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File: 566-02-38440

Citation: 2020 FPSLREB 114

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

ERIC GAGNÉ

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

Indexed as
Gagné 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 and 14, 2020.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Eric Gagné, alleged that the termination of his employment by the Correctional Service of Canada (CSC or "the employer") was without cause. He was terminated from his correctional manager (CM) position at the CSC's Edmonton Institution (EI) on January 8, 2018, following a workplace assessment there. The assessment revealed allegations of his involvement in physical and sexual assaults of employees at EI, personal and sexual harassment of employees at EI, inappropriate conduct involving inmates at EI, inappropriate conduct including bullying and intimidating employees at EI, and misuse of CSC property. In addition, EI employees had reported he allegedly breached employer policies, procedures, and directives and other legislation to the employer's tip line.

[2] The employer conducted a disciplinary investigation into these 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 Discipline* ("CD-060"), and *Commissioner's Directive 001 Mission, Values and Ethics Framework of the Correctional Service of Canada*. It was determined that by his conduct, the grievor lacked the integrity and professionalism expected of a CSC employee, for which he was terminated.

II. Summary of the evidence

[3] In March 2017, the employer assessed the workplace at EI due to allegations that it was toxic. Based on the results, the employer determined that something had to be done to address the culture there. A series of town-hall meetings was held, and a tip line was set up for employees to report to the employer anything they thought needed to be addressed in the fall of 2017; it was an EI version of the popular phrase, "see something, say something". The investigation of the grievor arose from a report to the tip line.

[4] The grievor worked the evening shift at EI on August 25, 2017, as a CM, when an inmate, "JB", had to be restrained and sent to the segregation unit. A tip-line report stated that while JB was in the shower being strip-searched, the grievor hit him. The correctional officers (CXs) who claimed to witness the incident reported it after an employer town-hall meeting and after coming forward to the union about it ("union"

refers to the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN). They did so even though no mention of it had been made in their Officer Statement and Observation Reports (OSORs), which they had filed contemporaneously with the event. The catalyst was the town-hall meeting, at which the employees were encouraged to report anything they had seen that the employer should know about. Failing to report something could have resulted in peril to their continued CSC employment.

[5] The CXs who reported the alleged assault on JB were concerned for their jobs, given the recent removals of certain members of staff from EI for their roles in events that had come to management's attention through the workplace assessment report. The CXs stated that they did not report the incident involving the grievor when it occurred. They claimed that they had violated the requirements to truthfully report all incidents and to file accurate OSORs and accordingly, they feared for their jobs. That was why they sought the union's assistance in coming forward with their knowledge of the events allegedly involving the grievor.

[6] Tyler McNay was a CX01 at EI from 2015 to November 2017. He was one of the officers involved in the August 25, 2017, incident in which inmate JB was removed from H unit following a search of his cell. Mr. McNay testified that he responded to a call for staff assistance on H unit. When he arrived, JB was in the upper-level phone room. JB was in a belligerent and agitated state when Mr. McNay was given the direction to enter the phone room and handcuff him. Once JB was handcuffed, CM Mikalski ordered the officers present to take JB to Admissions and Discharge (A&D), which was the portal to the segregation unit at EI, to be strip-searched before he was admitted to the segregation unit. Mr. McNay did this with CX Jesse Perry, CM Todd French, and the grievor using 2 x 2 controls. The grievor and CM French responded to the same call as did Mr. McNay.

[7] According to Mr. McNay, once JB was in the shower in A&D, Mr. McNay was given the order to remove the handcuffs from JB. The grievor was standing in front of JB. Once the handcuffs were removed, again according to Mr. McNay, the grievor struck JB in the gut five times. A struggle then ensued, during which Mr. McNay strove to remove the second handcuff from JB; his arm with the handcuff attached was flailing about, posing an imminent threat to those in the area. The struggle to remove the second handcuff continued until Warden Clovis Lapointe arrived.

[8] The situation de-escalated when Warden Lapointe arrived, according to Mr. McNay, who was then able to remove the handcuff. Mr. McNay and CX Perry strip-searched the inmate. He was then put in a holding cell in A&D but was never sent to the segregation unit.

[9] Following the incident, Mr. McNay completed his OSOR as required (Exhibit 1, Tab 10). He admitted that the OSOR did not match his testimony at the hearing. He explained it by saying that he had been directed on what to write in the OSOR by one of the CMs present, either CM French or CM Gagné, but he could not remember which one had given the direction. He was directed to exclude from his OSOR all the information he testified to.

[10] After the town-hall meeting, Mr. McNay knew that he had to talk to the union about this incident, for some advice. He spoke to Mike Inkpen, a local union representative, and to Shawn Whalen, the president of the union local at EI. They in turn spoke to Warden Lapointe. The next day, Mr. Whalen advised Mr. McNay that the Warden wanted to speak to him. Mr. McNay claimed that he knew that he was in trouble, since he had filed a false OSOR, and that he had to fix it before he lost his job, given what he had heard at the town-hall meeting.

[11] Mr. McNay then met with Mr. Lapointe and Mr. Whalen. He testified that he told Mr. Lapointe the truth of what had happened in the showers that day. Mr. Lapointe told him that the investigators from the investigation committee would contact him later. Subsequently, two investigators interviewed him at a secret location. Mr. Whalen accompanied him.

[12] When he was asked why he reported the incident to his union and then to the tip line, Mr. McNay testified that the handling of the situation did not sit well with him. The use-of-force model dictated that force was required, but Mr. McNay would not have used the response that the grievor chose.

[13] According to Mr. McNay's testimony, the workplace environment at EI was extremely negative. EI is a maximum-security institution. The staff there did not help anyone except those within their own camps or factions. A CX belonged to a camp based on the crew the CX worked with. Crews were defined based on the shift they worked. There were 4 shifts at EI. Two crews worked a 7 to 3 shift, one crew worked a 7 to 4 shift, and one crew worked a 12-hour shift. Mr. McNay worked with

CX Graham Spilsbury, who was seen as the head of the crew that worked on G/H unit. Mr. Whalen was head of the union and of the 12-hour crew. CMs like the grievor did not belong to any crew. None of the crews liked the CMs; the CMs were supposed to be in control of EI, but in reality, according to Mr. McNay, the crews ran it.

[14] On August 25, 2017, the first time Mr. McNay saw the grievor was on the upper range of H unit, when he responded to the call for assistance. The alleged assault took place in the showers in A&D. The space has a 4-foot-wide entrance with a room that is initially 8 feet by 8 feet and that opens to 8 feet by 12 feet. No officers were present other than the 4 he described in his testimony. No rooms opened into the showers, which would have given an officer a view of what happened there. Mr. McNay was in the narrow part of the hallway portion of the room and was next to CX Perry. Mr. McNay did not know where CM French was, but he was certain that the grievor was in the wider part of the room, facing the inmate.

[15] Mr. McNay remembered the inmate swearing but did not remember whether anyone else in the room vocalized or swore. He did not recall which hand the grievor used to strike the inmate, but he did remember that the inmate was struck several times. He remembered the sound of the strikes and that the inmate did not say anything when he was struck. According to Mr. McNay's testimony, he was busy trying to get hold of the inmate's hand to remove the second handcuff. He could not remember where CX Perry or CM French were or if they were there at all during the event. No other officers were present in A&D, according to Mr. McNay, until Warden Lapointe eventually appeared with Ms. Mikalsky.

[16] Mr. McNay testified that he prepared his OSOR at 09:46 on August 25, 2017, while "the events were fresh in [his] mind". Then he testified that a CM, whom he could not identify, directed him to omit details of what had happened. He did not specify those details. He stated that despite the unusual direction, he did not recall who gave it to him. After reflecting on the contents of the town-hall meeting and speaking to his family, Mr. McNay consulted his union. The next day, he reported the excessive use of force at a meeting the union had arranged with Warden Lapointe.

[17] Piotr Oszczygiel testified that he had been employed as a CX01 at EI since 2008. He was working overtime on H unit on August 25, 2017, and was completing an OSOR when he received a call for assistance. He responded, and when he arrived,

approximately 20 staff members had already gathered there. The inmate was in the phone room. Once he was handcuffed, Mr. Oszczygiel followed CX Perry and CX McNay, who escorted JB to A&D.

[18] Mr. Oszczygiel testified that CX Perry and CX McNay took JB into the showers to be strip-searched and that the grievor was there with them. CM French blocked the door. He had no view of what happened in the shower room, who was there, or where they were in the room. Mr. Oszczygiel stood outside in the hallway and did not see anything other than the grievor's arms swing a couple of times. He did not see any blows. He did hear a large amount of yelling until Mr. Lapointe arrived and entered the shower room.

[19] According to Mr. Oszczygiel, Mr. Lapointe de-escalated the situation, and everyone left the shower area. According to Mr. Oszczygiel, as CX Perry passed him, he said, "Nothing happened here." This made Mr. Oszczygiel feel intimidated, according to his testimony. He went back to the unit office and wrote his OSOR. He testified that he could not believe what he had just witnessed, but his OSOR did not reflect what he had seen or the truth of what had happened. He felt that if he wrote down what he had seen and handed it to the CMs involved, it would not have turned out well for him.

[20] Mr. Oszczygiel handed his OSOR to CM French, who was involved in the situation. He feared retaliation if he told the truth, given Mr. Perry's comment and the environment at EI. If he said anything, he feared that he would be called a "rat", as had been others who had come forward to management. Once others had come forward after the town-hall meeting, Mr. Oszczygiel approached Mr. Whalen, who accompanied him to talk to Mr. Lapointe. After that, he spoke to the investigators and the Edmonton Police Service (EPS). He testified that the version of the events reported in the board of investigation's report (Exhibit 1, Tab 10, at page 10) is accurate as to what took place.

[21] In September 2017, after the town-hall meetings, Mr. Perry called Mr. Oszczygiel into the unit office to ask him if he had talked to anyone about the events of August 25. According to Mr. Oszczygiel's testimony, this also scared him. He did not want anything to happen to him because he had come forward to management, which he had done on his own after the town-hall meetings, once Mr. McNay had come forward. He did not do it because of pressure from the union or management. He did not know who else had come forward, but through the rumour mill, he had heard that

someone had done so. He feared that he would lose his job if he did not come forward with what he knew because he knew that likely, he would be named.

[22] Inmate JB testified that he was moved to EI because of his deteriorating behaviour at another penitentiary, the CSC's Bowden Institution. Due to that transfer, all his possessions had not yet caught up to him. JB testified that because of this, he had items in his cell that he had borrowed from other inmates, which was not allowed. According to JB, on August 25, 2017, CX Spilsbury ordered him to leave his cell so that it could be searched for contraband and for items that did not belong to him. JB reported that he told CX Spilsbury to go "f… himself", which gave rise to a heated exchange of words and to JB being locked in the phone room.

[23] According to JB, Mr. Spilsbury ordered that JB be taken to the segregation unit. He was handcuffed and escorted to A&D to be strip-searched by two CXs, the grievor and CM French. According to JB, "CM French choked [him] out while [his] hands were handcuffed behind [his] back", which in common parlance would mean that he passed out from being choked. The grievor then punched him in the gut. The CXs then laid him on the floor, and he got a break from the beating. According to JB, only when Warden Lapointe arrived and asked if everything was alright were his handcuffs taken off and was he returned to his unit.

[24] On cross-examination, JB's story of the events differed from what he had told on direct examination. JB testified that he and the grievor have a history; they encountered each other several times over the 10 years of JB's incarceration. JB testified on cross-examination that the handcuffs were removed by the same officer who put them on before he left the unit and that it was done before he entered the shower. The grievor did not punch but rather used both forearms to hit him in the gut. CM French was not in the showers in this version of the events. JB did not report the assault to Warden Lapointe when he arrived; nor did he report any injuries to the nursing staff at EI, even though he claimed that his stomach and ribs were bruised and sore for a week. He did not seek post-use-of-force medical care. He has not filed any complaint against the grievor or the CSC through the internal processes or a civil claim.

[25] Mr. Whalen was the local union president at EI at the time in question. He participated in the workplace assessment, which resulted in the TLS Report. He

testified that he did whatever the CSC's commissioner and deputy commissioner asked of him to establish a safer and more positive workplace at EI. After the TLS Report's release in March 2017, which reported on rumours of assaults on inmates and staff and on the toxic work environment at EI, the employer began looking into specific incidents. According to Mr. Whalen, after the town-hall meetings, he had a lineup of people who wanted to talk to him about incidents after the Commissioner put into place the "see something, say something" rule.

[26] According to his evidence, Mr. Whalen triaged the reports and directed them to Warden Lapointe and to the CSC's commissioner for investigation. He sat in on a large number of CX interviews as the union representative because the employer wanted to limit the number of people involved. He and Mike Inkpen, another member of the union executive, would text the Commissioner to arrange meetings with the members.

[27] The town-hall meetings were particularly significant to the employees at EI because that was the day the walk-offs began. After one such meeting, five employees were publicly marched out of EI without explanation, never to return. Rumours circulated that they had been fired for assaults. But many CXs believed that if a CX did not come forward and report something, the CX would be lumped into that group and walked off EI, never to return.

[28] After one town-hall meeting, Mr. Oszczygiel approached Mr. Whalen in a hallway and told him that he might have seen something in A&D. Then he asked Mr. Whalen what he should do about an assault in A&D. Mr. Whalen told him to talk to Warden Lapointe, and he then set up a meeting for Mr. Oszczygiel with the Commissioner. Later, a member of the emergency response team asked to speak to Mr. Whalen. It was Mr. McNay. He reported to Mr. Whalen that he had witnessed an assault in A&D. He had not reported it and by that point was afraid that he would lose his job. Mr. Whalen followed the same process as he did with Mr. Oszczygiel and set up a meeting with the Commissioner.

[29] Mr. Whalen is now employed at the Pê Sâkâstêw Centre, a healing lodge in Alberta where, as of the hearing, he was an acting CM. According to his testimony, he could no longer continue to work at EI given his role in the investigations that followed the walk-offs in 2017. According to him, 84 of the witnesses interviewed by the Commissioner asked for transfers to other institutions. And either he or Mr. Inkpen, a

fellow member of the union executive, had arranged 90% of the interviews of the 84 witnesses.

[30] According to Mr. Whalen, the grievor was well liked at EI. He was known to be a decent person and had a positive reputation. He got things done with a direct style that according to Mr. Whalen, was refreshing. His name came up with the union a couple of times with respect to a use-of-force incident in A&D and to an emergency-response-team cell extraction on A unit when he was the assistant warden, operations, on an acting basis. It was unclear from the testimony whether those incidents were brought up via the tip line or in the course of Mr. Whalen's dealings as the local union president.

[31] Mr. Whalen met with the investigation committee six or seven times. His role was to bridge the gap between the CXs and management, in hopes of finding ways to reduce the toxicity at EI. He denied that he met with CX Donnie Roussel to discuss the grievor. Mr. Whalen also denied telling Mr. Roussel that he had to provide information against the grievor, even if he had to make it up. According to Mr. Whalen, any meeting he had with Mr. Roussel would have been about individuals on his crew, which did not include the grievor. Mr. Whalen had attempted to set up a meeting with the Commissioner for Mr. Roussel via a text message (Exhibit 4, Tab 44), but Mr. Roussel did not respond, so the meeting was cancelled.

[32] Mr. Lapointe was the warden of EI at the relevant time and is now the executive director at the Pê Sâkâstêw Centre, where Mr. Whalen now works. He signed the generic convening order that launched the disciplinary investigation. Eventually, he amended it to include the added grounds against the grievor. Initially, it was intended to investigate allegations that several employees had been involved in harassment, sexual harassment, and bullying as identified in the TLS report. It was amended later, once the initial investigations started and when it was determined that the allegations went further back than the time frame originally identified. The majority of the information used to initiate investigations was provided directly to the Commissioner, who was on-site through Mr. Whalen's facilitation. Mr. Lapointe was briefed as allegations came forward to the board of investigation ("the board").

[33] A significant amount of information about the grievor went directly to the Commissioner. According to Mr. Lapointe, two officers, Mr. McNay and Mr. Oszczygiel,

came directly to him, along with Mr. Whalen, and reported that they had seen the grievor assault JB. Mr. Lapointe was familiar with the incident because he had been there. Mr. Oszczygiel was the first to come forward. He told Mr. Lapointe that he saw the assault on JB and that he was willing to go to the Commissioner and the investigators to tell them what had he had seen. Mr. McNay approached him later on, after a training session. Mr. Lapointe was certain about that order of being approached. This was his only involvement with the investigation. He left EI in November 2017.

[34] Mr. Lapointe testified that he was not aware of the specific allegations against the grievor. He recalled going to A&D that day because he had been told that JB was being moved to segregation without his permission. Apparently, JB had a disagreement with CX Spilsbury over a radio in his cell, which led to a cell search and a violent reaction by JB. CX Spilsbury ordered that JB be taken to segregation. When Mr. Lapointe heard this, he went to A&D to tell those present that he did not authorize the move. During working hours, only the warden can authorize a move to segregation. EI's culture was to have the warden authorize such a move after the fact, but Mr. Lapointe had put an end to it.

[35] When he entered A&D, Mr. Lapointe found two CMs and a numbers of CXs. The inmate was agitated, but other than that, nothing was out of the ordinary. Mr. Lapointe spoke to the inmate and told those assembled to figure things out because the inmate was not going to segregation. The decision had been reached that the inmate would go back to the unit and that he and CX Spilsbury would mediate the situation. Mr. Lapointe was unaware that the CMs present had already made that decision before he arrived. They had not mentioned it to him. He was there for only a minute or two.

[36] There was no reason to speak to the inmate following this meeting, according to Mr. Lapointe. There were no obvious indications that a use-of-force incident had occurred, and no one, including the inmate, had reported one. The inmate showed no signs of physical handling that would have indicated that he had been assaulted. No use-of-force reports were completed, and medical assistance was not called for.

[37] Mr. Lapointe testified that EI had difficulties with its working environment. He had a good relationship with all the staff but had challenges dealing with the union. The CXs, their union, and the CMs were in constant conflict. He worked to mend that conflict and was making inroads when the board began its work. A steering committee

had been set up. He sat on it with representatives from the different unions at EI and the assistant deputy commissioner to drive change at EI. The committee recommended changes, including in infrastructure, which the employer addressed.

[38] Denise D'Astous testified as the representative of the board. She is employed by Presidia Security Consulting, the firm the employer hired to help investigate the allegations of wrongdoing at EI that came to light after the workplace assessment. She and Brian Weatherbee joined two CSC investigators to form the board. It met for the first time in Ottawa, Ontario, on September 20, 2017, to review the reports of wrongdoing that the Commissioner had received. The board was presented with the convening order (Exhibit 1, Tab 5), which later was amended and broadened (Exhibit 1, Tab 7).

[39] The board's mandate was to investigate allegations of physical and sexual assault, harassment, and inappropriate conduct, such as bullying and intimidation of employees. The CXs at EI were the subjects of the investigation. Information received through the tip line that the Commissioner established after the town-hall meetings was passed to the board for it to investigate.

[40] The board's mandate was disciplinary, so from the first day, the EPS was involved. The investigators decided that they would not interview victims, witnesses, subjects, and persons of interest without the Crown's and the EPS's approval. In the grievor's case, the matter came to the board after Mr. Oszczygiel and Mr. McNay spoke to the Commissioner about filing false OSORs about the same incident. The board set out to investigate two allegations against the grievor, which were that he used and distributed steroids at EI and that he had used force against JB. Before the investigation could begin, the board had to wait for the EPS' permission to interview the witnesses.

[41] According to Ms. D'Astous, there was a large amount of chatter but no facts about the grievor's use of steroids. The board had received rumours and assumptions based on his size and build. The investigators concluded that the allegations were unfounded. While he did use testosterone, he had a prescription for it, which he produced to the board.

[42] As for the incident involving JB, the investigators spoke to 13 people, including the grievor and the 2 who reported the incident. Ms. D'Astous reported that during his

interview, Mr. McNay told the investigators that he wanted to change his OSOR because he was afraid of what might happen to him for filing a false one. The initial OSOR was written at the specific direction of either CM French or the grievor, Mr. McNay could not remember which of them it was, who gave him a direct order not to report the activities in A&D, specifically not to report the grievor's assault on JB. Mr. McNay told the investigators that he had completed the OSOR as accurately as possible while omitting the assault, as ordered.

[43] According to Ms. D'Astous, Mr. Oszczygiel told the investigators that he stayed in the hallway and did not enter the shower area. He heard the grievor shouting but could not see anything because his view of the showers was blocked by CM French. The grievor ordered the handcuffs removed from JB, following which Mr. Oszczygiel heard the sound of strikes. Mr. Oszczygiel reported to the investigators that he did not report any of this in his OSOR because of a warning that CX Perry gave him when he was leaving the shower area to the effect that his OSOR was to reflect that nothing had happened.

[44] Other CXs who had been in the A&D area reported that approximately 10 CXs had been involved in bringing JB there. As one of the other CXs interviewed, CM Carmen Ings told the investigators that she overheard the grievor bragging about roughing up an inmate in A&D. CX Lohrentz was on duty in A&D that day and remembered CM French and the grievor bringing a very resistive inmate to the showers to be strip-searched. She heard someone being struck but did not file an OSOR because at least 6 other CXs who were involved should have done so. She reported to the investigators that she advised the tip line of the event.

[45] CX Purtell was also working in A&D that day. According to Ms. D'Astous, he told the investigators that CM French, the grievor, and 10 CXs entered with the inmate. CX Purtell reported to the investigators that he overheard an argument, so he looked into the hallway, where he saw Mr. Oszczygiel standing and looking at the floor. He heard the grievor tell the inmate to stop resisting and then heard the sound of someone being struck. Once everything ended, CX Purtell spoke to the grievor, who told him to talk to Warden Lapointe about what had happened and to file an OSOR, which CX Purtell did not do.

[46] The investigators spoke to the grievor twice. Two members met with him the first time, then all four met with him the second time. He described the events of August 25, 2017. He responded to a call for assistance on H unit with CM French. On their arrival, they found JB locked in the telephone room. He did not recall who decided to take the inmate to A&D to be strip-searched. Since the inmate was not compliant, he had been handcuffed.

[47] On his arrival at A&D, the grievor ordered the handcuffs removed from JB. The grievor told the inmate to calm down, which he would not do. When one handcuff was removed, he began struggling and refusing to comply with orders that would have allowed removing the second handcuff. The grievor told him to drop the attitude. The grievor admitted that he raised his voice and that he swore at the inmate. He admitted that that was unprofessional of him, but he denied hitting the inmate. According to the grievor, Mr. French was able to calm the inmate. By the time Warden Lapointe arrived, the decision had been made to return the inmate to his cell. According to the grievor's evidence at his interviews, the union was out to get him. It did not like his direct style of management.

[48] Mr. French corroborated the grievor's version of events. The grievor raised his voice at the inmate, so CM French became involved and was able to calm the situation down. CM French was with the grievor the entire time, and at no time did the grievor strike the inmate.

[49] According to Ms. D'Astous, when CX Perry was interviewed, he stated that initially, he did not recall the event. After some prompting, he did recall that along with Mr. French and the grievor, he escorted JB to A&D to be strip-searched. The inmate was very aggressive, and he struggled while Mr. Perry took off one handcuff and the grievor attempted to take off the other one. The grievor ordered the inmate to cooperate, but the inmate continued to struggle until CM French intervened and calmed things down. The inmate was not struck despite his struggling. He was returned to his cell after Warden Lapointe arrived.

[50] Ms. D'Astous explained the board's analysis to reach its conclusions. It relied on four independent witnesses, who put themselves at risk by coming forward. CM Ings heard the grievor brag about getting things done off-camera, but this comment was not specific as to when it happened or in what context. No cameras were used, and the

CMs filed no use-of-force reports or OSORs, even though during his interview, the grievor insisted that he had filed an OSOR, as required. When it came to the blows, only one witness claimed to have actually seen them, while two others reported having heard them. That was sufficient for the board to conclude that the blows occurred as reported. The grievor was known to be a very hands-on CM, according to Ms. D'Astous' information received from CM MacPherson, while other CMs at EI were not. The other CMs were happy to let others deal with the inmates. So based on this description of the grievor by a colleague, the board concluded that on a balance of probabilities, he had done what he was alleged to have done.

[51] The grievor testified that he retired from the Canadian Armed Forces after 22 years and that he then joined the CSC. As of his termination, he had been at EI for 10 years. During that time, he had been part of the talent-management and mentoring programs. He had been a CX01, CX02, CM, CM Operations, an assistant warden, operations, on an acting basis, a member of the emergency response team for 5 years, and as a CM, an emergency-response-team commander. As a CM and acting assistant warden, operations, he was involved in developing policies and procedures at EI. He had no disciplinary record.

[52] In August 2017, CM French was the grievor's partner. On August 25, they received a call that an inmate was threatening staff on H unit. Since CM French was the officer in charge that day, he was required to respond to the call; the grievor went with him. When they arrived, JB was secured in the telephone room while approximately 15 CXs were outside it. The grievor testified that he spoke to JB through the locked door since he knew him from when the grievor worked on the segregation unit where JB had been housed. According to the grievor, JB was extremely belligerent. He told the grievor to "F… off" and shouted that whoever was in front when the door opened was going to "get it". CM Mikalski, who was also present on the unit, told the grievor and CM French that JB was to be taken to segregation. She was on her way to tell Warden Lapointe about the move and to obtain his approval when they arrived.

[53] The grievor testified that he told JB to face the wall. Every command brought new threats from JB; every command had to be repeated. Eventually, JB was handcuffed to the rear. Mr. French called for a camera, but none was available, which was not unusual at EI. With Mr. Perry and Mr. McNay, the grievor and Mr. French

escorted JB to A&D. No cameras are allowed in the shower area or during a strip-search, for the inmates' privacy.

[54] Once in the shower area, the grievor ordered Mr. McNay to remove the handcuffs. According to his testimony, the grievor was running the show and was trying to defuse the situation, but JB was physically resistive and verbally abusive. The grievor admitted that at one point, he screamed at JB, at which point Mr. French stepped in, calmed things down, and got JB to hear them out. JB then explained to the CMs why he was so upset. JB did not want to go to segregation because if he did, given his institutional record, he would be transferred to a location where his family would not be able to visit him. Once things had calmed down and JB had explained why he was so upset, CM French and the grievor agreed with JB that he could be returned to the unit, where the situation would be mediated if the staff on the unit agreed to it.

[55] At this point, according to the grievor, Warden Lapointe arrived with CM Mikalski. JB told the Warden that he wanted to return to the unit. The Warden agreed with the plan and told JB that he was to be taken back to his unit. He then told CM French to complete the strip-search and that he had done a good job defusing the situation. He then left. Mr. McNay completed the search. No handcuffs were required to return JB to the unit.

[56] On arrival on H unit, the mediation occurred, and JB was returned to his cell. All the CXs were told to write OSORs as this was the grievor's practice in all situations, according to his evidence. OSORs were to be completed where there something worthy of note that occurred during the officer's shift. CM French told CX Spilsbury to complete a use-of-force report, in light of the events around the extraction of JD from the phone room. The grievor specifically denied that he told anyone what to put in their OSORs as that would violate the policy that he was responsible for enforcing as a CM.

[57] The grievor went on vacation after the August 25 incident and never returned to EI. He was advised of the investigation into the incident on his return from vacation on September 16, 2017. When he was presented with his notice of a disciplinary investigation, he was on sick leave, having been diagnosed with post-traumatic stress disorder (PTSD). His wife had been insisting that he seek help for his illness since June 2017, but things had come to a head while they were on vacation.

[58] The grievor commenced a workers' compensation claim on his return from vacation by contacting the acting deputy warden, following which he received an email containing the convening order on September 22, 2017 (Exhibit 3, Tab 12). According to his testimony, he does not remember receiving it. He was medicated at the time. On reading it later, he could not believe that he was alleged to have sexually assaulted an inmate and that he had bullied staff. The inmates liked him, according to his testimony, and they called him "Frenchie".

[59] This investigation was a great blow to the grievor. It hurt his pride. He had retired from the Canadian Airborne Regiment to join the CSC. He was extremely proud of his service with the Canadian Armed Forces and with the CSC and would not have done anything to embarrass either organization.

[60] The entire investigative process was done by email, other than the 2 interviews. The first interview was about allegations that he had provided steroids to staff. According to his testimony, the source of this rumour was his posting of a photo of him bench-pressing 600 pounds. He admitted to the investigators that he used testosterone, and he provided them with a copy of the prescription.

[61] At the first interview, no mention was made of any allegations related to an incident with JB. He assumed that the matter was concluded until he was contacted again two weeks later for another interview. The grievor testified that he thought that the second interview was a follow-up to the first. He was accompanied by CX02 Luke Fournier the second time. When they arrived, they were advised that they were to discuss an incident involving an assault on JB. The grievor was never interviewed by the EPS about any such assault.

[62] The grievor ran out of sick leave in late October or early November. After that, he was put on sick leave without pay pending the completion of the investigation. According to him, he thought that he would return to work once the investigations were completed. He did not know that they had been completed until Warden Blasko contacted him to set up the disciplinary hearing for January 3, 2018. He then received a redacted copy of the disciplinary investigation report, which he could not verify was accurate because so much of it had been blacked out. He prepared a response to the report to the best of his ability and sent it to Ms. Blasko in preparation for the disciplinary hearing. Two meetings with Ms. Blasko were held in early January 2018. At

the second one, she advised the grievor that he had been terminated, retroactive to November 24, 2017.

[63] The grievor testified that the culture at EI was divided, toxic, and very hard to manage. The staff was frustrated, and management had run out of ideas on how to mitigate the toxicity. Two known factions were at work within the staff: the Spilsbury faction, and the Whalen or union faction. As a result, according to the grievor, the employees received two different kinds of justice from senior management. The Spilsbury faction contained primarily ex-military employees who had joined the CSC, as had the grievor. Many of them had been in his regiment, so according to him, those he called the members of the Whalen faction perceived that he was aligned with the other faction.

[64] Mr. Whalen and the grievor did not see eye to eye, according to the grievor. They had the same goals, but there was always some point of contention between them. As an example, he stated that Mr. Whalen insisted that cell searches be scheduled, to provide overtime opportunities to his members. The grievor did not agree with performing searches just to create overtime opportunities because doing so meant that the inmates would be locked down for no legitimate reason. According to him, Mr. Whalen and the union executive were more concerned with their members' income than with the inmates' welfare and rights.

[65] The grievor testified that he was respected at EI for being direct. He had learned that leadership style in the army and had brought it to the CSC. He denied ever having any conversation with CM Ings beyond what was needed to debrief each other on their shift changes. He would not have had a conversation about roughing up an inmate in A&D since never in his career had he roughed one up. He was very surprised about the allegation that he had struck JB because he was the first inmate with whom the grievor had had a difficult time in his career. He had worked to successfully develop a rapport with JB. The grievor testified that he even helped JB with his taxes and with filing other government documents.

[66] Mr. French testified that he and the grievor responded to a call on H unit, where JB was being belligerent. On their arrival, CM Mikalski advised them that JB had to be moved to the segregation unit. Before approaching JB, Mr. French asked the officers in the unit command post for a camera and was told that they did not have one. An

officer was then dispatched to find one. That officer disappeared and never returned with the requested camera.

[67] Mr. French corroborated that JB was removed from the phone room as described by the grievor and that Mr. French, the grievor, and CX Perry escorted JB to A&D. He did not recall Mr. McNay being present. In the shower area, the grievor gave the direction to remove the handcuffs. He was trying to talk over JB, who was being extremely verbally abusive, uttering threats at the grievor, and being physically uncooperative while someone tried to remove the handcuffs from him, without success. Mr. French stood in the hallway looking into the room. He does not remember Mr. McNay being in the room but does remember seeing the back of someone's head and from the report knows that that person was Mr. McNay.

[68] Mr. French testified that he then took JB to the wall, talked to him one-on-one, and defused the situation. When he looked over his shoulder, he saw Warden Lapointe and CM Mikalski approaching. Mr. French asked JB if he wanted to return to the unit, which he did. The Warden agreed that it was best if JB were returned to the unit, so Mr. French left to call the unit and inform it that JB was returning.

[69] The grievor and Mr. French took JB back to the unit, where he met with CX Spilsbury for a few minutes in the unit servery. The two CMs watched JB and CX Spilsbury on camera, and when they finished, the inmate was returned to his cell. In the meantime, the missing belongings, over which the inmate had been so upset, had been retrieved and put in his cell. Mr. French confirmed that the grievor directed all staff directly involved in the incident to fill out OSORs, as he always did at the conclusion of an incident of this sort, with his customary "OSORs all round" comment. Mr. French perused the OSORs but had no control over what was in them. CX Spilsbury was told to file a use-of-force report, which he did not do immediately but eventually did.

[70] According to Mr. French, it was a low-level resolution to an everyday situation that he and the grievor carried out. It was a "nothing" situation. Mr. French did not file an OSOR because he had not had a big enough or any hands-on role in it. Furthermore, he testified that at no time did he see the grievor, or anyone for that matter, hit the inmate.

[71] Mr. French described the staff at EI as being hostile towards members of other crews and management while working in a high-stress environment. He understood the inmate's frustration with the difficulty obtaining his kit and food. The staff on H unit would do nothing to help him. EI was a horrible place to work, but Mr. French was lucky because he had a good partner. Mr. French also testified that his employment with the CSC as a CM was terminated in January 2018 for his role in this incident and for swearing and sexual harassment, which were the same allegations reported to the tip line about the grievor.

[72] Mr. Spilsbury and Mr. Roussel testified about their involvement with the board and the environment at EI. According to Mr. Spilsbury, EI was a very difficult place at which to work, and the two sides were constantly at loggerheads. Many of the officers were angry at the perks that the union executive members received, like unauthorized or special leave, which put an unusual burden on others to cover their shifts. The officers felt that the union executive members were out to get them if they complained about anything that the executive did. Mr. Spilsbury, who had been a member of the union executive from 2004 to 2015, testified that initially, he tried to mediate between the two factions, but that he gave up when he saw that he could not placate either side. Mr. Spilsbury testified that the union executive wanted any CM who did not go along with it gone from EI, no matter what it took.

[73] As for the incident, Mr. Spilsbury testified that it occurred on his last day of work at EI. He too was terminated in January 2018 as a result of the fallout of the TLS report and the subsequent investigations. He remembered that the inmate put on quite the performance that day and that JB had been locked in the phone room. While in there, the inmate kicked and hit the glass, shouted, swore, and threatened Mr. Spilsbury and another officer, CX Ranta.

[74] According to Mr. Spilsbury, the situation escalated to the point that he called CM Mikalski to the unit. CM Pauley came with her and directed that the inmate be moved to segregation. CM Pauley directed Mr. Spilsbury to apply handcuffs. CX Ranta and Mr. Spilsbury managed to handcuff the inmate, who was being physically resistive. The inmate was then ready to be moved to segregation. Mr. Spilsbury remembered Mr. French asking CX Ranta to fetch a camera.

[75] Later that day, when the inmate returned to the unit, Mr. Spilsbury entered into mediation with him. During their discussions, the inmate appeared fine and did not report any injury or concerns with the events while in A&D. He complained about not receiving his personal effects, even though he had been at EI for five days, but said nothing about an assault or any mistreatment while in the showers or in A&D.

[76] Mr. Roussel testified that he was a grievance coordinator and shop steward with the union between 2012 and 2015. He testified that he worked with the grievor when he was a CX and that he reported to the grievor as his CM.

[77] Mr. Roussel testified that he also served on the emergency response team with the grievor. In August 2017, Mr. Whalen called Mr. Roussel to a meeting. Mr. Roussel testified that at the meeting, Mr. Whalen demanded information on the staff of G/H unit and on the grievor in particular. Mr. Whalen wanted to turn this information over to the Commissioner and the board. When Mr. Roussel asked Mr. Whalen what he wanted, Mr. Roussel was told, "Anything, even if you have to make it up," according to Mr. Rousell's testimony. Mr. Roussel told Mr. Whalen that he did not have any information of illegal activity, and he refused to cooperate with the union. He was then told that failing to provide any information would result in the termination of his employment.

[78] Mr. Whalen told Mr. Roussel that "[w]e [the union] are throwing you a lifeline." At this point, according to Mr. Roussel, he gave Mr. Whalen his phone number and agreed to attend a secret meeting that Mr. Whalen would arrange with the Commissioner. According to his testimony, he would have agreed to anything at that point, just to get out of the room. Mr. Whalen later texted Mr. Roussel to confirm the time and place of the secret meeting and whether he would attend (Exhibit 4, Tab 44). Mr. Roussel did not respond to the text and did not attend the meeting. In the course of the investigation, Mr. Roussel confirmed the grievor's recollection of events on the day in question. As a consequence, he reported that his peers deliberately did not inform him when an emergency phone call came for him while he was on duty at EI. Mr. Roussel is no longer employed at EI; he was given the option of resigning rather than being terminated.

[79] Ms. Blasko was the warden of EI who determined that the grievor's employment should be terminated. She was supposed to be at EI only from November 2017 to

February 2018 but ended up staying longer, at the Commissioner's request. When she arrived there, several long-term employees, including the grievor, had been suspended. Ms. Blasko's first encounter with the grievor was at the disciplinary hearing. However, she had been briefed about him by the Commissioner and by Labour Relations before she assumed the warden role.

[80] Ms. Blasko was aware of the contents of the TLS report and had sat in on meetings with the union that the assistant deputy commissioner, operations, had chaired to discuss required improvements before she became the warden at EI. According to her, the grievor had been suspended as a result of the TLS report, and the resulting disciplinary action came out of the investigation committee's report by Mr. Weatherbee.

[81] Ms. Blasko testified that as the warden, she received the draft report from the board, reviewed it, suggested some changes to it, then accepted its findings and conclusions. She then forwarded it to Labour Relations and commenced the disciplinary proceedings against the grievor. She ensured that he received a vetted copy of the report along with his notice of disciplinary hearing. The hearing was scheduled for January 5, 2018.

[82] The grievor filed a written rebuttal in which he denied all the events described in the report. Ms. Blasko testified that she reviewed his rebuttal during her decision-making process. She did not ask him questions about it during the disciplinary hearing. She took the information she had on hand, along with the investigation report, the rebuttal, and the information from the disciplinary hearing, and in consultation with Labour Relations, determined that termination was appropriate. According to her testimony, she considered a demotion, a transfer to a different institution, and lesser penalties but determined that they were not warranted because the grievor did not accept responsibility for his actions. Her testimony and opinion were that anything less than a termination could not correct the bad behaviour that the grievor had demonstrated. She had before her evidence of several serious breaches of employer policy, which the grievor had denied.

[83] According to Ms. Blasko, the grievor was unsuitable as a role model for inmates and did not demonstrate CSC values and ethics. As a CM, he was expected to demonstrate leadership and to be a role model for how to deal with difficult situations.

Instead, he had put CXs in jeopardy and in a difficult situation because he had signed off on their OSORs reporting his involvement in an assault on an inmate. EI was struggling, and he should have been a role model. He contributed to its toxic work environment. The bond of trust with him had been broken.

[84] Ms. Blasko testified that she knew that she would be the warden at EI for only a brief time. She had never met the grievor before then but had heard about him and had been briefed about the allegations against him before she assumed the position at EI. She went to EI in part to deal with the disciplinary processes arising from the board. She also knew that the environment there was toxic and that she was there to address it. The staff at EI had to be shown that CSC management took the TLS report seriously. She was aware that the board had investigated several staff. She knew that the employer intended to deal with the cases seriously and to set an example for the staff that remained at EI that the behaviour described in the TLS report would not be tolerated.

[85] She did not recall the grievor offering anything of worth at the disciplinary hearing. She did not recall him offering to print the OSOR he claimed had been filed on the day at issue. She did not review the notes of the disciplinary hearing before she made her decision to terminate him. Disciplinary action must be taken quickly, which she did. The disciplinary hearing was held on January 5, 2018, and she made her decision the next day.

[86] In November 2017, in preparation for assuming her role as EI's warden, Ms. Blasko asked for the grievor's performance reviews and disciplinary records. She reviewed them. When she decided that he should be terminated, she was aware that he was a long-term employee with a clear employment record who had been given opportunities in senior management roles on an acting basis, such as the assistant warden, operations, role. She did not put stock in these documents as in her estimation, for them to contain anything negative, it would have had to have been a very significant issue. She did not believe that they truly reflected the grievor's performance or his discipline record.

[87] Based on the conclusions in the investigation report and on what she heard at the disciplinary meeting, Ms. Blasko concluded that termination was appropriate. In his letter of termination dated January 8, 2018, Ms. Blasko referenced the investigation

that took place following the October 27, 2017 convening order to investigate the allegations of inappropriate conduct at EI. She described the grievor's misconduct as follows:

> *In the investigation noted above, it was concluded that you committed the following misconduct: (i) that you displayed inappropriate conduct involving an inmate at Edmonton Institution; (ii) and breached employer policies, procedures, directives and other relevant legislation, more specifically, that you assaulted inmate* [JB] *in the Admission and Discharge shower at Edmonton Institution on August 25, 2017. Moreover it was demonstrated that you failed to report this incident.*
>
> *In your investigation interview and in your disciplinary hearing you admitted to failing to report his incident; however you denied that you assaulted the inmate. Furthermore, during the disciplinary hearing you failed to admit your role and demonstrated no remorse in the above noted misconduct. Having carefully reviewed the facts in this case, including your comments, I concur with the findings of the investigation.*
>
> *As a result of this process, I have concluded that your actions have violated Standards 1 Responsible Discharge of Duties, 2 – Conduct and Appearance, 3 – Relations with other Staff Members, 4 – Relationships with Offenders of the Correctional Service of Canada (CSC) Standards of Professional Conduct and Code of Discipline, Commissioner's Directive (CD) 001 Mission, Values and Ethics Framework of the CSC, CD 060 Code of Discipline, CD 567 Management of Security Incidents and CD 568 – Management of Security Incidents and Intelligence.*
>
> *In determining an appropriate disciplinary measure, I have taken into consideration all aggravating and mitigating factors, including your years of service, employment record and your personal statements. I have given considerable thought to your comments at your disciplinary hearing as well as the rebuttal to the Investigation report you provided. However, I do not believe that this completely removes your culpability considering the seriousness of your actions. Your misconduct involved premeditated actions in violation of fundamental CSC and Public Service policy and standards of conduct. In light of the above, and given the severity of your misconduct, I have considered that the bond of trust essential to your employment with the Public Service of Canada has been irrevocably broken.*

[88] On the basis of these conclusions, the grievor's employment was terminated retroactively to November 24, 2017.

III. Summary of the arguments

A. For the employer

[89] 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 ("the *William Scott* analysis"):

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

[90] The grievor stated that the incident did not happen and that he is the victim of a conspiracy between the union and EI management. There is a question of the evidence. Context is very important in this case. Due to the nature of correctional jobs, CXs and CMs are held to a higher standard than are most public servants. As peace officers, they are expected to act within the law. As a manager, the grievor was expected to lead by example. In all cases, he failed.

[91] To believe the evidence, an adjudicator must weigh the credibility of the witnesses (see *Stene v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 36, and *Faryna v. Chorney*, [1952] 2 D.L.R. 354). Messrs. McNay, Oszczygiel, and the inmate involved were all witness to the incident, and they all testified. Mr. Whalen gave context as to the environment at the time. Mr. McNay did not benefit from coming forward; he put himself in trouble for not filing an honest OSOR. Mr. Oszczygiel did not see the incident, but he did see movement in the showers. He came forward, and so he has been labelled a rat. Why would the inmate lie? He had nothing to gain. He had finished his time and had moved on. Mr. Lapointe was familiar with the incident. He ordered the inmate returned to his cell.

[92] The grievor was an experienced officer who knew about the requirement for a camera when escorting an inmate to segregation. Why did he not have one? He testified that Mr. French asked for one but that the CX who went to get one never returned. He

also testified that he should have waited and that he had time to wait, as with the inmate locked in the telephone room, there was no rush. Since there was no camera, there is no certainty of evidence. The grievor is responsible for that uncertainty.

[93] The showers are a perfect place to assault an inmate. The grievor knew that there were no cameras there. It was the perfect opportunity, and he took advantage of it, from which inferences must be drawn. The credibility of his witnesses must be examined. Messrs. Spilsbury and French each have cases linked to the outcome of this case, so they have a lot to gain from providing evidence that supports the grievor. Mr. Spilsbury was named as one of the toxic elements in the TLS report.

[94] If the Federal Public Sector Labour Relations and Employment Board (FPSLREB) finds no one credible, there are still issues that go to the bond of trust, such as the lack of a camera, which the grievor admitted to Ms. Blasko he should have had. Also, there is his failure to complete an OSOR. He did not take responsibility for his actions at any time, including at the hearing. He did not demonstrate appropriate leadership that night, and his leadership contributed to the toxic work environment that he complained about.

[95] His actions went to the core of the CSC's mission, which is to protect inmates and to provide them with positive role models. Many decisions made that night put EI, the officers, and the inmate at risk. From the instant he arrived on the unit, the grievor took control of the situation. He must be held accountable for his actions.

[96] CSC employees are held to a higher standard, and the mere existence of a serious doubt about their integrity is sufficient to prevent reinstating them, because trust is such an important factor when individuals' lives and safety are at risk (see *Simoneau v. Treasury Board (Solicitor General of Canada - Correctional Service)*, 2003 PSSRB 57 at para. 62). The employer has to trust that the officers will do the right thing.

[97] Any loss of confidence in the grievor will impair the correctional service and will adversely impact the employer's ability to function. It is trite law that trust and honesty are the cornerstones of a viable employer-employee relationship, particularly when the employee occupies a position of trust. CXs are linked to the integrity and safety of the laws of Canada, institutions, inmates, and staff (see *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26 at paras. 79 to 81).

[98] The grievor was a peace officer and was expected to act within the law and the employer's policies. He was expected to be a role model for offenders, to help them reintegrate into society. Through his actions, he lost the employer's trust; it considered him a risk to institutional safety. There was no justification for the use of force that day. Any mitigating factors are outweighed by the vulnerability of the inmates in the grievor's charge. His lack of remorse and failure to accept responsibility demonstrates a lack of rehabilitative ability (see *Richer v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 10; *Roberts v. Treasury Board (Correctional Service of Canada)*, 2007 PSLRB 28; and *Shaw v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 101).

[99] As stated in *Walker v. Deputy Head (Department of the Environment and Climate Change)*, 2018 FPSLREB 78 at paras. 627, 630, and 631, discipline that the employer imposes on an employee must be warranted in the circumstances, must consider all aggravating and mitigating factors, and must be reasonable. A reasonable penalty is not excessive. In this case, the employer fulfilled its obligations and imposed a reasonable penalty, which should not be interfered with.

[100] This *de novo* process remedied any procedural issues. Credibility questions must be dealt with by the test articulated in *Faryna*. The evidence must be subjected to an examination of its consistency with the probabilities that surround the existing conditions. The truth of the case must be the harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions (see *Stene*, at para. 191).

[101] In *Rose v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 17, the grievor's termination was overturned in that use-of-force case, and a one-year suspension was substituted. In that case, unlike this one, the grievor recognized that something had happened that should not have happened. His actions were fundamentally opposed to a CM's role, in which trust is required. His dishonest conduct resulted in the loss of the employer's trust, which strikes at the core of the employment relationship and the integrity of the correctional system. The termination of his employment was the only suitable option.

B. For the grievor

[102] The context of this case is key. The TLS report identified an environment at EI of bullying, intimidation, and harassment. As a result, the employer embarked on a series of investigations using generic and vague terms of reference to look into the conduct of certain of its employees, including the grievor. In this context, Ms. Blasko went to EI to deal with the disciplinary action to be taken against the grievor and other employees.

[103] As a result of the TLS report, which found bullying, intimidation, and harassment rampant at EI, Mr. Lapointe issued generic terms of reference to the board to investigate the people identified to it, including the grievor. The investigators met with a number of witnesses, wrote their report, and sent it to Ms. Blasko. She reviewed the draft, made comments, and returned it for them to finalize. Based on the report, she determined that the grievor should be terminated.

[104] The witnesses that the investigation committee interviewed testified at the hearing. Mr. McNay testified that he and some other staff members entered the unit and handcuffed the inmate. He and Mr. Perry then escorted the inmate to A&D. He did not mention that the grievor struck the inmate three to five times in the abdomen or that he had removed the one handcuff. He recalled that the inmate was agitated and that there was shouting. He also did not recall which CM directed him to omit events from his OSOR.

[105] The inmate testified that he told Warden Lapointe that everything was alright, and he did not mention an assault, even though he claimed that a CM had choked him until he passed out and that the grievor had struck him repeatedly. He claimed that the handcuffs were removed after he was struck and that he had bruises in his stomach area, although he never consulted medical care as required by CSC policy in use-of-force incidents. Mr. Lapointe testified that when he arrived, nothing out of the ordinary was going on. There was no assault, and no healthcare consultation was required as no use of force had occurred. Mr. Oszczygiel claimed that he heard nothing while standing in the hall but that he saw the grievor's arms swinging. Then he claimed that his view was blocked by Mr. French, who had filled the doorway.

[106] Ms. D'Astous' testimony can be overlooked. It was a hearing *de novo*, and the investigator's testimony is irrelevant. She did not participate in the entire investigative

process. She testified that the mandate for the investigation was very much disciplinary and that much discussion took place with the higher authorities at the CSC and the EPS about the mandate and the expectations from the EPS. The investigators had to be careful with whom they spoke because the EPS was also investigating individuals who had been identified to the board, which meant that the interviews did not necessarily follow any particular order. They had to be staggered. Overall, the investigators interviewed 13 people about the grievor.

[107] According to Ms. D'Astous, much weight was put on opinion evidence, such as that of Ms. MacPherson, who told the investigator that in her opinion, the grievor had been involved in a large number of use-of-force incidents, and that as a CM, he should manage and not be hands-on with respect to incidents. This was of significant importance in the committee's considerations. Similarly considered were Ms. Ings' comment that she overheard the grievor bragging about roughing up an inmate in A&D and the evidence of Ms. Lohrentz that she heard thumping noises coming from the strip-search room. Both comments were without time and place and could not be tied to the incident for which the grievor was being investigated.

[108] The grievor testified that CM French was in charge on the night at issue and that he responded to the call from G/H unit, as French's partner. He was one of three CMs involved in moving the inmate to segregation. CM Mikalski decided to move him to segregation without securing the warden's approval, as was the practice at EI. The grievor admitted that he knew that policy required the warden's approval and that a camera was required to record the transfer. According to the grievor and other witnesses, cameras were rarely available at EI.

[109] The grievor admitted that he had a verbal altercation with the inmate in the showers but denied any physical altercation. He was certain that he had written an OSOR. Mr. French's testimony aligned with that of the grievor and the OSORs that were filed that night. The inconsistencies are with the evidence and the investigation report.

[110] The entire investigation process raises procedural fairness concerns. If an investigation process is procedurally unfair, a hearing *de novo* must establish grounds for discipline. Ms. D'Astous testified that she was frustrated by the investigation process. She was prevented from interviewing witnesses because of the EPS and the Royal Canadian Mounted Police.

[111] Mitigating factors have not been accounted for. There is no indication as to how things were weighed, including the grievor's length of service, reputation, untarnished discipline record, excellent performance reviews, etc. Ms. Blasko showed little openness to considering any evidence that ran contrary to the investigation report. She arrived at EI with a purpose from which she was not willing to waver.

[112] The employer had the burden of proving that on the preponderance of the evidence, the grievor's conduct justified imposing discipline (see *Pelletier v. Canada Revenue Agency*, 2019 FPSLREB 117). A decision maker may draw an adverse inference from the employer's failure to disclose documents, such as Ms. Blasko's notes. Adverse inferences are founded on the common-sense logic that if a party has evidence and chooses not to bring it forward, it must not be favourable (see *Ma v. Canada (Citizenship and Immigration)*, 2010 FC 509; and *Stassis v. Amicus Bank*, 2014 NLCA 38).

[113] The employer in this case failed to produce Ms. Blasko's notes, recordings of the interviews from the investigation committee, the committee's notes that had been turned over to the employer, and several other documents. The logical conclusion has to be that they do not support the employer's action of terminating the grievor.

[114] The grievor's position is that the employer did not proceed fairly in its investigation of him, and therefore, it violated his right to procedural fairness. The report on which Ms. Blasko relied was biased or at the very least demonstrated a reasonable apprehension of bias. In evaluating the *Wm. Scott* factors, the grievor's stand is that the employer did not establish that he engaged in any misconduct, that the discipline imposed was excessive, and that if any discipline was required, a brief suspension would have been appropriate.

[115] An adjudication hearing provides a grievor with a hearing *de novo* sufficient to remedy any procedural errors encountered in the investigative process. At that hearing, the employer is required to discharge its burden of proof and establish the facts upon which the disciplinary action was originally founded. This is even more crucial when the investigation and the report are flawed and biased (see *Legere v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 65; and *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL)).

[116] An adjudicator should reduce a disciplinary penalty when it was clearly unreasonable or wrong (see *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119 at paras. 13 and 14). In *Pelletier*, the grievor was ordered reinstated as of the suspension date (even though the suspension was not before the adjudicator because the termination was retroactive to the suspension date), and the employer was ordered to reimburse the grievor for salary, benefits, and pension losses, subject to the usual deductions. Likewise, in *Legere*, the grievor was reinstated to his position, including compensation for any shift and weekend premiums, overtime, and salary increases.

[117] The Supreme Court of Canada has ruled that pay in lieu of reinstatement should occur only if the adjudicator's findings reflect concerns that the employment relationship is no longer viable. When making this determination, the arbitrator is entitled to consider all the circumstances relevant to fashioning a lasting and final solution to the dispute (see *Gill v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 102 at para. 143; and *Alberta Union of Provincial Employees v. Lethbridge Community College*, 2004 SCC 28).

[118] An adjudicator has the authority to award compensation in lieu of reinstatement in appropriate circumstances. Reinstatement is not a right, even after a finding of unjust dismissal is made (see *Gill*, at para. 143; *Lâm v. Deputy Head (Public Health Agency of Canada)*, 2011 PSLRB 137; and *Bahniuk v. Canada Revenue Agency*, 2014 PSLRB 73 (overturned in 2016 FCA 127)).

[119] The most commonly accepted test to determine if the employment relationship has been undermined or has deteriorated to the extent that it is untenable was established in *DeHavilland Inc. v. CAW Canada, Local 112* (1999), 83 L.A.C. (4th) 157. The factors to consider are whether co-workers are willing to work with the grievor, the lack of trust between the grievor and the employer, the grievor's inability or refusal to accept responsibility for any wrongdoing, the grievor's demeanour and attitude at the hearing, the grievor's animosity towards management or co-workers, and the risk of a poisoned workplace if the grievor is returned to it.

[120] In this case, the employer provided no objective evidence of any of these factors. The employees who testified agreed that they could work with the grievor. Ms. Blasko never worked with him, so how could she possibly know whether she could

trust him? He demonstrated no animosity towards the employer or anyone who testified. He accepted responsibility for what he did wrong, which was not having the required camera and violating the employer's policy on admitting an inmate to segregation without the warden's approval. But he did not accept responsibility for something he did not do, as other witnesses corroborated.

[121] The employer provided the grievor with a catch-all convening order that contained numerous allegations of misconduct that did not even apply to him. It failed to inform him of what he was to be investigated for. When he appeared at his first interview with the investigators, he was not questioned about whether he had assaulted the inmate. Instead, the investigators focused on his possession of steroids and other allegations of misconduct. Only when he was called back for a second interview were the allegations of assaulting an inmate raised.

[122] In *Pelletier*, as in this case, the investigation report was of central importance to the employer's decision. Unlike the *Pelletier* case, the adjudicator in this case cannot review the minutes of the interviews conducted with the witnesses as they were not produced by the employer, even though according to Ms. D'Astous, they were provided to the employer. Despite the requests for the production of documents, the grievor was provided with only the brief synopses of the interviews in the investigation report, which was initially provided to him only in a redacted format. He received the complete report only after the adjudicator ordered it produced to him.

[123] Although nine OSORs were filed and listed as attached to the investigation report, only eight were attached to the copy provided to the grievor (Exhibit 1, Tab 10). Mr. Perry's OSOR is not included, even though the investigators noted that Mr. Perry was allowed to review it. Furthermore, the investigation report contained testimony from only three of those who filed OSORs, namely, Messrs. Perry, Oszczygiel, and McNay. Two of them had allegedly witnessed the purported assault. The investigators did not interview or did not include evidence from the other six individuals who filed OSORs, namely, Ms. Mikalsky and Messrs. Ranta, Spilsbury, Pye, Barrette, and Fraser.

[124] Ms. Blasko accepted the investigation report's findings and noted in her evidence that the grievor refused to apologize for his misconduct. What she failed to acknowledge was that he denied the investigation report's findings and denied that he had ever assaulted the inmate. He acknowledged his failings that night; he should not

have engaged in a shouting match with the inmate, and he should have had a camera. It would not have mattered what he said at the disciplinary hearing. Ms. Blasko had already determined that he would be terminated before she even made his acquaintance, let alone met with him.

[125] Ms. Blasko and the employer had a duty to act fairly toward the grievor and to allow him the chance to provide a substantive response to the findings in the investigation report. The employer is obligated to ensure that investigations are conducted in compliance with the laws of natural justice (see *Legere*). It is well established that the right to respond to evidence or allegations made against a grievor is at the foundation of the rules of natural justice. Failing to inform the grievor of who had made the allegations against him and of their nature and extent and failing to provide him with an unvetted investigation report before the disciplinary hearing rendered the investigation and discipline process procedurally unfair.

[126] In the face of an investigation process that was procedurally unfair, it was even more crucial that the employer discharge its burden of proof and establish the facts necessary to support its disciplinary decision (see *Legere*). It had the burden of showing how the process it used to reach its conclusion and the outcome it reached were fair and justified. By failing to disclose documents, such as Ms. D'Astous' and Ms. Blasko's notes, a negative inference out to be made that the information in them could not support the employer's position.

[127] The employer had the burden of demonstrating that on the balance of probabilities, the grievor assaulted the inmate. It is important to highlight that more than mere possibilities are required to conclude that wrongdoing occurred (see *Legere*). The employer failed to meet that burden. The grievor adamantly and consistently denied assaulting the inmate, which Mr. French and Mr. Spilsbury corroborated during their direct testimony at the hearing, as did Mr. Perry, according to the investigation committee's notes. All the OSORs created and submitted immediately after the alleged incident with the inmate did not record any assault. Had physical force been used on the inmate, the strict process that the employer's policies require includes following up with the inmate and making a visit to and obtaining a report from EI's nursing staff. None of this was done. All this leads to the conclusion that there was no assault.

[128] Ms. D'Astous testified that the investigators simply accepted Ms. MacPherson's testimony that the grievor was frequently involved in use-of-force incidents. There was no investigation of the records, and no follow up was done, yet this was a critical part of their decision-making process. The investigation report does not mention that the grievor had never been disciplined. Ms. D'Astous testified that the EPS prevented the investigators from completing a proper and thorough investigation. Yet, Ms. Blasko simply accepted the report and used it to terminate the grievor's employment, without question.

[129] Both the grievor and Mr. Spilsbury testified to the tension between the union executive and its members at EI. Mr. Whalen testified that he was directly involved with setting up interviews with the CSC's commissioner, to whom he had a direct line. Mr. Whalen and Mr. Inkpen, the union's president and vice-president, set up the interviews for the officers and then accompanied them to the interviews. The investigation report notes that Mr. Oszczygiel changed his testimony once he attended Mr. Lapointe's office with Mr. Whalen. Mr. Whalen contacted Mr. Roussel on August 11, 2017, and tried to convince him to testify against the grievor and others. In a closed-door meeting, Mr. Inkpen and Mr. Whalen informed Mr. Roussel that they did not care if he had to make things up but that he had to provide evidence against the other officers, especially the CMs, or his job would be in jeopardy. When Mr. Roussel refused, he was told that his choice was to resign or be terminated. He chose to resign.

[130] The employer did not prove the grounds it relied on to terminate the grievor. In *Seamark v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 56, an officer who administered knee strikes to an unresisting inmate after an unwarranted cell search was fined only one day's pay. In *Hicks v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 99, a use of excessive force applied to an inmate's head even after the inmate was handcuffed and on the floor, along with filing an untrue OSOR, resulted in the officer being suspended for 20 days without pay. In *Rose*, the former Public Service Labour Relations Board (PSLRB) determined that the termination at issue in that case was excessive due to an excessive use of force and a "concerted effort" to conceal it. The PSLRB substituted a one-year suspension for the termination.

[131] Based on the results in all those cases, it is clear that the termination of the grievor was excessive in this case. He maintained that he did not assault the inmate. The employer provided inadequate evidence and witnesses that were contradictory and

not credible, and it could not show that the grievor in fact did what he was accused of doing. Even if the FPSLREB deems that there is sufficient evidence to suggest that the grievor did in fact use excessive force against the inmate, the jurisprudence suggests that termination was still an excessive penalty. In the alternative, if excessive use of force is found, a suspension would be proper. In addition, the grievor seeks any other remedy that the FPSLREB deems appropriate.

IV. Reasons

[132] This termination cannot be upheld. Due to the employer's failure to establish the allegations against him upon which the termination was based, the termination must be overturned.

[133] The letter of termination cited the violation of several different standards and directives. The evidence put before me focused on three incidents: the grievor was alleged to have assaulted an inmate; to have transported an inmate without a camera; and to have yelled at the inmate.

[134] One of an adjudicator's key roles is assessing the credibility of witnesses as part of determining whether the employer met its burden of proof. The employer in a discipline case must show on the basis of clear, cogent, and compelling evidence that the grievor did what he or she is accused of doing. The employer in this case brought before me many witnesses upon whose evidence its counsel argued that he met the burden of proof. I do not agree. The testimony I heard from the employer's witnesses has many issues and inconsistencies.

[135] I do not find the evidence of Mr. McNay credible. He remembered what fit the script of an excessive use of force, which exonerated him from any culpability. His memory was selective when it involved everyone but the grievor. As part of assessing a witness's credibility, I must also take note of the witness's behaviour on the stand (see *Faryna*). The disdain this witness held toward the grievor while on the stand was palpable, and it was clear to me that by his testimony, he intended to see the grievor undone.

[136] Mr. McNay testified that he prepared his OSOR at 09:46 on August 25, 2017, while "the events were fresh in [his] mind". Then he testified that a CM, whom he could not identify, directed him to omit details of what had happened. He stated that despite

the unusual direction, he did not recall who gave it to him. Such an extraordinary event would stand out in the mind of a well-trained peace officer whose duty is to make note of such things, particularly when it was alleged that the OSOR was intended to disguise that CM's actions.

[137] I also do not believe that after reflecting and speaking to his family, Mr. McNay consulted his union about anything other than trying to protect himself. The day after he reported the alleged excessive use of force to the union, it set up a meeting with Warden Lapointe. I believe that Mr. McNay reported the grievor to protect himself from the discovery of his involvement in escorting an inmate to segregation without proper authorization, should someone else report it. How he came to report it is inconsistent with the evidence of Mr. Whalen. Also inconsistent is who told him not to report anything.

[138] Mr. Oszczygiel saw nothing, according to his own evidence. The employer in their summation noted that Mr. Oszczygiel did not see the incident in the shower room, but only saw the movement of arms. This makes Mr. Oszczygiel's testimony that 'he couldn't believe what he just witnessed' after leaving the A&D area rather incredulous. In my estimation, his true grievance would be against Mr. Perry for the alleged intimidation, if it can be believed that Mr. Perry said anything to Mr. Oszczygiel. I am reluctant to accept that seeing hands swinging when there was a struggle to remove handcuffs, according to Mr. McNay, amounted to the actions for which the grievor was terminated. This is particularly so when, as testified by Mr. Oszczygiel himself, he was in the hallway, and his view was obstructed by Mr. French. He provided no proof as to how he knew whose hands he saw swinging. The grievor's hands are very distinctive as they are heavily tattooed, and he is a very large man with large hands. This would have been an easy way of identifying them, but no such reference was made.

[139] Perhaps he did see hands swinging, but given the struggle to remove the handcuffs described by Mr. McNay, I cannot be certain what Mr. Oszczygiel saw, if in fact he saw anything. I doubt that Mr. Oszczygiel saw anything that day while standing outside the showers, given that the doorway was blocked by Mr. French, according to his testimony. Even according to Ms. D'Astous' testimony, Mr. Purtell saw Mr. Oszczygiel staring at the floor and not paying attention to what was happening in the showers. In my view, the most plausible explanation of the 'movement of arms'

which Mr. Oszczygiel may have seen was from the inmate himself, as he resisted the removal of the handcuffs. Finally, I note that the timing of his report, which he claims occurred only after Mr. McNay came forward, is also at odds with Mr. Whalen and Mr. Lapointe's testimony.

[140] As to the version of events described by the inmate, JB, it was completely inconsistent with everyone involved and with the employer's scenario. No one other than JB mentioned that he was choked by Mr. French until he passed out, which would have rendered him limp and would have made it highly unlikely that the grievor could have landed blows to his torso while JB was in that condition. Then on cross-examination, he told yet a different story. I cannot accept his evidence because of its inconsistencies on its own and those it had with that of the other witnesses. Furthermore, if any such assault happened, why was it not reported to Mr. Lapointe at the first opportunity, when he arrived at the shower area? Why was EI's healthcare unit not consulted? Why did no one, including Warden Lapointe, note marks on JB's neck, which surely would have been there had he been choked to the point of unconsciousness?

[141] A struggle might have occurred; but what it was, without clear, cogent, and compelling evidence, I cannot say. The best evidence of what happened that day is that of Mr. Lapointe, who testified that there was no evidence of a use of force and that the inmate reported no use of force on or assault to him. Mr. Lapointe testified that when he arrived the inmate seemed agitated, but nothing out of the ordinary. I can conclude only that based on his evidence, what was reported to the board of investigation did not happen as reported. I believe his testimony over that of the CXs who feared for their continued employment if they did not serve up someone to satisfy Mr. Whalen's witch-hunt, as described by Mr. Roussel, and the demands of EI's version of McCarthyism, through its use of unfair allegations and investigation. I find as a fact that the grievor did not assault inmate JB in the showers of A&D on the day in question.

[142] Furthermore, having considered all of the circumstances around the transfer of the inmate to A&D, the evidence before me leads to the following findings. The grievor was called to assist with the escalating situation with JB. On arrival, he was informed that an order was given (in some accounts by CX Spilsbury, in others by CM Mikalski, still others by CM Pauley) to transfer the inmate to segregation. A camera was

requested for the transfer from the unit command post, but one was not available. A CX was sent to get a camera, but the CX did not return. The uncontested evidence is that cameras were rarely available at EI. Once in A&D, before Warden Lapointe arrived, JD had been verbally abusive to the grievor and was resisting the removal of handcuffs. The grievor reacted, by shouting. CM French was able to intervene and calm JD down. CM French spoke to JD to determine the cause of the incident and found a resolution that did not involve taking the inmate to segregation. This is also consistent with Warden Lapointe's testimony that on his arrival, he found the inmate agitated but nothing out of the ordinary. I note that Warden Lapointe's testimony does not support Mr. Oszczygiel or Mc Nay's version of events, in that they had claimed that the handcuff struggle continued until Warden Lapointe's arrival.

[143] The manner in which the employer pursued the allegations against the grievor and the open-ended terms of reference, which were made broader in the course of the process given to the investigators, amounted to a witch-hunt in the grievor's case. There is no doubt that the wrongs at EI identified in the TLS report had to be addressed. But the implementation of the tip line with the threat that employees either had to report wrongs or face being walked off amounted to McCarthyism and served only to put any evidence garnered about the grievor from tips in doubt unless they were otherwise objectively corroborated, which did not happen in this case.

[144] Mr. Lapointe's evidence did not help the employer's case. It corroborated that the CXs ignored the CMs' authority at EI. This gives credence to the grievor's allegations that one of the factions or crews at EI had targeted him. The employer embarking on terminating a CM or any employee on the basis of tips without the proper corroborating investigation and the proper consideration of all mitigating and aggravating factors cannot be ignored. In its zeal to address an untenable situation at EI and to put an end to a reign of terror by certain employees, the employer cut a very wide swath through the population of its employees. In this case, it did so without proper attention to the requirements for determining just cause and the principles of natural justice. As opposed to rooting out an employee who is not acting in accordance with employer standards, the employer instead gave individuals the opportunity to put a target on this employee simply because they disagreed with him or his management style. This 'target' was also extended to those employees who were viewed as supportive of the grievor, as evidenced by Mr. Roussel's testimony.

[145] There were no recordings of the cell extraction or the escort to A&D, as was required, and there were no video recordings on which I could rely. While recordings of a strip-search are not allowed, the hallway cameras might have provided at least an audio recording of the events in the shower, but none was provided to me. I had only the verbal evidence of the witnesses who testified that they all lied in their OSORs. I am faced with the question of when they lied. Was it when they filed the first OSORs or when they feared being walked off?

[146] The degree of analysis described by Ms. D'Astous was in no way sufficient to conclude that on the balance of probabilities, what was alleged to have happened did happen, particularly in light of Mr. Lapointe's testimony. The fact that the grievor was known as a hands-on type of CM and that he was known to get things done was used against him when in my opinion, it reflects positively on him in that he was willing to do his job despite the environment at EI, in which other CMs would not have become involved. The fact that the board put much weight on the comment that the grievor was a hands-on manager, to render it to mean that he was a manager who was known to lay hands on inmates, was unwarranted, highly prejudicial and disturbing. This interpretation was not supported by the evidence or his CSC employment record. The burden of proof in this type of case is not the criminal standard of proof beyond a reasonable doubt but rather the balance of probabilities, based on clear, cogent, and compelling evidence, which Ms. D'Astous' testimony did not bring to light.

[147] Clear, cogent, and compelling evidence is the measure of proof required when the nature of the allegations is serious and the consequences are severe. The best evidence to prove an allegation is direct evidence of someone who witnessed an event, provided that the person is a credible witness. The cogency of direct evidence relies only on the accuracy of the witness giving it. If direct evidence does not exist or is unreliable, an adjudicator must rely on circumstantial evidence, which is subject to errors due to inferences drawn from it (see Gorsky et. al., *Evidence and Procedure in Canadian Labour Arbitration*, at 13-4 to 13-5). In either case, the cogency of circumstantial or direct evidence is dependent upon its source and its particular relation to the issues in a case. In this case, in which most of the employer's witnesses stood to gain from their testimony and their participation in the investigation process, I find their evidence neither compelling nor cogent, given the inconsistencies and the perceived benefit the witnesses received in exchange for their stories. The investigation

report cites other CXs that claim to have 'heard' the assault. The employer however did not call these individuals as witnesses at the hearing.

[148] Also, given the employer's failure to produce certain documents, such as Ms. Blasko's and the investigators' notes, which would have been covered by the disclosure order issued in the pre-hearing phase of this matter, I can conclude only that a negative inference should be drawn, as argued by the grievor's counsel. Therefore, I conclude that these documents might not have supported the employer's actions and were withheld because of the possible prejudice they would have posed to its case.

[149] The employer's counsel blamed the grievor for the lack of evidence as to what happened that day. The grievor admitted that he violated the employer's policy on recording on video an escort to segregation that while it would not have shown what happened inside the showers, it might have provided an audio recording of what was happening and a video recording of what others might have seen. However, this does not explain why the employer did not provide the video of the events on the unit leading up to the point at which the grievor left with the inmate. Again, a negative inference is to be drawn, as it surely would have clarified many things about the events that day, including the roles of Ms. Mikalski and Mr. French, whether a camera was requested and who made the request for one, and who actually handcuffed the inmate.

[150] As I have said many times, it is trite law that hearings before adjudicators are *de novo* hearings and that any prejudice or unfairness that a procedural defect might have caused are cured by the adjudication (see *Maas v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 123 at para. 118; *Pajic v. Statistical Survey Operations*, 2012 PSLRB 70; *Tipple*, at 2; and *Patanguli v. Canada (Citizenship and Immigration)*, 2015 FCA 291). I am not bound by the findings of the board or by any of its conclusions. In this case, I find a paucity of evidence insufficient to support the conclusions on which discipline was imposed.

[151] When the evidence is lacking or inconclusive, I must give the grievor the benefit of the doubt. Ms. D'Astous' conclusions are not binding on me and were based on faulty analysis and logic. She and the board on which she served rejected the evidence of the grievor and of other eyewitnesses who supported his version of the events without an explanation to me, most likely because the witnesses had also been the

subjects of reports to the tip line. Instead, they chose to favour the uncorroborated rumour of a witness, CM Ings, who might have heard something but could not remember where or when, and the evidence of two CXs, who were clearly unreliable for the reasons stated earlier in this decision. I am particularly concerned that she did not mention the involvement of the warden, Ms. Blasko, when finalizing the report before it was submitted to the employer.

[152] I found the evidence of the grievor's witnesses clear, compelling, and supported by that of Mr. Lapointe. The employer was unable to challenge it on cross-examination. On the other hand, the evidence of the employer's witnesses was neither clear nor compelling, with the exception of Mr. Lapointe's.

[153] It was the employer's duty to discharge its burden of proof. That means that the evidence adduced must lead me or a reasonable person to conclude that based on the balance of probabilities, the events occurred as the employer described them. It is not the grievor's burden to prove what the employer alleges is not true. It is improper for either party to manufacture evidence as it would appear was the case with Mr. Whalen's role in this process, proven by his role of seeking to secure evidence against the grievor as described by Mr. Roussel, whose testimony I accept as truthful and as supported by the exhibits.

[154] In its letter of discipline, Ms. Blasko noted that the grievor's misconduct involved 'premeditated actions'. Counsel for the employer argued that the grievor knew that the showers were a perfect place to assault an inmate because there were no cameras there. It was the perfect opportunity, and he took advantage of it. In essence, counsel asked me to draw a negative conclusion against the grievor based on a scenario that the evidence does not support. In that scenario, the grievor decided to take the inmate to A&D for the purpose of assaulting him and deliberately failed to acquire a camera so that the assault would not be recorded. Respectfully, this is a complete fabrication and does not reflect the evidence before me that the grievor and Mr. French responded to G/H unit and encountered CM Mikalsky, who was on her way to tell Warden Lapointe that the inmate was being moved to segregation. Contrary to what was written in the letter of discipline and the theory presented by the employer, this move to A&D was not premeditated by the grievor; this course of action had been determined prior to his arrival on scene. The inmate, who had been confined to the phone room, was removed, handcuffed, and escorted to segregation without the

benefit of a video recording. At some point, Mr. French sent one of the officers to find a camera, but one was not secured. This was not a conspiracy of the grievor's making.

[155] I accept that JB was escorted to A&D to be strip-searched in the shower area because this is a common thread in all the direct evidence. I also accept that JB and the grievor had a verbal altercation as admitted by the grievor himself. I also accept that JB was physically resistive with Mr. McNay and the others present to their attempts to remove the handcuffs from him. What I do not accept is that the grievor intentionally and with premeditation inflicted blows on JB because I would have expected that an inmate in such an agitated state would have taken advantage of the warden's presence to report such an assault at the first opportunity.

[156] Even were I to accept that blows were exchanged, alternate explanations are possible, given the struggle to remove the handcuffs. When alternate explanations exist that are equally plausible, the benefit of the doubt must go to the grievor. Consequently, the employer failed to discharge its burden of proof that an assault took place on the basis of clear, cogent, and compelling evidence.

[157] I turn now to the question of the transport of JD without a camera. As noted above, the evidence establishes that the operation unit did not have a camera. A CX was requested to go find one, but did not return. Should the grievor have waited? The uncontested evidence is that cameras were in fact rarely available at EI. Given all of these circumstances, the grievor cannot be held accountable for failing transport the inmate without a camera – the employer cannot impose a policy and then fail to equip the institution with a sufficient number of cameras or make them readily available, in order to allow the employees to carry out the Directive.

[158] While the grievor had been ordered to take JD to segregation, I find that once the inmate had been removed from the heated situation in the telephone room (surrounded by some 20 other staff members), he and CM French found an alternate solution, even before Warden Lapointe's arrival, and they were not going to take the inmate to segregation. As set out above, I find the employer has not met its burden in establishing that the grievor physically assaulted the inmate. Finally, I note that the grievor has admitted that he shouted at the grievor which was unprofessional, however does not merit termination.

[159] Ms. Blasko testified that she lost trust in someone she had met only at the disciplinary hearing based on conclusions from a report that has been shown to be biased. In her testimony, she stated that the grievor had put CXs in jeopardy and in a difficult situation because he had signed off on their OSORs reporting his involvement in an assault on an inmate. This testimony does not align with the events which transpired: the OSORs did not contain any information pertaining to the grievor's involvement in an assault; furthermore, the OSORs were not signed off by the grievor – they were signed by CM French, who was the officer in charge that day. Finally, I note that it was alleged that the grievor failed to file an OSOR. The witnesses were clear that the grievor instructed then to file OSORs. In the course of the investigation, he asked for the opportunity to print his OSOR which he stated he filed, but this was denied. I have no reason to doubt the grievor followed his usual practice and filed an OSOR recording the events of that day.

[160] As was said in *Walker*, 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 this case, the employer took into account none of the mitigating circumstances, including the fact that as of the disciplinary hearing, the grievor was undergoing treatment for PTSD. Ms. Blasko went to EI to deal with the fallout of the TLS report and to demonstrate that the employer was taking it seriously. In my opinion, the grievor was the scapegoat for this cause. The employer did not establish a compelling case that Ms. Blasko has lost faith in the grievor, given that she had never met him before the disciplinary meeting. She has never worked with him. In my opinion, it is not possible for her to say that the bond of trust has been irreparably broken, given all the faults in the investigative process that she accepted without question. The way she dismissed his disciplinary record and performance reviews was offensive. Stating that they were not accurate reflected poorly on the CSC and its performance management system. There is no objective evidence before me that the grievor cannot be reinstated as is required under the *DeHavilland* test.

[161] In sum, I will conclude by answering the questions from the *Wm. Scott* test. The only cause for discipline that has been established in this case is the verbal altercation which the grievor engaged in with the inmate. The termination of the grievor's employment was clearly excessive and unjustified, and it must be overturned. In light of the grievor's forthrightness in admitting to this behaviour, the grievor's years of

service, the grievor's disciplinary and performance history, I believe an oral reprimand would have sufficed. I do not believe any further action is necessary.

[162] The employer was right in its determination that the toxic environment at EI had to be addressed. However, it did not have the right to pursue that initiative while ignoring the grievor's right to natural justice. He was not investigated for contributing to EI's toxic work environment but instead for a use-of-force incident and for steroids allegations. However, an insidious part of the investigative process was the employer's goal of righting the toxic work environment.

[163] Normally, a hearing *de novo* resolves any breach of natural justice in the investigative process. As was stated in *Legere*, 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. This was not done in this case.

[164] The decision maker in this case was involved in giving directions to the investigators on the final draft of the investigation report, but she did not detail those directions. No consideration was given to the grievor's version of the events, past performance, or disciplinary record. Furthermore, the overarching reason for the disciplinary action was his alleged contribution to the toxic work environment, which was not proven before me or investigated but clearly was part of Ms. Blasko's decision-making process. The decision was made before she even met the grievor. In my opinion, the disciplinary hearing was only *pro forma*. Disciplining him based on a procedurally flawed report and process and on allegations that were never put to him seriously violated the grievor's rights to such an extent that it could not be addressed solely by a hearing *de novo*.

[165] Furthermore, the disdain with which Ms. Blasko testified of the value of the grievor's performance records was disturbing. The employer had recognized the grievor as a valued employee. He had received promotions and the opportunity to perform at the assistant warden, operations, level on an acting basis. Throughout his career, his discipline record was without blemish. Ms. Blasko claimed that this was insignificant and that these factors were not worthy of her consideration.

[166] There is an obligation of good faith and fair dealing on the part of employers when they dismiss employees. By relying on a tainted investigation process and a

tainted investigation report, the employer acted in bad faith. This is a case in which the employer's failure to properly discharge its obligations made it foreseeable that the grievor's dismissal would cause mental distress. Such egregious, high-handed, and offensive tactics were not remedied by the hearing. In such cases, damages consistent with the case law in *Honda Canada Inc. v. Keays*, 2008 SCC 39, and *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, would have been appropriate. However, no such damages were requested in this case.

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

[168] For all of the above reasons, the FPSLREB makes the following order:

(The Order appears on the next page)

V. Order

[169] The grievance is allowed.

[170] The grievor is to be reinstated to his CM position at an institution mutually agreeable to the parties within 90 days of this decision, retroactively to November 24, 2017, without loss of seniority or other benefits, including vacation, sick leave, and overtime calculated on the basis of the average of all overtime earned by CMs at EI from November 24, 2017, until the date of his reinstatement.

[171] The grievor shall also receive any salary increases he would have been entitled to but for the fact that his employment was terminated, effective November 24, 2017.

[172] The grievor shall be paid, within 90 days of this decision, all retroactive salary and premium pay, including overtime arrears owed him as set out at paragraphs 170, and 171 of this decision, less all statutory or other deductions required by legislation or a collective agreement.

[173] The grievor shall be entitled to interest on the net amount owed him under paragraphs 170 and 171 of this decision at the appropriate rate of interest in accordance with the laws of Alberta, as provided for at s. 36(1) of the *Federal Courts Act* (R.S.C., 1985, c. F-7). Prejudgement interest is to be calculated from the date of the termination to the date of this judgement, and then from the date of this judgement until the date of payment, interest is to be calculated at the post-judgement rate.

[174] I order removed from the grievor's disciplinary, labour relations and any other personnel records any documentation – other than this decision – that relates to the termination of his employment.

[175] I shall retain jurisdiction over this matter for a period of 90 days from the date of this decision to deal with any questions arising out of the implementation of this order.

December 15, 2020.

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