC) in Saskatoon, Saskatchewan, as a result of his involvement in a use-of-force incident that the employer determined had been excessive and contrary to policy.

II. Preliminary matters

[2] At the outset of the hearing, the employer's representative requested that the exhibits be sealed that contained information that would identify the inmate involved in the use-of-force incident for which the grievor was disciplined. I agree and order that those exhibits entered as Exhibit 2 and Exhibit 3, including the video recording of the use of force, shall be sealed. The representative also requested that the inmate's name be anonymized. This is not required as I do not intend to refer to the inmate by name.

[3] As stated in the "Policy on Openness and Privacy" of the Federal Public Sector Labour Relations and Employment Board ("the Board"), the open court principle is significant to our legal system. In accordance with that constitutionally protected principle, the Board conducts its hearings in public, except in exceptional circumstances. The Board maintains an open justice policy to foster transparency in its processes, accountability, and fairness in its proceedings. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute. The policy is public, available to anyone, and shared with parties to the adjudication process.

[4] In exceptional circumstances, the Board may depart from its open justice principles and grant requests to maintain the confidentiality of specific evidence and may tailor its decisions to accommodate the protection of an individual's privacy when such a request accords with applicable and recognized legal principles. In these circumstances, the Board applies the Dagenais/Mentuck test (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, 2001 SCC 76), which was

reformulated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 53, as follows:

> […]
>
> *(a) such an order is necessary in order to prevent a serious risk to an important interest, […], in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> *(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

[5] In the present case, there is a serious risk if the inmate's identity is disclosed, given that inmates are a vulnerable population. I am satisfied that the inmate's privacy rights can be sufficiently protected by sealing exhibits; I heard no argument to the contrary. The inmate's name will also be redacted in the termination letter that appears in the Board's file. The positive effects of limiting the open court principle outweigh its negative effects. I will make an order to that effect at the end of this decision.

III. Summary of the evidence

[6] The grievor was employed as a CX-02 by the employer for 17 years; as such, he held peace-officer status. The primary responsibility of his job was to protect the institution and the public. As a peace officer, he was sworn to protect those around him and to maintain order in the institution. He was a highly trained officer, experienced in implementing the use of force and the policy applicable to it. During his 17 years as a CX, he was a member of the emergency response team (ERT) for 15 years and its team lead for 4 of the last years he was on it. He was highly trained in the Situational Management Model (SMM), which is a decision-making model employed to assess the appropriate level of force to use in a conflict situation. He knew that he was obligated to use only the minimal amount of force necessary to de-escalate and resolve a situation.

[7] According to the grievor, he had been involved in at least 100 use-of-force incidents leading up to the events of April 1, 2015, and had never been disciplined for any of them. The event at issue in this decision was the one and only time he was disciplined. On April 1, 2015, the inmate in question, who had a reputation for "shooting off his mouth", as witnesses described him, became non-compliant when

given orders to lock up and return to his cell. The inmate was 60 years old and significantly smaller than the grievor. He showed no signs of aggression during the incident at issue but was not complying with the grievor's directions to return to his cell. To gain his compliance, the grievor approached the inmate from behind, applied an arm-bar takedown, and took him to the floor.

[8] Another CX came to the grievor's aid and became entangled with the inmate. The grievor then applied knee strikes to the inmate's head, neck, and shoulder area to free his fellow officer from the inmate's grip. After an extensive review, the employer determined that the grievor used excessive force to take down the inmate when no such takedown was required to gain his compliance or control of him. It also determined that even though physical handling had been appropriate in the circumstances, the degree of force the grievor used was excessive and inappropriate.

[9] Shawn Bird was the RPC's warden at the time of the incident. He testified that the RPC differs from other institutions in the region as it is the only psychiatric treatment centre. It is a stand-alone facility that is accredited and that meets provincial healthcare standards. It offers psychiatric treatment and interventions for inmates; 80 of its 220 beds are for psychiatric treatment. Inmates arrive via clinical admissions and are managed through a clinical treatment plan as well as a regular correctional plan.

[10] The treatment team and the CXs work together as a team, according to Mr. Bird. The CX-01s provide static security by operating doors and performing cell counts as at any other institution. The CX-02s, like the grievor, provide dynamic security, interact with inmates, and are part of the treatment and case management team. The grievor functioned in that role at the RPC for 17 years on Bow Unit at the RPC, where the incident occurred.

[11] Mr. Bird testified that the grievor was selected as the team lead for the ERT on the basis of his performance. ERT members provide a response in high-risk situations. Team leads are selected based on their professionalism, recognition that they go above and beyond, being role models for other officers, and recognition that they are experts in the use of force and its application pursuant to the employer's policies. ERT members train regularly and hone their skills. They take a three-week initial training course and are required to complete refresher training annually.

[12] Each use-of-force incident, including those of the grievor, was and is reviewed at the institutional level, according to Mr. Bird. The Correctional Manager, Operations (CMO), carried out the initial review of the grievor's use-of-force incident based on the Officer Statement and Observation Reports (OSOR) filed and the post-use-of-force healthcare report. The inmate involved also provided a written submission. The CMO concluded that while use of force had been reasonable, given the possibility that the inmate would assault the grievor with hot liquid, the degree of force the grievor used was excessive.

[13] Peace officers are protected under the *Criminal Code of Canada* (R.S.C., 1985, c. C-46) when exercising force, if it is proportional to the situation. The conclusion of the CMO's review was that the degree of force used in this case was excessive, given the behaviours the inmate displayed. As a result of the use of force, he suffered facial injuries, bruising, shoulder pain, and headaches.

[14] When the CMO completed his review and made his recommendations, Mr. Bird reviewed the video and spoke to the inmate directly, who indicated to Mr. Bird that he wanted an apology from the grievor for the excessive nature of his use of force.

[15] Mr. Bird described what he saw on the video recording as the grievor and his partner, Nikolause Danczak, following the inmate to a table, where the grievor knocked a bowl out of the inmate's hand. According to Mr. Bird, it can be seen airborne. At the same time, the grievor grabs the inmate and throws him onto the table and then onto the floor, where the grievor hits him in the head with his knee a couple of times.

[16] Before the grievor takes the inmate to the floor, Mr. Bird noted that there is no urgency to the situation. The bowl had been knocked out of the inmate's hands. The grievor has ample opportunity to retreat and reassess the situation. Instead, he applies an arm-bar takedown and clumsily and dangerously brings the inmate to the floor. The inmate then grabs Mr. Danczak's legs. At this point, the grievor lands two knee strikes on the inmate's neck, back, and shoulder area. Eventually, the inmate is handcuffed, stood up, and escorted to his cell. Mr. Bird saw no body language from the inmate leading to the takedown that he would say was aggressive.

[17] Mr. Bird concluded that the use of force had been excessive, although a lesser use of force had been warranted in the circumstances. The review process continued on to the regional and national levels. Once it completed and it concurred with

Mr. Bird's findings, he initiated a disciplinary investigation during which the grievor was suspended without pay. Mr. Bird appointed Heather Bergen and Kathy Neil as the disciplinary investigators. They were given 30 days to report back to him with their findings.

[18] Their written report (Exhibit 2, tab 1) concluded that the grievor had not followed the employer's policies or the legislation. Although use of force had been required, the degree of force used had been unreasonable and excessive. They concluded that the grievor had violated "Commissioner's Directive 060" ("CD-060") and the employer's code of discipline and that he had endangered the inmate, his co-worker, and himself.

[19] According to Mr. Bird, it is an offence under CD-060 for an officer to use excessive force in the discharge of the officer's duties. Pursuant to the SMM, when faced with a conflict, an officer is to assess it and whenever possible use verbal interventions to resolve it. When force is used, it must be necessary, reasonable, and proportionate to the threat the officer faces. The investigators concluded that the force the grievor used, which had been determined excessive at all stages of the use-of-force review process, violated CD-060.

[20] Mr. Bird testified that he accepted the findings. Consequently, to give the grievor the opportunity to reply to the report, Mr. Bird convened a disciplinary hearing, which the grievor attended with his union representative. Until that point, according to Mr. Bird, he had not drawn any conclusions as to the outcome of the disciplinary process. However, when given the chance, the grievor did not present Mr. Bird with anything to consider in making his decision. Mr. Bird's impression was that the grievor did not take the matter seriously and did not recognize the significance of what he had done.

[21] The grievor took no ownership of his actions. According to Mr. Bird, the grievor could not explain to him what Mr. Bird could see on the video, what had gone wrong, and what necessitated the grievor to respond to the inmate the way he did. The grievor's co-workers present at the incident did not corroborate his version of the events; nor did they substantiate his description of the inmate as being aggressive, a troublemaker, and violent. The only explanation the grievor offered for his actions was that he thought the inmate would assault him, which Mr. Bird testified he could not

accept as it was clear from his viewing of the videotape that the inmate and not the grievor had been vulnerable.

[22] The inmate in question was 60 years old and had no history of violence in either his criminal record or while incarcerated. He was vulnerable, which the grievor did not recognize, according to Mr. Bird. The grievor repeated that he thought that the inmate would throw something hot at him. He provided Mr. Bird with vague references to having been assaulted before with hot liquids, but he could not provide Mr. Bird with any specifics. No such incidents were recorded in the last four years of events, according to a check of institutional records initiated by Mr. Bird. Consequently, Mr. Bird dismissed this as untrue. If OSORs existed to document these assaults, the grievor should have presented them to him at the disciplinary hearing; he did not.

[23] According to Mr. Bird, the goal in a violent workplace such as a prison is to provide staff with training, specific tools, and processes, and to ensure there is sufficient staff to mitigate workplace risks. In Mr. Bird's opinion, the grievor, given his experience and ERT training, should have been prepared to deal with the situation. A CX cannot always assume that the worst will happen.

[24] Mr. Bird described himself as disappointed with the grievor's reaction to the situation and with how he dealt with it. Given the grievor's experience as a CX and as a team lead and member of the ERT, he is an expert in the use of force and was expected to conduct himself as a role model for other officers. He failed miserably at all those things in the situation at issue. None of his reactions reflected the degree of training and experience he had in use-of-force situations.

[25] The grievor told Mr. Bird that he had tried to negotiate with the inmate. Mr. Bird concluded that no negotiations had occurred, according to his review of the videotape and the grievor's responses when he was asked what exactly he had done that would constitute negotiation. According to Mr. Bird, yelling at and then giving an inmate direct orders is not negotiation. Again, the grievor failed in his application of the SMM and with respect to the expectations of him as a use-of-force expert.

[26] Mr. Bird hypothesized that had the grievor been truly concerned about being assaulted with the contents of the bowl in the inmate's hands, the threat could have been neutralized by knocking it out of his hands, which was exactly what the grievor did. At that point, the threat was neutralized, and the grievor should have reassessed

the situation according to the SMM and determined how to proceed, given the new circumstances. There was plenty of time for him to retreat, yet he did not. Instead, he took the inmate to the floor in a fashion likely to injure the inmate, thus escalating the situation. There was no urgency to the situation until the grievor pursued his plan of attack.

[27] It was clear to Mr. Bird that disciplinary action was warranted against the grievor, who had no explanation of why things happened as they had. Discipline is intended to be corrective, but this means that the employee needs to recognize that he or she has done something wrong. If not, then nothing can be corrected. Based on what Mr. Bird heard from the grievor, which was that at no time did he take responsibility for what happened, on the grievor's role in creating the use-of-force situation that ensued, and finally on the grievor not recognizing that he did anything wrong, according to Mr. Bird's assessment, the only option open to the employer was termination.

[28] The grievor's employment was terminated on the basis that his actions significantly harmed the inmate, that he did not follow the employer's policies, that he used excessive force, and that his version of the use of force did not align with the facts. Mr. Bird could no longer find the grievor trustworthy; he was not upfront and truthful when describing his actions in the use-of-force incident. He could not be trusted to properly apply force against an inmate in the future.

[29] The RPC is an accredited hospital; the inmates are vulnerable patients. The grievor violated his duty of care towards the patient when he exercised excessive force. In Mr. Bird's mind, it raised the question of whether at all times the grievor had conducted himself appropriately with the vulnerable population. According to Mr. Bird, he was not certain that the grievor had done so, and thus, Mr. Bird could not trust him and doubted his ability to trust the grievor were he ever to be reinstated to such a position of trust.

[30] When the grievor applied for employment insurance, the employer challenged his entitlement on the basis that he had not been forthcoming and honest in his application. This was only the second time in his warden role that Mr. Bird had taken this extreme step, but it spoke to the depth of his convictions that the grievor was not truthful and did not accept any responsibility for his actions.

[31] Jean-Guy Ouellette was the CMO at the RPC at the time of the incident. He conducted the use-of-force review at the institutional level and made recommendations on his assessment. He explained for the hearing the setup of Bow Unit, where the inmate was housed, and the locations and angles of the video cameras on that unit. He had secured the videotape (Exhibit 2, tab F3).

[32] Leon Durette has managed and maintained use-of-force files and has conducted use-of-force reviews for the employer. He is trained in all aspects of the use of force. He is a national master trainer for ERTs. He testified that the SMM is a graphic representation of the decision-making process involved when managing use-of-force situations. It is circular to represent the need for flexibility. All situations require problem solving and demand that CXs assess all situational factors and acquired information to ensure that all other components of response are considered before resorting to use of force, which is to be the last resort. To be considered appropriate, a CX may apply force only after having considered the behaviours displayed by the inmates and all other situational factors, and it must be proportional and necessary. Officers are expected to assess and reassess their reactions throughout an incident and adjust them to meet the changing situation.

[33] According to Mr. Durette, ERT members, such as the grievor, receive additional training that builds on the basic arrest-and-control and self-defence training provided to all CXs. They review the SMM in every module of their training. They are experts in the use of force within an institution and within the CSC. Knee strikes are not part of their training.

[34] When reviewing a use-of-force incident, a reviewer must first determine whether the use of force was necessary. Then, the questions are whether it was proportional and reasonable in the circumstances. According to Mr. Durette, a use of force is deemed necessary if a CX exhausted all options, attempted to communicate with the inmate, attempted to de-escalate the situation, and first attempted a lesser intervention. Then, a use of force is necessary. A use of force can be anything from a physical presence to physical handling to the use of weapons, if necessary.

[35] According to Mr. Durette, a use of force was proportional if it was appropriate to the level of threat the CX faced, considering the officer's perception. Proportionality is a question of how much force was used in response to the inmate's behaviour. In

this case, the inmate was mouthing off at the grievor while complying with the direction given to him. This would be considered verbally resistive, according to Mr. Durette, and would not have required physical handling of the nature the grievor used, in Mr. Durette's opinion and experience.

[36] Ms. Neil testified about the conduct of the investigation she carried out with Ms. Bergen. They interviewed everyone they considered relevant to their investigation, including all witnesses and the inmate. They were provided with a copy of the recorded video. In addition, they reviewed the relevant policies and other documents, including OSORs and the "Bow Unit Tracking Log", which CXs use to record significant events that occur during a shift. If an inmate had to be locked up a number of times for bad or uncooperative behaviour, it was expected that it would have been recorded in the unit logbook, but for the inmate at issue, there was no such record. Nothing in the logbook supported the grievor's assertions that the inmate was aggressive, a troublemaker, and violent. According to Ms. Neil, the investigators concluded that the grievor lacked credibility.

[37] When Mr. Danczak reported to the investigators that the inmate had been involved in a previous assault, the investigators reviewed all incident reports involving the inmate. There was no record of any report that the inmate had assaulted anyone, and there was no history of him being aggressive or displaying violent behaviour towards staff or other inmates. He had no history of violent offences. He had been incarcerated for property offences. The investigators concluded that the inmate had been upset that his morning routine had been disrupted, that he had been told "no", and that he had to return to his cell but that he had not displayed any physically aggressive behaviour.

[38] According to Ms. Neil, during his interview, the grievor described the inmate as quick to escalate to anger when told "no". On the day in question, he had been told "no" twice and had been told to return to his cell. The grievor told the investigators that he directed the inmate to lock up. When the inmate refused, the grievor attempted to negotiate with him. When that failed, the grievor then demonstrated his physical presence by escorting the inmate to his cell. Since he was afraid that he would have hot liquid thrown on him, the grievor resorted to physical handling, according to what he told the investigators.

[39] According to Ms. Neil, based on their interview with the grievor, the investigators drew certain conclusions, such as that the grievor did not attempt to negotiate with the inmate and that only four minutes passed from the lockup order being given to the use-of-force incident, which was insufficient time for any meaningful interaction with the inmate. Negotiation requires that the CX and the inmate interact. Also according to Ms. Neil, the OSORs made no mention of negotiations; they reported orders being given but made no mention of any other interactions.

[40] On the video recording, the inmate looked relaxed and did not demonstrate any aggressive postures, according to Ms. Neil's evidence. At 08:20, he had been given 10 minutes to lock up. Then, at 08:24, the grievor intervened. The inmate had not exceeded the time; there was no reason for the grievor to apply force as he did.

[41] The investigators also determined that the grievor had not used the SMM appropriately or applied the least amount of force necessary when the inmate became physically uncooperative and refused to go back to his cell. The grievor had had options available to him before physical handling became appropriate or necessary.

[42] When the use of force was initiated, the inmate was not in an aggressive state, and the grievor had sufficient time to knock the hot liquid out of the inmate's hands. That gave him time to reassess the situation, according to the SMM. When the arm bar was applied, the inmate was focused on picking up his porridge bowl; he was surprised by the grievor's action of reaching over and grabbing him. According to Ms. Neil, the grievor could have stepped back, created distance, and attempted to communicate with the inmate instead, which would have been consistent with the SMM. Instead, he went directly to a use of force.

[43] Ms. Neil testified that the investigators viewed as particularly problematic the knee strikes that the grievor applied to the inmate's neck and shoulder area once he was on the floor. According to her, the inmate was already on the floor and in a tight space. He was reacting to the officers' (the grievor and Mr. Danczak) interventions, and the knee strikes served only to escalate the situation.

[44] According to Ms. Neil, no true negotiation process was demonstrated. There was no demonstrated immediate sense of emergency to lock up the inmate. The grievor knew that the inmate lived on the upper range and that the practice was to allow

inmates living there to take their porridge and coffee to their cells. The grievor's regular posting had been on Bow Unit for a number of years; the inmate had been on that unit for approximately a year. The grievor should have had an understanding of the inmate's pattern of behaviour, particularly if he was prone to physical violence.

[45] Ms. Neil spoke to the contrast between the grievor and the inmate involved in the incident. The inmate was 60 years old and had no history of aggression. On the two occasions when he had been involved in physical altercations, they had been with other inmates. He was known to display his aggression verbally, not physically. On the other hand, the grievor was an experienced CX, with 15 years' experience on the institution's ERT. The employer had trained him highly to deal with this type of situation. In his interview and in his OSOR, he used SMM language, but the investigators saw no evidence of it in the video recording of the events. He displayed none of the behavioural indicators that would have showed that he attempted to defuse the situation, such as asking questions and slowing the incident down versus using physical handling or increasing communication versus giving directions.

[46] When the grievor told the investigators that he had been assaulted with hot liquids on the job, which was part of his reasoning for his actions, Ms. Neil reviewed the Offender Management System, in which any such occurrence would have been recorded. Her research determined that the majority of officer assaults by inmates with liquids involved urine or saliva. Two incidents had been recorded in which hot liquids had been thrown on officers working on the women's unit in the three years before to the incident at issue, but none had involved the grievor. When asked for more details, he could not remember the inmate's name, so a further search was not possible. But Ms. Neil posited that in her experience, had the incident been significant, the grievor would easily have remembered the inmate's name. In the end, the investigators could conclude only that the grievor was "paranoid", as Ms. Neil described it, about liquids but that he could provide no evidence to the investigators to support the basis for his paranoia.

[47] Ms. Neil reviewed the investigators' conclusions as to the degree of force the grievor had used. The two distraction blows and the physical handling had been excessive. Slamming the inmate's head into the tabletop followed by two distraction blows was not commensurate with the risk he posed at the time. The grievor reacted to the inmate calling him "Buddy" while the inmate picked up his porridge and prepared

to return to his cell. The investigators also concluded that the inmate was upset that day because of circumstances beyond the control of the officers on duty, which required again that week locking up the inmates.

[48] Mr. Danczak was the other CX involved in the use-of-force incident for which the grievor was discharged. He described Bow Unit as being very challenging to work on because of the diversity of the inmates populating it. They display considerable self-harming behaviour and outbursts, so tensions run high among the CXs assigned there. The unit was also prone to staff shortages, which resulted in frequent lockdowns. That upset the inmates.

[49] That morning, another lockdown on the unit was announced; the inmate in question was not happy. The normal unit routine had started, and without notice, the lockdown was announced. The inmates were told to take their breakfasts and return to their cells. Mr. Danczak saw the inmate involved in the incident approach the unit command centre and express his discontent over the lockdown to the grievor, but he was unable to hear what the grievor said to the inmate in return.

[50] Mr. Danczak could see that the inmate was becoming more agitated. The grievor gave the inmate direct orders to lock up, according to Mr. Danczak. When the inmate started towards his cell, the grievor followed him down the range. But the inmate did not go directly to his cell; he stopped at a table to pick up his porridge. The grievor told him to keep going, not to stop. An exchange happened while the two were at the table, but Mr. Danczak did not hear exactly what was said. He described it as "chirping". The inmate was not visibly aggressive at that point; he was not waving his hands and had not assumed an aggressive posture, according to Mr. Danczak.

[51] When Mr. Danczak approached the table where the grievor stood with the inmate, he could hear the grievor yelling orders at the inmate. When the inmate went to pick up something that he had put in the microwave, Mr. Danczak determined that he was being physically uncooperative by not returning to his cell, which raised a red flag for Mr. Danczak. That was when the grievor intervened and took the inmate to the floor. Other inmates looked on.

[52] When Mr. Danczak moved in to assist the grievor with handcuffing the inmate, the inmate grabbed Mr. Danczak's leg. Mr. Danczak then yelled at the grievor in a "panicked tone", as he described it, crying out for assistance. To free Mr. Danczak from

the inmate's grasp, the grievor struck the inmate twice with his knee to distract him, which provided Mr. Danczak the opportunity to extricate himself from the inmate's grasp.

[53] When he was asked to describe the grievor in general, Mr. Danczak said that the grievor was his mentor and his leader. The grievor had taught him how to be safe.

[54] The grievor described his career with the employer. He began working at the RPC in December 1999 and had been assigned to Bow Unit for all but two years of his time after that. After 1999, the grievor had been promoted to CX-02, had become a staff trainer on the use of fire equipment and self-contained breathing apparatus, and had become a member and eventually the team lead of the institution's ERT. As the team lead, he was responsible to present crisis management plans during a crisis. He was also responsible for the ongoing training of ERT members and was a role model for the other team members.

[55] According to the grievor, the inmates on Bow Unit were assigned there because of their psychiatric issues or deteriorating mental health. It comprised inmates classified at several security levels who displayed very unpredictable behaviours. The use-of-force incidents that occurred there were a result of its physical infrastructure. It was an open unit that offered no secure area for staff, according to the grievor's evidence. It had an open concept, which was very noisy, making it hard to contain an incident. The only way to deal with one was to lock down the inmates.

[56] The grievor testified that on the day in question, the CMO called the unit and ordered a lockdown, due to staff shortages. Over the public-address system, the grievor ordered the inmates to return to their cells and tried to address their concerns. According to the grievor's testimony, the inmate in question told him that he would not lock up. Then, according to the grievor, in a calm tone of voice, he engaged the inmate in conversation and tried to de-escalate the inmate's comments. Apparently, the inmate was upset about being locked down yet again that week.

[57] The grievor described the inmate's behaviour as distracting the other inmates from returning to their cells. He was demonstrating heightened physical behaviour; he flailed his hands and demonstrated body language that indicated agitation. In the grievor's opinion, the inmate's tone of voice incited other inmates to negative behaviour and posed a threat to the overall unit. He could see other inmates begin to

agree with the inmate in question and become agitated. The grievor feared that the other inmates would also refuse to return to their cells and that an incident would occur.

[58] The grievor described his interventions with the inmate in question. He began with a conversation and attempted to hear the inmate's point of view and his negotiation options. According to the grievor, this was verbal intervention. The inmate wanted something with which the grievor could not comply and did not allow him to offer anything, so negotiations were not possible. The grievor's comments and suggestions escalated the inmate's anger; his responses became short and vulgar, according to the grievor. Had the inmate asked to be allowed to get his breakfast, the grievor would have allowed it, but he never did ask, according to the grievor. However, in non-emergency lockdown situations, inmates are allowed 10 to 15 minutes after the order is given to return to their cells, to collect their personal belongings. However, on the day in question, once the inmate refused to return to his cell, it was no longer a normal lockdown situation, and he was not entitled to the 10 to 15 minutes before returning to his cell. The grievor expected him to return immediately.

[59] The inmate's behaviour reflected negatively on the grievor's authority in front of the other inmates. The grievor gave him three or four direct orders to lock up before the grievor introduced his physical presence into the scenario by stepping out of the bubble (the secure unit command post) onto the range to deal with the inmate face to face. The grievor is approximately 5 feet, 10 inches, in height and weighed 270 pounds at the time. According to him, the inmate is approximately 5 feet, 8 inches, in height and weighed 180 pounds.

[60] The inmate was given more orders to return to his cell, and he continued to refuse. He had become verbally resistive and physically uncooperative. The situation had escalated. The inmate proceeded down the hallway, past the staircase that led to his cell, to a table. He made no signs that he was interested in any further discussions with the grievor. The grievor testified that he followed the inmate to the table, where the inmate attempted to grab a cup of hot coffee.

[61] According to his evidence, the grievor perceived the cup as full and became scared that he would be assaulted. He never intended to use physical handling, but when his safety was at risk, he determined that it was required. The coffee in the cup

was a weapon, which in the grievor's mind, the inmate intended to use. He had had an experience in which coffee had been thrown in his face on another unit, and he had seen inmates hit by thrown hot coffee. Given his proximity to the inmate at the time, the grievor felt that he was at risk of being assaulted with coffee.

[62] To protect himself, when the inmate went for the porridge bowl, the grievor grabbed the inmate's forearm to mitigate the risk that the coffee posed. He chose physical handling because of his fear of imminent assault, which required an immediate response. He then used an arm-bar takedown because he was most comfortable with that tactic. The initial use of force was the arm bar; it became a takedown because the inmate withdrew from his grasp.

[63] The grievor admitted that he did not perform the manoeuver well. He did not assess the proximity of the tables around him (which were bolted to the floor) and blamed the tables for how the takedown went awry in that the inmate landed on his upper back, head, and shoulder area. When the grievor was asked why he had not used the other tools available to him rather than executing a takedown, he testified that after he grabbed the inmate's arm, he could no longer distance himself. He also determined that he could not use his OC (oleoresin capsicum) spray because he did not have the time to take it off his belt. Had he used it, the rest of the unit would have been cross-contaminated. He did not step back because doing so would have exposed him to hot liquid and because given the location, he could not have safely backed away.

[64] The grievor never planned to use physical handling to deal with the inmate. Once he had the inmate on the floor, he attempted to apply handcuffs with the assistance of Mr. Danczak, who notified the grievor that the inmate had hold of his leg. According to the grievor, Mr. Danczak called out to him and sounded upset and concerned about his safety. In the grievor's mind, his colleague was being assaulted. In an attempt to stop the assault, the grievor used a distraction technique (two knee strikes) to the inmate's head and neck area. The grievor's intent in so doing was to stop the assault and to gain control of the inmate and, ultimately, compliance. In the end, compliance was gained when the inmate was in handcuffs.

[65] The grievor admitted that he underestimated the inmate's size in comparison to his own. He also admitted that he misjudged the space he was working in and that his

size made that "problematic", as he described it. However, in the moment, he thought it was the right thing to do, given the effects of adrenaline and his fear for his safety. He used his training. He testified that in retrospect, he would not have used an arm bar but instead a wrist lock, a twist lock, or a nerve block. That day, he used the technique that he had the most experience with.

[66] After the use-of-force incident, Mr. Bird contacted the grievor. He wanted to meet with the grievor and the inmate to discuss the complaint the inmate had filed concerning the incident. The grievor admitted that he told Ms. Neil that he had apologized to the inmate as is indicated in the investigation report. However, he stated otherwise before the Board. He testified that the inmate wanted an apology from him, but instead, he told the inmate that things had happened because he had feared for his safety at the time. He described the outcome of the meeting as a case of agreeing to disagree and as parting ways after shaking hands. He testified that he agreed to move forward and to build a rapport with the inmate, which was part of his dynamic security role. After that meeting, between April 1, when the incident occurred, and mid-June 2015, the grievor worked approximately 40 shifts on Bow Unit, during which the inmate was present.

[67] The grievor testified that in the 15 years of his ERT career, it had been his first use-of-force investigation and that he had been involved in more than 100 use-of-force incidents in his career. As of his suspension in June 2015 and as of his termination, he had no current disciplinary record.

IV. Summary of the arguments

A. For the employer

[68] The grievor's motivation drives the facts of this case. The employer contended that he used force to exhibit control out of frustration, while he claimed that he used force to protect himself. Based on the case law, there is not much question of the penalty for his actions; it just depends on which version of the facts the adjudicator accepts. The employer's version is more likely based on the facts and the video provided.

[69] In certain circumstances, CXs may use force against inmates. That force is used within the framework set out in the Commissioner's Directives. The grievor did not follow the use-of-force framework, thus violating its first principle, which is to protect

the inmate and the public. The case law is clear. Inmates are a vulnerable population dependent on CXs for the basics of life. They lose their autonomy. They are also vulnerable because they are not to be believed. Since they have custody of this vulnerable population, CXs are in a position of trust (see *Ontario Public Service Employees Union (Gillis et. al.) v. Ontario (Ministry of Community Safety and Correctional Services)*, (2008) 178 L.A.C. (4th) 385).

[70] It is essential that this heightened level of trust in a CX be maintained. Courts, adjudicators and arbitrators have recognized that a physical assault on an inmate by a CX without cause constitutes a breach of trust of the highest order and a most serious offence (see *Ontario Public Service Employees Union (Marshall et. al.) v. Ontario (Ministry of Community Safety and Correctional Services)* (2013), 236 L.A.C. (4th) 91). An assault on an inmate by a CX is fundamentally contrary to the purpose for which the CX was hired.

[71] Despite this, use of force is an essential part of a CX's job. Excessive use of force is contrary to the purpose of that job. Any use of force must be proportionate and appropriate to the extent necessary to control the situation. For that reason, the employer has rigorous frameworks and polices in place with respect to the use of force. CXs know how and when it is appropriate to use force. The SMM establishes the framework for the use of force and is a tool that CXs are to use to determine the appropriate response in a given circumstance.

[72] When an officer goes outside the SMM, as the grievor did, the situation escalates; co-workers are put at risk, and the rule of law is undermined. A CX has the legal right to apply physical force against an inmate, consistent with the proper discharge of the CX's duties. If a CX abuses the right to use force, the inmate is in a position of vulnerability because it is unlikely that the inmate's word would bear more weight in the situation than that of the CX. Because of this vulnerability, the employer places a significant degree of trust in CXs and when that trust is breached, the employer is entitled to treat that breach as proof that the CX does not possess the attributes essential to the proper performance of the CX's duties (see *British Columbia v. British Columbia Government Employees Union (Correctional Services Component)* (1987), 27 L.A.C. (3d) 311 at paras. 66 to 69).

[73] Inmates with mental health issues are the most vulnerable of the vulnerable inmates, and CXs who deal with them do not have an easy job (see *Syndicat des agents de la paix en services correctionnels du Québec c. Québec (Ministère de la Sécurité Publique) (grief de Savard)*, 2013 LNSARTQ 90). Regardless, CXs working in that milieu must keep their cool; it does not excuse an excessive use of force, which would remain a grievous breach of the employer's protocols.

[74] The grievor also grieved his suspension without pay during the investigation into his actions. He was suspended on June 17, 2015, and remained suspended until the date of his termination. As was the case in *Bétournay v. Canada Revenue Agency*, 2017 FPSLREB 37, local management tried to make sense of what happened in the unit on that day, which required a considerable amount of time. The employer's processes to assess the use of force in question were in constant play. As the Federal Court of Appeal held in *Attorney General of Canada v. Bétournay*, 2018 FCA 230 at para. 67, doing otherwise would have encouraged the employer to make a decision as quickly as possible rather than weighing all the relevant considerations before deciding the most appropriate sanction.

[75] On August 7, 2015, the investigators concluded that the grievor had used excessive force against the inmate by initiating a use-of-force handling situation against a non-aggressive inmate and by initiating knee strikes. When the use of force was initiated, the inmate was not demonstrating a threat; nor was he even aware of the grievor approaching him from behind. The use of knee strikes in the circumstance in which the inmate was subdued was an inappropriate option.

[76] The disciplinary hearing was held in September, and in October, the grievor was terminated. There was not an extraordinary lapse of time between the event and the imposition of the disciplinary action.

[77] The question before the Board is determining the appropriate sanction, given everything mentioned so far. A reasonable person would not allow the employer to turn a blind eye to the violence the grievor displayed towards a vulnerable inmate. It is inappropriate and unethical for a CX to perpetuate unprovoked violence on an inmate in the CX's care (see *Albano v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 79).

[78] While it is true that the use of force is an unfortunate reality in the world of corrections, excessive use of force is a serious disciplinary offence that warrants a severe penalty (see *Hicks v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 99; *Legere v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 65; and *Newman v. Deputy Head (Canada Border Services Agency)*, 2012 PSLRB 88).

[79] In the termination letter, the employer set out a number of infractions. However, it has only one finding and only one ground for termination, which is the excessive use of force. In this case, based on the facts, the excessive use of force breached of the fundamental trust required between the employer and its employee. The bullets set out in the letter are examples of what is required of that employee and flow from that trust relationship. Based on the grievor's excessive use of force, the employer can no longer trust him to perform CX duties. For that reason, he was terminated.

B. For the grievor

[80] In *Basra v. Attorney General of Canada*, 2010 FCA 24 at para. 24, The Federal Court of Appeal provided procedural guidance for adjudicators when deciding termination cases. Adjudicators are to answer the following three questions, set out in *Wm. Scott & Co. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 at para. 13 ("*Wm. Scott*"):

> *… [H]as the employee given reasonable cause for some sort of discipline by the employer? If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case? … [If] the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?*

[81] The Board has accepted this line of reasoning many times. The employer's onus is to prove the underlying facts to justify the discipline as well as the appropriateness of the penalty (see the Federal Court of Appeal's *Basra* decision). The employer did not do that in this case. The adjudicator should not rely solely on the video; it must be put into the context of the day. It is not reasonable for the grievor to be judged solely on the video. Some weight must be given to his evidence and that of his witnesses.

[82] Videos are subject to the viewer's interpretation. More weight must be given to the oral evidence of those directly involved in the incident. The grievor's version of events has never changed. Both he and Mr. Danczak testified that Bow Unit is a

dangerous and volatile workplace that houses approximately 100 inmates who are spontaneous, unpredictable, and erratic.

[83] The configuration of Bow Unit, as an open unit, made it impossible for the grievor to isolate the incident. There was no space or time for indecision when things were escalating. Had he not acted when he did, he could have been assaulted. The inmate was inciting other inmates not to lock up that day. He ignored Mr. Danczak's direct orders. The grievor tried negotiating with the inmate, but the inmate was not interested. The OSORs that the CXs on shift that day filed described the inmate as angry and uncooperative.

[84] It is unclear whether the inmate picked up a bowl or a cup; clear is that the grievor believed it was filled with hot liquid. He had seen co-workers assaulted with hot liquids in the past and had had hot liquids thrown at him. He tried to remove the container from the inmate's hands because he believed an assault was imminent. A CX does not have to wait for an assault to happen before taking action.

[85] Commissioner's Directive 567, entitled *Management of Incidents*, defines "assault" as a threat implied through behaviours or actions. To determine if the grievor had a reasonable perception of being threatened, his actions should be assessed from the perspective of a reasonable person. Based on his experience, and based on his reading of the situation, the grievor perceived that he was being threatened. He then used the tactic he was most comfortable with, the arm-bar takedown.

[86] On the stand, the grievor acknowledged that this was a mistake. The inmate was not supposed to land on his head, neck, and shoulder areas. Other options had been available to the grievor, but with the adrenaline rush and the overall need to control the situation, he used the technique with which he was most comfortable.

[87] When Mr. Danczak intervened and the inmate grabbed his leg, the grievor responded with knee strikes to distract the inmate and free his colleague. This was the only option available to him, given the tight quarters he found himself in between the tables; he could not reposition himself. There was no malice or ill-intention in his decision to use knee strikes; it was a matter of practicality. There was a legitimate purpose for his actions, which were carried out in good faith.

[88] The evidence does not support the employer's assertion that the grievor and the inmate had had a disagreement and that the grievor acted out of anger. Everything was done for a specific purpose. When it was over, the grievor spoke to the inmate and explained why he had done what he did. He expressed his willingness to work with the inmate in the future, which they did for approximately two months, without incident.

[89] The employer relied on seven grounds in the termination letter and had to establish each one with clear, cogent, and compelling reasons (see *Lloyd v. Attorney General of Canada*, 2016 FCA 115). It did not prove each one, which requires reducing the penalty.

[90] The grievor's use of force was warranted. It was not excessive and was purpose driven. The SMM is a guide that provides options to follow when they are warranted. The model is not linear and allows for discretion based on the perception each individual brings to an event. Adjudicators should not replace with their perceptions those of someone involved in the events. This case includes video of the incident but nothing showing what led to it. The grievor's position throughout the video is not aggressive or passive; it is defensive. The sweeping momentum of his arm and body when he executes a takedown cannot be stopped. He never intended for the inmate to land on his head. The grievor admitted to his fault in the execution of the takedown and admitted that he had room for improvement. Let him learn from the situation and move on.

[91] Peace officers should not be judged against a standard of perfection. A use of force cannot be measured with exactitude (see *R v. Nasogaluak*, 2010 SCC 6). It is not fair to hold the grievor to a standard of perfection (see *Levesque v. Zanibbi*, 1992 CarswellOnt 2832). Consideration must be given to the circumstances as they existed at the time (see *Anderson v. Smith*, 2000 BCSC 1194). In similar circumstances, other CXs have received only four-day suspensions without pay (see *King v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 84).

[92] The employer led no evidence as to how the grievor's actions discredited its reputation or the correctional service in general. There was no evidence that this incident came to the media's attention. Mere allegations are not proof.

[93] Even if the grievor's actions were worthy of discipline, the penalty imposed was excessive, in light of the Board's jurisprudence and the mitigating factors. He had built

a lengthy career, without discipline. At some point, he had to make a mistake. He has to be allowed to address his mistakes and to continue as a valued member of the employer's workforce. Denying him that is unfair. If the actions for which he was disciplined were so egregious, why was he not suspended immediately? He was a role model to other CXs, and in the spur of the moment, he overreacted. He admitted that what he did should have been done differently, which shows that he understands the consequence of his actions and that he will not repeat them.

V. Reasons

[94] At this outset of the reasons, it is important that I make a finding of fact based on my viewing of the video evidence. To do this, I will describe what I have repeatedly seen on the video recording submitted as an exhibit.

[95] The inmate in question approaches a row of fast-food-type tables, which have stools attached and are bolted to the floor. Immediately in front of him is a staircase. Behind him can be seen a passageway, doorways, and a microwave. He picks up a bowl and reaches for a cup of liquid, which is clear but has been described consistently as coffee. He does not appear agitated. His arms do not flail, as the grievor described. Mr. Danczak described him as calmly standing at the table, picking things up. He speaks, but the recording has no audio.

[96] The grievor enters the video frame. He grabs the inmate's right arm from behind; the cup becomes airborne in the process. Liquid spews under the stairs, where the cup eventually lands and rolls out of sight. The grievor does not retreat. Mr. Danczak approaches the scuffle from the side.

[97] The grievor continues to take the inmate to the floor between the tables. The inmate lands on his upper shoulder, neck, and head. The grievor follows swiftly behind him in what I would describe as a "pile driver" motion. At this point, Mr. Danczak enters to help the grievor gain control of the inmate, who is struggling to get out of the grievor's grasp.

[98] The inmate gets hold of Mr. Danczak's leg. At that point, the grievor recoils his leg and strikes the inmate with a knee twice on the inmate's upper shoulder and neck area. Mr. Danczak and the grievor eventually gain control of the inmate, place him in handcuffs, and begin to escort him away. The video ends there.

[99] The importance of this finding of fact is relevant to which version of the two stories I accept as truthful and most consistent with the evidence before me. If I accept the employer's argument that the grievor was motivated by frustration, I must discount his evidence that he had a genuine fear of being assaulted by hot liquid. That might have excused his actions or at the least might have been a mitigating factor in the penalty determination.

[100] This is why I have taken the unusual step of documenting what I saw on the video, which is that at the time of the incident, no hot liquid could have posed a threat to the grievor. It had been dispensed with by his initial intervention. Having established that, it is clear that by continuing as he did, in the absence of the danger, which had been dispensed with before the takedown, he failed in his duties as a CX to properly apply the SMM at the least and at the most failed in his duties as a CX by mistreating a vulnerable inmate in his care by applying excessive use of force for unjustified motives.

[101] The grievor's representative argued that videos are subject to the viewer's interpretation. More weight must be given to the oral evidence of those directly involved in the incident. The grievor's version of the events has never changed. Both he and Mr. Danczak testified that Bow Unit is a dangerous and volatile workplace, which houses approximately 100 psychiatric inmates who are spontaneous, unpredictable, and erratic. While it is true that the grievor and Mr. Danczak agreed on their descriptions of Bow Unit, it does not assist the grievor. It serves more to underline the vulnerability of the population with which they dealt and the need for special skills when dealing with them.

[102] It is trite law that hearings before an adjudicator are *de novo* hearings. I am not bound by any of the conclusions that emanated from the disciplinary investigation. But in this case, I find that on the stand, Ms. Neil made certain very insightful comments that espoused an opinion with which I concur. Consequently, I agree with the findings of Ms. Neil and Ms. Berger in their report that the grievor demonstrated an excessive use of force on April 1, 2015, in his handling of the inmate in question.

[103] On the balance of probabilities, the information that the grievor provided to the investigators, to his employer, and to this hearing is not credible. It is not consistent with the OSORs that other officers filed, with the video recording that I reviewed

extensively and in minute detail, with the witness called on his behalf, or with the unit's records, in which if the inmate had as the grievor described a history of assaults, violence, and antisocial behaviour, it would surely have been recorded.

[104] Likewise, I cannot accept or believe that the grievor had a real fear of the inmate assaulting him with hot liquid. It is clear to me from the repeated viewing of the video that the grievor spilled the liquid that was within the inmate's reach, which might have been hot, when he took the bowl away the first time. No threat required the actions that he took. His actions were not those expected of an officer as highly trained and experienced as a 15-year veteran of the ERT and an experienced ERT team lead. Furthermore, through his unnecessary overreaction, he put his colleague at risk, which was another inexcusable violation of the employer's policies. Yet, he could not explain his role in creating that risk.

[105] I am confident that the true cause of the incident that day was the grievor's reaction to being challenged by the inmate in front of the other inmates. It was not the coffee that he saw as the threat; it was the threat to his authority that the inmate posed. The entire incident was about a scene that, if I accept the grievor's description of the inmate's behaviour, which I do not as it is not consistent with the description of the inmate's behaviour provided by Mr. Danczak, was created by the grievor's abuse of authority and disrespect for the SMM.

[106] The grievor's actions escalated the situation to the point at which he saw the need to resort to physical handling, which then put his colleague in danger as further force was required to extricate him. At no point did the grievor ever retreat, assess, or reassess. Clear from the video is an officer aimed at taking down and handcuffing the inmate in an unsafe manner in a location where three people were put at risk. At no point after the initial order was given and after the grievor knocked the cup of liquid over did he act as a responsible ERT member or comply with his training or any of the Commissioner's Directives related to the use of force, the first of which is to resolve the situation with the least amount of force required.

[107] After the inmate was given the order to lock up, he would normally have had time to get his breakfast and coffee to take back to his cell. Nothing stopped the grievor from escorting the inmate to the table quietly, securing the breakfast, and escorting the inmate to the cell. This physical presence would have been within the

SMM and would have defused the situation and allowed the grievor control over the liquid he was so concerned about. Again, I can conclude only that the liquid was not the point of concern but rather the inmate's disregard for the grievor's authority.

[108] To me, the grievor's lack of insight into the consequences of his actions is astounding. Only after much prodding on the stand did he concede that he "might have done things better" and that his colleague or the inmate might have been seriously injured as a result of his actions.

[109] What he did not recognize is that it was sheer luck that the inmate involved in that scuffle was not seriously injured or even killed, given the close quarters, the fixed furniture, and the improper application of the arm-bar takedown. An officer with the grievor's experience cannot be driven by emotion, which is exactly what occurred in this circumstance, based on the balance of probabilities and an objective viewing of the evidence. He was fed up with the inmate "chirping at him", as Mr. Danczak said, and he reacted.

[110] Even in the face of the video, which clearly showed that the liquid was spilled as it can be seen airborne across the room before the takedown occurs, the grievor kept repeating to the Board that the inmate had hot liquid in his hand and that the grievor was afraid of being assaulted with it to justify his actions instead of following the SMM, his training, and the Commissioner's Directives.

[111] The grievor's representative argued that to determine if the grievor had a reasonable perception of being threatened, his actions should be assessed from the perspective of a reasonable person. I am confident that a reasonable person viewing liquid spewing across a screen would conclude that any fear of hot liquid had been defused and that given the grievor's extensive training and familiarity with the use of force, he would have by reflex followed the SMM and reassessed the situation rather than using the arm-bar takedown in a dangerous environment. A reasonable person would not have concluded that the grievor had exhausted all options or that he had attempted to communicate with the inmate. A reasonable person would not have concluded that the grievor had attempted to de-escalate the situation or that he had first attempted a lesser intervention.

[112] The grievor admitted that he could have used another approach. At best, this is damning with faint praise! When he was asked what he could have done better, he still

insisted that the situation required taking the inmate to the ground. This was a clear indication to me that even at that late stage, when he was pleading for reinstatement, he did not understand the true nature of why he was terminated. He did not understand the repercussions of his actions on the employer-employee relationship.

[113] The employer did not hold the grievor to a standard of perfection. Consistent with the Supreme Court of Canada's ruling in *Nasogaluak*, the employer examined the circumstances as they existed at the time the use-of-force incident occurred and made its determination based on the factors known at that time. I have made my assessment based on all the evidence before me, including the grievor's testimony.

[114] In my assessment, the grievor has not demonstrated a true understanding of the potential consequences of his actions and would no doubt resort to the same tactics if faced with similar circumstances in the future, which would put the institution, the inmates, and his fellow co-workers at risk. He violated not only CD-060 but also the employer's "Code of Professional Conduct" by mistreating an inmate in his custody. Despite training in the proper methods of the use of force, with annual refreshers, he chose to use methods to control the inmate that were not part of his training and that in fact were excessive. The employer is justified in its concern about the grievor repeating this behaviour should it continue to employ him. Consequently, I do not believe that the employer was unreasonable or wrong in determining that termination was appropriate in the circumstances.

[115] I agree with counsel for the employer's assessment that this is a case of two competing stories and that motivation drives the facts. I also agree that the version of that story that is most consistent with the objective evidence before me is the one in which the grievor used force to exhibit control out of frustration, and for that, termination was warranted, given the vulnerable population with which he worked, his roles as an ERT member and a team leader, and his extensive training in the appropriate application of the use of force and the employer's related policies.

[116] According to Mr. Danczak, the grievor was his mentor and role model. The grievor testified that as the ERT team lead, his role was to be a role model for other ERT members. It was incumbent on him, given his 17 years' service, his team lead role, his ERT membership, and his membership of the inmate treatment team to demonstrate to others the appropriate way in which to deal with a situation such as

the one at issue. The behaviour he demonstrated in these circumstances was not the type that the employer wants other employees to emulate, and the penalty imposed on him, given his position and role as the team lead and a role model, clearly had to send the message to those that looked up to him that inmate abuse will not be tolerated. In my opinion, a lesser penalty, given the circumstances, would not do that.

[117] Contrary to the mention of the grievor's representative in *Lloyd*, this is not a case in which the employer set out a series of violations of CD-060, which is the employer's code of discipline. The grievor was discharged from the CSC because his actions, some of which were enumerated in the discharge letter, resulted in the loss of the employer's trust. He was terminated because the employer could no longer trust him to properly conduct himself in the workplace and to apply the use-of-force policies against inmates.

[118] I concur with this assessment. I have an honest and strong belief that the grievor lacks the insight required not to repeat the behaviour for which he was terminated if he were reinstated, and the employer's loss of trust in him is justified. The employer discharged its onus to prove that the bond of trust has been irreparably broken on the basis of clear, cogent, and compelling evidence.

[119] In sum, I will conclude with answering the questions from the *Wm. Scott* case. The grievor provided the employer with cause for discipline that given the circumstances of this case and based on all the evidence, including the video, the oral testimony, and the exhibits, demonstrates that the employer's decision to terminate the grievor's employment was not an excessive response. Given this conclusion there is no need for me to consider which alternate measure should be substituted in this case.

[120] The parties provided me with numerous cases to support their arguments. While I have read each one, I referred only to those of primary significance.

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

(The Order appears on the next page)

VI. Order

[122] The grievance is denied.

[123] I order the following documents , including the video recording to be sealed:

- Exhibit 2 – Tab 1
- Exhibit 2 – Tab A, C, D, E
- Exhibit 2 – Tab F1, F3, F9, F10, F11, F13, F15, F16
- Exhibit 2 – Tab G1, G2, G5, G7, G8
- Exhibit 3 – Tab 5

[124] I order the name of the inmate to be redacted from the grievor's termination letter dated October 30, 2015, which is located in the Board's case file.

October 10, 2019.

Margaret T.A. Shannon,
a panel of the Federal Public Sector
Labour Relations and Employment Board