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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

APRIL MICHEL

Grievor

and

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

Respondent

Indexed as

Michel 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: Daniel Sorensen and Brian Grootendorst, counsel

For the Respondent: Pierre-Marc Champagne, counsel

Heard at Edmonton, Alberta,
February 18 to 21, 2020, and via teleconference October 13 to 15, 2020.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, April Michel, alleged that the termination of her employment by the Correctional Service of Canada (CSC or “the employer”) was without cause. On January 5, 2018, she was terminated from her Correctional Manager (CM) position at the CSC’s Edmonton Institution (EI) in Edmonton, Alberta, following an assessment of that workplace (“the TLS report”). That report revealed allegations of her involvement in physical and sexual assaults of employees, personal and sexual harassment of employees, inappropriate conduct involving inmates, and other inappropriate conduct, including the bullying and intimidation of employees, the misuse of CSC property, and breaches of the employer’s policies, procedures and directives of other legislation.

[2] Following the release of the TLS report, the employer received information that the grievor failed to intervene in and did not report an incident in which two male correctional officers (CX) handcuffed a female CX to a chair and then proceeded to draw on her with a permanent marker. The events allegedly occurred on a evening shift in September 2015 while the grievor was on duty and conducting rounds on G/H unit at EI.

[3] The employer conducted a disciplinary investigation into the allegations, on the basis of which it concluded that the grievor violated standard one (*Responsible Discharge of Duties*) of the employer’s (*Standards of Professional Conduct, Commissioner’s Directive 060, Code of Conduct (CD-060)*, and *Commissioner’s Directive 001-Mission, Values and Ethics Framework of the Correctional Service of Canada (CD-001)*). It was determined that the grievor’s conduct lacked the integrity and professionalism expected of a CSC employee for which she was terminated.

II. Summary of the evidence

[4] In March 2017 the employer conducted the workplace assessment at EI related to allegations that the workplace was toxic. Based on the results of that assessment, the employer determined that something had to be done to address the culture at EI. A series of town-hall meetings were held at which the CSC’s then Commissioner spoke to the employees in attendance and told them that their careers were at risk if they knew of employee misconduct and did not report it. A tip line was set up for employees to report anything they thought needed to be addressed; an EI version of a “see

something, say something” line. The investigation of the grievor arose from a report to the line made by a CX who attended a town hall-meeting.

[5] Clovis Lapointe was the acting warden at EI when the convening orders for the disciplinary investigations were issued. The orders were generic and were used to investigate many officers identified in reports to the tip line. Other officers were investigated based on the evidence garnered in the investigation process. Initially, the investigation period was limited to January 1, 2014, to September 12, 2017 (Exhibit 1, tab 5), but it was later amended to reach back to January 1, 2011 (Exhibit 1, tab 7), as more information was uncovered and more reports were made to the tip line.

[6] The investigators were selected in consultation with the employer’s Labour Relations office based on their availability and skill sets. The employees who were investigated pursuant to the convening orders never received specific written allegations relative to the charges against them, only the generic convening order, which was all-encompassing.

[7] An investigation committee was struck, which investigated three allegations against the grievor. They arose after the town-hall meetings in March 2017, when it was reported that in approximately September 2015, the grievor told two CXs that she had just seen a female CX handcuffed to a chair while two male CXs drew on her face with a Sharpie. The grievor did not deny observing the behaviour to the investigators. According to the employer, she did not explain why she did not try to stop or report it. Still according to the employer, her opinion was that it was not her job to deal with EI’s toxic environment.

[8] Denise D’Astous testified that she was one of the five people who formed the investigation committee that the employer created to investigate allegations about the grievor that arose from reports made to its tip line. The committee’s mandate was to investigate allegations of physical and sexual assault, physical and sexual harassment, and inappropriate conduct, bullying, and intimidation of employees by other employees as well as inappropriate conduct toward inmates, misuse of CSC property, and breaches of the employer’s policies, procedures, and directives, and of other legislation.

[9] Ms. D’Astous explained that after the TLS report was released, the CSC’s commissioner organized the town-hall meetings at EI at which he informed those in

attendance that if they knew of improper conduct, they had to come forward and report it. The tip line was set up, and information reported to it was passed to Ms. D'Astous' committee to investigate. The committee's mandate was disciplinary. Reports that while on duty, the grievor had witnessed the female CX handcuffed to a chair and had not intervened were referred to the committee for investigation. A second report that was investigated alleged that the grievor was a bully. Two CXs were interviewed about the allegations against the grievor, Helen Richards and Kim Tinnis, a CX-03 at EI.

[10] According to Ms. D'Astous, Ms. Richards reported to the committee that one night in September 2015, she was working the evening shift at EI on E unit when at 20:00, the grievor came to her unit to sign the logbook. Ms. Richards reported that while laughing, the grievor told her that the "boys" on G/H unit had handcuffed a female CX to a chair and drew on her face with a Sharpie. The grievor then reportedly left Ms. Richards' unit. Ms. Richards then discussed with Ms. Tinnis that it was wrong that as the CM, the grievor had done nothing to assist the female CX.

[11] Ms. D'Astous reported that Ms. Tinnis's version of the events was that the grievor laughed when she recounted the event to her and that the grievor said, "those boys". Ms. Tinnis told the committee that she did not report the event to the employer earlier as she saw no reason to, according to Ms. D'Astous.

[12] When she was interviewed by the investigation committee, the grievor stated that in September 2015, she was a newly appointed CM and was new to EI. She had transferred there from the Edmonton Institution for Women (EIW). She recalled doing the rounds that night starting in G/H unit. She recalled seeing the female CX tied to a chair while the two male CXs, CX Spilsbury and CX Fraser, attempted to write on her face with the Sharpie. The grievor reported that upon entering the unit office and seeing the activity, she said, "Seriously, guys", following which the activity stopped, and the female CX went to the washroom to wash off the writing. The grievor reported hearing the female CX state that the last time CX Spilsbury and CX Fraser drew on her face, it had been hard to wash off. At the time, the grievor did not see anything drawn on the female CX's face.

[13] The grievor described the activity to the investigation committee as horseplay. She did not consider that the female CX was in any danger, so she did not follow up

with the female CX. When the grievor then went to E unit, she talked to CX Tinnis about what she had seen. She denied laughing and stated that she had been in disbelief over what she had seen. Employees at EI considered the female CX involved as “one of the boys” from G/H unit. The grievor claimed to the investigators that in hindsight, she should have reacted differently to the situation.

[14] According to Ms. D’Astous, the grievor returned from vacation in September 2017 and heard rumours that people had spoken to the tip line about her. She then spoke to Ms. Richards, Ms. Tinnis, EI’s assistant warden, operations (AWO), and EI’s deputy warden about the rumours. This was the root of the allegations that the grievor was bullying her colleagues.

[15] Since the investigation committee was not permitted to interview anyone who was the subject of an ongoing criminal investigation, it was very limited as to who it could interview with respect to the allegations it was charged with investigating, according to Ms. D’Astous. Even though the grievor provided a list of 14 character witnesses, the committee interviewed none of them with respect to her, although Mr. Spilsbury was interviewed about other incidents. Given the convening order’s due date to complete the report, the committee proceeded based on the information it could obtain rather than waiting to obtain some from others who might have been involved in criminal processes.

[16] Regardless, based on the information the committee was able to secure, it concluded that the grievor did not speak to the female CX to ensure her safety and that she did not stop the two male CXs. She did not report the incident, counsel the male CXs, or investigate further. As a result, the committee concluded that through her inaction, the grievor violated her CM obligations. She never denied that the incident occurred; she denied her reaction, which had been reported.

[17] Ms. Richards testified that she has been employed as a CX-01 at EI since 2000. In October 2017, she received a phone call from Mr. Lapointe, EI’s warden, advising her that she was required to meet with the investigation committee to discuss her call to the tip line.

[18] Ms. Richards testified that she attended the town-hall meetings and that she heard the Commissioner’s directions that an employee would be disciplined if the employer found out that the employee knew about something and did not report it.

Ms. Richards started thinking about things that had occurred while she was at work, with the intention of reporting them to the tip line, and concluded that she should report an incident from September 2015 that she had not recorded or reported that had occurred when she and Ms. Tinnis were partners on an evening shift. Ms. Richards felt that it was time to report it because a number of people had been removed from EI, and those remaining, including her, presumed that they had been fired for not reporting incidents. So, she feared for her employment. She thought that the events of that night had been odd, so to preserve her employment, she reported them.

[19] According to Ms. Richards, she reported the incident involving the grievor because through the rumour mill, she had heard of many things that had happened to the female CX while at work at EI. Ms. Richards thought that the incident in particular, which the grievor had witnessed and had not intervened in, was an important piece of that puzzle. Ms. Richards had discussed the incident only with her husband and the investigators. Eventually, she called Ms. Tinnis to ask if she remembered the incident and to tell her that she had reported it. The entire interaction with the grievor that gave rise to the tip line report lasted less than two minutes. Ms. Richards did not know the grievor and did not know that she was new to her CM role.

[20] According to her testimony, Ms. Richards reported to the investigators that she was not sure whether anything had happened on G/H unit on the day in question. She did not know whether it had been a joke, but she questioned why the grievor had not taken any action to stop whatever was going on. Ms. Richards would have expected a CM to stop such an incident, remove the female CX from the situation, and report the male CXs. The female CX was known within EI as one of the “guys” who got along with everyone on her unit; she was part of the team that worked on G/H unit. When things came to light after the workplace evaluation earlier in 2017, Ms. Richards saw things in a different light; it did not appear to her that the female CX had just been getting along with her workmates.

[21] The investigation committee interviewed Ms. Tinnis with respect to three people it was investigating, including the grievor. She told the investigators that the grievor laughed while telling her about what the grievor had just seen on G/H unit, which was that the female CX had been handcuffed to a chair while two fellow male CXs wrote on her face with a Sharpie. Ms. Tinnis testified that she had been shocked that a CM did nothing to stop it and that she had not known what to say to the grievor. She

remembered the grievor laughing and saying something about “those guys” on G/H unit. It was known that horseplay was common on shifts there.

[22] Ms. Tinnis did not report it at the time; nor did she report it to the tip line. She would not have reported it. She did not remember it until she spoke to Ms. Richards, who reminded her of it. Ms. Tinnis knew that the grievor was new to the CM role. She had come to EI as a block trainer and would not have been aware of the hostility that existed there when she became a CM, in Ms. Tinnis’ opinion.

[23] The grievor testified that she transferred to EI from EIW in 2014 as a CX-02. She stayed at EI for approximately 1.5 months and returned to EIW for 3 months to accept an acting CM position. In February 2015, she returned to EI to accept an acting CM position, to which she was appointed in March 2015. She remained in that position until she was suspended on November 3, 2017, and terminated on January 5, 2018. During her time with the CSC, the grievor received the standard CX and CM training. The CM training did not deal with staff relations or conflict management. She completed an online program on supervising staff and completed the institutional management program. As part of the employer’s talent management program, she was the acting assistant warden, management services. At no point in her career had she ever been involved in a disciplinary process.

[24] According to the grievor, she was terminated for breaching the employer’s policy because she did not report an incident she had witnessed on her shift. At the time, she considered it horseplay by a group of individuals known within EI for doing that. She did not see it as harmful.

[25] The grievor testified that at the time at issue, she had been new to her CM role at EI. She remembered doing her rounds. She left the segregation unit and travelled clockwise through EI. She arrived at G/H unit. CX Spilsbury was sitting at the desk in the office. The female CX was sitting in a chair. She was laughing. To the grievor, she appeared restrained, probably by handcuffs. The grievor remembered that CX Fraser was on her left and that other CXs were present. According to her testimony, she talked to the female CX, who laughed and told her that that happened on G/H unit; those working there did these things. The grievor insisted that she told the group, “Seriously, guys”. She remembered the female CX saying, “Come on guys; stop. Last time, it took a long time to wash off”, (referring to the Sharpie residue). The grievor

testified that she saw marks on the female CX's arms but none on her face. According to the grievor, when the female CX asked to go to the washroom, someone released her, although the grievor was not sure whether it was CX Spilsbury or CX Fraser. When the female CX left the room, she was still laughing, according to the grievor.

[26] Thinking that she had stopped the horseplay, the grievor left to complete her rounds. She insisted that she did not laugh because she had found it amusing. If she did chuckle, it was at the absurdity of what she had just seen. When she arrived at E/F unit, she saw Ms. Tinnis, whom she had known for many years. She brought up what she had just seen and expected Ms. Tinnis to react in some way. When Ms. Tinnis did not respond, the grievor left to continue her rounds. She never spoke of the incident again.

[27] Given that she knew the rumours about the group who worked on G/H unit and that many had told her when she started as a CM at EI to keep her head down and mind her own business, the grievor did just that. The workplace assessment demonstrated the well-known fact at EI that it was not acceptable for a woman to come to EI from an institution for women as a CM. As such a person, the grievor would not have known how an institution for men worked, in the opinion of those working at EI, according to her.

[28] The grievor feared what she called "parking lot justice", which she alleged was common at EI. She testified that she was new and that she had no mentor to consult. She had been shown the roster and the daily routine but had not been taught how to handle EI's toxic culture. CMs there were not listened to, and a select group of CXs ran EI. She did her best to survive, which included not reporting the incident or events on G/H unit. Over time, she gained the respect of the CXs on that unit.

[29] The crew of CXs working on G/H unit were well known as the group with the power at EI. They could have made or broken the grievor as a CM, according to her testimony. Her husband was also a CM at EI, but she could not talk to him about this situation. She had to survive on her own abilities. As she got to know the crews and how to manage them, she gained their respect and that of management.

[30] Ms. Richards was one of the CXs that the grievor managed as part of the institutional routine. She denied discussing the incident on G/H unit and the female CX

with CX Richards. She did not deny discussing it with CX Tinnis, but she could not place CX Richards in the room.

[31] The grievor did not report the incident to senior management, which had permitted the horseplay on the unit until that point, so she felt that there was nothing to do to end it. It did stop that day when she said, “Seriously, guys”. Obviously, according to the grievor, those involved took her comment as a direction to stop the horseplay. She was not supposed to see it. The CXs in subcontrol were supposed to give the CXs involved a warning when the CM entered the unit. For some reason, it did not happen that time.

[32] According to her testimony, the grievor now recognizes that there was a safety risk to the female CX had she received a call to respond. Horseplay is not perceived as dangerous, but it contains an inherent element of danger, which was the reason behind the “6-up rule”. That rule states that the CX in the command post gives the other CXs on the range a heads-up when a CM enters the range, so that they can stop any horseplay before they are caught. It did not work that night.

[33] When the grievor returned from vacation in late 2017, she heard rumours that Ms. Tinnis was saying that the grievor had allowed male CXs to handcuff a female CX to a chair and to harm her. When she heard the rumours, the grievor went to management. She also spoke to Ms. Tinnis, who denied making the comments. On November 3, 2017, the grievor was suspended without any reference to the specific incident or of intimidation, harassment, and bullying.

[34] To assist her in her defence, the grievor sought access to her emails from the now acting warden of EI. Her request was denied, so she was not able to provide the investigators with proof that she had been harassed by CXs and their union executive.

[35] The grievor met with the investigation committee accompanied by EIW’s assistant warden, intervention. She was asked what she would do differently. She responded that had she known that the female CX was not a willing participant, she would have stopped the horseplay. The situation she was forced to go through, including the investigation and revisiting her role in how the female CX was treated, caused memories to recur of being sexually assaulted. She testified that she would never let anyone be put in that same situation. At the time at issue, she saw only that

the female CX was one of the guys and that she showed no signs of distress during the incident, according to the grievor.

[36] The grievor provided the investigators with 14 letters of support from members of the CX ranks, which she asserted proved that she had earned their respect. The investigators refused to consider the letters. While others were asked to show their support, according to the grievor, they were afraid to. They feared retaliation from the CXs' union, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN), and from EI management if they did so.

[37] The grievor received the investigation report via email on December 22, 2017, along with a notice that she was to attend a disciplinary hearing on January 3, 2018. In the report, the investigation committee stated that she was genuine and forthright. She accepted responsibility for her failure.

[38] EIW's assistant warden, intervention, was not available to attend the disciplinary hearing on January 3, 2018, with the grievor. According to the grievor, the employer refused to change the date so that she could attend. The grievor was then forced to find someone else to attend with her. She spent Christmas Day drafting her rebuttal to the report, which she sent to the employer on December 26, 2017. There were many errors in the investigation report, including the mention of how long the grievor had been employed at EI.

[39] At the disciplinary hearing meeting, Deputy Warden Posyluzny asked the grievor several questions and, according to her testimony, made it clear to her that he did not believe that she did not recall the events of the evening in question. At the end of the meeting, he told her to return on January 5, for the decision.

[40] When she returned, the grievor was told that the employer did not believe that she was trustworthy. She had breached their bond of trust, which was irreparable; because of it, her employment was terminated. The employer did not consider that she had been a new CM and new to EI or any of the hardships she had endured since she started working there. The employer ignored the mitigating factors, including the harassment that the grievor had endured. While she expected that she would receive some sort of disciplinary penalty, she never expected that her employment would be terminated.

[41] The grievor filed her grievance and sought the assistance of her uncle, a former senior CSC manager, to assist her in the grievance process. Despite his assistance, she did not receive any response to her grievance before she referred the matter to adjudication. She went to her local Member of Parliament. That also produced no relief. It was clear to her that the employer was out for heads and that hers was one of them.

[42] When she was asked to describe the difference between EIW and EI, the grievor testified that it was night and day. At EIW, there were no cliques; it was an open environment. She would never have left there except that she needed to work in an institution for men to advance her career. No one at EI worked together; she always watched her back. At EIW, she was provided with mentors to guide her in her new roles. She also worked with a steady partner at EIW. None of this happened at EI. She had no one to consult about what she had seen that day, which was why she mentioned it to Ms. Tinnis, since she had worked with Ms. Tinnis for some time. At EIW, CXs were respectful of CMs and followed their directions. At EI, CMs were treated as if they had no authority and with outright belligerent and bullying behaviour. The union representatives ran EI and did everything they could to intimidate the CMs.

[43] The grievor recognized that the situation she encountered with the female CX was not acceptable, but it was the norm for that group. She had never witnessed this level of horseplay before but had seen varying levels of it during pat-downs, in the parking lots, and during briefings. Each time she had seen horseplay, other CMs had been present and had done nothing to correct the behaviour. It was an accepted type of behaviour within EI. As Ms. Richards and Ms. Tinnis testified, everyone at EI viewed the female CX at issue as part of the gang who worked on G/H unit and as a willing participant in the horseplay.

[44] If the highest levels of management at EI allowed such behaviour, the grievor had no control over it, according to her. The TLS report, released in 2017, stated that CMs at EI had no power and that there was no control there. As a new CM, the grievor did not agree with what she saw at EI, but given that its senior management was aware of it and did nothing to stop it, and given that she had no power over and received no respect from the CXs she managed, she could do nothing to stop it. Brad Sass, EI's assistant warden, intervention, allegedly admitted to the grievor that he did nothing to stop the behaviour, and she paid the price for it, according to her testimony.

[45] Also, according to the grievor's testimony, the female CX was an active participant on the night in question. She was the only one involved who spoke to the grievor. She also laughed and joked with CX Spilsbury and CX Fraser. As part of their ongoing training, CXs are encouraged to practise with their equipment, including the handcuffing procedures. That could have been what was going on, but what the grievor saw was not an appropriate means of doing so, which is why she intervened. After the grievor said, "Seriously, guys", and after the female CX asked to be allowed to go to the washroom, she was released.

[46] When she took the CM job at EI, the grievor was told to keep her mouth shut and her head down, which she did that night. Based on her knowledge of the female CX involved, the grievor perceived that she was not in any danger. The grievor dealt with the situation at the lowest level. She perceived a safety risk for everyone, and she intervened. She knew from experience that the female CX never went to the CM office without CX Spilsbury or CX Fraser present and that every time she was on the sub-board (a posting board where all CXs identified as substitutes for that shift were assigned) and placed on a different unit, she ended up returning to G/H unit.

[47] The grievor conceded that the female CX could have been laughing because she was uncomfortable with the situation. The grievor testified that since that time, she has questioned herself as to whether she missed a sign from the female CX, but she does not believe that she did. When the female CX went to the bathroom, she was still laughing and talking about washing off the Sharpie residue. The grievor told the investigators that the female CX told her that "this is what we do here", but that was not mentioned in the report, and the employer gave it no consideration in its decision to terminate her.

[48] At EI, the work environment was such that CMs did not ask CXs how they were doing because the CMs would then be accused of harassment, intimidation, and bullying. The grievor testified that she tried it once, and exactly that happened. She would never express concern for a CX in such a fashion again, at least not at EI, which had two factions, the crew who worked on G/H unit, including the female CX at issue, and the UCCO-SACC-CSN. The grievor testified that the union management and crew from G/H unit bullied her and had no respect for her or her authority.

[49] EI's work culture was toxic, and CMs there had no authority, according to the grievor. The union controlled the show and managed everything from schedules to special work arrangements, which were the CMs' responsibility. When she questioned special deals that violated the collective agreement and the rules in place, she was told to let them go. When she questioned the role of the CM desk, she was told that her voice was not wanted. As a female, she was ostracized at EI from the beginning, but as a female CM, she was left with no doubt that she had no place at EI.

[50] Glen Brown assisted the grievor in the grievance process. He had 33 years' service with the employer; his last position was the warden of Matsqui Institution in British Columbia. He was alarmed by what he heard when she contacted him on January 5, 2018. He helped her write her grievance. He requested witness statements and other documentation on her behalf but received none. She was part of a much larger process and was not provided with the specifics of the allegations against her, so she was not able to properly respond to them. This was a breach of natural justice, in his opinion. During his many years as part of CSC management, Mr. Brown was involved in many disciplinary processes, but according to him, the process at EI did not follow any of the rules set out by the employer to ensure that the grievor's entitlement to natural justice was met.

[51] Julie Blasko arrived at EI in November 2017 and took over as the acting warden. Initially, she had intended to go there as a mentor, but the CSC's commissioner asked her to take over EI and help it through the situation it was in following the TLS report of the workplace climate. The first time she met the grievor was at her disciplinary hearing, although she had been briefed about the grievor's and other cases by the CSC's commissioner, other senior managers, and labour relations representatives.

[52] Ms. Blasko received the draft disciplinary investigation report and provided feedback to the committee. When it returned to her with the final version, she shared it with Labour Relations at Headquarters. Once it was redacted, she ensured that the grievor was provided a copy. The disciplinary hearing was scheduled for January 3, 2018.

[53] In preparation for that hearing, Ms. Blasko read the grievor's response to the vetted copy of the investigation report that she had been provided, along with the hearing notice. According to Ms. Blasko, the grievor took no responsibility for her

failings on the night at issue. She blamed her actions on a lack of mentoring and management training. Some undisclosed person had told her to keep her head down because of the environment, which she did.

[54] Ms. Blasko testified that she was not satisfied with the grievor's rebuttal and that she did not believe the grievor's version of events. The grievor claimed that she replayed the scene in her head and that she had had nightmares about it. At the same time, she claimed that it was so insignificant that she had forgotten all about it. Her claims about mentoring made no impact on Ms. Blasko as she testified that the grievor would never have been mentored in what to do if she encountered an employee handcuffed to a chair by co-workers.

[55] According to Ms. Blasko, the grievor could have called the AWO or deputy warden about the situation if she did not feel comfortable discussing it with a colleague, but she did not. She could have consulted someone at EIW, where she claimed to have been mentored and to have had good relationships with her supervisors. Many options were available to the grievor inside and outside EI, but she chose to do nothing for two years.

[56] It was of great concern to Ms. Blasko that the grievor did not recognize that it was inappropriate for male staff members to humiliate female staff members in the fashion at issue. The CX handcuffed to the chair was released only when she asked to go to the washroom. Only then was the grievor made aware that this had happened before to the female CX. Still, the grievor did nothing. She left the female staff member in an unacceptable and unsafe situation with no concern for her safety and well-being or the safety of the rest of the staff and EI. By condoning these actions, in Ms. Blasko's opinion, the grievor was an active participant.

[57] The grievor's actions violated the values of respect and integrity, impacted EI's safety, and did not promote a healthy workplace. By not bringing the incident forward, and given her knowledge of previous instances of inappropriate behaviour by officers on duty, the grievor did not responsibly discharge her duties. In Ms. Blasko's assessment, the grievor's overall conduct of promoting the male officers' behaviour that day and for the next two years by not reporting it until the investigation into her conduct began, at which point she acknowledged at a minimum that she could have

done better, was likely to bring the CSC into disrepute in that she was allowed to continue as an employee of it.

[58] There were mitigating factors, including the grievor's 10 years of service and clean disciplinary record. She acknowledged her responsibility for her actions to Ms. Blasko. The aggravating factors outweighed the mitigating factors. The events were very serious, and even as of the disciplinary hearing, the grievor did not recognize how serious they were. Ms. Blasko did not find the grievor credible. Despite everything the grievor said, it was not enough for Ms. Blasko to conclude that she could trust the grievor any longer. The grievor did not demonstrate respect for the employees she managed and in Ms. Blasko's opinion had no professional or personal integrity.

[59] The grievor expressed remorse at the disciplinary hearing and appeared upset and emotional, which Ms. Blasko questioned. To her, given that the grievor had not reported the incident for as long as she had, she doubted that the grievor would ever be remorseful.

[60] As a CM, the grievor had more responsibility than the CXs she managed. She was expected to be their role model. She did not inquire into the situation she encountered that day; nor did she do anything to ensure that it would not occur again. According to Ms. Blasko, the grievor apologized to her because the grievor felt sorry that they were dealing with the situation at that point, not that she had dealt with the situation inappropriately, because her first stand was that she could not remember it. After assessing everything, Ms. Blasko concluded that she had no option other than to terminate the grievor's employment, effective the date of her suspension, November 3, 2017.

III. Summary of the arguments

A. For the employer:

[61] The adjudicator's role in a discipline case is set out as follows in *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1 ("Wm. Scott"):

...

The usual basis for adjudicating discipline issues involves considering the following three questions: (1) Has the employee

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given reasonable cause for some sort of discipline by the employer (i.e. was there misconduct by the grievor)? (2) If so, was the discipline the employer imposed an excessive penalty in the circumstances? (3) If it was excessive, what alternate measure should be substituted that is just and equitable in the circumstances? (See: Hyslop v. Deputy Head (Canada Border Services Agency), 2019 FPSLREB 29 at para 87).

...

[62] The facts in this case are not in dispute. It is a question of interpreting the events at issue and whether the employer was justified in determining that the grievor lacks the integrity required for the CM position such that it can no longer trust her to perform its duties.

[63] The employer's position was that the grievor reacted inappropriately in the face of discovering a female CX handcuffed to a chair and then being told that it was not the first time it had occurred. Her reaction shed light on how she could not be trusted to faithfully discharge her CM duties at EI. She did not meet her obligations and therefore violated CD-001 about the CSC's mission, vision and values, and CD-060, its code of conduct.

[64] The grievor tried to excuse her actions or inactions that night by stating that she was afraid of going to G/H unit. So, when she entered the room and saw the female CX handcuffed to the chair while the two male CXs drew on her face with the Sharpie, instead of intervening, she did nothing. That night, she saw unacceptable behaviour that also posed a safety threat to the CX handcuffed to the chair and to EI; yet, she chose to do nothing. Instead, she categorized the male CXs' actions as horseplay, and in the spirit of boys-will-be-boys, she moved on.

[65] Why did she accept that the female employee involved was a willing participant and was comfortable with the situation? Even if so, the activity was inappropriate for everyone and was a safety threat to those involved and to EI. The grievor claimed that she believed that she resolved the situation when she said, "Seriously, guys" and left because by that point, the female CX was on her way to the bathroom. However, at that point, the grievor heard that it was not the first time that that activity had happened.

[66] What did the grievor do? She left the unit without saying anything further. She did not report any of the CXs involved. She failed to manage and to exercise the leadership she was paid for as a CM. She did demonstrate to those in the know that

she was keeping her head down as she had been told and that she was promoting the toxic environment outlined in the TLS report. By not dealing directly with the CXs involved and by not reporting the behaviour she encountered, she condoned the unsafe and inappropriate behaviour. On top of all that, she exacerbated her actions by ignoring the situation for two years, until it was brought to light following the town-hall meetings.

[67] By doing nothing, she became part of the problem identified in the TLS report. The grievor testified that she had nightmares about what happened and how she handled it, yet she still did not report it. Ms. Richards testified that she saw the grievor laughing about what she had seen, which is indicative of the grievor's lack of leadership. Ms. Tinnis testified that she was shocked by the grievor's reaction to what she had seen. She expected a CM to report such an incident. Contrary to what the grievor testified, Ms. Tinnis did not recall the grievor asking her what she would have done in the situation. Had she been asked, she would have told the grievor to report it.

[68] CMs are expected to control the institutional environment and not sit and keep their heads down, as the grievor did. It was easier for her to allow the CXs to run the show than do her job. She contributed to the toxic workplace and allowed unsafe and inappropriate activities to continue, unreported. It is irrelevant whether the female CX in question was a willing participant. The activity in question was unsafe and inappropriate, and the grievor did nothing about it. She demonstrated a lack of both leadership and judgement.

[69] In *Simoneau v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2003 PSSRB 57 at para. 62, the adjudicator found that the seriousness of the actions of which the grievor was accused added to the loss of his credibility and had irreparably breached the trust that must exist between a CX and the CSC. That is also true in this case, as is evident from Ms. Blasko's testimony. Trust and honesty are essential in the correctional environment (see *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26 at paras. 79 to 81).

[70] The grievor saw and knew what was going on when she arrived on G/H unit that night. She knew it was inappropriate, and she did nothing. She also knew that the unit had a history of inappropriate behaviour, which scared her. It was unethical for her to turn a blind eye to what she saw that night and to allow it to continue without

reporting it for two years. Actions such as this are incompatible with a CM's role; they render the employment relationship unviable (see *Albano v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 79; and *Richer v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 10).

[71] Unlike the situation in *Albano*, in which someone reported a situation early on, in this case, no one reported it until after the town-hall meetings two years later. Had that not happened, the grievor would never have brought it to light and would never have attempted to stop it. She had not done so for two years. She would have continued to keep her head down, and the CXs involved would have continued to ride roughshod over G/H unit and its female employees. No training will ever instill the judgement required to do the right thing. A person either has it or has a stronger instinct to survive, as was so in this case.

[72] Since good judgement is an integral part of all jobs in corrections, whether as a CM or a CX, demotion was not possible, and in the circumstances, termination was the only viable alternative.

[73] According to the adjudicator in *Walker v. Deputy Head (Department of the Environment and Climate Change)*, 2018 FPSLREB 78 at paras. 630 and 631, as follows, an adjudicator should not reduce a disciplinary penalty unless it is excessive:

[630] I have considered all the factors and arguments that the parties put to me in support of their stands on the question of the discipline imposed. Cooper v. Deputy Head (Correctional Service of Canada), 2013 PSLRB 119, is often cited in support of the argument that an adjudicator should not interfere with a disciplinary penalty unless it is unreasonable or wrong (see paragraph 13 of that case). Other decisions state that the penalty should be overturned only if it is excessive (see Iammarrone v. Canada Revenue Agency, 2016 PSLREB 20; and Rahim). Still in other cases, adjudicators have determined that penalties should not be overturned if they were justified (see McNulty v. Canada Revenue Agency, 2016 PSLREB 105).

[631] Essentially, in my opinion, these cases all stand for the same principle, which is that any disciplinary penalty imposed by the employer against an employee must be warranted in the circumstances, must consider all the aggravating and mitigating factors, and must be reasonable. A reasonable penalty is not excessive. In light of the evidence before me, I find that the termination of the grievor's employment was not excessive and that it was reasonable in the circumstances.

[74] In these circumstances, the decision to terminate the grievor's employment was not excessive and should not be interfered with.

B. For the grievor

[75] The TLS report demanded immediate changes to remedy EI's poisoned work environment, which was not of the grievor's making. It existed when she was transferred there. She was told that she would not stand a chance at EI. Female and outside CMs would not be tolerated. To survive, she had to keep her head down and say nothing. She had no choice.

[76] The employer's investigation process was flawed, and its sole purpose was finding fault. The preconceived conclusions were that the grievor was guilty of the allegations against her. The investigators did not interview the female CX involved; nor did they interview CX Spilsbury, who was one of the male CXs involved. The investigators did not interview witnesses identified by the grievor or rely on the 14 character references she provided. Their list of possible witnesses was further limited by the employer's insistence that they were not allowed to interview anyone without the permission of the Edmonton Police Service or the Royal Canadian Mounted Police.

[77] The grievor did not deny that she did not respond appropriately to what she confronted that night. She thought that it was innocent horseplay and that it ended when the female officer went to the washroom. As a new supervisor, she did not perceive any risk to the female officer. She saw no harm occurring, just an officer joking and laughing with her colleagues. She also took no notice of the comment that it had happened before.

[78] Ms. Blasko testified that the grievor's rebuttal raised more questions for her than it answered, but these questions were not put to the grievor for clarification. The grievor had nightmares because as a sexual assault victim, with respect to the incident at issue, she had missed something that she should have seen. Ms. Blasko's assessment was based on a pile of documents and not on reality. She never worked with the grievor and so does not know that she cannot trust her.

[79] The investigation was not procedurally fair. The disciplinary report that Ms. Blasko helped draft was not complete. The misconduct that the grievor admitted to at the first opportunity was minor, and the discipline was excessive. The evidence

does not support the second question of the *Wm. Scott* test, which is whether the discipline that the employer imposed was an excessive penalty in the circumstances. The grievor's opinion is that the answer to the third question of the *Wm. Scott* test is that a written reprimand should be substituted for the excessive penalty imposed by the employer, and she should be returned to the workplace. She is willing to return to EIW if the employer sees fit to assign her there.

[80] As was the case in *Legere v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 65, the employer is obligated to ensure that investigations into misconduct are conducted expeditiously, without bias or the reasonable apprehension of bias, and in compliance with the laws of natural justice. That case stated as follows:

...
[225] *The issue of bias or reasonable apprehension of bias was addressed as follows in Robertson v. Deputy Minister of National Defence, 2010 PSST 0011:*

...
50 ... Bad faith traditionally implies that there is an improper intent, a bias, or a lack of impartiality in exercising discretionary authority. Therefore, the allegation that the respondent was biased is one of bad faith in its assessment of him. See: *Beyak v. Deputy Minister of Natural Resources Canada*, 2009 PSST 0007. See also: René Dussault and Louis Borgeat, *Administrative Law: A Treatise*, 2nd ed. (Toronto: Carswell, 1990) vol. 1, at 425 and vol. 4, at 343.

51 The courts have acknowledged that direct evidence of actual bias is difficult to establish and have found that fairness requires that there be no reasonable apprehension of bias. A test for reasonable apprehension of bias has been established and is to be applied when reviewing a decision from a public authority that affects the rights and privileges of a person. This test is flexible as it takes into consideration that the duty to act fairly varies depending on the context of the decision. See: *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, at paras. 45 to 47; and, David Philip Jones & Anne S. de Villars, *Principles of Administrative Law*, (Toronto: Thomson Carswell, 2009), at 396 and following.

52 In *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394, the reasonable apprehension of bias test is set out as follows:

[T]he apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining

thereon the required information....[T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly.

...

[81] The investigation was flawed in many ways, including the unclear and amended terms of reference, the selective interviews, the failure to produce documents and tapes in the employer’s possession, despite disclosure orders, and the requirement to respond to a redacted version of the investigation report such that it was impossible for the grievor to know what had been said and who had said it. All this made it impossible for her to be treated fairly and within the bounds of the rules of natural justice, as described by Mr. Brown.

[82] An adjudicator should reduce a penalty if it is unreasonable or wrong (see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119; *Basra v. Canada (Attorney General)*, 2010 FCA 24; and *Albano*). Clearly, if the grievor had no intent to cause harm and took responsibility for her actions, the termination of her employment was unreasonable and wrong. Similar to the situation in *Legere*, at paras. 198, a written reprimand would be appropriate.

[83] The grievor seeks reinstatement, which, according to *Gill v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 102, is the default remedy. Alternatively, if the bond of trust is broken, she seeks damages in lieu of notice. She would also agree to a short suspension and more training.

IV. Reasons

[84] It is trite law that hearings before an adjudicator are *de novo* hearings and that any prejudice or unfairness that a procedural defect might have caused are cured by the adjudication of the grievance (see *Maas v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 123 at para. 118; *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70; *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL) at 2; and *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291. At times, as in the *Legere* case, the employer’s conduct in investigating the employee might have been so offensive that it was impossible for the employee to receive the benefit of any of the

protections of natural justice, but even then, the hearing *de novo* remedies that situation. The procedural irregularities in this case did not reach that level and were resolved by this hearing.

[85] The question is whether the termination of the grievor's employment was excessive in the circumstances, given that at the time, management had allowed the behaviour and horseplay on G/H unit to exist for some time and had accepted that the CMs' authority at EI was secondary to the CXs' decisions. Counsel for the grievor argued that some degree of disciplinary action was required to recognize her failure to execute her CM duties.

[86] I believe that the grievor cannot be excused from the proper exercise of her duties or at least from attempting to properly execute them. Furthermore, her failure to report the unacceptable behaviour and activities allowed them to continue for two years, perpetuated the poisoned environment for which EI was notorious at that time, and exacerbated her failure.

[87] Horseplay is not an acceptable workplace activity. It poses not only a workplace safety issue but also, depending on the circumstances, may lead to assault and harassment. It violates the employer's Standards of Professional Conduct with respect to the proper discharge of a CX's duties. The grievor was obligated to end it when she encountered it, whether or not the female CX appeared to be in distress and whether or not the grievor feared that it would make her fall into disfavour with CXs Spilsbury and Fraser. Despite that the horseplay ended at about the time she made the comment, "Seriously, guys", it is not clear whether her comment or the female CX's washroom request ended the captivity.

[88] The grievor did not give a direct order to release the female CX that one would have expected her to do and that she should have done. As a result, she failed to properly discharge her CM duties. The fact she found herself wondering about the absurdity of what she had just seen should have triggered in her the need to report it, yet she did not file an "Officer Statement/Observation Report" (OSOR) or report it to anyone.

[89] During the hearing, she testified that since the female CX had been released to go to the washroom, the matter was over; things were finished. She also testified that since the female CX was laughing during the event, there was no harm. She failed to

understand the threat that this type of behaviour posed to EI's safety, morale, and employees. She failed to address it immediately and failed to address it later by not reporting it, which would have ensured that it did not happen again.

[90] The grievor testified about the 6-up rule on G/H unit, where the CXs assigned to the unit command post would warn other CXs there who were involved in horseplay that the CM was on his or her way. No doubt, the reason for this rule is that the CXs recognized that this type of behaviour was unacceptable, and they did not want to be caught. Having caught them, her duty was to deal with the situation in a way that would preserve the employer's reputation. I have no direct evidence of what type of discredit this incident caused to its reputation, but as was stated as follows in *D'Cunha v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 78 at para. 269, I need none if a reasonable and informed observer would likely view it as discrediting the CSC. Then, no such proof is needed:

[269] I find that the behaviour of both grievors of attending at Ms. B's home and purchasing marijuana on numerous occasions over an extended period comprised serious misconduct that a reasonable and informed observer would view as behaviour that would likely discredit the CSC. Actual discredit need not be proved.

[Emphasis added]

[91] Surely, an objective member of the public would be offended to find out that a manager charged with the conduct of CXs in a federal maximum-security institution allowed male officers to handcuff female officers to chairs and draw on them with permanent markers. I have no doubt that many would consider this assault. Knowing that the officers were allowed to do it with impunity would be detrimental to the CSC's reputation.

[92] The employer is justified in doubting her integrity and judgement given the seriousness of the offence and the impact that her behaviour has had on her credibility (see *Simoneau*). She was paid to manage and act in EI's best interests. Instead, she ignored an unsafe situation, allowed a risk to continue to the safety of staff, inmates, and EI, and perpetuated a toxic work environment of which she claimed to be a victim.

[93] Her demonstrated lack of leadership warranted the loss of the employer's trust. As stated in *Albano*, at para. 172, "it is simply inappropriate and unethical to turn a

blind eye to potential unprovoked violence against a human being ...". She put her interests above those of EI, the inmates, and the employees she was paid to manage. Then, when she was confronted with the situation two years later, she attempted to trivialize it by describing it as something that was done on G/H unit and as just horseplay. Even with the benefit of hindsight, she did not have the insight to recognize the inappropriateness or the danger that the situation posed; nor did she recognize that she perpetuated EI's toxic environment through her inaction of not reporting the situation, as required by policy.

[94] The grievor's counsel listed a number of mitigating factors that I should consider. Key among them was that the grievor was new to EI and to the CM role. He asked that I consider the toxic work environment at EI and that the grievor was afraid of the crew on G/H unit that had pressured her not to say anything. What he considers mitigating factors can also be seen as aggravating factors. While she may have been new to EI and newly appointed to her substantive CM position, she was not new to corrections and had had numerous acting opportunities including at the CM level. The grievor had the opportunity to change the toxic work environment, to address the crew that she was afraid of, and to show that she would not be intimidated, instead she chose to keep her head down. She ignored a dangerous situation, and protected herself for over two years, until she could no longer ignore the truth. In the circumstances, significant discipline was required.

[95] In determining whether the discipline is excessive or unreasonable, I am particularly mindful of the employer's failure to control the type of behaviour demonstrated by the CXS it in the past. The grievor was not provided any assistance or guidance in assuming her role at EI and establishing her authority over a group of CXs who were known for their disregard for the rules and their disrespect for management. Counsel for the grievor argued that with mentoring and training, she could learn the skills necessary to deal with these circumstances were she returned to the workplace with a minor amount of discipline, such as a written reprimand. Ms. Blasko testified that no training can instill in someone the judgement and integrity that the grievor required to deal with this situation properly, and she had no confidence that if faced with a similar situation in the future, the grievor would react differently.

[96] The grievor cannot fully blame her failings on those of EI management, which allowed and condoned this type of behaviour even before she arrived. Managing bad

behaviour and ensuring respect for the rules were her primary duties at EI, which she had sought and accepted willingly. Under the *Standards of Professional Conduct*, she was to faithfully discharge her duties; she did not on that day, and she allowed the breach to continue for two years until she was faced with the investigation. No matter how poorly the investigation was conducted, she could no longer deny her failure. She did nothing to immediately address the poisoned work environment she confronted at EI; nor did she attempt to help the female CX she encountered that night address the environment she worked in on G/H unit. Changes needed to be made from the roots up at EI, and she ignored her opportunity to start them. She did not report the incident, as required by the commissioner's directives, and she failed to comply with the CSC's mission statement.

[97] The grievor testified that she had nightmares since her termination as she has thought about her actions that night. Ms. Blasko mentioned in her testimony that she took this into consideration but according to the grievor's counsel she misinterpreted the grievor's statement which was not intended to reflect a guilty mind but rather the impact that the incident had on the grievor because of her past. The cause of her nightmares was her remorse for not helping a female in need. Even if Ms. Blasko misinterpreted the grievor's statement, it does not necessarily render the employer's decision excessive or unreasonable.

[98] Any faults with the investigation committee's investigation were remedied by the hearing, at which the grievor was given every opportunity to be heard and to confront her accusers. The facts are not in dispute. There are no issues of credibility to be assessed. In the end, she admitted what she did or, rather, failed to do. She allowed male co-workers to handcuff a female co-worker to a chair. She tried to tell herself that it had been horseplay, so it was acceptable, but by the time the hearing occurred, she knew better.

[99] Similar to the case in *Albano*, it is simply inappropriate not to intervene knowing that someone is at risk. It was inappropriate that the grievor allowed a human being to be handcuffed to a chair in the circumstances she encountered and did not intervene. Furthermore, claiming to accept responsibility for actions at adjudication and after a lengthy investigation lacks sincerity. The time for the grievor to have accepted responsibility was two years before it was reported to the tip line. I accept the employer's assessment that no amount of mentoring or training can ever create in her

the type of integrity and judgement required of an officer who, when confronted with unsafe activity, does the right thing at the first possible opportunity or can ever re-establish the bond of trust necessary to continue the employment relationship.

[100] The grievor was terminated because the employer could no longer trust her to properly conduct herself in the workplace, to abide by its policies, and to act as a role model. I concur with this assessment. The fact that even at the hearing the grievor continued to downplay the seriousness of the events of that day, even stating that the incident was minor and deserving of only a written reprimand confirms that to me that she lacks the true insight into the damage that her actions have caused to the bond of trust relationship between her and her employer.

[101] I have an honest and strong belief that she lacks the insight required not to repeat the behaviour for which she was terminated were she reinstated, and the employer's loss of trust in her 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.

[102] In sum, I will conclude with answering the questions from the *Wm. Scott* test. The grievor provided the employer with cause for discipline that given the circumstances of this case and based on all the evidence, including the oral testimony and the exhibits, demonstrates that its 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 its place.

[103] 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.

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

(The Order appears on the next page)

V. Order

[105] The grievance is denied.

December 15, 2020.

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