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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

JOSHUA EWART-WILSON

Grievor

and

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

Respondent

Indexed as

Ewart-Wilson v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Darryl Korell, counsel

For the Respondent: Richard Fader, counsel

Heard by videoconference at Ottawa, Ontario,
October 15, 16, and 21, 2020.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Joshua Ewart-Wilson, was employed by the Treasury Board (“the employer”) and worked for the Correctional Service of Canada (CSC) as a correctional officer classified at the correctional officer 1 (CX-1) group and level at Joyceville Institution (“Joyceville” or “the institution”) in Kingston, Ontario. By letter dated June 7, 2017 (“the letter of termination”), he was terminated from his position, effective that day.

[2] The letter of termination was under the name of the warden, Julie Blasko, albeit signed by someone else on her behalf. Ms. Blasko testified that she made the decision to terminate the grievor’s employment and that she was the author of the letter of termination, the relevant portions of which state as follows:

...

This is further to the Disciplinary Investigation convened on December 12, 2016 in order to review allegations that you concealed and consumed alcohol while on duty in a Correctional Service of Canada escort vehicle that was being driven on public roads on November 21, 2016.

The matter has now been investigated and the final report was provided to you on or around April 7, 2017. You were given the opportunity to review the information and evidence contained in the findings of the report, prior to the disciplinary hearing that was conducted on April 25, 2017 in the presence of your chosen representative.

I have carefully reviewed the information and circumstances available to me and, based on a balance of probabilities, I have concluded that you have violated the following provisions of the Standards of Professional Conduct and the Code of Discipline:

Standard One – Responsible Discharge of Duties:

- Refuses to testify before or submit evidence to, or obstructs, inhibits or otherwise hampers any investigation conducted pursuant to any act of Parliament or any investigation as defined in the Commissioner’s Directive on Investigations;*
- Fails to conform to, or to apply, any relevant legislation, Commissioner’s Directive, Standing Order, or other directive as it relates to his or her duty;*

- Fails to report to a superior authority any contraband found in the possession of another employee, inmate or member of the public;
- Performs his or her duty in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service, or any other person(s), either directly or indirectly.

Standard Two - Conduct and Appearance:

- Displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform;
- Acts, while on or off duty, in a manner likely to discredit the Service;
- Consumes alcohol and other intoxicants while on duty;
- Reports for duty impaired or being unfit for duty due to the influence of alcohol or drugs.

Standard Three - Relationships with Other Staff Members:

- Interferes with the work of others.

Given the nature and gravity of this misconduct, I can only conclude that the bond of trust, which is fundamental to the employment relationship, has been irrevocably broken. Moreover, the behavior that you have demonstrated is incompatible with that expected of [sic] Correctional Officer of the Correctional Service of Canada. In reaching my decision, I have given all due consideration to your clear disciplinary record and your length of service. In addition I have further considered that you have failed to provide information related to the events of November 21, 2016; your collusion with other employees in an apparent attempt to cover-up the events of November 21, 2016, along with the fact that you provided inconsistent accounts of events throughout the disciplinary process. I have also considered the fact that you showed no remorse for your actions.

...

[3] On June 16, 2017, he grieved the termination of his employment, presenting the grievance at the final level of the grievance process. On July 15, 2019, the employer denied the grievance. It was referred to the Federal Public Sector Labour Relations and Employment Board (“the Board”) for adjudication.

[4] At the outset of the hearing, the grievor admitted to having carried and consumed alcohol while on duty as a CX-1 in a CSC vehicle that was driving on public roads on November 21, 2016.

[5] The parties requested that the hearing be bifurcated and that it address only the initial question of whether the termination of employment penalty was excessive. I accepted that joint request. This decision will address only that question.

II. Summary of the evidence

A. Background

[6] Joyceville is a medium-security penitentiary for men located on a federal reserve northeast of Kingston along the Rideau River system. The same federal reserve also hosts a minimum-security penitentiary for men.

[7] The evidence disclosed that Joyceville has at least two entrances: a principal (or front) entrance, where most foot traffic arrives, and a second entrance identified only as a “sally port” (a secondary entrance not used by the public). Access through the principal entrance is strictly controlled. As part of the security measures, equipment was and is used to scan bags and parcels, which allows detecting metal objects concealed in bags or containers. It also disclosed that if a question arose as to what was in a bag or container, CXs working the principal-entrance post could conduct a physical search to determine its contents.

[8] Millhaven Institution (“Millhaven”) is a maximum-security penitentiary for men located on a federal reserve (“the Millhaven reserve”) southwest of Kingston along Lake Ontario. On the same federal reserve is a medium-security penitentiary for men as well as a regional hospital (“the CSC hospital”). At that hospital, inmates are treated for healthcare issues that go beyond the scope of the institution they are housed in but that do not require treatment in a facility outside the penal system.

[9] The grievor began his career as a full-time CX-1 in either November or December of 2010 at Joyceville. He worked solely at that institution throughout his time with the CSC. As of the events that led to the grievance, he was 32 years old.

[10] As of the hearing, Julie Blasko was retired from the CSC. As of the events that are relevant to this grievance, she was the warden of Joyceville. She began her career with the CSC in 1988, working in several different positions, and she was appointed as a warden in 2007.

[11] As of the hearing, Jack Coimbra was the deputy warden at Collins Bay Institution (“Collins Bay”), a medium-security institution for men, also located in

Kingston. He had been in that position for about a year-and-a-half. Before that, and at the time of the events that are relevant to this grievance, he was the assistant warden of operations (AWO) at Joyceville. He started with the CSC in 1995 as a CX-1 at Millhaven. The AWO is responsible for all security matters at an institution as well as all admissions, escorts, and routine there. All CXs and correctional managers report to him through the chain of command.

[12] As of the events that are relevant to this grievance, Lorrie Oddie was the assistant warden, management services (AWMS), at Joyceville. She started with the CSC in 1990 at Kingston Penitentiary and worked in different positions at different locations for the CSC. She became the AWMS at Joyceville in 2010. The AWMS is responsible for overseeing the provision of services to the inmates and staff at an institution, including but not limited to such things as food, finance, administration, and material management, which includes buildings, equipment, and vehicles. The AWMS reports directly to the warden.

[13] As of the hearing, Cathy Boyce was retired from the CSC. As of the events that are relevant to this grievance, she was the chief of material management (CMM) at Joyceville. She started with the CSC in 1992 and became the CMM at Joyceville in 2015. The CMM is responsible for the Stores area, which includes a warehouse area, freight and vehicles, messengers, and drivers. The CMM reports to the AWMS.

[14] As of the hearing, and since 2018, Bryan Leeman was the correctional manager for operations at Joyceville. In November of 2016, he was the correctional manager of the segregation unit at Joyceville. He started with the CSC in 1981 as a CX-1 at Collins Bay.

[15] To transport inmates, the CSC uses specially-fitted cube vans. They have a compartment in front and both a front and a back seat. Behind the back seat is a segregated, sealed, and caged compartment for inmates. The van drivers are not CXs but are employees that work in the Stores or warehouse area. They belong to a different bargaining unit and report to the CMM (at the relevant times, it was Ms. Boyce).

[16] All of Mses. Blasko, Oddie, and Boyce and Messrs. Coimbra and Leeman testified on behalf of the employer. The grievor testified on his behalf.

[17] Entered into evidence were the grievor's performance appraisals for the following performance cycles:

- March 3, 2011, to January 3, 2012;
- October 1, 2011, to September 30, 2012;
- October 1, 2012, to March 31, 2014; and
- April 1, 2016, to March 31, 2017.

[18] All the grievor's performance appraisals indicated that he was either on track to meet expectations or had met expectations. There was no evidence of performance issues. There was no previous misconduct or discipline on his record.

B. Relevant Commissioner's Directives, the *Standards of Professional Conduct*, and the CX-1 work description

[19] Entered into evidence was a copy of *Commissioner's Directive (CD) 060*, the *Code of Discipline* ("the Code"), which was in effect at the time of the misconduct and discipline. The relevant portions are as follows:

POLICY OBJECTIVE

1. *To ensure high standards of conduct for employees of the Service.*

GENERAL RESPONSIBILITIES

...

3. *Employees of the Service are responsible for adhering to the Standards of Professional Conduct. Arising from the Standards of Professional Conduct are a number of specific rules that employees of the Correctional Service of Canada are expected to observe. Some examples of infractions are given in a list below each specific rule. These lists are not exhaustive.*
4. *Each employee of the Service is also expected to be conversant with, and adhere to the various Acts, Regulations and policies affecting employees of CSC as well as the instructions and directives of the Service.*

PROFESSIONAL STANDARDS

Responsible Discharge of Duties

- 4.
5. *Staff shall conduct themselves in a manner which reflects positively on the Public Service of Canada, by working co-operatively to achieve the objectives of the Correctional Service of Canada. Staff shall fulfil their duties in a diligent and competent manner with due regard for the values and principles contained in the Mission Document, as well as in accordance with policies and procedures laid out in legislation,*

directives, manuals and other official documents. Employees have an obligation to follow the instructions of supervisors or any member in charge of the workplace and are required to serve the public in a professional manner, with courtesy and promptness.

Infractions

5.

6. *An employee has committed an infraction, if he/she:*

- a. fraudulently records, or fails to record, his/her attendance or that of another employee;*
- b. is late for duty, absent from duty or leaves their assigned place of duty without authorization;*
- c. fraudulently seek to obtain, or fraudulently obtains, documentation required for approval of leave of absence from duty;*
- d. refuses to testify before or submit evidence to, or obstructs, inhibits or otherwise hampers any investigation which is conducted pursuant to any act of Parliament or any investigation as defined in the Commissioner's Directive 041-Incident Investigations;*

...

- f. fails to take action or otherwise neglects his/her duty as a peace officer;*
- g. fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates to his/her duty;*

...

- j. wilfully or through negligence, makes or signs a false statement in relation to the performance of duty;*

...

- l. fails to report to a superior authority any contraband found in the possession of another employee, offender or member of the public;*
- m. Performs his/her duty in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service, or any other person(s), either directly or indirectly*

...

Conduct and Appearance

6.

7. *Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and on the Public Service generally. All staff are expected to present themselves in a*

manner that promotes a professional image, both in their words and in their actions. Employees [sic] dress and appearance while on duty must similarly convey professionalism, and must be consistent with employee health and safety.

Infractions

7.

8. *An employee has committed an infraction, if he/she:*

a. displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform;

...

c. acts, while on or off duty, in a manner likely to discredit the Service;

...

g. consumes alcohol or other intoxicants while on duty;

h. reports for duty impaired or being unfit for duty due to influence of alcohol or drugs

...

ANNEX A ... - REPORTING AND RESPONDING TO ALLEGATIONS OF MISTREATMENT, HARASSMENT, OR DISCRIMINATION TOWARDS OFFENDERS ...

RESPONSIBILITIES

All CSC staff members have an obligation to report any situation where they believe an offender is being mistreated, harassed or discriminated against by a staff member.

Institutional Heads/District Directors are responsible for resolving situations of mistreatment, harassment or discrimination of which they are made aware, whether or not a complaint/grievance has been made and to take immediate corrective action as appropriate.

...

Convening a Fact Finding/Investigation

If the Institutional Head/District Director decides to convene a fact finding/investigation, he/she will specify the mandate to the investigator(s). He/she will also ensure that persons conducting the fact finding/investigation are appropriately trained for the particular issue being investigated (e.g. gender, diversity), that they are impartial, that they have no supervisory relationship with the parties, and that they are not in a position of conflict of interest. At least one investigator will not have a reporting relationship to the Institutional Head/District Director.

...

[Emphasis in the original]

[20] Entered into evidence was a copy of the CSC's *Standards of Professional Conduct* ("the Standards") that was in effect at the time of the facts that gave rise to the discipline. The relevant portions of it state as follows:

...

PROFESSIONAL STANDARDS

1. STANDARD ONE

RESPONSIBLE DISCHARGE OF DUTIES

Staff shall conduct themselves in a manner which reflects positively on the Public Service of Canada, by working co-operatively to achieve the objectives of the Correctional Service of Canada. Staff shall fulfil their duties in a diligent and competent manner with due regard for the values and principles contained in the Mission Document, as well as in accordance with policies and procedures laid out in legislation, directives, manuals and other official documents.

...

2. STANDARD TWO

CONDUCT AND APPEARANCE

Behaviour, both on and off duty, shall reflect positively on the Correctional Service of Canada and the Public Service generally. All staff are expected to present themselves in a manner that promotes a professional image, both in their words and in their actions. Employee dress and appearance while on duty must similarly convey professionalism, and must be consistent with employee health and safety.

...

3. STANDARD THREE

RELATIONSHIPS WITH OTHER STAFF MEMBERS

Relationships with other staff members must promote mutual respect within the Correctional Service of Canada and improve the quality of service. Staff are expected to contribute to a safe, healthy and secure work environment, free of harassment and discrimination.

...

[Emphasis in the original]

[21] Entered into evidence was the work description of a CX-1, the relevant portions of which state as follows:

Client Service Results ...

Correctional operations related to the safety and protection of the public, staff, inmates and the institution and the functional supervision of activities for the Correctional Service of Canada (CSC).

Key Activities ...

Supervises, controls and monitors inmate movement and activities within and outside the institution; conducts counts and patrols.

Performs security checks and searches of living units, the physical plant, buildings, vehicles, inmates, other persons and their personal property, and other areas for contraband.

Monitors the movement and activity of visitors and civilian contractors as well as social activities and events in the institution and on the penitentiary reserve.

Participates as a member of the unit correctional team and contributes input toward the development and implementation of unit programs.

Provides on-the-job mentoring and coaching to entry-level correctional officers and practicum students.

Demonstrates professionalism in the performance of security duties to present a positive behavioural example to inmates and facilitate an environment conducive to the development of life skills.

In the course of duties, encourages inmates to take part in reintegration programs.

Records observations of inmate movement and behaviour on specific activity records in order to keep supervisors informed.

Participates in escorts and inmate transfers outside the institution.

Seizes and records unauthorized items and contraband for security purposes.

Administers cardiopulmonary resuscitation (CPR) in response to medical emergencies and lends immediate support and assistance, once the area is secure, to injured parties as required. There may also be a requirement to use the self-contained breathing apparatus to effect rescue of individuals in smoke-filled environments.

The incumbent of this position has Peace Officer status.

...

Responsibility ...

...

(2) Well-Being of Individuals

Escorts inmates outside the institution, taking appropriate security measures to ensure the safety of the public, staff and inmates.

Ensures the safety and security of the public, staff and inmates by conducting searches for unauthorized items, monitoring physical security (e.g. checking tools, equipment and locks), monitoring inmates' activities and evaluating the behaviour and attitude of specific inmates or groups of inmates. This includes prevention of or active intervention in disputes between inmates, staff or the public, which may involve tactics aimed at intimidating staff.

Intervenes when necessary to reduce the likelihood of muscling, intimidation or possible harm as a result of inmates' behaviour and actions.

Intervenes to prevent or defuse violence and protect the public, staff and inmates. Employs the safest and most reasonable intervention possible, in accordance with the approved crisis management model, to subdue, restrain and control inmates acting in a violent or threatening manner.

When necessary, administers first aid / CPR or uses a self-contained breathing apparatus to effect rescue of individuals in smoke-filled environments.

Encourages inmates to take part in reintegration programs.

Lends support and assistance to injured parties as soon as the area is secure.

Processes inmates' requests on a case-by-case basis, in accordance with legislation and policy.

...

(6) Ensuring Compliance

Performs security duties to enforce compliance with all applicable acts, regulations and policies.

In accordance with the requirements of the Peace Officer designation, ensures inmates comply with CSC rules and regulations. The incumbent may take administrative action for minor offences and recommend disciplinary action for major reported offences. If witness to an offence committed by an inmate, fulfills the duty to act in accordance with section 10 of the CCRA and section 2 of the Criminal Code. Employs the safest and most reasonable intervention to prevent/counteract, in accordance with the approved crisis management model, inmate assaults, riots or escape attempts.

...

[22] Entered into evidence was a copy of *Commissioner's Directive 566-6 Security Escorts*, which was in effect on November 21, 2016. It contains a provision that states

that during the course of a security escort of an inmate, provincial traffic regulations are to be respected.

C. Undisputed facts related to November 21, 2016 (“the November 21 incident”)

[23] On November 21, 2016, the grievor was scheduled to work an evening shift (from 14:00 to 23:00). On the rotation schedule, he was shown as being in a substitute position, meaning that he was not assigned a specific post or location but that he would be assigned something when he arrived on shift. Before he arrived on shift, an inmate, for the purpose of this decision identified as “IM A”, had been transported to Kingston General Hospital (KGH) for treatment and was still there with the CXs who had escorted him. The exact details of the transport to and stay at the hospital are not germane to the grievance or this decision. Once IM A was cleared for release from the hospital, the protocol required him to be transported to the CSC hospital on the Millhaven reserve and not back to Joyceville.

[24] When the grievor arrived on shift at 14:00, he and another CX-1, “Ms. B” (the names of some involved in the events at issue are anonymized in this decision), were assigned to relieve the escort already at the KGH and to continue the escort of IM A. It included remaining at KGH with him until he was discharged and then accompanying him in the CSC van to the CSC hospital, after which they were to return to Joyceville and complete their shifts.

[25] The evidence disclosed that the escort in question required the CXs to be armed, so both the grievor and Ms. B were each issued 9 mm handguns, with ammunition. Once they had everything they needed for the escort, they left Joyceville and went to KGH. The evidence disclosed that the normal protocol would be for the CXs to gather their equipment, including weapons, and then to meet up with the van and driver. However, the details of how it occurred were not provided to me, specifically if it occurred within the walls or fence of Joyceville or merely on the grounds of the reserve, outside the secure perimeter.

[26] At some time in the late afternoon or early evening, IM A was released from KGH, and the grievor and Ms. B escorted him in the CSC van to the CSC hospital on the Millhaven reserve. After doing so, together with “Mr. C” they returned to Joyceville, where they finished their shifts.

D. November 22, 2016, onward, and disputed facts related to the November 21 incident

[27] On November 22, 2016, Ms. Boyce came into the Stores area, where she has an office. She testified that she happened to walk past the garbage bins. In them, she noticed some cans that contained alcohol, which she said she brought to her office to put into a bag. Entered into evidence were photographs of two different craft-beer cans, which she identified. One can clearly disclosed an alcohol content of 6.5%.

[28] Ms. Boyce testified that as she carried the cans to her office to bag, "Mr. D" (another driver) followed her and told her what he had heard from Mr. C. She stated that she then called Ms. Oddie and told her what Mr. D had told her, which was that Mr. C had been on an escort the previous day and that on the drive back from the Millhaven reserve, the CXs asked if he minded if they drank beer. He [Mr. C] thought that they were joking and then heard cans being snapped open. When he arrived at Joyceville, he dropped the CXs off, returned the van to the Stores area, and cleaned everything out and put it in the garbage.

[29] On November 25, 2016, at 15:28, Ms. Boyce emailed Mr. Coimbra, stating as follows:

...

To the best of my knowledge, here's the chain of events for the incident of Monday, Nov 21st 2016 evening:

Tue, Nov 22nd/16, - in the afternoon, I can't remember exact time, I was looking at the garbage and noticed 2 cans which normally would be in the other bucket. Picked one up and noticed the alcohol content of 6.2%. I was called away and put the can back into the garbage until I returned.

- within a few minutes I pulled the cans out and placed them in a plastic bag in my office.*
- one of the Stores Officers came in to my office and told me what had happen while another Stores Officer was on escort the previous evening*
- I placed an email to the AWMS at 3:40, received a email reply then had a phone conversation, relaying the information I had been given by the Stores Officer*

Wed, Nov 23/16 at approx 2:20pm

- Met with Lorrie Oddie and Jack Coimbra, sharing the information as it was given to me*

- Jack indicated as OSOR be written by those involved with the escort
- The OSOR would not be given to anyone except Jack and not processed through normal channels
- Jack went over ramifications of not coming forward with details

Thur, Nov 24/16 at approx 10:30

- I sent one of the Stores Officers an email asking him to have a chat that day or would he answer the questions I had written down and would he comfortable speaking privately with Jack about the incident - the Stores Officer was out on escorts at the time then went out on another escort at 2:00 pm
- Jack called to see if I had spoke with the Driver - no I had not - he was out on escort and didn't return until after normal working hours

Fri, Nov 25/16 at approx 8:15

- I met with one of the Stores officers who indicated they did not want to be labelled rats or black listed, they had to work with other staff on an ongoing basis. There were already enough Staff knowing of these types of situations who chose not to come forward, they (Stores Officers) were not going to be hung out to dry. All they have to do is look at the cameras to find out who are not going through the main entrance but through the Sally Port. It won't be the support staff who are by-passing the scanner.
- At that time he indicated it was not the original escort team that went from the Hospital to Millhaven but Officers who had been switched out to relieve those Officers at the hospital. No stops were made on the way to Millhaven or on the return to the institution. Upon return to the institution, the Officers were dropped off in the Sally Port and the vehicle was returned to Stores where it was cleaned.

At approx 8:45

- I met with Jack who reiterated the need for the OSOR to be given to him today. He would bring it forward to the Warden on Monday who would make the decision on how to proceed. A Direct Order will be given to create the OSOR in needed.

At approx 9:45

- Met with one of the Stores Officers explaining the need for the OSOR - stressing the importance. The Stores Officer is will to meet with Jack outside the institution at any given time but not at a Timmies.

At approx 3:23 pm

- Have not talked a chance to talk with the Stores Officer due to on-going escorts throughout the day. He has not returned

as of this time. I have sent him another email stating that he needs to speak with you.

...

[Sic throughout]

[Emphasis in the original]

[30] “OSOR” is an acronym for “Officer Statement/Observation Report” and is sometimes referred to as an “Obs” report.

[31] On November 25, 2016, at 15:40, Ms. Boyce emailed Mr. C, stating as follows:

...

We need to talk on Monday about the incident on Monday last. Jack is insisting you submit an Obs report which will not be put through the regular process but to him only. I will have deliver it to him. I can help you write it if you want. Jack need the information so he can forward with a very quiet investigation or however the Warden wants to proceed.

I have told him about your concerns about being labelled a rat and put on the black list when there are so many others who know what's going on but have not come forward. Doesn't matter who told me the story, I found the cans in the garbage, looked at the label and seen it was alcohol. If they had been in the other bucket, I wouldn't have noticed them. Then the story came out.

Given that I had the information, I had to forward it to Lorrie who in turn went to Jack. By not giving her the information, I could have found guilty of covering up what went on. I am not losing my job for any little boy or girl in blue just because they are ass holes and don't care about anyone else except themselves. Their foolishness would have effected your licence had you been stopped.

Because you didn't pick up those guards, you have no way of knowing how and when they picked up the drinks. All you know is they asked if you cared if they had a beer and you thought they were joking. And due to the weather you weren't paying too much attention to them but concentrated on driving through the snow storm.

...

[Sic throughout]

[32] Ms. Blasko was brought to Ms. Boyce's November 25, 2016, email to Mr. C and was asked what, in her view, Ms. Boyce said in the last paragraph. Ms. Blasko said that in her view, it is what Ms. Boyce understood from Mr. C or Mr. D. When it was suggested to her that it could be interpreted as her telling Mr. C what to say,

Ms. Blasko said that it could be but that she did not read it that way and that Ms. Boyce should be asked what she meant by it.

[33] Ms. Boyce was asked to explain the email. She stated that she tried to stress to Mr. C that he should be upfront and truthful about what happened and that he should submit an OSOR. She told him that the events at issue could have repercussions on his driver's licence. She said that she knew that he had concerns about being labelled a "rat" but that he should submit an OSOR.

[34] Ms. Boyce testified that after the event became known, staff treated her poorly. She stated that she was "put on the dummy" or the "dummy list", meaning that when she would enter into a room, everyone would be quiet. She would be ignored and not included in discussions.

[35] In cross-examination Ms. Boyce stated that she did not help Mr. C write an OSOR for the November 21 incident; nor did she help any other employee write one. When she was asked why she offered to help Mr. C, she stated that it was because he was reluctant to write one. When she was asked about her reference to the CXs as "assholes", she stated that she was referring to the two who drank beer while on the job. She indicated that she was frustrated with their behaviour and its effect on both her and Mr. C and with the situation it put them in. She said that the situation could have been seen as a cover-up and that she could have been seen as part of it, and she said that she would not go through that.

[36] On November 28, 2016, Ms. Boyce forwarded to Ms. Oddie her November 25, 2016, email to Mr. C. She wrote as follows: "This is what I sent to [Mr. C] on Friday while he was out on another escort. He is not willing to go any further with this. Maybe you can speak with him while you're down here ...".

[37] Also on November 28, 2016, at 11:39, Ms. Oddie emailed Mr. Coimbra and copied Ms. Boyce, stating as follows:

...

Jack, upon learning that [Mr. C] was unwilling to submit an observation report regarding an incident that took place last week (beer cans found in CSC vehicle) I approached him this morning in Stores to discuss further. He was very reluctant to discuss with me. He initially denied having any first hand knowledge of Officers consuming alcoholic beverages on the

escort. He indicated that [name omitted] found the beer cans in the vehicle. I explained to him the importance of reporting on observations as serious as this – I explained that it not only puts the drivers in a bad position but could potentially threaten the safety and security of the institution. Although he continued to deny any knowledge of the incident he did indicate that he subsequently spoke to both Officers and they assured him that it would not happen again. I advised him that my expectation is that he will submit a detailed observation report and failure to do so could result in a direct order and/or discipline. I advised him that we will be proceeding with a fact finding, and again my expectation is that he fully cooperate. He advised that he would be seeking union representation. I will give him until noon tomorrow to submit an observation report – should he fail to do so we will give a direct order. He presented as very nervous during my conversation with him and indicated that he fears retaliation. Please let me know if you have any questions or concerns.

...

[38] On December 2, 2016, at 14:30, Mr. C provided an OSOR, which Ms. Boyce received. It stated that the date and time of the incident reported was November 21, 2016, at 19:00, and his narrative was as follows:

...

I was on escorts day of Nov/21/16 and emptied the trash can from the escort van into the Stores container. The next day Nov/22/16 (CMM) Cathy Boyce questioned me about the beer cans and said they must of [sic] came [sic] from the trash out of the escort van.

...

[39] On December 12, 2016, Warden Blasko issued a convening order for a fact finding, which stated as follows:

DISCIPLINARY BOARD OF INVESTIGATION INTO ALLEGATIONS OF CONSUMING ALCOHOL WHILE ON DUTY BY EMPLOYEES ON MONDAY NOVEMBER 21, 2016 AT JOYCEVILLE INSTITUTION.

...

WHEREAS on Monday, November 21, 2016 employees, Joshua Ewart-Wilson CX-1 and [Ms. B] CX-1 allegedly concealed and later consumed alcohol while on duty. This took place in a Correctional Services of Canada vehicle that was in the community, being driven on public roads by [Mr. C] Stores Officer while returning from Millhaven Regional Hospital.

THEREFORE, I, Julie Blasko, Warden of Joyceville Institution, Ontario Region, do hereby appoint Bryan Leeman as Chairperson

and Trevor McCuaig as Board Member of the Disciplinary Investigation.

I DIRECT AND CHARGE the persons so appointed to faithfully execute the duties entrusted to them in the conduct of this investigation and to provide me with the complete circumstances surrounding the above-mentioned incident including:

- a) a background of the incident;
- b) description of the allegation(s) and;
- c) the chronology of the events.

In the event that other misconduct is discovered during the course of the above-mentioned investigation, and such misconduct is significantly different from the misconduct currently subject to investigation, the Board is required to obtain an amended Convening Order pertaining to same.

I FURTHER DIRECT that the Board specifically analyze the following issues including any issues of compliance to law, policy and procedure:

- a) Review the circumstances surrounding the allegations of inappropriate conduct and provide any relevant findings;
- b) Whether any documentation or records requested by the Board were not received; and
- c) any other matter which is deemed relevant.

AND I FURTHER DIRECT the Board to provide me with its findings on the above matters. The Board is also asked to report on any best practices encountered during the course of its investigation.

AND FURTHER, to ensure the success of this investigation, the Board is authorized:

- a) to adopt such procedures and methods as may be deemed necessary for the proper conduct of this investigation review;
- b) to be provided with adequate and secure working accommodation and administrative assistance as required;
- c) to search any building, receptacle or thing being on the property of and in possession of the Correctional Service of Canada, 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;
- d) to have complete access to documentation and personnel under the employ of, or under contract with, the Correctional Service of Canada;

e) to communicate, at the discretion of the Chairperson, with any outside person, agency, office or organization which may assist in the successful completion of this review; and

f) to disclose any personal information it deems necessary to follow the principles of the Duty to Act Fairly.

...

AND I FURTHER DIRECT the Board to submit to me, Julie Blasko, Warden of Joyceville Institution, Ontario Region, a written report marked "Protected B", no later than the [sic] January 31, 2017.

...

[40] Entered into evidence was a copy of the "Disciplinary Investigation Report", dated January 31, 2017, and authored by Messrs. Leeman and McCuaig ("the investigation report"), the relevant portions of which state as follows:

...

Part IV. Narrative:

...

When interviewed on December 20, 2016 in the presence of UCCO Representative Michael Deslauriers, Stores Driver [Mr. D] stated that he was asked by [Mr. C] the morning of November 22nd to confirm that the cans he had disposed of from his escort the previous night contained an alcoholic beverage. [Mr. D] did verify by reading the writing on the cans that the cans did in fact contain alcohol. [Mr. D] recalled meeting with Ms. Boyce on November 22nd, however he could not recall any of the details of the conversation and did not corroborate the statements made by Ms. Boyce during her interview. [Mr. D] also had no knowledge of the conversation with [Mr. C] on Wednesday November 23rd regarding the details of the escort that was heard by Ms. Boyce.

During his interview on December 20, 2016 in the presence of UCCO Representative Michael Deslauriers, Stores Driver [Mr. C] confirmed he was the escort driver during the week of November 21, 2016. [Mr. C] recalled taking an escort to Kingston General Hospital (KGH), then on to Millhaven Institution and then back to Joyceville Institution. The escort returned after normal working hours approximately 18:30. [Mr. C] attested that he was in the escort vehicle from when they left Joyceville at approximately 10:30 on November 21st until it returned to Joyceville that evening. There was no inmate in the escort vehicle on the return trip to Joyceville. [Mr. C] stated that the roads were bad on the escort and he was focused on his driving the entire time. [Mr. C] also confirmed that he had emptied the garbage from the escort vehicle upon his return to Joyceville Institution. [Mr. C] did not remember the third-party account of the

correctional officers asking him about drinking and subsequent disposal of cans that was offered by Ms. Boyce. [Mr. C] stated that it was not until the next day that he realized the alcoholic beverage cans were in the garbage. [Mr. C] confirmed that one of the correctional officers was in the front seat of the escort vehicle on the return trip, however he could not recall if it was the male or the female officer.

[Mr. C] further stated that it was not Ms. Boyce's business what was being discussed when she overheard the conversation between himself and [Mr. D] on November 23rd - but he did not deny that the conversation occurred. [Mr. C] also explained that he does not regularly read a lot of Ms. Boyce's e-mails - who is his direct supervisor and was never asked to submit an S.O.R. by Ms. Boyce. The Board noted that the E-mail from Cathy Boyce on November 25, 2016 at 3:40PM Appendix B directly refutes this statement.

...

[Mr. C] further stated that he received a direct order from AWMS Lorrie Oddie to submit the report during their meeting.

During their separate interviews, both held on December 21, 2016 in the presence of UCCO Representative Michael Deslauriers, Joyceville Correctional Officers Joshua Ewart-Wilson and [Ms. B] confirmed that they were on escorts on November 21, 2016. Mr. Ewart-Wilson confirmed that he brought his gym bag along with him [Ms. B] stated that she brought nothing extra along on the escort. The officers both confirmed that they travelled from Joyceville Institution to KGH together on November 21st afternoon in a regular, CSC vehicle. The officers stated that they did not stop anywhere on the way down to the hospital to relieve the current escorting officers at KGH. Upon the inmate being released from the hospital, the officers escorted the inmate to Millhaven Institution with the Stores Driver [Mr. C]. The inmate was left at Millhaven for observation and the escort vehicle returned straight back to Joyceville with the Stores driver and two escorting officers. Both [Ms. B] and Mr. Ewart-Wilson relayed similar accounts of the evening's events and both denied any knowledge of drinking alcoholic beverages or disposing of the resulting cans.

During his interview on January 25, 2017 in the presence of UCCO Representative Gary Lalande, Joyceville Correctional Officer [name omitted] confirmed that he was on an escort with Stores Driver [Mr. C] that left Joyceville on the morning of November 21st and proceeded to KGH. [Name omitted] confirmed that he was relieved by Officers Ewart-Wilson and [Ms. B]. When asked if he had seen any alcohol cans in the vehicle prior to, or during the escort, [name omitted] responded that he had not. When asked if he smelled anything out of the ordinary in the vehicle, or if the vehicle smelled, [name omitted] confirmed that it did not.

Part V. Analysis:

During the interviews the Board was able to determine that Officers Ewart-Wilson and [Ms. B] did attend the escort at KGH to relieve Officers [sic] [name omitted] in order to transfer an inmate from the hospital to Millhaven Institution. It was confirmed by Officer [name omitted] that there were no noticeable smells in the vehicle during his time on the escort, prior to being relieved. Further to this [Mr. C] stated that he left Joyceville at approximately 10:30 and stayed in the vehicle down at KGH until 17:30 waiting for the escort to return. Then [Mr. C] drove to MI with the inmate and the two escorting Officers Ewart-Wilson and [Ms. B] where the inmate was dropped off then straight back to JI. [Mr. C] spent approximately 8 hours in the escort vehicle on November 21st. The Board is of the opinion that it would be reasonable to expect that two beer cans left open in a vehicle for a number of hours, would begin to produce a noticeable smell that would be difficult to overlook.

It was also confirmed that Officer Ewart-Wilson brought a gym bag along on the escort Officers Ewart-Wilson and [Ms. B] were in the escort vehicle on the return from KGH to Millhaven and then to Joyceville Institution along with Stores Driver [Mr. C]. It was further determined that, due to inclement weather, the roads were bad during the return leg of the trip and that the Driver, [Mr. C], was focused on driving. [Mr. C] attested to removing garbage from the escort vehicle upon his return to Joyceville Institution and it was later determined that beer cans were included in the garbage that was removed. Since the cans were obtained from the garbage in Stores the following morning, with no other vehicles being utilized for escorts, the Board reached the logical conclusion that if the cans were not present prior to the relief of the escorting officers at KGH, then they must have been introduced during the return leg of the trip to Joyceville Institution into the escort vehicle driven by [Mr. C].

...

Part VII. Conclusion:

Through the information obtained during the investigation, it was demonstrated that the allegation to the effect that:

On November 21, 2016 employees Joshua Ewart-Wilson (CX-01) and [Ms. B] (CX-01) concealed and later consumed alcohol while on duty. This took place in a CSC vehicle that was in the community, being driven on public roads by [Mr. C] Stores Officer, while returning from Millhaven Regional Hospital.

*On a balance of probabilities, is believed to be **founded**.*

...

[Emphasis in the original]

[41] On April 25, 2017, a disciplinary hearing was held for the grievor. Entered into evidence were the labour relations officer's (Ryan Dejneha) notes that he made of the hearing, the relevant portions of which state as follows:

...

In Attendance:

- *J. Ewart-Wilson (EW)*
- *M. Deslauriers (MD)*
- *J. Coimbra (JC)*
- *L. Oddie (LO)*
- *R. Dejneha (RD)*

-No written submissions were offered during the hearing.

-The hearing was recorded by both parties - mp3 is available on file.

...

- *MD as the employee's representative, made note of the amount of speculation contained within the body of the investigation report and stated that third-party speculation formed the basis for the report's findings.'*
- *MD stated that the trash from the escort vehicles is not cleaned on a daily basis, but is rather cleaned on an as-needed basis. How the beer cans ended up in the trash is subject to speculation.*
- *MD stated that the third-party accounts were questionable at best. These accounts formulated a basis from which a broad picture of the events of November 21, 2016 were established.*
- *MD pointed out that an OSR regarding the incident was only produced as a result of a request made directly from Cathy Boyce and Lorrie Oddie.*

...

- *EW called into question [Mr. D]'s 'colourful past.' EW and MD presented a print-out [sic] taken from the internet that brought forward information regarding [Mr. D]'s past criminal charges and violation of bail conditions (circa 2012). This print-out [sic] was not accepted as having any relevance to the proceedings and so it was not included as a written submission.*

...

[42] The grievor testified that in the evening of November 20, 2016, he went to a friend's house. He brought some beer with him in his gym bag. When he returned

home, some unopened beer containers were in the bag, which he did not remove. He said that he forgot about them. He stated that on November 21, he packed food, snacks, soft drinks, water, and possibly energy drinks into his gym bag and then went to work. He said that he brought the gym bag with him into the institution after coming in through the principal entrance. He said that no one approached him about having beer in the bag. He said that when he and Ms. B went on the escort, he brought along his gym bag, and that it also went with him into KGH.

[43] The grievor further testified that after they dropped IM A at the Millhaven reserve, and on their way back to Joyceville, he was seated in the front seat of the CSC van. He said that he was thirsty and that he asked Ms. B if she wanted a drink. He took out a can for himself and gave her one. He said that not realizing that it was beer, he opened the can and drank it. He said that he could not say if Ms. B drank the beer he gave her. He said that it was not pre-planned and that he did not know that the beer was in his gym bag until he started to drink it. He stated that he consumed the entire beer. He said that he should have known better; it was a lapse in judgement. He confirmed in cross-examination that both cans of beer contained alcohol.

[44] When his legal counsel asked him how much time was left in his shift when they returned to Joyceville, he said about a half hour and that it was about 22:30. He said that he simply hung out at the sally -port until the count cleared at 23:00; then, he went home. When he was asked if he interacted with any inmates, he stated, "No." When he was asked if anyone asked him after that shift if he had had beer in the evening of November 21, while on duty, he said, "No."

[45] There is no evidence that either the grievor or Ms. B completed an OSOR for any event that might have occurred on November 21, 2016.

[46] In his evidence before me, the grievor stated that he felt horrible, and he apologized several times for his behaviour. He said that more than once, he had personal stressors at the time that played into his lapse of judgement and indicated that the stressors were at both work and home. He did not identify any stressors at home; in fact, he did not speak about his home life.

[47] As for the stressors at work, the grievor stated that he was afraid of the ramifications of being labelled a rat and that everyone in the institution who works

for the CSC adheres to the “rat code”, including management and non-CX staff. He said that he felt huge pressure from the day after it happened to the day he was terminated. He did not provide any specifics; nor did he speak of any other specific stressors at work except to state that work could be stressful.

[48] The grievor also said that he continued to carry out escorts even after the November 21 incident, stating that he did not think he ever stopped doing them. He stated that as far as he was aware, no changes were made with respect to any of the tasks that he had done before November 21. He said the following about himself:

*loved [his] job as a CX, except for the stress;
enjoyed the change of pace, doing different things everyday;
liked the people, [his] fellow CXs and had good relationships with
other CXs and non-CX staff; and,
was good at what [he] did and performed [his] duties except on
that one occasion.*

[49] The grievor said that as a CX-1, he earned around \$70 000 per year and had medical and dental benefits and a pension plan. But after his termination, he found work only in January 2019, and then only as a general labourer earning about \$14 per hour with minimal benefits, no pension, and no union representation.

[50] Neither during the investigation nor during the disciplinary hearing did the grievor admit to bringing beer with him to work on November 21, 2016, providing it to a colleague, or drinking it. When he was asked why he did not make those admissions at those times, he said that it was due to the culture, his stress, and his lack of judgment and to his fear of an overzealous manager who created a negative work environment. He suggested that he was afraid of being overdisciplined.

[51] The grievor did not explain what he meant by the culture or by an overzealous manager, a negative work environment, or overdiscipline.

[52] The grievor identified Mr. Leeman as his most regular manager, as he mostly worked in the institution’s segregation unit. I heard no evidence of Mr. Leeman’s actions as a manager in disciplinary matters or whether he had any authority to discipline. I heard of no examples of Mr. Leeman being overzealous or creating a negative work environment. In cross-examination, no mention of his authority to

discipline was raised; nor were there any questions related to overzealousness or a negative work environment.

[53] I heard no evidence that any other managers to whom the grievor had reported had been overzealous, had created a negative work environment, or had any authority to discipline, and if so, any discipline they had administered for misconduct.

[54] A disciplinary hearing was held for Mr. D, which was recorded and transcribed by Gillespie Reporting Services of Ottawa, Ontario. A copy of the transcript was entered into evidence, the relevant portion of which is as follows:

...

Ms. Blasko: Okay, please tell me what [Mr. C] told you.

Mr. D: That on the way back from Millhaven, he was asked if it was okay if they had a beer. He was concentrating on driving in a snowstorm and he didn't even think they were being serious because it has never happened before as far as I know. In the 10 years I've been here, I've never come across anything like this.

Ms. Blasko: Okay.

Mr. D: He was concentrating on driving, didn't really pay attention to it. When he got back to the institution, he was asked what should I do with these cans. He said just leave them in here. I will get rid of them, thinking they were pop cans and he just emptied the van when he got down to stores.

Ms. Blasko: Hm-humm.

Mr. D: He got down to the gate. The gate was locked. It was frozen. He had to come back up, get a propane torch. It was 7:30 at night. He said he was frustrated, walked in, threw the cans in the garbage, went home. The next morning they were found.

...

[55] None of Ms. B or Messrs. C or D testified.

[56] Ms. Blasko stated that she decided that terminating the grievor's employment was appropriate because his actions amounted to a very serious incident. She stated the following about him:

- he took alcohol with him on an escort;
- he had the alcohol with him when he picked up the inmate at KGH;
- he had the alcohol with him when he brought the inmate to the CSC hospital at the Millhaven reserve;
- he gave alcohol to Ms. B;

- he drank the alcohol while in a CSC vehicle on public roads and while on duty;
- he had no insight into what he had done;
- he took no accountability or responsibility for his actions;
- despite being given opportunities to cooperate, he did not;
- he colluded with others to cover up the event;
- he showed no remorse for his actions;
- he lied about everything;
- he did not display strong ethics;
- he tried to impugn the character of Mr. D, whom he suggested was a liar, when Mr. D told the truth; and
- he gave no thought to the CSC's responsibilities; nor did he demonstrate any of its values to other people.

[57] She stated that because the grievor was a CX-1, there was no lower position into which she could demote him.

[58] When Ms. Blasko was asked about the grievor's admission (just before the hearing started) that he brought the beer with him and consumed it in the CSC van, she said that her initial reaction was to question why he made the admission only then. She said that he had been given many opportunities and that at no time did he admit to what had happened. She surmised that perhaps Ms. B, who was also terminated due to the November 21 incident, was not prepared to lie anymore, and so he realized that the writing was on the wall. She said that when she looks at things such as integrity, responsibility, and accountability, the grievor has none. She believed that he tried to cover himself with that admission at that time.

[59] In cross-examination, Ms. Blasko was brought to Annex A of the Code, specifically to the paragraph about fact findings and investigations, where it states that when appointing persons to conduct a fact finding, those persons should not include the immediate supervisor of the individual or individuals who are the subject or subjects of the investigation. It was pointed out to her that Mr. Leeman was the grievor's immediate supervisor when he worked in the segregation unit. She was asked first that if this was so, would he have been the grievor's direct supervisor, or did he have a supervisory relationship with the grievor. Ms. Blasko confirmed that she knew that the grievor had worked in the segregation unit and stated that all correctional managers (Mr. Leeman included) would have had a supervisory relationship over him.

[60] Ms. Blasko was told that Mr. Leeman had completed the grievor's most recent performance appraisal. She responded that if Mr. Leeman testified that he was the

grievor's supervisor, she would not contradict that fact. It was then put to her that if in fact Mr. Leeman had been the grievor's direct supervisor, whether it had been appropriate for him to carry out the fact-finding investigation. She replied that it had been appropriate as Mr. Leeman was a long-standing employee and very fair and ethically minded, and she viewed him as without bias.

III. Summary of the arguments

A. For the employer

[61] The employer submitted that the grievance should be dismissed.

[62] The employer referred me to *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, *Horne v. Parks Canada Agency*, 2014 PSLRB 30, *Rahim v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 121, *Cormier v. Treasury Board (Fisheries and Oceans)*, 1989 CarswellNat 1833, *Markham (Town) v. C.U.P.E., Local 1219*, 1997 CarswellOnt 5307, *Dekort v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 75, *Faryna v. Chorny*, [1951] B.C.J. No. 152 (QL), *Ken's Lift Truck Delivery Ltd. v. Howell*, 2003 CarswellNat 7244, *Mackie v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2004 PSSRB 3, *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26, *Newfoundland Association of Public Employees v. Her Majesty the Queen in Right of Newfoundland as represented by Treasury Board (Department of Environment and Lands)*, 1995 CarswellNfld 549, *Richer v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 10, *Bridgen v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 92, *Teamsters Local Union 230 v. Premier/KVN Concrete* (1993), 29 C.L.A.S. 224, *Teeluck v. Treasury Board (Solicitor General - Correctional Service Canada)*, PSSRB File No. 166-02-27956 (19980820), [1998] C.P.S.S.R.B. No. 76 (QL), *Tobin v. Canada (Attorney General)*, 2009 FCA 254, and *Grievor X v. Canada Revenue Agency*, 2020 FPSLREB 74.

B. For the grievor

[63] The grievor submitted that a number of mitigating factors should be considered that should lead to the conclusion that the termination of his employment was excessive and that instead, a lesser penalty should be imposed.

[64] In addition to addressing the employer's arguments and jurisprudence, the grievor also referred me to *Hughes v. Parks Canada Agency*, 2015 PSLREB 75.

IV. Reasons

[65] Adjudication hearings with respect to discipline under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2) are hearings *de novo*, and the burden of proof is on the employer.

[66] The usual basis for adjudicating discipline issues is by considering the following three questions (see *Wm. Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 C.L.R.B.R. 1): Was there misconduct by the grievor? If so, was the discipline imposed by the employer excessive in the circumstances? If it was excessive, what alternate penalty is just and equitable in the circumstances? In this case, I have been asked to end my inquiry after the first two questions.

A. Was there misconduct by the grievor?

[67] In the letter of termination, the employer determined that as a result of a disciplinary investigation, it was found that the grievor had breached Standards One, Two, and Three of the Code, as he did the following:

- consumed alcohol while on duty;
- failed to provide information related to the November 21 incident;
- colluded with other employees to attempt to cover-up the November 21 incident; and
- provided inconsistent accounts of the events of the November 21 incident throughout the disciplinary process.

[68] At the outset of the hearing, the grievor admitted to having brought and consumed alcohol while on duty as a CX-1 in a CSC vehicle that was driving on public roads on the day in question.

[69] For the reasons that follow, I am satisfied that the grievor breached Standards One, Two, and Three of the Code.

Standard One

Refuses to testify before or submit evidence to, or obstructs, inhibits or otherwise hampers any investigation conducted pursuant to any act of Parliament or any investigation as defined in the Commissioner's Directive on Investigations

[70] The evidence disclosed that on November 21, 2016, the grievor brought beer (containing alcohol) with him to work at Joyceville and that he brought it with him in the CSC van while on the escort he performed that day. As such, it would have been

in his possession at KGH and then on the Millhaven reserve. While he was still on duty, on the public roadways and in the CSC van, he consumed one beer and provided a second one to a fellow CX, Ms. B. He admitted to all of this.

[71] Despite his actions on November 21, 2016, the grievor did not fill out an OSOR. And during the fact-finding investigation, he provided misleading information. He denied any knowledge of the beer cans found in the Stores garbage and denied consuming the beer while on duty. These actions clearly disclose that he refused to submit evidence and that he obstructed, inhibited, and hampered the investigation convened by Ms. Blasko.

Fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates to his or her duty

[72] Bringing alcohol to work, consuming it, and providing it to a fellow officer was a clear failure by the grievor of conforming to and applying the Code and the Standards, both of which prohibit the consumption of alcohol while on duty.

Fails to report to a superior authority any contraband found in the possession of another employee, inmate or member of the public.

[73] The grievor was in possession of alcohol while on duty and provided alcohol to Ms. B. Alcohol is contraband. Regardless of the circumstances within which he found himself, he was duty-bound to report having the alcohol, providing it to Ms. B, and its consumption while on duty.

Performs his or her duty in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service, or any other person(s), either directly or indirectly.

[74] The grievor was on an escort and was issued and was carrying a loaded 9 mm handgun. The sole purpose of a handgun issued in the course of duty to a CX is for lethal force. An officer who consumes alcohol, while on duty and in possession of a loaded handgun, performs his or her duty carelessly and risks not only that officer but also anyone the officer comes in contact with. The grievor breached this provision additionally by providing alcohol to his partner, Ms. B, as she was also carrying a loaded 9 mm handgun.

Standard Two

Displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform;

Acts, while on or off duty, in a manner likely to discredit the Service;

Consumes alcohol and other intoxicants while on duty;

Reports for duty impaired or being unfit for duty due to the influence of alcohol or drugs.

[75] Clearly, consuming alcohol while on duty and while armed with a loaded handgun is behaviour unbecoming of a CSC employee. Doing so is acting in a manner that is likely to discredit the CSC. The grievor did so while on duty and in uniform and in a CSC vehicle on public roads.

[76] At paragraphs 51 and 60 through 62 of *Tobin*, the Federal Court of Appeal addressed the question of discredit and harm to the employer's reputation as follows:

51 In the same way, the Standards of Professional Conduct and the Code of Discipline deal with conduct which will bring discredit to the CSC. Having regard to the CSC's mission, the assessment of whether a criminal conviction, and the circumstances of that conviction, will bring discredit to the CSC are factors to be considered in assessing the appropriateness of the penalty imposed on Mr. Tobin.

...

60 The adjudicator does not specify the form such evidence should take. There may be a role for direct evidence of loss of reputation in some circumstances but it was clearly unreasonable for the adjudicator to set a standard which, for all practical purposes, could never be met. The reputation of a national institution cannot be measured or assessed in the same way as the reputation of a person in the community. How did the adjudicator conceive such evidence might be put before him? Would it be by the way of public opinion surveys? Quite apart from the issue of cost and the judicious use of public funds, it seems to me that the design of such surveys would be fraught with difficulties. For example, how would the employer know to begin the process of collecting evidence of its reputation before the incidents in question? The idea that the state of the CSC's reputation can be gauged with arithmetical precision and that changes in that reputation can be attributed with certainty to one factor or another is simply unreasonable.

61 The passage which the applications judge cited from Fraser v. Canada (Public Service Staff Relations Board), [1985] 2 S.C.R. 455

[Fraser] at paragraph 50 of his Reasons is particularly apposite in this regard. The issue in Fraser was whether a public servant's criticism of government policy resulted in a perception of an impairment of his ability to discharge his duties as a public servant. The concept of impairment, like the concept of discredit, is rather elastic. This is what the Supreme Court said:

Turning to impairment in the wider sense, I am of the opinion that direct evidence is not necessarily required. The traditions and contemporary standards of public service can be matters of direct evidence. But they can also be matters of study, or written and oral argument, of general knowledge on the part of experience [sic] public sector adjudicators, and ultimately of reasonable inference by those adjudicators.

Fraser, supra at paragraph 48

62 The same is true of the question of whether certain conduct brings the CSC into discredit. The question is one which calls for the application of common sense and measured judgment....

[77] Drinking alcohol on duty for the CSC while armed, and providing alcohol to a colleague who is also armed, and while in a CSC vehicle driving on public roads, cannot in any way be seen as showing the CSC, or the federal public service, in a positive manner. It clearly brings discredit to the organization. As set out in *Fraser v. P.S.S.R.B.*, [1985] 2 SCR 455, direct evidence of the public's negative view of the CSC in light of the grievor's actions or behaviour is not needed. Common sense and measured judgement disclose that a reasonable person would view the grievor's actions in a negative manner that also would cast his employer and the CSC in a negative light.

[78] Additionally, the grievor's outright lying in the course of an investigation did not portray the CSC or the federal public service in a positive manner. Nor did his attempt to discredit another employee by casting aspersions about that employee's character when that employee told the truth.

[79] I find that the grievor's behaviour of bringing alcohol with him into the institutions and on the escort and then drinking it, providing it to a colleague, and misleading the investigation into his behaviour comprised serious misconduct that a reasonable and informed observer would view as likely discrediting the CSC and the employer. No actual discredit need be proved.

[80] While the employer did not suggest that the grievor was impaired, in the manner defined in the *Criminal Code* (R.S.C., 1985, c. C-46), the consumption of alcohol, in the form of a can of beer, does cause some impairment. That is what alcohol does. Having consumed the beer, while in the possession of a loaded handgun, meant that he was on duty while impaired or that he was unfit due to the influence of alcohol.

Standard Three

Interferes with the work of others

[81] In simple terms, the CSC is mandated with the housing, care, and control of persons who have been convicted of criminal offences (inmates) and are serving incarceration sentences of two years or more. They live in institutions of different security levels, across the country, based on a number of different factors. Some have been found guilty of violent and vicious crimes and are spending their lives in institutions. Depending on the security level, the inmates' lives, day in and day out, are highly controlled and regulated. The CXs provide security for the institutions and for those who live and work in them.

[82] Standard Three sets out how employees are to relate to other staff members in the performance of their work. The grievor's actions of initially bringing alcohol to work with him, providing it to a co-worker, consuming it, covering up their actions, and attempting to cast blame on others does not promote mutual respect or improve the quality of service, nor does it contribute to a safe, healthy and secure environment, free from harassment and discrimination.

[83] The evidence disclosed that a number of people were involved in investigating and dealing with grievor's misconduct, several of whom testified before me. In addition, his behaviour created an environment in which other employees found themselves caught between doing what was right and being labelled rats, which would have led to suffering harassment and retribution. All this interfered with the work of others.

B. Was the discipline excessive in the circumstances?

[84] As the employer proved the allegations, I now turn to whether the penalty, the termination, was excessive. For the reasons that follow, I am satisfied that it was not excessive, and I decline to set it aside.

[85] The assessment of the penalty in discipline matters in the federal public sector was set out at paragraphs 179 and 180 of *Brazeau*, where the former Public Service Labour Relations Board (PSLRB) stated as follows:

179 Brown and Beatty, Canadian Labour Arbitration, 4th ed., discusses the arbitrator's role in assessing the fairness of a particular penalty imposed as follows:

...

The purpose of their review is to determine for themselves that a sanction is just and reasonable in all the circumstances - that the penalty "fits the crime" (page 7-129)

...

It is now understood that testing the reasonableness of a disciplinary sanction involves a wide-ranging review of a broad set of circumstances concerning the employee, the employer and the incident itself. (page 7-144)

...

Consideration is invariably given to the nature of the misconduct, the personnel circumstances of the employee, the way in which the employer has managed the situation or a combination of all three. The employment context and the employee's occupational and professional status often play important roles as well.

In an effort to give employers and employees a better sense of the analytic framework they employ, arbitrators have provided checklists of the most important factors that typically organize their deliberations. In an early and often-quoted award, one arbitrator summarized in the following terms those factors that, other things being equal, can offset the gravity of the misconduct:

It has been held, however, that where an arbitration board has the power to mitigate the penalty imposed on the grievor, the board should take into considerations in arriving at its decision the following factors:

- 1. The previous record of the grievor*
- 2. The long service of the grievor*
- 3. Whether or not the offence was an isolated incident in the employment history of the grievor*
- 4. Provocation*
- 5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated.*

6. *Whether the penalty imposed has created a special economic hardship for the grievor in light of his particular circumstances*
7. *Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination*
8. *Circumstances negating intent, e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it*
9. *The seriousness of the offence in terms of company policy and company obligations*
10. *Any other circumstances which the board should properly take into consideration (page 7-153)*

...

180 *Discussing rehabilitative potential and the corrective approach, Brown and Beatty write as follows:*

The critical question for arbitrators using a corrective approach is the grievor's capacity to conform to acceptable standards of behaviour in the future. To answer this question requires an assessment of the grievor's ability and willingness to reform and rehabilitate himself or herself so that a satisfactory employment relationship can be re-established. In a word, an arbitrator must decide whether the person is "redeemable". On this view, as one arbitrator pointed out, the checklist of mitigating factors "are but general circumstances of general considerations which bear upon the employee's future prospects for acceptable behaviour, which is the essence of the whole corrective approach to discipline.

In assessing whether a viable employment relationship can be re-established, arbitrators put great weight on whether the employee has tendered a sincere apology and/or expressed real remorse. The assumption is that employees who do so recognized the impropriety of their behaviour and are likely to be able to meet the employer's legitimate expectations.

[Sic throughout]

[86] In *Horne*, at paragraph 204, the PSLRB stated that dishonesty in an investigation is a serious employment offence.

[87] The grievor did not have any discipline on his record, which is a factor in his favour. However, he was not a long-service employee. He joined the CSC only in late 2010, so he had only six years of service as of the November 21 incident.

[88] While there is no evidence that the grievor had previously brought alcohol to work and consumed it while on duty or provided it to a colleague, it was not the entirety of the November 21 incident. When he was interviewed as part of the investigation exactly one month after the November 21 incident, and while represented by a bargaining agent representative, the grievor denied that he had brought the beer to work and consumed it or provided it to Ms. B. At his disciplinary hearing, held on April 25, 2017, some five months after the November 21 incident, and again while represented, he not only once again denied the allegations but also called into question the integrity of another employee (Mr. D) who had provided information about the November 21 incident.

[89] Grievances involving terminations of employment are routinely dealt with at the final level of the grievance process, and this case was no different. The grievor could have come forward then as well; again, he did not. This matter was originally scheduled to be heard together with Ms. B's grievance against her termination that arose from the same fact scenario during the week of March 23, 2020, in Kingston. However, the hearing was postponed due to the lockdown caused by the COVID-19 pandemic. It was rescheduled and was heard via videoconference October 15, 16, and 21, 2020. I was advised that only just before the hearing, Ms. B's grievance had been resolved and that only the grievor's would proceed. Only at that time, in the week before the hearing and almost four years after the November 21 incident, did the grievor admit to bringing beer with him, consuming one, and providing another one to Ms. B.

[90] The grievor's actions of misleading his employer with respect to the November 21 incident, more than once, go directly to his integrity and judgement. In addition, his repeated misleading of his employer occurred well after the event in question and after he had had sufficient time to think through the appropriate course of action. Rather than tell the truth, he pursued a premeditated course, which he continued to maintain as time went on. He had several opportunities to step forward and do the right thing. Yet, despite being given ample opportunity, he not only decided not to but also knowingly chose to mislead his employer. It cannot be said that his actions were one-off, done at the spur of the moment, or an emotional reaction.

[91] The grievor submitted that he has good rehabilitation potential. For the reasons already stated and for those that follow, I do not agree.

[92] I am not prepared to accept the grievor's version about bringing the beer and consuming it on November 21, 2016, as it does not meet the credibility test set out in *Faryna*, which states in part as follows:

...
... the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions...

[93] The grievor stated that when he went to work on November 21, 2016, he had apparently inadvertently left some cans of beer in his gym bag that he had brought to a friend's house the previous evening. He also said that before leaving for work that day, he packed food, soft drinks, water, and perhaps energy drinks into the bag and that he brought it into the institution with him. He said that when he did so, he passed through security, and no one noticed the beer in the bag.

[94] If I am to believe this version of events, I am required to accept that there was a complete breakdown of security at a medium-security prison and that the CXs charged with the important and difficult task of maintaining safety and security at a Canadian institution were so derelict in conducting their duties that they allowed contraband to be walked in through Joyceville's front door. While I do not accept this as a true version of events, if it were the case, the fact that the grievor did not come forward for almost four years made it impossible for the employer to investigate what could have been a serious threat to the safety and security of the institution, the people working there, and, potentially, the public.

[95] In addition, in his testimony, the grievor attempted to downplay any risk to Joyceville due to his consumption of alcohol, stating that he returned there in the vicinity of 22:30 and that he simply hung around the sally port until the night count was completed, which was around a half hour later; he then went home. I do not find this excuse either acceptable or believable, and the only evidence of it is his testimony, which stands in stark contrast to three other pieces of evidence, as follows:

- In his OSOR, Mr. C stated that the time of the event at issue, the emptying of the trash from the CSC van, was 19:00 on November 21.
- The investigation report states that during his interview, Mr. C stated that on November 21, he returned to Joyceville (after going to the Millhaven reserve) at approximately 18:30.
- The transcript of Mr. D's disciplinary hearing notes that he stated that Mr. C told him that he returned to Joyceville at 19:30 on November 21.

[96] While neither of Messrs. C or D testified, the times they provided and that were captured in the documents entered into evidence indicate that Mr. C arrived at Joyceville between 18:30 and 19:30, somewhere between three and four hours before the grievor said they returned. I am prepared to accept that these times, as they were provided by Messrs. C and D in late 2016 and early 2017, are likely more accurate than the self-serving time the grievor provided in late October of 2020. While the times are not exactly the same, they provide a range of within an hour. In addition, they correspond to another time in another portion of the investigation report, where it states that Mr. C stated that he remained at KGH until 17:30 on that day.

[97] Depending on the route, the distance between KGH and the Millhaven reserve is between 25 and 29 km, and again depending on the route, the distance between Millhaven and Joyceville is between 43 and 48 km. All things being equal, given the preponderance of the evidence, it is likely that the time frame of somewhere between 1 to 2 hours to make the trip would be realistic.

[98] Additionally, the times that Mr. C or Mr. D provided were innocuous facts that play no role in the misconduct or the discipline that related to either of them. Neither of them consumed alcohol. The misconduct for which they were being taken to task was their failure to cooperate with respect to reporting and the investigation. The time at which Mr. C returned to Joyceville was irrelevant to anything with respect to misconduct related to either Mr. C or Mr. D. However, it was very relevant to the grievor's misconduct and discipline, as a return at 18:30 to 19:30 would have meant that he was back at Joyceville after consuming alcohol on duty, and at least for a part of the time in possession of a loaded weapon, for between 3.5 and 4.5 hours. Given his history of lying and misrepresentation with respect to the November 21 incident, I am not prepared to accept his statement as to the time at which he returned to the institution. Therefore, this is not, as he suggested, a mitigating factor in his favour.

[99] The grievor said that one of the reasons that he did not tell the truth about what happened was his fear of an overzealous manager and of being overdisciplined.

These statements are simply bald allegations and an attack on his supervisor's integrity. He provided no evidence whatsoever. I heard nothing that would suggest that Mr. Leeman, who was his manager in the segregation unit (where the grievor worked regularly), had disciplined any employee, let alone overdisciplined one. No questions were put to Mr. Leeman about his authority to discipline, what, if any, discipline he has administered, or any examples of his alleged "overzealousness". Also, no evidence of any other overdiscipline or overzealous manager was brought forward.

[100] While the grievor did apologize for his behaviour during the hearing, I do not believe that it was honest or sincere; nor do I believe that he is remorseful. The testimony he provided at the hearing and his apology disclosed that almost four years after the November 21 incident, he maintained a lie and sham until the last possible moment. He admitted to wrongdoing just days before the hearing started and apologized only during the course of his evidence. It is strikingly coincidental that his admission of wrongdoing came only when Ms. B, who was also dismissed in relation to the November 21 incident, settled her grievance at the eleventh hour.

[101] During the course of his testimony, despite using words of apology, the grievor maintained his excuses, in an attempt to minimize his behaviour and to blame others. He said that he forgot he had the beer in his gym bag and suggested that an alleged lack of security and dereliction of duty by his co-workers allowed him to bring the beer into the institution. When he testified about how he came to consume the beer, he said that he did not know that he had opened a beer as opposed to a soft drink, water, or an energy drink. Yet, while acknowledging that he did not know what it was before he took a sip, once he did take that sip, he knew what it was, and rather than dispose of it or stop drinking and pour it out, he drank it. This is rather a convenient story that also does not meet the test set out in *Faryna*. The grievor also attempted to blame his silence on alleged strict managers, evidence of which was not brought forward.

[102] The grievor also maintained he did not come forward sooner because of the rat code. "Rat code" is a term referring to an understanding among people to not reveal damaging information about other people or groups, which usually involves information that would otherwise put that person or group into trouble. The use of this term and the adherence to it in the correctional system is not unheard of,

although the true extent of its practice is not entirely clear. Clear from the evidence before me was that both Messrs. C and D were concerned about ratting out the grievor and [Ms. B], and Ms. Boyce stated that she was subject to the rat code when she was treated with silence and ignored.

[103] Adherence to the so-called “rat code” is certainly not a legitimate excuse for not coming forward and admitting wrongdoing. Even if it was an issue for the grievor, it should have no longer been one long in advance of mere days before the hearing of his grievance. Indeed, by mid-2017, he was out of a job. Was he concerned about the rat code once he was terminated? I would think that he should not have been.

[104] In fact, the grievor should have had the foresight to realize that by the time of his disciplinary hearing, he was in serious trouble, based on what he knew the employer knew and because he knew he was lying and that he was culpable for his conduct relative to the November 21 incident. Surely, saving his job was more important than the rat code. Again, the grievor’s evidence in this respect is not congruent with the test in *Faryna* and appears to be nothing more than an empty excuse. In any event, despite saying that he was concerned about the rat code, he provided no details of anyone even suggesting that he not tell the truth or that he should lie or misrepresent what happened and that unless he did so, unfavourable things would happen to him.

[105] The grievor also submitted that after the termination of his employment, he had difficulty finding a new job, and that when he did, he earned much less, in essence minimum wage, with fewer benefits and no union representation. He also stated that he enjoyed his work as a CX and that he enjoyed working with his fellow CXs. While this is unfortunate, the fact that discipline has a financial impact on an employee does not in and of itself serve to require an arbitrator, adjudicator or arbitration board to reinstate that employee. Otherwise, no termination case in which an employee lost his or her job and suffered financially could be maintained.

[106] The grievor also suggested that despite his behaviour, he believes that he continued to carry out escorts and his work routine did not change and, as such, this should be a factor in his favour. However, his evidence in this regard was far from certain, and given this uncertainty and his difficulty presenting the truth, I am not

prepared to accept his statement to that effect in weighing factors regarding whether or not the discipline imposed by the employer was excessive.

C. Miscellaneous

[107] In his submissions, the grievor alluded to the fact that it was inappropriate for Mr. Leeman to be a part of the investigation, as he was in a supervisory capacity to the grievor. While it probably makes good sense that an immediate supervisor not normally be involved as an investigator in an investigation of an immediate subordinate, the section of the Code that prohibits an immediate supervisor from being a part of a fact-finding investigation is not a general prohibition but involves fact finding into the mistreatment of inmates under Annex A.

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

(The Order appears on the next page)

V. Order

[109] The grievance is denied.

March 30, 2021.

**John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board**