Date: 20220622

File: 560-02-40827

Citation: 2022 FPSLREB 52

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

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

BETWEEN

SEAN WHITE

Complainant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

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

In the matter of a complaint made under section 133 of the *Canada Labour Code*

Before: David Orfald, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Complainant: Corinne Blanchette, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Elizabeth Matheson, counsel

Heard by videoconference,
December 7 to 9, 2021,
and following written submissions,
December 10 and 21, 2021.

REASONS FOR DECISION

[1] This decision is issued at the same time as its companion decision *Burlacu v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 51. Together, they offer a reformulation and simplification of the principles set out in *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52, for determining whether an employer has violated a prohibition contained in section 147 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*").

I. Complaint before the Board

[2] In this matter, Sean White ("the complainant"), made what is generally called a "reprisal complaint" under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"). Mr. White is a correctional officer at the Kent maximum-security institution ("Kent" or "the institution") of the Correctional Service of Canada ("CSC") in Agassiz, BC. He alleged that Meachel Chad, acting Assistant Warden of Operations at Kent, disciplined him because he raised a health and safety issue in the workplace and exercised his right to refuse to work under the *Code*, in contravention of s. 147 of the *Code*. These provisions fall within Part II of the *Code*, which governs occupational health and safety in the federal public service and federally regulated workplaces.

[3] As corrective actions, the complainant requested the removal of the disciplinary measure from all his files, a letter of apology, a direction that Ms. Chad attend training about the *Code*, and damages.

[4] The Treasury Board is the complainant's legal employer: see s. 240(c) and the definition of "employer" in s. 2(1) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2, "the *Act*"). As section 147 of the *Code* imposes a prohibition on an employer, the Treasury Board is the respondent to the complaint.

[5] In this decision, "the Board" refers to the Federal Public Sector Labour Relations and Employment Board and its predecessors.

[6] I will quote more extensively from the relevant provisions of the *Code* in the reasons that follow, but for introductory purposes want to highlight the following portions of s. 147:

147 *No employer shall dismiss, suspend, lay off or demote an*	***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied*

employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee	*ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :*
…	[…]
(c) *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*	***c)*** *soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*

[7] The central issues in this case are whether the complainant acted in accordance with, or in furtherance of, Part II of the *Code*, and whether the respondent took an action prohibited by s. 147 against the complainant as a result.

[8] On April 22, 2019, a stabbing incident took place involving inmates at Kent. One inmate was hospitalized. The incident resulted in a partial lockdown of the institution.

[9] On the morning of April 24, 2019, the complainant was on the morning shift, and he was asked to allow an inmate under his supervision to meet with lawyers from Prisoners' Legal Services (PLS). The parties agreed that these lawyers are not public service employees. Mr. White did not allow for the inmate to meet with the PLS lawyers, and instead took steps to inform them about the stabbing incident.

[10] The complainant was given a reprimand verbally with respect to his actions on the morning of April 24, 2019. This was documented in an email dated April 30, 2019, which confirmed certain details about the reprimand.

[11] The parties agreed that the reprimand constituted discipline.

[12] The complainant argued that he refused work that he believed was a danger to health and safety, by not allowing an inmate under his supervision to meet with the PLS lawyers. He also argued that under the circumstances, he took reasonable and necessary steps to inform the PLS lawyers of that danger. He submitted that, for these actions, he was disciplined, in violation of s. 147 of the *Code*. He believes that the complaint should be allowed.

[13] The respondent argued that the complainant's actions did not amount to a work refusal. It argued that the discipline imposed on the complainant was not directly linked to any right he exercised under the *Code*. The respondent submitted that the *Code* required the complainant to report health and safety dangers to the CSC, not to outside individuals. According to the respondent, the complainant had options open to him other than sharing information with the PLS lawyers. The respondent claimed that the complainant was disciplined for the disclosure of information that he was not authorized to provide to the PLS lawyers. This is not a violation of s. 147 of the *Code*, the respondent argued.

[14] The question of whether the actions of the complainant amounted to a work refusal under s. 128 of the *Code* is important because it determines where the burden of proof lies in this matter. As per s. 133(6) of the *Code*, when an employee makes a reprisal complaint in relation to such a work refusal, the burden of proof lies with the respondent to establish that there was no violation of s. 147.

[15] For the reasons that follow, I find that the complainant's actions did amount to a work refusal under s. 128 of the *Code*. Therefore, the respondent bears the burden of proving that it did not violate s. 147 in that regard.

[16] Further, while Mr. White might not have made perfect choices with respect to his actions on the morning of April 24, 2019, he has demonstrated that they were in accordance with, or in furtherance of, Part II of the *Code*. I find, on a balance of probabilities, that the disciplinary action taken on April 30, 2019, was because of the actions the complainant took under the *Code,* and that it violates of s. 147.

II. Summary of the evidence

[17] The complainant testified for himself and called Daniel MacKinnon as a witness. Their details are as follows:

- Mr. White started his employment at the CSC in June 2000, and at the time of the events in question, he worked as a correctional officer, level 2 (CX-2), at Kent. He has also served as a shop steward for his union, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN ("UCCO-SACC-CSN" or "the union"). At one point, he also served as union co-chair of the workplace occupational safety and health committee ("the OSH Committee").
- Mr. MacKinnon is also a CX-2 at Kent, and at the time of the events in question, he was the vice-president of the UCCO-SACC-CSN's local there. At

the time of the hearing, he was also the UCCO-SACC-CSN's second regional vice-president for the Pacific region.

[18] The respondent called these two witnesses:

- Jim Swerhun, who at the time of the events in question was substantively a CX-2 but had been acting for a period of about three weeks in the position of a correctional manager.
- Ms. Chad, who at the time of the events was the acting Assistant Warden of Operations at Kent and one of two such position holders who reported to the deputy warden.

[19] The summary of evidence that follows is based on witness testimony and documents entered into evidence. Facts not in dispute are summarized without referencing the source. For any conflict in the evidence, I make specific reference to what I heard from different witnesses.

[20] In the following sections, I will first summarize the chronology of events, followed by a few additional points of evidence that do not fit easily into the chronology.

A. Chronology of events

[21] Kent is a CSC's maximum-security institution in British Columbia. It houses federal inmates, consisting of both a general population and those in protected custody. Inmates reside in several different units. In this matter, the relevant units include Delta and Golf.

[22] On the evening of Monday, April 22, 2019, a stabbing incident took place in the courtyard, involving inmates from Delta and Golf Units. The stabbing resulted in the hospitalization of one inmate. Delta and Golf Units were placed in modified lockdown, which meant that certain restrictions were made to inmate routines and movements. One of the purposes of such a lockdown is to allow a search of the affected units for weapons. The lockdown continued until noon on Thursday, April 25, 2019.

[23] On Wednesday, April 24, 2019, Mr. White reported for work at approximately 6:30 a.m., which was the start of a 16-hour shift. He was assigned to Delta Unit. He learned that PLS lawyers would be coming to meet with inmates at Kent that day. He testified that he reported health and safety concerns about the PLS lawyers meeting with inmates during the modified lockdown to a correctional manager named Paul Kambo (his correctional manager on duty that day), and to Darrel McKamey (his

union's local president). He testified that Mr. Kambo asked if he wanted to deny the lawyers access to the inmates and that he answered "No," but given that the unit was still in lockdown and a search had not been completed, he felt added security measures should be put in place. Mr. Kambo did not get back to him about these concerns, the complainant testified.

[24] At about 9:30 a.m. on April 24, 2019, Mr. White received a call from another correctional officer, Randy Voth, who said that the PLS lawyers wanted to meet in Golf Unit with an inmate from Delta Unit.

[25] Mr. White testified that the request was for the inmate from Delta Unit to be "sent over" (unescorted) to Golf Unit. Mr. Swerhun testified that the request was for the inmate from Delta Unit to be "brought over" (or escorted) to Golf Unit.

[26] Mr. White did not send or escort the inmate from Delta Unit to Golf Unit. Instead, he went over to Golf Unit himself. He testified that when he stepped through the doors, he saw three correctional managers, including Mr. Swerhun. Mr. White testified that he and Mr. Swerhun exchanged greetings, twice saying, "Hey Jim. Hey Sean."

[27] He went into the room where the PLS lawyers were seated. According to his testimony, he greeted the lawyers and explained that he understood that they had a right to see their clients but that given the stabbing incident and the partial lockdown, he had health and safety concerns about sending the inmate from Delta Unit over to Golf Unit. He testified that the PLS lawyers thanked him. They told him that they no longer needed to meet with the inmate from Delta Unit but that they then wished to meet with another inmate.

[28] After talking to the PLS lawyers, Mr. White went back to Delta Unit.

[29] Mr. Swerhun's version of events was that when Mr. White entered Golf Unit, he called out to Mr. White twice, expecting him to stop. He testified that Mr. White did not respond and instead walked right past him and into the room with the PLS lawyers. He said that he followed Mr. White into the room and that he heard Mr. White explain the stabbing incident to the PLS lawyers. He testified that he did not speak to Mr. White before he left Golf Unit.

[30] Mr. Swerhun then directed Mr. Voth to retrieve the other inmate to meet the lawyers. He returned to the correctional managers' office, where he explained what happened to Mr. Kambo, who told him that he should report the incident.

[31] At 10:12 on April 24, 2019, Mr. Swerhun sent an email to himself, which he then forwarded to Ms. Chad. The email documented his version of events. He wrote that when Mr. White came into Golf Unit, Mr. White walked right past him and ignored him when he called out. He reported that Mr. White had told the PLS lawyers "… about the incident that happened in the courtyard a couple of nights prior, and for their safety he felt they should know." He wrote that Mr. White "went into detail" about the incident, while the lawyers sat and listened. He also wrote that Mr. White informed the lawyers that the inmate from Delta Unit "… will not be coming over as he cannot be strip searched and that there may be a risk of a weapon."

[32] At 10:45 on April 24, 2019, Mr. White also sent an email about the incident to Tysha Owens, acting Deputy Warden of Operations at the time. He expressed concerns that correctional officers were no longer permitted to attend morning meetings to learn information and assist in resolving issues. He expressed frustration that they had to wait and hope that correctional managers came into the units to share information at the start of shifts. He complained that no correctional manager had attended his unit that morning. He reported that he did not feel that it was safe to allow an inmate from his unit (Delta) to attend a meeting in another unit "… without proper security and safety procedures enacted." He informed her that the PLS lawyers had understood his concerns and had thanked him. He explained that while writing the email, he was informed that he was being relieved to attend a meeting in the correctional managers' office, which he anticipated was about this incident. He explained that his actions were out of concern for the safety and health of inmates, staff, and the public and ended by stating this: "I did what I was legally obligated to do as I believed there was a health and safety risk."

[33] Mr. White testified that after he sent that email, he attended a meeting in the visits and correspondence area at Kent with Mr. Swerhun and Ms. Chad. He testified that the meeting went on for about 30-45 minutes. He said that he expressed his concerns about the lack of information given to the correctional officers that morning and that he had acted out of concern for health and safety. He testified that Ms. Chad expressed concerns about him being angry and frustrated, and he assured her that he

was in a mental state to return to work. He said that she encouraged him to "take a breath" before acting in the future. He testified there was no discussion of discipline.

[34] Mr. Swerhun recalled having a conversation with Mr. White after their interaction at Delta Unit, but had no clear recollection of a meeting in the visits and correspondence area with Mr. White and Ms. Chad. When asked about it in cross-examination, Ms. Chad could not recall this conversation. An email written the next day by Ms. Owens does reference a meeting having taken place between Ms. Chad and Mr. White, shortly after he had sent his email at 10:45.

[35] Mr. White then returned to his work at Delta Unit. He testified that he had a short debrief with Mr. Swerhun, who was concerned about maintaining their friendship. Mr. White recounted that he told Mr. Swerhun that they were still friends but that the correctional officers had to receive clear information. He said that they did not discuss discipline. In his testimony, Mr. Swerhun did not provide any specifics about this meeting.

[36] Mr. White testified that on the evening of April 24, 2019, he was informed that Ms. Chad was on her way over with some paperwork. When she arrived, he was given a notice of a disciplinary hearing for 9:30 a.m. the next day. The notice described Mr. White's actions that morning as insubordinate. It specifically listed a failure to obey orders (for bypassing acting Correctional Manager Swerhun) and the sharing of information in contravention of the "CD 060 Code of Discipline", the *Privacy Act* (R.S.C., 1985, c. A-1), the *Access to Information Act* (R.S.C., 1985, c. P-21) and the Policy on Government Security, as reasons for a possible disciplinary action.

[37] Mr. White testified that when he was given the notice of disciplinary hearing, he told Ms. Chad that he thought that they had already discussed the issue. He testified that she told him that if he accepted a verbal reprimand, "this goes away." Mr. MacKinnon testified that he was also in attendance at this conversation. He corroborated Mr. White's version of events and confirmed hearing Ms. Chad say that the whole thing could go away. He testified that he perceived this statement as a threat of harsher discipline if the verbal reprimand was not accepted. He testified that Mr. White felt that he had done nothing wrong and that he was going to refuse to accept the verbal reprimand.

[38] The notice of disciplinary hearing stated that Mr. Swerhun was its author. However, Mr. White testified that on the morning of April 25, Mr. Swerhun told him that he had not written the notice. Mr. Swerhun also testified before me that he did not write it. When asked in cross-examination about whether he was concerned about his name being on the notice, he said that he did not like it. He could not recall what he did to report this concern at the time.

[39] In her cross-examination, Ms. Chad also denied writing the notice of disciplinary hearing. She could not recall being informed at the time that Mr. Swerhun was not its author. She did admit that the phone number on the notice was her office number.

[40] Ms. Chad also could not recall delivering the notice to Mr. White on the evening of April 24, 2019. She could not recall meeting with him. She did not recall saying that if Mr. White accepted a verbal reprimand, the issue would go away. She did not agree that there was any threat of harsher disciple if Mr. White did not accept the verbal reprimand.

[41] At some point on April 24, 2019, Mr. White had received a call offering overtime work for the next day. He had initially accepted the offer. However, following the meeting with Ms. Chad and his receipt of the notice of disciplinary hearing, he rescinded his acceptance of the offer to work the overtime.

[42] The actual disciplinary meeting did not occur as scheduled on April 25, 2019. Ms. Owens and Mr. White exchanged emails on the evening of April 25. Ms. Owens wrote that she had spoken with Ms. Chad and that she recognized as legitimate the complainant's concerns about the lack of briefings by correctional managers. Ms. Owens acknowledged his passion for the job. She wrote: "I understand your level of frustration, however I urge you to conduct yourself professionally even during the most frustrating times; I believe we can work better together than working in opposition." He replied that he was seeking further discussion with Ms. Chad. Ms. Owens replied that she would ensure that a time was set up.

[43] The disciplinary hearing took the form of a meeting between Mr. White and Ms. Chad on Friday, April 26, 2019. Mr. White testified that the meeting was brief, no longer than 15 minutes, and that the union local's president was also in attendance. He testified that they discussed the incident that involved the PLS lawyers and that Ms. Chad reiterated that if he felt angry, he should calm himself before acting. He testified

that there was no discussion at the meeting about insubordination, a breach of privacy or access-to-information legislation, or a breach of policy.

[44] Ms. Chad's testimony about that meeting focused on the follow-up email she sent on April 30, 2019, to Mr. White and copied it to some others, including Mr. McKamey and a representative from Labour Relations. It read as follows:

> *Good Day Mr. White*
>
> *This email is the follow up to the conversation we had in relation to your actions around confronting the PLS Lawyers while they were at Kent Institution. During this interaction you revealed specific information about a security situation happening at Kent Institution to non CSC employees.*
>
> *You admitted that you acted out of anger and frustration and that in the future you will take a moment to collect your thoughts and emotions before acting on them.*
>
> *You explained that you did not hear your direct supervisor while he was calling your name in an attempt to stop you from entering the room with the PLS lawyers. You did admit that this was probably because of your state of mind at the time.*
>
> *I appreciate your openness and your willingness to have the conversation with me. I believe that we have both come to an understanding of what is expected of your actions in the future.*
>
> *This email will remain on your file for 2 years. It is not a written reprimand but an email documentation of a verbal reprimand.*
>
> …

[45] The next day, May 1, 2019, one of the persons who had been copied on the April 30 email forwarded it to someone higher up in Labour Relations, with the words, "For the discipline file" added.

[46] On July 29, 2019, Mr. White made his complaint with the Board.

B. Additional points of evidence

[47] I will note six other points of evidence that came out in the testimony that were not addressed in the chronology of events just detailed.

[48] First, Mr. White was asked in cross-examination whether he had actually refused to bring the inmate from Delta Unit over to Golf Unit. He testified that instead of sending him over as requested, he went over there himself. He was asked if he told management that he was refusing work and answered, "technically no." He was asked

if he used the words, “he did not feel comfortable” sending the inmate from Delta Unit over and answered, “Yes.” He testified that he felt that there should have been protocols in place to ensure that it was safe.

[49] In re-examination, Mr. White testified that his message to the PLS lawyers was that he was not comfortable sending the inmate from Delta Unit over because of concerns about potential health and safety risks. He was not ordered to complete the task and said that is why he did not have to make an official work refusal under s. 128 of the *Code*. By that point, the PLS lawyers had said that they no longer needed to meet with the inmate from Delta Unit, so no order (or refusal) was necessary.

[50] Second, Ms. Chad testified that she was asked to investigate the incident involving Mr. White by Ms. Owens. In carrying out her role, she testified that she relied primarily on information from Mr. Swerhun. In cross-examination, she acknowledged that there was no disciplinary investigation. She did not speak to the PLS lawyers. She did not seek Mr. White’s version of events, except in the discussion with him at the April 26 disciplinary meeting. She did not recall making any notes.

[51] She also testified about the CSC Commissioner’s Directive on information sharing (called “CD 701”), which outlines that it is against policy to share information with non-CSC employees, except as authorized. She testified that Mr. White was not authorized to share with the PLS lawyers the information he did. She stated that it would have been acceptable for Mr. White to give “the gist” of the stabbing incident to the PLS lawyers but that he had gone too far in providing them with details.

[52] However, I note that neither Ms. Swerhun nor Ms. Chad testified to precisely what details Mr. White provided to the PLS lawyers that he should not, in their view, have provided. Mr. White testified that he did not provide the PLS lawyers with the name of an inmate; it was they who brought up the identity of a particular inmate. Neither the April 24, 2019, notice of disciplinary hearing nor the April 30, 2019, email from Ms. Chad, specifically identified what information was allegedly shared by Mr. White with the PLS lawyers that would have violated employer policy.

[53] Third, some evidence was tendered with respect to discussions between the UCCO-SACC-CSN and Ms. Chad about trying to resolve this matter after the reprimand had been rendered but before the complaint was made. These discussions, which took place by email, did not resolve the matter.

[54] Fourth, I note that both Mr. White and Mr. MacKinnon testified about the negative impact that discipline can have on health and safety in the institution. They testified that there had been significant staff turnover at Kent and that Mr. White was a relatively senior employee. They expressed concern about the chilling impact that disciplining a senior employee would have on junior officers who were concerned about health and safety matters. The respondent objected to this testimony, arguing that it raised additional allegations outside the scope of this complaint. I allowed the questions and said that I would hear the parties' arguments about the relevance of this testimony to the issues before me.

[55] Fifth, I note that in cross examination, Ms. Chad was brought to the Treasury Board's *Guidelines for Discipline* and asked about its provisions with respect to oral and written reprimands. She confirmed that the definition of an oral reprimand includes the phrase, "No record of this measure is placed on the employee's personnel file." She also confirmed that the definition of a written reprimand includes the phrase, "A formal written notice that misconduct has occurred." She also testified that in "Appendix A" to the guidelines, at point 7, it states that, "A written record of the disciplinary action taken should be placed on an employee's personnel file." She testified that the only thing that should have been placed on Mr. White's file is a note that a verbal reprimand had taken place, not the full email of April 30, 2019.

[56] Sixth and finally, in written submissions dated December 10, 2021, the respondent confirmed that there was no longer any record of the reprimand of April 30, 2019, on Mr. White's personnel file. In written submissions dated December 21, 2021, the complainant withdrew his request for the removal of the disciplinary measure from all his files and informed the Board that a statement to the effect that the Board "… would have ordered the removal of the discipline imposed by the respondent against the complainant on April 30, 2019, if it was still on his record…" would be sufficient.

III. Reasons

A. The legal framework that applies to this complaint

[57] The prohibition against reprisals is found at s. 147 of the *Code*, which reads as follows:

147 *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked,* ***or take any disciplinary action against or threaten to take any such action against an employee because the employee***	***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie,* ***ou de prendre — ou menacer de prendre — des mesures disciplinaires contre lui parce que :***
…	[…]
(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.	***c) soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.***

[Emphasis added]

[58] The provision that allows an employee to make a reprisal complaint is found at s. 133, which reads in part as follows:

133 (1) *An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*	***133 (1)*** *L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite* [à la Commission] *au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.* […]
…	
(3) *A complaint in respect of the exercise of a right under section 128 … may not be made unless the employee has complied with subsection 128(6) … in relation to the matter that is the subject-matter of the complaint.*	***(3)*** *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128* […] *sa présentation est subordonnée, selon le cas, à l'observation du paragraphe 128(6) par l'employé* […]
…	
(5) *On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or*	***(5)*** *Sur réception de la plainte,* [la Commission] *peut aider les parties à régler le point en litige;* [si elle] *décide de ne pas le faire ou si les parties ne sont pas parvenues à*

the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.	*régler l'affaire dans le délai* [qu'elle] *juge raisonnable dans les circonstances,* [elle] *l'instruit* [elle-même].
***(6)** A complaint made under this section in respect of the exercise of a right under section 128 … is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*	***(6)** Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128* […] *sa seule présentation constitue une preuve de la contravention; il incombe dès lors à la partie qui nie celle-ci de prouver le contraire.*

[59] The provision at s. 133(6) is important because it reverses the burden of proof onto the respondent, in a situation where a complainant exercised their right to refuse to perform an activity reasonably perceived as dangerous. That right is found at s. 128, which reads as follows:

***128 (1)** Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*	***128 (1)** Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :*
…	[…]
***(c)** the performance of the activity constitutes a danger to the employee or to another employee.*	***c)** l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.*
…	[…]
***(6)** An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1) … shall report the circumstances of the matter to the employer without delay.*	***(6)** L'employé qui se prévaut des dispositions du paragraphe (1)* […] *fait sans délai rapport sur la question à son employeur.* […]
…	
***(7.1)** The employer shall, immediately after being informed of a refusal under subsection (6), investigate the matter in the presence of the employee who reported it. Immediately after*	***(7.1)** Saisi du rapport fait en application du paragraphe (6), l'employeur fait enquête sans délai en présence de l'employé. Dès qu'il l'a terminée, il rédige un rapport*

concluding the investigation, the employer shall prepare a written report setting out the results of the investigation.	*dans lequel figurent les résultats de son enquête.*
…	[…]

[60] This Board's mandate to hear complaints made under s. 133 of the *Code* is set out in s. 240 of the *Act*, which provides that the Board deals with complaints made under s. 133 of the *Code* in respect of the public service and may order an employer to remedy the situation pursuant to s. 134 of the *Code*. I will provide the wording of s. 134 later in these reasons.

[61] Other disputes that can arise under Part II of the *Code* in respect of the public service are not within the Board's mandate. For example, if an employee refuses to do work that the employee believes to be dangerous, and his or her employer determines that there is no danger, the employee's appeal process (under ss. 128 and 129) does not end up before this Board.

[62] While the distinction is legally clear, in practice, this can present some challenges.

[63] In some cases, the same underlying set of events and facts could give rise to two different complaint processes, raising distinct legal questions and ending up before different decision makers.

[64] While I do not have to decide on them in the context of this specific complaint, the arguments made about the verbal reprimand imposed on Mr. White nevertheless relates to the rights and responsibilities of employees and employers that another decision maker may have had to decide under distinct proceedings set out in the *Code*.

[65] For example, as I will detail later in these reasons for decision, Mr. White explained his actions on the morning of April 24 in relation to what he believed to be his responsibilities as an employee under the *Code* (at s. 126; I will refer more specifically to s. 126 later in these reasons). His explanation of why he spoke to the PLS lawyers directly was rooted in his assessment of how the institution had failed in its health and safety responsibilities (at s. 125; I will refer more specifically to s. 125 later in these reasons).

[66] In turn, as I will also detail later in these reasons for decision, the respondent's arguments depend at least in part on challenging Mr. White's interpretation of his responsibilities under s. 126 of the *Code* and its arguments as to what Mr. White ought to have done other than speak directly to the PLS lawyers.

[67] To the extent that these arguments relate to the matter that is before the Board, I have to at least weigh their impact on this complaint, even though I may not have to address their merits.

[68] My task is limited to making a determination whether the respondent violated s. 147 of the *Code* and, if so, to making any orders considered appropriate and necessary under s. 134.

[69] The standard test applied by the Board in complaints involving s. 133 of the *Code* was established in *Vallée* at para. 64, which reads as follows:

> *64 Thus, the complainant would have to demonstrate that:*
>
> *1. he exercised his rights under Part II of the* [*Code*] *(section 147);*
>
> *2. he suffered reprisals (sections 133 and 147 of the* [*Code*]*);*
>
> *3. these reprisals are of a disciplinary nature, as defined in the* [*Code*] *(section 147); and*
>
> *4. there is a direct link between his exercising of his rights and the actions taken against him.*

[70] The parties did not dispute that *Vallée* is the appropriate test to be applied by the Board, although the complainant argued that the jurisprudence has evolved somewhat in the 15 years since it was released.

[71] Given the wording of s. 147, and the facts and issues at play in this case, I find that some of the criteria in *Vallée* are constructed too narrowly. The wording of the first and fourth criteria in *Vallée* are too narrowly focused on the "exercising of rights" under Part II of the *Code*. While the first part of s. 147 does speak about the exercising of rights, the latter part of s. 147 prohibits reprisals when an employee "… has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part" (see s. 147 (c)). The enquiry with regards to the first and fourth criteria of *Vallée* must therefore encompass any actions taken in accordance with, or in furtherance of, Part II of the *Code*, not just those that involve the exercising of rights.

[72] I note that the third criterion in *Vallée* is also narrower than the wording of s. 147, which speaks not only of reprisals, but of **threat** of reprisals. In that regard, it is also important to note that not all reprisals are financial in nature. As argued by the complainant the broad purpose of the provision is to encourage employees to bring forward health and safety concerns without fear of reprisal. I agree with the principle articulated in *Chaves v. Treasury Board (Correctional Service Canada)*, 2005 PSLRB 45, in which the Board concluded, at paragraph 72, as follows:

> *[72] […] The intent and goal of the* [*Code* provisions] *are to ensure a safe workplace for employees and the "whistle blowing" provisions of the* [*Code*] *would be rendered meaningless if the employer were allowed to take action against an employee, as long as that action did not result in a financial penalty for the employee.*

[73] In the circumstances before me, and in light of the wording of s. 147 of the *Code*, I find it more useful to reformulate and simplify the principles in *Vallée* and *Chaves* as follows:

1. Has the complainant acted in accordance with Part II of the *Code* or sought the enforcement of any of the provisions of that Part (section 147)?
2. Has the respondent taken against the complainant an action prohibited by section 147 of the *Code* (sections 133 and 147)? and
3. Is there a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with Part II of the *Code* or seeking the enforcement of any of the provisions of that Part?

[74] In this matter, the respondent agreed that criterion 2 is met, in that sense that it took action against Mr. White, in the form of a disciplinary reprimand.

[75] The issues needing determination are therefore whether the first and last criteria are met.

B. Burden of proof

[76] The first issue to be determined is whether the complainant exercised a right to refuse dangerous work pursuant to s. 128 of the *Code*. The answer to that question will determine who bears what burden of proof in that regard.

[77] S. 133(6) of the *Code* reads as follows:

133 (6) *A complaint made under this section in respect of the exercise of a right under section 128 … is*	***133 (6)*** *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128 ou*

itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.	[…], *sa seule présentation constitue une preuve de la contravention; il incombe dès lors à la partie qui nie celle-ci de prouver le contraire.*

[78] The right to make a work refusal is set out at s. 128(1) of the *Code*. That section allows work refusals in a number of situations, including refusing "… to perform an activity, if the employee while at work has reasonable cause to believe that … the performance of the activity constitutes a danger to the employee or to another employee." When an employee makes a work refusal, any right to make a complaint of reprisals under s. 133(1) as a result of that work refusal is subject to the employee having complied with the requirements of s. 128(6) (see s. 133(3)). S. 128(6) reads as follows:

128 (6) *An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1) …* ***shall report the circumstances of the matter to the employer without delay.***	***128 (6)*** *L'employé qui se prévaut des dispositions du paragraphe (1)* […] ***fait sans délai rapport sur la question à son employeur.***

[Emphasis added]

[79] Therefore, to determine where the burden of proof lies with respect to the allegation of reprisal as a result of a work refusal, I must determine whether Mr. White refused to perform an activity under s. 128(1) of the *Code* **and** whether the requirement in s. 128(6) of reporting the circumstances of the matter to the employer without delay was met.

[80] The complainant argued that there are no "magical words" to be used when making a work refusal (see *Noel v. VIA Rail Canada Inc.* (1986), 64 di 17 (CLRB), and *LeClair v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 49 at paras. 117 and 123). He argued that his actions on the morning of April 24, 2019, amounted to a work refusal, even if he did not use those words.

[81] I agree there are no magical words to be used in making a work refusal, and much of the actual evidence is in the complainant's favour. On the morning of April 24, 2019, he told Mr. Kambo that he had health and safety concerns about the PLS

lawyers meeting with Delta Unit inmates. He did not allow the inmate from Delta Unit to go over to Golf Unit when he was asked to arrange it. He went himself and explained to the PLS lawyers why he thought sending the inmate from Delta Unit over was unsafe.

[82] While Mr. White and Mr. Swerhun have somewhat different accounts of their interactions at Golf Unit, it is also clear that Mr. Swerhun, at the time acting as a correctional manager, overheard Mr. White's conversation with the PLS lawyers. Mr. Swerhun's email report of the encounter included the information that Mr. White raised concerns about the safety of the PLS lawyers meeting with the inmate from Delta Unit. Although Mr. Swerhun was only acting in the correctional manager's role, he was at the time a representative of the employer.

[83] Finally, when Mr. White returned to Delta Unit, he wrote an email to Ms. Owens, a senior employer representative, detailing that he "… did not feel that it was safe to allow an inmate from [his] unit to attend without proper security and safety procedures enacted."

[84] In short, Mr. White refused to perform an activity (send or bring the inmate from Delta Unit to Golf Unit), as he did not perform that activity, and he met the requirement of s. 128(6) of the *Code* to "… report the circumstances of the matter to the employer without delay."

[85] On the other hand, I must take account of the respondent's argument that Mr. White's actions did not amount to a work refusal under s. 128 of the *Code*. It argued that under the *Code,* an employee must clearly communicate that a danger exists, so that an employer can know that s. 128 is in play. This did not occur, it argued. It noted that Mr. White did not make a work refusal to a manager before he left the Delta Unit. He went over to Golf Unit himself, and although he encountered three correctional managers there, he did not make a work refusal to them. Instead, he spoke directly to the PLS lawyers, who are not employees of the CSC. He also admitted in cross-examination that "technically" he did not make a work refusal to a manager.

[86] After speaking to the PLS lawyers, Mr. White was told that they no longer needed to meet with the inmate from Delta Unit. As he himself testified, because the lawyers no longer needed to meet with the inmate from Delta Unit, the need to arrange the meeting had disappeared. He said that had the correctional managers at Golf Unit

ordered him to send the inmate over, he "could have made a full work s. 128 refusal", the respondent noted.

[87] The complainant has made a complaint under s. 133 of the *Code*, in which he claimed to have exercised his right to refuse work as outlined in s. 128 of the *Code*. Once a complaint is filed in respect of reprisals resulting from a refusal to work, the burden of proof shifts to the respondent. This was clearly stated by the Board in *White v. Treasury Board (Correctional Services of Canada)*, 2013 PSLRB 63 ("*White 2013*") at paragraph 138, as follows:

> *138 Pursuant to subsection 133(6) of the* Code*, once filed, the complaint is evidence that the contravention actually occurred, and if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party. The initial burden of proof lies with the complainant, who must prove only that he or she has filed a complaint under subsection 133(1) of the Code and that the complaint arose in respect of a right being exercised under either section 128 or section 129 of the Code.*

[88] In *White 2013*, *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4, *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17, *Sousa-Dias v. Treasury Board (Canada Border Services Agency)*, 2017 PSLREB 62, and *Vanegas v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 60, the Board placed an initial obligation on complainants to establish that they had filed complaints under subsection 133(1) of the *Code* as a result of a right being exercised under either section 128 or section 129. Once that initial burden had been discharged, the Board applied to the respondents the reverse onus of proving that contraventions of section 147 did not occur.

[89] In this matter, the complainant has met his initial burden. On the morning of April 24, 2019, Mr. White was asked to send or escort an inmate from Delta unit to Golf Unit. He did not perform that activity. Instead, he went over to Golf Unit himself. Although he initially communicated his concerns about safety directly to the PLS lawyers, and not to the three correctional managers there, he did communicate his concerns in the presence of at least one correctional manager, Mr. Swerhun. The evidence clearly demonstrates that Mr. Swerhun overheard the conversation between Mr. White and the PLS lawyers. Then, shortly after Mr. White returned to his work unit, he wrote an email to Ms. Owens and reported that he "… did not feel that it was safe to

allow an inmate from my unit to attend without proper security and safety procedures enacted."

[90] The evidence before me plainly shows that, in fact, Mr. White refused to perform an activity (send or bring the inmate from Delta Unit to Golf Unit), as he did not perform that activity. The undisputed evidence in this case also establishes convincingly that he expressed to many respondent's representatives his concerns about occupational health and safety and that did so sufficiently clearly to meet the requirement of s. 128(6) of the *Code* to "… report the circumstances of the matter to the employer without delay…": see in *Kinhnicki v. Canada Customs and Revenue Agency*, 2003 PSSRB 52 at paragraph 44.

[91] Of course, once the PLS lawyers no longer needed to meet with the inmate from Delta Unit, there was no need to proceed further with the work refusal process. However, the fact the work refusal was effectively over almost as quickly as it began should not change the conclusion that a work refusal did take place.

[92] As I have concluded that Mr. White's actions on the morning of April 24 did amount to a work refusal under s. 128 of the *Code*, the respondent bears the reverse burden of proof set out at s. 133(6) of establishing that a contravention of s. 147 did not occur.

[93] As such, it is up to the respondent to prove, on a balance of probabilities, that the CSC did not impose the reprimand on the complainant because he had exercised his right to refuse work.

[94] That being said, the complainant still bears the burden of establishing, on a balance of probabilities, that part of his complaint that alleges retaliation for having acted in accordance with, or in furtherance of, Part II of the *Code*, because the reverse onus set out in s. 133(6) does not apply to that part of his complaint.

C. Mr. White's actions in accordance with, or in furtherance of, Part II of the *Code*

[95] Mr. White argued that in addition to the work refusal under s. 128 of the *Code*, his actions were also rooted in other responsibilities under the *Code*.

[96] The complainant argued that after he raised his concerns with Mr. Kambo on the morning of April 24, 2019, the institution should have acted to ensure that

protocols were put in place for any meetings between the PLS lawyers and the inmates. He argued that these actions were required under the *Code*, because the employer is responsible to do the following:

- at s. 125(1)(y): "ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees;"
- at s. 125(1)(z.02): "respond as soon as possible to reports made by employees under paragraph 126(1)(g);" and
- at s. 125(1)(z.14): "take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed in the work place …".

[97] The complainant testified that on the morning of April 24, 2019, Mr. Kambo never came back to Delta Unit to address the concerns that he had raised at the beginning of his shift. No other correctional manager came to the unit. Mr. White believed that no correctional manager informed the PLS lawyers about the possible danger of a visit with the inmate from Delta Unit. Mr. Swerhun testified that he did not know if the PLS lawyers had been informed about the lockdown.

[98] The complainant argued that his actions on the morning of April 24, 2019, were consistent with obligations on employees under the *Code* to do the following:

- at s. 126(1)(c): "take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and **any person likely to be affected by the employee's acts or omissions** [emphasis added];" and
- at s. 126(1)(g): "report to the employer any thing or circumstance in a work place that is likely to be hazardous to the health or safety of the employee, or that of the other employees or **other persons granted access to the work place by the employer** [emphasis added] …".

[99] The respondent argued that under s. 126(1)(g) of the *Code*, Mr. White's obligations were limited to reporting to the employer. That section did not give him the right or responsibility of reporting the alleged danger the PLS lawyers, who were not even employed at the CSC.

[100] Furthermore, the respondent argued that Mr. White's obligations under s. 126(1)(c) of the *Code* are limited to taking "reasonable and necessary precautions". Mr. White had alternatives other than speaking directly to the lawyers. He could have made a formal work refusal. He could have simply told the PLS lawyers that he had a concern about sending the inmate from Delta Unit over without disclosing that the inmate from Delta Unit was the source of the weapon, it said. If his actions were not reasonable and

necessary, then the complainant was not exercising any rights under s. 126(1)(c) of the *Code*, and there cannot be a nexus between the exercise of such rights and the discipline administered, it argued. If Mr. White's actions were not reasonable and necessary, his complaint should be dismissed, it said.

[101] The contention that the employer did not uphold its obligations under s. 125 of the *Code* is not an issue before the Board, the respondent argued. The complaint before the Board concerns s. 133. A complaint about s. 125 would be the subject of a different process, it said.

[102] As noted earlier, the role of the Board when it comes to determining issues under the *Code* is limited to s. 133 (and by extension s. 147) and s. 134. An allegation that an employer failed to fulfill its obligations under s. 125 would not come before this Board. An allegation that an employee acted wrongly in respect of employee responsibilities under s. 126 would also not come before this Board, unless the allegations are tied to a complaint under s. 133, as they are here.

[103] Also as noted earlier, I at least have to weigh the parties' arguments about the application of s. 125 and s. 126, in order to determine whether Mr. White was acting in accordance with Part II of the *Code* or was seeking the enforcement of any of the provisions of that Part.

[104] This is an appropriate place to point out that at a couple of points in time during the hearing, Mr. White interjected during the respondent's questions or pleadings by asking, in effect, "What should I have done differently?" During the hearing, I informed him that the hearing was not the proper place for his interjections, and I suggested that he speak to his representative during a break.

[105] With hindsight, it would be easy to consider that Mr. White's actions on the morning of April 24, 2019, were not perfect. He could have made a formal work refusal instead of leaving Delta Unit. He could have stopped when he entered Golf Unit and spoken to Mr. Swerhun. He could have insisted that Mr. Swerhun explain to the PLS lawyers why the inmate from Delta Unit should not be sent or brought over. In speaking to the PLS lawyers, he could have said less than he did.

[106] In all fairness to the complainant, I should mention here that CSC also had other options open to it. Mr. Kambo or another manager of the respondent could have

addressed the concerns that the complainant had raised with Mr. Kambo at the beginning of his shift. Mr. Kambo or one of the other correctional managers could have proactively addressed the request of the PLS lawyers to meet with the inmates. Mr. Swerhun, instead of simply following Mr. White into the room with the lawyers and saying nothing, could have intervened more directly, as he was acting Correctional Manager and a management representative.

[107] However, speculating what other options would have been open to either Mr. White or to the CSC is of no help in deciding whether the complainant was acting in accordance with Part II of the *Code* or was seeking the enforcement of any of the provisions of that Part, and whether the disciplinary reprimand was retaliation for the actions that the complainant took on April 24, 2019.

[108] What matters is that under the circumstances, Mr. White felt that the PLS lawyers ought to know of a possible danger. There had been a stabbing. One inmate had been sent to hospital. The situation was still fluid, as Delta and Golf Units were still under modified lockdown.

[109] Clearly, Mr. White was frustrated that no correctional manager appeared to be taking control of the situation. No correctional manager had ensured that there was a flow of information to the correctional officers.

[110] Perhaps Mr. White acted with more anger or frustration than would be ideal. But to the extent that he acted out of anger or frustration, his actions were motivated by his concern about health and safety. There is no dispute between the parties on that point.

[111] In short, at the time, Mr. White believed that it was reasonable and necessary to speak to the PLS lawyers. While the respondent may believe his actions were not reasonable and necessary, there is no dispute between the parties that the complainant believed that there was a health and safety issue. He took steps to address the issue that he believed were consistent with his rights and responsibilities under the *Code*. On the morning of April 24, 2019, he raised his concerns with Mr. Kambo. He spoke to the PLS lawyers, who fall into the category of "… other persons granted access to the work place …" referred to in s. 126(1)(g) of the *Code*, and did so in the presence of Mr. Swerhun. After the meeting with the PLS lawyers was over, he described his concerns in the email to acting Deputy Warden Owens. She acknowledged those concerns.

Whether these actions were the right or best actions is not the question before the Board. He believed that his employer was not taking the steps it should have, and that his actions were in accordance with ss. 126(1)(c) and (g) or in furtherance of those provisions.

[112] Perhaps in a different fact situation, where an employee's actions were clearly outside the realm of reasonable action, I might make a different conclusion. Here, in light of the above analysis, and as there is no dispute between the parties that the complainant was exercising what he felt were his responsibilities under the *Code* to ensure the health and safety of employees, inmates, and the PLS lawyers, I find that the complainant was acting in accordance with Part II of the *Code* or was seeking the enforcement of any of the provisions of that Part in respect of what was accepted by both parties as a health and safety issue. This too meets the first criterion in *Vallée,* as I have reformulated and simplified it earlier in this decision.

D. Is there a direct link between the reprimand given by Ms. Chad and Mr. White acting in accordance with Part II of the *Code* or seeking the enforcement of any of the provisions of that Part?

[113] As mentioned earlier, in this matter, the respondent agreed that step 2 of the reformulated and simplified *Vallée* test is met, in that sense that it took action against Mr. White, in the form of a disciplinary reprimand.

[114] I turn now to the heart of this matter, which is whether, on a balance of probabilities, the disciplinary reprimand was given **because** the complainant refused to work or otherwise acted in accordance with Part II of the *Code* or has sought the enforcement of any of the provisions of that Part. To reiterate, the last step in *Vallée*, as reformulated and simplified earlier in this decision, requires that "… there is a direct link between (a) the action taken against the complainant and (b) the complainant acting in accordance with Part II of the Code or seeking the enforcement of any of the provisions of that Part ." In the case at hand, that requirement relates to the causality between the reprimand of April 30, 2019, and his actions of April 24, 2019.

[115] The complainant argued that there was a clear nexus between the disciplinary reprimand he received on April 30, 2019, and the actions he took on the morning of April 24, 2019. There is no dispute between the parties that he was exercising what he felt were his responsibilities under the *Code* to ensure the health and safety of

employees, inmates, and the PLS lawyers. He maintained that he took those actions because, despite the fact that he had raised his concerns with Mr. Kambo, he was still being asked to send the inmate from Delta Unit over to Golf Unit. His decision to speak to the PLS lawyers was both reasonable and necessary, he argued. He believes that the CSC disciplined him for those actions, in violation of s. 147 of the *Code*.

[116] The complainant argued that the Board should reject the respondent's argument that the discipline was for other reasons, because the respondent failed to establish that there was any other cause for the discipline. He argued that the disciplinary process that the CSC used had so many problems with it that it amounted to a contrived reliance, a sham or a camouflage. He argued that if the CSC had legitimate other reasons for disciplining him, it would have clearly expressed them in its notice of discipline, and throughout the disciplinary process. The employer has failed to establish precisely what the complainant did wrong, he argued.

[117] The complainant argued that the provisions in the *Code* are designed to ensure that employees feel free to bring forward perceived threats to the health and safety of the workplace, without fear of reprisal. He submitted that he was a correctional officer with significant seniority in the workplace, and the discipline he received should not be allowed to stand, as it has had a chilling effect on other employees.

[118] In support of his arguments, the complainant took me to several cases in which complaints under s. 133 of the *Code* had been allowed in what he argued were analogous situations (see *Noel*, at para. 15; *LeClair*; *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40 at paras. 73 to 75; *Grogan v. Canadian National Railways* (1986), 67 di 183 (CLRB); and *Chaney v. Auto Haulaway Inc.*, 2000 CIRB 47 at paras. 30 to 32).

[119] The respondent argued that Mr. White was not acting under obligations he had under the *Code*. The respondent submitted that it was not reasonable and necessary for him to directly inform the PLS lawyers of a potential danger. The respondent contended that he shared information with the PLS lawyers that he was not authorized to share and that he did not need to share, given the perceived danger. The respondent maintained that the discipline that the complainant received was not because of his actions under the *Code*. According to the respondent, the disciplinary reprimand

imposed was for not following the orders of Mr. Swerhun and because of the information he shared with the lawyers.

[120] The *Code* does not task the Board with determining whether an employer has just cause for its discipline or whether that discipline was reasonable, the respondent argued. It said that if the evidence does not establish, on a balance of probabilities, that the disciplinary reprimand was linked to an action under the *Code*, the only issue is whether the employer had cause (not just cause) to render discipline (see *Anderson v. IMTT-Québec Inc.*, 2011 CIRB 606 at para. 91). In this case it did, and the complaint should be dismissed, the respondent argued.

[121] In support of its arguments, the respondent took me to several cases in which complaints under s. 133 were dismissed in what it argued were analogous situations (see *Pezze v. Treasury Board (Department of Natural Resources)*, 2020 FPSLREB 37 at paras. 44 and 45; *Walker v. Deputy Head (Department of the Environment and Climate Change)*, 2018 FPSLREB 78 at para. 613; and *Nash* at para. 77). The respondent argued that in each of those cases, the Board concluded that the discipline rendered was not linked to the exercise of rights under the *Code* but to other reasons.

[122] The respondent also argued that in *Pezze* (at paragraph 42), the Board has confirmed that close proximity in time between the administration of discipline and the exercise of a right under the *Code* is not, in and of itself, proof of a violation of s. 147.

[123] The respondent also argued that while the complaint in *Martin-Ivie* was allowed, the Board acknowledged that employer discipline related to an employer's code of conduct is not a violation of the *Code,* as follows at paragraph 59:

> *59 If the story ended there, I would have no qualms finding in favour of the respondent. Instituting an investigation to look into a possible breach of an employer policy is not, in and of itself, in my opinion a threat of discipline. An employer has every right to discipline an employee for a breach of its policies. The complainant cannot hide behind the exercise of her rights under the* Code *to avoid disciplinary action which may result from actions which are a violation of the employer's code of conduct.*

[124] The respondent also highlighted this finding in *Walker*, at para. 622:

> *622 The exercise of one's rights under the* [*Code*] *is not a shield against inappropriate workplace behaviour. The protection against reprisal does not cover unrelated misconduct. The question is whether there is a nexus between the discipline and the exercise of rights under Part II of the* [*Code*]*. The exercise of rights under s. 128 of the* [*Code*] *must be the proximate cause of the discipline imposed … It is not enough to show that discipline occurred; the grievor must also show that a nexus exists between the discipline and the exercise of rights under s. 128 … which she has not done.*

[125] In reviewing the evidence before me, I note that there are two very different versions of what took place and why Mr. White was disciplined. These differences involve not only the interpretation of events but also many aspects of the events themselves. In particular, I note the following:

1. Mr. White testified that he was asked to "send" the inmate from Delta Unit over to Golf Unit, while Mr. Swerhun testified that he asked Mr. Voth to contact Mr. White and have the inmate from Delta Unit "brought" over.
2. Mr. White and Mr. Swerhun had very different versions of their interactions at Golf Unit: the former testified that they greeted each other, twice, and the latter testified that no words were spoken between them.
3. Although the notice of disciplinary hearing listed Mr. Swerhun as the author, he denied writing it, as did Ms. Chad. Neither could explain who actually did write it.
4. Mr. White and Mr. MacKinnon testified that Ms. Chad had encouraged Mr. White to accept a verbal reprimand so that the whole thing would go away, which they perceived as a threat of more significant discipline. Ms. Chad did not recall saying that the "whole thing would go away". She did not agree that she made a threat of more serious discipline.

[126] If the issue before me were whether the discipline administered on Mr. White was for cause, I might have to wrestle with each of these discrepancies and determine which version of events I find more credible. But this is not a grievance about discipline. (I parenthetically note that even if it were, I would not have jurisdiction because it is merely a reprimand, not a disciplinary matter referable to adjudication under s. 209(1)(b) of the *Act*.)

[127] Rather, the issue that I must determine is whether the disciplinary reprimand was **because** Mr. White had refused to work or was otherwise acting in accordance with, or in furtherance of, Part II of the *Code*.

[128] Regardless of the specific burdens on proof that apply in the case, that is whether the respondent has proven that the disciplinary reprimand was not because of Mr. White's refusal to work or whether Mr. White has proven that the disciplinary

reprimand was because he was otherwise acting in accordance with, or in furtherance of, Part II of the *Code*, I find it more probable than not that the reprimand was **because** of Mr. White's actions in the morning of April 24, 2019. As I have already found, he took those actions in accordance with, or in furtherance of, Part II of the *Code*, and those actions included his refusal to perform an activity because he believed that the performance of that activity constituted a danger.

[129] It is not disputed that Mr. White raised health and safety concerns with his manager, Mr. Kambo, on the morning of April 24, 2019. He also spoke to his union local's president about it. When he went over to Golf Unit and spoke to the PLS lawyers, he told them that he did so because of his health and safety concerns. Whether the inmate from Delta Unit was to be sent over or brought over does not matter; in either scenario, Mr. White was concerned about a lack of safety protocols. Mr. White did not carry out the instructions that were given to him, and his decision to do so was motivated by the health and safety concerns that he had already communicated to Mr. Kambo. As already mentioned, there is no dispute between the parties that the complainant believed that there was a health and safety issue, and that he took steps to address it that he believed were consistent with his rights and responsibilities under the *Code*.

[130] While Mr. White might or might not have spoken directly to Mr. Swerhun, Mr. Swerhun clearly heard what was being said to the PLS lawyers. He later summarized in his email that Mr. White had spoken to the PLS lawyer out of a concern for their health and safety.

[131] Mr. White's email to Ms. Owens following the interaction that took place in Golf Unit clearly indicates that his discussion with the PLS lawyers was motivated by what he believed were his legal obligations for health and safety. The evidence shows that following receipt of this email, Ms. Owens asked Ms. Chad to investigate the situation, and Ms. Chad undertook to get Mr. Swerhun's version of events. A brief meeting happened in the visits and correspondence area between Mr. White, Ms. Chad and Mr. Swerhun. Although Ms. Chad and Mr. Swerhun could not recall that meeting in detail, Mr. White recalled it clearly. Following those events, Ms. Chad started a disciplinary process against Mr. White which culminated in her April 30, 2019, email.

[132] In short, this evidence supports a conclusion that a causal link exists between the discipline imposed on Mr. White, and all the actions taken by him in accordance with, or in furtherance of, Part II of the *Code*.

[133] The respondent argued that the disciplinary reprimand was for other reasons, not linked to Mr. White's actions in respect of health and safety, but to violations of CSC policy.

[134] Being faced with two different versions of why Mr. White was disciplined, I must decide, on a balance of probabilities, which version has more credibility. That is to say that I ought to assess which version is more consistent, or in better harmony, with the balance of probabilities in light of all the evidence before me: see *Faryna v. Chorny*, 1951 CanLII 252 (BC CA).

[135] The respondent's version might have been more plausible were it not for several inconsistences in the process that the CSC followed. I will note six of them.

[136] First, no one could explain who actually wrote the notice of disciplinary hearing given to Mr. White on the evening of April 24, 2019. It was issued under Mr. Swerhun's name, but he denied writing it on the morning of April 25, 2019, according to Mr. White. He also denied writing it before me. The notice contains Ms. Chad's office phone number, but she also denied writing it, and could not explain who did write it.

[137] If CSC had a clear reason for disciplining Mr. White for violation of its policies, it would be reasonable to expect it could identify the author of the notice convening a disciplinary hearing.

[138] Second, no thorough disciplinary investigation took place. Ms. Chad testified that she relied entirely on Mr. Swerhun's summary of events. She could not recall the meeting she had with Mr. White in the visits and correspondence area. According to Mr. White, it did not amount to a fact-finding meeting. Ms. Chad testified that she did not interview the PLS lawyers.

[139] If CSC had a clear reason for disciplining Mr. White for violation of its policies, it would be reasonable to expect it would have investigated the suspected violation and establish the facts behind that violation.

[140] Third, and perhaps flowing from the lack of an investigation, even after three days of hearing, I still have no complete understanding of **precisely** what Mr. White said to the PLS lawyers that Ms. Chad felt went too far. The April 30, 2019, reprimand stated that he "revealed specific information about a security situation to non CSC employees" but does not say what that information was. The testimony of Ms. Chad **appears** to suggest that he revealed the identity of the inmate from Delta Unit, who allegedly stabbed another inmate. However, she did not specifically testify to that. More importantly, Mr. Swerhun, who was the only one before me who could have overheard what Mr. White said, did not testify to precisely what was said. As noted, Mr. White denied giving the name of the inmate to the PLS lawyers. He testified that it was they who revealed the name of the inmate to him.

[141] On balance, I can find that it is possible that during the course of the conversation between Mr. White and the PLS lawyers, it became clear that the inmate from Delta Unit was the one who stabbed the inmate from Golf Unit. However, whether it is probable that Mr. White clearly communicated that information is another question. If the CSC had a clear reason for disciplining Mr. White for a violation of its policies, it would be reasonable to expect that they could clearly establish that it was Mr. White who mentioned this information to the PLS lawyers, as opposed to inviting the Board to infer that the PLS lawyers could not have reached that conclusion by themselves. After all, Mr. Swerhun overheard the conversation, and he was one of the respondent's managers at that time. Mr. White testified that he did not provide the PLS lawyers with the name of an inmate and that it was they who brought up the identity of a particular inmate. The respondent failed to produce sufficiently clear, convincing and cogent evidence to contradict the complainant's testimony on that point.

[142] Fourth, there were inconsistencies in the employer's descriptions of how Mr. White allegedly violated the CSC's policies or code of conduct. The notice of disciplinary hearing listed two issues. The first was a failure to obey the lawful orders of a superior employee (i.e., not stopping to talk to Mr. Swerhun after allegedly being told to stop). The second related to the unauthorized sharing of information in violation of CD 060 *Code of Discipline*, the *Privacy Act,* the *Access to Information Act,* and the Policy on Government Security.

[143] The notice of disciplinary hearing does not mention CD 701, the CSC Commissioner's Directive on information sharing, which the respondent sought to rely on in this hearing.

[144] The uncontradicted evidence of the complainant was that the actual disciplinary meeting that took place on April 26, 2019, did not involve a discussion of alleged violations of employer policy. Mr. White testified that the meeting was 15 minutes in length and that it did not include any discussion of CD 701, the CSC Commissioner's Directive on information sharing. Ms. Chad could recall few details about this meeting.

[145] Furthermore, most of the evidence indicates that the employer's primary concern was about Mr. White's tone and demeanour in his approach to meeting with the PLS lawyers. According to Mr. White's testimony, that was the main theme of the conversation he had with Ms. Chad and Mr. Swerhun in the visits and correspondence area on April 24, 2019. It was also the dominant message in Ms. Owen's April 25 response to Mr. White's email, who urged him "…to conduct yourself professionally even during the most frustrating times…". Finally, the April 30 reprimand also addressed this issue, when Ms. Chad wrote the following to Mr. White "You admitted that you acted out of anger and frustration and that in the future you will take a moment to collect your thoughts and emotions before acting on them."

[146] While I accept that Mr. White might have acted out of frustration, I heard no testimony about his tone and demeanor, neither from him nor Mr. Swerhun. I also heard no evidence that linked his tone and demeanor to violations of CSC policies or its code of conduct. The notice of disciplinary hearing was silent on this issue.

[147] Fifth, I note the complete lack of clarity in the CSC's explanation of what kind of reprimand this was. Ms. Chad's email said it was not a written reprimand but an email documentation of a verbal reprimand. However, she acknowledged that the Treasury Board's *Guidelines on Discipline* states that verbal reprimands are not put in writing. When questioned about how a verbal reprimand later documented by email was consistent with the employer's disciplinary policies, Ms. Chad testified that, when an employee receives a verbal reprimand, a note is placed on the employee's file to record that a verbal reprimand had been given, without any details.

[148] However, Ms. Chad's email of April 30, 2019, stated, "This email will remain on your file for 2 years." The email forwarding it to Labour Relations on May 1, 2019,

read, “For the discipline file.” Ms. Chad testified that she felt that she had to write the email so that it would stay on file for 2 years “in case this happened again.” In the absence of any clearer evidence as to what was placed on Mr. White’s file, I conclude it was the entire email.

[149] This ambiguity about the nature of the reprimand left the complainant, in his complaint to the Board, to calling it a “written oral reprimand.” However, it’s clearly more than verbal reprimand, particularly as it appears the entire email went on Mr. White’s file. Just as clearly, the email fails to link Mr. White’s actions or behaviour to any actual alleged violation of CSC policies, directives, or legislation, unlike the notice of disciplinary hearing of April 24, 2019. It therefore falls short of what might be expected in a written reprimand. This ambiguity further undermines the employer’s explanation of why Mr. White was disciplined.

[150] Sixth, I note that I had no evidence that CSC ever responded to Mr. White’s health and safety concerns after the events in question, either through discussion with him, or with management, or with the joint OSH committee. Had it done so, then perhaps the disciplinary process could have been interpreted as a separate and distinct process not linked to the raising of health and safety concerns. Because I heard no evidence suggesting that any of these actions took place, the respondent’s argument that the discipline was for other reasons loses further weight.

[151] In summary, the disciplinary process contained several inconsistencies that leave me unable to conclude that it was administered because of an alleged violation of disciplinary standards. The respondent was unable to demonstrate that the disciplinary reprimand was based on a violation of any CSC’s policies, directives, or legislation.

[152] In *Martin-Ivie* the Board noted that employers should be able to discipline employees for a breach of its policies, stating: “Instituting an investigation to look into a possible breach of an employer policy is not, in and of itself, in my opinion a threat of discipline.” (para. 59). However, like in this case, in *Martin-Ivie* the Board did not find evidence supporting the theory that the discipline administered was linked to an employer policy.

[153] I should note that the complainant made arguments as to why employer policies and codes of conduct cannot be used to trump the provisions of the *Code*. As I have

concluded that no clear link was established between the disciplinary reprimand and any such policies, directives, or legislation, I do not think it necessary to elaborate on those arguments.

[154] On April 30, 2019, Mr. White's employer disciplined him, although it knew full well that the actions he took to notify the PLS lawyers of a danger were taken because he was concerned about health and safety. On a balance of probabilities, I find that the final criterion in *Vallée* is met and that the disciplinary reprimand was because of the actions that Mr. White took on April 24, 2019, as a result of his belief that there was a health and safety issue at Kent and that his actions were consistent with his rights and responsibilities under the *Code*. Therefore, I find that the written reprimand in Ms. Chad's email of April 30, 2019, violated s. 147 of the *Code*. The employer should not have administered it.

E. Appropriate remedy

[155] When the complaint was made, the corrective actions sought under s. 134 of the *Code* included the removal of the disciplinary reprimand from all the complainant's files, a letter of apology, a request that Ms. Chad be obligated to attend supplemental training about the *Code*, and damages.

[156] Before me, the complainant argued that the Board should order the removal of the April 30, 2019, email from not only his personnel file but also from all records of the employer, including email systems.

[157] In terms of damages, the complainant argued that the Board should include in its remedy payment for the overtime shift that he would have worked on April 25, 2019. The only reason he cancelled that shift was that the employer had commenced the disciplinary process by providing him with a notice of disciplinary hearing, he argued. The complainant noted that the Board granted the payment of an overtime shift in *LeClair* (see paragraph 156).

[158] The respondent argued that if I allow the complaint, nothing more than a declaration should be made. It should not be ordered to pay Mr. White's cancelled overtime shift. The complainant made the decision to decline that shift on his own initiative; the CSC did not ask him to cancel it. There are no facts to link the disciplinary reprimand to the shift being cancelled, the respondent argued.

[159] The remedial powers of the Board are set out at s. 134(1) of the *Code*, which reads as follows:

134 (1) *If, under subsection 133(5), the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to*	***134 (1)*** *S'il décide que l'employeur a contrevenu à l'article 147,* [la Commission] *peut, par ordonnance, lui enjoindre de mettre fin à la contravention et en outre, s'il y a lieu :*
(a) *permit any employee who has been affected by the contravention to return to the duties of their employment;*	***a)*** *de permettre à tout employé touché par la contravention de reprendre son travail;*
(b) *reinstate any former employee affected by the contravention;*	***b)*** *de réintégrer dans son emploi tout ancien employé touché par la contravention;*
(c) *pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and*	***c)*** *de verser à tout employé ou ancien employé touché par la contravention une indemnité équivalant au plus, à son avis, à la rémunération qui lui aurait été payée s'il n'y avait pas eu contravention;*
(d) *rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.*	***d)*** *d'annuler toute mesure disciplinaire prise à l'encontre d'un employé touché par la contravention et de payer à celui-ci une indemnité équivalant au plus, à son avis, à la sanction pécuniaire ou autre qui lui a été imposée par l'employeur.*

[160] Following the hearing, the respondent confirmed that no record of discipline remained on Mr. White's personnel file at that date.

[161] I agree with the complainant that had the April 30, 2019, disciplinary reprimand still been on his record, I would have rescinded it and ordered the respondent to remove it. I note that the complainant confirmed in his written submissions dated December 21, 2021, that he would be satisfied with a Board's statement to that effect.

[162] To compensate Mr. White for the overtime shift on April 25, 2019, I would have to conclude that he would have worked that shift "but for" the disciplinary reprimand he received. He has not satisfied me of that. On the evening of April 24, 2019, the complainant voluntarily rescinded his acceptance to work overtime. I can easily distinguish this from the situation in *LeClair*, in which the lost overtime was the result of the employer's action. In this case, Mr. White made his own choice. Moreover, he made that choice after receiving the **notice** of disciplinary hearing. He had not yet actually been disciplined.

[163] Although he did not argue it in detail, at one point, the complainant suggested that the Board might order posting this decision in the workplace, but did not provide arguments as to why that would be an appropriate remedy in this case. Neither did the complainant provide arguments in support of its requested remedies for an apology, or about the Board's jurisdiction to do so, or for the Board to order training for the manager involved in this matter. In the absence of more detailed arguments, I do not find reasons for making these orders, to the extent that I would have jurisdiction to make them.

[164] Given these reasons, I conclude that the only appropriate remedy in this matter is the making of a declaration.

IV. Other comments

[165] I will close with a couple of further comments that I hope may be of benefit.

[166] In making these comments, I keep in mind that the purpose of the *Code*'s Part II provisions are, as stated at s. 122.1, "… to prevent accidents, occurrences of harassment and violence and physical or psychological injuries and illnesses …".

[167] I also keep in mind that the preamble to the *Act*, which the Board has responsibility to administer, includes this recognition:

…	[…]
effective labour-management relations represent a cornerstone of good human resource management ***and that collaborative efforts between the parties, through communication and sustained dialogue****, improve the ability of the*	*que des relations patronales-syndicales fructueuses sont à la base d'une saine gestion des ressources humaines****, et que la collaboration, grâce à des communications et à un dialogue soutenu,*** *accroît les capacités de la fonction publique de*

public service to serve and protect the public interest;	*bien servir et de bien protéger l'intérêt public;*
…	[…]

[Emphasis added]

[168] The ability of the Board to assist with these objectives faces some limitations, in an adversarial proceeding regarding events that took place more than two-and-a-half years before the hearing. I expect the hearing was frustrating for Mr. White, who as I have noted, interjected at a couple of points to raise questions about what he ought to have done differently in the situation, as well as for the managers involved.

[169] The best time to answer Mr. White's legitimate questions would have been shortly after the events in question. It appears that the parties started this with a fruitful discussion immediately after the events about the complainant's ability to maintain his composure on April 24, 2019. Instead of administering the disciplinary reprimand, perhaps a fuller debrief between the parties was required. That could have been followed with a review of the situation by the OSH committee, perhaps with the objective of identifying how to better manage situations such as this in the future.

[170] A later alternative would have been to attempt to informally resolve this dispute before a complaint was made or after it was made to address it through mediation or even with the assistance of the mediation services offered by the Board. All of these options provide opportunity for the kind of collaborative efforts, communication and sustained dialogue that builds more effective labour-management relations.

[171] I also noted earlier that the respondent objected to testimony from Mr. White and Mr. MacKinnon that the reprimand the CSC gave the complainant had a chilling effect on other employees. No actual evidence of that was tendered, and in any case I have not placed any weight on that argument in making my decision. That being said, I want to emphasize that the entire point of s. 147 is to discourage any employer from taking reprisals for the exercising of rights or acting in accordance with, or in furtherance of, Part II of the *Code,* and allegations of discipline causing a chill ought to be taken seriously by the CSC.

[172] I hope that this decision might assist ongoing discussion about the management of health and safety issues at Kent Institution and other, similar locations.

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

(The Order appears on the next page)

V. Order

[174] The complaint is allowed.

[175] I declare that the respondent violated s. 147 of the *Code* when it imposed a disciplinary reprimand on the complainant on April 30, 2019, because of the actions that the complainant took on April 24, 2019, as a result of his belief that there was a health and safety issue at Kent and that his actions were consistent with his rights and responsibilities under the *Code*.

June 22, 2022.

David Orfald,
a panel of the Federal Public Sector
Labour Relations and Employment Board