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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

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BETWEEN

**LEIGH THOMPSON**

Grievor

and

**DEPUTY HEAD  
(Correctional Service of Canada)**

Respondent

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

In the matter of an individual grievance referred to adjudication

**Before:** Nancy Rosenberg, a panel of the Federal Public Sector Labour Relations and Employment Board

**For the Grievor:** Himself

**For the Respondent:** Karl Chemsî, counsel

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Heard at Calgary, Alberta,  
August 27 to 29, 2019.

**REASONS FOR DECISION**

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**I. Individual grievance referred to adjudication**

[1] At the times of these events, Leigh Thompson (“the grievor”) had been a correctional officer for six years and was classified CX-02. He was employed by the Correctional Service of Canada (“CSC” or “the employer”) at the Bowden Institution (“the institution”), a minimum- and medium-security correctional facility located near the town of Innisfail, Alberta.

[2] On April 2, 2013, the grievor had an altercation with an inmate that resulted in the inmate being taken to the floor, handcuffed, and sent to segregation. A board of investigation (BOI) was tasked with looking into this incident, and on January 16, 2015, the grievor received a 20-day suspension. His discipline letter listed numerous policy breaches. The essence of the alleged misconduct was that he had used unnecessary and excessive force which had resulted in an altercation with an inmate, improperly lifted and dropped the inmate, and submitted an inaccurate report of these events.

[3] The grievor challenged this and took the position that he had used force in accordance with policy and had reported it properly. The grievor acknowledged that in hindsight, he would have written a more detailed report or a second report. However, with respect to his interaction with the inmate, he was adamant that he had followed policy absolutely correctly and would do nothing differently in the same circumstances. On June 4, 2015, his grievance was referred to this Board (named the Public Service Labour Relations and Employment Board at that time) for adjudication.

[4] The employer submitted the investigation report, along with its appendices and other documentary evidence of its policies and procedures on the use of force and reporting. Tracey Farmer, Deputy Warden, Drumheller Institution, chairperson of the BOI, and Acting Warden Nancy Shore testified for the employer. Video footage of the altercation taken from a fixed CCTV range camera was viewed, as was handheld camera footage of the inmate being lifted and dropped to the floor. Mr. Thompson testified on his own behalf and submitted a detailed written rebuttal.

[5] I find that the grievor engaged in unnecessary and excessive use of force against an inmate and that he inaccurately reported the incident. I further find that the 20-day

suspension was not an excessive penalty for this misconduct. Accordingly, the grievance is dismissed.

## **II. Summary of the evidence**

### **A. The use of force incident**

[6] The grievor's altercation with the inmate occurred on Unit 3, A Range, the area reserved for Indigenous inmates participating in the institution's Pathways Initiative. Pathways Initiatives are programs designed to provide Indigenous inmates with opportunities to follow a more traditional healing journey, consistent with Indigenous values and beliefs. The Pathways Initiative at the institution provides an Indigenous program facilitator and access to elders. Inmates are supported and encouraged to engage in traditional cultural and spiritual practices, such as smudging and healing lodges, as well as art and craft projects for which they are provided with tools and materials as needed. The tools are stored in a locked cabinet beside a furnished, circular seating area where inmates can meet with elders.

[7] Inmate F was an Indigenous offender housed on A Range and a participant in the Pathways Initiative. He is described as a low-functioning individual living with mental health issues. The inmate was not a party to these proceedings and his identity is not relevant to this decision; to protect his privacy he will be referred to as "Inmate F", the first letter of his surname.

[8] On the day of the incident, Inmate F was engaged in an approved art project. In his interview with the BOI, Officer Gordon Rose (CX-2) mentioned that Inmate F was in a good mood that morning and had shown Officer Rose some of the beaded lanyards he had made. He had been to see Donna Bishop, the coordinator of the Pathways Initiative. He had smudged a number of his beaded lanyards and elk-hide rattle keychains and had given them to her for Pathways giveaways. He had returned to his room to finish another rattle keychain, for which he needed tape. He had asked Officer Rose for tape earlier, but the officer was busy at the time and told him to come back later.

[9] The grievor wrote in his Statement of Observation Report (SOR) that Inmate F "...approached the panel and demanded a role [*sic*] of tape." The grievor's written rebuttal stated this: "[Inmate F] had been spoken to by numerous staff about

Institutional rules and knew full well that he couldn't have a full roll of tape, and was even offered strips to accommodate his needs."

[10] Officer Rachel Vinet (CX-1) wrote in her SOR that "...Inmate F approached the panel and asked me for some tape." The notes taken of her BOI interview indicate that she elaborated as follows: "I don't know exactly what he wanted, he just said tape so I don't know if he was asking for a couple pieces or the entire roll."

[11] Inmate F's statement is as follows: "...so I went to the council for tape - Vinet the female officer. I ask for tape. Because I clerly don't talk to thompson the male gaurd who attacked me... [sic throughout]".

[12] Officer Vinet told Inmate F that she could give him some tape but not a whole roll. There is no evidence that Inmate F responded negatively, or at all, to this information. However, lacking familiarity with the unit, Officer Vinet looked to the grievor for confirmation that that was the correct response. It was not a verbal question, just a look. At that point, the grievor interjected and, in no uncertain terms, advised Inmate F that the officers did not hand out whole rolls of tape. Inmate F immediately became agitated and verbally disrespectful of the officers, expressing profanities and insults. Because of the verbal outburst, the grievor ordered him to return to his cell and lockup.

[13] Inmate F's account is as follows:

*... she asked why I needed tape and I said for art project she said I don't know if I can give you tape n thompson said no n f\*\*\* off im eating as if I asked for his two cents I did not ask him nor did I want to talk to him eny ways so it trigerd me so I got pissed off and I said f\*\*\* thompson your a real f\*\*\*\*\* jerk pig. He said go to your room n lock up ....*

[Sic throughout]

[14] The grievor stated that Inmate F was "grandstanding" (as the officers refer to it) and that by doing so, he was attempting to incite the unit. Due to the camera's location, Inmate F's verbal outburst was not caught on video; nor was the beginning of his initial compliance, when he turned and walked away from the console area, through the barrier, and onto the range. However, the accounts of this initial compliance are substantially the same. They differ slightly only with respect to the time between the grievor's order and Inmate F's compliance.

[15] Inmate F's statement is not completely clear on the point but seems to indicate that, in his view, he complied: "...He said go to your room n lock up a said whatever f\*\*\* you you allways hated me halfways to my room I stoped n told him that... [sic throughout]."

[16] Officer Vinet's statement to the BOI more clearly describes Inmate F's immediate compliance with the order. The BOI notes taken of her interview state that she reported that when the grievor told Inmate F that the officers "don't hand out rolls of tape here" Inmate F "...threw his arms up, said you effen goofs, FU and as he was yelling he was kind of walking away at the same time."

[17] The grievor, on the other hand, stated that Inmate F did not comply with his order but continued to grandstand at the console in an attempt to incite the unit. He stated that only when he stood up at the console did Inmate F turn and walk away. Therefore, he viewed Inmate F as being not only verbally resistive at that stage, but also physically resistive. In his investigation interview, he estimated that Inmate F was grandstanding at the console for 30 to 40 seconds.

[18] The video shows Inmate F walking through the barrier and proceeding about 10 steps into the range toward his cell. His hands were in the front pockets of his jeans. Inmate F continued his verbal abuse of the officers as he walked. The grievor followed him onto the range continually ordering him to return to his cell, with verbal commands and gestures. Inmate F repeatedly looked over his shoulder as he walked, presumably at the grievor. Then he stopped, turned around and waited in place for the grievor to catch up to him. He took a few small side steps, then a few steps forward to meet the grievor who was striding quickly toward him. They met within inches of each other and can be seen on video standing very close, having a heated verbal confrontation. The inmate's hands remained in his pockets throughout this time. Then, without physical provocation, the grievor began pushing Inmate F forcefully with both hands.

[19] The investigation report states that Inmate F's hands remained in his pockets while the grievor pushed him twice and that only on the third push did he take them out of his pockets and begin swatting the grievor's hands away. It further states that the grievor then pushed Inmate F three more times and that only on the sixth push did Inmate F push back. I see the video somewhat differently. I see that Inmate F's hands

remained in his pockets throughout the verbal confrontation. However, at the first push, he removed his hands from his pockets and defensively swatted the grievor's hands away. Also, I did not see six pushes on the video. I saw three forceful pushes, followed by two or three directional nudges to the shoulder and back.

[20] The video then appears to show some kind of retaliation from Inmate F. At this point in the video they are down the range in a very small space between the furniture and the tool crib. It is difficult to discern the details but it appears that Inmate F may have lunged forward towards the grievor, may have pushed him and/or may have kicked or attempted to kick him. Whatever he did, the grievor's response was immediate - he grabbed Inmate F first around the waist, then proceeded to put him in a headlock and bring him to the floor.

[21] The grievor tells it differently. He stated that Inmate F was "calling him on"; daring him to come out and make him return to his cell. He followed Inmate F onto the range to isolate him and contain the situation, as he was trained to do. In his view, Inmate F was verbally resistive, had been physically non-compliant at the console until he stood up, and would not comply with the order to return to his cell without the grievor's continued physical presence. However, he stated that he did not expect Inmate F to suddenly turn around and get in his face. He stated that at this point, Inmate F was in his personal space and was so close that he felt Inmate F's saliva spray on his face. He extended his hand to distance himself.

[22] At various points in the investigation and disciplinary process, and in his evidence at the hearing, the grievor stated that Inmate F lunged at him, deliberately spat at him, kicked him or pushed him, suggesting that these actions instigated the physical confrontation. He said that Inmate F was physically uncooperative, verbally assaultive, inciting and assaultive toward him. That he assumed a threatening stance and stared through the grievor. That he would not blink, clenched his teeth and threatened to remove the grievor's head. The grievor's written rebuttal describes: "... the incident, in which the inmate did confront me, assault me, kick me, and attempt to overpower me."

[23] Officer Vinet, who followed the grievor onto the range a few seconds after he had followed Inmate F, took out and displayed her OC (oleoresin capsicum) spray but

did not deploy it. A “code 44” (officer needs assistance) alarm was sounded, and four officers responded. Acting Correctional Manager Pappas locked down the unit.

[24] Inmate F was subdued in the prone position with his hands behind his back. The grievor had one knee on the floor and one knee on Inmate F’s back while he attempted to handcuff him. Officer Rose responded and assisted. The officers tried to assist Inmate F to a standing position to be escorted to segregation, but he refused to stand.

[25] The officers grasped Inmate F and brought him to a kneeling position by his arms, which were hyperextended to the rear. Inmate F is quite a large individual. He weighs about 250 pounds, and he went limp, dead-weighting himself. The officers could not sustain their grip on him; Officer Rose tried unsuccessfully to break the fall and injured his hand. As Inmate F’s hands were cuffed behind his back, he could not break his fall and fell face down onto the floor.

[26] Ms. Bishop came and knelt beside Inmate F, spoke to him in a calm manner, and touched his arm, trying to gently coax him through the situation. Inmate F had previously engaged in self-injurious behaviour that involved holding his breath in an attempt to become unconscious. Ms. Bishop removed the lanyard with his cell key from around his neck and encouraged him to breathe and to cooperate with the officers. He responded positively to her. Officer Rose recognized the positive effect of Ms. Bishop’s presence and decided to let that continue for a short interval.

[27] Then he asked Inmate F if he would get up on his own if the grievor went away. He agreed and Officer Rose told the grievor to withdraw. When he did so, Inmate F immediately became compliant, stood up with the assistance of Officer Rose, and was escorted to segregation, where he stayed for two days.

## **B. Convening the BOI**

[28] Ms. Shore was the acting deputy warden at the institution when the incident occurred. She testified that it came to the attention of Warden David Pelham when Corrections Manager of Operations Delvin Albright reviewed the officers’ SORs and raised concerns about inconsistencies between the reports and the video footage. He also raised concerns that the Situation Management Model (“SMM”) had not been applied and that the grievor had not used the least-restrictive option to deal with the situation, as required by policy.

[29] On April 11, 2013, Warden Pelham convened the BOI to look into allegations that five employees had either used or witnessed an excessive use of force and had failed to appropriately report it. Warden Pelham appointed Mr. Farmer as the BOI chairperson and Pam Gahir, Deputy Warden, Edmonton Institution, as a board member.

[30] The BOI reviewed the SORs and interviewed the officers involved as well as Ms. Bishop and a number of other employees who were peripherally involved or witnessed different parts of the events. The BOI reviewed 13 written staff reports, Inmate F's written statement, conducted 6 interviews and viewed the only 2 videos of the events. One showed the grievor's altercation with Inmate F, and the other showed the lift that ended with Inmate F being dropped to the floor.

### **C. Investigation findings**

[31] The BOI determined that the grievor had used excessive force against Inmate F and that he had not reported it appropriately.

[32] The investigation report concluded that he had chosen an incorrect response strategy for dealing with an inmate with mental health issues and had unnecessarily initiated physical contact. It noted that the video evidence did not support the grievor's allegations that Inmate F initiated physical contact by spitting, kicking, or lunging at him. Rather, it concluded that throughout the incident, the grievor's behaviour, actions, and responses had a direct negative impact on Inmate F and escalated the situation exponentially. The situation was not diffused until another officer directed the grievor to remove himself from the scene. When he did so, the situation was immediately diffused, and Inmate F became compliant.

[33] The report determined that the grievor's immediate and brief use of physical handling, once Inmate F did retaliate, was the only appropriate part of the use-of-force incident. However, his behaviour to that point violated policy. The use of force was required only because the grievor had instigated the confrontation. He approached the inmate far too closely. Even had Inmate F gotten too close to him, as the grievor described it, the appropriate response would not have been to start pushing the inmate; instead, Mr. Farmer indicated that it would have been to order the inmate to stay where he was, extend a hand for distance, and step back.



[34] The grievor did not appropriately apply or follow the SMM outlined in the *Commissioner's Directive 567 - Management of Security Incidents*. According to the SMM, an officer has to determine if an inmate is verbally resistive, physically uncooperative, or assaultive. A range of possible responses are provided for each kind of situation. The assessment is fluid and must change whenever new information presents itself. The officer must adapt his or her approach to a sometimes quickly changing situation and must apply the most appropriate, least-restrictive response to the behaviour.

[35] Mr. Farmer testified that initially, the inmate was verbally resistive but was complying with the grievor's direction and walking towards his room. He then stopped walking and turned around, however even then his hands remained in his pockets, and there were still many options open to the grievor before considering physical handling, such as achieving a safe distance, negotiating, disengaging, displaying OC spray, or having another officer or the correctional manager take over.

[36] Although his direction and presence clearly was not producing the desired results, at no time did the grievor's behaviour indicate that he reassessed, re-evaluated, or considered withdrawing from the situation, as instructed by policy. Mr. Farmer suggested that when Inmate F's behaviour was still only verbal, the grievor should have handed the situation over to Officer Vinet. Instead, he made a conscious decision to aggressively and unnecessarily follow Inmate F onto the range and to use physical handling, without justification.

[37] The dynamic security required of the grievor by policy was lacking. Although he was familiar with Inmate F's mental health issues and cultural considerations, these factors did not appear to have been taken into account in the grievor's decision making. As well, a number of staff noted that the grievor had had previous conflict with Inmate F.

[38] The officers' attempt to raise Inmate F off the floor while he was handcuffed to the rear with his arms hyperextended violated policy and training. The BOI did not conclude that Inmate F's fall was intentional or malicious but rather that the officers tried to hold him but lost their grip when he dead-weighted. Nevertheless, the inmate was dropped to the floor due to their disregard of policy and use of an incorrect procedure.

[39] As well, as Mr. Farmer testified, other options were available to deal with the inmate's resistance to standing up. The officers could have moved some chairs to make more room to manoeuvre and gotten down lower to place their hands under Inmate F's armpits and elbows (the way Officer Rose ultimately helped him to stand). They could have tried negotiating, or simply let him talk to Ms. Bishop a bit longer, until he was ready to stand on his own. There was no rush to raise Inmate F.

[40] The BOI further found that the grievor's SOR did not accurately portray either incident. It contained untruthful statements suggesting that Inmate F had initiated the physical confrontation, and it completely omitted the fact that Inmate F had been improperly lifted and dropped to the floor. The BOI found that the grievor had demonstrated a willingness to omit facts and to embellish inmate behaviour and that he had failed to report truthfully. The video evidence contradicted his version of events.

[41] The BOI reported that the grievor had stated that he "... wouldn't do anything different regarding the interaction between himself and [Inmate F]; the only thing would be writing a SOR." He indicated that what he did was "100% accurate" and that if he had "... missed some stuff in his SOR, then he missed some stuff."

[42] The BOI found that the grievor had not complied with *Commissioner's Directive 060 - Code of Discipline*, *Commissioner's Directive - 567 Management of Security Incidents*, *Commissioner's Directive 560 - Dynamic Security and Supervision*, the *Personal Safety Refresher Training Manual*, *Commissioner's Directive 568-1 - Recording and Reporting of Security Incidents*, *Commissioner's Directive 568-2 - Recording and Sharing of Security Information and Intelligence*, and *Commissioner's Directive 567-1 - Use of Force*.

#### **D. Decision on the disciplinary measure**

[43] When the investigation report was completed, Warden Pelham was on leave; it was submitted to Ms. Shore, who was then the acting warden. She gave it to the grievor to give him an opportunity to review the findings, challenge anything in it, or provide any additional information. He submitted a detailed written rebuttal, and a disciplinary hearing was held on May 15, 2014.

**1. The altercation**

[44] A/Warden Shore reviewed the investigation report and its appendices, as well as the grievor's written rebuttal. She reviewed the video footage. She did not attend the disciplinary hearing but was briefed on it, listened to the audio recording and reviewed the notes. She reviewed the jurisprudence dealing with similar cases and consulted with a labour relations advisor about the appropriate sanction.

[45] A/Warden Shore contemplated the grievor's failure to consider Inmate F's cultural and mental health status. Policy requires considering an Indigenous inmate's background and social history. This can include considering how the person was raised and whether there is a family history of residential schools, foster homes, or abuse. All this comes into play with respect to how inmates respond to stress. Inmate F, who lives with mental health issues, requires an ongoing high level of intervention. The grievor said that Inmate F was on his caseload and that he knew him well, yet failed to consider his profile and elevated intervention needs.

[46] She took into account that Inmate F was not assaultive, that the grievor initiated physical contact several times before Inmate F responded in kind, and that the grievor used more force than necessary to deal with Inmate F's behaviour. He appeared to instigate and escalate the confrontation, rather than diffuse it.

[47] She considered that there had been a number of readily available opportunities to respond more appropriately to the situation. Although Inmate F was verbally insulting and threatening, even when he stopped and turned he did not take an assaultive stance. His hands were in his pockets, and he did not look like he was about to strike the grievor. It was improper for the grievor to move in so closely and then to push the inmate, to achieve distance. He could have stepped back to give Inmate F some space. He could have removed himself from the situation or engaged in negotiation and conflict resolution. Ms. Bishop was nearby, in her office. She has a good rapport with all the inmates and could very likely have helped to de-escalate the situation at the outset. Dynamic security includes using the resources at your disposal. A/Warden Shore also considered that even if physical handling had been called for, it would have entailed putting the inmate into a wrist lock, not repeatedly pushing him.

[48] A/Warden Shore also noted that the Pathways range is designed differently from most ranges, which typically are clear of all obstacles. The altercation took place

in a small space between the furniture and the tool cabinet. Pushing the inmate and taking him to the floor in such an environment involved an elevated risk, as he could have lost his balance and hit his head.

## **2. The improper lift**

[49] A/Warden Shore further noted that holding a cuffed inmate in a prone position and lifting him by the arms hyperextended to the rear is a painful and potentially dangerous procedure. It has been known to result in excited delirium, asphyxia and death, particularly when mental health issues or drug use are also present. She referred to *Security Bulletin 08-02*, dated March 12, 2008, which was issued specifically to call the staff's attention to this potential danger after a fatal incident of this type had occurred.

[50] She did not think that the grievor let Inmate F fall deliberately, but said that that did not mitigate the situation - it happened because the officers failed to use a proper lift procedure. Further, there was no need to lift Inmate F right away; they could have waited until he was in a better frame of mind and more likely to stand up on his own. In fact, he readily did so as soon as the grievor removed himself from the situation.

## **3. Reporting obligation**

[51] A/Warden Shore testified that the grievor's incomplete and inaccurate reporting compromised the integrity and reputation of the staff, the institution, and the CSC. Without the video footage, management would have accepted the grievor's reporting of the incident. The staff must uphold the law and be role models for inmates. Otherwise, the trust of the inmates and the public that the CSC will act based on law and policy would be lost.

[52] Officers know the reporting policy and receive training on how to write reports. In A/Warden Shore's view, Inmate F was mistreated, and the grievor failed to properly report it. His SOR contained significant statements that were contradicted by the video evidence. For example, he stated that he extended his hand to create some distance from the inmate when, in fact, he moved in close and pushed him. As well, some significant information was completely missing, most notably any mention of the improper lift, which resulted in Inmate F being dropped to the floor.

#### **4. Impact on Inmate F**

[53] With respect to the impact of the incident on Inmate F, A/Warden Shore noted that, in itself, being sent to segregation is a severe outcome. Segregation can exacerbate mental health issues. She said that the courts had recognized the serious problems associated with segregation and due to this, pending legislation was aimed at abolishing it. She noted that Inmate F was in segregation for two days after the incident.

[54] She explained that time spent in segregation also affects an inmate's security level, which operates on a points system. The time spent in segregation could have prompted a review of Inmate F's security level; or at minimum would have increased his points, taking him closer to a future review. This could have resulted in a transfer to a maximum-security institution with much harsher conditions. Even if it is found that the grievor used excessive force, the time spent in segregation would still count against his points level. This was a very serious impact that could not be undone.

[55] A/Warden Shore acknowledged that inmates often want to be taken to segregation for protection, which the grievor alleged that Inmate F did, and that correctional officers need a legal means to send them there. This sometimes causes an inmate to deliberately create a situation that gets them to segregation. However, A/Warden Shore noted that a correctional officer cannot presume an inmate's intent, and more importantly, whether or not Inmate F wanted to be sent to segregation was irrelevant. It would not change the fact that he was on his way back to his cell when the grievor followed him until he turned around, then moved in and began pushing him.

#### **5. Mitigating and aggravating factors**

[56] A/Warden Shore considered the grievor's years of service, employment record, age, and prior discipline (one reprimand for an off-site matter that did not involve an inmate). She stated that for her, the most significant factors were the fact that the grievor's SOR and his subsequent statements differed considerably from the video footage, that he had instigated the physical contact, and that he still insisted that he did nothing wrong.

[57] She testified that management looks for recognition of wrongdoing, remorse, and accountability. If employees recognize that they had other options and take

responsibility for not using them, there is a higher likelihood that the conduct will not be repeated. The grievor showed no remorse and failed to take any responsibility for his actions; his tendency was to blame others for what had occurred. He accepted none of the BOI's conclusions, thought that his actions had been 100% appropriate, and said that he would change nothing in the future.

[58] A/Warden Shore stated that discipline is not meant to punish but rather to be corrective. It should be progressive, but it depends on the seriousness of the misconduct. She reviewed similar cases with a labour relations advisor, and the jurisprudence indicated that a 20-day suspension would not be unreasonable.

### **III. Summary of the arguments**

#### **A. The employer's submission**

[59] The employer acknowledged its duty to prove that the misconduct happened and to establish that the penalty was not excessive, however, it submitted that, given the grievor's position that there was no misconduct, there is no question before the Board of the appropriateness of the penalty. Accordingly, the employer argues that the Board need only determine whether or not there was an excessive use of force.

[60] It noted that the grievor, faced with many allegations of misconduct, denied each and every one, completely. He refused to even consider the possibility that he had had other options when he deliberately engaged Inmate F in what became a physical altercation and said that he would do the same thing if faced with the same circumstances. These were important factors in determining the sanction.

[61] The employer submitted that each stage of the misconduct must be assessed from when it started and in combination with the other stages. The incident did not begin when the grievor grabbed Inmate F and put him to the ground. That action resulted from the grievor's prior conduct. Had he exhibited proper conduct at the beginning, it is likely that the altercation would never have occurred.

#### **B. The grievor's submission**

[62] The grievor described a different situation. He stated that not only was Inmate F being extremely disrespectful and uttering insults and threats but also, he was physically non-compliant. The grievor stated that Inmate F was grandstanding in front

of the console. He ordered Inmate F back to his cell, but the inmate did not comply and could have caused a potentially volatile situation in his attempt to incite the unit.

[63] The grievor stated that compliance was achieved only when he stood up at the console. Then Inmate F walked away, and he followed, to isolate Inmate F and contain the situation as he was trained to do, keeping a constant physical presence and direction as outlined in *Commissioner's Directive 567 - Management of Security Incidents*. The SMM instructs that dynamic security, staff presence, verbal intervention, conflict resolution, negotiation, and verbal orders are all techniques that should be used when appropriate. All of them were used.

[64] When the grievor used his physical presence by following Inmate F onto the range, he did not expect Inmate F to turn around and confront him. When Inmate F stopped suddenly and turned, he was in the grievor's personal space. The grievor extended a hand, to gain some distance. He stated that he constantly pointed Inmate F toward his cell and gave him verbal orders to return to it. However, Inmate F did not respond or follow directions but rather continued his threatening stance and his threats to harm the grievor.

[65] The grievor raised issues that he said were of concern to him as the altercation played out. One was the proximity of the tool crib which he said might have been unlocked allowing Inmate F or other inmates to retrieve tools to be used as weapons. The other was that the inmate's hands in his pockets caused the grievor to worry that he might be holding a weapon. The grievor cross-examined Mr. Farmer closely about this, inviting him to agree that one must always assume the presence of a weapon.

[66] With respect to the lift, the grievor stated that they were between the couch and the tool cage with minimal space to manoeuvre. Inmate F dead-weighted himself to deliberately extend the disturbance. This was followed by an attempt to render himself unconscious by holding his breath. The officers cannot be held responsible for the inmate's own actions, which resulted in them being unable to hold his body weight.

[67] The grievor further stated that after the incident, Ms. Bishop confirmed that Inmate F had given her all his artifacts. According to the grievor, this indicated that Inmate F intended to create a situation so that he could "check-in" (go to segregation), as he had done many times in the past. Indeed, in the grievor's view, Inmate F had been

trying to segregate himself for weeks, even going so far as to smash computers in the Cultural Centre.

[68] The grievor argued that the employer relied solely on the video evidence and did not consider some of the staff accounts. He also submitted that, without audio, the video footage did not provide the context of the inmate's verbal aggressiveness and threatening tone.

[69] The grievor stated that he dealt with the situation in a calm and professional manner and that he continually re-evaluated the situation while under constant stress from the close proximity of Inmate F and his threats to remove the grievor's head. The grievor used the least-restrictive means necessary as instructed in the SMM, which states that physical handling can be used in a situation in which an inmate is physically uncooperative or physically assaultive. In the grievor's view, Inmate F was both, and physical handling was mandated by policy.

#### **IV. Reasons**

[70] The decisions in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1976] B.C.L.R.B.D. No. 98 (QL) and *Basra v. Canada (Attorney General)*, 2010 FCA 24, provide the framework for the analysis that I must conduct in this case. First, I must consider whether there was reasonable cause for some sort of discipline by the employer. If so, then I must determine whether the employer's decision to impose a 20-day suspension was an excessive response in all of the circumstances. Finally, if I find that the suspension was excessive, I must examine what alternative measure should be substituted.

[71] I find that there was cause to discipline the grievor and that the 20-day suspension was not excessive in the circumstances.

#### **A. Was there reasonable cause for discipline?**

##### **1. Instigating and escalating the altercation**

[72] The key to analyzing these events is to ask the age-old question: Who started it? The grievor seems to have gone out of his way to antagonize Inmate F. In my view, the most significant aspect of the grievor's actions is that they were not a response to any threat or situation created by Inmate F to which the grievor had to respond.



[73] From the staff reports, interviews and Inmate F's statement, it is clear that the grievor and Inmate F had had previous conflict. Sandie Curtis, Chief of Health Care reported that Inmate F had advised her that he had not "gotten along" with the grievor for the past year. Inmate F also mentions this in his written statement and further states that halfway to his room, he told the grievor, "you allways hated me [*sic*]". Officer Rose mentioned that the inmate and the grievor had a long-standing issue and related that as soon as the grievor withdrew from the situation, Inmate F had commented "f\*\*\* him, I hate that f'n lee [*sic*]". A/CM Pappas reported that the two had had a "run-in" a year previously, when in his view, Inmate F had used the grievor to get to segregation. He opined that Inmate F was doing the same thing in this incident.

[74] Ms. Bishop related that she had been trying to help Inmate F by suggesting proactive ways to deal with the grievor. As she put it, "Him [*sic*] and Leigh trigger each other." In his written rebuttal, the grievor recounts that Ms. Bishop had raised a concern in a meeting that Inmate F had told her that the grievor was picking on him. The grievor stated that "... in an attempt to appease Mrs. Bishop ..." he and Inmate F had had a case conference with an elder and a correctional manager which ended with a handshake.

[75] The grievor felt that he had a good rapport with Inmate F. If the grievor truly thought so, it is certainly not what his colleagues saw or what Inmate F experienced.

[76] That is all the more reason that the grievor should have exercised discretion and good judgment initially and simply let Officer Vinet speak to Inmate F at the console. She had already told him he could have strips of tape but not a whole roll and there was no indication that her response had upset him. When she looked over at the grievor for confirmation that her response was appropriate, he could have affirmed that for her with as little as a nod of the head. Instead, he engaged directly with Inmate F, repeating what Officer Vinet had already told him. Depending on whose account is more accurate, the grievor did this somewhat rudely, or extremely rudely. Whichever it was, it was enough to make Inmate F "fly off the handle", as Officer Vinet put it.

[77] It appears that the grievor's unnecessary instigation of the incident with Inmate F started right there. He must have known that he was not the best person to respond to Inmate F and there was no need for him to do so. By intervening, he forced Inmate F

to engage with him rather than with Officer Vinet. He then took it upon himself to rudely deny him something that he likely did not even request, let alone demand. Unfortunately, this intervention triggered Inmate F to begin his verbal abuse.

[78] Both A/Warden Shore and Mr. Farmer were clear that profane and threatening outbursts occur frequently in the correctional setting and do not warrant a physical response as long as they remain verbal only. The grievor's testimony confirmed as much. While initially describing being called a "f\*\*\*\*\* goof" as the worst possible insult in a corrections setting, in cross-examination, the grievor clarified that that was true only for an inmate. As a correctional officer, he said that he has been called that three or four times a day.

[79] In any event, at that point the grievor ordered Inmate F to go to his cell and lockup. The grievor stated that Inmate F did not comply with the order right away and continued to grandstand at the console, attempting to incite the unit and refusing to do what he was told. The statements of Inmate F and Officer Vinet indicate otherwise. The BOI found that Inmate F complied with the order. I also find that he turned and walked toward his cell almost immediately after the grievor directed him to. However, whether he did that immediately, or after 30 to 40 seconds of "grandstanding", once he turned and started to walk, he was in compliance.

[80] The video shows Inmate F continually looking back over his shoulder as he walks away, apparently in reaction to the grievor, who is following at a short distance continually ordering and directing him to his cell. The grievor said that officers are trained to follow through and make sure their orders are complied with. However, his order was already being complied with and both Mr. Farmer and A/Warden Shore were clear that policy does not dictate that a complying inmate must be followed to ensure continued compliance. Mr. Farmer stated that the grievor could have simply watched Inmate F from the console.

[81] Inmate F had his hands in his pockets and was initially physically compliant, as he walked toward his cell as directed. Physical presence was not called for. Even if the grievor genuinely felt that there was a need to escort Inmate F, another officer could have done it. Officer Vinet was right there and had been first engaged by Inmate F. Other officers were close by, as well, and Ms. Bishop was nearby in her office and could

have assisted. It was not an emergency situation to which the grievor had to respond immediately. There were other options and time to consider them.

[82] Although Officer Vinet followed the grievor out to the range after a few seconds, she did not do so because she thought their physical presence or further verbal direction was required to ensure Inmate F's compliance with the order. She indicated no concern that Inmate F would not return to his cell on his own. Her reports indicate that they followed Inmate F because they wanted to talk to him about his behaviour in his cell and not out on the range, where other inmates could have been incited by the disturbance.

[83] In my view, following Inmate F onto the range and continuing to verbally direct him to comply with the order he was already complying with, was a gratuitous display of authority. The grievor testified that he knew the inmate well, that Inmate F was volatile and had smashed computers, that he had tried to swallow razor blades, that on a number of occasions he had held his breath hoping to achieve unconsciousness and that he had created situations in the past to go to segregation. Despite all that, instead of de-escalating the situation that he had created, the grievor needlessly antagonized Inmate F until he stopped walking and turned around.

[84] The video appears to me to confirm that Inmate F made a deliberate decision to turn around, as he told Ms. Curtis he did, when she assessed him in segregation. As she reported his account to her on this point, "Inmate F was told to lock up, but after heading toward his cell, he decided to stop and argue instead of following the officer's direction."

[85] In my view, when Inmate F turned around he was no longer compliant and as I understand the policy, the grievor is correct that physical handling became an option at that point. However, context is everything. Just being an option does not make it the first one to use in the absence of indicators that suggest it is necessary. The SMM lays out a range of possible responses that can be used depending on an officer's assessment of the situation. The officer must apply the most reasonable measure to prevent, respond to, and resolve situations.

[86] Events like this can change quickly, and the correct response is not always immediately evident. However, when Inmate F stopped and turned, this presented another opportunity for the grievor to reassess, to recognize that his strategy was

making the situation worse, and to change tracks. Inmate F did not exhibit an aggressive or assaultive stance. It is clear on the video that he simply waited for the grievor to reach him, hands still in pockets, and then took a few steps forward to meet him.

[87] At the very least, it would have been prudent for the grievor to stop advancing, to keep a safe distance. Instead, he continued advancing until he was inches away from Inmate F; much too close. The grievor's claim that Inmate F suddenly turned and got in his face such that he had to extend a hand to distance himself is patently false. It was the grievor who got in too close and stayed there. A short verbal confrontation followed, and then as the investigation report indicates and the video clearly shows, the grievor initiated physical contact and forcefully pushed Inmate F, three times by my count.

[88] Inmate F's hands did not remain in his pockets through the first two pushes as the investigation report states. However, they did stay in his pockets when he stopped walking, turned around, and waited for the grievor to advance. They stayed in his pockets when he took a few steps forward to meet the advancing grievor. And they stayed in his pockets throughout the whole verbal confrontation. Inmate F's hands came out of his pockets only when the grievor pushed him. He swatted the first push away and continued to deal with the grievor's subsequent pushes the same way. These were clearly defensive moves that were made to avoid being pushed.

[89] The grievor's alleged concern that Inmate F's hands in his pockets suggested a possible weapon was not credible. The grievor's SOR made no mention of such a concern. Nor did his use of force report or his six-page rebuttal. In his investigation interview, the grievor was asked where Inmate F's hands were. He replied that he couldn't tell; he was too close. At the disciplinary hearing, he stated that Inmate F's hands were not in his pockets. The first time the grievor mentioned any concern about a possible weapon because Inmate F's hands were in his pockets was at the hearing. Had a potentially exculpatory concern such as this been present, there is little doubt that it would have been mentioned long before the hearing. Further, it stretches credulity to suggest that the grievor's response to a concern about a weapon in the inmate's pocket would be to move in and stand inches away from him, as the video clearly shows that he did.

[90] Similarly, his alleged concern about the possibility of an unlocked tool crib containing potential weapons was not credible. While the grievor may have had this concern, (and he did mention it in his investigation interview) it is clear that it did not weigh too heavily on his mind given that he pushed and directed Inmate F down the range and right into the very small space between the tool crib and the furniture. The scuffle and take-down that ended the altercation took place directly in front, and within arm's reach of the tool crib. If the grievor had had a real concern about the tools he would undoubtedly have directed Inmate F down the range on the other side of the furniture and nowhere near the tool crib.

## **2. Dropping Inmate F to the floor**

[91] The second part of the grievor's misconduct occurred when he and Officer Rose improperly lifted Inmate F from a prone to a kneeling position by hyperextending his arms behind his back. They lost control and dropped Inmate F face down, on the concrete floor. This was a very serious event, undoubtedly painful and humiliating in the moment and it could have resulted in lasting damage to Inmate F. Both A/Warden Shore and Mr. Farmer testified that it could also have seriously damaged the CSC's reputation and eroded trust in the institution.

[92] The officers' actions were contrary to virtually everything the training manual teaches about lifts. Inmate F was lying on his stomach. The officers should have been on their knees but were standing. His head should not have been forced down. His arms should not have been hyperextended. They did not tell him what they would do at each step; an important aspect for inmate safety when officers engage in physical handling. The employer's evidence clearly showed that the lift was wrongly executed and that it was contrary to policy.

[93] As an additional comment on this issue, I note the complete silence surrounding it not only from the grievor but also from every other officer who was involved or who witnessed it. It is the one thing that did not show up in anyone's SOR. From that silence, an inference could be drawn that the staff was aware that it was an improper lift.

[94] In his interview, Officer Rose acknowledged that it was an improper lift and apologized for not including it in his report.

[95] The grievor did not acknowledge that the lift was improper, stating that he saw nothing inhumane about it and characterized the possibility of asphyxia resulting as absurd. He expressed the opinion that the officers could not be held responsible for Inmate F's deliberate action of dead-weighting himself - that the inmate was to blame for his own actions. However, the grievor could not explain why they were using an improper procedure in the first place, except to say that Officer Rose was in charge of the lift, he was just assisting.

[96] Explaining why his report contained no mention of it, he stated that he was trained to write concise reports that answer the questions of who, what, where, and when and that a report should contain no fluff. He said that it wasn't relevant and that it just never crossed his mind to report it. These are rather telling responses given that they refer to using a prohibited procedure resulting in an inmate being dropped face down onto a concrete floor with no way to break his fall.

[97] The employer referred to *Security Bulletin 08-02*, which had been issued to advise staff of the potential of a very serious consequence for an individual held in such a position, which includes a risk of excited delirium, asphyxia, and possible death. The grievor was adamant that there was little to no such risk in this case and implied that the risk described in the bulletin was exaggerated. A/Warden Shore testified that it is evident that not every such hold or lift will result in severe illness or death. However, where there is a potential for such a serious outcome, even if it happens only rarely, it simply must not be done. The policy aims to avoid possible serious harm to inmates, and it must be respected.

### **3. Inaccurate reporting and reliability of video evidence**

[98] The third aspect of the grievor's misconduct was the failure to meet his reporting obligation. A/Warden Shore testified that the CSC uses SORs to ensure that everyone stays safe and that any procedural deficiencies are corrected. They can also be used in criminal processes if an inmate or staff member is criminally charged. Complete and accurate reporting is extremely important in the CSC.

[99] This is the grievor's entire report of the physical altercation with Inmate F, as written in his SOR:

*[Inmate F] came towards me and I put my hand out to distance myself with him as he was less than a foot from my face. He*

*swatted my hand and continued to call me on. [Inmate F] was physically assaultive by striking me in the chest then lunging at me. I grabbed his waist and directed him to the ground....*

[100] The video footage contradicts that statement in several ways, by showing the following:

- While Inmate F did take some steps toward the grievor, he did so only when the grievor quickly advanced toward him. He did not aggressively advance on the grievor; rather, he stood and waited for him and then took some steps toward him until they met.
- The grievor did not extend his hand to distance himself; rather, he forcefully pushed the inmate several times, with both hands.
- Inmate F did not strike the grievor in the chest or lunge at him before the grievor instigated physical contact; the inmate may have done both of those things in retaliation but he did not instigate physical contact as implied.
- Initially, the grievor did grab Inmate F by the waist, but then immediately proceeded to a headlock, which he did not include in his report.
- The inmate was lifted improperly and dropped, which he did not report.

[101] The grievor submitted that the video footage was unreliable as it did not capture everything, in particular the grandstanding at the console, and it lacked audio, thereby failing to convey the threatening and stressful context of the incident. He referred to *King v. Deputy Head (Correctional Service of Canada)* 2014 PSLRB 84.

[102] I note firstly that the adjudicator's comments in *King* about lack of audio were made in the context of many serious reliability problems with the video in that case. For example, among other issues, there was footage from two other cameras that likely would have provided a better and unobstructed view of the incident that were not viewed by the investigator or entered in evidence.

[103] The Board dealt with a similar argument regarding audio in *Hicks v. Deputy Head (Correctional Service of Canada)* 2016 PSLREB 99 ("Hicks"). At paragraph 69 the Board comments as follows:

*The grievor's representative also argued at length that the video...cannot be relied upon because it lacks audio and context. She relied primarily on King and its adjudicator's comments at paragraph 103. This case is not about context. Nor is it like one described in Legere, in which the employer alleged that the grievor in that case said something to an inmate, which instigated one inmate assaulting another. In both cases, without an audio recording, there was no evidence to support the employer's decision to discipline the grievors. This case rather would fall*

*within the following comment of the adjudicator in King: "...there may be circumstances in which a lack of audio on a surveillance video is not a problem..."*

[104] It is certainly true that silent video footage cannot always convey the entire context of a stressful incident. However, the employer was clear that there was no dispute that the inmate was loudly disrespecting the officers and threatening the grievor. They were equally clear that this is not unusual and that an inmate's actions often speak louder than his words. The grievor's own testimony with respect to the frequency with which a correctional officer is confronted by this kind of verbal assault, bears this out.

[105] I agree with the reasoning in both *King* and *Hicks*, that the extent to which lack of audio poses a problem, if at all, depends on the circumstances. In this case, in my view, it does not pose a problem. As A/Warden Shore stated, even if physical handling had been necessary, the officer would have been expected to put the inmate in a wrist lock, not repeatedly push him. With or without audio, the video clearly shows that the grievor made the first physical contact by forcefully pushing the inmate.

[106] The grievor also submitted that the employer placed too much reliance on the video and ignored some staff accounts. The employer did discount some of the staff reports of the altercation, as have I, because the video quite clearly shows them to be inaccurate. Several accounts imply that the inmate instigated the physical confrontation. The video shows clearly that he did not.

[107] As for the improper lift and drop, not one officer reported it. Not one. Without the video footage, the employer would have been entirely unaware of it. The grievor testified that it was irrelevant and it just did not cross his mind to report it. A/Warden Shore testified that officers' reports sometimes fail to mention important matters due to simple negligence, however, when different staff members consistently omit the same information, it is usually deliberate.

[108] The importance of accurate reporting could not be more clearly illustrated, than it was in this case. Based on the staff reports alone, had there been no video footage, it is unlikely that there would have been any investigation at all. Rather, management would simply have concluded that Inmate F assaulted the grievor, as reported, and was



put in segregation. The consequences of that could have been extremely serious for Inmate F.

#### **4. Conclusion: the misconduct was proven**

[109] Regrettably, at times, the use of force must occur in correctional institutions. To deal with that reality humanely and reasonably, policies and procedures are in place that strictly set out when the use of force is appropriate and necessary; how it is to be applied with the least harm to the inmate, staff, and others; and how it is to be reported. All officers are trained to know the policies, to understand the procedures, and to be able to carry out the techniques. Failure to follow the policies and procedures is a violation of the CSC's *Code of Discipline*.

[110] I find that the grievor used excessive force when he instigated and exacerbated an altercation with Inmate F and when he executed an improper and dangerous lift. In addition to these acts of misconduct, I find that he did not provide a complete, accurate, or truthful report of these events in his SOR, his use of force report, his investigation interview, his written rebuttal or at his disciplinary hearing. Violating his reporting obligation also constitutes serious misconduct.

#### **B. Was a 20-day suspension an excessive penalty?**

[111] The grievor did not submit that if cause for discipline was found, that a lesser penalty should be substituted. He simply argued that there had been no misconduct whatsoever. The employer submitted that, therefore, there was no issue with respect to the appropriateness of the discipline before me. I disagree.

[112] I believe that since I have found cause for discipline, I am obligated to determine whether the penalty was an excessive response in all the circumstances. As the Federal Court of Appeal specified in *Basra* at paragraph 26, “[t]he employer bears the onus of proving the underlying facts which are invoked to justify the imposition of discipline...[t]his applies to both the facts justifying the imposition of the discipline as well as the appropriateness of the discipline.”

[113] Accordingly, I have considered whether the penalty was excessive and whether it should be reduced.

[114] A/Warden Shore took into consideration the grievor's age, years of service, employment record, and prior discipline. He had only one reprimand for an off-site

matter that did not involve an inmate, however, she noted that the grievor had also shown a lack of remorse or accountability in that matter.

[115] None of these considerations served to significantly mitigate the misconduct. On the other hand, there were three serious aggravating factors: the credibility issues raised by the stark differences between the grievor's account and the video footage, the fact that his use of force was not only excessive but was instigated by his own actions and the grievor's lack of remorse and unwillingness to see that he had done anything wrong.

[116] I was referred to Hicks and to *Ontario Public Service Employees Union v. The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services)*, 2010 CanLII 38788 (ON GSB). In both of these decisions, 20-day suspensions for excessive use of force were upheld.

[117] In *Hicks*, an inmate punched one of five officers escorting him. The grievor in that case then punched the inmate six times in the back and shoulder. In *Hicks*, unlike in this case, the inmate had instigated the physical contact. However, he was under the control of the officers, and there was no need for the grievor to strike him. There was also a failure to properly report in *Hicks*, as in this case. The Board commented on the penalty as follows:

...

*71 The case law clearly confirms that excessive use of force when restraining an inmate is a serious disciplinary offence, as is a failure to accurately report the events in an OSOR ....*

...

*76 ...The combination of the two infractions warranted a severe penalty, which the employer determined was a 20-day suspension without pay. In my estimation, it was neither unreasonable nor wrong. In many of the cases cited by the counsel for the employer, the employees in them were terminated for such infractions, which would also have been reasonable in this case.*

...

[118] I was also referred to *Rose v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 17, a case in which a discharge for excessive use of force was reduced to a one-year suspension. The misconduct was a kick to an inmate's buttocks. A number of mitigating elements distinguish that case from this one, the most important being that

the grievor admitted that what he did was wrong, was remorseful, and apologized. The adjudicator concluded that the grievor had learned his lesson and that he was unlikely to repeat the misconduct in the future.

[119] Finally, I was referred to *Roberts v. Deputy Head (Correctional Service of Canada)*, 2007 PSLRB 28, in which the grievor was discharged for excessive use of force. The *Roberts* case bears the greatest factual similarity to this matter, in that, the adjudicator found that the grievor in *Roberts* had unnecessarily inserted himself into a situation, had responded physically to verbal insults, had not been truthful in his reporting, and had failed to take responsibility. He had even stated exactly what the grievor said in this case, which was that he would do the same thing again. The discharge was upheld, and the adjudicator commented as follows:

...

*317 The grievor was adamant in his contention that he did nothing wrong in the treatment room. More to the point, he testified that "I would do the same thing again." Statements of this type ... strongly suggest that he was, and is, unprepared to accept any responsibility for his actions ... I expect that the grievor will remain convinced that all of his actions were appropriate and undertaken with good will despite the finding in this decision that he used excessive force on Inmate A. There is clearly no element of remorse here, and certainly no apology, that could serve as mitigating factors.*

...

[120] Unfortunately, those comments are equally applicable to this case. The grievor did not demonstrate any remorse or willingness to accept responsibility for his actions.

[121] Considering the serious nature of the misconduct, the equally serious aggravating factors, and the disciplinary sanctions taken in other similar cases, there is no basis upon which to find that the 20-day suspension was excessive.

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

*(The Order appears on the next page)*

**V. Order**

[123] The grievance is dismissed.

[124] I order the respondent to vet the exhibits it filed and to provide submissions on any redactions or other confidentiality measures that may be required to protect Inmate F's name or identifying information. The Board will temporarily seal the original exhibits pending the parties' further submissions on this issue. The respondent shall provide its submissions within 10 days of the date of this decision. The grievor may then provide a response to those submissions within 5 days.

[125] I will remain seized of this matter for the purpose of determining any further confidentiality measures.

July 16, 2020.

**Nancy Rosenberg,  
a panel of the Federal Public Sector  
Labour Relations and Employment Board**