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



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

BETWEEN

GRACE SCOTT

Grievor

and

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

Respondent

Indexed as

Scott v. Deputy Head (Correctional Service of Canada)

In the matter of individual grievances referred to adjudication

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

For the Grievor: Christophe Haaby, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SACC-CSN)

For the Respondent: Marie-France Boyer, counsel

Heard via videoconference,
August 30 to September 3, and October 13, 2021.

REASONS FOR DECISION

I. Individual grievances referred to adjudication

[1] The grievor, Grace Scott, was employed by the Treasury Board (TB or “the employer”) at the Correctional Service of Canada (CSC) as a primary worker (PW), classified at the CX-2 group and level, at Edmonton Institution for Women (“EIFW” or “the institution”) in Edmonton, Alberta, in the CSC’s Prairie Region.

[2] At CSC institutions for women, CX-2s are identified as PWs.

[3] On March 20, 2017, the grievor was suspended without pay, pending the outcome of a disciplinary investigation into alleged conduct during the early hours of the morning of January 23, 2017 (“January 23”), while on duty in the segregation unit of EIFW. The suspension without pay was extended on April 10, 2017, and on May 1 and 23, 2017. On March 30, 2017, the grievor filed a grievance against the initial suspension without pay, and on June 5, 2017, she filed additional grievances against the two extensions of the suspension on May 1 and May 23, respectively; these comprise Board file nos. 566-02-14326, 14468, and 14469.

[4] By letter dated July 6, 2017 (“the letter of termination”), signed by EIFW Warden Brigitte Bouchard, the grievor was terminated from her position, effective March 20, 2017. The relevant portions of the letter of termination state as follows:

...

The purpose of this letter is to advise you of the outcome of the disciplinary process concerning allegations that on January 23, 2017 you were negligent in your performance of duties while conducting high suicide watch on Inmate [name redacted] at Edmonton Institution for Women.

The Correctional Service of Canada (CSC) expects all employees to conduct themselves in a manner consistent with CSC’s Standards of Professional Conduct and Commissioner’s Directives. After a thorough review of the evidence, including video footage from January 23, 2017 and the information provided by you during the disciplinary process; I find that your actions were not in accordance with the behavior expected of a CSC employee. On January 23, 2017 you failed to maintain direct and constant supervision of Inmate [name redacted], you also failed to properly document the inmates’ [sic] activities as required by policy. As such, your actions were negligent, and your behavior shows clear disregard for the Standards of Professional Conduct. Consequently,

you were found to have committed the following infractions of CD 060: Code of Discipline:

Responsible Discharge of Duties

- *Paragraph 6(f)* “fails to take action or otherwise neglects his/her duty as a peace officer”;

- *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”;

Specifically: Commissioners Directive 843, Management of Inmate Self-Injurious and Suicidal Behavior, Paragraph 11, “In the case of inmates on High or Modified Suicide/Self-injury Watch, the Correctional Officer/Primary Worker (or the health care professional, if applicable) will document the inmate’s activities on a Seclusion and Restraint Observation Report (CSC/SCC 1006), as required, but at least every 15 minutes.” and Paragraph 17, “Inmates on High Suicide/Self-injury Watch will be under constant, direct observation by a Correctional Officer/Primary Worker (or it may be a health care professional in Regional Treatment Centres). Monitoring via camera does not fulfill this requirement.”

- *Paragraph 6(j)* “wilfully or through negligence, makes or signs a false statement in relation to the performance of duty”;

- *Paragraph 6(m)* “performs his/her duty in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service, or any other person(s) either directly or indirectly”;

Conduct and Appearance

- *Paragraph 8(i)* “sleeps on duty”.

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 fairness, 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 a peace officer.

Accordingly, given the seriousness of your misconduct a decision has been made to terminate your employment for disciplinary reasons. Therefore, pursuant to Section 12(1)(c) of the Financial Administration Act and by the authority delegated to me by the Deputy Minister, I am terminating your employment with the Correctional Service of Canada effective March 20, 2017.

...

[5] On July 31, 2017, the grievor grieved the termination of her employment, requesting the following relief:

...

I request that the termination be quashed, reinstatement, retroactive payment of all monies including pension adjustments, CPP that I have lost and will lose and compensation for loss of benefits that I have and will incur as a result of the employer's decision.

I request all other rights that I may have pursuant to legislation and the collective agreement as well as all real, moral or exemplary damages, to be applied retroactively with legal interest without prejudice to other acquired rights.

...

[6] All the grievances were denied during the grievance process, and all four grievances were referred to the Federal Public Sector Labour Relations and Employment Board ("the Board") for adjudication under s. 209(1)(b) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act").

II. Summary of the evidence

A. Background

[7] The facts that give rise to the misconduct that led to the grievor's suspension from work and termination of employment took place between 23:00 on January 22, 2017 ("January 22"), and 03:00 of January 23 in the segregation unit, sometimes referred to as the secure unit or the segregation secure unit of EIFW. For the sake of simplicity, I will refer to it as the segregation unit.

[8] An inmate (identified in this decision as "IM A") was designated as being at a high risk for self-harm and suicide and was placed on high suicide watch (HSW) from approximately 17:00 on January 20, 2017, until 14:00 on January 23. During this period, she was in the first cell as you enter the EIFW segregation unit, cell no. 182.

[9] An HSW is sometimes referred to in the evidence as a "high watch".

[10] At the time she was terminated from her position, the grievor had approximately nine years of service with the employer at the CSC. She joined the CSC in 2008 and, at that time, worked at Grand Valley Institution for Women ("GVI") in

Kitchener, Ontario. She worked at GVI until she was deployed, at what appears to be her request, to Alberta for personal reasons and began to work at EIFW in either very late 2016 or early 2017. The grievor is 5 feet, 6 inches, tall.

[11] At the time of the hearing and since October of 2020, Ms. Bouchard was the district director for the Montréal metropolitan district of the CSC in its Quebec region. At the time of the facts relevant to this grievance, she was the warden of EIFW. She testified that at times between February and May of 2017, she was away, and that others acted in her stead.

[12] At the time of the hearing, Belinda Cameron was the manager of intensive intervention strategies at EIFW. At different times during the period between February and May 2017, she was the acting warden of EIFW.

[13] At certain times in February of 2017, Lee Anne Skene was the acting warden of EIFW.

[14] At the time of the hearing, Henry Shea was the assistant warden of operations (AWO) at Kent Institution, a maximum-security institution for men located in the Fraser Valley in western British Columbia in the CSC's Pacific Region. At the times relevant to the matters in the grievance, he was the AWO at EIFW.

[15] At the time of the hearing and at the time of the facts relevant to the grievance, Janice Marghella was a correctional manager (CM) at EIFW.

[16] At the time of the hearing, Clover Henry was a CM at GVI.

[17] At the time of the hearing, Iris Bussey was a project officer within the health services portion of the CSC at its National Headquarters in Ottawa, Ontario. Her duties and responsibilities included training with respect to health services, including educating operational services personnel (correctional officers (CXs) and PWs) with respect to issues involving mental health, self-harm, and suicide.

[18] At the time of the hearing, Mark Anderson was retired. Before his retirement, he had been with the CSC since March of 1981, where he worked in different capacities, including as a CX-1, CX-2, and CM and in acting assistant warden and deputy warden positions.

[19] At the time of the hearing and since March of 2017, Daphne Desjarlais was a CX-2 at Mission Institution, a medium-security institution for men located in the Fraser Valley, B.C., in the CSC's Pacific Region. Before that time, she was a CX-2 PW at EIFW. At the time relevant to the facts that gave rise to the misconduct and the grievances, she was working the same shift as the grievor and interacted with the grievor. In addition, Ms. Desjarlais was also subject to discipline with respect to her conduct during the HSW that same shift, which she has grieved. Her grievance has been heard by me in a separate hearing (Board file no. 566-02-14845).

[20] At the time of the hearing and since 2005, Danisa Jara was a CX-2 PW at EIFW. At the times relevant to the grievance, she was also the union local president.

[21] At the time of the hearing and since March of 2019, Jeffery Robinson was a CX-2 PW at GVI. From November of 2013 to March of 2019, he was a CX-2 PW at EIFW and was on the same shift as the grievor and interacted with her.

[22] At the time of the hearing, Matthew McLaren was a PW at GVI and had been in that position for approximately 10 years. He was also actively involved in the union, serving in different positions, including as local president and vice president and as a health and safety officer.

[23] Entered into evidence was a copy of a disciplinary investigation report dated March 20, 2017 ("the investigation report"), completed by Mr. Anderson and Maria Popiwchak (whose position was not identified to me), with respect to alleged misconduct by the grievor and Ms. Desjarlais.

[24] The disciplinary investigation into the grievor's conduct was initiated by Ms. Cameron, in her role as the acting warden, by a convening order dated February 8, 2017. Ms. Cameron testified that she did so after an anonymous note was brought to her attention that stated, "Grace Scott spent her time on High Watch on Saturday night sleeping curled up in a blanket on a mattress on the range" ("the anonymous note"). The initial investigation with respect to the grievor was eventually expanded to include Ms. Desjarlais.

[25] By a memorandum dated February 8, 2017, Ms. Cameron notified Mr. Anderson and Ms. Popiwchak of their mandate with respect to the investigation, sending to them a copy of the February 8, 2017, convening order. As part of the instructions to Mr.

Anderson and Ms. Popiwchak, Ms. Cameron advised that "... if, during the course of the investigation, you discover other misconduct that is significantly different from the misconduct under investigation, you are required to contact me to request an amended Convening Order pertaining to same."

[26] By a letter dated January 30, 2017, Ms. Cameron notified the grievor that she was placed on administrative leave with pay, pending a further review of the allegations related to her supervision of IM A on January 23.

[27] On February 21, 2017, Ms. Skene was the acting warden of EIFW. On that date, she amended the February 8, 2017 convening order, expanding its terms of reference to add Ms. Desjarlais' conduct during the shift on January 23 also while conducting the HSW of IM A.

[28] By a letter dated March 20, 2017, Ms. Bouchard notified the grievor that effective that day, she was suspending her without pay, pending the disciplinary process. She further advised her that she would be reviewing her decision to suspend the grievor without pay periodically, to determine whether it continued to be necessary. The grievor remained suspended without pay for the duration of the period after March 20, 2017, to the day she was provided with the letter of termination.

[29] Mr. Shea testified that the EIFW security intelligence officer ("SIO") brought to his attention the anonymous note. This caused him to look at the grievor's schedule and determine when she would have been responsible for the HSW on January 23. He determined the period in question, then reviewed the videos of the segregation unit range, and then saved and secured the videos of it and of cell no. 182, where IM A was housed.

[30] The segregation unit comprises an area that includes the segregation unit control post ("SUCP"), a range ("the range"), and four cells. The range is similar to a hallway or corridor in a house from which you gain access to rooms. In the case of the segregation unit, the rooms would be the cells, which have doors that exit into the range. The range itself is segregated from the rest of the institution by a locked door ("the range door"). It is at one end of the unit and adjacent and to the left of it, as you look down the range, is the SUCP. It has windows that look down-range and has a view of the doors to the cells. If you are standing at the range door looking down into the range, the cells are on your right. There are four cells. Immediately to the right as you

enter the range, before the first cell, is the segregation unit shower (“the shower”). After the shower is the first cell, in which IM A was being housed, cell no. 182.

[31] Mr. Shea testified that there are two cameras at either end of the segregation unit range, in the top corners, and all cells on the unit have a camera. He stated that video footage is stored on a server for a period of 30 days after which, if it has not been saved (downloaded), it is recorded over. He stated that only the SIO’s office and his office have access to the server and videos. Mr. Shea testified to the security measures that are in place to ensure that the videos are not tampered with. There was no evidence that the videos produced to the hearing were anything but authentic.

[32] Two videos were entered into evidence. The first being from inside IM A’s cell (“the cell video”) and the second being from the camera located at the back of the range (“the range video”). Both begin at 23:58:00 on January 22. The footage comes with a continual time record that shows the time in hours, minutes, seconds, and milliseconds; however, in these reasons, when referencing video time, I shall refer only to hours, minutes, and seconds (in this format: 00:00:00).

[33] For the purpose of this hearing and the hearing of Ms. Desjarlais’ grievance, Ms. Marghella carried out measurements and created a diagram of the relevant parts of the range and the positions of things in the range in the vicinity of cell no. 182 relevant to understanding the allegations of misconduct and what happened. The diagram was identified by Ms. Marghella and entered into evidence. The features of it that are relevant to understanding this decision are as follows:

- the range is a long rectangle;
- as you enter the range and look down it from the range door, the cells are all on the right-hand side;
- immediately to the left of the range door is a portion of the SUCP that encroaches a little into the range and has a window that looks both out and down the range and includes a view of the cell doors;
- as you walk down the range and past that part of the SUCP that encroaches into the range, the extreme left side of the range is a concrete wall (“the back wall”) and runs parallel to the segregation unit cells;
- the distance from the segregation unit cell doors to the back wall is 149 inches or 12 feet, 5 inches;
- immediately adjacent to the range door, and between it and cell no. 182, is the shower;
- at about the midpoint of the range, is a rectangular table (“the range table”) affixed to the floor, which has 6 stools that appear to be affixed either to the table or floor, 3 on either side; and,

- there is a camera for the range (“the range camera”), and if you are standing at the range door and looking down the range, the camera is located at the top left-hand corner of the back wall of the range. The view from this camera covers all 4 cells.

[34] The range camera takes a video of the range, looking at it from the end of the unit toward the front. When viewing the range video, the cell doors are on the viewer’s left-hand side, the last cell on the range being the first one on the viewer’s left, while cell no. 182 is the last cell on the left. The range’s back wall is on the right side. The middle of the camera view shows the range door and to its right, the SUCP as it encroaches into the range.

[35] A PW is stationed in the SUCP and controls access into the range area until a point after the lights are shut off for the night, when the range door is unlocked. I was not told when it is locked again.

[36] Ms. Marghella’s diagram also sets out the features of the door into cell no. 182 and its measurements, which are as follows:

- it is 36 inches, or 3 feet, wide;
- it is 84 inches, or 7 feet, high;
- it has two windows to look through into the cell, one on the upper portion of the door, and one on the bottom portion, which are separated by a food slot;
- both windows are the same size, being 23 inches wide by 25 inches high (almost but not quite 2 feet square);
- the space below the bottom window and the floor is 11 inches;
- the top of the bottom window, when measured from the floor, is 36 inches (3 feet);
- the bottom of the food slot, as measured from the floor, is 40½ inches;
- the gap between the top of the bottom window and the bottom of the food slot is 4½ inches;
- the gap between the bottom and top of the food slot is 6 inches;
- the gap between the top of the food slot and the bottom of the top window is 5 inches; and
- the gap between the top of the top window and the top of the door is 7½ inches.

[37] While the diagram did not disclose the measurements from the edges of the door to the edges of the windows, it appears from the videos that the windows are centred in the door, from left to right.

[38] Cell no. 182 is sparse. I did not have dimensions for it; however, based on the fact that there is a bed in it that a person must be able to lie on, the cell appears from the videos to be at a minimum more than 6 feet if measured from the door to the cell’s

back wall. If you are standing outside the cell and looking in through the window, the bed is adjacent to the right-hand side of the wall and runs perpendicularly from that part of the cell in which the door is located. It is fixed to the floor and appears fixed against the wall that is shared with the shower. The end of the bed closest to the cell door, based on the size of everything in the videos, appears to be at least 3-to-3½ feet from the cell door.

[39] The cell video camera is located at the back of the cell in the upper left-hand corner of the cell when you are standing at the cell door, looking in. If you are viewing video footage of the cell, as you watch, the cell door would be more to the right-hand side of the screen, while the left-hand side and middle largely show the bed with IM A on it. IM A slept on the bed with her head at the back of the cell or furthest away from the door and with her feet at that part of the bed closest to the door.

[40] Mr. Anderson testified about the steps that he and Ms. Popiwchak took to conduct their investigation, including gathering and reviewing relevant documents, including the range video and cell video (which he stated he received from Mr. Shea) and interviewing different individuals, including the grievor. Both videos were played at the hearing, and at times, Mr. Anderson was asked questions by both the employer counsel and the grievor's representative about what was going on in the videos and what was recorded in the investigation report. Mr. Anderson testified that he visited the segregation unit on two occasions, February 15, 2017, and February 20, 2017.

[41] I reviewed the video recordings in their entirety.

B. Relevant legislation, regulations, Commissioner's Directives, CSC policies and procedures, and the PW work description

[42] In many of the CSC's documents, inmates are often referred to as "offenders".

[43] The *Corrections and Conditional Release Act* (S.C. 1992, c. 20; "the CCRA") is the legislation that governs corrections and the conditional releases and detentions of persons (inmates). It is the governing legislation for the CSC. Pursuant to the CCRA have been enacted the *Corrections and Conditional Release Regulations* (SOR/92-620), section 3 of which states as follows:

3 Every staff member shall

3 L'agent doit :

(a) be familiar with the Act, these Regulations and every written policy directive that relates to the staff member's duties;

(b) perform the staff member's duties impartially and diligently and in accordance with the principles set out in the Act and in the Mission of the Correctional Service of Canada, published by the Service, as amended from time to time

a) bien connaître la Loi et le présent règlement ainsi que les directives écrites d'orientation générale qui concernent ses fonctions;

b) exercer ses fonctions avec impartialité et diligence, conformément aux principes énoncés dans la Loi et dans le document intitulé Mission du Service correctionnel du Canada, publié par le Service, compte tenu de ses modifications éventuelles;

[...]

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

...

POLICY OBJECTIVE

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

GENERAL RESPONSIBILITIES

...

3. Employees of the Service are responsible for adhering to the Standards of Professional Conduct. Arising from the Standards of Professional Conduct are a number of specific rules that employees of the Correctional Service of Canada are expected to observe. Some examples of infractions are given in a list below each specific rule. These lists are not exhaustive.

4. Each employee of the Service is also expected to be conversant with, and adhere to the various Acts, Regulations and policies affecting employees of CSC as well as the instructions and directives of the Service.

PROFESSIONAL STANDARDS

Responsible Discharge of Duties

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

instructions of supervisors or any member in charge of the workplace and are required to serve the public in a professional manner, with courtesy and promptness.

Infractions

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

a. fraudulently records, or fails to record, his/her attendance or that of another employee;

b. is late for duty, absent from duty or leaves his/her assigned place of duty without authorization;

c. fraudulently seeks to obtain, or fraudulently obtains, documentation required for approval of leave of absence from duty;

d. refuses to testify before or submit evidence to, or obstructs, inhibits or otherwise hampers any investigation which is conducted pursuant to any act of Parliament or any investigation as defined in the Commissioner's Directive 041-Incident Investigations;

...

f. fails to take action or otherwise neglects his/her duty as a peace officer;

g. fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates to his/her duty;

...

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

...

l. fails to report to a superior authority any contraband found in the possession of another employee, offender or member of the public;

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

...

Conduct and Appearance

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

Infractions

8. *An employee has committed an infraction, if he/she:*
- a. displays appearance and/or deportment which is unbecoming to an employee of the Service while on duty or while in uniform;*
 - ...
 - c. acts, while on or off duty, in a manner likely to discredit the Service;*
 - ...
 - g. consumes alcohol or other intoxicants while on duty;*
 - h. reports for duty impaired or being unfit for duty due to influence of alcohol or drugs;*
 - i. sleeps on duty.*
 - ...

[Emphasis in the original]

[45] CD 843 is titled *Management of Inmate Self-injurious and Suicidal Behaviour*, and the relevant portions state of it as follows:

...

**PROCEDURES FOR ASSIGNING A SUICIDE WATCH
OBSERVATION LEVEL**

Screening for Suicide Risk

6. *All inmates will be screened using the Immediate Needs Checklist - Suicide Risk pursuant to CD 705-3 - Immediate Needs and Admission Interviews.*
7. *In addition to the requirements in CD 705-3 - Immediate Needs and Admission Interviews, the Immediate Needs Checklist - Suicide Risk will be used:*
- a. within 24 hours of arrival to a new institution*
 - b. upon admission to administrative segregation*
 - c. by any non-health care staff interacting with the inmate when there is reason to believe that the inmate may present some risk for suicide and a mental health professional is not immediately available. This would include when returning from outside court or when the reason for placement in administrative segregation is changed.*
8. *If there is reason to believe that the inmate may be at imminent risk to attempt suicide, the staff member will immediately contact a mental health professional and the Duty Correctional Manager. The mental health professional will assign an observation level based on an in-person assessment. If no mental health professional is available, the Duty Correctional Manager will immediately place the inmate on High Watch and the inmate will be assessed by a*

mental health professional as soon as reasonably possible, but within 24 hours.

9. Referral to a mental health professional (use Referral Form Psychology/Institutional Mental Health Services, CSC/SCC 0450) must be documented in a Casework Record.

Suicide Watch Observation Levels (High Suicide Watch, Modified Suicide Watch and Mental Health Monitoring)

10. An inmate assessed as requiring High or Modified Suicide Watch will:

- a. be placed in a suicide watch cell
- b. have a mental health assessment, in person, by a mental health professional within 24 hours; the frequency of subsequent assessments will be determined by a mental health professional. The mental health professional will review and initial the Seclusion and Restraint Observation Report (CSC/SCC 1006) and incorporate any relevant information into the assessment
- c. be visited daily by a Nurse, pursuant to CD 800 - Health Services (section on Administration Segregation).

11. Inmates on High Suicide Watch will be under constant, direct observation by a Correctional Officer/Primary Worker (or it may be a mental health professional in Regional Treatment Centres). Monitoring via camera only is not permitted.

...

13. The Correctional Officer/Primary Worker (or the mental health professional, if applicable) will document the inmate's activities on a Seclusion and Restraint Observation Report (CSC/SCC 1006), as required, but at least every 15 minutes.

...

15. The mental health professional will complete the High Suicide Watch Observation Form (CSC/SCC 1434), the Modified Suicide Watch Observation Form (CSC/SCC 1435) or the Mental Health Monitoring Form (CSC/SCC 1436). A copy will be given to the Duty Correctional Manager, who will ensure that it is accessible to staff who have regular interaction with the inmate on all shifts. If the inmate has an active Interdisciplinary Management Plan (CSC/SCC 1432), the Suicide Watch Observation Forms are not required.

...

High Suicide Watch

17. An inmate who is at imminent risk for suicide or self-injurious behaviour is placed on High Suicide Watch.

18. An inmate placed on High Suicide Watch will be provided with, at minimum:

- a. a security gown, at all times

b. a security blanket and mattress unless the inmate attempts to use these items in a manner that is self-injurious or affects staff's ability to monitor the inmate. In this case, the items can be removed from the cell, with the intention of returning the item as soon as safely possible

c. food and fluids that can be easily consumed without cutlery or tableware (finger foods)

d. hygiene items (the mental health professional, with the input from the Duty Correctional Manager, will determine when to provide hygiene items if these items are associated with any risk for suicidal or self-injurious behaviour).

...

[Emphasis in the original]

[46] Entered into evidence was a copy of the work description of a PW. The excerpts relevant to this grievance are as follows:

Client Service Results ...

Correctional operations related to the safety and protection of the public, staff, inmates and the institution

Key Activities ...

1. Ensuring security within the institution (includes public, staff, volunteers, visitors, service providers, and inmates). This includes ensuring security at an assigned post, operating and ensuring that safety equipment and devices are safe guarded [sic] and in working order, identifying and reporting deficiencies and potential safety risks, searching areas to prevent and detect contraband.

...

Effort ...

...

(12) Sustained Attention

...

3. Sustained attention is required to evaluate the behaviour and attitudes of inmates in relation to correctional strategies. Numerous distractions may increase the difficulty.

4. Sustained attention is required when monitoring and observing inmate behaviour during program and leisure activities. This attention is required throughout the workday to identify and take measures against security risks or breaches.

...

Responsibility ...

...

(6) Ensuring Compliance

1. Conducts routine rounds, surveillance and inspections of the institution and as well as surveillance of inmates, visitors and staff in the institution and enforces compliance with all acts, regulations and policies applicable to CSC (i.e., CCRA).

2. As a member of the case management team, monitors and documents inmate behaviour based on the objectives of correctional plans and applicable policies and legislation. Shares responsibility for identifying and reporting progress or violations of correctional plans to appropriate institutional authorities. Violations may result in charges being laid, expulsion from programs or transfer to a higher security unit.

...

C. January 22 to 23, 2017

[47] At 16:47 on January 20, 2017, IM A was assessed by a mental health care professional, who completed a CSC/SCC 1434 form titled, “High Suicide Watch Observation Form”. It indicated that IM A was to be provided a security gown, security mattress, and security blanket and that she would be provided finger foods, a disposable cup for liquids, and hygiene products for use under supervision. In the box marked “Observation method - Méthode d’observation”, it stated, “Constant in person observation by staff member.” In addition, the following notes were made by the mental health care professional, in the box marked “notes-remarques”:

Writer met with [IM A] @1647hrs following report that she had punctured her left wrist with a pen (superficial). [IM A] was co-operative with the interview in the interview room. CM McCormick, CM Bevan and CM Kowalchuk were consulted. Based on [IM A’s] presentation, her past history and situational factor, it is recommended that [IM A] be placed on High suicide watch.

[48] As of the evening of January 22, IM A was located in cell no. 182 in the segregation unit. Given the determination that she was a high risk for suicide, and she was to be constantly watched while in her cell by a PW, a CSC/SCC 1006 form (“the 1006 form”) was used. This is the form used by the PW who is watching an inmate on an HSW and upon which they are to document the behaviour of the inmate in 15-minute intervals. The form is pre-printed with 3 long columns. There is 1 column for each of the day shift (from 07:00 to 14:45), the afternoon shift (from 15:00 to 22:45), and the night shift (from 23:00 to 06:45). The night shift covers the last hour of 1 day and the first 6¾ hours of the next morning.

[49] Each column is broken down into 15-minute intervals, with 2 spaces next to the listed 15-minute interval time. The first space is for a number code to be written, next to which is a second space for the PW, who was watching the inmate at that specific time and who made the assessment, to initial. The top of the 1006 form has a box. The box is a legend assigning a number code, 1 through 21, to represent a different activity. For example, the number 1 referred to “[b]eating on door/wall/floor”, and the number 2 referred to “[y]elling or screaming”.

[50] The evidenced disclosed that the grievor and Ms. Desjarlais were the two PWs who carried out the HSW of IM A during the portion of the shift that ran from 23:00 on January 22 to 07:00 on January 23. The grievor was responsible for the period from 23:00 until roughly 03:05, and Ms. Desjarlais took over at or around 03:05.

[51] Entered into evidence was the form 1006 for IM A (“the IM A 1006 form”) that covered the period from 07:00 on January 22 to 06:45 on January 23. This form contained an additional handwritten time at the very bottom, 06:46. The codes used throughout this 24-hour period consisted of 5 numbered codes, as follows:

- “8”, which represents standing;
- “9”, which represents lying down or sitting;
- “11”, which represents being quiet;
- “20”, which represents some interaction with the inmate; and
- “21”, which represents some other activity not covered by the previous 20 codes.

[52] On the IM A 1006 form, next to the code of 21 at several time points, in brackets, the PW observing noted the particular activity, such as eating or exercising, and with respect to the code of 20, which references interaction with the inmate, in brackets, the PW observing would note who was interacting with the inmate; for example, a mental health care professional.

[53] On the IM A 1006 form, for the period between 23:15 on January 22 and 03:00 on January 23, the grievor initialled all entries during this period, a total of 16 entries, all of which had two numbers listed, 9 and 11, representing lying down or sitting and quiet.

[54] An institution is a highly controlled and regulated facility. As part of its systems of control, the CSC uses logbooks to document things. Entered into evidence were the relevant pages of the logbooks for the SUCP as well as for EIFW’s main control post.

The logbooks are there to keep a record of what is going on, including the most mundane things. With respect to an inmate who is on an HSW, a special logbook, in addition to the form 1006, is used. It allows for the documentation specifically of things that are happening with the inmate.

[55] This specific logbook is similar to other logbooks used by the CSC in its institutions. It has many lined blank pages. Entered into evidence was a portion of the specific logbook for IM A during the period she was on the HSW while on the segregation range (“the IM A logbook”). The manner in which entries are recorded is in the following fashion: the time in the 24-hour clock format; the relevant activity; then, at the end of the activity entry, if there is still space, a line is drawn to the end of the line so that nothing else can be entered; and then, at the end of the entry or the line drawn, the relevant employee’s initials. When a new day starts, the date is written in. Ms. Marghella testified that it is expected that the PW carrying out the HSW will review this when they are assigned to or at least at the time of the HSW so that they know what is going on with the inmate. The logbook is kept in the inmate’s file, which also holds the HSW form and the 1006 form, all of which is in the possession of whichever PW is carrying out the HSW.

[56] For the purpose of this decision, I will not put in the lines or the initials of the recording officer. The relevant entries for the purpose of this decision are as follows:

...
2017-01-22

...
1515 - [PW’s name redacted] *on post*
1520 - [PW’s name redacted] *on post*
1605 - [PW’s name redacted] *back on post*
1636 - *exercising - (squats sit ups) for 5 mins*
1641 - *stretching out legs*
1705 - *Meal delivered & accepted*
1905 [PW’s name redacted] *on Post, inmate [IM A] resting in bed on R side, moves intermittently, but appears to be sleeping*
2000 *remains sleeping*
2005 [PW’s name redacted] *relieves [PW’s name redacted] for break*
2010 [PW’s name redacted] *on post again*

2110 up to urinate and back to bed after asking the time

2125 asleep

2220 moving around and inmate [IM A] has kept her head covered while in bed this shift

2300 Remains asleep- moves around occasionally

2017-01-23

1217 - [PW's name redacted] on post

...

[57] None of the entries in IM A's logbook on either January 22 or January 23 were made by the grievor or Ms. Desjarlais.

[58] Ms. Marghella testified that the night-morning shift starts at 18:30 of one day and ends at 07:15 the next day. The shift briefing is at 18:30. So in this case, the start of the shift would have been at 18:30 on January 22, and it would have ended at 07:15 on January 23. The roll call was entered into evidence; Ms. Marghella testified that there was a full complement of staff on shift plus two extras in case an escort was needed or something else happened. It is at the shift briefing that work assignments are confirmed or amended. The shift briefing is done by the CM on duty.

[59] During the course of the HSW of IM A, four chairs were identified as being used. One was a telescoping high chair ("the high chair") that is similar to a bar stool with a back and a seat that swivels, and the height can be adjusted up and down but at a higher level than a normal office-type chair. This allows a CX, or a PW in the case of a woman's institution, to sit and to look down into the segregation cell from the upper window and see an inmate completely from head to toe when lying on the bed (albeit if the inmate has covered themselves, the CX or PW would see the inmate from head to toe with portions of their body covered by the security blanket).

[60] The second chair was a white plastic chair like those found on decks or in backyards ("the white chair"). It did not have rollers or wheels. The third and fourth appeared to be two separate standard office desk chairs on wheels or rollers ("office chair no. 1" and "office chair no. 2").

[61] On February 20, 2017, the grievor was interviewed as part of the disciplinary investigation. She was accompanied by a union representative. Entered into evidence in addition to the investigation report were Mr. Anderson's handwritten notes of his

interviews with the grievor as well as those of Ms. Popiwchak. He testified that he had reviewed the notes and said that they accurately reflect what went on in the interview.

[62] The relevant portions of the investigation report that cover the interview of the grievor state as follows:

...

PW SCOTT was interviewed at Edmonton Institution for Women on February 20, 2017

... PW SCOTT confirmed [with the Board] she was assigned to a High Suicide watch on January 23, 2017. Neither she nor the other Primary Worker assigned to the High Suicide watch were trained to work in the Secure Unit Sub-Control which meant they could not rotate through that post and the High Suicide watch. PW SCOTT reported she had to complete four hours of High Suicide watch.

PW SCOTT reported she transferred from Grand Valley Institution in December 2016 and while at Grand Valley Institution she had completed several High Watch suicide watches. The January 23 2017 High Suicide watch was her first at Edmonton Institution for Women... PW SCOTT explained that High Watch supervision requires the Primary Worker to maintain constant visual of the inmate, constant sight and supervision.

PW SCOTT explained she had a physical injury to her ribs and didn't want to use an extended amount of sick leave since her new arrival to Edmonton Institution for Women. She felt she was able to complete all her duties regardless of the rib injury.

PW SCOTT described the office chairs available to Primary Workers in segregation and how they are used to observe into the inmate cell. There is an adjustable chair where staff can observe through the top cell door window [the high chair]. The cell door has two windows separated by a metal food slot. The normal style office chair [the office chair] doesn't allow a person to look into the cell; it's the same height as the food slot.

PW SCOTT reported she sat on the tall chair [the high chair] and observed inmate [IM A]. PW SCOTT described inmate [IM A] as sleeping with her feet near the door and her head at the far end of the bed. At one time, inmate [IM A] said, "You arguing, shut up." PW SCOTT reported that the previous working day she and other Primary Workers had been instructed by a person from the Mental Health team not to engage or interact with inmate [IM A]. PW SCOTT believed inmate [IM A] may be volatile and chose to move away from the cell door.

PW SCOTT obtained a segregation mattress and placed it on the floor directly across from inmate [IM A's] cell. PW SCOTT explained she could see inmate [IM A's] entire body, her breathing, any moving, and her legs moving. PW SCOTT repeated her decision to move away from the cell was to keep inmate [IM A] calm and not

escalate her. PW SCOTT remained on the floor for two hours looking through the lower cell door window.

PW SCOTT stated she didn't know if she dozed off or not. She didn't have a clock with her. If she did doze off it wasn't intentional. PW SCOTT reported "No one came to see if I was doing okay or not". I don't recall dozing off. I was tired but I filled the fifteen-minute log sheet. I didn't have a clock so I estimated between punches how much time passed. PW SCOTT questioned why another person could report she was sleeping but not come and check on her.

...

[63] On the IM A 1006 form, for the period between 19:15 and 22:45 on January 22, the PW conducting the HSW of IM A initialled all entries during this period, a total of 15 entries, and all but 1 entry had 2 numbers listed, 9 and 11, representing lying down or sitting and quiet. The only entry that was different was at 21:15, in which the numbers listed were 16 and 9. The 16 indicated that IM A was going to the toilet. The entries before those, between 17:45 and 19:15, were all initialled by another, different PW who was conducting the HSW, and those entries, a total of 6, were also all noted as 9 and 11.

[64] Ms. Desjarlais was interviewed on two occasions during the investigation, the first on February 15, 2017 (erroneously noted as January 16 in the investigation report), and the second on February 21, 2017. The portions of the investigation report that cover the interviews of Ms. Desjarlais that are relevant to this hearing state as follows:

...

... PW DESJARLAIS confirmed with the Board she was assigned to a High Suicide watch on January 23, 2017.

PW DESJARLAIS indicated that she completed High Suicide watches before. PW DESJARLAIS described how it's necessary for the Primary Worker to sit at the inmates' [sic] cell door and watch the inmate. Also, it is necessary [sic] maintain the log checklist (Appendix G4) every fifteen minutes. The inmate is provided with a gown and blanket to sleep on the bed. A mattress is placed [sic] on top of the raised metal frame.

PW DESJARLAIS reported there are several chairs in segregation, Primary Workers have to choose from to sit at the cell door: a tall office chair [the high chair], a standard office chair [either office chair no. 1 or office chair no. 2], and a small plastic chair [the white chair]. PW DESJARLAIS described the windows in the segregation cell door. There is a large upper and lower window

separated by the metal food slot. PW DESJARLAIS prefers using the tall office chair to observe the inmate through the upper window. PW DESJARLAIS described that if she used the standard office chair she would have to hunch over to view through the bottom cell door window as the food slot would obstruct her view into the cell.

PW DESJARLAIS described how she observed PW SCOTT carry a mattress and blankets onto the segregation range. PW DESJARLAIS asked PW SCOTT what she was doing, to which PW SCOTT replied she was cold and was going to place the mattress against the wall and she could see into the cell.

...

PW DESJARLAIS did not report PW SCOTT bringing the mattress and blankets into segregation. PW DESJARLAIS indicated this was not normal to have a mattress and blankets on the range during a High Suicide watch. At 03:00, PW SCOTT asked her if she wanted to use the mattress and blankets to which she replied, no, it's not a good idea. PW SCOTT told her she learned to do this from her time working at Grand Valley Institution.

...

The Board asked if PW DESJARLAIS completed security patrols in segregation. PW DESJARLAIS reported she was post 15, prior to her starting the High Suicide watch. She completed security patrols in segregation....

...

[65] In her testimony, the grievor stated that she was not sleeping when she was on duty between 00:00 and 03:00 on January 23. Ms. Desjarlais and Mr. Robinson both testified that they were on the segregation range on the morning of January 23, and both said that when they saw the grievor, she was awake and not sleeping. Ms. Desjarlais also testified that when the grievor was on the mattress, she was seated on it with her back against the back wall of the range.

[66] While I will set out the evidence from the range video in more detail, a review of it does not show the grievor sleeping while on duty; nor does it show her lying horizontally on the mattress.

[67] No witness testified that they witnessed the grievor sleeping while on duty or lying horizontally on the mattress.

1. Range and cell video evidence

[68] Both the range and cell videos start at 23:58:00 on January 22 and continue to just after 07:15:00 on January 23.

[69] At 23:58:00, both the range and cell videos show the grievor at the door to cell no. 182, looking in through the upper window of the door. Initially, she is seated on the high chair, looking into the upper window, but shortly afterward, she gets off it and stands and continues to look through the upper window. The high chair is situated in front of the cell door, albeit a bit back from it.

[70] At 00:00:35, the grievor can be seen on the range video, walking away from the cell door toward the range door; she then walks back to the cell door at 00:00:51, glances in, looks away and down, and at 00:00:56, she again walks away from the cell door over to the range door. At this same time, the video shows Ms. Desjarlais enter the range and then the grievor leave. Ms. Desjarlais puts some articles she has with her on the white chair that is on the range and is located abutting the wall between the shower and the door to cell no. 182. At 00:01:08, she looks into the cell. She then takes a seat on the high chair, which she moves a little forward toward the door and proceeds to watch IM A through the upper cell-door window. At 00:01:16, Ms. Desjarlais is visible watching IM A through the upper window of the cell door.

[71] At 00:06:43, as Ms. Desjarlais is seen watching IM A, through the upper window of the door of cell no. 182, the range door opens, and the grievor is seen entering the segregation unit range with a mattress. At 00:06:55, Ms. Desjarlais stops watching IM A and turns and watches the grievor. This is clear also on the cell video. The mattress is not very thick as the video shows the grievor was able to grasp its thickness with one hand. The grievor then moves office chair no. 1 that appears to have things on it, and she pushes it over toward the range table, closest to that part of the range table that is closest to the back wall of the range. She then bends the mattress at about its halfway point, placing half of it against the back wall and half on the floor.

[72] At 00:07:07, Ms. Desjarlais has still not turned back to cell no. 182 and is seen getting up from the high chair. At 00:07:09, after fiddling with the mattress and office chair no. 1, the grievor heads back toward the range door. As she gets closer to the range door, Ms. Desjarlais is standing, and it is clear she and the grievor are engaged in some brief discussion. At 00:07:21, Ms. Desjarlais, still standing, turns back to look

into cell no. 182, and the grievor exits the range. Ms. Desjarlais remains standing at the door and watching IM A through the upper window.

[73] In her examination-in-chief, Ms. Desjarlais was asked how the grievor positioned the mattress on the range floor. She stated that it was folded in half and placed on the floor and up against the back wall. She was further asked if they had a conversation at this time. She said that they did and that she told the grievor that her actions with the mattress would not look good. She said that the grievor told her that they did it at GVI and that she would be able to see IM A.

[74] At 00:08:02, the range video shows the grievor re-entering the range, carrying blankets. Ms. Desjarlais turns away from watching IM A for a moment to look at the grievor. The grievor picks up a backpack from on top of the white chair. She then proceeds to place the backpack and blankets in the vicinity of the mattress and along the wall that is under the windows of the SUCP. She then moves back to the area between the range door and the door to cell no. 182 and is seen speaking to Ms. Desjarlais. Ms. Desjarlais appears to be watching IM A from a standing position.

[75] At 00:08:20, the grievor picks up a file from the white chair and moves over and places it in the vicinity of the mattress, blankets, and backpack. At 00:08:24, Ms. Desjarlais turns away from cell no. 182, is watching the grievor, and appears to be speaking to her. No one is watching IM A. At 00:08:39, the range video shows the grievor standing and grasping the seat back of the high chair as she is speaking to Ms. Desjarlais, who is away from cell no. 182 in the vicinity of the range door and has her back to cell no. 182. The grievor then pulls the high chair away from the front of cell no. 182 and places it close to that part of the range table that is farthest from the back wall and closest to cell no. 182. She and Ms. Desjarlais appear to be continuing their discussion.

[76] At 00:08:45, the range video shows Ms. Desjarlais turning to the range door to exit and the grievor, with her back to cell no. 182, moving toward the back wall of the range and the mattress. At 00:08:54, Ms. Desjarlais is seen leaving the range. At this time, the white chair is clearly visible adjacent to the wall between the door of cell no. 182 and the shower.

[77] The grievor is not watching IM A or looking into cell no. 182 or even toward cell no. 182. At 00:09:02, the grievor can be seen opening up one of the folded blankets,

giving it a shake, and spreading it onto the mattress that is on the floor. She fiddles with the blanket for a bit, and at 00:09:32, she pushes the high chair closer to the range table, ostensibly out of her line of vision between where the mattress is situated and the bottom window of cell no. 182. She then goes back to manipulating the mattress, and the range lights go out at 00:09:35. It takes a second for the camera to adjust to night vision. The grievor continues to be manipulating things with respect to the mattress, and it is obvious that she is not watching IM A. She is facing away from cell no. 182. At 00:09:44, she pushes the high chair even closer to the range table. At 00:09:50, she is on her knees, likely on top of the mattress, and has her back to the cell. She continues to manipulate the mattress or blankets.

[78] Although the range lights were turned off, the lights in cell no. 182 remained on. The lights in the other segregation unit cells were turned off.

[79] At 00:10:01, the range video shows the grievor seating herself on the mattress with her back against the back wall, facing cell no. 182. She then appears to place a blanket on top of her outstretched legs.

[80] Throughout this period from 23:58 to 00:10:01, when the grievor is seated on the mattress against the back wall, the cell video shows IM A lying on the bed, in cell no. 182, with the blanket pulled all the way up over her entire body, including a large portion of her head. At no point does the video give any visual indication that IM A is somehow engaging with the PW stationed at her doorway.

[81] At 00:17:10, Ms. Desjarlais enters the range to complete her security patrol on the inmates there. At 00:17:45, Ms. Desjarlais exits the range. Ms. Desjarlais was asked about what the grievor was doing when she entered the range. She said that the grievor was seated on the mattress with her back against the back wall, with a blanket. After Ms. Desjarlais leaves the range, the grievor remains against the back wall of the range.

[82] The next activity of note seen on the range video is at 01:14:10, when Ms. Desjarlais enters the range and conducts a security patrol. At 01:15:03, Ms. Desjarlais is seen stopped in the area of where the grievor is on the mattress. At 01:16:00, she exits the range. Again, in her examination-in-chief, Ms. Desjarlais was asked what the grievor was doing at this time, to which Ms. Desjarlais said that the grievor was seated on the mattress with her back against the back wall with a blanket across her legs that appeared to be crossed.

[83] The next activity of note seen on the range video is Ms. Desjarlais entering the range at 02:11:29, again for her security patrol. At 02:12:30, Ms. Desjarlais leaves the range. Again, in her examination-in-chief, Ms. Desjarlais was asked what the grievor was doing at this time, to which Ms. Desjarlais said that the grievor was seated on the mattress with her back against the back wall, with a blanket across her legs.

[84] At 02:16:25, the grievor, for the first time since sitting down on the mattress at 00:10:01 gets up from and moves away from the mattress and the back wall, walks over to the door of cell no. 182, and looks in. She then walks away and paces back and forth. At 02:19:54, Ms. Desjarlais enters the range, and the grievor leaves. Ms. Desjarlais removes toilet paper from the white chair (which is still abutting the wall between cell no. 182 and the shower) and places it on the window ledge of the SUCP. She moves back toward the door of cell no. 182, looks in, and then reaches for and picks up the white chair and moves it to a position a few feet back from the door but slightly more to the left of the door if you are looking toward the cell. The chair itself is not pointed with its front toward the door of cell no. 182 but toward the range door. She then sits down in the chair.

[85] At 02:29:03, the grievor enters the range and goes back to the mattress at the back wall. Ms. Desjarlais turns away from watching IM A, and it appears that she is engaging with the grievor in a conversation, looking in the direction of the grievor and not in the direction of cell no. 182. At 02:31:33, Ms. Desjarlais stands up, leaves the white chair where it is, and continues her conversation with the grievor. At 02:40:30, Ms. Desjarlais goes over to the mattress, bends down, and appears to squat next to the grievor. At 02:47:45, Ms. Desjarlais stands up.

[86] Ms. Desjarlais was asked about what happened at 02:16:25, and she stated that the grievor had asked for a break, and so Ms. Desjarlais said that she relieved her for a short period and that the grievor returned, went back to the mattress, and sat back down on it, against the back wall.

[87] At 02:55:50, Mr. Robinson enters the range, goes over to where the grievor and Ms. Desjarlais are, and something is exchanged between them. Both Ms. Desjarlais and Mr. Robinson in their evidence testified that he was getting some keys from the grievor.

[88] At 02:56:15, Ms. Desjarlais and Mr. Robinson leave the range. At 02:57:53, the grievor starts to stand up from her seated position against the wall and walks forward to the range table and puts something onto it. She then walks over to cell no. 182. At 02:58:10, she glances through the upper window of the cell. At 02:58:11, she turns away from the cell window, and proceeds to adjust her uniform and equipment, and walks back to the back wall with her back to the cell., continuing to adjust her uniform and equipment. It isn't until 02:59:10, that the grievor returns to the cell door and glances inside cell no. 182. She then proceeds to drink from a container and then to move and place the container on the high chair with the bag or backpack she had previously placed there. She has her back to the cell and then moves toward the back wall of the range. At 02:59:37, she picks up the blanket, walks back toward cell no. 182, and folds the blanket while standing in front of the cell door. At 02:59:51, she places the blanket on the white chair and again walks away from the cell. She stands by the high chair and picks up another blanket and folds it. At 03:00:22 she returns to the door of cell no. 182, where she remains.

[89] Between 03:05:45 and 03:10:45, the following is seen on the range video:

- At 03:05:45: Ms. Desjarlais enters into the range pulling office chair no. 2; she and the grievor appear to be speaking to one another, and it appears that the grievor is looking into cell no. 182.
- At 03:07:23: neither the grievor nor Ms. Desjarlais is looking into cell no. 182. The grievor is seen moving away from the door of cell no. 182 with her back to the cell door. Ms. Desjarlais is facing away from the cell toward the back wall, looking at the grievor.
- At 03:07:38: the grievor picks up the blankets she had folded and placed on the high chair.
- At 03:08:14: neither the grievor nor Ms. Desjarlais is looking into cell no. 182.
- At 03:08:26: still neither the grievor nor Ms. Desjarlais is looking into cell no. 182. The grievor walks to the range door.
- At 03:08:29: neither the grievor nor Ms. Desjarlais is looking into cell no. 182. The grievor exits the range. Ms. Desjarlais has her back to the door of cell no. 182 and moves office chair no. 2 toward the back wall.
- At 03:09:50: Ms. Desjarlais is manipulating the high chair when she turns and looks at the range door, which opens, and the grievor enters. The grievor walks past cell no. 182 and conducts a security patrol on the balance of the cells in the range by looking into each cell through the cell-door window.
- At 03:10:36: the grievor walks toward the range door.
- At 03:10:38: the grievor walks past cell no. 182 and does not look in.
- At 03:10:45: the grievor leaves the range.

[90] The grievor returned to the range at 06:45:40, when she relieved Ms. Desjarlais for a short period.

2. The non-video evidence

[91] The grievor as well as Ms. Desjarlais confirmed in their evidence that the grievor brought the mattress and blankets into the range at or about the times that are indicated on the range video. Ms. Desjarlais confirmed in her evidence that, which the video also disclosed, she did not use the mattress while carrying out the HSW of IM A.

[92] When Ms. Desjarlais was asked what state the grievor was in when Ms. Desjarlais entered the range to do her rounds, she said that the grievor was awake and was not lying down.

[93] In her examination-in-chief, the grievor was asked how many HSWs she carried out in her career, to which she said many and then said that if she had to guess, 100. When asked how many she carried out at EIFW, she said 1. She said that she had carried out HSWs at GVI using a mattress.

[94] The grievor testified that at the relevant time, she had recently moved to Alberta from Ontario and that during the move, she had injured her ribs. She said that she had a medical note and that she provided it to a member of management. No medical note was entered into evidence. There is no evidence that the grievor requested or required any form of accommodation during the period at issue, from 23:00 on January 22 to 07:00 on January 23. No medical documentation with respect to this injury was provided in evidence; nor did any healthcare professional testify.

[95] In her examination-in-chief, the grievor was asked why she brought in a mattress instead of a chair, to which she said that the high chair did not have arms, and she said that she couldn't adjust her weight on it "due to [her] injury." She confirmed that she brought extra blankets and that she placed them over her legs, stating that it was cold in the segregation range.

[96] The grievor stated that from her position seated against the wall across from the door of cell no. 182, she had a view of IM A. She confirmed that she was given IM A's HSW form and the IM A 1006 form. She also confirmed that she did not have a watch or a clock. She said that she tried to get a clock but not from a CM, from a co-worker. She said that she could not recall who but thought that it was either the PW in the SUCP or Ms. Desjarlais, both of whom she said told her they needed their "timepieces" to carry out their duties.

[97] Entered into evidence was a copy of the grievor's rebuttal to the investigation report, which was sent by email from her to Warden Bouchard on May 15, 2017. The following comments were relevant to the hearing:

...

I understand my role as a PW outlined in CD 843.

My not having included [IM A]'s interaction with me which led to my decision to move away from her cell and remain in constant and direct supervision are as follows:

After years of working with volatile inmates, I assessed inmate [IM A]'s interaction with me as one that I should disengage in an effort to ensure she did not continue to escalate.

This behaviour occurred between 15 minute logs, therefore was not included as an entry.

In terms of not having a watch or a clock and my statement that I added entries approximately 15 minutes apart, there is no clock in the segregation range and I did not wear a watch nor is one required in law and policy.

...

After the initial interaction with [IM A] she slept and logging she is quiet and laying down for the remainder of my shift is fact.

My words during my initial interview were misinterpreted. At no time did I ever state or agree that I was sleeping on shift.

...

[98] The grievor said that she filled in the IM A 1006 form based on her estimate of what the time was at any given time. When she was asked how she was able to evaluate the intervals, she stated, "every hour; point of reference was the beginning of the hour when they did the round and then split into four; I used that." She stated that her shift on the HSW started at 23:00. She said that IM A was in an agitated state during the first hour that the grievor was watching her and that she tried to speak with IM A to calm her down but that when that was not effective, she provided IM A with more space. When asked when, she said that she did not know. She then said that she thought that it was ongoing. She said that she did this by sitting away from the door on the mattress against the back wall. In her examination-in-chief, when she was asked why she used the mattress and not the high chair, she said that the high chair had no arms, so she could not adjust her weight due to her injury. When she was asked about the blanket, she said that it was very cold.

[99] The IMA 1006 form shows the grievor's initials at 23:00 (along with another PW) and at 15-minute intervals after that, until 03:00. In the spot for the numerical code, the grievor marked on each one of the 17 lines from 23:00 until 03:00 "9/11". The number 9 is the code for lying or sitting, and the number 11 is the code for quiet.

[100] In cross-examination, the grievor was brought through the IM A logbook and when asked if she read it, she said that she did not recall. She was brought to the entries specifically stating that between 19:05 and 23:00, IM A was sleeping, and then had it pointed out to her that she did not document the actions she alleged that IM A had been carrying out. Her response was that she was used to a separate logbook.

[101] When the grievor was asked about potentially being relieved in her duties, she stated that she was not trained on the SUCP or the main control post and that Ms. Desjarlais told her that she had paperwork to complete before her transfer to Mission.

[102] The grievor testified that her interview by the investigators took place without her being shown either the range or the cell videos. Ms. Jara saw the cell and range videos on March 27, 2017. By the time Ms. Bouchard authorized the grievor to view the cell and range videos, she had moved out of Alberta and was unable to view them. She also said that she moved back to Ontario from Alberta while under suspension, over the May long weekend in 2017.

[103] In re-examination, the grievor was brought back to the investigation report, where it referenced what she had said to the investigators about IM A's behaviour and was asked if it was possible that she mixed up this event with another, to which she said that it was possible.

[104] Ms. Marghella testified that a PW responsible for the HSW of an inmate is expected to have constant and direct observation of the inmate to ensure that they are not acting out, self-harming, or trying to commit suicide. When asked where she expected a PW to position themselves during the HSW, Ms. Marghella said right outside the cell. She stated that a high chair is provided that is able to have its height adjusted and to roll. She said that before what happened on the morning of January 23, 2017, she was unaware of any PW carrying out an HSW away from the cell door at issue.

[105] Ms. Marghella was asked how appropriate it would be for a PW to move away from the door during the HSW if the inmate was volatile or yelling, to which she stated

that the PW is expected to stay at the door and observe the inmate; that is the whole purpose of their role during the HSW. When asked how appropriate it would be to sit on a mattress to conduct the HSW, she stated that it was not appropriate. When asked how appropriate it was for the grievor to turn her back while conducting the HSW, she said it was not appropriate.

[106] At the time of the hearing, Ms. Henry was a CM at GVI in Kitchener. She testified that during her career as a PW or CX, she performed HSWs and observed other PWs carry them out. Ms. Henry testified that she was responsible for the grievor's training "on the job" and that she was a CM for the grievor while she was at GVI until the grievor transferred to EIFW in late 2016. Entered into evidence was a series of photographs taken by Ms. Henry of a segregation unit cell at GVI.

[107] The first series of photographs shows the cell door, which had a small upper window that appears to be about one-foot square and a sliding metal panel to cover the window. The only other way to look into the cell was through a food slot that appears to be about one-third of the way up the door from the floor level. The second series of photos shows a door with two windows, similar to if not exactly the same as the windows on cell no. 182 at EIFW; there are upper and lower windows, separated by a food slot. Ms. Henry testified that she took the photos in the week of August 24 and 25, 2021, and that the last photo taken is of her at that time by someone else, which shows her seated in a chair that appears to be similar to the high chair from EIFW, and she is looking into the cell from the upper window.

[108] Ms. Henry said that the cell doors in the HSW segregation range at GVI switched from having one small window to two larger windows sometime around 2012 to 2013. She stated that during an HSW, PWs are expected to position themselves right at the cell door and to have eyes on the inmate being watched at all times. As the inmate has been determined to be at a high risk of attempting to commit suicide or self-harm, the PWs are to watch the inmate closely for any behaviour that may be risky. When asked if she ever heard of CXs or PWs being seated away and opposite the cell door against a back wall, she stated that she had not, and stated that it was not appropriate to carry out an HSW in that manner.

[109] Ms. Henry testified that the CMs at GVI have quarterly meetings in which they address issues and discuss concerns raised. She stated that these meetings cover all

topic areas involving the institution and matters over which they are responsible, including the management and supervision of CXs. She stated that it was never raised at any of these meetings that PWs were conducting HSWs of inmates from anywhere except right outside the relevant cell door. She stated that they never had raised at any of the CM meetings at GVI the issue of PWs using mattresses to conduct an HSW.

[110] In cross-examination, Ms. Henry confirmed that PWs could rotate through an HSW either hourly or every four or eight hours. When asked if she as a CM told the PWs how often to rotate through or relieve (or spare off) each other, she said that she can and that she has but said that they often work it out themselves.

[111] Ms. Bussey testified about the grievor's training record and what the materials it contained consisted of. Entered into evidence was the grievor's training record. It discloses that the grievor received and completed training with respect to suicide and self-harm initially in the Correctional Officer Training Program (CTP) and as well in refresher courses in 2010, 2011, 2013, and again in 2015.

[112] Ms. Bussey indicated that the grievor's training record showed that she successfully completed all the training recorded in it. Ms. Bussey said that the training on mental health and inmates would have been covered over two days in December of 2009.

[113] The training material provided included significant information on suicide and self-harm and the signs being exhibited by inmates. Part of the evidence was material created in 2014 as part of a suicide and self-harm refresher course that was given online. Included in that material was a statement that "All institutional staff must know their responsibilities as per Commissioner's Directive 843: *Management of Inmate Self-Injurious and Suicidal Behaviour*, hereinafter CD 843."

[114] A disciplinary hearing was held via conference call as the grievor was living in Ontario. The exact circumstances surrounding the time of the grievor's move was not made clear to me.

[115] Entered into evidence was the audio recording of the grievor's disciplinary hearing as well as a typewritten version of what were identified as the notes of the labour relations officer (LRO) who also attended the hearing. I have listened to the audio recording and have reviewed the notes. While the notes are not an exact

transcription of the audio recording, they do largely and accurately cover the salient parts of the hearing. The portions of the notes that are relevant to my decision are the following:

...

Question #2

Brigitte Bouchard (BB): *I'm going to ask you something, if you can comment on the infraction against the Code of Discipline (CD 060) with regard to your misconduct that was reported through the investigation ... as it relates to failed to take actions or otherwise neglects his or her duty as a peace officer, fails to conform or apply any relevant legislation, commissioners directive, standing orders, or other directive as it relates to your duties as, specifically to 5664 and 843 - willfully or through negligence makes or signs a false statement in relation to the performance of your duties. Perform your duty in a careless fashion so as to risk or cause bodily harm or death to any other employees in the service or any other persons either directly or indirectly. And sleep on duty.*

GS Response: *I wasn't sleeping on duty. Never once did I say that I was sleeping on duty. I was extremely forthcoming during my investigation, and I said that I was tired because I was, and that happens to anyone working night shift... I take high watch extremely seriously. In regards to the falsifying documents - that was never my intention. I didn't have a clock - and I did the best I could. So you know what - you're right. I may have been off a couple of minutes when I documented. I have a pretty good estimate of time after so long in the service, but I didn't have a clock...a clock wasn't provided... I did the best I could with what I had. The sitting on the seg mattress - it's not against policy, it's not against conduct. There are two windows on the doors for a reason. And the inmate even said that she didn't know I was sitting there, which means to me that my methods were effective....*

Brigitte Bouchard (BB) Question #3: *So in reading the report in your rebuttal that you sent me, you said that you felt that the Board of Investigation (BOI) twisted your words.*

Grace Scott (GS) Response: *I did because there were a lot of opinions there. They took my being forthcoming about saying I was tired - because I was completely honest and forthcoming. And they twisted it to say that they believed that I was sleeping... never once did I even imply that I was sleeping... I took an honest look ... And I didn't, I didn't do it. I was trying to explain that to them, and I guess in my effort to explain myself, they may have misunderstood me. I never once said that, and I never would....because I don't. I didn't. I have so much going on. I do feel that my words were twisted there and it was either misunderstood or misrepresented ... And it was never my intention to pass blame; I was trying to point out and in my defense, in support of my not sleeping because it is just my word, if I was sleeping why wouldn't*

someone approach me? Or a manager? Or someone? to me that's negligence on everybody's part. Because that inmate is on high watch. So as a report is, it doesn't do anything during that shift. That's just dangerous, in my opinion. If you think somebody might be sleeping, or might be in some sort of medical distress, you approach them. And if you're not comfortable to do that you approach the manager - because that inmate is on high watch for a reason. So what I was trying to do was I was trying to back up and give you more than just my words to go on and I feel that that got twisted into me not accepting responsibility. And I am not that type of person; I will accept responsibility for my actions.

Question #4:

Brigitte Bouchard (BB): In the report it does talk about the fact that you did not maintain constant and direct supervision of the inmate (GS interjected before BB was able to finish the question)

Grace Scott (GS) Response: You know what, I honestly didn't even think about that, but they're right. For a brief period of time my back would have been to the inmate. I became complacent after almost a decade of doing high watch. And I'm sorry, it wasn't intentional, it wasn't willful, I wasn't trying to be harmful. I just became complacent and reliant ... But you're right; I totally turned my back for a brief period of time and therefore broke constant sight and supervision. It wasn't willful. Until I read the report and saw that, I didn't even consider that. And, I'm being honest. I've been doing this for a lot of years and it was my mistake. I became complacent....

...

Danissa [sic] Jara (DJ) comment: So it is fair to say that now you understand fully because you read the report and the rationale? And now it's been clearly outlined what the misconduct is believed to have been?

(GS) Comment: Ya. I still think that it could have been resolved but I do understand why management chose the route they did, and the seriousness. I apologize if you thought I didn't take it seriously. There must have been a miscommunication and my efforts. It seemed the more I tried to communicate how seriously I took this, the more almost defiant I looked. And, that wasn't the intention - it's the exact opposite. I appreciate the seriousness of the job; I appreciate what could happen if we don't do our job; especially when an inmate is on high watch; I appreciate liability for everybody - personal and professional because it takes a toll on people. I was trying to communicate and reiterate that and I think it came across as defiant. The more I tried to explain myself, the more defiant I looked. When what I was trying to do is say listen, I understand; I'm trying to understand, and I understand because I've experienced this stuff; I know the toll it takes on everybody. I've seen it, I do take it seriously.

...

Question #6

Brigitte Bouchard (BB): Do you understand the determination that the Board made about not being able to do constant observation of the inmate? Do you understand how they came up with that finding?

Grace Scott (GS) Response: Yes, apparently they watched the video and saw that I turned my back to the inmate for a brief period of time - when I was walking from the cell door to the seg mattress.

(BB) Comment: In the analysis portion of the report it actually talks about the way the mattress was situated and the two windows that you couldn't have provided direct supervision.

(GS) Comment: Oh, right right. I disagree with that to be completely honest. I know that I saw her moving... I feel like I was able to maintain supervision of her. Now, given what the board found and how I know management feels about it would I do it again? No. But do I think I fulfilled my job duties that night - yes.

...

[Sic throughout]

[116] Ms. Bouchard testified that she was away from EIFW when the anonymous note was delivered. She said that she did not recall watching the range or cell videos. She said that because initially, she placed the grievor on administrative leave with pay because of the serious allegation that the grievor slept during an HSW, it made it difficult to put her on duty pending the investigation. She said that she was guided in her actions by discussions and advice she received from Labour Relations. She said that she later placed the grievor on leave without pay once the investigation had been completed. She said that she changed the status of the leave at this point because there were grave findings of fault reported in the investigation report which were significant enough to place the grievor on administrative leave without pay. She stated that it was inappropriate for the grievor to be in the workplace as the report found serious misconduct, there was no work that did not involve inmate contact, and the findings indicated that there was a risk to inmates and co-workers if she were allowed to remain on the job.

[117] Ms. Bouchard stated that the work description of the PW talks about sustained attention and ensuring compliance, both of which are critical to an HSW. She described an HSW as involving direct and constant supervision. She said that in no circumstance can a PW move away from the door and that the CSC expects them to be ready to intervene as the preservation of life is part of the CSC's mandate. She said that if you

are going to leave, you are to request relief. There is a reason an inmate is put on an HSW; it is done because there is a high risk that the inmate will imminently take their own life. She said that being seated on a mattress was not appropriate with respect to response time. It would take time for the PW to get up and then move.

[118] Ms. Bouchard was shown the grievor's response to the investigation report and was asked about it. She said that she was trying to get the grievor to see what she did was wrong and that she would not do it again. She said that she wanted to hear the grievor give an indication that she wanted to know what not to do, so she would not do things wrong again. She said that instead, what she received were reasons from the grievor to justify her behaviour. With respect to the reference by the grievor that she did not have a watch or clock, Ms. Bouchard said that this is not a legitimate excuse as there are clocks in every control post; the grievor should have asked for one. She said that it was strange that the grievor did not have a watch as all PW duties in the institution have "time issues in all duties".

[119] With respect to the grievor's justification of moving away from the cell due to the alleged volatile behaviour, Ms. Bouchard said that this was not proper procedure. She said that it is the responsibility of the CSC and the PWs to ensure that the inmates are in a safe and secure environment. This is in the mission statement of the CSC.

[120] Ms. Bouchard stated that she understood that the grievor said that she did not sleep, but that was only part of the concern; the other part "was sitting four metres from the cell with no constant and direct observation." She said that she was not satisfied that the grievor took responsibility for her actions and did not acknowledge the gravity of what had happened. She said that the grievor was aggressive and defensive. Ms. Bouchard said that she wanted the grievor to make her feel confident that she could put the grievor back to work without having a concern but instead found that the grievor was trying to justify what she did. She said that the grievor did not acknowledge the wrongdoing. She said that even after the investigation report and the clear explanation of what was wrong and not appropriate, the grievor was still justifying that it was okay and said that she would do it again. Ms. Bouchard said that she asked herself how she could put the grievor back into the position if she did not understand that what she did was wrong. Ms. Bouchard said that if the grievor had shown accountability, she would have taken that into account, but that it was the lack of accountability that drove her decision to terminate the grievor's employment.

[121] When asked about the fact that the grievor was new to EIFW, Ms. Bouchard said that she gave that a little consideration but not much as the grievor was not new to the CSC. She stated that the grievor's previous experience was at GVI, which is a similar type of institution.

[122] In cross-examination, Ms. Bouchard was asked about the difference between sitting on the mattress and a chair, to which she said that sitting on a chair would have allowed the grievor the ability to get up and respond quicker.

[123] Ms. Bouchard said that she took into account the grievor's record and that the grievor seemed to perform to expectations.

[124] In both the audio recording and the disciplinary hearing notes, reference is made to a re-enactment. The grievor stated in her examination-in-chief that she was unaware of any re-enactment until the discussion during her disciplinary hearing. As a part of the evidence in Ms. Desjarlais' grievance hearing (Board file no. 566-02-14845), a short video made by the investigators of the view from outside of cell no. 182 was entered into evidence and was spoken to by Mr. Anderson. I have seen this video. It was not produced during the course of this hearing.

3. Occupational health and safety issues

[125] I heard evidence from some witnesses about issues involving occupational health and safety (OHS) that had been brought forward, mostly at GVI, with respect to PWs performing HSWs for extended periods, without relief, and to having to use chairs that were uncomfortable or not ergonomic, or both.

[126] Also entered into evidence were numerous documents related to the OHS issues in HSWs. Some related to the length of time being spent by an individual PW without relief, and some related to the chairs and their suitability, comfort, or discomfort, as the case might have been. I will not get into any of this evidence, given that as the hearing progressed and the key issues became clear, it was not relevant to what I had to determine.

4. Post-termination employment

[127] The grievor testified that after her termination of employment, she was employed for a period in Alberta from November of 2017 to February of 2018, after which she voluntarily left and moved to Nova Scotia, where she was employed in March

and April of 2018. She then moved from Nova Scotia to Ontario, where she obtained employment and worked from September of 2018 through June of 2019. In June of 2019, she went on maternity leave from the position she was in at that time. She moved to Saskatchewan in late spring or early summer of 2021, where she was living at the time of the hearing. She stated she was not employed as of the hearing.

[128] The evidence was not at all clear on the grievor's move from Alberta to Ontario, which appears to have occurred in May of 2017, and when the grievor came back to Alberta such that she was employed there until February, when she moved to Nova Scotia. It was also not clear from the evidence as to what if any maternity benefits she received and when her employment ended with her pre-maternity-leave employer.

III. Summary of the arguments

[129] The employer referred me to *Baptiste v. Deputy Head (Correctional Service of Canada)*, 2011 PSLRB 127, *Besirovic v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLRB 33, *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, *Bridgen v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 92, *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), *Canada (Attorney General) v. Bétournay*, 2018 FCA 230, *Canadian Union of Public Employees, Local 3207 v. Cheshire Homes of Regina Society*, 2016 CanLII 152568 (SK LA), *Cassin v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 37, *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, *Cudmore v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File No. 166-02-26517 (19960725), *Dekort v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLRB 75, *Douglas v. Treasury Board (Correctional Service of Canada)*, 2020 FPSLRB 51, *Hogarth v. Treasury Board (Supply and Services)*, PSSRB File No. 166-02-15583 (19870331), *Kikilidis v. Treasury Board (Ministry of Solicitor General)*, PSSRB File Nos. 166-02-3180 to 3182 (19771011), *MacLean v. Treasury Board (Department of the Solicitor General)*, PSSRB File No. 166-02-757 (19730608), *Management and Training Corp. of Canada (c.o.b. Central North Correctional Centre) v. Ontario Public Service Employees Union*, [2006] O.L.A.A. No. 146 (QL), *McKenzie v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 26, *N.J. v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 129, *Philps v. Canada Revenue Agency*, 2016 PSLREB 110, *Rahim v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 121, *Ranu v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 89, *Richer v. Deputy Head*

(*Correctional Service of Canada*), 2012 PSLRB 10, *Shaver v. Deputy Head (Department of Human Resources and Skills Development)*, 2011 PSLRB 43, *Stead v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 87, *Teck Cominco Metals Ltd. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 480*, [2006] B.C.C.A.A.A. No. 161 (QL), *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL), *Tousignant v. Treasury Board (Solicitor-General of Canada)*, [1979] C.P.S.S.R.B. No. 26 (QL), *Yayé v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 51, *Walker v. Deputy Head (Department of the Environment and Climate Change)*, 2018 FPSLREB 78, and *William Scott & Co. v. C.F.A.W., Local P-162*, 1976 CarswellBC 518 (“*Wm. Scott*”).

[130] The employer requested that the grievances be dismissed.

[131] The grievor also referred me to *Wm. Scott*, *Besirovic*, *Dekort*, and *Yayé*, as well as *Basra v. Canada (Attorney General)*, 2010 FCA 24, *King v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 84, *Kinsey v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 30, *Lyons v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLREB 122, *Verville v. Canada (Service correctionnel)*, 2004 FC 767, *Faryna v. Chorny*, [1952] 2 D.L.R. 354, *Carignan v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 86, and *Matthews v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 38.

[132] The grievor acknowledged that there may be some merit to some of the allegations of misconduct related to the events of January 23; however, the termination of her employment was excessive. She requested that the grievance be upheld, that the termination of employment be set aside, that a short suspension be imposed in its stead, and that she be reimbursed all lost salary and benefits.

[133] In addition, the grievor requested that I remain seized to address any issues arising out of the implementation of any relief I grant.

IV. Reasons

A. Sealing order

[134] The employer asked that the videos of cell no. 182 and the segregation unit range be sealed. In the hearing of the Desjarlais grievance, the employer also requested that Ms. Marghella’s diagram of the segregation unit also be sealed. While they did not

specifically make that request, in this hearing, I assume that the failure to do so was a simple oversight as the reasoning behind the request in that hearing equally applies in this hearing. In *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, the Public Service Labour Relations Board stated as follows:

9 The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the “freedom of expression” provisions of the Canadian Charter of Rights and Freedoms; for example, see Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; R. v. Mentuck, 2001 SCC 76, Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (CanLII).

10 However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as Dagenais and Mentuck. These decisions gave rise to what is now known as the Dagenais/Mentuck test.

11 The Dagenais/Mentuck test was developed in the context of requests for publication bans in criminal proceedings. In Sierra Club of Canada, the Supreme Court of Canada refined the test in response to a request for a confidentiality order in the context of a civil proceeding. As adapted, the test is as follows:

...

- 1. such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
- 2 the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*

...

[135] In the present circumstances, I find it appropriate to seal the exhibits. It is in the public's interest to maintain the confidentiality of the layout of the security of the premises at a penitentiary as well as the privacy of IM A. Sealing these videos does not in any way affect the transparency of the decision or the process. Therefore, Exhibits E-1 tab 45, E-2 and E-4 are ordered sealed.

[136] I also note that in both the employer's and grievor's briefs of documents, in some places, IM A's name, inadvertently, was not redacted. The parties are to review the document briefs that they submitted to ensure that IM A's name is redacted throughout. The Board shall seal all of the exhibit briefs that could potentially have IM A's name inadvertently left in them for a period of 30 days to permit the parties to carry out this task and to provide the Board with replacement briefs.

B. Request for a view

[137] I was initially assigned to hear the grievance in Board file no. 566-02-14845, *Desjarlais v. Deputy Head (Correctional Service of Canada)*, and began that hearing the week of November 18, 2019, in Abbotsford, B.C. During the course of that hearing, I became aware that these Board files relating to the suspension and termination of the grievor were also before the Board and that they arose out of almost the exact same circumstances. After bringing this to the attention of the Chairperson of the Board, these matters were also assigned to me.

[138] As the hearing of Ms. Desjarlais' grievance during the week of November 18, 2019, came to a close and was not complete, I had discussions with the parties in that matter about continuing it in Edmonton, in conjunction with the hearing of this matter and carrying out a view of the segregation unit at EIFW and cell no. 182. Counsel for the employer and the employer's representative were the same in both this matter and in Ms. Desjarlais' grievance; however, the union representative in this matter was different from the one in Ms. Desjarlais' grievance. I instructed the Board's registry to coordinate the continuation of Ms. Desjarlais' grievance with the hearing of this matter in Edmonton, such that a view would be taken at EIFW and the representatives in both matters would be able to attend, as well as me.

[139] Despite the best efforts of all involved, the COVID-19 pandemic struck before the matters could be scheduled in Edmonton and a view taken at EIFW. As of mid-March 2020, the Board ceased hearing matters, cancelling all hearings that had been

scheduled up to the end of July of 2020. In the late summer of 2020, the Board began to once again hear cases; however, all were being conducted virtually via either a Zoom or Microsoft Teams videoconferencing platform. Since the start of the pandemic, the federal government and large portions of the public service have worked from home and have not returned to their office settings. In addition, travel by federal public servants has been highly curtailed.

[140] Before the continuation of the hearing in Ms. Desjarlais' grievance and the start of the hearing in these matters, I was informed by counsel for the employer that the CSC was carrying out renovations to the segregation unit at EIFW and that it may not be in the same condition after the renovations as it was on the morning of January 23, 2017. However, as of the hearing of these matters and the completion of Ms. Desjarlais' grievance hearing on August 3 to 4, 2021, those renovations had been delayed, and counsel for the employer reiterated a request for a view.

[141] While things on the pandemic front were better in the late summer of 2021, when I heard this matter and completed the hearing of Ms. Desjarlais' grievance (both by videoconference), the country was squarely within the third wave of the pandemic, with many national, provincial, and local restrictions still in place. I determined based on the evidence that I had seen and heard in both this matter and Ms. Desjarlais' grievance (much of which was similar or identical) as well as taking into account the ongoing state of the pandemic and the recommendations being made by the relevant health authorities that it would not be safe or wise to either attend or require the parties and their representatives to attend EIFW for a view.

C. The merits of the grievances

1. Grievances against the suspension of employment in Board file nos. 566-02-14326, 14468, and 14469

[142] The grievance in Board file no. 566-02-14326 is with respect to the grievor's initial suspension without pay on March 20, 2017, while those in Board file nos. 566-02-14468 and 14469 are against the continuations of the suspension without pay that occurred on April 10 and May 1 and 23, 2017, respectively.

[143] As set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, and in a long line of Board cases that have applied it, as well as the recent decision in *Bétournay*, for a matter to not be moot, there must be a tangible issue to be decided.

The grievor was in fact terminated from her employment retroactively to the date on which she was first suspended without pay. That issue, the termination of employment, is a real and tangible issue that is not only the subject of a grievance but also is the subject of a grievance before me. The relief requested by the grievor in her grievances against her suspension without pay and against the continuation of her suspension without pay is the same relief that she has requested in her grievance against her termination, which is to be reinstated with full pay and benefits as of March 20, 2017. As such, I find that the grievances in Board file nos. 566-02-14326, 14468, and 14469 are moot and shall be dismissed.

2. Grievance against the termination of employment in Board file no. 566-02-14525

[144] Adjudication hearings with respect to discipline under s. 209(1)(b) of the *Act* are hearings *de novo*, and the burden of proof is on the respondent.

[145] The usual basis for adjudicating discipline issues is by considering the following three questions (see *Wm. Scott*): Was there misconduct by the grievor? If so, was the discipline imposed by the employer excessive in the circumstances? If it was excessive, what alternate penalty is just and equitable in the circumstances?

a. Was there misconduct by the grievor?

[146] All the misconduct alleged relates to the manner in which the grievor conducted her duties in the segregation unit at EIFW on the morning of January 23. In the letter of termination, the employer stated that the grievor was found to be negligent in the performance of her duties while she was conducting the HSW of IM A and that she had breached the *Standards of Professional Conduct* and the provisions of the *Code*, specifically *Standard One - Responsible Discharge of Duties*, as follows:

...

- *Paragraph 6(f)* “fails to take action or otherwise neglects his/her duty as a peace officer”;

- *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”;

Specifically: Commissioners Directive 843, Management of Inmate Self-Injurious and Suicidal Behavior, Paragraph 11, “In the case of inmates on High or Modified Suicide/Self-Injury Watch, the Correctional Officer/Primary Worker (or the health care professional, if applicable) will document the inmate’s activities

on a Seclusion and Restraint Observation Report (CSC/SCC 1006), as required, but at least every 15 minutes.” *and Paragraph 17*, “Inmates on High Suicide/Self-Injury Watch will be under constant, direct observation by a Correctional Officer/Primary Worker (or it may be a health care professional in Regional Treatment Centres). Monitoring via camera does not fulfill this requirement.”

- *Paragraph 6(j)* “wilfully or through negligence, makes or signs a false statement in relation to the performance of duty”;

- *Paragraph 6(m)* “performs his/her duty in a careless fashion so as to risk or cause bodily harm or death to any other employee of the Service, or any other person(s) either directly or indirectly”;

...

and Standard Two - Conduct and Appearance, as follows:

...

- *Paragraph 8(i)* “sleeps on duty”.

...

[147] On January 20, 2017, IM A was determined by a mental health professional to be at risk of self-harm or suicide, and it was determined that she be subject to an HSW. She was placed in cell no. 182 in the segregation range. Cell no. 182 is the first cell to your right as you enter into the segregation range. If you are looking into cell no. 182 at its door, to your left is another cell, and to your right is the shower.

[148] Between 00:00 and 07:00 on January 23, two PWs, the grievor and Ms. Desjarlais, were tasked to carry out the HSW of IM A. From roughly 00:00 to roughly 03:00, the grievor was responsible, and from roughly 03:00 to 07:00, Ms. Desjarlais was responsible; however, the range video evidence shows that there was not a clear delineation of each of them exclusively carrying out the HSW during those periods and that there was some overlap during which one or the other might have been responsible as both were present in the range at the same time. These will be spelled out in more detail later in these reasons.

[149] The allegations against the grievor can be split into the following acts of misconduct:

- i) the grievor was not maintaining constant and direct watch of IM A while she was not seated against the back wall of the segregation range;
- ii) the grievor was not maintaining constant and direct watch of IM A while she was seated against the back wall of the segregation range;

- iii) the grievor was sleeping while she was supposed to be conducting the HSW of IM A; and
- iv) the grievor did not properly document IM A's activities on the Form 1006.

i. The grievor was not maintaining constant and direct watch of IM A while she was not seated against the back wall of the segregation range

ii. The grievor was not maintaining constant and direct watch of IM A while she was seated against the back wall of the segregation range

[150] I have set these two together as the test for them is largely the same: Did the grievor maintain constant and direct observation of IM A while she was charged with the task of carrying out the HSW of IM A during the early hours of January 23?

[151] In the work description of a PW, the very first line under the heading "Client Service Results" states "[c]orrectional operations related to the safety and protection of the public, staff, inmates and the institution ...". Under the heading "Key Activities", the very first one listed is the "... security within the institution (includes public, staff, volunteers, visitors, service providers, and inmates)."

[152] CD 843 deals with the management of inmates who are displaying self-injurious and suicidal behaviour. It sets out what steps are to be taken to assess an inmate for this behaviour and then, if it is determined that the inmate falls within the criteria for self-injury or suicide, a protocol is established. It sets out three suicide watch observation levels, the highest of which is the HSW. When an inmate is placed on an HSW, they are placed in a suicide watch cell, and they "... will be under constant, direct observation by a Correctional Officer/Primary Worker (or it may be a mental health professional in Regional Treatment Centres). Monitoring via camera only is not permitted."

[153] The very definition of "HSW" and the very fact that a qualified health care professional, who is responsible for the inmates in the institution, has determined that a particular inmate should be placed on an HSW is a clear indication that this person is at significant risk to immediately, or at any moment, either cause themselves harm or attempt to commit suicide.

[154] I have no doubt that the term "constant, direct, observation" is both clear and unambiguous. The words constant and direct are defined by the *New World Dictionary of the American Language* as follows:

constant

1. not changing; remaining the same; specif., a) remaining firm in purpose; resolute; b) ... c) remaining free from variation or change; regular; stable 2. Going on all the time; continual; persistent

...

direct

1. ... not interrupted ... 3. with nothing or no one between; immediate; close, first-hand, or personal; 4. In an unbroken line of descent; lineal;

[155] I have no doubt what the use of the terms “constant” and “direct” in CD 843 means and what the PWs should understand it to mean: you are always watching the inmate to ensure that they are safe and are not doing anything to attempt to harm themselves or to take their own life. That is the sole point of the HSW. It does not mean “kind of” watching or watching “some of the time” or “looking or glancing in”. It means “always”.

While not seated against the back wall

[156] It is clear from the range video that there were periods between 00:00 and 03:00, when the grievor was supposed to be responsible for the HSW of IM A, in which she was not keeping constant and direct watch of IM A. These are as follows:

- between 00:00:35 and 00:10:01;
- between 02:16:19 and 02:18:17; and
- between 02:57:53 and 03:08:30.

[157] While the evidence disclosed that the grievor was supposed to be conducting the HSW from 00:00 to 03:00 and that it was Ms. Desjarlais' time from 03:00 to 07:00, the evidence, as will be more specifically identified later in this decision, disclosed that sometimes, the two of them were in the range during each other's time of watch and neither was carrying out the HSW. This is particularly the case at the period right around midnight, when the grievor was supposed to be starting the HSW, and at about 03:00, when she was handing it over to Ms. Desjarlais.

[158] Between 00:00:35 and 00:00:56, the grievor is alone on the range and not keeping a constant direct watch on IM A. Between 00:00:56 and 00:08:53, Ms. Desjarlais and the grievor are both on the range, at times, during which the grievor leaves twice. During these times, it is presumed that Ms. Desjarlais has assumed responsibility for

the HSW of IM A, however during these periods there are times she is also not keeping a constant direct watch on IM A. The grievor during this time is not watching IM A at all. At 00:08:54, Ms. Desjarlais leaves the range. The grievor is the only PW on the range, and her evidence was that from 00:00:00, she was supposed to be responsible for the HSW of IM A. While Ms. Desjarlais is seated or standing at the door of cell no. 182, it is difficult to suggest that the grievor is responsible for the HSW; however, as of 00:08:53, once Ms. Desjarlais leaves the range, this responsibility is clearly the grievor's. From 00:08:53 until she seats herself on the mattress at the back wall at 00:10:01, the grievor is not watching IM A at all.

[159] At 02:16:19, the grievor can be seen moving the blanket and then getting out of her seated position, walking over to the door of cell no. 182, and then looking in from the top window. During that time, she would not have been able to see inside the cell in a manner that would have allowed constant and direct observation. Once she stood up, her height, her location(s), and the location of the cell-door windows would, by simple geometry, have obscured her ability to see IM A until she moved to the door sufficiently to be able to look in from the top window and then down to the bed.

[160] At 02:16:38, she looks through the top window of the door of cell no. 182. At 02:17:04, she turns and walks back toward the mattress at the back wall of the range. At 02:17:12, she walks back to the door of cell no. 182 and then watches IM A through the upper window for a little more than a minute, when at 02:18:17, she then looks to the back of the range toward the mattress and then, a few seconds later, turns to look back in the cell.

[161] At 02:57:53, the grievor starts to stand up from her seated position against the wall and walks forward to the range table and puts something onto it. She then walks over to cell no. 182. At 02:58:10, she glances through the upper window of the cell. At 02:58:11, she turns away from the cell window, and proceeds to adjust her uniform and equipment, and walks back to the back wall with her back to the cell., continuing to adjust her uniform and equipment. It isn't until 02:59:10, that the grievor returns to the cell door and glances inside cell no. 182. She then proceeds to drink from a container and then to move and place the container on the high chair with the bag or backpack she had previously placed there. She has her back to the cell and then moves toward the back wall of the range. At 02:59:37, she picks up the blanket, walks back toward cell no. 182, and folds the blanket while standing in front of the cell door. At

02:59:51, she places the blanket on the white chair and again walks away from the cell. She stands by the high chair and picks up another blanket and folds it.

[162] At 03:00:08, the grievor is seen holding a blanket up that obscures the view into cell no. 182. At 03:00:22 the grievor moves to the door of cell no. 182 and appears to be looking in at IM A. She then looks into the cell. At 03:00:30, the grievor is seen looking down at the floor. At 03:05:55, Ms. Desjarlais is seen entering the range, rolling in the office chair. At 03:06:45, the grievor is turned toward Ms. Desjarlais and is not watching IM A. At 03:07:30, neither the grievor nor Ms. Desjarlais is watching IM A, and they appear to be having a discussion. Both have their backs to the cell. At 03:08:11, the grievor still has her back to cell no. 182; she is holding what appear to be her belongings, and Ms. Desjarlais is not watching IM A. At 03:08:29, the grievor leaves the segregation range.

[163] The evidence disclosed on a balance of probabilities that the grievor, by failing to maintain direct and constant observation of IM A during the times I have just reviewed, was clearly in breach of her duties under CD 060, paragraph 6(f), which states, “fails to take action or otherwise neglects his/her duty as a peace officer”; paragraph 6(g), which states, “fails to conform to, or apply, any relevant legislation, Commissioner’s Directive, Standing Order, or other directives as it relates to his/her duty”, specifically CD 843; and paragraph 6(m), which states, “performs his/her duty in a careless fashion so as to risk or cause bodily harm or death to ... any other person(s), directly or indirectly”. This constitutes misconduct.

While seated against the back wall

[164] It is clear from the way each party presented their case and the evidence that most of what was in dispute was whether the grievor could have properly carried out the HSW when she was seated on a mattress (which was laying on the floor of the segregation range) with her back against the back wall, more or less directly across from cell no. 182, albeit approximately 12 feet from the cell door.

[165] The evidence disclosed that at 00:10:09, the grievor had settled into her spot seated on the mattress with her back against the back wall of the range. She is seated to the right of the range table (if you have your back to the back wall of the range) and is facing toward the door of cell no. 182. During the majority of the period between 00:10:09 and 02:58:03, the grievor is seated in this position, except for between

02:16:19 and 02:30:20, when she gets up and moves about for a few minutes (as set out in the last section) and is relieved by Ms. Desjarlais.

[166] There are many variables that affect how and what a person can see. One of these is where someone is positioned, vis-a-vis what it is that they are looking at. The position they are situated in determines their perspective. "Perspective" is defined by the *New World Dictionary of the American Language* as follows:

*1. The art of picturing objects or a scene in such a way, e.g. by converging lines (**linear perspective**), as to show them as they appear to the eye with reference to relative distance or depth 2. a) the appearance of objects or scenes as determined by their relative distance and positions b) the effect of relative distance and position 3. The relationship of proportion of the parts of a whole regarded from a particular standpoint or point in time*

[167] Every day, when we use our eyes to look at or watch things, we are engaged in using the concept of perspective; it is something that is constantly happening. A good example of this is when you are standing at a doorway, either between rooms or from a hallway looking into a room. When standing right at the doorway, with your head aligned perpendicular to the walls on either side, your eyes give you an almost 180-degree view, even if you keep your head looking forward. If you maintain that position and turn your head ever so slightly to the left, part of what you had been able to see to the right, you can no longer see. If you take even a step backward from the position you were formerly in, you will notice that depending on the amount the room extends out from you on either side, significant portions of what you formerly were able to see are no longer visible as they are blocked from view by the sides of the door. If the door entrance you were standing in was located more to one side of the room or the other, this would alter how much of the room you would be unable to see on each side. Each time you take a step back from the room, albeit still looking through the door, not altering the height or otherwise the position of your body, the less of the room you will be able to see.

[168] This is true for any aperture that you stand on one side of and view through to see what is on the other side. For example, if you stand at a window that is in a door and on the upper half of that door (as this is what is pertinent in this case) and press your face as close to or even touching the window (like the earlier example with respect to the door and the room), you can see extensively almost 180 degrees from

side to side. In addition, as well as seeing almost 180 degrees, if you look down, you can see to almost, but not quite, the point where the bottom of the door meets the floor, pavement, or walkway immediately outside and abutting the door. However, as soon as you move in any way, depending on the location of your eyes, your perspective is altered, and what you can see on the other side of the window changes.

[169] I am satisfied that while the grievor was seated on the mattress, positioned at the back wall of the segregation unit, she was able to maintain constant and direct observation of IM A, albeit in a somewhat unorthodox manner, assuming that she was looking through the lower window in the cell door. I base this on both simple mathematical understanding as well my knowledge of the layout of the segregation unit and the videos entered into evidence. As I am satisfied that the grievor would have had the ability to maintain a constant and direct view of IM A from this position, the employer has not established this allegation of misconduct.

iii. The grievor was sleeping while she was supposed to be conducting the HSW of IM A

[170] The only evidence that the grievor was sleeping while she was supposed to be conducting the HSW of IM A was the anonymous note that was sent to the SIO, which was the genesis for the investigation. No witnesses stated that the grievor was sleeping when they saw her. The grievor denied sleeping while on duty. Ms. Desjarlais stated that on each occasion that she was in the segregation range with the grievor on the morning of January 23, 2017, the grievor was awake. The video evidence does not disclose the grievor sleeping. The range video, at best, shows the grievor seated on the floor of the segregation range in the manner both she and Ms. Desjarlais described, with her back against the back wall.

[171] The notes of both investigators and as well the synopsis of the grievor's interview during the investigation refer to the grievor stating that she did not remember falling asleep. This is not evidence that she was asleep.

[172] On a balance of probabilities, I find that the employer has not established that the grievor was sleeping while she was conducting the HSW of IM A on January 23 and as such that she did not breach CD 060, paragraph 8(i), which states, "sleeps on duty".

iv. The grievor did not properly document IM A's activities on the Form 1006

[173] CD 843 further states that an inmate on an HSW will have their activities documented by the PW conducting the HSW on the 1006 form every 15 minutes.

[174] In short, the evidence disclosed that the grievor documented IM A's activities on the form 1006; however, she did not have a watch or clock of any type, and it is questionable as to how accurate the documentation is. Therefore, the employer has established on a balance of probabilities that the grievor breached CD 060, paragraph 6(g), which states, "fails to conform to, or apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directives as it relates to his/her duty", specifically CD 843; and paragraph 6(j), which states, "wilfully or through negligence, makes or signs a false statement in relation to the performance of duty".

b. Was the discipline excessive in the circumstances?

[175] As the employer established some elements of the misconduct it alleged, I now turn to whether the penalty, the termination, was excessive. For the reasons that follow, I am satisfied that it was and set it aside.

[176] It is not clear that any breakdown was done with respect to the amount of discipline that was accorded to the grievor's failure to watch IM A versus the amount accorded to her failure to properly document the IM A 1006 form.

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

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

...

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

...

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

...

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

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

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

1. The previous record of the grievor
2. The long service of the grievor
3. Whether or not the offence was an isolated incident in the employment history of the grievor
4. Provocation
5. Whether the offence was committed on the spur of the moment as a result of a momentary aberration, due to strong emotional impulses, or whether the offence was premeditated
6. Whether the penalty imposed has created a special economic hardship for the grievor in the light of his particular circumstances
7. Evidence that the company rules of conduct, either unwritten or posted, have not been uniformly enforced, thus constituting a form of discrimination
8. Circumstances negating intent, e.g., likelihood that the grievor misunderstood the nature or intent of an order given to him, and as a result disobeyed it
9. The seriousness of the offence in terms of company policy and company obligations
10. Any other circumstances which the board should properly take into consideration (page7-153)

...

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

The critical question for arbitrators using a corrective approach is the grievor's capacity to conform to acceptable

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

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

[Sic throughout]

[178] The evidence disclosed that until this incident, the grievor had nine years of discipline-free service. I did not see any performance reviews; however, I did not hear any evidence to suggest that other than this incident, her performance as a PW was anything other than satisfactory.

[179] With respect to the documenting on the IM A 1006 form, there was no indication that there was any provocation or that her actions were due to strong emotional impulses. Nor is there any evidence that the grievor misunderstood the duty, responsibility, and requirements of the patrol. The grievor certainly seemed to know and understand what was required of her as the evidence clearly shows that the grievor had done many HSWs before this one and as such would have been well aware of the responsibilities required of her doing this task.

[180] Institutions, be they for males or females, are highly regulated places. Part of this is the timing of virtually everything. Lights on and off, meals, schooling, work, recreation, movements, and security patrols are all very controlled and timed. As part of this regulated environment, written records, be they paper or electronic, are made of a significant amount of what goes on in every corner of the institution and at all times of the day. The grievor, with her 9 years of experience and, by her own words, having carried out about 100 HSWs, would have been well aware that having a timepiece with her on shift was probably required. While anyone can make mistakes

and forget things, knowing that she did not have a timepiece and that she was going to be carrying out an HSW should have alerted her to the fact that she should have obtained one. The fact that the grievor was just outside the SUCP, which would have had a timepiece of some sort and been occupied by another PW, could have provided the grievor with alternate means of obtaining the time on a 15-minute basis, such as simply asking the PW to tap on the glass every 15 minutes.

[181] With respect to carrying out the HSW of IM A, again, from all the evidence, there is no indication that there was provocation; nor is there evidence to suggest that her actions were due to strong emotional impulses or that she did not understand the nature and content of the duty and responsibility.

[182] The grievor certainly seemed to know and understand what was required of her, as set out earlier in this decision; her evidence was that she had carried out HSWs before, perhaps about 100 of them.

[183] There is no evidence that the misconduct was spur of the moment or a momentary aberration due to strong emotional impulses; nor would I say it was premeditated or that there was provocation. Quite frankly, it appears to be, as the grievor herself said, due to complacency. She was lazy in the way she was doing her job. The evidence clearly displayed that she had a lax, nonchalant attitude toward a very serious situation and assignment. There was no evidence that the grievor misunderstood the nature or intent of an order given to her and as a result disobeyed it.

[184] Much of the evidence I heard was about the manner in which the grievor carried out the HSW while seated with her back to the wall. Some of the evidence I heard from the grievor and the witnesses called by her representative was about how this way of carrying out the HSW was appropriate and about the discomfort of the high chair.

[185] I also heard from witnesses called by the grievor, who said that they could see an inmate in a cell from distances back from the cell door. And while the policy and training documents entered into evidence do not specify that the HSW must be carried out by standing or sitting directly in front of the cell door in which the inmate is situated, the evidence of management, as well as that of Ms. Henry, a CM from GVI who was responsible for the grievor's on-site training, demonstrated that how the HSW was

to be conducted at GVI was by either standing or being seated right at the door of the cell where the inmate on an HSW was, looking down directly at her.

[186] The misconduct of which I have found the grievor culpable, in relation to the actual HSW, was not about the manner in which she conducted the HSW from the seated position on the mattress but the manner in which she did so while she was not seated on the mattress. These instances were when she was more focused on her own comfort by setting up the mattress and blanket and fiddling with them as well as putting them away and gathering up her uniform and belongings. These were all things that should not have been done while she was supposed to be conducting the HSW.

[187] While for the majority of the time that she was required to carry out the HSW of IM A, the grievor either did so, or the employer did not prove on a balance of probabilities that she had failed to do so, there were significant periods in which the grievor quite clearly chose not to carry out the duties she was supposed to carry out. I have already set those out and will not repeat them here.

[188] One of the criteria set out in *Brazeau*, where it quotes *Brown and Beatty*, is “[t]he seriousness of the offence in terms of company policy and company obligations”. In this case, this is the most important of the criteria.

[189] The evidence clearly disclosed that the safety of persons, be they staff, visitors, the public, or the inmates, is the paramount duty of a PW in a woman’s institution and of a CX in a men’s institution. It is referenced as part of the “Client Service Results” and as a “Key Activity” as set out in the work description of the PW; indeed, it is the first one listed. This obligation is brought to a new and higher level when the PW is tasked with the constant and direct watching of an inmate on an HSW. It is, other than actually saving someone’s life while on the job, the most important task of a PW. The person who is the subject of an HSW is one of the most vulnerable members of our population. The people charged with their safety and security must be at their most vigilant. A person does not need to be highly educated and specially trained in corrections or as a CX or PW to know this; it is common sense. The cavalier manner in which the grievor ignored IM A, who was vulnerable and at high risk, makes this, in my view, a most serious, if not the most serious, type of misconduct that can arise in employment with the CSC.

[190] While the grievor's failure to properly document the IM A 1006 form, by merely estimating the time, is not quite at the same level of seriousness as her failure to conduct the HSW of IM A by constant and direct observation, it is an extremely important obligation and requirement of the CSC and again goes directly to the health and safety of individuals. The manner in which the grievor carried out this task while carrying out the HSW of IM A was evidence of the disregard she had for carrying out the duties related to the HSW of IMA.

[191] Ms. Bouchard said that the grievor indicated that she would act in the same manner, despite the investigation and its findings. That is not borne out by the recording or the notes of the disciplinary hearing. Ms. Bouchard said in her testimony before me that she was looking for the grievor to "take responsibility for her actions" and that she was not satisfied that she had done so. She said that the grievor did not "acknowledge the gravity of what had happened" and that the grievor was "aggressive and defensive". She also said that the grievor was still justifying what she did and that she did not understand what she did was wrong. She said that had the grievor shown accountability, she would have taken that into account, but that it was the lack of accountability that drove her decision to terminate the grievor's employment. I took this comment about the grievor taking responsibility for her actions to mean that if she had done so, Ms. Bouchard would not have terminated her employment.

[192] I had the opportunity to hear the recording made of the disciplinary hearing as well as see the typewritten notes of the LRO, both of which were introduced into evidence. While the notes are not completely verbatim with respect to the recording, they are extremely close. From my review of the notes and listening to the recording, Ms. Bouchard's testimony before me on this is not sustainable. In this respect, the grievor is quoted in the LRO's notes as stating the following:

1) In response to being asked to comment on neglecting her duties, she stated:

...

... I take high watch extremely seriously. In regards to the falsifying documents - that was never my intention. I didn't have a clock - and I did the best I could. So you know what - you're right. I may have been off a couple of minutes when I documented. I have a pretty good estimate of time after so long in the service, but I didn't have a clock....a clock wasn't provided... I did the best I could with what I had....

2) In response to the allegation that she did not maintain constant and direct supervision, she stated:

... You know what, I honestly didn't even think about that, but they're right. For a brief period of time my back would have been to the inmate. I became complacent after almost a decade of doing high watch. And I'm sorry, it wasn't intentional, it wasn't willful, I wasn't trying to be harmful. I just became complacent and reliant ... But you're right; I totally turned my back for a brief period of time and therefore broke constant sight and supervision....

3) In response to Ms. Jara asking the grievor to confirm that she now fully understood, she stated:

... I still think that it could have been resolved but I do understand why management chose the route they did, and the seriousness. I apologize if you thought I didn't take it seriously. There must have been a miscommunication and [sic] my efforts. It seemed the more I tried to communicate how seriously I took this, the more almost defiant I looked. And, that wasn't the intention - it's the exact opposite. I appreciate the seriousness of the job; I appreciate what could happen if we don't do our job; especially when an inmate is on high watch; I appreciate liability for everybody - personal and professional because it takes a toll on people. I was trying to communicate and reiterate that and I think it came across as defiant. The more I tried to explain myself, the more defiant I looked. When what I was trying to do is say listen, I understand; I'm trying to understand, and I understand because I've experienced this stuff; I know the toll it takes on everybody. I've seen it, I do take it seriously.

[193] It is clear to me that the grievor did acknowledge her errors and mistakes, and she apologized. I do not believe that she was being disingenuous when she stated these things. I also acknowledge that there were parts of the disciplinary hearing during which the grievor clearly disagreed with the allegations being put forward by the employer, notably with respect to the suggestion that she slept while on duty and that she did not have a direct and constant view of IM A while seated on the mattress along the back wall.

[194] The grievor should not be faulted for being aggressive and defensive with respect to these two items as the employer has not established misconduct related to them. I would expect nothing less than a fulsome denial and defence of one's actions from someone who has not done what they are accused of doing. She did not accept that what she did was evidence that she slept while on duty; nor did she accept that she did not have a direct and constant view of IM A. The fact that she did not accept

the findings of the investigation in these two respects does not validate Ms. Bouchard's testimony about the grievor not being accountable.

[195] The final factor that is identified from *Brown and Beatty*, in *Brazeau*, is any other circumstance that the Board should properly take into consideration.

[196] Being issued at the same time as this decision is the decision on Ms. Desjarlais' grievance. Ms. Desjarlais was also disciplined for misconduct related to her actions during the morning of January 23, 2017. Her discipline was for misconduct related to her failure to properly conduct rounds in the segregation unit and, similar to the grievor, her failure to maintain direct and constant observation of IM A, who was on the HSW. Unlike the grievor, Ms. Desjarlais was not terminated from her position but was given a three-week disciplinary suspension.

[197] The evidence in that matter, like this one, was largely about the manner in which Ms. Desjarlais conducted the HSW of IM A, some of which has been set out in this decision, as at times she and the grievor overlapped in their responsibilities for the HSW. Therefore, I am faced with two sets of misconduct, very similar in nature, arising out of almost identical facts, in the same institution, over the same shift, in the same unit, about the same HSW of the same inmate. In one instance, the grievor was terminated from her employment, and in the other, Ms. Desjarlais received a three-week suspension. There is some incongruity in the grievor losing her job while Ms. Desjarlais received a three-week suspension. While there are differences between the two cases, those differences are insufficient to warrant such a grave result for one and a much lesser penalty for the other. While I appreciate that the discipline was determined by two different managers in two different CSC regions, both the grievor and Ms. Desjarlais were PWs at the same institution engaging in, in essence, the same misconduct at the same time. They were both also employed by the same employer, the TB. This is concerning.

[198] The failure to maintain direct and constant observation of IM A was a very serious breach of the grievor's duties; however given all the circumstances I have already outlined, I am satisfied that it was excessive, and the termination shall be set aside. In its stead, I am replacing it with a suspension.

[199] As the employer deemed that the conduct of Ms. Desjarlais warranted a three-week disciplinary suspension, it is difficult for me to assess the grievor with a

suspension that is in excess of that time, given the assessment made by the employer with respect to Ms. Desjarlais.

[200] The termination is thus set aside, and the grievor shall be reinstated into her position as a PW with the CSC, and in its stead, the grievor shall be given a three-week disciplinary suspension.

[201] I note that the evidence disclosed that the grievor held several jobs from the time of her termination and that she has moved several times. As of the hearing of this matter, the grievor was not employed, had a small child, and was living in Saskatchewan. These are all factors that go directly to the issue of damages and the return to work. As I cannot reinstate the grievor into a position other than her own, this shall be the order that is made.

[202] I shall reserve on the issue of damages related to the cost of moving the grievor back to Edmonton and allow the parties to discuss whether she returns to EIFW or if there is a position for her in the province in which she currently resides.

[203] The grievor shall be paid the difference between what her salary would have been if she had not been terminated, set off against any income she earned between the date of the termination and this decision.

[204] The grievor has had, since her termination, a baby. In normal circumstances, the grievor would have been on maternity leave for a period, and per CSC policy with respect to CXs, upon the disclosure of her pregnancy, she would have been reassigned to non-inmate-contact duties. This would likely have affected the amount of overtime the grievor would have earned. Therefore, I order that the grievor also be reimbursed for lost overtime opportunities for that period between her termination of employment and the date she discovered she was pregnant. As the grievor was new to EIFW at the time of her termination, and her overtime at GVI and the overtime in general at EIFW would not necessarily be the same, the lost overtime shall be calculated based on the lesser of the average amount of overtime per PW at EIFW in fiscal year 2016-2017 and the amount of overtime the grievor earned in her last full fiscal year working at GVI (2015-2016).

[205] I decline to award any overtime for the period after the grievor had her child, given that there was no information as to the grievor's family situation and whether

given her family status, the grievor would have been ready, able, and willing to carry out overtime assignments.

[206] The grievor's sick leave bank shall be credited with the appropriate amount of sick leave credits that she would have earned had she not been terminated, less any credits she would not have earned for time off during her maternity and parental leave, depending on the wording of the collective agreement.

[207] The grievor's vacation leave bank shall also be credited with the appropriate amount of vacation leave credits that she would have earned had she not been terminated, less any credits she would not have earned for time off during her maternity and parental leave, depending on the wording of the collective agreement.

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

(The Order appears on the next page)

V. Order

[209] The grievances in Board file nos. 566-02-14326, 14468, and 14469 are denied.

[210] The grievance in Board file no. 566-02-14525 is allowed, and the termination of employment is set aside and replaced with a 15-day disciplinary suspension. For the sake of clarity, the 15-day disciplinary suspension shall be calculated on the basis of a day comprising a 12-hour shift as that was the shift the grievor was working at the time of the misconduct.

[211] The grievor is to be reinstated into her position as a PW with the CSC at EIFW in Edmonton, Alberta, effective the date of this decision.

[212] The grievor's salary upon reinstatement shall be at the level on the grid that it would have been if she had not been terminated.

[213] The grievor shall be paid an amount equal to the difference between what her gross CX-2 salary would have been from a date determined to be the equivalent of 15 (12-hour shift) days after her termination of employment (to take into account the 3-week disciplinary suspension), to the date of this decision setting off those gross amounts she earned as income from any employment source and employment insurance or social welfare benefits, if any. The calculation of this amount shall also take into account any amount of maternity or paternal benefit she would have been entitled to as per the collective agreement in place between the TB and her union, and any annual salary increases she would have received.

[214] The grievor shall be paid an amount for the loss of overtime opportunities on the basis I have set out earlier in this decision.

[215] The grievor shall be paid interest on all amounts at the rates for pre-judgement and post-judgement interest set out under the *Federal Courts Act* (R.S.C., 1985, c. F-7).

[216] Within 30 days of the date of this decision, the grievor and the employer shall discuss her reintegration to the workplace in Edmonton, Alberta, or such other CSC institution to which the parties mutually agree. If within the 30 days, the parties cannot come to an agreement, they shall immediately advise the Board's registry, and I shall deal with it.

[217] The cost of returning the grievor to Edmonton, Alberta, or any other community where the parties have mutually agreed the grievor shall work, from wherever she is currently residing, shall be governed by the National Joint Council's *Relocation Directive* as if the move were employer-requested.

[218] The grievor shall be paid her salary from the date of this decision, as a full time employed CX-2 or PW, working regular 12-hour shifts, without overtime, for a period of sixty (60) days to permit the parties to implement the terms of her reinstatement and move, if necessary, or such other period as the parties may mutually agree. Upon the expiry of the 60 days, if the implementation of the terms of this decision have not been completed the parties shall return to me for such further order with respect to this issue, and I shall deal with it. The payment of any amounts during this period shall also be subject to the setting off any gross amounts she earns as income from any employment source and employment insurance or social welfare benefits, if any.

[219] Exhibit E- 1, tab 45 (segregation unit diagram) and exhibits E-2 and E-4 are ordered sealed.

[220] The parties shall review the documents contained in their document briefs that were submitted to the Board, and provide the Board, within 30 days of the date of this decision, corrected and redacted briefs of documents, to replace those that were submitted for the hearing of this matter.

[221] I shall remain seized of this matter for a period of 120 days to address any issues related to the implementation of this decision.

December 22, 2022.

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