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

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

BETWEEN

LOUISE LYONS

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

Before: Bryan R. Gray, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Corinne Blanchette, Union of Canadian Correctional Officers-CSN

For the Respondent: Nour Rashid, counsel

Heard at Abbotsford, British Columbia,
October 30 to November 2, 2018, and January 8 to 11 and August 6 to 9, 2019.
(Written submissions filed August 19, September 12, 20, and 30, and October 21 and 31, 2019, and April 20, 2020.)

Table of Contents

I. Summary 2
II. Background 4
A. Fentanyl and Kent Institution 4
B. The Board of Investigation and allegations against the grievor 7
C. Section 53: emergency exceptional search 11
D. CX training 12
E. The institution's lockdown 15
III. Analysis 17
A. Was there reasonable cause for discipline? 18
B. Was the decision to terminate the grievor's employment excessive in the circumstances? 19
1. The video 22
a. August 23, at 3:52:39 p.m.: Echo lower area, cells 1-6 23
b. August 23, at 3:53:49 p.m. (1 minute later): Echo lower area, cells 7-12 23
c. August 24, at 3:21:06 p.m. (1 day later): Echo lower area, cells 1-6 23
d. August 24, at 3:22:03 p.m. (1 minute later): Echo lower area, cells 7-12 23
e. August 24, at 3:20:05 p.m. (2 minutes earlier): Echo mezzanine level 24
2. Alleged rush to judge 24
3. Passing items for inmates between their cells 26
4. The large bag of personal items taken from Inmate W's cell 31
5. The grievor's assertion that she distributed razors to inmates 37
6. The grievor's alleged inappropriate relationships with inmates 40
7. The allegation that the grievor knowingly compromised the s. 53 search 43
8. Witness credibility 45
a. The credibility of the Warden's and Acting Warden's testimonies 46
b. The credibility of the grievor's testimony 49
c. The informant 54
9. The jurisprudence 57
C. Disciplinary measures that should be substituted as just and equitable 61
IV. The employer's request to supplement its reasons for termination and its motion 64
A. The employer's request 64
B. The employer's motion 64
C. The grievor's reply submission 66
V. Order 70

I. Summary

[1] Louise Lyons ("the grievor") worked as a correctional officer (CX, classified CX-02) at the maximum-security Kent Institution ("the institution") of the Correctional Service of Canada ("CSC" or "the employer") near Abbotsford, British Columbia. She maintained an unblemished performance record over her approximately 16-year career, and she received several written commendations for her good work.

[2] The employer became aware that an inmate had made very serious allegations against the grievor. The inmate was being held in segregation while facing drug possession charges under the *Corrections and Conditional Release Act* (S.C. 1992, c. 20; *CCRA*). He feared that his pending transfer out of the institution to a medium-security institution could be cancelled because he had been caught with drugs, and he wanted to offer information to ensure that his transfer went ahead as planned.

[3] The allegations against the grievor included acts that could have formed the basis of at least one serious criminal offence, had the matter been referred to law-enforcement authorities. The informant's information led to the discovery of a large quantity of the illegal drug fentanyl hidden in an inmate's cell at the institution and to the seizure of an encrypted cell phone and a security screwdriver that inmates use to access otherwise inaccessible areas of their cells to hide contraband, such as narcotics.

[4] The informant's disclosure led to reviewing the video from the security cameras ("the video"), which constantly monitor the corridors (the range) outside the cells. The video showed the grievor passing items between cells. It also showed her taking a large bag of personal items from an inmate known as "Inmate W" in his cell and then putting it in a room for the CXs during a lockdown under s. 53 of the *CCRA* ("the s. 53 search"; the details shall be described later in this decision) to search for drugs.

[5] The employer used the video to note the grievor standing close to the open food-tray slot of a cell door, where the inmate inside could possibly reach her. The employer suggested that she needlessly put herself at risk of harm from the inmate by doing so. She then looks over her shoulder in a suspicious manner towards where her partner had been and then pauses, possibly to ensure that her partner CX is not still there, to potentially observe her interacting with the inmate. She then removes her safety glove, takes items through the open slot, and briefly converses with the inmate

inside. All this led the employer to conclude that she trusted the inmates, which was evidence that she had unacceptable relationships with them.

[6] The employer also concluded that those actions of the grievor compromised the s. 53 search of the grievor's E ("Echo") unit due to the risk posed that drugs or other contraband, such as weapons, were hidden in the items she passed between the inmates. The employer determined that it amounted to serious violations of its code of ethics and that it violated its Commissioner's Directives (CD) 566-9 and 12.

[7] The employer formed the view that the grievor's actions were deliberate and serious that together irreparably broke its bond of trust with her. They necessitated her immediate suspension with pay and later, after an investigation, the termination of her employment.

[8] In reality, the evidence established that the employer relied primarily upon the informant's information and that it decided early in the investigation that the grievor had been compromised.

[9] However, the employer brought virtually no evidence forward at the hearing pertaining to these very serious allegations made by the informant. It became clear that the employer had acted on these allegations without ever having presented them fully to the grievor or giving her an opportunity to respond to the case being made against her.

[10] That violated the most fundamental principle of Canadian administrative law, which is that natural justice requires that the grievor know the case against her and that she be able to respond and answer to the allegations. This is captured by the Latin maxim *audi alteram partem* or "hear the other side".

[11] Based upon the evidence that was brought before me however, I conclude that the video showing that the grievor passed items between cells during a lockdown without searching them and her taking a large bag of items from a cell and placed it in the CX office outside the search area were contrary to established policy and procedures, were unacceptable, and were worthy of discipline.

[12] Given all the relevant circumstances, including the grievor's excellent record of service and the employer's reliance on unproven information, upon which it acted without respecting principles of natural justice, I conclude that the termination of her

employment was excessive. I substitute her termination of employment with a one month suspension without pay.

[13] I informed the parties of my decision to allow this grievance in a videoconference on December 16, 2020 with written reasons to follow as are provided below.

II. Background

[14] On March 22, 2017, the grievance was referred to the Public Service Labour Relations and Employment Board, as the Board was known then, for adjudication pursuant to s. 209(1)(b) of the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2, since renamed the *Federal Public Sector Labour Relations Act*. This provision allows referring grievances to adjudication about disciplinary action that resulted in a termination, demotion, suspension, or financial penalty. For such a grievance, at adjudication, the employer has the burden of proof and must defend its actions.

A. Fentanyl and Kent Institution

[15] The employer presented evidence that established that suffering and death caused by fentanyl had grown to crisis proportions in Vancouver and the Lower Mainland of B.C. by the spring of 2016, in the months leading to the events at issue in the hearing.

[16] News reports detailing this public health crisis were tendered as exhibits. Fentanyl is so dangerous that even trace amounts can cause illness, and very small doses cause death. Bobbi Sandhu ("the Warden") testified that despite the institution being maximum security and holding some of the nation's most dangerous criminals, it was not immune from the harm being caused by fentanyl.

[17] The institution is a maximum-security penitentiary for men located in an area on the edge of the eastern reaches of the Fraser Valley that is separated from any community. The Warden testified that it was designed and built in the 1970s and that care was taken to preclude the risk of any large gathering of inmates in one location. The events reviewed at the hearing focussed upon the general inmate population as opposed to inmates in segregated units.

[18] The evidence established that the inmates relevant to the hearing occupied positions at the higher echelons of life in Kent, such as being members of organized crime groups and criminal biker gangs.

[19] The Board acknowledges with appreciation the employer's efforts and the cooperation of the grievor's bargaining agent as a representative of each party joined me in taking a view of the institution and in particular the range of cells where the events at issue occurred. The tour was very helpful in that it provided a better perspective of the physical proximity of the events on the video, which the employer relied upon in evidence.

[20] While the specific events are analyzed in detail later in this decision, at this point I wish to note my observations made while touring the institution and after reviewing a floorplan tendered as an exhibit. The cells in each unit are arranged in rows of 6, with 2 L-shaped corridors per floor. Thus, the 2 corridors provide 4 x 6 or a total of 24 cells.

[21] Each L-shaped corridor is separated by a security control structure at the corner of the L, thus leaving up to 12 inmates in a wing with a shared common room and shared shower. This structure is duplicated on a second floor. At the centre of the elbow in the L-shaped ranges is a large guard-post structure.

[22] I observed the guard post and noted that it had clear sightlines to each of the four (two upper and two lower) ranges it oversees. It has large video monitors showing a live view up and down each corridor. It is made from thick safety glass and has gun turret openings sightlines in each direction. It has no access from or egress to any inmate range, to prevent inmates accessing it and then passing through it into other areas of the institution.

[23] A camera placed near the ceiling at each end of each range corridor and a camera looking the other direction down each range from near the ceiling at the guard post capture video. The video clips tendered as exhibits showed how the cameras capture both angles of each range so that both sides of a CX on the range may be seen.

[24] The evidence established that in the days and weeks preceding the s. 53 search, which will be examined later in this decision, inmates possessed fentanyl, that at least

one inmate overdose had occurred, and that two CXs had sought medical treatment after being exposed to vaporized fentanyl in a cell while on duty.

[25] Despite the fact that at the institution, ion-scanning drug-detection equipment is used and arriving people and goods are searched, small amounts of illegal drugs, including cannabis, cocaine, and performance-enhancing steroids, have all been discovered in the inmates' possession. They have been found in inmate mail and concealed on the visitors. As for the Inmate W, who was involved in the allegations against the grievor, both his mother and his wife had been caught trying to smuggle illegal drugs into the institution concealed on their persons.

[26] The institution had daytime nursing staff to provide medical assistance, but none was on night duty. Serious medical problems for inmates and staff required transport, which took some considerable time to respond, pick up the person requiring assistance, and travel to a hospital as the institution is located in a rural setting on the edge of the Fraser Valley.

[27] The evidence establishes that the institution's management sent a memo to staff dated August 22, 2016, informing that illegal drugs, including fentanyl, were present in the inmate population. The staff was informed of the related health and safety implications and was warned of the grave risks posed by fentanyl.

[28] The evidence also established that the CXs were expected to and virtually always did wear at least one layer of protective gloves while dealing with inmates, their personal items, or their cells. The evidence also established that many CXs wore double gloves when there was a risk of inmate contact and drug exposure.

[29] The evidence established that the CXs were at risk of an attack anytime they were in contact with inmates. Cells had been booby trapped with concealed sharp objects intended to injure CXs during searches.

[30] When CXs intervened in situations in which drugs were present or suspected, they could wear protective clothing and breathing apparatus to avoid exposure to fentanyl or other drugs. It was known that inmates consumed them in a vaporized manner by heating the drug powder using batteries from radios or video games or using 110-volt electrical outlets.

B. The Board of Investigation and allegations against the grievor

[31] The employer convened a disciplinary investigation on August 30, 2016. The Board of Investigation (BOI) was chaired by an assistant warden from a CSC facility in the Pacific Region. The BOI's final report, dated October 21, 2016 ("the BOI Report"), quotes the following allegations against the grievor:

> *Whereas Correctional Officer II (CX II) Lyons allegedly:*
>
> - *Engaged in an inappropriate relationship with an inmate(s);*
> - *Introduced contraband and unauthorized items into Kent Institution for distribution within the inmate population;*
> - *Accepted monetary payment for the introduction of contraband and unauthorized items into Kent Institution*
>
> *On September 13, 2016 the convening order was amended to include an additional allegation of:*
>
> - *Compromised a CCRR/CCRA emergency search exceptional search by assisting inmates with the concealment of unauthorized items and/or contraband.*

[32] While the BOI found all four of these allegations were substantiated, the employer pursued only the allegations of inappropriate relationships and compromising an emergency search in their termination of the grievor's employment.

[33] The convening order creating the disciplinary BOI that the Warden signed alleged that the first three allegations took place between April 2 and August 26, 2016. I also note that the order granted the BOI the authorization to "… search any building, receptacle or thing being on the property of and in possession of the CS, and to seize and retain such books, documents or things as the Board may deem, on reasonable grounds, necessary for the successful execution of its mandate."

[34] The BOI Report notes that the grievor began her career as a CX I at the institution on August 26, 2000, and that her most-recent performance reports described her work as proficient. It also notes that in 2005, 2008, and 2011, she received memos "in appreciation of her work."

[35] The BOI Report notes that on November 12, 2014, the grievor received a written commendation for her efforts dealing with a problematic inmate. And finally, it notes that she had no discipline on her file.

[36] As background, the BOI Report notes that institution staff had interrupted an inmate fentanyl overdose on June 1, 2016, on Delta Unit and that several other inmate cells tested positive for fentanyl around that time. The s. 53 search and lockdown was ordered of all inmates, but the presence of fentanyl among the inmates persisted despite it. On August 20 and 21, 2016, several cells were swabbed. They tested positive for fentanyl. Two CXs were taken to hospital after being exposed to a drug thought to be fentanyl.

[37] On August 22, Acting Warden Noon-Ward ordered the s. 53 search and lockdown of Delta, Echo, and Golf Units. Delta Unit was searched that day, and the BOI found that it had been searched "incorrectly" and that it had to be searched again. The BOI noted that an inmate had been allowed to leave his cell and the unit for a family visit without being searched. This happened despite family visits being suspended during the search. The second search will be analyzed in detail later in this decision.

[38] The BOI Report states that on August 23, the BOI noted that an informant had provided intelligence about fentanyl in the institution. Later, on August 25, Units Golf and Echo were searched. A cell phone and homemade weapon were discovered in them, respectively. No other contraband or unauthorized items were found in Echo unit.

[39] The BOI Report states that on August 25, 2016, reports were received from other CXs stating that the grievor behaved unusually when she was reassigned from Echo unit to the institution's main entrance.

[40] The BOI Report then named an inmate who, on September 8, 2016, requested that his personal effects be returned to him. They were in a clear plastic bag. Other inmates did the same thing on that day for their personal items that been taken during the s. 53 search.

[41] The BOI Report then cites several "Statement/Observation Reports" (SORs), as follows, which staff members create to capture and share information that they think might be relevant in some way to the safe and improved operation of the institution:

> *August 17, 2016 Two CXs discovered and confiscated a note in a G Unit cell regarding the drug subculture. This note was mentioned in the morning staff briefing the [sic] occurred daily at the start of each shift. The author of the SOR states that the grievor was*

> *present in the briefing when the note was discussed and that she subsequently aggressively questioned the two CXs who discovered the note about its' [sic] contents and circumstances of discovery. The two CXs found this to be out of the ordinary and then the next day one of the CXs observed the grievor with the note and the report about it.*

[42] When I reviewed the SOR, which is titled, "Suspicious Activity Reading Office [*sic*] Lyons" and is signed by a CX II, I noted that the original also states the following:

> *Soon after I arrived in my office (after the morning briefing ended), my phone rang. It was* [the grievor] *and she began questioning me on what the note I submitted said. Her line of questioning was aggressive; it appeared slightly breathless or panicked. I was immediately uncomfortable with the way she demanded answers from me, and therefore* [I] *only gave vague answers to her. I then ended the phone call as soon as possible… In summary, the behaviour exhibited by* [the grievor] *was out of the ordinary. While she is entitled to read Protected B information, there was no need for her to aggressively question me… Her demeanour to me seemed panicked when she talked to me on the phone.*

[43] The BOI would have reviewed that additional text, but it was not included in the BOI Report summary. There is more:

> *- August 24, 2016 The Source was interviewed and he provided information about the institutional drug trade and the location of fentanyl and other drugs, weapons, hiding spots, a cell phone and the method of introduction of these items into Kent was through a staff member. The Source identified that the method of introduction was through a CX. He described that she had black hair, sleeve tattoos and professionally done fingernails. He was shown a picture of the CX and he said that was her and that her name was Louise and that she worked in Echo Unit.*
>
> *- August 25, 2016 A second search of D unit was conducted after the first was compromised. The locations identified by the Source were searched. The contraband and unauthorized items were discovered in these locations, including a cell phone hidden behind a clothing hook. It notes that the special tamper-proof security screws (used to fasten fixtures and other things within reach of inmates) can only be turned with a special security screwdriver that is not available to CXs.*

[44] Given that information in the BOI Report, the Warden placed the grievor on paid suspension, effective August 26, 2016. This prohibited her from being present on any CSC property. The written notice of the suspension stated the following: "The

employer has been notified of alleged behaviour exhibited by you [the grievor] that would constitute a potential threat to the health and safety of Kent Institution."

[45] On October 25, 2016, the Warden accepted the findings in the BOI Report, which determined all the allegations against the grievor were well-founded. On November 29, 2016, a disciplinary hearing was held, which she and her union representative attended. In the letter notifying her of the termination of her employment dated January 23, 2017, among other things, the following items that arose during the disciplinary hearing are noted:

- The grievor indicated that she took full responsibility for her actions as they related to compromising the s. 53 search.
- She stated that she had had no ill intent in taking the items from the inmates and that at that time, she did not see the issue with taking them.
- She could look back and see that errors were made and that she could be seen as moving contraband within the institution; however, she wished to assure the Warden that she would not make the same errors again.
- She stated that she was embarrassed and remorseful for her actions.
- She did not agree with the additional allegations, although she said that she could understand why the Warden would feel that there were boundary issues with inmates.

[46] Among other things, the BOI Report also concluded as follows:

- The grievor failed to demonstrate that she understood the seriousness of her actions. Nor did she provide any reasonable explanations for her actions of any significance.
- Her actions could have led to serious consequences.
- During the s. 53 search, it was noted that the CSC's CD 566-12 "allows for the search of inmate effects against the inmates [*sic*] personal property card to ensure that the items in their cells are authorized".
- That CD states that inmates are not permitted to give, trade, loan, rent, or sell personal property to other inmates, either directly or indirectly. The grievor's actions (passing goods between cells during the s. 53 search) conflicted directly with the nature of that CD.
- "[T]he Warden had authorized the s. 53 search to search for drugs …", and the grievor failed to take any action to ensure that the items that she received from inmates and then placed into storage were not used to conceal contraband.
- The grievor acknowledged that she failed to ensure that the compact disc cases that she distributed to inmates did not contain contraband. As per CD 566-9, it was expected that she would have seized them and completed the appropriate seizure documentation.
- As an experienced CX II with 16 years of service, she ought to have known that her actions created the risk that the Warden was trying to address. By failing to follow policy when performing her duties, she risked the health and safety of the individuals around her. Given the public health emergency due

to the use of fentanyl, including occupational exposure, the consequences of her actions could have been fatal.
- By entering into unprofessional relationships with inmates and by allowing them to participate in activities that went against policy, she jeopardized the institution's safety and security and that of its staff and the inmates housed there.
- She failed to establish professional boundaries with the inmates that would be expected of any peace officer or CX.
- Despite her 16 years of service with a "discipline free employment record", she displayed a willful disregard of CSC policies and procedures, and her conduct damaged her credibility and demonstrated poor judgement. The conclusion was that corrective action would not be effective in changing her attitude, rebuilding trust, or adhering to policy. Confidence has been lost in her ability to perform her duties.

[47] The letter advised the grievor that her employment was terminated, effective January 23, 2017. This grievance, in which she requested that the termination be rescinded, was filed on that same date. The matter was rejected at the final level of the grievance process on January 24, 2017, and was referred to adjudication on March 30, 2017.

C. Section 53: emergency exceptional search

[48] Section 53 (the marginal note before it states, "Exceptional power of search") of the *CCRA* states as follows:

> ***53 (1)*** *Where the institutional head is satisfied that there are reasonable grounds to believe that*
>
> ***(a)*** *there exists, because of contraband, a clear and substantial danger to human life or safety or to the security of the penitentiary, and*
>
> ***(b)*** *a frisk search or strip search of all the inmates in the penitentiary or any part thereof is necessary in order to seize the contraband and avert the danger,*
>
> *the institutional head may authorize in writing such a search ….*

[49] A memo to all staff, dated August 22, 2016, from Assistant Warden Donald Labossiere, informed them that Unit 1 (Blocks D, E, and G) had been locked down and that the Warden had authorized the s. 53 search of them due to fentanyl being discovered in inmate cells. Every paragraph of its two-and-a-half pages focused upon and included the word "fentanyl".

[50] It provided details of which cells had tested positive for fentanyl and of an inmate overdose. It mentioned that batteries were being used to heat and vaporize the fentanyl and that at least once, a compact disc case was used to conceal fentanyl. It included safety precaution instructions stating, among other things, "always wear nitrile gloves; wear double sets of gloves for added protection in case of a tear."

[51] On August 22, 2016, Assistant Warden Labossiere also issued a "Staff Communication" bulletin. It largely summarized the material in the other memo of that date. I note that it focused solely upon a "s.53 search being conducted due to the presence of Fentanyl with the GP Units."

[52] The communication stated that a full search of all general population (GP) units would be conducted. It set out an inmate routine for the duration of the search, which stated that suspended were yard access, structured activities, school and programs, and visits. It also stated that the CXs were to deliver all meals to the cells.

[53] An "Institutional Incident Report" filed on or about the conclusion of the s. 53 search and dated August 31, 2016, was similarly focused upon fentanyl and other illegal drugs and drug paraphernalia. It also referred to a small number of sharp metal weapons and a SIM card discovered in the search.

[54] The grievor adduced evidence through cross-examination and argued that none of those documents mentions a directive to search or a result from the search that involved inmate personal property being accounted for against each inmate's personal property card. Those cards record all the personal property for an inmate. This will be analyzed later in this decision.

D. CX training

[55] The employer called Steven Loeb to testify to the many different areas of training that the grievor would have received. He is a correctional manager. He now works at an institution near Kent and was a training officer during the time at issue in this matter. He served for 10 years as a training officer. He provided uncontradicted testimony about many aspects of the training that all CXs must undergo before beginning to work as a CX and about the ongoing development provided to them every year they remain in that career.

[56] None of his testimony was challenged for accuracy or for the fact that the grievor would have received all the noted training during her career.

[57] Mr. Loeb's testimony included the following, which was confirmed by written materials, such as training manuals, entered as exhibits:

- The CXs receive a half-day of instruction on institutional subculture, in which they are taught how inmates try to obtain drugs and how an institutional economy operates with little or no cash. Inmates trade their very limited personal property, for example, to obtain drugs or services. The importance of reporting by staff is noted so that information can be gathered to help enforcement and stop or avoid hazardous behaviour.

- The CXs receive a half-day of training on inmates using manipulative behaviour to gain influence over correctional staff. Through training and role play, the CXs are shown how they are at risk of being groomed by inmates. Once even the slightest favour is granted, it can be used later to threaten the CX to obtain greater favours. The CXs receive examples of expected responses. They are taught to be firm but fair and to always follow the policies, legislation, and CDs.

- The CXs receive a full education-and-training module specifically on search and seizure. Mr. Loeb pointed out in the accompanying documentation (Exhibit E-9, page 65) that in an exceptional search under s. 53, in which the circumstances include contraband that creates a clear and substantial danger to human life or institutional security, the Warden must authorize it, inmate consent is not required, and the following documents are noted under s. 58 of the *Corrections and Conditional Release Regulations* (SOR/92-620), which reads as follows:

  58 (1) A person who conducts a search *under any of sections 47 to 64 of the Act* ***shall prepare and submit*** *to the institutional head or a staff member designated by the institutional head, as soon as practicable and in accordance with subsection (4), a* ***post-search report*** *respecting the search if*

  (a) *the search is a non-routine strip search conducted pursuant to any of subsections 49(3) and (4) and 60(2) and (3) and paragraph 64(1)(b) of the Act;*

  (b) *the search is a search conducted pursuant to section 51 or 52 of the Act;*

  (c) *the search is a routine strip search conducted under section 48 of the Act which necessitated the use of force;*

  (d) *the search is an emergency search of an inmate, a vehicle or a cell; or*

> ***(e)*** *the staff member or other authorized person seizes an item in the course of the search.*
>
> ***(2)*** *Every employee of a community-based residential facility who conducts a search pursuant to section 66 of the Act shall prepare and submit to the person in charge of the facility, as soon as practicable and in accordance with subsection (4), a post-search report respecting the search.*
>
> ***(3)*** ***Every institutional head who authorizes a search of all inmates pursuant to section 53 of the Act shall prepare and submit to the head of the region, as soon as practicable and in accordance with subsection (4), a post-search report respecting the search.***
>
> ***(4)*** *A post-search report shall be in writing and shall contain*
>
> ***(a)*** *the date, time and place of the search;*
>
> ***(b)*** *a* ***description of every item seized****;*
>
> ***(c)*** *the* ***name of the person searched****, the number of the room or cell that was searched or the licence number of the vehicle searched, as applicable;*
>
> ***(d)*** *the name of every person conducting the search and, where applicable, the name of every person present during the search;*
>
> ***(e)*** *the reasons for the search;*
>
> ***(f)*** *the manner in which the search was conducted; and*
>
> ***(g)*** *in the case of a post-search report referred to in subsection (3), the facts that led the institutional head to believe that the presence of contraband constituted a clear and substantial danger to human life or safety or to the security of the penitentiary, and an indication of whether the danger was averted.*
>
> ***(5)*** *Every person to whom a search relates, or from whom any item is seized in the course of a search referred to in subsection (1) or (2), shall have access, on request, to the post-search report respecting the search or seizure.*
>
> ***(6)*** *Every post-search report shall be* ***retained for a period of at least two years*** *after the date of the search to which it relates.*
>
> [Emphasis added]

[58] While helpful, the testimony and many exhibits dealing with the grievor's training were of little dispositive value to the hearing.

[59] My acknowledgement of the most relevant aspects of this part of the hearing is being provided to allow the employer its submission that the grievor's actions of removing her protective gloves to take items from an inmate in his cell, passing

personal property between inmates, and taking the inmate's bag were all contrary to her CX training.

[60] That said, the employer's submissions about the importance of mandatory report writing would have had more impact had it produced in evidence the final report of the s. 53 search, which had to be submitted to the regional office after the search ended.

[61] The fact that the employer did not comply with my order and that it claimed that the final version of the report could not be found, despite the obvious gravity of this entire matter when these events occurred, betrays the level of importance that the institution placed upon adherence to report-writing rules at the time of these events.

E. The institution's lockdown

[62] When it presented its case, the employer made much of how all inmates must be completely controlled at all times, for the safety of everyone in the institution, and of how the grievor defeated that control.

[63] In her testimony, the Warden stressed how many of the most dangerous inmates in the country are housed at the institution. She explained that the inmates in the general population, such as those in the units at issue at the hearing, are mostly hardened life-long criminals who in many cases are members of criminal gangs or the Mafia and who refuse treatment programs aimed at bettering their lives as they wish to remain pure and show dedication to their criminal endeavours. She said that the staff must be "hyper vigilant", which takes a "different kind of intensity".

[64] The Warden testified that a s. 53 search and lockdown "freezes the institution" and gives its staff "total control" of all inmates. She said that all inmate movement is prohibited or restricted to eliminate any possibility of inmate movement or communication and to eliminate the movement of contraband such that every possible inmate space can be searched with confidence.

[65] Also, when she watched the grievor on the video, the Warden testified that passing items between inmates denied her the opportunity to keep her facility safe. She added that the grievor's acts showed that the grievor did not understand the gravity of her actions, as the Warden requires complete integrity for a 100% secure search.

[66] Acting Warden Labossiere stressed it as well when he repeatedly said that the institution was in a total lockdown and that nothing was to be moved while every inmate and cell was searched.

[67] The Warden testified that nothing should ever be passed between inmates and cells during a s. 53 search and lockdown and that staff would be aware of the importance of that prohibition.

[68] The Warden explained how the general population in Units D, E, and G, each with 24 cells, was totally locked down so that the staff could conduct a search of each cell and all inmate common areas for fentanyl, other illicit drugs, weapons, and contraband.

[69] She also stated that the staff was to conduct property card searches to verify the contents of each cell against the inmate's declared inventory on his card, which was set down on his arrival at the institution.

[70] Despite the strong language that the Warden used to describe the total inmate lockdown, the grievor testified that in fact, on the days at issue in this matter, Echo unit, where she was assigned, was not in a total lockdown. She referred to the status of that unit as "one-up and one-down".

[71] The grievor noted this as she explained that her Echo unit was not actually in a total lockdown.

[72] I reviewed the recorded audio files of the grievor's disciplinary hearing, which had been tendered as an exhibit. I heard an employer representative state that on a security video, an unescorted inmate, on his way to shower on Echo unit, could be seen picking a compact disc off the floor that had just been slid from under a cell door into the corridor.

[73] My review of that security video, taken in Echo unit on August 24, 2016, starting at 3:58:53 p.m. that was tendered as an exhibit, clearly shows an inmate in shorts, barefoot in "flip-flops", walking alone down the range of cells on his way to the shower. Two seconds before he passes a cell door, an item is slid under it onto the floor of the range corridor in front of the unescorted inmate.

[74] The unescorted inmate looks at the item but keeps walking. He turns the corner and goes off camera, but then 26 seconds later, he returns, walking in the opposite direction. He stops to pick up the item from the cell and walks away off camera with it. A modest smile can clearly been seen on his face after he picks it up and walks to the end of the range and off camera. He reappears 35 seconds later, walking unescorted down the range with a towel in one hand and something in his other hand.

[75] While I do not place a great deal of probative value on this video, I note its consistency with the grievor's assertion that Echo unit was not in a complete lockdown on the day captured in the video.

[76] This grievor's testimony was also consistent with the staff communication memo dated August 22, which outlined plans for the s. 53 search. In her closing submissions, she pointed out that the memo clearly states that a shower program would be in place effective August 24 for Unit 1 inmates, which included Echo unit.

[77] This video is also consistent with my conclusion that the employer's witnesses testified to aspects of the s. 53 search that seemed somewhat overstated as they were not always consistent with the totality of the evidence.

[78] The Warden testified repeatedly to the importance of the inmates being under her total control for the efficacy of a s. 53 search. The case against the grievor sought to portray her as solely responsible for compromising the search. The video is consistent with my findings detailed later in this decision that such assertions by the Warden and Acting Warden Labossiere were not entirely supported by the evidence.

III. Analysis

[79] The parties jointly submitted that the case law before the Board governing termination of employment for cause is well established and traces back to *Wm. Scott.*

[80] It is also well established that the employer bears the onus of proving the underlying facts relied upon to justify the discipline as well as the appropriateness of the discipline. (see *Basra v. Canada (Attorney General),* 2010 FCA 24 at para. 26).

[81] I summarized that authority in my decision in *Braich v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLREB 47, as follows:

...

> ***15*** *The Board frequently cites the decision in* Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162, *[1976] B.C.L.R.B.D. No. 98 (QL)(*"Scott"*), as authority for determining whether there was just and reasonable cause for a termination.* Scott *finds that for a dismissal for cause to be considered just, firstly, the employer must consider whether the employee has given it just and reasonable cause for some form of discipline. Secondly, it must be determined whether the decision to dismiss the employee was an excessive response in all the circumstances. And thirdly, if the adjudicator considers that the dismissal was excessive, then he or she must determine the measures that should be substituted as just and equitable (see* Scott*, at para. 13).*
>
> ***16*** *For the first two elements,* Scott *considers the seriousness of the offence, whether it was premeditated or spontaneous, whether the employee had a long-standing and good record of service, whether progressive discipline was attempted, and finally, whether the discharge was consistent with the employer's established policies or whether the employee was singled out for harsh treatment (see paragraph 14).*
>
> ...

A. Was there reasonable cause for discipline?

[82] Of the two allegations against the grievor brought before the hearing, she denied that she had any inappropriate relationships.

[83] In her testimony, the grievor admitted that she erred when she agreed to pass items between inmates locked in their cells during the s. 53 search as it risked contraband being passed. This was also admitted in her representative's concluding submissions.

[84] The grievor testified that she accepted responsibility for her mistake and that she would accept appropriate discipline, which in her opinion obviously does not include the termination of her employment.

[85] In the closing argument, her representative spoke to this. With supporting reasons that will be examined in detail later in this decision, her representative suggested that an oral reprimand from the grievor's manager would be appropriate, given the fact that another CX erred and compromised another s. 53 search of a different unit at the institution the same week and received no discipline.

[86] I agree that there was reasonable cause to discipline the grievor for passing items between inmates during the s. 53 search. Her actions in doing so were a violation

of CD 566-9 dealing with seizure of contraband as was found in the BOI and referenced in the letter of termination.

[87] I do not conclude that CD 566-12 was violated as it pertains to a permissive but not mandatory reconciliation of inmate personal property against their property cards. This CD does not contain a mandatory duty upon CXs and the employer could not point to any documentary evidence before the hearing that would have established that the grievor was instructed to conduct a card search.

[88] I conclude that the employer did not meet its burden of proof on the second allegation against the grievor, which was that she engaged in inappropriate relationships. There is no clear, cogent, and convincing evidence to support that allegation.

B. Was the decision to terminate the grievor's employment excessive in the circumstances?

[89] In this matter of a disciplinary termination of employment, the employer had the burden of proving that on a balance of probabilities, its actions were justified.

[90] Having carefully considered all the evidence presented to me at the hearing, I conclude that the employer did not prove that it is more likely than not that its decision to terminate the grievor's employment was not excessive, in all the circumstances.

[91] I make this conclusion based upon my finding that the employer's evidence was at less than the required standard of being clear, cogent, and compelling.

[92] I am similarly unconvinced by the evidence tendered at the hearing that I should make an adverse finding of credibility about the grievor's testimony, as the employer's counsel requested.

[93] While the very serious mal-intent that the employer repeatedly sought to ascribe to the grievor's actions was possibly well founded, no clear, cogent, or compelling evidence was presented to me at the hearing upon which I could make such a grave determination, which would damn her character.

[94] The evidence showed that this case was based upon the employer's belief that the grievor was acting as a drug courier for organized crime, thus placing the inmates and staff at the institution at a high risk of very serious harm or death.

[95] While it is possible that the employer's belief was well founded, no evidence was brought before me to support such a conclusion.

[96] In fact, when the employer had opportunities to search for evidence linking the grievor to those serious allegations, it made almost no effort to do so.

[97] While the grievor's actions in passing items between inmates were unacceptable, which she admitted to upon being called to account by her superiors and upon review at the hearing, the evidence does not support terminating her employment.

[98] A s. 53 search of a separate unit the same week was compromised and had to be done again due a CX's errant act. A private family visit was allowed during the unit lockdown despite the Acting Warden suspending all visits when the search was launched.

[99] The compromised search attracted no discipline for the CX who made the error as the Warden testified that it had been an "honest mistake". Acting Warden Labossiere testified that that compromised search was caused by a "simple error."

[100] I also find that the evidence showed that the grievor erred by agreeing to move personal items between cells and by taking the large bag from the cell and stowing it in a CX work room outside the search area.

[101] But the required reports, confiscation and the filing of charges against the inmates in question that were required under CSC policies and directives were not routinely enforced in the institution.

[102] Given what I can best describe as the employer's inconsistent approach with respect to these items, I am left with no doubt that its decision to terminate the grievor's employment was influenced by the informant's allegations against her.

[103] In the audio recordings of the disciplinary hearing, the Warden admitted that the employer had no direct evidence to support the veracity of the informant's

allegations. That never changed throughout the investigation, the BOI's mandate, and the hearing.

[104] The grievor's admitted poor judgement observed on the video did merit corrective action as her actions were unacceptable. But terminating her employment was not justified.

[105] When considering all the circumstances surrounding the grievor and the impugned events, *Wm. Scott* provides guidance on the factors that may be relevant when considering whether a termination of employment was excessive.

[106] At paragraph 14, *Wm. Scott* considers the seriousness of the offence, whether it was premeditated or spontaneous, whether the employee had a long-standing and good record of service, whether progressive discipline was attempted, and finally, whether the discharge was consistent with the employer's established policies or whether the employee was singled out for harsh treatment.

[107] Paramount in the consideration of this aspect of the analysis is the fact that the employer testified to matters that directly asserted that the grievor had a guilty mind when she knowingly violated its CD about inmate searches and when she established inappropriate relationships with inmates.

[108] The Warden testified that although she accepted all the BOI's findings that all four allegations were substantiated, she relied only on the allegations of inappropriate relationships and compromising the s. 53 search.

[109] The grievor denied having any inappropriate relationships and argued that the Warden erred and either ignored or misunderstood the findings of her investigation into this allegation.

[110] The evidence tendered as proof of these matters focused mostly upon video that showed the grievor taking items from inmates in their cells and witness testimony that sought to ascribe ill motives to her actions and to point out the serious risks posed to the inmates and staff associated with her actions.

[111] On the other hand, the grievor testified to her admission, when she was called into the Warden's office for the first time about this matter, to passing compact discs between inmates. She testified that she also told the Warden that it was indeed a

mistake on her part that arose from working two 16-hour shifts on consecutive days. Those shifts led to the events at issue.

[112] She also testified that she considered the risk low that the inmate would deceive her or that harm would arise from using her bare hand to accept an item from him while standing near his open food-tray slot.

[113] The grievor explained that the inmate held a position of trust with staff as he was allowed to do certain tasks such as paint the hallways, which was a privilege that had to be earned through good behaviour. It was not granted allowed to all inmates.

[114] The following pages shall recite relevant testimony in support of both the employer's evidence and allegations as well as the grievor's exculpatory explanations.

[115] I will also note several actions or inactions by the employer that the grievor argued and I agree were inconsistent with the level of concern and risk it relied upon in argument to justify its decision to terminate her employment.

1. The video

[116] The employer presented the video files as exhibits and largely rested its case upon the grievor's actions that were captured in them, which it said were very suspicious. It stated that a CX should never do them during a s. 53 search.

[117] Despite the grievor's protestation that one video clip which shall be noted later, was not shown to her in the disciplinary process, her representative did not object to any of the video evidence.

[118] I shall consider all the video clips tendered as exhibits before the hearing as having been comprehensive of all that were used by the BOI and the employer in conducting the investigation of the events at issue.

[119] The grievor testified that immediately upon being called to the Warden's office, she admitted to passing the compact discs and taking the large bag out of the search area. In her testimony, she provided explanations that portrayed some of the acts seen on the video as being rather benign compared to the employer's accusations.

[120] The grievor's representative provided useful perspective on the role of video at an adjudication hearing. She noted the Board's decision in *King v. Deputy Head*

(Correctional Service of Canada), 2014 PSLRB 84 at paras. 103 and 104, in which it was found that without audio, video footage is simply a series of images capable of different interpretations, depending on the viewer.

[121] I spent many hours at the hearing and many more after it closely examining the video tendered as exhibits. I can confidently endorse the Board's findings in *King*.

[122] Video that is lacking audio might sometimes tell part of a story, but it also risks misinterpretation. It is an imprecise tool for discovering the truth when a guilty mind is alleged to have motivated the actions observed on it, such as is at the foundation of the allegations before me.

[123] The following paragraphs all relating to 2016, deal with video showing the grievor and the range outside the cells that was entered into evidence as exhibits at the hearing.

a. August 23, at 3:52:39 p.m.: Echo lower area, cells 1-6

[124] The grievor is seen picking up food trays from the small slots in the cell doors with her partner, CX I Cindy Grasby. As the video begins, CX I Grasby walks down the range away from the grievor and turns the corner, off camera. She is then out of sight of the grievor. The grievor then leans back and looks towards where her partner has just exited the range. She removes her glove and receives a compact disc case through the food-tray slot from the inmate inside. She places it into her large cargo-style thigh pocket.

b. August 23, at 3:53:49 p.m. (1 minute later): Echo lower area, cells 7-12

[125] The grievor walks down the range, stops at a cell, opens the food-tray slot, takes the compact disc out of her pocket, and hands it to the inmate through the slot.

c. August 24, at 3:21:06 p.m. (1 day later): Echo lower area, cells 1-6

[126] The grievor takes something through the food slot from the inmate.

d. August 24, at 3:22:03 p.m. (1 minute later): Echo lower area, cells 7-12

[127] The grievor opens the food-tray slot, stands near it, and places something small and identifiable in it, which the inmate then takes by hand into the cell. She then moves, briefly pauses at two nearby cells on the same range, and again places

something on each open food-tray slot. The inmates inside each cell reach out and take the items into their cells. On this video, there is no visible sign that a feeding is underway while she makes these actions.

e. August 24, at 3:20:05 p.m. (2 minutes earlier): Echo mezzanine level

[128] The grievor goes to Inmate W's cell door. The food-tray slot is open. She picks up a used food tray, looks down the range, and then walks to the CX office. She emerges with a large, clear garbage bag in her hand and takes it, along with some food trays, down the stairway.

[129] Approximately three minutes later, the grievor appears back in the camera view. She is ascending the stairs to the mezzanine level. She is holding a paper in one hand and a large, clear garbage bag filled with clothing in the other hand. She places the bag in the CX office while off camera. She emerges without it and puts the paper in the outgoing mail slot.

2. Alleged rush to judge

[130] In argument, the grievor noted that the Warden was so moved by the report of an informant accusing the grievor of bringing fentanyl into the institution that as early as 9:23 a.m. on August 29, 2016, the Warden had already requested and was already receiving feedback from Labour Relations as to whether the informant's information alone might be sufficient justification to terminate the grievor's employment.

[131] In an email on that date and at that time, she was told that research had been conducted into cases in which a CX had been fired based solely upon informant information. The staff replied that it could not find such a precedent case and that in its opinion, "[Mark] doesn't believe that the informant information on its own merit would result in termination."

[132] In cross-examination, the Warden testified that she had not made a final decision to terminate the grievor before holding the disciplinary hearing.

[133] The grievor's representative drew my attention to the fact that the Warden tasked a manager, Mr. Noon-Ward, to oversee the institutional efforts related to investigating the grievor and to liaise with the BOI once it was established.

[134] Mr. Noon-Ward emailed the Warden on August 26. He shared his opinion that he did not think that the informant's information alone would be sufficient to justify terminating the grievor's employment.

[135] This same exhibit also showed that in an August 26 email, Mr. Noon-Ward referred to the grievor as Biff Naked. Social media information was tendered as an exhibit, without objection, which established that "Biff Naked" is a stage name for an accomplished musician and social activist who was born in India and raised in rural Manitoba. She is a cancer survivor who continues to perform, record music, and speak as a public advocate for cancer survivors and women's empowerment. She received an honourary doctorate degree from the University of the Fraser Valley in 2013.

[136] I note that both the performer and the grievor have dark hair and many tattoos.

[137] The grievor's representative argued that this evidence shows a bias against the grievor in Mr. Noon-Ward's mind. While I agree that this unfortunate email reflects very poorly on Mr. Noon-Ward's professionalism, I make no finding of bias.

[138] Recently, I issued two decisions noting how it is unacceptable for members of the public service to address their superiors disrespectfully.

[139] This applies *a fortiori* to managers.

[140] A manager must be expected to lead by example. Each public official, including a CX, deserves to be treated at all times with respect from his or her manager. (See *Pezze v. Treasury Board (Department of Natural Resources)*, 2020 FPSLREB 37, and *Gulia v. Chief Administrator of the Courts Administration Service)*, 2020 FPSRLEB 39.)

[141] The grievor argued that the Warden's failure to remove Mr. Noon-Ward from his position liaising with the BOI also was a failure of leadership on her part and further evidence of bias.

[142] I will simply conclude that this was a lost opportunity for the Warden to add credibility to the investigation.

[143] Perhaps of more significance to my findings are the facts relied upon by the grievor, which state that Mr. Noon-Ward wrote a rather revealing email dated

August 26, in which he stated that he did not think that the informant's information alone would be enough to justify terminating the grievor's employment.

[144] Given the conduct of the hearing and my assessment of the employer's case, as noted in this decision, it appears that in fact the employer did decide at that point to terminate the grievor. It then spent the next several weeks trying to build a case against her that it believed would withstand a challenge before the Board.

[145] I reviewed the audio files tendered as an exhibit, which are of the disciplinary hearing held on November 29, 2016. At 9 minutes and 45 seconds into part II of the recording, the Warden responds to the grievor's insistence that she be allowed to see the allegations that the informant made against her. The grievor suggests to the Warden that inmates are not reliable.

[146] The Warden replies by saying, "You [the grievor] are right; I [the Warden] don't have you with your hand in the cookie jar… I don't have anything 100% concrete saying you brought drugs into the institution, but I do have a credible-source inmate, so why would I not believe what he says about you?"

[147] The audio file continues with the Warden stating that the informant is "completely reliable" and that she is "completely confident" accepting his allegations accusing the grievor of bringing drugs into the institution.

[148] The audio file reveals the Warden becoming almost argumentative with the grievor after the grievor denies the informant's allegations and points out that inmates cannot be trusted. The Warden tells the grievor, "I have a credible-source inmate, so why would I not believe him when it comes to you?"

[149] While I do not accept the allegation of bias, I do conclude that that the Warden's confidence in and acceptance of the informant's allegations never diminished throughout the BOI's mandate, the grievance process, and the adjudication hearing.

3. Passing items for inmates between their cells

[150] When she was asked about the series of events captured on the video, the grievor testified that she had worked very long hours on the days before the events. She stated that she had worked two 16-hour shifts back-to-back and that on the third day, she worked a regular shift on August 23, and again on August 24.

[151] In cross-examination, she acknowledged that she was aware of the fentanyl problem, that an inmate at the institution had overdosed on it, and that it was a very dangerous substance, which had given cause for the s. 53 search.

[152] Despite her testimony that she had thought that the drug problem was isolated in a unit other than Echo unit, where she worked, she admitted that in fact, she had been sent the all-staff memo dated August 22, 2016, which clearly stated that all units were at risk from fentanyl.

[153] In cross-examination, the grievor also admitted that she was aware that inmates could hide drugs and other contraband in compact disc cases, hats, and clothing. The August 22, 2016, memo stated that the only fentanyl that had been seized after an inmate overdose was in the form of a powdery residue located on a compact disc cover in the inmate's possession.

[154] The grievor also admitted that a CX cannot always trust an inmate. When she was challenged to admit that a CX should always verify anything an inmate says or does, she replied that the inmate that the video shows her taking a compact disc case from, which she placed in her pocket with her bare hand, in fact enjoyed a position of relative trust in the institution.

[155] She explained that the inmate was given a painting job, which allowed him more freedom than normal on the range. She said that that freedom required that he be compliant and trustworthy. She said that she had known him a long time. When she was challenged on that time, she said that she had known him for close to three months.

[156] The grievor testified that in her opinion, she did not provide any favours or gifts to the inmates; she simply agreed to pass a compact disc case, which she again admitted was an error. She was challenged that passing compact disc cases was a breach of CD 566-12, which states at paragraph 20, "Inmates are not permitted to give, trade, loan, rent or sell personal or other property to other inmates directly or indirectly. Unauthorized exchange of property between inmates may result in a disciplinary charge."

[157] The grievor acknowledged CD 566-12 but replied that a CX assisting an inmate by returning personal property to another inmate "was done all the time."

[158] The grievor noted that CD 566-12 is worded in a permissive way such that a disciplinary charge "may" result from inmates trading or loaning personal property. In her opinion, such charges were rarely if ever laid.

[159] As I have noted, both before the BOI and at the hearing, the grievor conceded that passing personal items between inmates during the s. 53 search was a mistake.

[160] To add emphasis to this point, I will simply note that both parties called witnesses who testified that while working as CXs, they have never and would never agree to pass any personal items between inmates during a s. 53 search.

[161] Chanveer Rai, a CX II, admitted to passing personal items between inmates during a s. 53 search. He said that he did it in an attempt to alleviate the stress that builds within the inmate population during a lockdown. He also testified that he prefers to focus his efforts on the search's goal, which is usually to find drugs and or weapons. He explained that this is done because it is time consuming to seize personal items, complete the necessary paperwork to log them, and take them to the admissions and property office, which logs and stores personal items seized from inmates.

[162] When he was challenged in cross-examination, CX Rai stated that no inmate should ever be trusted or taken at his word. He agreed that he would search any items that he might pass between inmates during a s. 53 search.

[163] He testified that failing to look for such items would defeat the purpose of the search. When in cross-examination, he was asked about the risk of compact disc cases being used to conceal drugs, he testified that he was aware of it being a problem at the institution and that he would always open those cases during a cell search. He added that he would always wear gloves during any cell and inmate search, for his safety.

[164] When Mr. Rai was offered an opportunity during cross-examination to repeat his testimony that he might agree to pass personal items between inmates during a s. 53 search specifically for fentanyl, he declined and stated that he would not do it.

[165] Still in cross-examination, Mr. Rai was asked if he has agreed or would ever agree to take a large bag of personal items out of a cell for an inmate during a s. 53 search to keep it from being searched. He replied that he has not and that he would not.

[166] The grievor called Richard Ogilvie, a CX I, to testify. He admitted that once, he agreed to pass a video game charging cord between inmates during a lockdown, but that he searched it first; such a search is very important. He further testified that he has been asked to pass other items during lockdowns and that he has always refused. He stated that he knew that other CXs had agreed to pass items between cells during a lockdown but would not divulge the details of who did it or where or when it might have occurred. In cross-examination, he added that he always wore protective gloves and a respirator when conducting a fentanyl search.

[167] Mr. Ogilvie also testified that during a card search, in which personal items are documented and checked against the inmate's list of possessions, he would not take any personal items if an inmate asked him to. Doing so could later risk causing a seized item to be declared seized unlawfully because he agreed to pass it to another inmate. He also testified that he would never agree to accept a bag of personal items from an inmate during a s. 53 search.

[168] In her testimony while viewing the video, CX I Grasby, the grievor's partner as of the incidents in question, said that she saw the grievor take her glove off and then take an item. It surprised Ms. Grasby; she said that she would never take her gloves off and that she had never seen another CX do so during a search.

[169] CX Grasby added that it was not normal for a CX to take an item out of a cell during a s. 53 search and that she would never do it.

[170] The employer's counsel called Sean White, a CX II, to testify. He testified that he has been asked to but that he has never agreed to take personal items from an inmate and store or pass them, especially during a s. 53 search. He said that he would consider taking only a library book or toilet paper to an inmate during a search and that he would search both items if he agreed to take them to another inmate.

[171] CX White said that a CX should never take a bag of personal items from a cell during a search. He added that a CX should always wear protective gloves and that he would never remove his while dealing with inmates.

[172] In his cross-examination, Mr. White admitted that he had returned personal items to an inmate who was moving within the institution but only after searching

them and verifying that the inmate owned them by checking the inmate's personal property card.

[173] When CX White was shown an SOR that he filed after confiscating rolling papers from an inmate and was asked if he filed papers to charge the inmate with an offence for possessing contraband, CX White explained that he did not do that because he confiscated only part of the cover of the package. Had he had taken the full package of rolling papers, he would have filed a charge for an offence.

[174] The grievor's representative pursued the matter of whether CD 566-12 was in reality enforced during the s. 53 search.

[175] In her cross-examination, the Warden was challenged to confirm that after reviewing the employer's book of documents, it was true that there was no record of any offences or SORs being filed to report any inmates found not complying with their personal property cards during the s. 53 search.

[176] The Warden was also asked whether it was true that after the s. 53 search of the 96 cells, in not one was any improper personal property found that was not accounted for on an inmate's property card. In reply, she did not contradict the leading questions and replied only by saying that it was possible that some of those cells were vacant during the search, which would have reduced the number of cells and inmates searched.

[177] Mr. Labossiere, Assistant Warden Operations, during the s. 53 search, testified to his direction to staff that the search of the institution's general population units would take place due to the presence of drugs and weapons and that it included a card search of the inmates' personal effects.

[178] In cross-examination, Mr. Labossiere testified to his assertion that the s. 53 search was not only for drugs and weapons but also for cards. When he was challenged to point to a document that would confirm it, he mentioned his memo to staff dated August 22, 2016, and titled, "Section 53 search and Safe Handling of Fentanyl".

[179] After taking several minutes to make a careful review of that document and of all the documents in the employer's book of exhibits, he was unable to refer me to anything in writing that directed staff to conduct a card search.

[180] He also reviewed his staff communication bulletin of the same date. Similarly, it focused upon fentanyl and did not refer to the s. 53 search or to a card search.

[181] The Warden and Mr. Labossiere both testified that the s. 53 search they ordered was due to the presence of fentanyl and other drugs in the institution. But they also said that it was to include card searches.

[182] A card search refers to the declared personal property items that each inmate is allowed to bring with him upon his arrival at the institution. Strict limits apply to that property, and the card lists each item brought in. The card is checked to ensure that the inmates possess only their declared property.

[183] As noted earlier, this strict inventory control is done to ensure that personal items are not traded or bartered as a form of currency in the illegal institutional underground economy, in which contraband, homebrew, and sexual services are marketed.

[184] Evidence was presented through inmate-request forms that showed that after the search, inmates stated that they wished to recover their belongings that had been taken in large, clear plastic bags and put in the CXs' office until it could be confirmed whom they belonged to. The requests specifically mentioned that compact discs were among the missing items. They were written in early September 2016.

4. The large bag of personal items taken from Inmate W's cell

[185] The employer argued that the grievor compromised the s. 53 search and lockdown by taking the large, clear, plastic garbage bag of personal items from Inmate W before his cell was searched.

[186] Evidence was adduced to show the grievor was responsible for knowing that Inmate W was violent, manipulative, and involved in the institution's drug subculture.

[187] Upon a review of that video in cross-examination, the grievor was challenged to explain why she is seen approaching a cell door when food trays were being retrieved, and instead of taking the tray, she pauses and takes a long look over her shoulder to where her partner CX had just exited the range by walking around a corner, out of her view. She does that just before she extends her bare hand to accept a compact disc case from the inmate, who passes it through the tray slot.

[188] The grievor replied that she always looked over her shoulder when working on the range from force of habit and a concern for her safety. She explained that she had once been caught in a workplace prison riot where she feared for her life and phoned her mother to say goodbye as she anticipated her being killed while waiting to be rescued. She said memoires of this experience had never left her.

[189] She also testified that another inmate called out to her from his cell, that she looked over her shoulder in his direction to reply, and that she told that other inmate to wait. Note that the grievor provided the same explanation when the Warden asked her the same question at the disciplinary hearing.

[190] When she was asked if in fact she accepted the compact disc case, quickly placed it into her large cargo pocket, and immediately walked away from the cell in the opposite direction from where her partner had gone, to conceal her actions, the grievor replied that she knows that eyes are always on her while she works in the range.

[191] The grievor was then asked if she knew that the video of her actions would be automatically erased in seven days. She replied that she did know that but added that she disclosed the fact that she had passed compact disc cases between cells when she was called into the Warden's office to be suspended.

[192] The grievor testified that she told management of this fact when she was called to the Warden's office and suspended. The grievor also testified that she put the inmate's name on the bag. She made the same statements to the BOI, as confirmed on page 17 of the BOI Report.

[193] The grievor also testified that she disclosed to CX Dan McKinnon, her union representative, the bag that she left in a bin in the CX office.

[194] I note that he is heard clearly on the audio recording of the disciplinary hearing confirming that he witnessed the grievor inform the Warden of the bag that she put in the CX office.

[195] However, when he was asked about this at the hearing, CX McKinnon testified that he had no recollection of the grievor disclosing the existence and whereabouts of the bag to him.

[196] The Warden also testified that the grievor did not disclose the existence of the bag to her during their conversation as of the grievor's suspension.

[197] During her cross-examination, the Warden was presented with an advisement based on *Browne v. Dunn*, (1893) 6 R. 67 (H.L.), stating that the grievor would testify that immediately upon being called in to be suspended, she told the Warden that she had passed a compact disc between inmates.

[198] The Warden replied by stating that she did not recall it. When she was then asked if she had notes from the meeting with the grievor, the Warden replied that she does not take notes at meetings, but rather has staff perform that task.

[199] The Warden testified that it is well known that inmates hide contraband, including illicit drugs, in clothing seams and that the bag created a significant health risk to the institution's staff and inmates.

[200] Evidence was also presented that showed that Inmate W was very violent and active in the drug subculture at the institution. The employer went to great lengths to show that he had a documented history of manipulation and deception. The evidence established that the grievor was assigned his files upon his arrival approximately two months before the events arose that were under scrutiny at the hearing.

[201] Each inmate is assigned a CX II caseworker who is responsible for maintaining close knowledge of his files and for overseeing his conduct and programming (if any) at the institution.

[202] The employer argued that the grievor's apparent level of comfort with and trust in Inmate W by helping him remove personal items from the s. 53 search was especially troubling given that her duty included knowing his manipulative and deceptive tendencies and his involvement in the drug subculture at the institution.

[203] The employer noted the records that showed that drugs had been found on Inmate W's mother and spouse and in his mail upon their entry into the institution.

[204] Despite what the employer tried to show were the warning signs of potential problems that Inmate W could have posed and that the grievor should have known of, when Acting Warden Labossiere was presented with inmate-tracking briefings shared with the CXs, which provide them with the intelligence and important information to

help in their patrols and in handling inmates, he acknowledged that Inmate W was not listed in the briefing for Echo unit during the time of the events at issue.

[205] The Warden also stated that the inmate who passed the bag to the grievor possibly wanted to avoid the seizure of contraband.

[206] While the employer argued that on its own, simply contravening this CD is serious, it is important to note that the concern that contraband such as fentanyl was hidden in the bag was proven only to be a matter of the grievor engaging in risky behaviour.

[207] In cross-examination, when he was challenged on this point, corrections manager (CM) McCoy confirmed that upon discovering the bag in the CX office, he searched it and found nothing other than inmate clothes, shoes, hat, watch, video games, and compact discs that presumably contained music.

[208] Mr. McCoy contradicted the grievor's claim that she had tagged the bag as he said it had no identifying tags or marks when he found it.

[209] He testified that he did not test the items for drugs as he found nothing in the bag that suggested that they were present.

[210] CM McCoy testified that once he searched the bag thoroughly and found it free of contraband, he tagged the items in it and logged the details. When he was asked about any follow-up, he could not say if any occurred with respect to laying charges for offences arising from inmates possessing items not registered on their property cards.

[211] He also admitted that contrary to clear policy, he did not submit an SOR about the personal items that he searched and logged.

[212] CM David Mardell, who served as a special investigations officer (SIO) during the events at issue, testified that he did not think that any of the items in the large bag were for drugs after the bag being located in the CX office.

[213] When CM Mardell was challenged on this point again, he testified that he most certainly would have been told had a positive test occurred for any drug or had a weapon been discovered in the bag.

[214] The employer's argument on this point was clear. It was supported by otherwise compelling evidence of the clearly worded CD prohibiting the inmate from possessing personal property that was not his own, including blue jeans, running shoes, and a hat, among other things.

[215] I might have been more persuaded by the employer's submissions on this matter had I been presented with evidence showing that the inmate in question was charged with an offence upon the discovery of the video and the bag of his apparently improperly possessed personal effects.

[216] Mr. Labossiere, the deputy warden at the institution and the acting warden as of the termination of the grievor's employment, testified that no charges arose from the discovery of the large quantity of fentanyl and other contraband items. He explained that the Warden did not want to risk exposing the informant's identity by laying charges.

[217] When he was asked to review the log of charges issued to inmates at the institution, Mr. Labossiere did so and acknowledged that none were laid during the s. 53 search.

[218] He was asked why no charges were laid. He replied that it might have been the manager's or the CX's choice to not lay any. He explained that some CXs believe that there is a systemic problem in that they often do not see consequences arise for an inmate through charges being laid, so CXs form the opinion that charges will have no result.

[219] When he was asked specifically about charges arising from unauthorized personal items in a cell, Mr. Labossiere testified that his experience was that charges are not always laid if they are found in a s. 53 search.

[220] Mr. Labossiere confirmed the testimony of CX Rai when he said that if the search is for drugs, then the CXs will focus on drugs.

[221] He said that in the search at issue, drugs were the focus, but so were the cards. If personal items were found in a cell that were not listed on that inmate's property card, they should have been seized and put into the evidence room.

[222] Mr. Labossiere also testified that if he became aware that a CX failed to write up charges against an inmate for possessing unauthorized items, he would intervene and speak to the CX to explain the CX's duties. If that did not work, he would escalate the issue to the CX's manager or the deputy warden.

[223] When in cross-examination, Mr. Labossiere was asked if CXs ever help inmates return items to each other, he said that it is not allowed. But when he was asked it again, he admitted that CXs have returned items to inmates but that it was not condoned, that it is against policy and procedure, and that it should not be done during a s. 53 search.

[224] CM McCoy testified that no items were seized from the inmate who provided the bag of items to the grievor.

[225] I find that the testimony that CXs focus on drugs in a drug search and more importantly, the fact that the employer could not point to any confirmation of any inmate property seizure or charges arising from it, support the grievor's submission that property-card offences were rarely pursued during the events at issue in this hearing.

[226] I also agree with the grievor's submission that the mal-intent that the employer attempted to ascribe to her taking the bag out of the search area was mitigated by the fact that she did it while her partner stood beside her and watched her take it and carry it off the range.

[227] My finding on this aspect of the employer's case is supported by the fact that the grievor took the bag to the nearby CX office in the plain view of her patrol partner, CX Grasby.

[228] When the BOI questioned CX Grasby, she stated that the grievor told her that the inmate had borrowed some personal items and did not want to lose them in the search, so she agreed to take just a pair of pants. To save paperwork for staff in the property office, she was to return the items to the documented owners later on. That was consistent with the grievor's testimony before me.

[229] The grievor testified that she intended to search the bag later, possibly the next day. She testified that her shift on the day in question ended at 4:00 p.m. The video was timestamped. It showed her taking the bag from the inmate at 3:23 p.m.

[230] The grievor argued that it was logical that she might have felt rushed near the end of a long shift to search the bag, take it to the property office, and complete the necessary paperwork.

[231] Counsel for the employer argued in reply by pointing to the grievor's testimony confirming that she phoned CX White the next morning after having been assigned to a different post. She did not alert him to the bag and its location.

[232] The fact that the bag was taken out of the cell, moved in the presence of and discussed with the grievor's patrol partner reduces any sinister or other mal-intent behind moving it that might be inferred when viewing the matter solely after hearing the informant's allegations.

5. The grievor's assertion that she distributed razors to inmates

[233] As noted at pages 10 and 11 of the BOI Report, the video review showed that in the videos from the second day of the grievor's impugned activities (August 24), she is seen on the lower Echo range at cells 7-12 at 3:23 p.m. opening the food-tray slots of each cell door and giving something to each inmate. The objects she distributed are too small to be identified in the video, which was taken from behind her.

[234] However, when Mr. Labossiere was shown the same sequence of events from the reverse angle taken from the camera at the other end of the range facing the grievor, he testified that in his opinion, he could see on the video that she placed compact disc cases on the food-tray doors of each of the three cells.

[235] The BOI Report claimed that all available video was shown to the grievor. It gives many details of the questions posed to her about her actions captured on the video in which she passes items between cells, but it is not entirely certain that the precise sequence or camera angle that was shown to Mr. Labossiere was also shown to her, for her comments.

[236] My review of the BOI Report showed no specific discussion at the BOI about the video from August 24 at 3:23 p.m. in which the grievor places a small object in the open food-tray slot of each cell on that range.

[237] At the hearing, the grievor testified that this video clip shows her distributing razors to inmates. Such a razor was tendered as an exhibit. I note that it

measured one inch in width on its head and that it had a very thin one-inch handle. The three-quarter-inch blade was encased in a clear, hard acrylic case. The handle was made of the same substance.

[238] When she was questioned about the grievor's testimony that she delivered razors to inmates in one segment of the video viewed at the hearing, CX I Grasby said that she was not aware of the grievor distributing any razors to inmates that day.

[239] CX Grasby also testified that she did not remember any inmates on the day at issue asking her for a razor. Had one done so, she would have asked the grievor to deliver the razor as she knew the inmates better. CX Grasby explained that she was not regularly assigned to Echo unit and that she had just filled in for an absent CX on that shift.

[240] CX Grasby also testified that the proper practice was that if a razor was being given to an inmate, when it was delivered, the old one was to be collected.

[241] The Warden was asked if the matter of the grievor distributing razors during the course of the events in the video had arisen during any part of the investigation or disciplinary hearing. She replied that it had not.

[242] In argument, counsel for the employer noted that the matter of razors being distributed arose quite some time after the incident had passed and the investigation had completed. Counsel suggested that therefore, I should not find this explanation credible.

[243] Counsel for the employer questioned why the razors issue had not arisen earlier, thus suggesting that it was not a credible statement. However, I note that the evidence is not clear that this specific segment of video was put to the grievor for detailed questioning.

[244] Furthermore, other than the employer's assertion that the grievor improperly passed items between inmates during the s. 53 search, it made no allegations or offered any theories supported by any evidence whatsoever that suggested that she did anything other than distribute razors on that segment of the video.

[245] I will note again that in the end, the search produced no evidence of drugs being passed to the inmates during the time viewed on that segment of the video.

[246] If in fact, this video does show the grievor passing more compact discs, as Mr. Labossiere testified, I do not consider this as materially impacting the employer's case.

[247] However, the fact that the grievor's memory of distributing razors arose so late, was cited by the employer's counsel in her submission on the grievor's testimony lacking credibility as shall be analyzed later in this decision.

[248] While counsel for the employer's case relied heavily upon the risk of harm arising from the possibility that the grievor could have passed drugs or other contraband, which was then destroyed by flushing it down the cell toilet, this is completely speculative and somewhat illogical.

[249] At page 13, the BOI Report notes that the informant told SIO Mardell that so many drugs were entering the institution that the inmates would flush them down the toilet as needed to avoid detection, without much concern, as they knew more would be soon available.

[250] If an inmate in possession of such contraband simply wanted to destroy it by flushing it down the toilet, he could have done it without needing the grievor to distribute the contraband to other inmates who could then flush it.

[251] I also note that no evidence was tendered at the BOI or before me at the hearing suggesting that any of the inmates seen receiving items from the grievor during the lockdown were later discovered to have consumed drugs during the days at issue.

[252] Given the evidence before me of the commotion caused by other inmates consuming drugs by heating them or simply ingesting them and becoming incapacitated, I conclude that it is more likely than not that the inmates observed receiving items from the grievor did not in fact possess drugs that were consumed or otherwise disposed of before they were subjected to the s. 53 search.

[253] No evidence was presented at the hearing that raised the spectre of the grievor's misadventures involving passing goods from a cell that had not yet been searched to one that had been searched.

6. The grievor's alleged inappropriate relationships with inmates

[254] At page 19, the BOI Report notes that the informant stated that the grievor was in a relationship with someone (the name was redacted) who had been an inmate and that she tried to contact him when he was back in the community.

[255] The informant also stated that the grievor was in some sort of relationship with another person (whose name was also redacted) housed in Echo unit and that she brought packages of which she did not know the contents into the institution for him.

[256] The BOI stated that it was unable to corroborate any of these claims with other evidence or witnesses but that it believed the informant's allegations as he provided other information that was proved accurate. The BOI knew of no motive leading him to make false allegations.

[257] The BOI also confirmed that it chose not to try to speak to the informant about this case since it did not want him identified as an informant.

[258] The BOI not only made this damning finding against the grievor by relying solely upon the hearsay of an incarcerated informant who feared the loss of his transfer to a medium-security institution, but also, it went further. On page 21 of the BOI Report, it made, what I find was, an adverse inference against her.

[259] The BOI Report stated that the grievor showed a lack of interest by not demanding to know from where the BOI had obtained the information about her alleged relationships. She denied the inference.

[260] The BOI concluded that it would have been a normal reaction for the grievor to want to know who made the allegations, so that she could defend herself. The BOI then noted that in fact, her union representative spoke at the meeting and requested the disclosure of the information that the BOI relied upon.

[261] On the allegation of inappropriate relationships with inmates, the BOI found that the grievor had in fact violated the CSC's "Code of Discipline and Standards of Professional Conduct" by engaging in inappropriate relationships with the two inmates named by the informant.

[262] It also found that the video evidence showing her speaking with inmates, taking items from them with her bare hand, and passing the items between inmates was also evidence of inappropriate inmate relationships.

[263] In the termination letter, Acting Warden Labossiere noted that the video of the grievor stopping outside inmate cell doors and speaking with them as well as taking her glove off and standing close to the door to take items from the inmate showed her familiarity with the inmates and proved that they were grooming her for their use.

[264] Mr. Labossiere also testified to his observations of the video, at the part where the grievor picks up food trays. She speaks to an inmate in his cell, then leaves his door empty-handed without taking the used food tray. She leaves it for her partner to pick up.

[265] He also took note of the grievor looking over her shoulder toward where her partner CX had just walked around the corner of the range and was out of sight, just before the grievor took the CD-ROM from the inmate. As noted earlier, the grievor answered this allegation by testifying that she had heard an inmate located in that direction call out from his cell. She looked that way to respond to him by voice.

[266] My review of the video showed that the grievor not only looked in the direction of where her partner had just exited the range but also that she kept her head looking in that direction for 3.9 seconds, according to the date and time stamps on the video from the employer's security system.

[267] Mr. Labossiere testified that all the grievor's actions and mannerisms when she dealt with the inmates looked very suspicious to him. He added that she did not have appropriate professional boundaries with inmates.

[268] In cross-examination, Mr. Labossiere admitted that he did not believe that the grievor realized any personal gain from any of the matters alleged against her in this case.

[269] To support its allegation, the employer pointed to the video of the grievor taking off her glove to receive a compact disc case through the food-tray slot of an inmate's door.

[270] The grievor replied that she needed to remove her glove as it was bulky and thick, and it would have prevented her from opening the cargo-style thigh pocket of her uniform pants, where she wished to place the compact disc case.

[271] The grievor submitted a pair of uniform gloves that CXs wear while working at the institution, which I accepted as an exhibit, along with a pair of uniform pants that were accepted as an exhibit.

[272] She also testified that she wore gloves that she sourced herself, which were thicker and bulkier than the uniform gloves.

[273] Without attempting to make a finding of fact of any possible mal-intent motivations when she put the CD-ROM into her thigh pocket, I observe that the pocket of the uniform pants tendered as an exhibit would indeed be difficult to open while wearing a glove of the type tendered as an exhibit.

[274] The grievor also explained that the inmate in question was known to be compliant. He enjoyed a level of trust with the staff, which was shown by him being hired to paint the range outside his cell. She explained that only trusted inmates received this rare privilege.

[275] To counter this reply, the employer sought evidence long after the grievor's termination to establish which inmate passed the compact disc cases to her bare hand.

[276] Upon establishing which inmate it was, the employer then called reply evidence to state that in fact the inmate had been charged more than once for failing to stand in his cell for roll call. This suggested that in fact, he was not compliant and, I presume, not trustworthy.

[277] I mention this reply evidence only to state that I place no probative value upon whether this inmate stood for roll call. I find his history of failing to stand is insignificant, given that the inmates in the institution's general population are some of the most violent and dangerous in the country, as the Warden testified.

[278] In conclusion on this point, I find it more likely than not that the grievor might well have had a brief conversation, given how long she looked in the direction she did.

[279] It seems illogical that if she was checking to ensure that her partner could not observe her surreptitiously taking a compact disc from an inmate, as the employer alleged, she would have held her gaze in that direction for almost four seconds.

[280] I would expect it to be more probable that if in fact she was about to do something she knew was wrong, and if she desired to hide it from her partner, then she would have made a quick glance and then immediately reached for the compacts disc case as she must have known that her partner would return to the range very soon and would see her as it was food-tray clean-up time, and there were more trays to pick up.

[281] For these reasons, I conclude that the employer has failed to bring clear, cogent and convincing evidence upon which I can find on a balance of probabilities that the grievor was engaged in inappropriate relationships contrary to the Code of Conduct and other employer policies.

7. The allegation that the grievor knowingly compromised the s. 53 search

[282] From the outset of the investigation of this matter, the employer and its BOI took the position that the grievor knowingly and wilfully undertook wrongful actions to aid inmates and to thwart the s. 53 search.

[283] While counsel's views on this matter were not canvassed at the hearing, I will take notice of the fact that I trust that in its vigorous submissions on this topic, the employer did not refer to the fact that the grievor did not appear to act in an autonomic manner, such as somnambulism, when she moved items between inmates.

[284] This means that by its many comments in its testimony and argument, the employer was necessarily engaging a *mens rea* (guilty mind) element in its case.

[285] The grievor argued vigorously that such a premise was false and noted that no evidence was tendered at the hearing to support this allegation.

[286] The termination letter states that the grievor "… displayed a willful [*sic*] disregard for CSC policy and procedures".

[287] Acting Warden Noon-Ward signed an SOR dated September 1, 2016, in which he wrote that the grievor "deliberately hid items" on behalf of Echo unit inmates to prevent them from being found in the search planned for later that week.

[288] Acting Warden Labossiere testified that in his decision to terminate the grievor's employment, he considered that she wilfully acted to jeopardize the s. 53 search as she chose to pass goods between inmates and remove items from the search area, and she disregarded a clear order.

[289] Acting Warden Labossiere also testified that when he considered the factors in his decision to terminate the grievor, he noted that she had placed Inmate W's bag in a "covert" location outside the search area and that he did not believe her statement that she intended to search it later.

[290] In closing argument, counsel for the employer suggested that the grievor colluded with inmates to do wrong and to defeat the s. 53 search.

[291] Later, counsel also suggested that the grievor was evasive when answering the BOI's questions about the seriousness of her actions.

[292] However, the employer could produce no supporting evidence. When he was challenged in cross-examination, Acting Warden Labossiere agreed that there was no evidence of the grievor being paid or rewarded for her actions of passing items seen on the video.

[293] Despite the sinister gloss the employer added when it summarized the grievor's act of taking the bag out of the search area, it admitted that no drugs or contraband was found in the bag when it was recovered in the CX room just off the range.

[294] Earlier, I noted that no drugs or contraband was found in any of the cells in which the grievor was observed passing items. In fact, no such discoveries were made during the s. 53 search on the entire Echo unit where she worked.

[295] The employer further admitted that no personal-property card search was done to reconcile the property to its owner and to charge the inmate seen on the video for violating the CD for possessing property other than his own.

[296] In the end, these statements as to a guilty mind are bald accusations unsupported by evidence.

[297] As I concluded earlier in this decision, the informant told the employer that the grievor was a paid drug courier for known criminals. The employer accepted this

allegation as truth. The rest of its case was spent reviewing video evidence where the grievor had admitted her fault and error.

[298] I am left with my conclusion that the employer failed to adduce clear, cogent, and compelling evidence upon which I could find that on a balance of probabilities, its allegations of the grievor having a guilty mind and any other mal-intent beyond what she admitted to. Which, as I have noted does show her inappropriate conduct in passing items between inmates and taking a bag of personal items.

8. Witness credibility

[299] Both parties argued that I should make an adverse finding of credibility of the other parties' witnesses.

[300] The Board regularly cites the guidance provided by the British Columbia Court of Appeal for determining contested facts and assessing witness credibility. The Court determined that the credibility of an interested witness must be tested by reasonably subjecting the witness's story to an examination of its consistency with the probabilities that surround the currently existing conditions. The real test of the truth of a witness's story must be its 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 *Faryna v. Chorny*, [1951] B.C.J. No. 152 (QL).

[301] Perhaps such dueling submissions were inevitable, given that the hearing mostly rested upon viewing a few brief videos and then spending over two weeks listening to testimony about what different people thought really took place in scenes depicted in the videos.

[302] I have made such adverse findings of credibility in other cases. I rejected the testimony of the grievors and grievances in both *Knox* and *Braich*. I found that those grievors' testimonies simply did not make sense and were untruthful, respectively. (*Knox v. Treasury Board (Canadian Food Inspection Agency)*, 2017 PSLREB 40)

[303] In both cases, I weighed the totality of the evidence and judged the testimony of each grievor as it related to the entire series of events before me in their hearings. In each case, the evidence before me was clear and convincing in my determination that they lacked credibility.

[304] In other words, to quote the Supreme Court of Canada, the evidence was clear, cogent, and convincing that the testimony of those grievors lacked credibility.

[305] The Board should not make such a finding lightly. See *F.H. v. McDougall*, 2008 SCC 53, which states:

> ...
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> *[46] Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.*
>
> ...
>
> *[53] As I have explained, there is only one civil standard of proof — proof on a balance of probabilities.*...
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> ...
>
> *[58] As Rowles J.A. found in the context of the criminal standard of proof, where proof is on a balance of probabilities there is likewise no rule as to when inconsistencies in the evidence of a plaintiff will cause a trial judge to conclude that the plaintiff's evidence is not credible or reliable. The trial judge should not consider the plaintiff's evidence in isolation, but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case.*
>
> ...

a. The credibility of the Warden's and Acting Warden's testimonies

[306] The grievor pointed to SIO Mardell's testimony in cross-examination. He had admitted that he was unable to corroborate the informant's allegations that the grievor had personal relationships with named members of organized crime gangs.

[307] In making this admission, he also admitted that in a December 12, 2016, security intelligence report to the Warden, which I had ordered the production of, about these matters involving the grievor's alleged wrongdoing and the related updates, he assessed that information of the informant as being of "Unknown Reliability".

[308] In his cross examination, SIO Mardell testified that his December report meant that the informant's allegations of the grievor's relationships with convicts and of her drug smuggling were neither confirmed nor disproven.

[309] He also acknowledged that other aspects of the related issues were assessed as "Believed Reliable" and that aspects in which contraband items that the informant had identified had been located were assessed as "Completely Reliable".

[310] The grievor contrasted SIO Mardell's evidence with the repeated assertions made by the Warden and Acting Warden Labossiere at the hearing that their information about her and in particular about her relationships was completely reliable.

[311] The grievor argued that those assertions could not stand as credible when viewed alongside SIO Mardell's admissions and his December 12 report.

[312] The grievor argued that I should find the continued attestations of reliance upon the informant as evidence of a lack of credibility with respect to the Warden and Acting Warden.

[313] When this same issue of relationships was before the BOI, it concluded in its Report that SIO Mardell "… stated that given all the SOURCE information provided was accurate he deems the information as "Completely Reliable" as per the reliability standards and codes.

[314] Somewhat presciently, the BOI concluded on this point that SIO Mardell had not been able to obtain any further information but that he would continue to investigate.

[315] The grievor also noted that the employer did not comply with my order to produce a copy of the final version of the report on the s. 53 search that had to be written after the search.

[316] While it is disappointing that a report that is required to be written and that should have obviously been known by the Warden to be significant, given the content of this hearing, was lost, I do not attribute this as a matter of her credibility.

[317] I similarly do not attribute the Warden's lost opportunity in her testimony to reconcile the Mardell evidence with the assertion she repeated that the informant was deemed "Completely Reliable" to her lacking credibility.

[318] In my considering the Warden's testimony, I give special note to her frank admission at the hearing when at the conclusion of her testimony; I asked her what if any role the informant's allegations had in the decision to terminate the grievor's employment. The Warden replied without hesitation that "it was in the background."

[319] I found this comment in keeping with the other direct and succinct answers she provided without hesitation to the questions put to her throughout the hearing.

[320] Given the *Faryna* test for witness credibility noted earlier in this decision, I found the Warden's testimony to have been clear and direct. Where I have gone to some length to set out her and the employer's allegations against the grievor which I have at times concluded were not supported by clear and compelling evidence, I find her mind to have been predisposed by what allegations had been made by the informant.

[321] For these reasons, I decline the request to make an adverse finding of credibility with respect to the Warden's testimony. I also decline the submission of the grievor to find the employer was biased for the same reasons.

[322] I also decline to do so with respect to the testimony of Acting Warden Labossiere.

[323] His contribution to the evidentiary record of the hearing was limited in that he essentially stepped-in very late in the disciplinary process to sign the termination letter due to the absence of the Warden.

[324] His testimony regarding the factors he considered in the decision to terminate was largely limited to his repeating the allegations against the grievor. While he made some admissions in cross-examination regarding results of the search and lack of charges laid arising from property cards during drug searches in cross-examination that were helpful to the grievor's case, his testimony is not of such a significant role in the hearing to write an independent analysis of his credibility.

b. The credibility of the grievor's testimony

[325] The grievor pointed to her testimony about the statements she made first upon being summoned to the Warden's office for her suspension, again at her disciplinary hearing, and finally, before me at the hearing. I listened to her testimony, carefully reviewed her comments at the disciplinary hearing, and agree with her submissions that her explanation for her actions has mostly remained consistent.

[326] Counsel for the employer noted well some important exceptions to this consistency, which will be examined.

[327] The uncontradicted evidence clearly established that at all times, and first at being summoned to the Warden's office to be suspended, the grievor has been completely respectful in both a professional and personal sense to her managers and co-workers.

[328] She showed contrition by acknowledging her error of passing items between inmates. She explained that she should have known better and that she would never make that mistake again.

[329] She testified that the two days at issue came after two 16-hour shifts that had left her exhausted; they had a deleterious effect upon her judgement. She repeatedly said that she takes full responsibility for her errors, and she expressed remorse and apologized.

[330] The grievor stressed that she was a good CX, that she always pressed her uniform and polished her boots, and that she took great pride in her career. She said that she felt terrible at making the errors in judgement of passing items between inmates and of taking the bag. She testified that she told the Warden immediately upon being summoned that she had passed some compact discs.

[331] When asked to explain the paper she was seen on video taking from an inmate, she explained that it was a letter that he had asked her to place in the outgoing mail.

[332] She explained that she knew that the s. 53 search was for drugs as fentanyl had been discovered in Delta unit. She said that she did not think that Echo unit, where she worked, had a drug problem when she agreed to pass the items as no fentanyl had been discovered there yet.

[333] At the disciplinary hearing, she explained that she took off her protective glove when taking the three compact discs from inside the cell though the open food-tray slot because she could not get them into her cargo-style thigh pocket if she kept the glove on.

[334] She testified that she knew that at all times, she was under the watchful eyes of both security video and the guard post. I described earlier that that post is always staffed and that it has a clear view of all the ranges, which were observed on the video.

[335] When the grievor was asked about how she appeared suspicious when she looked over her shoulder as her partner left the range, she explained that she had heard an inmate call out to her from inside his cell, that she looked in that direction toward that cell, and that she replied to him.

[336] When she was challenged as to what they discussed and why she would talk to an inmate, the grievor said that during a lockdown, the inmates always ask what is going on. She also testified that she works all day with the inmates on Echo unit and that her job is to get to know them as a part of her dynamic security.

[337] She added that she tries to build a professional rapport with them and that she tries to build mutual respect with them by treating them like humans.

[338] The grievor testified to her practice of "dynamic security", which was discussed as allowing or even encouraging communication and professional, measured interaction with inmates, to encourage their participation in programs aimed to help their rehabilitation and to gather intelligence.

[339] The Warden testified to this practice and confirmed the fact that CXs are trained to closely observe inmates and report everything heard, seen, or confiscated from them and their cells, to supplement the inmate records kept at all institutions. The Warden noted that CD 560 sets out the terms of dynamic security.

[340] The Warden also testified that she thought that it was significant that at the disciplinary interview, the grievor admitted to her that she might have indirectly moved contraband during the s. 53 search by passing items and moving the large bag.

[341] On the audio file of the disciplinary hearing, the Warden tells the grievor that she is not satisfied with the grievor's explanation. She challenges the grievor again by

saying that the grievor has boundary issues with inmates and that the grievor is not offering her anything that she does not already know. She tells that grievor that she has 17 years of experience and asks rhetorically how the grievor could not know that passing goods between inmates could allow passing contraband.

[342] The grievor replies again, agreeing that there were drugs in Delta unit but stating that there had never been any in Echo unit, where she worked. She repeats that she is regretful and apologizes for her error in judgement. She states that she would never put herself or her colleagues at risk by moving contraband.

[343] When she was asked about the large bag that she took from Inmate W and then placed out of sight in the CX workroom above the range, the grievor explained that the inmate had asked her for help to return some jeans to another inmate. She said that she told him that "he should not have other guys' stuff" and that she agreed to take them. She then said that he gave her much more than the jeans and that she made an error by taking all the items and putting them in a blue-box-style bin in the CX workroom upstairs.

[344] The grievor testified that when she took the bag from the inmate and placed it upstairs, it was late in her shift. She was concerned about the time-consuming paperwork required to report the bag and take it to the property office, as they were very busy. She said that she intended to return to the bag the next day and search it.

[345] Given that I noted that the grievor's narrative was mostly consistent throughout the years in which this matter was investigated and heard, I note that the consistency of a story on its own does not guarantee its truth. As the Ontario Court of Appeal stated recently in *R. v. G.J.S.*, 2020 ONCA 317 at para. 48:

> *[48] In* R. v. Khan, *2017 ONCA 114 … leave to appeal refused [2017] S.C.C.A. No. 139, Hourigan J.A. explained, at para. 41: "[prior consistent statements] cannot be used for the prohibited inference that consistency enhances credibility, or the incorrect conclusion that the simple making of a prior consistent statement corroborates in-court testimony" ….*

[346] The grievor also argued that not only was her recitation of the events consistent, but also, she maintained a cooperative approach at all times by answering the employer's questions and helping with its investigation. She emphasized that

immediately upon being summoned to the Warden's office and being told of a problem, she replied that she was not a drug smuggler.

[347] The employer's counsel pointed out that the issue of drugs and smuggling had not even been mentioned. Thus, raising the suspicion in their minds that the grievor's statement was evidence of her guilty conscience.

[348] When this was put to her in cross-examination, the grievor replied that after being summoned to the Warden's office and told of a problem, she presumed by logical deduction that if the problem was with the s. 53 search, which was launched due to the presence of drugs in the institution, then she had been summoned for that reason.

[349] The grievor also testified that during this discussion with the Warden, she invited the Warden to have her work locker, automobile, cell phone, and purse searched, to show that she had nothing to hide.

[350] The Warden testified that she placed little value on the grievor's offer to have her belongings searched as the Warden said that smugglers are known to avoid any illegal activity during periods of high risk, such as the s. 53 search that had already been announced that week.

[351] Counsel for the employer made submissions on this issue that pointed to the following inconsistencies arising from the grievor's testimony:

- Her testimony that she tagged the bag of property from Inmate W was contradicted by CX McCoy, who said that he found it unmarked.
- Her testimony that she informed the Warden of passing compact discs and of the existence and location of the bag was contradicted by several witnesses, who said that she made no mention of them and that the bag was discovered via an investigation by the staff after seeing it on the video.
- Counsel pointed to the fact that after she arrived at work the morning after placing the bag outside the s. 53 search area, the grievor reported for work and was assigned to a post at the gate. She made no attempt to notify anyone of the bag in the CXs' office.
- Despite testimony that the grievor had been shown the relevant video of her actions at her disciplinary hearing, she did not claim that she distributed razors to inmates in their cells during the s. 53 search until she testified at adjudication.
- Pointing to all the grievor's acts shown on the video, counsel argued that having many conversations with inmates and taking off her glove to accept items that were then concealed from her partner and given to inmates without being searched showed a complete failure of integrity. They were also violations of

multiple CDs and employer policies as well as breaches of the code of professional conduct.

- The employer pointed to inconsistent testimony by the grievor that she passed a compact disc only on August 23, despite it appearing that she passed many over the two days of video examined at the hearing.
- The employer pointed to the grievor's admission to the BOI to taking a compact disc from one inmate, but the video showed her also taking them from another one.
- Counsel pointed to the fact that at the hearing, the grievor provided more detail to explain her actions. The hearing was held approximately three years after the events at issue, so her memory should have been better during the BOI's activities.

[352] The grievor's representative replied by arguing that the grievor's testimony was mostly within the realm of the plausible. The few inaccuracies in her testimony could possibly be explained by the lengthy passage of time since the events occurred, the approximate six month delay between her examination-in-chief and her cross-examination, and the terrible stress she has endured for years since her suspension and termination of employment.

[353] The grievor argued that it is important to note that there was neither an allegation nor evidence of any issues related to her improperly accessing inmate files, as occurred in my decision of *Lawrence v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 67.

[354] In that case, a CX's inappropriate relationships with inmates was established. The evidence established that amongst other misdeeds, he had made unauthorized searches of third-party inmate files that he then shared with the inmates with whom he was financially and criminally involved.

[355] I carefully reviewed the several hours of audio recordings tendered as exhibits that capture the entire two grievor's BOI interviews and disciplinary hearing with the Warden before her employment was terminated as well as the many hours of examination and chief and then cross examination.

[356] While some exceptions to the cogency and plausibility of the grievor's testimony were noted by the employer's counsel, I find that none of those exceptions goes beyond the realm of what may simply be due to the enormous stress on the grievor and the unfortunate passage of time during this hearing.

[357] This conclusion is unlike the wholly unbelievable and internally inconsistent explanations from the grievors in *Knox* and *Braich*. Those grievors provided unreliable testimony that led me to conclude that they were not credible witnesses.

[358] I have no such certainty about the grievor in the matter before me.

[359] I also note that some of the observations that I have made of witnesses before me in other cases who clearly lack credibility were absent from the grievor's many hours of testimony in this case.

[360] The grievor in the matter before me was not evasive in her answers. She spoke freely and in a confident manner that did not seem to be hesitant or exhibiting any attempt to parse her words. It was not apparent at any time that her testimony surprised her representative such as was the case in both *Knox* and *Braich*.

[361] Where some aspects of testimony were challenged as noted previously, it is possible, as argued by the grievor, that these were gaps in her memory owing to the stress she was under since being summoned to the Warden's office and throughout the very unfortunate approximately 18 months that elapsed between the opening and closing of this hearing due to the employer's counsel scheduling conflicts.

[362] I find the grievor's testimony and explanations as being plausible. As such, I do not have clear, cogent and compelling evidence of her not being credible.

[363] I cannot make an adverse finding of the grievor's credibility as a witness.

c. The informant

[364] It is reasonable to state that this entire matter came to be solely due to the information provided to Kent management by the inmate being held in solitary confinement due to illegal drugs being discovered in his cell.

[365] The employer's counsel did not place the informant's allegations directly before me as evidence. But as the Warden testified, these allegations were in the background to the entire disciplinary matter and this grievance adjudication hearing.

[366] While the employer did not directly rely on the informant's allegations at the hearing before me, they indirectly formed the foundation of the case against the grievor. As I have analyzed with relevant evidence earlier in this decision, the Kent

management and the BOI were clearly predisposed to accept the informant's allegations as entirely truthful.

[367] It is important from the grievor's perspective that in her search for justice, this decision memorializes several matters presented as evidence before me that cast doubt upon the informant and his allegations.

[368] At the hearing, the grievor went to some effort to show the informant as unreliable.

[369] The allegations made by the informant were not presented at the hearing as evidence of the proof of the assertions. But they stand frozen in time in the BOI Report like a dark cloud that undoubtedly follows the grievor in her hometown day and night.

[370] Firstly, the evidence clearly established that the informant was at risk of losing his transfer out of the institution that had already been approved at the time of these events. He hoped to enjoy incarceration at a medium-security institution. In my tour of the institution, I saw the austere and what must be unpleasant life that the inmates there endure. But I do not know where the informant was to be transferred.

[371] However, it is safe to presume that because he was concerned about losing his transfer, I can conclude that clearly, he expected better conditions upon leaving the institution.

[372] When he was pressed on this subject in cross-examination, SIO Mardell confirmed that the informant had been "somewhat concerned" about losing his transfer to a lower security prison. He also testified that he was not sure that a "bargain" had been made in which the informant was documented as stating that he would provide information to the Warden in exchange for assurance that his transfer would not be cancelled due to the discovery of drugs in his cell.

[373] SIO Mardell also confirmed that the informant hoped that management would help him in return for his information.

[374] When the informant appeared to try to press his efforts to ensure that his transfer was not cancelled, he offered to identify the courier CX bringing fentanyl into the institution. His description of the courier reasonably matched the grievor.

[375] He identified the courier as having well-manicured and painted fingernails. He also cited full arm "sleeve" tattoos and hairstyle as identifying features of the grievor and identified the grievor by her first name.

[376] However, the evidence showed that one other female CX had a similar hairstyle and arm tattoos. Several questions arose that the grievor relied upon to suggest that the exact colour of the tattoos and the exact hair length and colour meant that the grievor might possibly have been mistaken for another CX at the institution. However, other evidence suggested the grievor had distinctive fingernails that were different from this other CX

[377] The evidence also established that the informant was shown only one photo of a CX, which was of the grievor, whom he identified by name as the CX cooperating with inmates.

[378] The grievor also testified at length about how she endured what I would call harassment and bullying from staff at the institution, who vandalized her workplace locker.

[379] The grievor testified that she had former spouses who were co-workers at the institution. It was her belief that some staff took alliances with these former spouses and held hostility towards her because of this.

[380] Curiously, this disturbing testimony of aggression and harassment from co-workers was not pursued by the grievor's representative in either witness examination or closing argument.

[381] She also testified that she sought assistance and support from the Warden at least once due to another type of conflict with a male staff member. The grievor explained that the Warden did not respond to the request for help.

[382] The fact remains that some of the informant's information was proven accurate since it led to the seizure of a large quantity of fentanyl and an encrypted cell phone of the kind used by organized crime.

[383] I note these aspects of the grievor's testimony and observations about the informant not as findings of fact that carry probative value to this decision, but rather to memorialize these matters which were of obvious importance to the grievor.

9. The jurisprudence

[384] Amongst the many cases that the parties presented and that I carefully read, I am most persuaded by three decisions in which the facts are most relevant to the matter before me. They deal with CXs, and I take particular note of the words of Vice-Chairperson Shannon of the Board.

[385] She wrote that she was provided numerous cases in argument. She stated that they were not terribly instructive, given that each one was based upon a very particular set of facts and that the facts of each case drive the determination of the appropriate discipline, subject to principles developed over time. See *Matthews v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 38 at para. 169.

[386] That decision found that the grievor in that case showed remorse and was redeemable. Given the seriousness of his errors, the Board concluded that a demotion to the CX I level and a very lengthy period of approximately two years without pay was just in the circumstances.

[387] In *Kinsey v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 30 at para. 108, she concluded that "discipline tainted by a breach of natural justice is inappropriate, and for this reason, the grievor's termination is overturned …".

[388] And finally, she found that a breach of natural justice in which a grievor was not able to answer an allegation made against him vitiated the financial penalty he sought relief from. See *Stann v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 5 at paras. 71 and 73.

[389] The grievor also drew my attention to this Board's recent decision in *Dekort v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 75:

> *[2] On the morning of February 24, 2017, Mr. Dekort accepted an overtime shift starting at 7:00 a.m. and was assigned to a mobile patrol post….*
>
> *[3] At approximately 8:30 a.m. that morning, three correctional managers found Mr. Dekort in his parked mobile. He was in a reclined position with his head back, his boots off, and his protective vest removed. One of the managers knocked on the window to get his attention. To the correctional managers ("the CMs"), Mr. Dekort appeared disoriented, dazed, and confused. They concluded that he had fallen asleep*
>
> …

[121] Mr. Dekort's decision to remain stationary for 75 minutes was the wrong decision. It was not in accordance with his training or the mobile post order. Combined with the decision to remove his boots and vest, recline his seat, and close his eyes to at least the point of drifting off, it was a career-altering bad decision. He was not alert, not attentive, and not engaged in dynamic security.

...

[149] In arguing that honesty is the cornerstone of the employment relationship, the employer sought to justify imposing a termination in a case in which an employee was found to have lied. Thus, the employee damaged the employment relationship to the point that the employer is justified bringing it to an end.

[150] With this principle, the employer based its arguments on its conclusion that Mr. Dekort lied about sleeping in the mobile patrol for a long period. As noted, I find that there is not consistent evidence demonstrating that in fact, he slept for an extended period. I concluded earlier that there was conflicting testimony from the employer's witnesses and the grievor. ...

*[157] I believe that Mr. Dekort has demonstrated a very high degree of remorse and that he has accepted far more accountability for his actions than the employer gave him credit for**....***

[214] I accept that the grievor made extremely serious mistakes in judgement on the morning of February 24, 2017, which were worthy of serious discipline. I do not accept that he lacks the basic instincts to do the job on the basis of a single, one-time event. Other than the events that morning, no evidence was adduced to demonstrate that he lacks the competence to perform the duties of the job.

*[222] On the morning of February 24, 2017, Correctional Officer William Dekort **deliberately removed his boots and vest, reclined in his seat in the vehicle, and closed his eyes. He at least drifted off for a time.** His attentiveness and good judgement were severely diminished. **He effectively abandoned his armed mobile post** and **therefore failed to carry out his peace officer duties**, and he did not follow the mobile post order.*

...

*[224] However, he clearly did not abandon his post to the extent that the employer concluded he did, and **from the first moment he could, Mr. Dekort acknowledged his wrongdoing and expressed a desire to improve**. I have considered the fact that discipline that had occurred 2 years earlier might have influenced the Warden's decision to terminate the grievor. I have considered that the disciplinary process did not engage Mr. Dekort beyond a 10-minute fact-finding meeting and that no investigation took place, despite Mr. Dekort's 9-plus years of service*

[228] The grievor is to be reinstated to his position effective the date of signing of this decision, without any retroactive pay.

[Emphasis added]

[390] The wrongdoing that is plainly evident in *Dekort*, namely, abandoning one's guard post at a prison by removing one's work gear to enjoy a comfortable nap is obvious.

[391] I view the actions of *Dekort* as being clearly more morally blameworthy and evident of a guilty mind than was in the evidence in the matter before me, in which the grievor's alleged moral blameworthiness was asserted through the employer's supposition.

[392] I note that the employer's counsel presented me with the Board's decision in *Lapostolle v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 138, in which the grievor, who was a CX II, had close ties to associates of organized crime.

[393] *Lapostolle* did not deny it at his adjudication hearing but rather said that he should not be punished for his private life and business with Mafia associates. In its reasons for upholding the termination, the Board noted that the grievor publicly associated with individuals involved in organized crime and thus had tarnished the employer's image (at paragraph 93).

[394] In *Lapostolle*, the Board also noted the *a posteriori* evidence of the grievor's public activities with persons linked to the Mafia.

[395] I find it troubling that the employer presented me with *Lapostolle*, given that that I had no evidence whatsoever placed in front of me at the hearing about any contact or involvement by the grievor with anyone associated in any way with the Mafia or organized crime.

[396] The BOI relied upon the informant, who made allegations of personal relationships of that nature, but the employer specifically distanced itself from this issue. However, it continually tried to bring the alleged relationships back before me.

[397] The employer cannot have it both ways.

[398] The only way I can understand the employer's efforts to link the grievor to the Mafia and illicit drugs is that it wished to attack her character in order to infer a link to the informant's allegations.

[399] Similarly, the employer relied upon a dated decision by one of the Board's predecessors, which found that a CX II who escorted an inmate to an appointment in the community was gullible and no longer trustworthy because the CX II allowed the inmate out of the escort to meet someone and return with a package of cigarettes.

[400] The CX II agreed to take the cigarettes back to the institution without checking it. I note again that no evidence was put before me at the hearing that the grievor brought anything into the institution. Still, the BOI found that she did (see *Courchesne v. Treasury Board (Solicitor General)*, PSSRB File No. 166-02-12299 (19820719), [1982] C.P.S.S.R.B. No. 119 (QL).

[401] Perhaps in a prescient effort to answer my concern over the grievor being denied natural justice by not being presented with the case against her and thus not being able to answer the charges, the employer drew my attention to the Federal Court of Appeal's decision in *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (QL).

[402] *Tipple* states that an unfair disciplinary process is cured by a hearing *de novo* in front of the Board, at which full notice of the allegations is provided, and the grievor has full opportunity to respond to them.

[403] I distinguish *Tipple* in my finding that the grievor was denied an opportunity to be presented with the full case against her and to answer it both in the disciplinary process and in the adjudication hearing before me.

[404] And finally, the employer relied upon *Tobin v. Treasury Board (Correctional Service of Canada)*, 2011 PSLRB 76 at para. 163, for the wise finding that I have followed many times in my decision writing. It states that a grievor with a long-standing record of good performance does not necessarily get a pass on bad behaviour but rather should have known better than to conduct himself or herself badly.

[405] In *Tobin*, the grievor was convicted of criminal charges related to harassing and intimidating a former female employee. He was a specialist who provided services to inmates with psychological problems and to those convicted of sexual offences. I completely support the Board's finding in *Tobin* but distinguish that case on its facts as nothing similar to them was presented before me in evidence to impugn the grievor.

C. Disciplinary measures that should be substituted as just and equitable

[406] I have analyzed the two allegations relied upon by the employer in the letter of termination. I have concluded that the employer failed in its burden of proof regarding the allegation of inappropriate relationships.

[407] I have concluded that discipline was warranted as related to the second allegation where the grievor failed to ensure that the compact disc cases that she distributed to inmates did not contain contraband. As per CD 566-9, it was expected that she would have seized these articles of inmate property and completed the appropriate seizure documentation. This was very important during a s. 53 search.

[408] Given my finding that there was just and reasonable cause for some form of discipline, I then considered whether the decision to dismiss the grievor was an excessive response in all the circumstances. I conclude it was excessive.

[409] The grievor had a long and distinguished career with several commendations for her good work. The employer was presented with damning allegations of her being compromised by organized crime and steps were taken to ascertain the reliability of the informant. Upon doing so, the employer became predisposed with the notion that the grievor was a drug courier who was involved in personal relationships with criminals both inside and outside Kent.

[410] However, evidence of these serious allegations was not brought before me. What was plainly evident was the grievor making poor decisions at work that she herself admitted to when given the opportunity.

[411] The poor decisions that were shown in the video clips as evidence at the hearing, when taken on their own, in isolation from the allegations of the informant are simply not deserving of a 16-year employee with an excellent record of service being dismissed from her job.

[412] Evidence showed that during the same s.53 search another CX made an erroneous decision which caused a unit of Kent to have the s.53 search re-done and this attracted no discipline.

[413] The Board decision in *Dekort* shows a CX whose moral culpability in abandoning his post to enjoy a comfortable nap was found by this Board not to justify dismissal from his job.

[414] As I document in this decision, the employer sought throughout and even after this hearing concluded to link the grievor to the possession and use of illicit drugs. No evidence was tendered in support of these allegations.

[415] In fact, it is clear to me that the employer's decision to terminate the grievor was not in fact based on the wrongdoing depicted in the security video explained earlier in this decision, but was really based upon the allegations of the informer and an attempt to link the grievor, even years after the events at issue, to illicit drugs.

[416] The employer reached this conclusion without ever providing the grievor a chance to be presented with and reply to these allegations, which constitutes a denial of natural justice to her and weighs heavily in my conclusion that the dismissal of the grievor was excessive.

[417] Having found the dismissal of the grievor from her job was excessive, the third stage of the *Wm. Scott* analysis requires me to substitute what discipline would be just and equitable for the grievor under all the circumstances.

[418] At the hearing, the employer's counsel stated that the employer was strongly opposed to the grievor being reinstated should the grievance be upheld. Vigorous arguments were made that serious and deliberate misconduct occurred that caused irrevocable loss of trust in her and led to the view that there was no hope to rehabilitate her.

[419] The employer went so far as to call CX-02 White to testify that he could not work with the grievor again as she was compromised by criminals. He said that would have no trust in her.

[420] However, in a written submission dated April 20, 2020, counsel for the employer informed the Board as follows:

> *I have been instructed by my client to retract the employer's position on damages in lieu of reinstatement. If the grievance is allowed, the employer is in agreement with the bargaining agent*

> *that the appropriate remedy would be reinstatement with payments subject to mitigation.*

[421] Were it not for the employer's written submission stating its agreement with the grievor's submission should her grievance succeed, I would have followed *Matthews* and ordered the grievor reinstated as a CX-01, effective the date of her termination as the grievor's actions in the matter before me were clearly shown in evidence to be inconsistent with proper conduct of a senior and experienced CX-02.

[422] However, given the employer's April 20, 2020, communication, I will accept the parties' joint submission. I will allow the grievance. I will order the termination of the grievor's employment rescinded and expunged from her record.

[423] I closely analyzed the evidence presented at the hearing. Although I determined that it did not justify terminating the grievor's employment, I conclude that it did merit discipline and that the equivalent of a one-month suspension without pay will be substituted as equitable in all the circumstances.

[424] Passing items between inmates during the s. 53 search was a serious error of judgement on the grievor's part. It posed serious risks to the inmates and staff at the institution. A strong denunciation of such errors is needed to serve as a deterrent to other CXs and to ensure that the grievor understands the gravity of her errors.

[425] An amount equal to what the grievor has earned in pay from employment since her termination shall be deducted from what the employer owes her.

[426] In her closing submissions, the grievor requested monetary awards for damages for psychological injuries and for punitive moral damages, plus interest.

[427] I shall convene a video-conference hearing with the parties within 60 days of this decision being rendered to allow the parties to make oral submissions on the grievor's request for my awarding her punitive moral damages and damages for psychological harm and any other losses she may argue have been suffered as a result of the actions of the employer leading up to and during the conduct of the hearing and follow-up written submissions appurtenant thereto.

IV. The employer's request to supplement its reasons for termination and its motion

A. The employer's request

[428] On the last hearing day, the employer requested the opportunity to supplement its reasons for terminating the grievor's employment.

[429] That was three years after the the grievor's suspension from work.

B. The employer's motion

[430] Weeks after the hearing concluded, the employer made the following motion for a third-party production order against the Chilliwack General Hospital of Chilliwack, B.C., to produce medical records allegedly involving emergency medical treatment for the grievor in summer 2019:

> *September 12, 2019*
> ***RE: FPSLREB: File No. 566-02-13909 (Louise Lyons)***
>
> *Further to the Board's August 15, 2019 direction, the employer is submitting in writing its request for a third-party production order of the grievor's medical records from the Chilliwack General Hospital.*
>
> *As communicated to the Board and the bargaining agent representative in camera on August 7, 2019, it was brought to the employer's attention that the grievor had been recently admitted to the Chilliwack General Hospital to be treated for an overdose following a 911 emergency call. This information was reported by a correctional officer to CSC management.*
>
> *Neither during the in camera session nor in their August 19, 2019 written submissions did the bargaining agent deny this allegation. The information regarding the alleged overdose is not within the employer's power, possession or control and, as a result, is not accessible to the employer. The employer does not have the authority to compel production of the medical records in order to substantiate these allegations*
>
> *Accordingly, the employer requests an order for production pursuant to paragraph 20(f) of the Federal Public Sector Labour Relations and Employment Board Act.1 It is only through the adjudicator's power to order production that the employer will have access to these documents.*
>
> *Specifically, the employer is seeking an order directing the Health Records Department at Chilliwack General Hospital (45600 Menholm Road, Chilliwack, B.C.V2P 1P7) to produce any and all patient records for Louise Lyons or Louise Humphrey from June 1 to August 1, 2019, including patient charts, records of admission*

and discharge, blood work tests and results, toxicology tests and results, physician notes, ambulance and paramedic records, and any record of communication with poison control.

We ask that this information is produced to counsel for the employer, Nour Rashid, within 10-days [sic] of the Order of the Adjudicator. The test for disclosure, when disclosure is contested, is well summarized in the West Park Hospital case (1998), 75 L.A.C. (4th) 289 (Springate):

i. *The information requested must be arguably relevant.*

ii. *The requested information must be particularized so there is no dispute as to what is desired.*

iii. *The board of arbitration should be satisfied that the information is not being requested as a "fishing expedition".*

iv. *There must be a clear nexus between the information being requested and the positions in dispute at the hearing.*

v. *The board should be satisfied that disclosure will not cause undue hardship.*

The information requested bears direct relevance to the main issue in dispute, namely, whether termination was the appropriate quantum of discipline in the circumstances. The remedy being sought by the grievor is reinstatement to her position as a correctional officer. According to the employer, if an officer is discovered to have been consuming illicit drugs, the employer can no longer trust in [sic] this officer to fulfil the duties of a correctional officer. In such circumstances, termination is the appropriate penalty.

The information sought is particularized in that there can be no dispute what is being sought. This is not a case where the employer is engaged in a "fishing expedition"; the information sought is directly related to the issue of the appropriate penalty.

The information being requested has a clear nexus to the position advanced by the employer at the hearing, namely, that the bond of trust between the employer and the grievor has been irrevocably broken and the grievor should not be reinstated in her position as a correctional officer.

It is also respectfully submitted that the disclosure will not cause any undue hardship. If there are concerns over the publication of the information listed above, the adjudicator can issue a sealing order and can proceed in camera when this information is being discussed at the hearing, as was done when the information was first brought to the Board's attention on August 7, 2019.

All of which is respectfully submitted.

C. The grievor's reply submission

[431] The grievor submitted the following:

> *This second request is absolutely without a shadow a "fishing expedition". The employer said that the information about the alleged drug overdose is not in its power. However, it was in its power to call witnesses and submit documentary evidence, like observations reports if one was even submitted, in relation to its request.*
>
> *The employer was given that chance on August 7, 2019 and did decline to do so. The employer could have called those unnamed individuals (a correctional officer to a correctional manager as per Ms. Nour's statement on August 7, 2019) caught into the gossip mill to ascertain if there was a hair of reliable, cogent, compelling and clear evidence of a 911 call and drug overdose.*
>
> *As such, this request is a fishing expedition. The employer prefers breaching the grievor's right to the privacy of her medical evidence instead of having produced those witnesses who most likely would have testified that it was no more than hearsay. The choice of the employer is to humiliate the grievor.*
>
> *Making such request on August 7, 2019 was wrong then. Repeating it, once the evidence and arguments on the case have been made, is even worse.*
>
> *We request from the employer's counsel on Wednesday, September 18, 2019 to disclose the identity of the correctional officer and correctional manager from whom the employer learned of the rumor. Our first request remained unanswered.*
>
> *We repeated our request today and were informed that counsel is waiting for instructions. It is clearly made it worse for the grievor who has to battle and defend her reputation against anonymous individuals whose CSC choose to protect over her. It shows that the CSC had no decency to protect the grievor and minimize the harm to her.*
>
> *In terms of harm, the grievor said that she had to consult her family physician who has ordered her to take some time off from work. The grievor does not have paid sick leave. The employer has made her financial situation worse. Her health has deteriorated too, to the point that her family physician prescribed her anti-depressant medication.*
>
> *The grievor is so demolished by the employer's request and suggestion that she is a drug user and had overdosed, that she hides in her house because she lives in "guards' central" city. The grievor is at loss on how to re-establish her reputation and her name given that the rumors have spread in correctional institutions.*
>
> *The employer's conduct is simply disgusting and sickening. CSC can't hide and pretend to not know the impacts of such*

> *unsubstantiated and false allegations on the grievor's health and reputation. The grievor is devasted by this second request to request production of her medical record based on some vague and anonymous allegations.*
>
> *Furthermore, through its counsel, the employer attacks the grievor and her representative's reputation by stating that the allegations were not denied when raised in chambers on August 7, 2019 or our submissions on August 19, 2019.*
>
> *The allegations were not denied in chambers for the simple reason that we did not know about these crazy allegations. And, reading our submissions, any reasonable person would conclude that the grievor denies the allegations of a drug overdose. The employer's inference on this point is quite frankly ridiculous.*
>
> [*Sic* throughout]

[432] I note that the bargaining agent replied again and provided a letter dated September 29, 2019 from the grievor's physician. This letter stated that the grievor did not visit the Chilliwack General Hospital between June 1, 2019 and August 1, 2019.

[433] As a result, on October 31, 2019, the employer withdrew its production request.

[434] Having carefully reviewed all these submissions arising after the hearing, it is necessary for me to clarify two important points, which were raised in the employer's submission:

[435] Firstly, it was disingenuous for the employer to initially suggest that the grievor had two opportunities and failed both times to deny the allegation of being treated at the hospital for an overdose.

[436] The employer's counsel stated that the employer had become aware of what I understood to be, at best gossip, and at worst information possibly obtained illegally as medical information and records and their confidentiality are protected by privacy legislation.

[437] I informed employer's counsel at the hearing that she appeared to be attempting to give evidence herself in support of her motion.

[438] I suggested to counsel that she immediately have the Warden testify about this shocking allegation.

[439] It was shocking both in how it was presented before me, with no evidence, and in how it arose three years after the events that led to terminating the grievor's employment, which I challenged counsel to establish as relevant and admissible.

[440] I recessed the hearing and offered counsel an opportunity to seek the attendance of the Warden to testify.

[441] After the recess we re-convened the hearing after having been told that neither the Warden nor any other official from Kent with information regarding the shocking allegation would attend our hearing.

[442] With no evidence to present in support of the employer's motion, I allowed counsel to withdraw it rather than me ruling it out of order.

[443] The second important matter that arose from the written submission and motion is that the employer must have a poor memory of its presentation at the hearing as counsel requested that we meet in chambers so that she could act on written instructions from her office to make the motion to amend the reasons for dismissing the grievor as it had been heard that the grievor had recently overdosed on drugs.

[444] No motion was made requesting that I either compel the grievor to produce records or direct a third-party health care provider to produce them. The third-party motion arose when I asked the employer to provide me with its motion to amend the terms of the grievor's dismissal as she presented at the hearing.

[445] I informed counsel in chambers that I was not aware of how that could be done three years after the fact. But given that the motion was not supported by any evidence, I did not need to rule on it in chambers.

[446] When the grievor's representative addressed this matter in her closing argument, she submitted that the employer's attempt to put an allegation based upon gossip before me in the manner it had been done was extremely prejudicial to the grievor's case. She added that this matter had caused the grievor terrible stress and anxiety.

[447] In light of the importance of the employer alleging very serious matters that seemed to directly engage the grievor's right to the privacy of her health and medical

history, as well as her vigorous response in which she expressed her wish to increase the requested amount of damages, I will invite oral arguments on these matters after this decision is rendered.

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

(The Order appears on the next page)

V. Order

[449] The grievance is allowed.

[450] The grievor is reinstated as a CX-02 with full salary and benefits, effective the date of termination, with no loss of seniority, less one-month salary and less her actual income earned since her termination.

[451] Lost overtime opportunities are to be paid and calculated by taking an average of overtime hours worked by the grievor in the three years preceding her termination.

[452] The employer must add simple interest to the amounts owed, calculated at the annual rate based on the Bank of Canada's official rate (monthly data).

[453] All employer documents or references relating to the grievor's suspension and termination of employment shall be destroyed.

[454] The parties are directed to seek agreement on the amount of monies owed to the grievor arising from and consistent with this order and this sum shall be paid to the grievor within 60 days from the date of this decision.

[455] I shall remain seized of this matter until all aspects of the remedy arising from this order are resolved.

[456] A hearing will be scheduled within 60 days of the date of this decision for oral arguments with respect to the request for awards for damages for psychological harm and for punitive moral damages.

December 31, 2020.

Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board