Date: 20211216

File: 566-02-14603

Citation: 2021 FPSLREB 138

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

KEVIN RANSOME

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Adam Cembrowski, counsel

For the Respondent: Joel Stelpstra, counsel

Heard via videoconference,
May 25 to 28, 2021.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] Kevin Ransome ("the grievor") was a correctional officer at the Correctional Service of Canada's (CSC or "the employer") Edmonton Institution ("the institution"), a maximum-security penitentiary. On October 6, 2016, he was alleged to have left his post without authorization and to have failed to respond to an inmate altercation. His employment was terminated for this alleged misconduct on June 19, 2017.

II. Preliminary issues

A. Sealing and confidentiality order

[2] At the hearing, video evidence of the assaults that included inmates' faces, as well as audio evidence of the response to the assaults that included an inmate's name, were introduced. The employer also introduced a floor plan of part of the institution. It requested a sealing and confidentiality order, and the grievor did not object. I ordered these exhibits sealed.

[3] The principle of the public nature of evidence and hearings before the Federal Public Sector Labour Relations and Employment Board ("the Board") is well established. The test for restricting the open court principle is whether the restriction is necessary to prevent a serious risk to an important interest, because reasonable alternative measures will not prevent the risk, and whether the salutary effects of the order outweigh its deleterious effects, including the public interest in open and accessible court proceedings; see *N.J. v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129 at para. 48.

[4] I found it appropriate to seal the exhibits. It is in the public interest to respect the privacy of inmates. The security of correctional institutions is also an important public interest; see *Boucher v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 106. Public access to inmates' identities is a serious risk to their privacy. Public access to the institution's floor plan poses a serious risk to its security. Less-restrictive measures would not protect either inmates' identities or the institution's security.

[5] Finally, in this case, the advantages of protecting the inmates' identities and sealing the floor plan outweigh any negative effects of that protection and sealing (that

is, depriving the public of its right to access a document and information adduced into evidence during a quasi-judicial proceeding). Sealing the videos and documents does not in any way affect the transparency of this decision or this quasi-judicial process. Therefore, the following exhibits are ordered sealed: E-2, E-3, E-4, E-5, and G-2.

[6] When these exhibits were presented at different points during the hearing, it was closed to the public.

[7] The employer redacted additional exhibits, to protect the inmates' identities. For the same reasons as granting the confidentiality and sealing order, I allowed the introduction of the redacted exhibits.

B. Bifurcation of the hearing

[8] The grievor does not seek reinstatement and requested that the hearing be bifurcated as to the appropriate remedy, were the grievance allowed in whole or in part. The employer objected to this request.

[9] I allowed the bifurcation of the hearing. I determined that it was the best use of the time available for the hearing. When the bifurcation request was made, the outcome of the hearing was not known. If the grievance were denied, there would have been no need for the additional evidence. If the grievance were allowed in whole or in part, in my experience, parties have often been able to reach an agreement on the appropriate remedy. Accordingly, I accepted the grievor's motion to bifurcate the hearing.

III. Summary of the evidence

A. The grievor's job duties and responsibilities

[10] The grievor was a correctional officer at the institution. He was classified at the CX-01 group and level from February 2011 until his dismissal. At the time relevant to this grievance (October 6, 2016), he was in a gallery officer position. October 6, 2016, was his second time on this post. A gallery officer patrols the observation galleries and observes inmate activities, to ensure a safe and secure environment. Patrols must be made regularly that focus on all inmate-occupied areas. The Post Order for the institution for this position states as follows:

…

> *The Gallery Officers will maintain surveillance over offenders, staff, and visitors within his/her field of vision. Officers in these posts shall provide security presence as required while paying particular attention to offender, visitor, and interior staff activities during scheduled movement and/or recreational activities within the exercise yards, common rooms, dining halls, recreation/weight rooms, program areas, health services rooms and interview rooms.*
>
> …

[11] A gallery officer is required to wear a two-way radio while on duty. He or she is also responsible for carrying assigned firearms while on duty. The grievor testified that he was required to have his rifle with him at all times while on the gallery post. Additional firearms and munitions are secured in designated locations. The gallery officer's role is to patrol the gallery on a "regular basis" by viewing all areas occupied by inmates as well as using closed-circuit television monitors to supplement direct supervision.

[12] The Post Order states that gallery officers "… will at NO time leave their area of duty without authorization… [emphasis in the original]" from the duty correctional manager. Gallery officers are also required to be on "constant alert" for any indicators of inmate unrest. In the event of a "situation", the Post Order contains the following instructions for them:

> …
>
> *Officers shall ensure the safety of staff and inmates in their area and intervene in the event of a situation (Observation of Officers on the ranges is a priority). This includes the use of firearms, oleoresin capsicum (OC) gas/spray and other assigned equipment.*
>
> …

[13] I heard testimony about the physical layout of the gallery post and was provided with a diagram of it and Unit 5. As I noted earlier, the diagram has been sealed, due to its confidential nature. I am also mindful that a detailed description of the layout could compromise the institution's security. Therefore, I have not summarized the testimonies of witnesses about layout and locations. However, I considered this evidence in reaching my conclusions about the grievor's actions during the incident.

[14] Chase Mayer, a correctional officer, testified about the gallery post. He stated that it had a mini-refrigerator and a microwave on a wooden desk. The correctional officers used them for storing and reheating their lunches. There is also a bathroom on

the post. Later in this decision, I will discuss correctional officers using the bathroom while on post.

B. The Commissioner's Directive on *Management of Security Incidents*

[15] The Commissioner's Directive (CD) on *Management of Security Incidents* (CD-567; "the Directive") sets out the responsibilities of management and officers in a security incident, such as the one on October 6, 2016. It also sets out the Situation Management Model (discussed later in this section).

[16] The head of the institution has the overall responsibility for implementing security policies and procedures as well as for ensuring that staff are equipped and trained in their duties. Following a security incident, the head is required to "… return the institution to a safe and secure environment as soon as possible, managing any resulting challenges". He or she is also responsible for debriefing all individuals involved in the incident.

[17] Staff at the institution are responsible for knowing and understanding the applicable law, policies, and procedures and for considering "… cultural, physical health, mental health and gender issues in their interventions". Correctional officers are also responsible for taking "every reasonable step" to return the institution to a safe and secure environment as soon as possible when they become aware of a situation that jeopardizes the security of the institution or the safety of the public, staff, or inmates. In addition, correctional officers are required to "… resolve conflicts and problems at the lowest level possible".

[18] The Directive also states that all interventions to manage or control security incidents "will be consistent with" the Situation Management Model, which is a circular graphic setting out the appropriate responses to a security incident. Under it, the following responses are considered appropriate in cases of grievous bodily harm: verbal orders, inflammatory or chemical agents, batons and other intermediary weapons, and firearms.

[19] The Directive defines "grievous bodily harm" as follows:

> *… any injury having the potential to endanger life, or which results in permanent physical impairment, significant disfigurement or protracted loss of normal functioning. It includes,*

> *but is not limited to, major bone fractures, the severing of limbs or extremities, and wounds involving damage to internal organs.*

[20] The Directive also sets out the process for selecting the appropriate management strategies for a security incident, as follows: "Every incident will be managed using the safest and most reasonable response, and be limited to only what is necessary and proportionate to attain the purposes of the CCRA [*Corrections and Conditional Release Act* (S.C. 1992, c. 20)] and to respond to the situation." The responses include verbal intervention, conflict resolution and negotiation, chemical and inflammatory agents, physical handling, batons and other intermediary weapons, and firearms. The relevant possible responses in the circumstances of this grievance (given the grievor's distance from the inmates involved in the assaults) were verbal intervention, chemical and inflammatory agents, and firearms. The Directive sets out the following requirements for each of these responses:

> …
>
> ***Verbal Intervention, Conflict Resolution and Negotiation***
>
> *17. Whenever appropriate, staff will manage situations using dynamic security, staff presence, verbal intervention, conflict resolution, negotiations, or verbal orders.*
>
> …
>
> ***Chemical and Inflammatory Agents and Physical Handling***
>
> *19. When an inmate is physically uncooperative, the following three options offer a continuum of responses that are most often used in combination to manage the situation:*
>
> *a. chemical agent …*
>
> *b. inflammatory agent …*
>
> …
>
> ***Firearms***
>
> *22. The use of firearms, in the form of the delivery of a deliberately aimed shot at a person, is limited to preventing grievous bodily harm, death or escape from a medium or maximum-security institution and satisfies the criteria pursuant to subsection 25(5) of the* Criminal Code
>
> "A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the CCRA, if
>
> (a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person

> (b) the escape cannot be prevented by reasonable means in a less violent manner"
>
> *23. A firearm may be used only when other response options are not available, when it is safe, and when it is necessary and proportionate to attain the purposes of the CCRA and given the situational factors.*
>
> *24. Firearms may also be used indirectly via physical presence with a firearm, charging of the firearm and/or use of a warning shot. The physical presence of a firearm in conjunction with the duties of an armed post does not constitute a use of force (e.g. catwalk or in a tower) unless the firearm is pointed at an individual or displayed as a show of force or for psychological effect.*
>
> …

[21] The Directive also defines a "warning shot" as "… a shot that is directed into a safe area and is not intended to harm anyone."

[22] Commissioner's Directive (CD) 567-5, "Use of Firearms", sets out the responsibilities of a correctional officer in the use of a firearm during a security incident. In particular, the requirements for a warning shot are as follows:

> …
>
> *13. Before warning shots are fired, a verbal warning will be given, unless time and circumstances do not permit.*
>
> *14. A warning shot may be used to prevent death, grievous bodily harm or escapes from a medium or maximum-security institution when all lesser means are not available, have proven unsuccessful or are not the safest and most reasonable intervention given situational factors.*
>
> …

C. The events of October 6, 2016

[23] The facts surrounding the inmates' altercation are largely undisputed.

[24] On October 6, 2016, the grievor was on an eight-hour shift as the gallery officer on Unit 5. He was the only correctional officer on the gallery. Shortly after the start of his shift, he noticed that ear protection for use with a firearm ("ear defenders") were not on the post. He emailed a correctional manager to advise that they were not on the post.

[25] There is a bathroom on the gallery post. Mr. Mayer testified that it was common for officers to use the bathrooms on post if nothing was going on. He stated that if the officer would be away for only one or two minutes, then asking for relief was not required. The grievor described that length of time as a "pee break". Mr. Mayer testified that these quick breaks to urinate happen "every day" at the institution. He also testified that this practice was discussed in on-the-job training. The grievor testified that taking a quick pee break was the general practice of all correctional officers at the institution. In his testimony, Clovis Lapointe, the acting warden at the institution in 2016, did not agree that that was the practice at the institution.

[26] Mr. Mayer testified that a correctional officer must use judgement when deciding whether to use the bathroom and must determine that the risk level is low. For example, he said, an officer would not take a short break when a search of the ranges is being conducted. He testified that if he was on the gallery, he would wait until the correctional officers were not doing any activities on the range. He stated that he would also not go if "something seemed tense" and arguing was occurring. If there were no activities, for example, if the inmates were playing cards, then he would go if he really had to. When inmate movement is taking place, there is a higher risk, he stated. He also testified that he would probably check all the areas he was responsible for before taking a break.

[27] Before heading to the bathroom for a pee break on that shift, the grievor checked all the cameras and then made a visual check and patrol of the entire gallery. He testified that everything seemed quiet and that the inmates were playing cards. He also noted that there was no visible animosity and that correctional staff were not carrying out walks at the time. He testified that incidents tend to happen at the beginning or ending of inmate movements from one area to another.

[28] The inmates from L and M ranges are incompatible and are always separated. At approximately 7:09 p.m., a correctional officer who had recently transferred to the institution and was on training at the Unit 5 sub-control opened the door between M Range of Unit 5 and the exercise and gym area while inmates from L Range were in the area. As a result of the M Range door to the gym area being opened, 11 inmates from M range ran into the exercise and gym area and assaulted 2 inmates from L Range (inmate "J" and inmate "L").

[29] Another correctional officer assigned to sub-control stated in his "Statement/Observation Report" (SOR) that he observed inmates from the M unit attacking two inmates from L unit. He then made a radio transmission stating that there was a fight in the L and M recreation yard. The radio transmission was entered as an exhibit at the hearing (and was sealed).

[30] As the grievor stepped into the bathroom, he heard the radio transmission. He immediately stepped out of the bathroom, without taking a pee break. He testified that from his hearing of the radio transmission, the location of the fight was in the J and K recreation yard. He then checked the other units until he finally reached the location of the fight (the M and L recreation area).

[31] Through one window, he saw one inmate off to the side (inmate J) and not being attacked at that moment. He then went to the other side of the recreation area and saw what looked like a fist fight taking place behind a low privacy wall. He could see what he thought were downward punches on inmate L.

[32] He testified that he assessed that chemical spray was the appropriate response, and he went to get it. By the time he returned, the fight had stopped. The chemical spray that he went to retrieve is called ISPRA (the brand name of a highly pressurized, high-intensity canister that sprays liquid agent up to 45 metres).

[33] In cross-examination, the grievor was asked why he did not take the chemical spray when he passed by its location on his way to the incident. He testified that at the time, he was experiencing "panic" or "panicking".

[34] The grievor testified that he did not consider firing a warning shot because he could not see any weapons being used by the inmates. He stated that he could not see the inmate behind the low wall, so he could not see the inmate's injuries.

[35] The grievor also testified that he determined that yelling at the inmates would have been ineffective. Music was playing, and the inmates were noisy. He also stated that no public address system was available through which to give verbal commands.

[36] Approximately one-and-a-half minutes after the door opened, the inmates from M Range returned to their range, and the door from M Range to the gym was secured.

[37] Correctional officers arrived at the gym and exercise area after the assault had occurred and remained behind a barrier until it was safe to enter.

[38] The institutional incident report noted that inmate J had wounds to his upper arm and right lateral side that required sutures. He had 10 puncture wounds. The severity of his injuries was characterized in the report as "non-serious". Inmate L had a fractured right mandible that required surgery. He also had 12 puncture wounds on his back as well as a black eye. This injury was characterized as "serious".

[39] After the area was cleared, a correctional officer conducted a search and found two pieces of Lexan (a polycarbonate resin thermoplastic) of approximately four inches in length sharpened to a point, with a handle made of bedding sheets.

[40] Shortly after the incident, the grievor prepared an SOR that stated as follows:

> *On 2016-10-06 at 1920 hours, I cx-1 Ransome, Kevin was posted to Unit 5 in the gallery supervision post when the following occurred.*
>
> *While attempting to go to the washroom a radio transmission for inmate fight unit 5 was* [heard]*. I could not make out which gym/rec side it was as both gym/rec were being utilized at the time. I checked J-K range gym/rec area and did not see any fights. Then arrived over to the L-M side of the range gym/rec where I witnessed an altercation but could not use any response options as there was no hearing protection available in the unit and the ispra was at the other gym/rec. Went and retrieved the ispra but when returning to L-M gym/rec the fight was over and staff was arriving on scene. I observed all inmates being escorted to their cells with no further incident.*

[41] In a rebuttal to the investigation report prepared by the grievor (discussed later), he summarized his reconstruction of the events as follows:

> *… based off the information received over radio, I went from the bathroom straight to J/K yard, the distance is 42 steps from the bathroom to J/K yard. I observed inmates crowding into the vestibule to come back into the gym. At that point I started moving back to check the gym for J/K. Because of the blind spots I had to backtrack to the other side of J/K to try to find this fight that was called, this is a total of 22 steps. I then checked the units on social time to make sure it wasn't called for those units before heading to the L/M rec yard which is another 42 steps. By the time I got to see where the fight was, it was in the far right corner of L/M Gym. My immediate response to what I could see as a physical altercation was to disperse inflammatory agents. I immediately moved to grab the ISPRA, which would be the appropriate response option, which*

> *is another 35 steps, but by the time I returned and opened the door the fight was over. To search for this fight it is a rough total of 141 steps with 16 windows/gun ports to check to attempt to find this fight. From the time the inmates enter to the time they vacate is 1 minute and 23 seconds. If you were to take 3 seconds checking each of the 16 windows it would be 48 seconds. I recently timed myself reenacting [sic] the response and with checking each window for 3 seconds moving as fast as possible I got to L/M gym in 1 minute 18 seconds leaving 5 seconds left. Which at that time like I stated before when I arrived the fight literally just stopped and the inmates were heading back to M range. Had there not been any confusion as to where the fight had been located this timing could have been a lot better. With the fight being over at that point, I stood watch as staff cleared the gym.…*

[42] The grievor testified that his SOR was poorly written. He testified that he wrote it while in a "bad state of mind" and that it was "stupid". He stated that for some reason, he focused on the lack of hearing protection, when he had already concluded that an armed response was not appropriate.

[43] In cross-examination at the hearing, the grievor admitted that he did not invoke any of his rights under the occupational health and safety regime when he noticed that the ear defenders were missing but stated that he "probably should have".

[44] The Security Equipment Manual states that hearing protection (including ear defenders) are for protection against noise exposure during firearms training and "… other conditions where ear protection is required".

[45] The grievor testified that when he arrived at the location of the assault, he could only see fists being used or what he described as "downward punching". He testified that he did not observe any weapons. Inmate L was being assaulted behind a low privacy wall. He also testified that he did not see the extent of injuries to inmate J.

[46] In cross-examination, the grievor was asked why he did not fire a warning shot when he observed the altercation. He stated that he was required to have a subjective belief that there was grievous bodily harm before he could fire a warning shot. When counsel for the employer suggested that grievous bodily harm was not required for a warning shot, the grievor replied that to use a warning shot, he was required to have proof that any lesser means of force would not be effective. He stated that it was his obligation to use the least lethal amount of force.

D. The investigation and the rebuttals

[47] Mr. Lapointe, the acting warden, testified that he likely became aware of the incident the following morning (October 7, 2016). He also testified that he likely had to submit a situation report for review by the CSC's commissioner. That situation report was not entered as an exhibit at the hearing. On October 26, 2016, he issued a convening order with the following allegation: "… on October 6, 2016, Correctional Officer I Kevin Ransome is alleged to have left post without authorization and failed to respond to an altercation between inmates on Unit 5." In the notice of a disciplinary investigation that Mr. Lapointe provided to the grievor, he noted this:

> …
>
> *Such action, if founded, constitutes a breach of CSC's* Standards of Professional Conduct *and/or CSC's* Code of Discipline.…
>
> …
>
> *Should the disciplinary investigation conclude that these allegations are founded, disciplinary action may be taken up to and including rejection on probation [sic].*
>
> …

[48] The employer accepts that the grievor was not on probation at the time of the incident.

[49] The disciplinary investigation was chaired by Nancy Shore, Assistant Warden, Operations, at the CSC's Bowden Institution. She was assisted by Dan Erickson, a former CSC employee. The investigation report was completed on February 2, 2017. Ms. Shore testified at the hearing.

[50] Ms. Shore testified that the investigation board's role was to review only the grievor's actions and not those of other correctional officers. She stated that if the investigation board had had concerns about other officers, it would have stopped the investigation and asked Mr. Lapointe if he wanted to amend the convening order.

[51] In its interviews of other correctional officers, the investigation board was told that the officer who inadvertently opened the door was "… actually 1 of the 6 posted staff despite being on OJT (post orientation)." When the door was opened, just two correctional officers were in the "bubble", including the correctional officer who was being trained. The other correctional officer in the bubble at the relevant time stated that the door control system for Unit 5 was different from those in the rest of the

institution. The investigation board confirmed that the correctional officer on training was not considered 1 of the 6 staff assigned to the unit and was being oriented to the post.

[52] The investigation board offered to play the video of the incident for the grievor, but he said that it was not that relevant, and he did not take the investigators' offer.

[53] The investigation board reviewed the recordings of the radio transmissions and confirmed that "there was some confusion" as to the location of the incident and that the grievor was not clearly called to the L and M yard. However, the board concluded that when he did arrive, he observed the fight in progress, and he should have taken immediate action. The board identified the following appropriate options: "… verbal intervention (yelling at them to stop) and firing a warning shot …". However, elsewhere in its report, it stated that an appropriate response "… could have been an initial verbal warning and followed by chemical agents or firearms …".

[54] The investigation board asked the grievor if he would have taken a warning shot had the ear defenders been available. The board reported that he said that "… he could have but up there any boom is going to be loud and that he did not have ear protection …". He was also asked if he had thought of a verbal warning, and he stated that he believed that the most effective tool was the ISPRA, since he did not see a weapon.

[55] Ms. Shore testified that using ear defenders with firearms was optional and that it was expected that an officer would use a firearm without ear defenders, if necessary.

[56] Ms. Shore stated that the grievor's appropriate response to the incident would depend on what he was able to see. She believed that he was able to see the altercation, the amount of blood, and the condition of the inmates, including puncture wounds. She testified that his immediate response could have included issuing a verbal warning, using a chemical spray, or firing a warning shot. She testified that the investigation board concluded that those were the appropriate responses because it was "quite obvious" that there were injuries and that there was a significant amount of blood.

[57] Ms. Shore testified that in the grievor's interview, he deflected responsibility for his actions to the institution's administration.

[58] The investigation board concluded that the grievor had committed the following infractions of the CSC's *Code of Discipline*:

> …
>
> *1. Paragraph 6 (f) "*fails to take action or otherwise neglects his/her duty as a peace officer*" when C01 RANSOME failed to respond according to the Situation Management Model to the assault in the unit 5 gym area when he took no action to cease the assault.*
>
> *2. Paragraph 6 (g), "*fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order or other directives as it relates to his or her duty*"; when CO RANSOME failed to comply with Post Order Building 5 - Gallery Officer and CD 567 - Management of Security Incidents.* When *he failed to complete the post change over security post and submit an Observation Report* [of] *the deficiency to the Correctional Manager.*
>
> *3. Paragraph 6 (p)* neglects to take, to the utmost of his/her ability, appropriate action when an offender: ii. assaults an employee, another offender, or member of the public, or iii. engages in any action likely to endanger life or property*. C01 RANSOME failed to respond in accordance with the Situation Management Model to the assault in the unit 5 gym area which resulted in 2 inmates sustaining significant injuries.*
>
> *4. Paragraph 6 (b) "*is late for duty, absent from duty or leaves his/her assigned place of duty without authorization when *he failed to seek authorization from the Correctional Manager to leave his area as per Edmonton Institution Post Order Building 5 Gallery Officer.*
>
> …

[59] The investigation board concluded that the grievor did not respond to the assault until after it concluded. The board also concluded that a lack of ear protection was not a valid reason for failing to use his firearm.

[60] Mr. Lapointe received the investigation report on February 8, 2017. The grievor received it on February 28, 2017. He wrote a rebuttal to it on the day he received it. He testified that it was "panicked" writing and that he had intended it to be replaced by a rebuttal he wrote later (discussed later in this decision).

[61] In the first rebuttal, the grievor made the following points, contesting the findings in the investigation report:

- Due to staffing issues, he was required to work on the gallery that day and did not receive any on-the-job training for this position.
- Post orders, handover sheets, or any other information on how to operate the post was not directly available. There was no computer in the gallery from which an officer could obtain this information.
- There should have been two officers on the gallery, and the staffing error put him in his words "under unnecessary pressure, stress" and set him up to fail.
- Unlike other parts of the institution, one officer had to attempt to respond to six different areas if something went wrong.
- All gallery posts have an available bathroom located on post for use by the officers staffing the gallery.
- He had a medical condition causing him to need to use the bathroom more than usual.
- The Board's finding that the radio transmission was unclear validated his position that he was delayed in his response as he checked the J and K yard and then the gym first before responding to L and M ranges.
- No information that weapons were involved was transmitted over the radio in a clear and concise manner. Had a clear and concise radio transmission of the status of the altercation been made, he could have had the opportunity to not only respond in a timely fashion but also to use the appropriate use-of-force options available.
- His subjective belief was that he witnessed a physical fight, and under the Use of Force Continuum, OC spray would be the appropriate measure, and by distance, the ISPRA would be the appropriate use-of-force option.
- He went to retrieve the ISPRA, and by the time he returned, the fight was over.

[62] The grievor wrote a second rebuttal on March 13, 2017. He testified that he thought that it would replace his first one.

[63] In the second rebuttal, he stated that the bathroom was within the post area and that "[i]n no way by using the bathroom officers are leaving the post." He also noted that there was no bathroom relief schedule and there had never been a requirement for a correctional officer to notify the duty correctional manager to use a bathroom on post.

[64] He also objected to the statement in the investigation report that the investigators' impression was that his role in the gallery was to protect only staff and not inmates. He wrote that he had simply stated that there were no officers on the range, so he elected to take a quick bathroom break. He stated that he knew that he was there for both staff and inmate safety.

E. The disciplinary hearing

[65] A disciplinary hearing with Mr. Lapointe was held on March 16, 2017. The grievor had a bargaining agent representative with him. Mr. Lapointe was accompanied by a labour relations officer, who took notes.

[66] The grievor's representative stated that the grievor had not seen the video of the incident that the investigators relied on. He said that the investigators had an obligation to show him the evidence they relied on. Mr. Lapointe responded that this was not necessarily the case, adding, "Sometimes they do, and sometimes they don't." He told the grievor that if he had asked to see the video, the investigators would probably have shown it to him. Mr. Lapointe also stated that the video was not a major component of the investigation.

[67] Mr. Lapointe reviewed the findings in the investigation report. He then stated that one of the inmates had an artery cut open and "almost died." He then asked the grievor where he was at the time of the incident. The grievor stated that he had to go the bathroom, so he checked the computer screen, took a quick look at the monitors, and made a physical patrol. He then went to go to the bathroom, when he heard a "muffled" radio transmission that he thought referred to J and K when the altercation turned out to be at L and M. He told Mr. Lapointe that by the time he found the fight, "it was done."

[68] He told Mr. Lapointe that after the incident, he counted the steps and the time it took to respond to the incident. He stated that it took 48 seconds to check all the windows. He stated that he retraced his steps and that the quickest he could complete the circuit was 1 minute and 18 seconds, leaving only 5 seconds for a response.

[69] Mr. Lapointe asked the grievor about his statement in his SOR that he could not take a shot because he did not have ear defenders. He stated that he wrote the SOR quickly and that he knew that it looked like he was focused on the ear defenders in his report but that that was not really what he was "trying to get at." He stated that he would have liked to have rewritten his SOR. He then clarified that even had he had ear defenders, he was not certain if he would have fired a warning shot. He said that he saw a fight, but it was physical, and by the time he arrived, it was almost over.

[70] The grievor told Mr. Lapointe that he thought that the statement in the investigation report that the incident could have led to death was speculation. Mr. Lapointe responded (as summarized in the meeting notes), "No that is fact. Then maybe you should read the medical report. His artery was hanging on by a thread. If the first aid response wouldn't have been as good as it was, then he would have died." The grievor requested the disclosure of the medical report as part of the proceeding. The employer conceded that Mr. Lapointe never saw a medical report.

F. After the disciplinary hearing

[71] The parties agreed that after the disciplinary hearing, the grievor continued to work on armed posts and security details, including working in the gallery post position. He testified that he received no retraining after the incident and that he was under no restrictions while carrying out these duties.

[72] Mr. Lapointe testified that the delay between the disciplinary hearing and the letter of termination (discussed in the next section) was due to his need for support from national headquarters. He testified that the grievor continued to work at armed posts until his termination of employment. Mr. Lapointe stated that it was his decision to assign the grievor duties while he waited for the "higher level" review of the decision. He testified that as of the incident, he did not have the information he needed to remove the grievor from his duties. In cross-examination, he agreed that he had concerns about the grievor's ability to carry out his duties after the disciplinary hearing in March 2017.

[73] Mr. Lapointe testified that shortly after the incident, he spoke to the officer who opened the door. He stated that she had only recently started working at the institution and that she had made a "non-culpable" mistake. He testified that she was distraught due to her mistake.

[74] Mr. Lapointe testified that no other correctional officer received discipline due to the incident of October 6, 2016.

G. The letter of termination

[75] Mr. Lapointe provided a letter of termination to the grievor on June 19, 2017. He wrote this:

…

> *… After a thorough review of the evidence including the disciplinary investigation report, your two written rebuttals and the information provided by you during the disciplinary process; I find that your actions on October 6, 2016 were not in accordance with the behavior [sic] expected of a CSC employee. You have failed to acknowledge the seriousness of the incident or recognize that an inmate nearly died because of the decisions you made that evening. Your decision to proceed to the washroom, without asking for relief, when you were the only armed presence in the gallery that evening, was a significant error in judgement that resulted in the near death of an inmate. I have no confidence in your ability to effectively carry out the duties of a correctional officer and your behaviour shows clear disregard for the Standards of Professional Conduct.…*
>
> …

[76] The letter identified the following infractions of the *Code of Discipline*:

> …
>
> • *6 (b) "*is late for duty, absent from duty or leaves his/her assigned place of duty without authorization*";*
>
> • *6 (f) "*fails to take action or otherwise neglects his/her duty as a peace officer*";*
>
> • *6 (g) "*fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directives as it relates to his or her duty*";*
>
> • *6 (p) "*neglects to take, to the utmost of his/her ability, appropriate action when an offender: Assaults an employee, another offender, or member of the public, or Engages in any action likely to endanger life or property*".*
>
> …

[77] Mr. Lapointe concluded as follows:

> …
>
> *After careful consideration, I have determined that you do not demonstrate the values and ethics required of a CSC employee as outlined in CSC's Mission Statement. By your actions you have irreparably broken and compromised the employment relationship. Your misconduct is of such a serious nature that you breached the fundamental principles of professionalism and accountability within the employment relationship which must exist between you and CSC. I am therefore unable to maintain confidence or trust in your ability to perform your duties as an employee of CSC and peace officer.*

> *Accordingly, given the seriousness of your misconduct a decision has been made to terminate your employment for disciplinary reasons.…*
>
> …

[78] Mr. Lapointe testified that in coming to his decision, he reviewed the investigation report, the two rebuttals, and the grievor's statements at the disciplinary hearing. He testified that he had serious concerns about the grievor's February rebuttal, which he said showed that the grievor did not believe that he did anything wrong. Mr. Lapointe stated that the rebuttal was a "massive deflection". He testified that the grievor's statements to the investigation board, his rebuttals, and his statements at the disciplinary hearing did not differ much. Mr. Lapointe stated that his impression was that the incident "meant nothing to" the grievor, who had an excuse for everything.

[79] Mr. Lapointe testified that the grievor could have circled the whole area in 10 seconds had he ran. He testified that the inmates could have died from their injuries. He stated that the behaviour he expected from the grievor was being alert and paying attention. He stated that the grievor would have had the full authority to fire a shot at the centre of the altercation, although usually a warning shot is sufficient. He testified that a warning shot should have been the first response, not going for the chemical spray.

[80] In cross-examination, Mr. Lapointe agreed that the assessment of the appropriate response to an incident will depend on the correctional officer's knowledge.

[81] In cross-examination, Mr. Lapointe also admitted that he had not seen any medical reports of the inmates' injuries. He denied that he exaggerated the extent of the injuries.

[82] Mr. Lapointe was also asked in cross-examination about the presence of a refrigerator and a microwave on the post. He was not aware of them and said that likely, management would not have approved the refrigerator.

[83] In cross-examination, Mr. Lapointe was asked about bathroom breaks and whether it was customary not to call a manager for relief when it was just a pee break. He stated that that was not the case when he was a correctional officer.

[84] Mr. Lapointe initially stated that a correctional officer would not walk around the post with a firearm. He later admitted that it could be that the post order for the gallery required constantly carrying a firearm.

[85] Mr. Lapointe testified that the bond of trust had been broken as the grievor had no recognition of any wrongdoing and had expressed no remorse. He testified that he had looked for mitigating factors but found none. He testified that because of the grievor's failure to recognize his misconduct, there was a potential for it to happen again.

[86] In the final-level grievance reply, Nick Fabiano, Acting Assistant Commissioner, stated that management took into account "a number of factors" in reaching the decision to terminate the grievor's employment, including the two rebuttal letters, the serious nature of the inmate's injuries, and the grievor's failure to acknowledge the seriousness of his actions. He concluded with this:

> *I am of the view that the nature of your misconduct is serious. You were found to have committed a number of acts of misconduct and your actions and behavior [sic] had serious consequences on public safety, the safety of offenders and fellow colleagues.*

[87] At the hearing, the grievor testified that he felt terrible after the incident. He stated that during the investigation, he did not have time to voice any of his feelings about the incident and that he spent the time going over it, trying to explain and to "clear things up". He testified that he could have done better and that he had learned from the incident.

IV. Reasons

[88] The parties agreed that the test for the adjudicator to use in discipline cases is set out in *William Scott & Company Ltd. v. Canadian Food and Allied Workers Union, Local P-162*, [1977] 1 Can. LRBR 1 ("*Wm. Scott*"), and *Basra v. Canada (Attorney General)*, 2010 FCA 24, as follows:

- Has the employee given reasonable cause for some sort of discipline by the employer (i.e., was there misconduct by the employee)?
- If so, was the discipline the employer imposed an excessive penalty in the circumstances?
- If it was excessive, what alternate measure should be substituted that is just and equitable in the circumstances?

A. Was there misconduct?

[89] The employer relied on alleged misconduct from one incident on October 6, 2016. The letter of termination refers to four infractions of the *Code of Discipline* (set out at in the second paragraph of the letter) that were taken from the investigation board's report, which included the grievor's failure to complete the post changeover form and to submit an observation report of the deficiency (lack of appropriate equipment) to the correctional manager. However, the letter of termination refers only to the alleged abandonment of his post and his alleged failure to respond appropriately to the inmate altercation. In the absence of a direct reference to changeover forms in the letter of termination, I have determined that the employer did not rely on this finding as a ground of discipline.

[90] The employer stated that the grievor's misconduct was serious. It submitted that the misconduct occurred when he went to the washroom when inmates were in the gym and he was the only officer on duty. In the employer's view, there is no acceptable time at a maximum-security institution for a correctional officer to step away from his or her duties (see *Yayé v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 51 at para. 130).

[91] The employer also submitted that stepping away from the post was contrary to the post order for the gallery. It maintained that by stepping away from his post, the grievor was responsible for the untimely response to the incident. It stated that a further act of misconduct was his failure to use the force necessary to resolve the incident. It stated that the appropriate response was either a warning shot or a verbal warning.

[92] In its submissions, the employer relied on the grievor's testimony that he was "panicking" during his response to the incident to support its decision to terminate his employment. This behaviour of the grievor was raised for the first time at the hearing. It is not fair to a grievor to raise new misconduct allegations at that stage of the grievance process. In addition, it was not fair for the employer to use that behaviour to buttress its decision on the misconduct; see *Besirovic v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 33 at para. 96. Mr. Lapointe did not rely on panic as a ground of termination in the termination letter and did not refer to it at the disciplinary meeting. I find that it is inappropriate to rely on this additional ground as misconduct.

[93] The employer submitted that the grievor's explanations raised further concerns. He stated that he was not properly trained for the post, despite working at similar posts for six years. He had time to orient himself to the gallery layout on his previous shift at that location or in the hours at the beginning of his shift on October 6. In addition, he did not have the tools to do his job, such as the ear defenders, and did not take any action to acquire them. If he felt that he did not have the essential tools to do his job, he had an obligation to obtain them.

[94] The grievor maintained that there was no misconduct and that in the alternative, the misconduct was minor. He stated that he did not abandon his post as he never used the bathroom; he only stepped into it. He stated that the bathroom was in the middle of the post and that there is a general understanding that a bathroom on post can be used for quick breaks. He raised his understanding of using the bathroom on post in the investigation board interview and in the disciplinary interview, and Mr. Lapointe did not follow up. The general practice in a workplace should be considered when assessing discipline, the grievor stated (see *Algoma Steel Inc. v. U.S.W.A., Local 2724* (2006), 154 L.A.C. (4th) 243, and *Loblaws Supermarkets Ltd. v. UFCW, Local 1000A* (2013), 231 L.A.C. (4th) 66).

[95] The grievor stated that the post order does not require a constant patrol — it requires a regular patrol. He also noted that a microwave and refrigerator are on the post, which correctional officers use, and when they use them, they are not watching inmates.

[96] In the alternative, the grievor submitted that there are degrees of abandonment of a post and that stepping into the bathroom was at the lowest possible end of the spectrum (see *Dekort v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 75). The biggest impediment to getting to the scene of the incident was the unclear radio transmission, he stated.

[97] The grievor submitted that his actions when he arrived at the assault should be viewed in light of the context. He submitted that he should not be judged to a standard of perfection; see *R. v. Nasogaluak*, 2010 SCC 6. He submitted that no one response is appropriate and that it would be difficult to find that his exercise of his discretion was improper. He stated that he did not see any weapons and that he thought that using a

chemical spray was the proper response. He also submitted that a verbal warning would not have been effective, in the circumstances.

[98] The grievor submitted that the ear defenders were a "red herring". He submitted that his belief that it was not appropriate prevented him from using his firearm, not whether he had ear defenders.

[99] There are two separate, but related, alleged acts of misconduct. The first is an alleged abandonment of his post when the grievor stepped into the bathroom while on post. The second is a failure to respond appropriately to an assault of an inmate. I will first address the alleged abandonment of post.

[100] There is no dispute on the facts relating to the grievor's actions. He has admitted that he was stepping into the bathroom when he heard the radio report of a fight. He immediately responded to the radio transmission when he heard it. He first stated this in his SOR, which he completed on the day of the incident. It is likely that the employer would not have known of his action had he not reported it.

[101] The disputed fact related to this allegation is whether it was an accepted practice for correctional officers to take a pee break while on post. The employer objected to Mr. Mayer's evidence about the bathroom-breaks practices on the basis that it was not presented to Mr. Lapointe for his response. Mr. Lapointe was asked about bathroom breaks in cross-examination, and he denied that this was the practice. I find that Mr. Lapointe was given sufficient notice of this alleged practice at the institution. It is also evidence that could not have taken the employer by surprise, since the grievor mentioned it in his rebuttal to the investigation report.

[102] The grievor and Mr. Mayer testified that it was common practice for correctional officers to take a quick pee break while on post. Although it might have been a long-standing practice, as noted in *Loblaws Supermarkets*, this "… does not necessarily transform it into proper or acceptable conduct." If the employer was aware of the practice, it had an obligation to advise employees that such behaviour was no longer acceptable. However, the grievor did not establish that managers, as employer representatives, were aware of the practice. For that reason, it cannot be said that the employer condoned taking quick pee breaks. Therefore, I find that the grievor did abandon his post when he stepped into the bathroom.

[103] In *Dekort*, the Board referred to a spectrum of what it might mean to abandon one's post, ranging from a short lapse in the ability to respond to "full-out abandonment" (at paragraph 93). In that case, the correctional officer had removed his boots and vest, which the Board described as "more than a mere lapse of judgement" and "… proof that his capacity to respond to situations around him had become impaired" (at paragraph 92).

[104] In *Dekort*, the Board found that the grievor's conduct was "somewhere in the middle" of the spectrum. In the case before me, the grievor's immediate response to the radio transmission shows that his ability to respond to the incident was minimally impaired. He had stepped into the bathroom when he heard the radio transmission and responded immediately, without using the bathroom. Therefore, I would describe this abandonment of a post as being at the lower end of the spectrum. I will address the seriousness of this misconduct in the next section.

[105] I now turn to the alleged misconduct related to the inmates' altercation. The employer's position is that the grievor did not appropriately respond to the assault. He submitted that his intended response — chemical agents — was the appropriate one but that by the time he returned with the chemical agent, the assault was over. He also submitted that the main reason for his delay getting to the site of the assault was the confusing radio transmission.

[106] The incident of October 6, 2016 was preceded by a failure of the institution's staff to prevent an inmate or inmates from obtaining materials used to fashion weapons. I heard no evidence on how the materials were obtained and how the inmates were able to hide them. However, I can assume that correctional officers are responsible for ensuring that to the extent possible, inmates do not possess such materials.

[107] The investigation board described the immediate event preceding the incident of October 6, 2016, as the inadvertent opening of a door separating two incompatible penitentiary populations. This error by a correctional officer was compounded by other correctional officers making no clear communication of the location and the nature of the threat to inmates' safety (the investigation board described it as a confusing radio transmission). In addition, the grievor was alone on the gallery and was monitoring multiple areas; he had no single line of sight.

[108] The sequence of events represents a collective failure to maintain institutional security and is an important context for the grievor's behaviour during the incident. I will address this context further in the next section, on whether the termination of employment was warranted.

[109] There is no dispute that the injuries that resulted from the assaults were serious for one of the injured inmates. The investigation board was mistaken when it concluded that the injuries sustained by both inmates met the criteria for "serious bodily injury" — only one inmate met the criteria.

[110] Mr. Lapointe made assertions about the injuries at the disciplinary investigation meeting and in the letter of termination that were not supported by the facts. For example, he suggested that an inmate "nearly died" and implied that he had reviewed the medical report of the inmate's injuries. There is no evidence that the inmate nearly died, and Mr. Lapointe has admitted that he never saw a medical report of those injuries. I will address Mr. Lapointe's exaggerations in the section of this decision relating to the bond of trust.

[111] The investigation board identified the appropriate responses based on its view of the video and its assessment of the seriousness of the injuries. The extent of the injuries — especially the grievous bodily harm — was not known at the time of the incident. Even if the grievor was able to observe puncture wounds from the gallery, it is not likely that he would have been able to assess the seriousness of the injuries from that distance, which could be assessed only after the incident. A correctional officer assesses an appropriate response to an assault based on the information available at the time of the assault.

[112] For the first time at the hearing, Mr. Lapointe raised the point that lethal force would have been an appropriate response. He did not mention this at the disciplinary hearing. More importantly, the investigation board concluded that the appropriate responses did not include lethal force. I find the investigation board's assessment more reliable because it conducted a full investigation of the incident. I will address Mr. Lapointe's position on the use of lethal force in the section relating to the bond of trust.

[113] Important for assessing the grievor's response to the altercation is what he was able to see and what he knew in the moment he decided the appropriate response.

Before the investigation board and at the hearing, the observers of the video were able to pause, rewind, and watch it again. The grievor had to decide on the appropriate response in mere seconds. I find this relevant to considering the appropriate response to the altercation.

[114] The investigation board stated that the appropriate responses were a verbal warning, followed by either chemical agents or a warning shot. The video of the assault did not have sound, but I accept the grievor's testimony that it was a loud environment (music and the fight itself), and a verbal warning would have only delayed the appropriate response.

[115] Commissioner's Directive 567, "Management of Security Incidents", states that a firearm may be used "… only when other response options are not available, when it is safe, and when it is necessary and proportionate …" and given the situational factors.

[116] The radio transmission referred only to a fight, not weapons. The grievor testified that he did notice the blood but not the extent of the injuries to inmate J. He testified that what he observed of inmate L's assault was just downward punching and not a downward stabbing motion.

[117] I accept that it is possible that the grievor did not observe the weapons being used and that he thought that only fists were being used in the assault that he observed. However, contradicting his position is his initial mention of ear defenders in his SOR and in his first rebuttal. If he thought that a warning shot was not an appropriate response, why would he mention the ear defenders? He testified that he was not thinking when he wrote the SOR and that his response to the investigation report was also rushed and "stupid". That does not explain why he mentioned the ear defenders. It is more likely that he mentioned them because he had contemplated using his firearm as an appropriate response.

[118] The Directive is clear that the use of a firearm is a last resort. In this case, I accept the grievor's assessment that a chemical spray would have been appropriate. The investigation board agreed that it was also an appropriate response. However, when he reached the site of the incident and observed the assault, he did not have the chemical spray with him — in other words, it was not immediately available.

[119] It was safe to fire a warning shot, since he had an area away from the inmates to shoot at, and the walls were suitable as targets. As for the safety of using a firearm without ear defenders, I accept that it is generally safer to shoot one with ear defenders than without them. This is demonstrated by the fact that ear defenders are used when correctional officers are on firearms training. It is also supported by the security manual, which states that ear protection is for firearms practice "and other conditions". However, when the use of firearms is required to respond to an incident, the first priority is the safety of others, not occupational health and safety requirements.

[120] The only other remaining criterion from the Directive is whether using a firearm was "necessary and proportionate", given the situational factors. Although the grievor might not have seen the weapons used in the assault, the inmate was being viciously attacked by more than one other inmate, and there was blood on the floor, which he would have also seen. In that situation (and in the absence of an available chemical spray), a warning shot was both necessary and proportionate.

[121] To be clear, the grievor's misconduct was not determining that chemical spray was the appropriate response; the misconduct was in not using his firearm when the chemical spray was not immediately available to him.

[122] In conclusion, I have determined that the grievor committed two acts of misconduct: abandoning his post and failing to make the appropriate response to an inmate assault. I now turn to the issue of whether this misconduct warranted terminating his employment.

B. Did the misconduct warrant the termination of employment?

[123] The employer submitted that termination of the grievor's employment was the appropriate response to his misconduct. The grievor submitted that since there was no misconduct, the termination was not appropriate. In the alternative, he submitted that a short suspension would be appropriate if the misconduct is founded.

[124] The employer made no submissions on mitigating factors. The grievor submitted that it was appropriate to consider mitigating factors when assessing discipline. In its reply, the employer agreed that no mitigating factors were set out in

the letter of termination, but this did not suggest that mitigating factors were not considered at the time.

[125] As set out in *Lagacé v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-16037 (19881007), [1988] C.P.S.S.R.B. No. 275 (QL), the consequence of a grievor's actions or inactions is not the only relevant consideration when assessing an appropriate disciplinary sanction. Other factors may also be relevant and should be considered.

[126] The factors to be considered are well established in the jurisprudence, and non-exhaustive lists of them were first comprehensively set out in cases such as *United Steelworkers of America, Local 3257 v. Steel Equipment Co.* (1964), 14 L.A.C. 356, , and *Wm. Scott*. The relevance and weight of a particular factor varies according to the facts of each case. When determining whether a termination of employment is justified, both aggravating and mitigating factors should be considered when evaluating the appropriateness of the discipline imposed by the employer. (See, for example, *Yayé*, at para. 119.)

[127] In both the letter of termination and the final-level grievance response, the employer did not state that it relied on any mitigating factors in assessing the appropriate discipline. In his testimony, Mr. Lapointe stated that there were no mitigating factors. The employer's suggestion in its reply submissions that mitigating factors might have been considered is not supported by any evidence.

[128] I prefer Mr. Lapointe's testimony to counsel's suggestion that mitigating factors might have been considered. I find that the employer did not consider any mitigating factors when assessing the appropriate discipline. I also find that it is appropriate to consider mitigating factors, as well as aggravating factors, when assessing the appropriate discipline for misconduct.

1. The seriousness of the offence

[129] The employer submitted that the grievor's inattentiveness was a serious offence (see *Besirovic*, at para. 106) and that the risk of grievous bodily harm or death added to the significance of the misconduct (see *Manitoba v. MGEU* (2016), 269 L.A.C. (4th) 417 at paras. 98 and 99). The employer also submitted that the standards applicable in a correctional environment are different from other work environments and that a

relatively minor incident can result in a termination of employment (see *Ewart-Wilson v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 32).

[130] The grievor took no issue with the higher standard of conduct that applies to correctional officers. However, he submitted that it does not mean that a correctional officer cannot make a mistake.

[131] Correctional officers are held to a higher standard of conduct than are those in other occupations. *Dekort* summarized this higher standard as follows (at paragraph 142):

> *[142] … As peace officers, correctional officers are charged with upholding the law. Their designation under the* Criminal Code *and the fact that they are armed and authorized to use force to protect the safety and security of inmates, other staff, and the public, places upon them a very high standard of behaviour. Thus, a deliberate effort to abandon one's position or to significantly reduce one's capacity to respond to a sudden emergency is far more serious in a correctional environment than it would be in most federal public service positions.*

[132] In *Yayé*, the Board Member noted the importance of monitoring inmates and highlighted as follows the seriousness of failing to monitor them (at paragraph 130): "When it comes to the safety of the inmates and the institution, there is no margin of error."

[133] As I noted earlier, the grievor's abandonment of his post was at the low end of the spectrum. However, any inattention in a correctional setting can lead to serious consequences and should be regarded as serious.

[134] The seriousness of the misconduct is reduced slightly by the actions of others that led to serious injuries for one inmate. As noted in *Matthews v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 38, the grievor's negligence must be evaluated in light of the failures of others, which compounded the severity of the events.

[135] In *Matthews*, the Board Member noted that it was the duty correctional manager's responsibility to provide the escort officer with a proper briefing and to explain the levels and conditions of supervision and contact requirements. The incident in the case before me could not have been mitigated or avoided with proper

information. Rather, the actions of others were significant contributors to the inmate's serious injuries.

[136] In particular, the opening of the barrier between two incompatible populations was the primary reason for the assaults on the two inmates. In addition, the confusing radio transmission that resulted in the grievor initially going to the wrong ranges contributed to his delay reaching the site of the incident. Stepping back even further, the failure of correctional officers to find the weapons made by an inmate or inmates also contributed to the seriousness of the assaults.

[137] The grievor's abandonment of his post was a momentary lapse and did not prevent him from hearing the radio transmission or responding to it. The bigger contribution to his delay reaching the site of the fight was the confusing radio transmission.

[138] I have concluded that the abandonment of the post was serious but that it was less serious than the failure to pay attention that was evident in both *Dekort* and *Besirovic*.

[139] The failure to respond to the assault with a warning shot is more serious misconduct. Since chemical spray was not available, he should have used a warning shot. Failing to stop an assault at the earliest possible opportunity could result in grievous bodily harm; therefore, a failure to act appropriately can be regarded as a serious offence.

2. Disciplinary record, job performance, and years of service

[140] The grievor had no prior discipline. He had worked for the employer as a correctional officer for six years and five months as of the termination of his employment.

[141] The employer conceded that the grievor had shown good performance as a correctional officer. In the grievor's performance appraisal for 2014 to 2015, the manager rated him as exceeding expectations in "integrity and respect". Under the heading of "Thinking things through", the manager noted that the grievor had the ability to make sound decisions "… without delay or hesitation, has had the experience of incidents on the unit and able to become very much involved on his own initiative."

[142] The performance appraisal for 2015 to 2016 also indicated that the grievor met expectations, and it contained almost identical comments to the previous year's appraisal.

[143] The grievor had a relatively short career with the employer. I find that the length of service is neither a mitigating nor an aggravating factor.

[144] I find that the employer should have considered the grievor's work performance and lack of a discipline record when it determined whether the termination of employment was appropriate.

[145] As noted in *Matthews*, when considering termination, its long-standing impact on the grievor must be considered. Given his age, the termination has had an impact on him. This was also a mitigating factor that the employer should have considered.

3. Remorse or acknowledgment of wrongdoing

[146] The employer submitted that the grievor did not accept responsibility for his actions or express remorse. It submitted that his protracted denial of responsibility over time supports the termination of his employment. In addition, it submitted that he continued to diminish the consequences of the assault, including the injuries to inmate J.

[147] The grievor submitted that not taking responsibility for his actions was understandable, since he was acting in accordance with the practice at the institution. He also believed that he had responded appropriately to the incident. He submitted that he was frustrated and that he continued to be frustrated by the employer's characterization of the events. He stated that it should not be held against him. He admitted that he could have done things better.

[148] The grievor was forthcoming in his statements to the investigation board, at the disciplinary hearing, and at the Board's hearing about his actions on October 6, 2014. However, only at the Board's hearing did he state that he could have done things differently. Instead of accepting responsibility for his actions, he deflected blame.

[149] The grievor did not acknowledge the impact that his actions had, or could have had, on the inmates' injuries. He also initially relied on the absence of ear defenders to justify not using his firearm. I have already found that this reliance showed that he

had considered using his firearm — otherwise, it makes no sense to have raised it in the context of his SOR or the investigation. His failure to acknowledge that he had considered but rejected using his firearm is an aggravating factor.

[150] I also find that the grievor's general lack of remorse and acknowledgment of any wrongdoing an aggravating factor. Stating at the hearing that he could have done better was not a fulsome acknowledgement of his errors.

4. Comparable treatment of others involved in the incident

[151] The grievor submitted that other correctional officers made errors that exacerbated the situation on October 6, 2016. He stated that he was not suggesting that others should have been disciplined for their actions, but if the employer contends that there is no margin of error, then it should have imposed discipline on others.

[152] The employer provided limited evidence on the treatment of the other correctional officers who were responsible for the events that led to the incident. It stated that the officer responsible for opening the door was a recently transferred employee on training and that her action was inadvertent. However, the investigation board found that she was in a post position and that seemingly, she was unsupervised. I heard no evidence about why a correctional officer on training would be left unsupervised, especially with a door control system that differs from those in the rest of the institution. In light of the events of October 6, 2016, this was a significant error on the part of the management of the institution. The investigation board did not investigate this management failure, and I heard no evidence about the circumstances that led to scheduling a trainee with no supervision. I do not have enough evidence to conclude whether the correctional officer who opened the door should have received discipline. However, the fact that Mr. Lapointe did not investigate the reasons for this error, including an egregious scheduling error, is a mitigating factor in this grievance.

[153] The investigation board concluded that the correctional officer who alerted others to the fight did so in a confusing way. The employer was aware of this both from the grievor's statements and the investigation board's findings. There is no evidence that that officer was disciplined or spoken to about the importance of clear communication in a serious incident such as this one. I find that this failure to

discipline or at least to raise this concern with the correctional officer is also a mitigating factor.

5. Progressive discipline, deterrence, and the bond of trust

[154] The employer submitted that the message sent by the termination of employment was important and that if the Board endorsed the practice of taking breaks while on post, it would send the wrong message to correctional officers. The employer submitted that the grievor's failure to accept responsibility is a critical question in determining whether the employment relationship is redeemable. It submitted that Mr. Lapointe was unable to conclude that the grievor had appreciated his errors and that he would behave differently in the future. The employer submitted that Mr. Lapointe's assessment was confirmed by the grievor's testimony at the hearing.

[155] The grievor submitted that Mr. Lapointe's statements about a lack of trust were overstated, as he continued to work on armed posts after the incident. In its reply, the employer stated that Mr. Lapointe had testified that he had to consult higher levels of management before imposing discipline. The employer also submitted that no finding suggested that the grievor could not be in the institution based on the risk he presented.

[156] The grievor submitted that the exaggeration of the scope of the inmates' injuries in the termination letter seriously undermined the employer's decision to terminate his employment; see *Toronto District School Board v. ETFO* (2019), 301 L.A.C. (4th) 225. In its reply submissions, the employer stated that it did not mischaracterize the grievor's misconduct. Any mischaracterization, which it denied, related to the consequences of his misconduct.

[157] I agree that general deterrence is an appropriate consideration when assessing discipline, especially for serious misconduct relating to inmates' safety and security; see *Ranu v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 89. In that case, the Board Member upheld the 30-day suspension for sleeping and missing rounds on a segregation unit.

[158] Balanced against the employer's interest in general deterrence is the grievor's (and the bargaining agent's) interest in progressive discipline. Progressive discipline is

the norm in unionized settings. It is based on the premise that employees deserve an opportunity to demonstrate that they can correct their behaviour if the employment relationship is not damaged beyond repair. The employer argued that it was damaged beyond repair by the grievor's misconduct. I do not find that the evidence supports a conclusion that the relationship was damaged to that extent.

[159] In *Yayé*, the most similar case to this one, the correctional officer's employment was terminated for a failure to monitor inmates. In that case, the officer lied about his conduct, did not admit to any wrongdoing, and showed no appreciation or understanding of the potential consequences of his actions. In this case, the grievor was forthcoming about stepping into the bathroom, beginning with his SOR, completed only hours after the incident.

[160] In *Ewart-Wilson*, the facts were significantly different (the grievor in that case brought alcohol into the institution), but the grievor's employment was terminated for what the employer described as a minor breach of the standards of discipline. However, in that case, the grievor misled the employer for four years and denied his actions. In the grievance before me, although the grievor has not accepted any wrongdoing, he has not misled the employer on his actions of October 6, 2016.

[161] Mr. Lapointe never adequately explained why he believed that the bond of trust was broken. He was aware of most of the details of the incident shortly after it happened, yet he continued to assign the grievor to the gallery officer and other armed positions right up to the termination of his employment. It could be argued that Mr. Lapointe did not have a full understanding of the events and the grievor's role until he received the investigation report in February 2017. However, he received that report on February 8, 2017, and waited 20 days to provide a copy to the grievor. The grievor continued to work as a correctional officer, including in the gallery officer position, until the date of the termination of his employment (June 19, 2017).

[162] The employer submitted in reply that that there was no finding that the grievor could not be in the institution based on the risk he presented. This is an important admission, in light of Mr. Lapointe's testimony about his lack of confidence that the grievor would not repeat his behaviour.

[163] Although the employer did not refer me to *Larson v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 9, it is the leading decision on the

risk of continuing to have an employee in the workplace. While *Larson* involved an indefinite suspension of an employee facing criminal charges, I believe that the employer's failure to apply the criteria from that case supports a finding that the bond of trust was not broken. The so-called *Larson* criteria are as follows:

- Does the presence of the grievor as an employee present "… a reasonably serious and immediate risk to the legitimate concerns …" of the employer?
- Was the grievor's action so potentially harmful or detrimental to the employer that the grievor will be unable to perform his or her duties or have a harmful effect on other employees or inmates?
- Did the employer conduct an investigation to assess the risk of the grievor's continued employment?
- Did the employer take reasonable steps to ascertain whether the risk of the grievor's continued employment might be mitigated through such techniques as closer supervision or a transfer to another position?
- Did the employer objectively consider the possibility of reinstatement within a reasonable period following a suspension, in light of new facts or circumstances?

[164] All but the last criterion is relevant to this grievance. Mr. Lapointe testified that he had concerns about the risks to the institution's safety were the grievor reinstated. The final-level grievance reply also refers to "serious consequences" on public, inmate, and colleague safety.

[165] I agree with the employer that safety is of high importance in an institution. The employer did conduct a disciplinary investigation through the work of the investigation board as well as the disciplinary hearing. The investigation board did not reach any conclusion on the grievor's continued employment. However, its detailed findings were presented to Mr. Lapointe on February 8, 2017, and he took no action to remove the grievor from the institution or to assign him duties that did not involve risking safety. Mr. Lapointe conducted his own disciplinary hearing on March 16, 2017, and yet did not suspend the grievor or assign him new duties pending the decision on the appropriate discipline.

[166] From these employer actions, I can conclude only that the grievor did not represent a "reasonably serious and immediate risk" to the employer's safety concerns. If he had, I can assume only that the employer would have suspended him pending its discussions at senior CSC levels.

[167] Mr. Lapointe's concerns about the bond of trust were related to his concerns about the institution's safety. Since the employer made no efforts to mitigate this

purported risk to safety, the foundation for its argument of a break in the bond of trust crumbles.

[168] At the hearing, Mr. Lapointe testified that he waited to hear back from CSC headquarters on the disciplinary response. This also reinforces the view that he did not have concerns about the grievor continuing with his regular duties. There was no testimony about the bond of trust between higher levels of management and the grievor, so I have no basis for concluding that the bond of trust was broken at that level.

[169] In addition, Mr. Lapointe did not offer the grievor retraining or coaching after the incident of October 6, 2016, further demonstrating that he had no concerns about the grievor being in a similar situation in the future.

[170] Mr. Lapointe misled the grievor at the disciplinary hearing. He implied that he had seen a medical report of the injuries when he had not. He also stated that an artery of the inmate "was hanging on by a thread", when he had no knowledge of the inmate's medical condition. He also stated that emergency medical attention was the only thing that had saved the inmate from death. There is also no evidence to support that statement.

[171] Mr. Lapointe also told the grievor that the video of the assault was not a major component in determining the discipline. It is clear from the employer's presentation at the hearing that the video was a critical piece of its case. I agree that the hearing was a fresh hearing of the evidence. However, Mr. Lapointe's misleading statements affect his credibility and the strength of his decision to terminate the grievor's employment.

[172] The final-level grievance reply also exaggerates the seriousness of the misconduct. Mr. Fabiano stated that the grievor's misconduct had "… serious consequences on public safety, the safety of offenders and fellow colleagues." There was no evidence adduced at the hearing of any danger to the public. There were also no correctional officers in the gym area at the time of the assaults — they were all behind a barrier, waiting for the assault to stop. Therefore, there were no consequences for the safety of fellow colleagues. Of course, the safety of offenders is an important consideration.

[173] However, adding categories of people who were not at risk of harm was clearly an attempt to buttress the employer's position. This further supports a finding that the bond of trust is not broken as the grievance was denied based on a deliberate misunderstanding of the seriousness of the misconduct.

[174] In a further attempt to buttress its case at this hearing, the employer suggested that the use of lethal force would have been justified. This was raised for the first time at the hearing by Mr. Lapointe. The employer's suggestion is not supported by any objective evidence. As noted earlier in this decision, the investigation report did not identify this as an appropriate response.

[175] I find that the employer's embellishments of the events of October 6, 2016, are a factor in my determination of the appropriateness of the grievor's termination. The addition of factors after the termination (that there was a danger to the safety of the public and staff and that lethal force was justified) demonstrates that the employer did not have confidence in its original decision to terminate the grievor's employment. In other words, if it had confidence in its decision, it would not have had to provide testimony, statements (the final-level grievance reply), and submissions that mischaracterized the evidence available to it when it made its decision to terminate the grievor's employment.

[176] In this case, the grievor does not seek reinstatement. However, in assessing whether termination was appropriate, I must consider whether the employment relationship could have been maintained after the misconduct. Considering the momentary lapse of attention to his duties as a gallery officer, and considering that the employer kept him in safety-sensitive positions without training or coaching for an additional nine months, I am satisfied that the employment relationship could have been maintained and that the bond of trust was not broken.

6. Conclusion

[177] In my view, a sanction less severe than the discharge would have been enough to correct the grievor's behaviour, while still sending a strong and clear message to all employees.

C. What penalty would be just and equitable instead of the termination?

[178] Although the termination of his employment was not appropriate, the grievor should have received some discipline for his misconduct. As already noted, he does not seek reinstatement. Accordingly, I do not need to determine if reinstatement would have been appropriate.

[179] The employer and the grievor made no submissions on an appropriate amount of discipline.

[180] In *Dekort*, a termination of employment was substituted with a lengthy suspension of over two years. However, in that case, the degree of abandonment of the post was described as being in the middle of the spectrum, while in this case, I have found that it was at the low end. In *Ranu*, a correctional officer missed two rounds of monitoring inmates and recorded that he had conducted them. In that case, a 30-day suspension was upheld. In this case, the grievor made no effort to hide his misconduct.

[181] The *Besirovic* decision also refers to *Brink's Canada Ltd. v. I.W.A., Loc. 1-217* (1990), 13 L.A.C. (4th) 427, a British Columbia case involving the termination of a security guard for sleeping on duty. The arbitrator substituted a 6-week suspension based on the grievor's good work record, the lack of progressive discipline, and other surrounding circumstances. In the case before me, the grievor has a good work record, and there was no progressive discipline.

[182] Other cases summarized in *Besirovic* are more in keeping with the misconduct in this case. In *Buchanan v. Treasury Board (Solicitor General Canada - Correctional Service)*, 2002 PSSRB 91, a correctional supervisor received a 20-day suspension for having provided little or no supervision on one of the ranges (he was watching television) and for not intervening when a correctional officer covered a surveillance camera with tape. In that case, the supervisor had received previous discipline, had not cooperated in the investigation, had poor work performance, and had expressed no remorse.

[183] In *Stead v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 87, two correctional officers had not properly accounted for inmates, resulting in one inmate sustaining injuries. Each correctional officer received a four-day financial penalty. The adjudicator noted that the misconduct was very serious and that while it was not the

primary cause of the inmate's injuries, it contributed to a situation in which the risk of injury among inmates increased. The seriousness of the misconduct was increased by the false statements that counts had been done. The adjudicator noted that a four-day financial penalty was on the low end of sanctions imposed in other cases.

[184] In *Desjarlais v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 88, a correctional officer had left a door propped open, for which she received a one-day financial penalty. In that case, the financial penalty was reduced to a written reprimand. Also, no assault resulted from that misconduct.

[185] In this case, the inmates' injuries were the result of a series of actions by others, including the grievor. The grievor's misconduct was at the low end of the spectrum on the abandonment of the post. His failure to fire a warning shot was more serious misconduct. I find a suspension of 30 days to be the appropriate discipline for the grievor's misconduct. In coming to this conclusion, I have considered all the aggravating and mitigating factors.

[186] Normally, a first act of misconduct would not lead to a 30-day suspension. The seriousness of the consequence of his misconduct and the grievor's failure to acknowledge any wrongdoing are significant aggravating factors. The mitigating factors that justify a disciplinary penalty of less than termination include the grievor's job performance, his disciplinary record, the lack of proportional consequences for others bearing some responsibility, his continued duties in armed positions for over nine months after the incident, and the employer's embellishments of the seriousness of the incident and the expected response to the assault.

D. Remedies

[187] The grievor does not seek reinstatement. The hearing was bifurcated, leaving the remedies to be first discussed by the parties. Therefore, the parties should discuss an appropriate remedy of compensation in lieu of reinstatement. That discussion should include a consideration of the grievor's mitigation efforts.

[188] If the parties are unable to reach an agreement within 90 days, the hearing will be reconvened to hear evidence and submissions on the appropriate remedy.

[189] I note that the grievor also requested "real, moral or exemplary damages" in his grievance. I heard no submissions on damages, and if the parties are unable to come to an agreement on damages, if any, they can also be addressed at a reconvened hearing.

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

(The Order appears on the next page)

V. Order

[191] The grievance is allowed in part. The discipline of the termination of employment is substituted with a 30-day suspension.

[192] The issue of further remedies is returned to the parties for discussion and resolution.

[193] I will remain seized for a period of 90 days to address any issues relating to remedies.

[194] The following exhibits are ordered sealed: E-2, E-3, E-4, E-5, and G-2.

December 16, 2021.

Ian R. Mackenzie,
a panel of the Federal Public Sector
Labour Relations and Employment Board