Date: 20210129

File: 561-02-720

Citation: 2021 FPSLREB 10

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

GAELEN JOE

Complainant

and

TREASURY BOARD (Correctional Service of Canada), BOBBI SANDHU, AND PATRICIA DEMERS

Respondents

Indexed as
Joe v. Treasury Board (Correctional Service of Canada)

In the matter of a complaint made under section 190 of the *Federal Public Sector Labour Relations Act*

Before: Chantal Homier-Nehmé, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Corinne Blanchette and Peter Kerr, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Respondents: Marc Séguin, counsel

Heard at Abbotsford, British Columbia, May 2 and 3, 2017.
(Written submissions filed January 30, February 20 and February 27, 2015)

REASONS FOR DECISION

I. Introduction

[1] On November 4, 2014, Gaelen Joe ("the complainant") made a complaint under s. 190(1)(g) of the *Public Service Labour Relations Act*, as it was then named, against Bobbi Sandhu, Acting Warden, Matsqui Institution ("the institution") of the Correctional Service of Canada, and Patricia Demers, Labour Relations Advisor, National Headquarters (NHQ) of the Correctional Service of Canada, ("the respondents"). At the time of the events in question, the complainant was the local union president at the institution.

[2] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the Public Service Labour Relations and Employment Board and the titles of the *Public Service Labour Relations and Employment Board Act* and the *Public Service Labour Relations Act* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

[3] The complainant outlined the particulars of his complaint as follows:

> *On October 28 and 29, 2014, Warden Bobbi Sandhu, under the direction of officials of CSC NHQ labour relations, including Ms. Patricia Demers, substituted a letter of reprimand to her initial one day suspension to refrain the complainant from exercising his rights to be heard by an adjudicator and testifying in the proceeding scheduled before adjudicator Shannon from November 4 to 7, 2014 in Abbotsford, BC. On October 29, 2014, the Employer raised an objection with the PSLRB to have this case closed for lack of jurisdiction given that written reprimands are not adjudicable under Section 209 (1) (b) of the PSLRA.*
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> *Also, the grounds of discipline relied on by the employer constitute another unfair labour practice as the complainant was acting within the scope of his union duties and responsibilities.*

[4] The complainant advanced two grounds in support of his complaint: the imposition of a one-day suspension for raising concerns about questionable scheduling practices and the deployment of correctional officers; and the substitution of that suspension with a letter of reprimand a few days before the hearing of the grievance

he had filed concerning the suspension. He contended that the respondents committed an unfair labour practice within the meaning of s. 185 of the *Act*, which states that an "… ***unfair labour practice*** means anything that is prohibited by subsection 186(1) or (2), section 187 or 188 or subsection 189(1)" [emphasis in the original].

[5] With respect to the imposition of the disciplinary measure, the complainant maintained that he acted at all times within the scope of his union duties and responsibilities. The provisions of the *Act* that the respondents allegedly breached when imposing the discipline are ss. 186(1)(a) and 186(2)(a)(iv). The wording of those provisions was modified in 2017 to include officers of the Royal Canadian Mounted Police, but the substance of the unfair labour practices found in those sections remains the same as at the time of the complaint. They read as follows:

> …
>
> ***186 (1)*** *No employer, and, whether or not they are acting on the employer's behalf, nor a person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*
>
> > ***(a)*** *participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization ….*
>
> …
>
> ***(2)*** *No employer, no person acting on the employer's behalf, and, whether or not they are acting on the employer's behalf, no person who occupies a managerial or confidential position and no person who is an* officer *as defined in subsection 2(1) of the* Royal Canadian Mounted Police Act *or who occupies a position held by such an officer, shall*
>
> > ***(a)*** *refuse to employ or continue to employ, or suspend, lay off, discharge for the promotion of economy and efficiency in the Royal Canadian Mounted Police or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person because the person*
> >
> > …
> >
> > > ***(iv)*** *has exercised any right under this Part or Part 2 or 2.1 ….*
> >
> > …

[6] The complainant alleged that in the substitution of the one-day suspension without pay with the written reprimand, the respondents breached s. 186(2)(c)(i) of the *Act*, which reads in part as follows:

> ***186(2)(c)*** *seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from*
>
> > ***(i)*** *testifying or otherwise participating in a proceeding under this Part or Part 2 or 2.1 ….*

[7] At the outset of the hearing, I informed the parties that I would not consider the complainant's allegation that the respondents committed an unfair labour practice in the imposition of the one-day suspension. A grievance challenging the suspension was dismissed in *Joe v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 95. In *Joe*, the adjudicator determined that had the employer not already reduced the penalty to a written reprimand, she would have upheld the one-day suspension that was originally imposed as it was neither unreasonable nor wrong, given her conclusion that he had in fact harassed an employee when he exercised his activities as a local president, and given that this conduct was not a protected union activity under the *Act*.

[8] At the conclusion of the evidence at the hearing, the complainant withdrew his allegation that the suspension constituted an unfair labour practice. The complainant agreed that the only live issue was whether the substitution of the one-day suspension with a written reprimand amounted to an unfair labour practice.

II. Summary of the evidence

[9] The complainant filed his grievance related to the one-day suspension on July 16, 2013. The first level of the grievance process was waived, and the grievance was denied by Ms. Sandhu at the second level on August 2, 2013. The grievance was transmitted to the third and final level on August 20, 2013. The Correctional Service of Canada rendered no decision at the final level, and the grievance pertaining to the one-day suspension was referred to adjudication on November 8, 2013. The grievance against the one-day suspension was heard by an adjudicator on November 5 to 7, 2014 and May 12 to 15 and November 3 to 5, 2015, in Abbotsford, British Columbia.

[10] Ms. Sandhu testified to the significant history between labour relations, management, and the individuals involved in the harassment complaints made against the complainant in 2010. In 2012, as the institution's warden, she was mandated to work with the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN) ("the union") effectively and to repair that relationship. She stated that she and the complainant had put equal effort into trying to fix the damaged relationship. There were multiple harassment investigations going on outside of that involving the complainant. She managed those and others, and she was able to repair the relationship in a positive way with the union and move forward with it. This was a sore spot for the complainant and for the harassed individuals. All parties were damaged as a result of the investigation. While she dealt with all these matters in parallel with the disciplinary measure, she also dealt with the individuals who were found to have been harassed and tried to relocate them and find them different workplaces.

[11] Ms. Demers testified that she recalled working with Treasury Board counsel around October 24, 2014 to prepare for adjudication. She recalled that Ms. Sandhu shared her concerns that the witnesses had to relive the harassment. She also had financial considerations. Ms. Demers was asked to approach Corinne Blanchette to resolve the matter without going to adjudication and to find out if the complainant would agree to accept a letter of reprimand; Ms. Blanchette doubted that he would.

[12] Ms. Demers testified that she discussed this matter with Ms. Sandhu. During their conference call, Ms. Sandhu stated that she believed that the complainant had learned from the incident and that she wished to substitute a letter of reprimand for the disciplinary measure. Her position was that she wanted to go through with this for the reasons mentioned earlier in this decision and that it was entirely her decision.

[13] On October 28, 2014, as recommended by Ms. Demers, Ms. Sandhu decided to replace the one-day suspension without pay with a written reprimand. According to her testimony, she was still of the opinion that the suspension had been warranted, but it was her decision, and hers alone to make the substitution.

[14] In reducing the discipline, Ms. Sandhu consulted the regional labour relations section and asked for advice. This was not a haphazard decision. Her intentions were purely for the wellness of the institution. She recognized that she did not have the

authority to do it, but she did not know that it was above her authority at the time she made the actual decision.

[15] The complainant recalled that he was summoned to Ms. Sandhu's office. He was greeted by her secretary. He did not know the purpose of the meeting. She gave him the letter and asked him to sign it. The meeting lasted two minutes. He read the letter and signed it. She was direct and she told him that she was told by NHQ not to talk about it. He found that odd because his relationship with her up to that point had always been "chatty". He felt that she was "hamstrung and sheepish". He had never seen her so direct and without comment. He inferred from the letter that adjudication was off the table. He then delivered the letter to Ms. Blanchette and returned to work.

[16] Ms. Sandhu recalled meeting with the complainant and another member of the union executive. They had good, healthy discussions. She acknowledged that the relationship between the union and management was positive and that it had been so for the last 16 or 17 months. There was no recurrence of bad behaviour or negative performance in the complainant's role as union president. In fact, it had changed leaps and bounds from where the relationship was when she started. The behaviour had corrected itself, and she always had healthy and respectful discussions with the complainant. She did not recall telling him that she was under strict orders not to discuss the letter. There were no privacy issues. At that time, the complainant and the union had a perception that it was not her decision, but she was unsure of the origins of that perception. As acting warden of the institution, she consulted with the labour relations section, but ultimately, it was her decision. She analyzed the advice she was given and made her decision for the betterment of the institution.

[17] In cross-examination, Ms. Sandhu recognized that she was aware of the grievance process in the collective agreement and that its second level is heard by the warden, while the third level is heard by the delegated NHQ authority who, in this case, was the assistant commissioner of human resources management. She agreed that in June 2013, at the second level grievance hearing, she carefully and thoroughly reviewed the complainant's grievance but maintained her decision to impose a one-day suspension. When the disciplinary action was substituted with a written reprimand, she was aware that the matter was scheduled for adjudication. She also knew that a written reprimand was not adjudicable.

[18] On October 29, 2014, the Correctional Service of Canada objected to the adjudicator's jurisdiction to hear the suspension grievance. It argued that since the initial suspension imposed against the complainant was replaced with a letter of reprimand, there was no live issue. The adjudicator had no jurisdiction since letters of reprimand cannot be referred to adjudication. The *Act* imposes limitations on which grievances are adjudicable. Pursuant to s. 209(1)(b), only a grievance that relates to a disciplinary action resulting in termination, demotion, suspension, or financial penalty may be referred to adjudication. A written reprimand, although disciplinary, does not meet the limitations listed in s. 209(1)(b).

[19] In cross-examination, Ms. Sandhu testified that she did not recall if the objection to jurisdiction was raised before she gave the letter of reprimand to the complainant. She did not know why she did not indicate that the complainant could have other recourse available to him. She felt that a written reprimand would put the matter to rest. She did not want to damage the progress that had been made with the complainant in his role as the local union president. They were still in a healing environment. She did not want to rehash matters and the significant impact on the individuals involved. She was concerned only about the wellness of the institution.

[20] On October 29, 2014, the complainant was again summoned to Ms. Sandhu's office. She made sure to tell him that it was solely her decision. It was his impression that she was trying to oversell that the letter of reprimand was her decision and not that of NHQ. Since June 2013, he had had an excellent working relationship with Ms. Sandhu. There was never any indication of any possibility that the one-day suspension would be changed. This came completely out of the blue. Ms. Sandhu informed him that the substitution was made after further consideration. He found it odd that four hours before, there had been complete silence, and there were no comments to explain the substitution. Ms. Sandhu informed him that it was because he had been good.

[21] The complainant prepared for his hearing for two months. He lost sleep and it was a stressful time for him. He was relieved that finally, his grievance would be heard in an unbiased forum. In cross-examination, he stated that he was not happy to receive the written reprimand instead of the one-day suspension. He was one week away from having his grievance heard at adjudication. He stated that they attempted mediation. He was not aware of efforts to settle the matter before that.

[22] The complainant stated that it was important for him to have his grievance heard at adjudication, because he wanted an opportunity to clear the record that he had never harassed other correctional officers; he acted within his duties as the local union president. He wanted to set the record straight and ensure future local union presidents would not be afraid to pursue workplace matters.

[23] On October 30, 2014, the parties to the grievance were informed that the issue of jurisdiction would be discussed as a preliminary matter at the hearing scheduled for November 5, 2014.

[24] On October 31, 2014, the parties to the grievance attempted to mediate the matter before the Public Service Labour Relations Board (PSLRB), as it was then named, but it was unsuccessful, and the grievance was heard.

[25] The adjudication of the grievance required a 10-day hearing and involved testimony from eight witnesses for the employer and five for the complainant, including him. From 2010 to 2012, the institution had three wardens who either: convened investigations, received investigation reports, or imposed discipline. That was a very tumultuous time between management and the union. A series of wardens tried to resolve the very turbulent labour-relations environment.

[26] The adjudicator rejected the employer's objection to jurisdiction and found that there was still a live issue to be determined. The issue before her was whether the one-day suspension was warranted, and if so, whether the penalty imposed was reasonable in the circumstances.

[27] The grievor argued that the principle established in *Parkolub v. Canada Revenue Agency*, 2007 PSLRB 64, should be followed. That is, that an adjudicator has jurisdiction if, when the grievance was referred to it, the grievor had the right to adjudication.

[28] The adjudicator agreed with the grievor. She determined that he did not grieve the letter of reprimand that was substituted by Ms. Sandhu. The grievance pertaining to the one-day suspension was referred to adjudication. She agreed with the grievor that public policy demands that in the interest of effective labour relations, the employer's decisions be subjected to scrutiny. The employer should not be allowed to evade this scrutiny by changing the original discipline to a letter of reprimand on the

courthouse steps. Parliament and the Federal Court did not envision using the prohibition against referring a letter of reprimand to adjudication to be used by employers to oust an adjudicator's jurisdiction on the eve of a hearing by substituting a letter of reprimand.

[29] Moreover, she questioned Ms. Sandhu's authority to substitute for the disciplinary measure the written reprimand once the grievance was referred to the third level and, subsequently, adjudication.

[30] Ultimately, the adjudicator determined that disciplinary action was warranted. The grievor's conduct toward the correctional service officer was objectionable, which the grievor ought to have known. In determining that he was guilty of harassment and that his conduct warranted discipline, the adjudicator considered his arguments pertaining to protected union activity. She determined that his conduct amounted to harassment and was not protected union activity.

[31] The complainant withdrew his allegation that the suspension constituted an unfair labour practice and agreed that the only issue before me was whether the substitution of the disciplinary measure, days before the complainant's grievance hearing, amounted to an unfair labour practice prohibited by the *Act*.

III. Summary of the arguments

[32] The complainant alleged that the substitution of the disciplinary measure was an attempt by the respondents to deprive him from having his grievance heard by an adjudicator and that it violated s. 186(2)(c)(i) of the *Act*.

[33] The complainant argued that this section of the *Act* should be interpreted liberally. To amount to an unfair labour practice, it does not require that the respondents be successful in preventing the grievor from having his grievance heard; nor does it require any ulterior motives. The provision is automatically triggered by the respondents' attempt to prevent the complainant from exercising his rights under the *Act*. The substitution of the disciplinary measure with a written reprimand was an attempt by the respondents to prevent the complainant from testifying or otherwise participating in a proceeding under Part I or Part 2 of the *Act.*

[34] The respondents argued that the complainant bore the burden of demonstrating a "*prima facie*" case that the respondents breached s. 186(2)(c)(i) of the *Act* for the

Board to have jurisdiction. In other words, I must asses whether, taking the facts alleged by the complainant as true, there is an arguable case that the respondents have contravened the prohibitions contained in s. 186(2)(c)(i) of the *Act*. Only when the complainant has demonstrated an arguable case does it engage the reverse burden of proof in s. 191(3) of the *Act*. Namely, s. 191(3) provides that the complaint itself is evidence that a failure to comply with s. 186(2) occurred and, if the respondents allege that that failure did not occur, the burden of proving that is on them.

[35] The respondents maintained that the complainant did not establish that the circumstances described in the complaint met any of the circumstances described in s. 186(2)(c)(i) of the *Act*. There is no allegation of intimidation, threat of dismissal, or any other kind of threat by the imposition of a financial or other penalty, or by any other means, or any indication of how he was prevented from testifying or otherwise participating in a proceeding under Part 1 or Part 2 of the *Act*. The respondents relied on the principles upheld in *Laplante v. Treasury Board (Industry Canada and the Communications Research Centre)*, 2007 PSLRB 95; and *Quadrini v. Canada Revenue Agency*, 2008 PSLRB 37; *Comiskey v. Jensen*, 2012 PSLRB 22

[36] The complainant responded that at the time of these events, he was the elected local president of the union at the institution. As the acting warden, Ms. Sandhu imposed the disciplinary measure on the complainant, and as the corporate labour relations advisor, Ms. Demers counselled Ms. Sandhu to substitute for the suspension a written reprimand just days before the scheduled hearing. Ms. Sandhu informed the complainant that she was under strict instructions from the labour relations section at NHQ not to discuss the change.

[37] Moreover, Ms. Sandhu testified that she felt that the one-day suspension was justified, but nevertheless, she proceeded with the substitution, knowing that the letter of reprimand was not adjudicable. Ms. Sandhu did not have the authority to substitute the disciplinary measure. There is a credibility issue with respect to her intent. Ms. Sandhu purported to act in good faith. The fact that she did not have the authority to substitute the discipline renders her motive questionable.

[38] According to the complainant, it is highly unlikely that the respondents would admit to a breach of the *Act*. There is enough circumstantial evidence to infer that there was such a breach. The main reasoning given by Ms. Sandhu was to put the

matter to rest, to prevent harm to the individuals impacted by the complainant's union activities, to save costs, to preserve the relationship with the complainant, and to shed light on the matter. The respondents ultimately did what they could not do at mediation. Ms. Demers was actively involved in the decision to substitute a written reprimand to the suspension without pay. Again, Ms. Sandhu told the complainant that she was under strict instructions from NHQ labour relations not to discuss the change of disciplinary measure. This fact was not contradicted by the respondents. With respect to depriving the complainant from having his grievance heard at adjudication, there is some analogy to borrow from cases of rejection on probation. The unilateral characterization of the respondents is not binding on the Board. The Board must appreciate all of the facts surrounding the circumstances of the case to appreciate whether or not the respondents' action is truly what it is or whether or not it is a sham or a camouflage. The Board's jurisprudence is helpful in this regard see: *Jacmain v. Attorney General,* 1977 CanLII 200 (SCC), [1978] 2 S.C.R. 15; *Canada (AG) v. Penner*, (1989) 3 F.C. 429 (F.C.A) at 440 (QL). This is sufficient to engage the reverse onus of proof noted in s. 191(3) of the *Act*. The complainant referred to the following jurisprudence in support of his position: *Lavoie v. Syndicat des Métallos, Local 7065*, 2012 CIRB 636 at para. 127.

IV. Reasons

A. Did the respondents breach s. 186(2)(c)(i) of the *Act* when it substituted for the disciplinary measure the written reprimand?

[39] In order to determine if the respondents breached s. 186(2)(c)(i) of the *Act* when it substituted for the disciplinary measure the written reprimand, the complainant must first establish an arguable case. As recognized in *Quadrini*, at para. 21, and *Laplante*, at para. 88, the question of whether the complaint on its face shows a reasonable link to the prohibitions listed in s. 186(2)(c)(i) of the *Act* is essential and goes directly to jurisdiction. Without it, the complaint cannot proceed.

[40] Typically, the assessment of an arguable case is done based on the allegations contained in the complaint and the written submissions on that issue. In *Laplante*, the PSLRB determined that a complainant must meet this precondition for the provision on the reversal of the burden of proof to apply; that is before the employer can be required to prove that it did not contravene the prohibitions. The complainant must show that one of the circumstances described in s. 186(2) of the *Act* has been met. The

complainant must also describe how they were either: intimidated, threatened, penalised or disciplined. Without that, the complaint is inadmissible, and the reversal of the burden of proof in s. 191(3) of the *Act* cannot be applied.

[41] I concur with the reasoning followed in *Quadrini* and *Laplante*. An allegation of a breach of s. 186(2) must be reasonably arguable on its face in order for the Board to have jurisdiction and for s. 191(3) to apply. In *Quadrini*, at para. 32, the PSLRB described the threshold as follows: "taking all of the facts alleged in the complaint as true, is there an arguable case that the respondents have contravened subparagraphs 186(2)(a)(iii) or (iv) of the new *Act*?"

[42] For the reasons that follow, I find that the allegations in the complaint that was filed on November 4, 2014, and the subsequent written submissions from the parties, demonstrate an arguable case of a contravention of s. 186(2)(c)(i) of the *Act*. To establish an arguable case, a complainant must demonstrate that there is substance to the complaint upon which a contravention of the *Act* can be found. It is not enough for a complainant to throw out accusations and rely on the inability of the respondents to disprove them. The Board's jurisprudence is consistent in this respect. The Board must decide whether the complainant has established the required elements of s. 186 of the Act before the burden of proof can be shifted to the respondents.

[43] In this case, the complainant established that his complaint is arguable under s. 186(2)(c)(i). The respondent substituted for the one-day suspension the written reprimand. As a result, the respondent objected to the Board's jurisdiction to hear the grievance against the suspension. The respondent sought to obtain by force what it could not at mediation. The complainant alleges this was an attempt by the respondents to prevent the complainant from having his grievance heard at adjudication.

[44] The provision reads as follows:

> …
>
> ***186(2)(c)*** *seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from*

> ***(i)*** *testifying or otherwise participating in a proceeding under this Part or Part 2 or 2.1 ….*
>
> *[emphasis added]*

[45] In substituting the one day suspension for the written reprimand and objecting to the Board's jurisdiction to hear the grievance, the respondent sought "by any other means" (…) " to refrain the complainant from testifying or otherwise participate in a proceeding under that Part or Part 2 or 2.1 of the Act".

[46] As determined in *Manella v. Treasury Board of Canada and Public Service Alliance of Canada*, 2010 PSLRB 128, an arguable case for a violation of subparagraph 186(2)(c)(i) of the Act, must indicate how the respondents sought "…by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means…" to compel the complainant to refrain from "testifying or otherwise participating in a proceeding under this Part or Part 2 or 2.1…". Complainants must outline how the respondent's behaviour comprised intimidation, a threat of dismissal or any other kind of threat, or the imposition of a financial or other penalty. Paragraph 186(2)(c) includes the phrase, "by any other means". The rules of statutory interpretation require that this phrase is interpreted as meaning, "by any other means <u>of a similar kind</u>" (*Manella* at para. 24, emphasis in original). In my view, "a similar kind" would include but not limited to: ill-will, deceit, fraud and an unreasonable exercise of management authority.

[47] In its written submissions, the complainant clearly makes reference to the previously existing tumultuous labour relations that existed at the institution at the time of the imposition of the disciplinary measure. Furthermore, the complainant argued that Ms. Demers's and Ms. Sandhu's actions were a camouflage and a sham to deprive him from exercising his rights under the Act. The complainant questioned Ms. Sandhu's intentions as well as those of Ms. Demers as the labour relations advisor to Ms. Sandhu.

[48] In support of this allegation, the complainant referred to the Board's jurisprudence on cases involving rejections on probation: that the unilateral characterization of the employer's actions are not binding and that the Board must appreciate all of the facts and surrounding circumstances of the case to determine whether the respondent's action is truly what it is or whether or not it is a sham or camouflage. I infer from the allegations that the complainant is alleging that he was

intimidated, felt threatened and that the substitution was done in bad faith. This is sufficient to engage the reverse burden of proof in s. 191(3) of the *Act.*

[49] Again, applying the arguable case test, I am satisfied that the alleged facts in the complaint and the written submissions are taken as true, there is an arguable case that the respondents contravened the prohibitions in s. 186(2)(c)(i) of the *Act*. The burden is on the respondents to demonstrate that it did not breach section 186(2)(c)(i) of the Act.

[50] Subsection 191(3) of the Act assigns the burden of proof in an unfair labour practice complaint involving subsection 186(2):

> *191(3) If a complaint is made in writing under subsection 190(1) in respect of an alleged failure by the employer or any person acting on behalf of the employer to comply with subsection 186(2), the written complaint is itself evidence that the failure actually occurred and, if any party to the complaint proceedings alleges that the failure did not occur, the burden of proving that it did not is on that party.*

[51] The respondents argued that ultimately, the complainant was provided with a full opportunity to be heard and to have his grievance adjudicated. He did not suffer any loss, and he was not deprived of any rights under the *Act*. He was not threatened, intimidated, penalised or compelled to refrain from pursuing his grievance at adjudication or to challenge the written reprimand. He was not disciplined for exercising his rights under Part 1 or 2 of the *Act*. He filed this complaint almost immediately after the substitution. The complainant was not disciplined or threatened or intimidated for filing the complaint that is before the Board.

[52] Although I agree with the respondents that ultimately, the complainant had his day in court and his grievance was fully adjudicated by the Board in *Joe*, I have serious concerns about how this matter was handled by the labour relations section and the respondents. Although it is management's right to substitute a disciplinary measure, this should have been done at the third level of the grievance process in accordance with the respondent's appropriate delegated authority. Furthermore, it should have been accompanied by a meaningful exchange with the complainant, rather than on the courthouse steps on the eve of the scheduled hearing. I agree with the complainant that the respondents essentially obtained by force what it could not achieve at mediation.

[53] While the respondents could have taken a better approach and the facts support that there was poor judgment on their part, I am satisfied that their actions were not meant to intimidate, threaten, penalise or discipline the complainant. I accept that Ms. Sandhu was attempting to prevent further harm to the individuals who were harassed by the complainant and to preserve the newly established favourable labour relations with the local union, but it was completely inappropriate for her to do so in the manner in which it was done. She had no ill will towards the complainant. In fact, the evidence supports that they had a good relationship. As for Ms. Demers, the evidence did not demonstrate any ill will towards the complainant. She provided advice to Ms. Sandhu. Ms. Sandhu made the final decision.

[54] Based on the evidence presented at the hearing, although I cannot find that the respondents committed an unfair labour practice, I find that this type of practice has no place in healthy labour relations. If the Correctional Service of Canada truly has at heart good labour relations, it should hear grievances at the third level and render decisions on them prior to their referral to the Board, not attempt to circumvent the Board's jurisdiction, no matter how noble the intentions. While the complainant questioned Ms. Sandhu's motives, I found her testimony to be credible and consistent with the facts of the case. The circumstances surrounding the substitution of the one-day suspension with the written reprimand, including the timing and manner in which Ms. Sandhu communicated it to the complainant do not lead me to question her motives. I believe that she truly was acting in the best interest of the institution. Had there been evidence of ill will towards the complainant to prevent him from pursuing his grievance to adjudication, my conclusion would have been different. But I do not find that to be the case. Therefore, I find that the respondents did not commit an unfair labour practice as alleged by the complainant.

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

(The Order appears on the next page)

V. Order

[56] The respondent's objection is dismissed.

[57] The complaint is dismissed.

January 29, 2021.

Chantal Homier-Nehmé,
a panel of the Federal Public Sector
Labour Relations and Employment Board