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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

DAPHNE DESJARLAIS

Grievor

and

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

Respondent

Indexed as

Desjarlais v. Deputy Head (Correctional Service of Canada)

In the matter of an individual grievance referred to adjudication

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

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

For the Respondent: Marie-France Boyer, counsel

Heard at Abbotsford, British Columbia,
and via videoconference,
November 19 to 22, 2019, and August 3 and 4, 2021.

REASONS FOR DECISION

I. Individual grievance referred to adjudication

[1] The grievor, Daphne Desjarlais, is employed by the Treasury Board (“the employer”) and works for the Correctional Service of Canada (CSC) as a correctional officer, classified at the CX-2 group and level, at Mission Institution (“Mission”) in Mission, British Columbia, in the CSC’s Pacific Region.

[2] At CSC institutions for women, CX-2s are identified as primary workers (“PWs”).

[3] The facts that give rise to this matter took place while the grievor was working as a PW at the Edmonton Institution for Women (“EIFW” or “the institution”) in Edmonton, Alberta, in the CSC’s Prairie Region, during an overnight shift on January 22 to 23, 2017. The grievor was deployed from EIFW to Mission shortly after the facts that give rise to the grievance.

[4] By letter dated October 19, 2017 (“the letter of discipline”), the grievor was given a 15-day disciplinary suspension by Brooke Kassen, the acting warden of Mission; the relevant portions of the letter state as follows:

...

On June 22, 2017 we met within the context of a disciplinary hearing, in the presence of [name omitted], your Union representative and [name omitted], Labour Relations Advisor for Mission Institution. The purpose of the hearing was to provide you an opportunity to clarify the facts surrounding the events of January 23rd, 2017, and to provide me with any mitigating circumstances you wished to be considered, prior to rendering a decision on discipline. During our meeting you confirmed reviewing both the disciplinary report drafted March 20, 2017 and the corresponding video footage of the shift in question. You cited specific concerns regarding the times of the security checks referenced by the BOI [Board of Investigation] in the report, the manner in which your participation in the investigative process progressed from witness to subject, and the BOI’s finding that you were not a credible witness.

You further expressed concerns over inaccuracies contained in the report, specifically the BOI’s findings contained on page 18 of the report, as detailed below, which you stated were “completely false”.

“At 03:16:42 PW Desjarlais obtains her book from the table. From this time PW DESJARLAIS is observed to be reading, periodically turning a page of the book until 04:04:30, at which time it appears that she records an entry on the log sheet (Appendix E4).

This continues until 06:51 when another Primary Worker enters the unit. It is not until 07:07:30 that PW DESJARLAIS approached inmate [name redacted]'s cell. From 03:09:30 to 07:07:30 PW DESJARLAIS failed to maintain direct and constant observation of Inmate [name redacted]"

After reviewing the video footage with your union representative in Edmonton, you advised you were unable to identify any inadequacies with regards to your performance of duties. During the disciplinary hearing you detail your performance as "bang on" with the exception of approximately 40 seconds of time in which you had your back to the Inmate. During our meeting you provided a copy of an email sent to Warden Lee Anne Skene on February 24, 2017 taking responsibility for your actions during this period.

The investigative process took place in the Prairie Region and Warden Brigitte Bouchard accepted the investigation as written, in which the BOI found:

- Security rounds were not conducted in accordance with CD 566-4 Counts and Security Patrols*
- Duties while posted to High Suicide Watch of Inmate [name redacted] were not performed in accordance with CD 843, Management of Inmate Self-injurious and Suicidal Behaviour.*

I have reviewed both the video footage and the BOI's report which depicts several occasions in which the manner in which duties were performed were unacceptable. Pages 17-18 of the BOI report specifically identifies [sic]:

- Between 02:20-02:29 observation of Inmate [name redacted] was conducted at a 90 degree angle with a book.*
- 02:29 - 02:56:09 engaged in conversation with a coworker while either standing or squatting down by the mattress; either position enabled direct observation of Inmate [name redacted].*
- 03:09:30-03:11:30 observed to be arranging items in the secure unit with back to Inmate [name redacted]'s window.*
- 03:11:30 - 03:16:42 conducted observation duties in a chair located at an angle and approximately 4 meters away from Inmate [name redacted]'s door, with legs extended onto another chair.*
- 03:16:42-06:51 observed reading, periodically turning pages. Inmate [name redacted]'s cell is not approached until 07:07:30.*

Officer Desjarlais, it is my expectation that staff are seated directly in front of the observation window, engaged and observing the inmate at all times when on High Suicide Watch duties. During the disciplinary hearing you refuted the finding that you were reading a book during the performance of your duties, clarifying it was the inmate's file that was in your possession. As a mitigating factor

you explained the high chair provided to you at EIFW to conduct the high suicide watch of Inmate [name redacted] was uncomfortable and not ergonomically correct. This resulted in discomfort that is exacerbated by the heavy boots you are required to wear as a Correctional Officer. No further information was provided that would explain, or in any way justify the above described cavalier manner in which you performed your duties on January 23, 2017. I consider your behaviour unacceptable within the context of the Correctional Service of Canada's Commissioner's Directive 843, Management of Inmate Self-injurious and Suicidal Behavior.

Your awareness and subsequent inaction with regards to your partner performing duties from a horizontal position on a mattress is cause for concern. During the disciplinary hearing you disclosed counselling your coworker of the optics of her actions, however dismissed any responsibility to report the occurrence, commenting you "didn't know if she had back problems". I do not accept the explanation as given; it is unreasonable to assume this was a management supported measure to ergonomically accommodate a staff member. It is my expectation if you see any staff member performing duties in a manner that would compromise the safety and security of the institution, that you report the occurrence to management.

Based on the above, I have determined that your actions resulted in your contravention of the following section of both the Standards of Professional Conduct and Code of Discipline (CD 060):

Standard One - Responsible Discharge of Duties

- 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;*
- Failing to take action or otherwise neglects his or her duty as a peace officer;*
- 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;*

I find that as a fully trained Correctional Officer of the Federal Public Service who has over five (5) years of experience within the Correctional Service of Canada, it is more than reasonable to expect that you understand and adhere to all policy, including Commissioner's Directives, Post and Standing orders during the course of your duties. The Primary duty of a Correctional Officer and that of the Correctional Service of Canada is the preservation of life. It is my expectation that all staff diligently conduct their duties in accordance with policy; given the increased propensity for injurious or suicidal behavior, this is especially important while monitoring inmates placed on High Suicide Watch.

...

[5] On November 6, 2017, the grievor grieved the disciplinary suspension, requesting the following relief:

...

I request that this disciplinary measure be cancelled and that I be reimbursed.

I request that all mentions of this discipline be removed from my files.

I request compensation for missed overtime opportunities as well as shift differentials, week-end [sic] premiums, lieu hours and leave credits (if applicable);

I request interest on the money owed to me;

I request an adjustment of my pension and CPP resulting of [sic] this measure;

I request that this grievance be moved directly to 2nd level as the delegated managers to answer at 1st level do not have the authority to overrule the warden.

...

[6] The grievance was denied during the grievance process, and it was 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”). The hearing started in person in Abbotsford, B.C., and due to the COVID-19 pandemic was completed by videoconference.

II. Summary of the evidence

A. Background

[7] The facts that give rise to the misconduct that led to the grievor’s discipline took place on the morning of January 23, 2017 (“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 a 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 disciplined, the grievor had approximately 6 years of service with the employer at the CSC. She joined the CSC in 2011 and at that time worked at its Pacific Regional Headquarters. She testified that after a little more than 2 years, in different positions with the CSC, she received an offer for a PW position at EIFW. The grievor is 5 feet, 6 inches, tall.

[11] At the time of the hearing, Mr. Kassen was the warden of the Fraser Valley Institution for Women but was on assignment as the warden of the Pacific Institution. Both are in the lower mainland area of British Columbia, in the CSC's Pacific Region. In June of 2017, he was the acting warden of Mission.

[12] At the time of the hearing and at the time the grievor was given the letter of discipline, Shawn Huish was the warden of Mission.

[13] At the time of the hearing and at the time of the facts relevant to the grievance, Lee Anne Skene was the deputy warden at Saskatchewan Penitentiary, a maximum-security institution for men in Prince Albert, Saskatchewan, in the CSC's Prairie Region. In February of 2017, she 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, 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.

[17] 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's local president.

[18] At the time of the facts relevant to the grievance, Grace Scott was a CX-2 PW at EIFW and was on the same shift as the grievor and interacted with the grievor. Ms. Scott was also subjected to discipline for alleged misconduct by her with respect to her

actions involving IM A during the period between 23:00 on January 22, 2017 (“January 22”), and 07:00 of January 23 in the EIFW segregation unit. She also grieved her discipline, which was the subject of a separate adjudication hearing before me and a separate decision.

[19] At the time of the hearing, Steven Loeb was the manager of program delivery at the CSC’s Correctional Learning and Development Centre. He joined the CSC in 1995 as a CX-1 and then later was a CX-2 at both Kent and Mountain Institutions, which are in the CSC’s Pacific Region.

[20] At the time of the hearing and since March of 2019, Jeffery Robinson was a CX-2 PW at the Grand Valley Institution for Women (“GVI”) in Kitchener, Ontario. 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.

[21] At the time of the hearing, Phoebe Zhong was a PW at GVI. She moved there in 2019 from EIFW, where she had worked since 2014.

[22] At the time of the hearing, Lesya Sorokopud was a technical assistant with Innovation Science and Economic Development Canada. Between January of 2015 and September 2017, she was a PW with the CSC at EIFW.

[23] At the time of the hearing, Tina Greyeyes was a correctional programs officer with the CSC. Between 2009 and 2020, she was a PW with the CSC at EIFW.

[24] At the time of the hearing and since August of 1996, Sandra Bellerose was a CX-2 PW at EIFW.

[25] 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. Scott.

[26] The disciplinary investigation was originally into the conduct of Ms. Scott and was initiated by Belinda Cameron, in her role as the acting warden, by a convening order dated February 8, 2017, 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 Ms. Scott was eventually expanded to include the grievor.

[27] By a memo 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.”

[28] On February 21, 2017, Ms. Skene, in her position as the acting warden of EIFW, amended the February 8, 2017, convening order, expanding its terms of reference to add the grievor’s conduct during the shift on January 23 also while conducting the HSW of IM A.

[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 his and the SIO's offices 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. Scott's 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 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

(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

3 L'agent doit :

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,

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

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 ...

...

[Emphasis in the original]

[45] CD 843 is titled *Management of Inmate Self-injurious and Suicidal Behaviour*, and the relevant portions of it state 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] CD 566-4 is titled *Counts and Security Patrols*, and the relevant portions of it state as follows:

...

Standards for Security Patrols

30. At maximum, medium and multi-level institutions, and the Secure Units at women's institutions, the security patrols in inmate accommodation areas will be as frequent as possible, but must be at least once every 60 minutes from the beginning of the last patrol. Patrols will be staggered to avoid predictability.

...

34. During security patrols, staff and contractors will ensure the presence of a live breathing body. In situations where it is not possible for staff or contractors to ascertain if the offender is alive and not in distress, they will interact with the offender in a manner consistent with CD 560 - Dynamic Security and Supervision to verify his/her well-being.

...

[47] 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

[48] 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.

[49] 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.

[50] 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”.

[51] 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. The grievor is shown as being on the post responsible for visitor security and the principal entrance. In her testimony, Ms. Marghella testified that as part of being on the principal entrance security post, the duties included security patrols on the segregation unit. She testified that while the PW is entered into the schedule in that post, they are actually not at the principal entrance the entire time. The grievor testified that at the start of her shift (18:30 on January 22), she was letting people out of the institution and was doing security patrols.

[52] The evidenced disclosed that the grievor and Ms. Scott 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 07:15 on January 23. Ms. Scott was responsible for the period roughly from 23:00 to 03:05, and the grievor took over at or around 03:05 and continued until 07:15.

[53] 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.

[54] 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.

[55] On the IM A 1006 form, for the period between 03:15 and 06:45, January 23, the grievor initialled all entries during this period, a total of 15 entries, all of which had two numbers listed, 9 and 11, representing lying down or sitting and quiet. The grievor also added a handwritten timed entry at 06:46, indicating that IM A was using the toilet at that time.

[56] 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).

[57] 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”).

[58] On February 15, 2017, the grievor was interviewed as part of the disciplinary investigation initially convened on February 8, 2017, into the actions of Ms. Scott. After the investigation was amended to include the actions of the grievor, the grievor was interviewed a second time, on February 21, 2017. During both interviews, the grievor was accompanied by a union representative. The second interview was recorded by her and her union representative. A copy of the recording of the second interview was entered into evidence.

[59] Entered into evidence in addition to the investigation report were Mr. Anderson’s handwritten notes of his interviews with the grievor. He testified that the notes he made of his interviews were of her answers and that he did not document the questions. In cross-examination, Ms. Popiwchak’s notes were entered into evidence.

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

...

PW DESJARLAIS was interviewed at Edmonton Institution for Women on January 16, 2017....

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

PW DESJARLAIS indicated she completed High Suicide watches before. PW DESJARLAIS described how it’s necessary for the Primary Worker to sit at the inmates’ cell door and watch the inmate. Also, it is necessary 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 paced 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 reported that during her High Suicide watch, 03:00 to 07:00, she sat on a chair directly in front of the inmates' cell door. PW DESJARLAIS repeated the two large windows in the cell door were where Primary Workers monitor the inmate. PW DESJARLAIS confirmed she sat on a tall chair until relieved at 07:00.

...

PW DESJARLAIS confirmed with the Board that she sat on a tall chair, directly outside of inmate [redacted] cell the entire time she was on HIGH Suicide Watch.

On February 21, 2017, the Board informed PW DESJARLAIS the Convening order had been amended to include her and the allegation that she was negligent in the performance of her duty during the High Suicide watch on January 23, 2017. Following which, PW DESJARLAIS was interviewed at Edmonton Institution for Women on February 21, 2017. PW DESJARLAIS was accompanied by Danisa JARA, EIFW, UCCO-SACC-CSN President.

Danisa JARA requested a brief adjournment following PW DESJARLAIS being informed the Convening order had been amended to include her and the allegation that she was negligent in the performance of her duty during the High Suicide watch on January 23, 2017. Danisa JARA and PW DESJARLAIS returned with an audio recorder and continued the interview.

The Board reviewed PW DESJARLAIS previous February 16, 2017, statement with her. PW DESJARLAIS confirmed she stayed right at the cell. The Board asked PW DESJARLAIS to explain what she meant by at the cell door. PW DESJARLAIS explained she sat in the tall chair looking through the top cell door window. The Board asked PW DESJARLAIS if she ever moved away from the cell door during her time on High Suicide watch. PW DESJARLAIS replied she couldn't recall, that she might have moved to a lower chair but couldn't recall moving the chair.

...

The Board asked PW DESJARLAIS to describe her position when sitting in a lower chair and what she could see in the segregation cell. PW DESJARLAIS reported she would have moved back from the high chair. When sitting in the lower chair you can see into the bed area through the lower window. PW DESJARLAIS approximated she would have been 10 feet away from the cell and off to the side.

...

[Sic throughout]

[61] Both Mr. Anderson's and Ms. Popiwchak's handwritten notes for the February 15, 2017, interview of the grievor indicate that the grievor said that for conducting the HSW, which she had done on previous occasions (before the January 23 HSW of IM A), you sit in front of the cell and watch. When asked how she was to do it, she said you sit outside the inmate's door, and every 15 minutes or so document (what the inmate is doing) on a checklist.

[62] Both Mr. Anderson's and Ms. Popiwchak's handwritten notes for both interviews reflect that the grievor stated that during the HSW, she sat right in front of IM A's cell door. In Ms. Popiwchak's notes, the following exchange was recorded during the second interview, on February 21, 2017:

[Note: "M:" refers to Mr. Anderson; "D:" refers to the grievor.]

...

M - mentioned High chair to position self

D - office chair that can be adjusted up

- stayed right at cell

M - what does that mean

D - looking thru the window - upper

- I don't remember - asked about distance fr door

M - asked if moved -

D - don't remember but might have moved to the lower chair

- doesn't recall if moved chairs - in 1st interview - stated she sat in High chair

- went over the door properties 2 windows w/food slot.

M - if on lower chair - can you see through the lower window? - Y

- if you are sitting in lower chair can see into the bed area thru the lower window

M - where were you positioned in relation to cell door

D - would have moved back if moved fr. High chair

...

[Sic throughout]

[63] The audio of the February 21, 2017, interview of the grievor was recorded and entered into evidence. I have listened to the entire recording. During the interview, the grievor confirmed that she told the investigators during her first interview that she

remained at the door to cell no. 182 while she was responsible for the HSW of IM A. When she was asked to clarify what she meant, she said that she was looking through the upper window, and then she confirmed that she was sitting in the high chair, looking through the upper window. When Ms. Popiwchak asked her how far away from the door she was (of cell no. 182), the grievor said that she was just outside the door and then said, “I believe”, at which point Ms. Jara interrupted and was heard to say, “If you don’t remember, say I don’t remember.” After Ms. Jara’s interruption, the grievor said that she did not remember.

[64] During the course of his testimony, Mr. Anderson was brought through both the cell video and the range video to specific points when the grievor was on the range and what he saw IM A as well as the grievor and other PWs doing.

[65] Mr. Anderson attended the segregation unit and positioned himself in line with where he and Ms. Popiwchak believed the grievor was seated and went inside the cell and laid on the bed. A video was made during one of Mr. Anderson and Ms. Popiwchak’s visits to the segregation range, which was entered into evidence (“the investigation video”). In his testimony, Mr. Anderson described what he and Ms. Popiwchak were doing when they took the investigation video.

1. Range, cell, and investigation video evidence

[66] 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.

[67] At 23:58:00, both the range and cell videos show Ms. Scott 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.

[68] At 00:00:35, Ms. Scott 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 the grievor enter the range and then Ms. Scott leave. The grievor 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, the grievor is visible watching IM A through the upper window of the cell door.

[69] At 00:04:12, the grievor is seen moving a hand to her face. While the picture is a little blurry, one can make out the grievor's head, and based on the proportion, she is bringing her hand to either her nose or her eyes. Based on the range video, and the objects in the video, the grievor is clearly seated about two feet from the window, and her eyes are just above the lower limit of the upper window. From the cell video, you can only see the grievor's feet and ankle area. Based on the cell video, the grievor is positioned to the left-hand side of the cell door and is looking in on an angle from the upper window.

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

[71] At 00:07:07, the grievor 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, Ms. Scott heads back toward the range door. As she gets closer to the range door, the grievor is standing, and it is clear she and Ms. Scott are engaged in some brief discussion. At 00:07:21, the grievor, still standing, turns back to look into cell no. 182, and Ms. Scott exits the range. The grievor remains standing at the door and watching IM A through the upper window.

[72] At 00:08:02, the range video shows Ms. Scott re-entering the range, carrying blankets. The grievor turns away from watching IM A for a moment to look at Ms. Scott. Ms. Scott 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 the grievor. The grievor appears to be watching IM A from a standing position.

[73] At 00:08:20, Ms. Scott 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, the grievor turns away from cell no. 182, is watching Ms. Scott, and appears to be speaking to her. No one is watching IM A. At 00:08:39, the range video shows Ms. Scott standing and grasping the seat back of the high chair as she is speaking to the grievor, who is away from cell no. 182 in the vicinity of the range door, has her back to cell no. 182, and is speaking to Ms. Scott. Ms. Scott 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 the grievor appear to be continuing their discussion.

[74] At 00:08:45, the range video shows the grievor turning to the range door to exit and Ms. Scott, with her back to cell no. 182, moving toward the back wall of the range and the mattress. At 00:08:54, the grievor 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.

[75] Ms. Scott is not watching IM A or looking into cell no. 182 or even toward cell no. 182. At 00:09:02, Ms. Scott 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 00:09:34 - 00:09:35. It takes a second for the camera to adjust to night vision. Ms. Scott 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.

[76] 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.

[77] At 00:10:01, the range video shows Ms. Scott 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.

[78] At 00:17:10, the grievor enters the range, and as she walks down the range, with only the briefest pause in her stride, but without stopping, glances into cell no. 182. The amount of time she looked was under one second. As she continues to move toward the cell adjacent to cell no. 182, she glances over to where Ms. Scott is seated, at which point, she turns on her flashlight. There is a window covering over the upper cell window of this cell. She moves it aside and leans forward to look in. She does not shine the light into the cell but holds it in a manner in which the light is shining toward the ceiling of the range; she then glances into the cell. She looks into the cell for less than one second before dropping the covering back down and moving to the next cell.

[79] The range video shows the grievor at the third cell on the range. She continues pointing her flashlight so that the beam is toward the range ceiling. This cell does not have a covering over the window. She looks into this cell for less than 1 second, before moving to the fourth and final cell on the range, which, like the second cell on the range, had a window covering that had to be moved out of the way. Again, she kept her flashlight pointed toward the ceiling of the range. She looked in for 1 second. From the moment the grievor glanced toward cell no. 182 to the moment she turned away from the fourth cell, 15 seconds had expired, of which, at most, the grievor spent between 3 and 4 seconds looking at 4 inmates.

[80] At 00:17:45, the grievor exits the range. The grievor was asked about what Ms. Scott 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.

[81] At 01:14:10, the grievor enters the range to conduct a security patrol. She briefly breaks stride and stops for just under 1.5 seconds to glance into cell no. 182 before moving toward the cell next to it. When she reaches this cell window, she pauses and appears to have her head turned away from this cell and is looking over her shoulder toward either the range door or Ms. Scott. Her flashlight is not yet on, and the covering has yet to be moved by her to look in. As the grievor's flashlight turns on, again beaming at the ceiling, she simultaneously moves the covering and looks into the cell.

She looks in for less than 1 second before moving toward the third cell. She glances in for less than 1 second. She moves to the fourth and final cell where, after moving aside the covering, she looks in for 13 seconds. From the moment the grievor enters the range to the point that she looks away from the fourth cell, 40 seconds elapse.

[82] At 01:15:03, the grievor is seen stopped in the area of where Ms. Scott is on the mattress. At 01:16:00, she exits the range. Again, in her examination-in-chief, the grievor was asked what Ms. Scott was doing at this time, to which she said that Ms. Scott 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 grievor enters the range at 02:11:29 for her final security patrol. As she does, she slows and stops in front of cell no. 182 but is looking down at Ms. Scott. At 02:11:43, she turns and looks through the top window of cell no. 182 for less than one second before turning her attention back to Ms. Scott. While continuing to look in Ms. Scott's direction, she slowly walks to the cell that is next to cell no. 182. Before getting there, she stops, and it is clear that she and Ms. Scott are having a discussion. She continues on to the second cell, where she moves the cover, turns on the flashlight in the same manner as she had in her other security patrols, and looks into the cell for one second. She moves to the third cell, where she looks in for less than one second before moving to the fourth cell and looking in for a second.

[84] At 02:12:30, the grievor leaves the range. Again, in her examination-in-chief, the grievor was asked what Ms. Scott was doing at this time, to which the grievor said that Ms. Scott was seated on the mattress with her back against the back wall, with a blanket across her legs.

[85] At 02:16:25, Ms. Scott, for the first time since moving the high chair at 00:09:44, 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.

[86] At 02:19:54, the grievor enters the range, and Ms. Scott leaves. The grievor clearly has some type of book in her left hand. She leans over and takes something from the white chair (which is still abutting the wall between cell no. 182 and the shower) and places whatever it is on the window ledge of the SUCP. The grievor testified that it was a roll of toilet paper. 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. The grievor then sits down in the chair. The grievor appears to be leaning forward in the chair.

[87] After the grievor sits down on the white chair, you see the back of the chair and the back of the grievor's upper torso and head above the top of the back of the chair. Also visible are the lower portions of the grievor's legs and her feet between the chair legs. And visible too is that the book is clearly opened by the grievor and visible to her left side (close to the light emanating from the lower window of cell no. 182).

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

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

[90] At 02:55:50, Mr. Robinson enters the range, goes over to where the grievor and Ms. Scott are, and something is exchanged between them. At 02:56:10, the grievor walks back to the white chair, places the book on it, and heads for the range door.

[91] In his evidence before me, Mr. Robinson testified that when he entered the range the first time (which according to the range video was at 02:55:50), he did a security round. However, this did not happen as the range video disclosed no round being done at this time.

[92] At 02:56:15, the grievor, together with Mr. Robinson, leaves the range. At 02:57:53, Ms. Scott stands up and walks toward cell no. 182. She looks in for a few seconds and then turns away and fiddles with her clothing. She then walks back to the back wall and mattress and picks things up. At 02:59:10, Ms. Scott walks back to cell

no. 182, again looks in, and then walks away and folds the blankets that she was using. She returns to the door of cell no. 182, where she remains.

[93] Between 03:05:50 and 03:12:34, the following is seen on the range video:

- At 03:05:45: the grievor enters the range pulling the office chair no. 2. The seat portion of the chair is seen to be at about the grievor's knee level. The grievor and Ms. Scott appear to be speaking to one another, and it appears that Ms. Scott is looking into cell no. 182.
- At 03:07:23: neither the grievor nor Ms. Scott is looking into cell no. 182. Ms. Scott is seen moving away from the door of cell no. 182 with her back to the cell door. The grievor is facing away from the cell toward the back wall, looking at Ms. Scott. The grievor is also holding what appears to be a water bottle or some sort of drink container that she shifts between her hands when speaking with Ms. Scott. There is nothing on the seat of office chair no. 2 as she rolls it into the range.
- At 03:07:38: Ms. Scott picks up the blankets she had folded and placed on the high chair.
- At 03:08:14: neither the grievor nor Ms. Scott is looking into cell no. 182.
- At 03:08:26: still neither the grievor nor Ms. Scott is looking into cell no. 182. Ms. Scott walks to the range door.
- At 03:08:29: neither the grievor nor Ms. Scott is looking into cell no. 182. Ms. Scott exits the range. The grievor has her back to the door of cell no. 182 and moves office chair no. 2 toward the back wall.
- At 03:08:42: the grievor moves office chair no. 2 and stops with it about halfway between the door to cell no. 182 and the back wall and sits down. She appears to be watching IM A through the lower window of cell no. 182.
- At 03:09:24: the grievor stands up and is clearly not looking into cell no. 182, as she turns her back to the cell door. She is clearly holding a water bottle or drink container. She places it onto the range table, then fiddles with her uniform for a moment, and then moves the high chair, manipulates it, and then pushes it away from the place it was deeper into the range and further from cell no. 182. While doing all this, she does not look into cell no. 182.
- At 03:09:50: the grievor is again manipulating the high chair and then turns and looks at the range door, which opens, and Ms. Scott enters. Ms. Scott 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. The grievor continues to manipulate the high chair.
- At 03:10:01: the grievor is at the back wall of the range, where Ms. Scott had placed her mattress. She has her back toward cell no. 182. Ms. Scott turns to the grievor, and it appears that she and the grievor speak.
- At 03:10:17: the grievor picks up and moves the mattress left by Ms. Scott against the back wall.
- At 03:10:28: the grievor moves office chair no. 2 to a spot against the back wall, where Ms. Scott had previously placed the mattress she had been seated upon. She then goes to the white chair and picks up the book that she had previously placed on it.
- At 03:10:36: Ms. Scott walks toward the range door. The grievor is bent at her waist manipulating office chair no. 2, which has its back against the back wall.
- At 03:10:38: Ms. Scott walks past cell no. 182 and does not look in.

- At 03:10:45: Ms. Scott leaves the range.
- At 03:10:48: the grievor is away from cell no. 182, with her back to cell no. 182, and is at the range table manipulating things on it that appear to be clothing and a book. She then takes a file folder from the material she has been manipulating on the range table.
- At 03:11:07: the grievor moves in the direction of cell no. 182 but stops at the white chair and does not go to the cell door or look in. She picks up a bag from the white chair and puts it on the range table.
- At 03:11:16: the grievor moves the white chair into a position across from office chair no. 2, such that when she sits on it, she can extend her legs and put them up on the white chair.
- At 03:11:26: the grievor stands at the range table in front of office chair no. 2, not looking at cell no. 182.
- At 03:11:36: the grievor sits in office chair no. 2 with its back against the back wall and places her feet on the white chair, extending her legs on the white chair. She has a file in her hands.
- At 03:11:54: the range door opens, and Ms. Scott enters and walks over to the vicinity of the range table. She stands in front of the white chair and appears to pick something up from the table. The grievor can be seen moving an arm up and in front of herself.
- At 03:12:27: Ms. Scott moves away from the range table, goes to the range door, and leaves the range. As she does this, the grievor holds something in her hands and moves it to her face.
- At 03:12:34: the grievor appears to remove something from a pocket. She then lifts a piece of paper that appears to be of legal size and is attached somehow to the file that she has on her lap.
- At 03:14:04: the page being held in the grievor's hand is placed on her lap.

[94] After Ms. Scott leaves the range at 03:12:27, between that time and 05:42:58, the grievor remains seated in office chair no. 2, which remains in place against the back wall. During this time, the grievor can be seen, and periodically, her movements disclose that she is either manipulating something in her lap, such as the file folder with papers, removing or replacing something at her breast pocket, or picking up or placing down her water bottle on the range table. At 05:42:49, the grievor turns toward the range table and is manipulating something there. The grievor is no longer seated such that her back is against the back of the chair, which is against the back wall. She is fully on screen and can be seen, while over the previous couple of hours, she had been seated such that you could make out that she was seated with her body and back against the back wall, but her head and torso were not visible on the range video.

[95] At 05:42:59, the grievor starts to remove what appear to be her glasses that have been perched upon her forehead and places them in front of her eyes. She also clearly takes something in her hand that appears to be either a pen or pencil, turns to

look down to her lap, and is writing something. At 05:43:26, her head comes up and turns back to the range table. She is then clearly looking over to cell no. 182.

[96] At 05:43:56, the grievor appears to move her glasses back onto her forehead. She continues to watch cell no. 182. At 05:44:44, she starts to get up from office chair no. 2 and stands right at it, without moving her feet forward, and remains standing there until 05:45:23, when she turns to her left and moves slightly toward the range table. While she was standing, her head appeared to be facing cell no. 182; however, when she turned, her head was focused on the items on the table. At 05:45:25, her right arm and hand come up to the table, and she starts to manipulate things on the table. At 05:45:40, she turns back to office chair no. 2 and sits back down, once again facing cell no. 182.

[97] At 06:43:02, the cell video shows IM A getting up and proceeding to stand and approach the door of cell no. 182. She stands at the door until 06:43:48, when she turns and moves to the toilet.

[98] At 06:43:18, the grievor stands up and slowly walks toward the vicinity of the range door and picks something up from the ledge of the window of the SUCP and then walks over to cell no. 182 and at 06:43:43 looks into the upper window of it. She opens the food slot and hands something (toilet paper) to IM A.

[99] At 06:45:10, the grievor turns her head away from the cell, and at 06:45:14, she turns her back on it and walks back toward the back wall of the range. At 06:45:22, she sits back down on office chair no. 2 and proceeds to take her glasses off her forehead and place them on her face, and she appears to be leaning forward. At 06:45:40, Ms. Scott enters into the range and proceeds to engage the grievor in a discussion. The grievor is not watching IM A or cell no. 182. The grievor then gets up, walks to the range door, and departs the range, and Ms. Scott sits down on office chair no. 2.

[100] At 06:50:23, the grievor re-enters through the range door and walks back to office chair no. 2, and Ms. Scott gets up and proceeds to leave the range. The grievor sits down in office chair no. 2. There are a few seconds, when Ms. Scott has gotten up and the grievor is returning to the chair, in which again neither the grievor nor Ms. Scott is watching IM A.

[101] At 06:50:52, the grievor stands up and walks over to the door of cell no. 182, and at 06:50:58, she looks through the upper window. At 06:51:01, Ms. Scott re-enters the range, and as she does, the grievor turns her back to cell no. 182 and walks back to the back wall of the range. Ms. Scott appears to be there to conduct a security patrol. As she does, she approaches cell no. 182, and she briefly glances into the cell, not stopping as she walks by. The grievor walks back to office chair no. 2 and sits back down. There are a few seconds again when neither PW is watching IM A.

[102] At 06:51:25, the grievor, while seated in office chair no. 2, turns her head toward the range table, away from watching IM A. She is looking at some papers that are clearly visible in her hands. At 06:51:34, Ms. Scott has completed her security patrol. She returns to the range door and exits the range. No one is watching IM A.

[103] At 06:51:40, the grievor brings the document she is looking at off the range table and down onto her lap, and her head can be seen looking at it in her lap. At 06:51:50, Mr. Robinson comes through the range door, proceeds to approach the grievor, and then engages her in what appears to be a conversation. Her head comes up from looking down in her lap, and she looks up and toward Mr. Robinson, and then her head moves back and is out of view of the camera. Something is exchanged between them, and at 06:52:17, Mr. Robinson exits the range. The grievor's head cannot be seen in the range video during this exchange or as Mr. Robinson exits the range.

[104] In cross-examination, Mr. Robinson was asked if when he came onto the range he recalled seeing the grievor sitting on a chair against the back wall, to which he said, "No."

[105] At 06:52:37, the grievor leans forward. Her head comes back into the camera's view, and she turns her head to look toward the range table and beyond, not at cell no. 182. At 06:52:51, Mr. Robinson returns to the range and approaches the grievor, who is still seated on office chair no. 2, and something appears to be exchanged. The grievor's head remains in view, and she appears to manipulate something on the white chair that is directly in front of her and then proceeds to appear to be looking toward cell no. 182.

[106] At 06:53:41, the grievor again turns her head toward the range table, picks something up, moves it to the white chair in front of her, and begins to manipulate

things on that chair, outside the view of the camera. It is unclear if the grievor is looking at material on the white chair or toward cell no. 182.

[107] At 07:07:14, the grievor stands up, walks over to cell no. 182, looks into the upper window, and continues to look into the upper window while standing outside the door until 07:08:55, when she turns and walks away from the door for a few seconds and then turns and looks back in. Then, at 07:09:05, she turns and walks over to the white chair, picks something up, and can be seen manipulating something in her hand, with her head facing toward the SUCP. At 07:09:39, she turns and walks back toward cell no. 182 and stands at the door, again looking in from the top window.

[108] At 07:12:57, the grievor looks away from cell no. 182 for a few seconds and then looks back.

[109] At 07:15:16, an unidentified PW enters the range, and the grievor's attention is turned away from cell no. 182. Neither the grievor nor this other PW are watching IM A. This PW places what appears to be a drinking container on the range table and moves back toward the grievor, who has her back to the cell. The grievor appears to give this officer something. No one is watching IM A. The two are having a discussion in front of the cell, but no one is watching IM A. At 07:15:46, the grievor moves away from the door of cell no. 182, and this PW steps up and starts watching IM A. The grievor picks up her drink container and at 07:15:55 departs the range.

2. Other evidence

[110] In his testimony, Mr. Anderson, in response to a question about asking an inmate to do something, for example, reposition themselves or show their hands and head, stated that "all options are on the table", as "we [the CSC] are obligated to ensure they are alive, safe and breathing." Mr. Anderson stated that when he viewed the cell video and saw the manner in which IM A had positioned herself, he then attended the segregation range and cell no. 182 and examined them and positioned himself where the grievor was. He said that you could not look through the lower window and constantly see the inmate.

[111] In cross-examination, in response to a question asked by the grievor's representative, Mr. Anderson stated what the grievor said that prompted him to go to management, which was that when he and Ms. Popiwchak were initially carrying out

their investigation, in her first interview, the grievor told them that she was seated in the high chair at the cell door during her portion of the HSW; when they viewed the range video, it became clear that this was not the case.

[112] Mr. Anderson testified that he took the investigation video. He said that he and Ms. Popiwchak went down to the segregation unit at EIFW to see if they could see what the grievor told them. He said that they positioned themselves in three spots:

- where Ms. Scott was seated on the floor at the back wall;
- where the grievor would have been in a chair against the back wall; and
- at the range table.

[113] When viewing the investigation video, however, it appears that the portion of the video taken, as identified in the video by Mr. Anderson, from the chair level, was quite a ways to the left of the window, and the type and height of the chair were not identified. Similarly, there was no indication as to which of the two possible seats at the corner of the range table closest to cell no. 182 was used to film from.

[114] Entered into evidence was a copy of a document titled, “Correctional Training Program (CTP), Course Components” (“the CTP syllabus”). Mr. Loeb testified that this is the course syllabus for the training program for new CX recruits. He stated that while the version provided to the hearing was dated January of 2015, the content was the same as it was when the grievor would have taken her training, albeit the formatting of the document would have been different. Mr. Loeb stated that the training program is delivered in stages. The first stage is approximately 80 hours of online courses, which is completed in between 4 and 5 weeks, for which there are examinations. The second stage is approximately 40 hours of assignments to be done by recruits, based on the knowledge conveyed in the first stage, which are to be done over between a 2- and 4-week period. The third stage is in-person training carried out at the CSC’s training facility and is a 351-hour, in-class program covered over an 11- to 12-week period.

[115] Mr. Loeb identified that course no. 6 of stage one of the CTP was titled, “Suicide Prevention and Self-Injury”. In stages two and three, there was a session called “Responding to Suicide and Self Injury Situations”. The CTP syllabus indicated that the training was seven hours.

[116] Mr. Loeb also identified the material titled, “Responding to Suicide and Self Injury Situations”. While this material does not set out specifically how a CX is

supposed to conduct an HSW, the material is clear and sets out the things that CXs should be aware of and watching for in inmates that are indicators and predictors of these situations.

[117] In her evidence before me, the grievor admitted that she did turn away from watching IM A and that her back was to the cell when she was moving the chairs that were on the range and the mattress that had been used by Ms. Scott. She said that this was for approximately 40 seconds.

[118] The grievor testified that while Ms. Scott was carrying out the HSW of IM A, she did bring in a mattress to the segregation range, which she placed against the back wall opposite to cell no. 182. She also confirmed that Ms. Scott brought in blankets. She stated that during the course of Ms. Scott's conduct of the HSW, she saw Ms. Scott sitting with her back against the back wall. She said that the blankets were covering Ms. Scott's legs. She said that whenever she saw Ms. Scott sitting on the mattress, she was awake and alert and was not lying down or sleeping. The grievor also stated that Ms. Scott told her that doing what she was doing, sitting on a mattress to conduct the HSW of an inmate, was done at GVI. The grievor said that she told Ms. Scott that it did not look good, sitting on a mattress to carry out the duty of the HSW.

[119] With respect to the allegation that she was reading a book while she was supposed to be carrying out the HSW, the interview notes of Ms. Popiwchak disclose that the grievor was asked if she brought a book or reading materials with her. The notes state that she responded with "checklist" and that she then said, "No not usually; maybe a book on a desk or something." In her testimony, the grievor denied that she was reading a book, although she admitted that she was carrying a book at the time she came to relieve Ms. Scott at 02:19:54. She then stated that she would bring books for the inmates as the inmate library was right outside the range door. She stated that the inmates (presumably in the segregation unit) did not get out. She then said that if the book was to be given to IM A, it would have had to be cleared by the psychologists. She later said that the book was left on the range table when she left. None of this was said in the second interview.

[120] Mr. Kassen stated that he decided to give the grievor a three-week disciplinary suspension because acts of misconduct, as set out in the letter of discipline, were

related to the manner in which she conducted the HSW of IM A and for not reporting Ms. Scott for the manner in which Ms. Scott conducted the HSW of IM A.

[121] The PW who worked in the SUCP during the period between 23:00 on January 22 and 07:00 on January 23 did not testify; however, she was interviewed as part of the investigation, and the interview notes of Mr. Anderson and Ms. Popiwchak, as well as the investigation report, disclose that this PW said this:

- *once the inmates in the range were locked in for the night, the range door was unlocked and as such staff did not have to have the SUCP officer unlock the door for them to enter and exit the unit;*
- *it is necessary for the PW conducting the HSW to maintain the inmate in constant observation; and,*
- *normally the PW conducting the HSW will sit on a chair or stand at the inmates' cell door.*

[122] On June 2, 2017, the grievor emailed several PWs the following:

...

As some of you already know, I am under scrutiny as to whether I performed my duties on high watch properly or not. I wholeheartedly believe that I did but the investigator is under the impression that you cannot see the inmate in the first cell breathing when you are sitting in the lower office chair and back by the range table. As most of us through the evening shifts and sometimes during the day depending on what the inmate is doing sit in that spot to put our coffee down, checklist or supplies for the inmate, and have clear visual of the inmate from that spot, I would like to please ask your support in the way of an email confirming that visibility of inmates lying in their bed in the first cell are visible from that spot?

...

[123] Ms. Zhong responded to the grievor's email on June 5, 2017. She identified her email of that day, which stated the following:

...

I have done numerous High Watch duties since I started working at EIFW. I can confirm that I have no problem observing a sleeping inmate, breathing in bed with the light on by sitting in a low office chair near the segregation range table. In fact, it is the better place to view the inmate when there is no high office chair available. By sitting in front of the cell door with the low office chair, it is really

hard to get a view without bending the upper body of the officer, which nobody can hold on [sic] that position for a long time. On the contrary, it will give us a clear view without exhausting us easily by sitting from the segregation range table with the low office chair. Furthermore, no matter where the officers sit, we adjust our positions when [sic] inmate moves in order to get the best observation.

...

[124] Ms. Zhong testified that she had been a PW at EIFW from 2014 to 2019, after which she transferred to GVI. She said that she is 5 feet tall or 5 feet, 1 inch. She stated that during her tenure at EIFW, she did, on average, 2 to 3 HSWs per month, sometimes more. She was asked by the grievor's representative where she positioned herself when she carried out the HSW, to which she answered, "Most of the time, we have to sit in a low chair." When asked about management telling her what to do, she answered that she did not recall any issue with management and said, "whatever chair is feasible to see the inmate." In cross-examination, she confirmed that she was not carrying out the HSW on IM A or doing security patrols in the segregation unit on January 22 and 23. She also confirmed that she did not know if the high chair was available on that shift.

[125] Ms. Sorokopud responded to the grievor's email on June 4, 2017. She identified her email of that day, which stated the following:

...

I, Lesya Sorokopud, have performed High Watch duties on numerous occasions. I confirm that one can observe a sleeping inmate (from head to toe) breathing in cell 182 with a light on, while sitting in an office chair near the segregation range table. You would only have to move to get a better view if the inmate has to use the bathroom. To be honest, sitting by the segregation table, observing the inmate is so much better sometimes, especially, on night shifts when the inmate is sleeping and there is not much movement from the inmate. It gets the job done because you still see the inmate breathing but it's more comfortable for the officer. One can sit on high watch a lot longer without getting tired in that location and this is so important especially if you do not have a lot of other officers available to switch with you that shift. The high chair we have to sit in front of the cell can be extremely uncomfortable. A lot of the times the foot rest on that chair does not work and sitting on that chair without the foot rest simply cuts off leg circulation within minutes while sitting on it (my feet can never touch the ground on that chair). As for standing in front of the cell - it can get exhausting very fast, especially when you spend usually at least an hour at a time on high watch. Daphne, if you ask anyone who has done High Watch and sat by the segregation

table observing the inmate in cell 182 with the light on, in our institution, they will be able to confirm visibility.

...

[126] Ms. Sorokopud testified that she had been a PW at EIFW from January of 2015 until September 30, 2017. She said that she is 5 feet, 5 inches tall. She stated that during her tenure at EIFW, she carried out about 20 HSWs, although she also stated that sometimes, she would carry out HSWs several times during 1 shift. She was asked by the grievor's representative to describe the office chair. She said that from her memory it was a soft office chair, then said that it was usually high, but then said that there was a low one from which you can touch the ground. She said that the high chair did not work for her but that the office chair could be adjusted and that her feet could be on the ground. She said that when you carry out an HSW, there are only so many staff, and that if you need to sit, the office chair is more comfortable. When she was asked to what extent if any management had spoken to her about carrying out the HSW from the range table, she said it had not. She said that she had never been spoken to about how she conducted the HSW or disciplined. In cross-examination, she confirmed that she was not carrying out the HSW on IM A or doing security patrols in the segregation unit on January 22 and 23. She also confirmed that she did not know if the high chair was available on that shift or where the grievor was situated when she carried out the HSW on January 23.

[127] Ms. Greyeyes responded to the grievor's email on June 5, 2017. She identified her email of that day, which stated the following:

...

I was unaware that there was any sort of investigation happening. But I can assure you that there is a visual (a direct one) that can be done at the distance of the segregation table into the first segregation cell on the Secure Unit. There is a clear view of the cell and dependant on where the inmate was, you are definitely able to see her. Unless she was using the toilet I think is the only obstacle that you would have to be close to the window to see her.

...

[Sic throughout]

[128] Ms. Greyeyes testified that she had been a PW at EIFW from 2009 until sometime in 2018. She said that she is 5 feet, 6 inches, tall. She stated that she carried out quite a few HSWs while at EIFW but did not put a number on it. She said that it was ongoing;

when asked if it was daily or weekly, she said that it was definitely monthly. She also stated that you could see the whole cell, except for the toilet. She indicated that she did not conduct the HSW from far back but that she did move around when she did, as long as she had a visual. When she was asked to what extent if any management had spoken to her about where she was located when doing the HSW, she said that it had not. In cross-examination, she said that she could not say if she was part of the HSW on IM A or carrying out security patrols in the segregation unit on January 22 and 23.

[129] Ms. Bellerose responded to the grievor's email on June 2, 2017. She identified her email of that day, which stated the following:

...
Hi, I have been on high watch numerous of times. I can say that it is a clear view to see the inmate in her room or lying on the bed as there is a light on above her and you can see her breathing. If the inmate was to get up and move around, you can also get up and monitor her through the window. However on nights this never happens, they are usually sleeping.

...
[Sic throughout]

[130] Ms. Bellerose testified that at the time of the hearing, she was a PW at EIFW and had been for 25 years. She said that she is 5 feet, 5 inches, tall. She stated that she carried out quite a few HSWs while at EIFW and that at the time she was testifying (August of 2021), she had done about 15 over the past couple of years. She said that you had a clear view of an inmate in cell no. 182 and that if the inmate in the cell moved the mattress onto the floor, which they sometimes did, you would have to move. When she was asked to what extent if any management had spoken to her about where she was located when doing the HSW, she said it had not. In cross-examination, she said that she was not on shift on January 22 and 23.

[131] Entered into evidence were several performance appraisals for the grievor, which included assessments of her work as a clerk (CR-4) before becoming a CX, as well as appraisals after she became a CX-2, for fiscal years 2014-2015 through to 2020-2021.

III. Summary of the arguments

[132] The employer referred me to *Besirovic v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLRB 33, *Bridgen v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 92, *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.), *Cooper v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 119, *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), *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, *Stead v. Deputy Head (Correctional Service of Canada)*, 2012 PSLRB 87, *Tipple v. Canada (Treasury Board)*, [1985] F.C.J. No. 818 (C.A.)(QL), *Yayé v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 51, *Walker v. Deputy Head (Department of the Environment and Climate Change)*, 2018 FPSLRB 78, and *William Scott & Co. v. C.F.A.W., Local P-162*, 1976 CarswellBC 518 (“Wm. Scott”).

[133] The employer requested that the grievance be dismissed.

[134] The grievor also referred me to *Wm. Scott*, *Besirovic*, and *Bridgen*, as well as to *King v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 84, *Carignan v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLRB 86, *Lyons v. Deputy Head (Correctional Service of Canada)*, 2020 FPSLRB 122, *Desjarlais v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 88, *Cyr v. Parks Canada Agency*, 2016 PSLREB 111, *Maas v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 123, *Verville v. Canada (Service correctionnel)*, 2004 FC 767, *Stann v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLRB 5, *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, and *Kinsey v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 30.

[135] The grievor requested that the grievance be upheld and that she be granted the following relief:

- reimbursement of the 15 days of lost pay due to the suspension;
- pre-judgement and post-judgement interest on the lost pay at the appropriate rate for the province of British Columbia;
- any lost overtime pay and shift premiums;

- adjustment of her pensionable time;
- adjustment of any loss of leave; and
- removal of the discipline from her file.

[136] 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

[137] The employer asked that the videos of cell no. 182, the segregation unit range, and the investigation video, and the segregation unit diagram be sealed. 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.

...

[138] 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 an institution 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-3, E-6, E-7, and G-6 are ordered sealed.

[139] 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

[140] During the course of the hearing, I became aware that the files relating to the suspension and termination of Ms. Scott were also before the Board and that they arose out of almost the exact same circumstances. After this was brought to the attention of the Chairperson of the Board, those matters were also assigned to me.

[141] As the hearing during the week of the November 18, 2019, came to a close, and as it was not complete, I had discussions with the parties about continuing it in Edmonton, in conjunction with the hearing of the grievances filed by Ms. Scott and arising out of the same HSW on the same January 23 morning, along with carrying out a view of the segregation range at EIFW and cell no. 182. Counsel for the employer and the employer's representative were the same in both this matter and Ms. Scott's grievances; however, the union representative in Ms. Scott's grievances was different from the one in this matter. I instructed the Board's registry to coordinate the

continuation of this matter with the hearing of Ms. Scott's grievances 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.

[142] 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.

[143] Before the continuation of this matter and the hearing of Ms. Scott's grievances, 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. However, as of the hearing of the completion of this matter on August 3 to 4, 2021, and the hearing of Ms. Scott's grievances, those renovations had been delayed, and counsel for the employer reiterated a request for a view.

[144] While things on the pandemic front were better in the late summer of 2021, when I completed hearing this matter and heard and completed Ms. Scott's grievances (both by videoconference), the country was squarely within the third wave of the pandemic, with many national, provincial, and local restrictions still in place; the fourth wave was yet to come. I determined based on both the evidence that I had seen and heard in this matter and Ms. Scott's grievances (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 was not required, nor would it be safe or wise to either attend or require the parties and their representatives to attend EIFW for a view. As such, no view was made.

C. The merits of the grievance

[145] 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.

[146] 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?

1. Was there misconduct by the grievor?

[147] 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. The misconduct alleged by the employer and set out in the letter of discipline was that the grievor did not conduct her security rounds in accordance with CD 566-4, did not conduct the HSW of IM A in accordance with CD 843, and her awareness of and inaction with respect to Ms. Scott's performance of her duties in "a horizontal position" contravened both the *Standards of Professional Conduct* and the *Code*, specifically *Standard One - Responsible Discharge of Duties*, as follows:

...

- 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;
- Failing to take action or otherwise neglects his or her duty as a peace officer;
- 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;

...

[148] 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.

[149] Between 00:00 and 07:00 on January 23, two PWs, the grievor and Ms. Scott, were tasked to carry out the HSW of IM A. From roughly 00:00 to roughly 03:00, Ms. Scott was responsible, and from roughly 03:00 to 07:00, the grievor 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.

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

- a) the grievor did not conduct her security rounds in accordance with the proper rules and procedures;
- b) 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;
- c) the grievor was not maintaining constant and direct watch of IM A while she was seated against the back wall of the segregation range; and
- d) the grievor did not report Ms. Scott's conduct of lying or sleeping on a mattress while Ms. Scott was responsible for the HSW of IM A.

[151] For the reasons that follow, I find that the employer established some of the misconduct it alleged and as such has satisfied the first question of the test in *Wm. Scott*.

a. The grievor did not conduct her security rounds in accordance with the proper rules and procedures

[152] Between 00:00:00 and 03:00:00, when she was not responsible for conducting the HSW of IM A, the grievor had other assigned duties, which included performing security patrols. I heard no evidence about those security patrols that took place outside the segregation unit, and as I understand the discipline, it related only to how she conducted the security patrol of the range, and the range video clearly shows when the grievor did them. The evidence disclosed that the grievor carried out three security patrols in the segregation range between 00:00:00 and 00:03:00, as follows:

- starting at 00:17:10;
- starting at 01:14:10; and
- starting at 02:11:29.

[153] The grievor denied that she did them improperly.

[154] I have viewed the range and cell videos very closely and carefully in their entirety.

[155] CD 566-4 sets out the provisions for counts and security patrols and states that they will be as frequent as possible but that they must be at least once every 60 minutes from the beginning of the last patrol and that patrols will be staggered, to

avoid predictability. It also says that during the patrols, the PW will ensure the presence of a live, breathing body.

[156] It is clear that the grievor conducted at least one security patrol within 60 minutes of her previous patrols as the first one was at 00:17:10 and the next two followed at 01:14:10 and 02:12:30, which were under 60 minutes after the previous patrol. I have no evidence about the security patrol that was done before the one carried out by the grievor at 00:17:10. Therefore, I am going to assume that her first patrol was done within the appropriate time frame, and as such, the grievor was not in breach of this provision of CD 566-4.

[157] In the evidence portion of this decision, I set out in detail how the grievor checked all 4 inmate cells on the range during the 3 security patrols. Four inmates and 3 patrols equals 12 checks on inmates. The details laid out in the evidence section of this decision clearly disclosed that of those 12 checks, all except for 1 was about 1 second in length, and several were under 1 second. As set out earlier in this decision, the range and cell videos records the time in hours, minutes, seconds, and milliseconds. The videos could be stopped, paused, and rewound to check the times.

[158] I am satisfied that in the manner in which the grievor carried out these security patrols, save and except the one time she was looking into the last cell on the range for 13 seconds, she was not able to verify that there was a live, breathing body that was safe and secure. It is clear during some of these security patrols, she spent more time engaged in some manner with Ms. Scott.

[159] I find that the employer satisfied its burden of proof on a balance of probabilities that the grievor was in breach of CD 566-4 on the morning of January 23.

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

[160] 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?

[161] 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).”

[162] 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.”

[163] 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.

[164] 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;

[165] 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”.

i. While not seated against the back wall

[166] At 00:06:00, both the range and cell videos show the grievor sitting on the high chair and looking through the upper window of the door to cell no. 182 at IM A. The evidence I heard from all of Messrs. Kassen, Shea, and Anderson and Ms. Marghella was that this was the manner in which the HSW was to take place. It was to be a direct and constant watch of the inmate such that all the inmate could be seen, in particular her head and torso area as well as her arms and hands, albeit some or all of the inmate might be covered by a security blanket. Sitting and watching through this upper window was optional; the PW could also stand if they wished.

[167] Indeed, this is what the grievor was recorded as having said in her interview with Mr. Anderson and Ms. Popiwchak and is recorded in their notes and in the investigation report as follows:

...

PW DESJARLAIS indicated 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....

...

PW DESJARLAIS reported that during her High Suicide watch, 03:00 to 07:00, she sat on a chair directly in front of the inmates' [sic] cell door. PW DESJARLAIS repeated the two large windows in the cell door were where Primary Workers monitor the inmate. PW DESJARLAIS confirmed she sat on a tall chair until relieved at 07:00.

...

[168] The evidence disclosed that the grievor appeared to be responsible for the HSW during the period between 00:00 and 07:15 on January 23 during three time frames, during which times she did not maintain constant and direct observation of IM A: 00:00:56 to 00:08:54, 02:19:54 to 02:29:03, and 03:05:45 to 07:15:46.

[169] Between 00:00:56 and 00:08:54, the grievor appeared to be responsible for the HSW of IM A as Ms. Scott, who had previously been watching the inmate, left the range at 00:00:56. Between 00:00:56 and 00:01:16, the grievor is not watching IM A. At 00:06:43, Ms. Scott re-enters the range, carrying a mattress. The grievor is still seated in the high chair at the door of cell no. 182 when Ms. Scott enters the range, and shortly after that, at 00:06:55, she turns away from watching IM A and watches Ms. Scott. She does this until 00:07:07, when she disembarks from the chair, still turned away from the cell, and stands. She appears to be watching Ms. Scott, and then they appear to be engaged in a conversation. It is not until 00:07:21 that the grievor turns her attention back to IM A. At 00:08:24, after Ms. Scott has left the range and returned, again, the grievor turns her attention away from the cell and her observation of IM A and concentrates on Ms. Scott. She is either watching Ms. Scott or speaking with her or both, but her attention is not where it should be. At 00:08:54, the range video shows the grievor exiting the range and Ms. Scott, with her back to cell no. 182, moving toward the back wall of the range and the mattress.

[170] It is noted that Ms. Scott is not watching IM A when the grievor departs the range. Ms. Scott does not look in on IM A until 00:10:01. While the grievor might have left the range when she did, and ostensibly Ms. Scott was then responsible for the HSW of IM A, it is clear that when the grievor left that task, she was well aware that Ms. Scott was not in a position to take over the HSW as she was nowhere near the cell and was busy fiddling with the mattress at the back wall of the range. The grievor should not have stopped conducting the HSW of IM A until such time as Ms. Scott was in a position to take it over. The facts clearly disclose that when the grievor left, Ms. Scott was not watching IM A; nor was she ready to watch IM A.

[171] At 02:19:54, the grievor enters the range, and Ms. Scott leaves. The grievor clearly has some type of book in her left hand. She moves the white chair into a position a few feet back from the door of cell no. 182; however, instead of pointing it so the front of it faces the cell, she points it 90 degrees to the right of the cell (when facing the cell), at the range door. This is curious. The grievor then has her back to the range camera.

[172] The range video clearly shows that the grievor enters the range with a book in her hand. Before she moves the white chair into position in front of the cell, she takes what is later determined to be toilet paper off the white chair and places it on a ledge

adjacent to the SUCP window. She does not go to the range table or the mattress where Ms. Scott is seated to retrieve the file with the information on IM A in it. The only thing she has with her, other than her person, is the book. After a careful review of the video, it is clear that the book is open and to the grievor's left side as she is seated. I find that on a balance of probabilities, given that she had the book in her hand and that it was visible to her left as she sat in the white chair with her back to the camera, at times during this period of approximately 10 minutes, until Ms. Scott returns and sets herself back up at the back wall, the grievor is not constantly and directly observing IM A.

[173] The grievor did not outright deny reading a book while she was seated on the white chair, between 02:19:54 and 02:29:03; that was the inference. And while she did admit in her testimony that she brought a book onto the range, the way she testified about this issue was to infer that it was for the inmates as the institution's library is just outside the segregation unit, and they could not access it. I find that the grievor's account about the book issue is just not believable or credible and that it does not withstand the test for credibility as set out in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, in which the British Columbia Court of Appeal stated as follows:

...

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility ... A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its

harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions....

...

[174] In her second interview with Mr. Anderson and Ms. Popiwchak, she was aware she was under investigation as well as Ms. Scott. She was specifically questioned about a book or reading material. Her response in the second interview, for which I have both Ms. Popiwchak's notes and the recording, indicated that she denied bringing a book with her, usually; however, she indicated that there could have been one on the desk (assuming she meant the range table). Yet, in her evidence before me, some two-and-a-half years later, she said that she did have a book with her but inferred that it was likely for the inmates, indicating that in segregation, they cannot get out to get them and that the institution's library is just outside the segregation unit.

[175] None of this makes any sense. The grievor is seen entering the range at 02:19:54 with a book in her hand. The checklist was not in her hand and was not exchanged between her and Ms. Scott when Ms. Scott left the range. She maintained the book on her person, and it is seen on her left side when she is seated with her back to the camera; her chair is pointed in the direction of the range door. Further, she is seen with the book in her hand at 02:56:10 before leaving the book on the white chair, just before she exits the range with Mr. Robinson a few seconds later.

[176] The grievor was scheduled to work the first part of the January 22 to 23 12.75-hour shift on the principal entrance, and she and Ms. Marghella both testified to this. She said that the first part of the shift was to see to the entrance and the people who were leaving. I do not find it plausible that for some reason at 02:19:54, when the inmates on the segregation unit were sleeping, the grievor would get a book for an inmate and bring it with her at that time. Other than the grievor stating this in her evidence-in-chief, there is no other reference or record of a request for any book for any of the inmates on the segregation unit.

[177] This issue with respect to the book is not the first time the grievor's recollection of events changed. The grievor's rendition of events during the investigation that she conducted the HSW of IM A at the cell door by looking through the upper window was not truthful. She confirmed that in both interviews; yet, during the second interview, when she was being asked about moving chairs, she then said that she did not recall. It

should be noted that the investigators had seen the range video and knew that the grievor had actually spent her time during the majority of the HSW seated on an office chair that was positioned at the back wall and not right at the cell door.

[178] Finally, there is the period between 03:05:45 and 07:15:46 for which the grievor was responsible for the HSW of IM A. It is during this period that the grievor relieved Ms. Scott. It is clear from the range video that there are periods between 03:05:45 and 07:15:46, 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. I will not repeat the evidence of when the grievor was not keeping direct and constant observation of IM A as it has already been set out in detail in the evidence section of this decision and is based on what is clearly shown in the range video.

[179] It is plain and obvious that during these periods, the grievor was not maintaining constant and direct observation of IM A, who was on an HSW. She was in clear and direct violation of *CD 843 Management of Inmate Self-Injurious and Suicidal Behaviour* and thus in breach of the *Code*, Standard One, "Responsible Discharge of Duties", by failing to take action or otherwise neglecting her duty as a peace officer and failed to conform to, or apply, any relevant legislation, CD, standing order, or other directive as it related to her duty.

ii. While seated against the back wall

[180] The other allegation with respect to the grievor's failure to maintain constant and direct watch of IM A involves her being seated on office chair no. 2, which was placed against the back wall, more or less directly across from cell no. 182, albeit approximately 12 feet from the cell door.

[181] 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

[182] 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.

[183] 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.

[184] I am satisfied that while the grievor was seated on office chair no. 2, 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 as 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.

d. The grievor did not report Ms. Scott's conduct of lying or sleeping on a mattress while Ms. Scott was responsible for the HSW of IM A

[185] As set out earlier in this decision, Ms. Scott was terminated from her position as a PW for misconduct also related to the HSW of IM A during the same shift (between 00:00:00 and 00:07:00 on January 23). The allegations against her were that she was sleeping on duty.

[186] There is no actual evidence of anyone seeing Ms. Scott sleeping or lying on a mattress while conducting the HSW of IM A.

[187] I have viewed the range and cell videos in their entirety. From what I can see on the range video, Ms. Scott set out the mattress with half of it against the back wall and half of it on the floor. She placed a blanket on top of the mattress, and when she used the mattress, the video discloses that she was seated with her back against the back wall. There is nothing on the video showing her lying down.

[188] Ms. Desjarlais and Mr. Robinson testified that when they were on the range, Ms. Scott was awake and alert. Ms. Desjarlais said that Ms. Scott was not lying down on the mattress but that she was seated, with her back against the back wall.

[189] There is no other evidence other than the anonymous note, which is unsigned.

[190] I am satisfied that the employer has not proven on a balance of probabilities that Ms. Scott was either lying down on the mattress or sleeping on duty, as it alleged, and as such, it has not proven that therefore, the grievor failed to report Ms. Scott doing this. As such, this alleged misconduct is not founded.

2. Was the discipline excessive in the circumstances?

[191] As the employer established some of the misconduct as alleged, the next question I have to determine is whether the discipline was excessive. For the reasons that follow, I am satisfied that it is not and decline to set it aside.

[192] 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 conduct the security patrols correctly and her failure to report Ms. Scott for sleeping on duty.

[193] The assessment of the penalty in discipline matters in the federal public sector was set out at paragraphs 179 and 180 of *Brazeau v. Deputy Head (Department of Public Works and Government Services)*, 2008 PSLRB 62, 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 (page 7-153)

...

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

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

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

[Sic throughout]

[194] The evidence disclosed that until this incident, the grievor had six years of discipline-free service. While any penalty that results in a loss of income would have some economic hardship, there was no evidence that the penalty imposed created a special economic hardship for the grievor in light of her particular circumstances.

[195] With respect to carrying out the security patrol, 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. I believe that over time, carrying out such a banal task of looking in on sleeping people at night had caused the grievor to become indolent and complacent. While there was no audio attached to the range video, the video evidence clearly showed that she spent more time engaging with her co-worker, Ms. Scott, than she did checking on the inmates whom she was tasked with ensuring were safe.

[196] 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.

[197] The grievor certainly seemed to know and understand what was required of her. Her responses during the investigation interview that took place on February 16, 2017, were that she had carried out HSWs before and that it was necessary to be at the cell door, watching. Indeed, she told the investigators that this is how she carried out the HSW of IM A on January 23 — that she was right at the window, looking down. The range video, shortly after 00:01:00 on January 23, shows that while she is waiting for Ms. Scott to take over the HSW, she is conducting the HSW in this fashion.

[198] While I heard from a number of witnesses 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 standing or sitting directly in front of the cell door in which the inmate is situated, the overwhelming evidence, including evidence from the grievor, was that the HSW was supposed to be carried out by either standing or being seated right at the door of the cell where the inmate on an HSW was located and by looking down directly on her.

[199] However, it is clear that despite knowing how the HSW should be carried out and actually having done so at least at the start of January 23, the grievor chose not to

continue to carry it out in this fashion for the balance of the time she was supposed to. While this may be a problem, it is really not what this case is about. It is about failing to conduct direct and constant observation of IM A, to ensure her health and safety.

[200] 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 has not proven on a balance of probabilities that she had failed to, there were significant periods in which the grievor quite clearly chose not to carry out the duties she was supposed to. I have already set those out and will not repeat them.

[201] 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.

[202] 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.

[203] While the grievor’s failure to carry out the proper security patrol 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. Inmates on the segregation range, at night, are locked in their cells. The only contact with another human being to check on their health, safety, and well being is that PW (the CX in a male institution) who carries out the security patrol once an hour. Every one of those inmates on the segregation unit is owed a duty of care from the PW who carries out the security patrol, to ensure that they are safe and not in any distress. The manner in

which the grievor carried out the patrols during the early hours of January 23 showed a disregard for the health and well-being of those persons.

[204] In addition, the grievor, during the course of the hearing, did not appear to grasp the seriousness of the conduct and the risk to which she subjected IM A, the other inmates housed on the segregation range on the morning of January 23, herself, her colleagues, and the CSC. During the disciplinary process, she did not display any sort of remorse or understanding.

[205] For these two tasks, the HSW of IM A and the security patrols, which the grievor chose to do in what can only be described as a cavalier and complacent manner, in my view, the seriousness of the misconduct could have warranted a much steeper penalty. While the employer failed to establish on a balance of probabilities that the grievor was failing to observe IM A in a constant and direct manner when she was seated at the back wall of the segregation range and that she had failed to report Ms. Scott sleeping, the seriousness of the two sets of incidents in which I have found the grievor to have engaged in misconduct is such that I am satisfied that the penalty should not be altered.

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

(The Order appears on the next page)

V. Order

[207] The grievance is denied.

[208] Exhibits E-3, E-6, E-7, and G-6 are ordered sealed.

[209] 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.

December 22, 2022.

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