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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

PAUL CANNING

Grievor

and

DEPUTY HEAD
(Correctional Service of Canada)

Respondent

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

In the matter of an individual grievance referred to adjudication

Before: Augustus Richardson, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Aaron Lemkow, Public Service Alliance of Canada

For the Respondent: Mathieu Cloutier, counsel

Heard by videoconference,
March 6, 7, and 8, 2023.

REASONS FOR DECISION

I. Introduction

[1] As of February 11, 2018, Paul Canning ("the grievor"), a plumber by trade, was a plumber instructor (classified GL-PIP-09) at the medium-security Springhill Institution ("Springhill") in Springhill, Nova Scotia, of the Correctional Service of Canada ("the respondent"). He had almost 10 years of experience with the respondent, first at its maximum-security Dorchester Penitentiary in Dorchester, New Brunswick, and then at Springhill. On February 12, 2018, he was terminated because he allowed a federal offender to drive an institutional vehicle by himself within Springhill and to report to a unit, without supervision, and because he sent an email to another employee containing a veiled threat.

[2] The grievor has conceded that his conduct warranted discipline. But he stated that termination was too extreme of a penalty for his conduct, particularly given his seniority and good record and because the penalty failed to comply with the principles of progressive discipline. The respondent, on the other hand, stated that the conduct in question — particularly the failure to supervise the offender — was grave enough to warrant termination and that in any event, the conduct irreparably damaged the bond of trust that is fundamental to the employment relationship.

[3] On the facts before me, and for the following reasons, I have concluded that the grievance must succeed on the question of the severity of the disciplinary action and that in place of the termination, a suspension of four months without pay is warranted.

II. The evidence

[4] This being a matter of discipline, the onus was on the respondent to establish cause for both the need for discipline and the penalty it imposed. On its behalf, I heard the testimonies of the following:

- Kevin Snedden, who at the material time was the respondent's acting regional deputy commissioner for its Atlantic Region;
- Doug Bitten, who at the material time was a correctional manager at Springhill; and
- Bruce Rushton, who at the material time was a maintenance supervisor at Springhill and under whose supervision the grievor fell.

[5] On the grievor's behalf, I heard the testimonies of the following:

- the grievor; and
- Bruce Barton, who at the material time was a long-term acquaintance of the grievor who worked at Springhill as a service and supply officer for fleet management.

[6] The parties also introduced a joint book of documents as Exhibit 1. A sealing order was issued with respect to Tab 24 (a schematic of Springhill) and Tab 25 (the grievor's medical record). Also of note were Tab 12, a statement of Mr. Rushton prepared on December 22, 2017, and Tab 13, a statement prepared by one of the grievor's supervisors, Ryan Murray, on December 22, 2017.

[7] I should also mention that the parties had little, if any, dispute as to the events that led to the termination. The grievor agreed that the conducts listed in the termination letter were an appropriate grounds for discipline. As well, the parties introduced an agreed statement of facts. The central issue then turned not on credibility but on the legal inferences and consequences to be drawn from the facts. That being the case, I will simply set out the facts as I find them and will refer to particular evidence only when necessary to explain a particular finding of fact.

[8] I commence with the agreed statement of facts that from time to time refers to documents in the joint book. I will refer to some of them later, in the reasons section. Most of the statement is reproduced; the paragraph numbering was changed to keep the numbering in this decision consistent.

III. The agreed statement of facts

[9] The respondent was represented by its deputy head.

[10] The Public Service Alliance of Canada is the certified bargaining agent for the Operational Services group bargaining unit.

[11] The Union of Safety and Justice Employees is a component of the Public Service Alliance of Canada. It administers the Operational Services group collective agreement on behalf of the Public Service Alliance of Canada and the bargaining unit's members.

[12] The grievor belonged to the bargaining unit throughout his employment with the respondent.

[13] At all times during his employment, the grievor was subject to the *Code of Discipline* and the *Values and Ethics Code for the Public Sector* at Tabs 1 and 2 of the joint book of documents. His work description is at Tab 3.

[14] On May 19, 2008, the grievor began his employment with the respondent as a plumber instructor, classified GL-PIP-09, at the CORCAN Construction location in Amherst, Nova Scotia. The term had an original end date of August 31, 2008. The employment contract that he signed on June 16, 2008, is at Tab 4 of the joint book of documents.

[15] On September 8, 2008, the respondent retroactively extended the grievor's term until October 2008. The extension letter that he signed on September 10, 2008, is at Tab 5 of the joint book of documents.

[16] On November 17, 2008, the respondent retroactively extended the grievor's term until January 14, 2009. The extension letter that he signed on November 26, 2008, is at Tab 6 of the joint book of documents.

[17] On September 3, 2009, the respondent retroactively extended the grievor's term until March 31, 2010, in the plumber position (classified GL-PIP-09) at Dorchester Penitentiary. The extension letter that he signed on September 22, 2009, is at Tab 7 of the joint book of documents.

[18] On May 20, 2010, the respondent offered the grievor a permanent appointment to the plumber position at Dorchester Penitentiary. The offer letter that he signed on June 10, 2010, is at Tab 8 of the joint book of documents.

[19] On September 15, 2010, the respondent offered the grievor a deployment to Springhill, as a plumber (classified GL-PIP-09). The deployment letter that he signed on September 29, 2010, is at Tab 9 of the joint book of documents.

[20] The grievor's training summary is at Tab 10 of the joint book of documents.

[21] On or around July 4, 2014, the grievor injured his back in the workplace. A description of the injury is at pages 87, 88, 91 to 93, 142, and 143, Tab 25, of the joint book of documents.

[22] On March 4, 2015, the respondent issued the grievor's final performance evaluation for the 2014-2015 evaluation period, a copy of which is at Tab 26, page 202, of the joint book of documents.

[23] On March 31, 2016, the respondent issued the grievor's final performance evaluation for the 2015-2016 evaluation period, a copy of which is at Tab 26, page 241, of the joint book of documents.

[24] On or around July 11, 2016, the grievor reinjured his back in the workplace. A description of the injury is at pages 106 to 197, Tab 25, of the joint book of documents.

[25] On or around September 28, 2016, the grievor reinjured his back in the workplace. A description of the injury is at page 170, Tab 25, of the joint book of documents.

[26] On March 10, 2017, the respondent issued the grievor's final performance evaluation for the 2016-2017 evaluation period, a copy of which is at page 283, Tab 26, of the joint book of documents.

[27] On or around April 25, 2017, the grievor injured his back in the workplace by pulling on a gate and was unable to return until May 8, 2017. An X-ray from around that time, and another from September 1, 2017, revealed arthritic changes to his right foot. The injury and arthritis detection are detailed at pages 117 to 121, Tab 25, of the joint book of documents.

[28] On August 30, 2017, the grievor was involved in a physical altercation with a co-worker at Springhill. On September 6, 2017, the grievor attended a disciplinary hearing with the respondent with respect to that altercation.

[29] On December 20, 2017, the grievor was taking a nap in his workshop when two correctional managers, Mr. Mitton and Mr. Sean MacLeod, woke him up. They left shortly after having a brief conversation with him.

[30] On December 21, 2017, the grievor received a call from his supervisor, who advised him that he had received a complaint about the grievor sleeping at work.

[31] Later on December 21, 2017, the grievor allowed an inmate to drive alone to another area of Springhill to carry out plumbing work.

[32] Still later on December 21, 2017, the grievor sent an email to Mr. Mitton with the subject line, “What goes around comes around”. A copy of the email is at Tab 11 of the joint book of documents.

[33] On December 21, Mr. Rushton, the grievor’s supervisor, wrote a detailed report entitled, “Paul Canning incident, Springhill Institution, Dec 21/17”. A copy of it is at Tab 12 of the joint book of documents.

[34] On December 22, 2017, Mr. Murray wrote a report about the events that took place on December 20 and 21, 2017. A copy of it is at Tab 13 of the joint book of documents.

[35] On January 3, 2018, the grievor wrote a letter to explain why he wrote the December 21, 2017, email (Tab 11, joint book of documents). A copy of it is at Tab 21 of the joint book of documents.

[36] On January 4, 2018, the grievor attended a disciplinary hearing with the respondent with respect to the December 21, 2017, email, and his decision to let an inmate drive an institutional vehicle. At the meeting, the grievor provided Mr. Snedden with a copy of his January 3, 2018, letter. At the end of the meeting, the respondent suspended the grievor for 20 days without pay for the physical altercation on August 30, 2017. A copy of the disciplinary letter is at Tab 14 of the joint book of documents.

[37] The respondent recorded the audio of the disciplinary hearing. A copy of it and the respondent’s hearing notes are at Tab 15 of the joint book of documents.

[38] The grievor did not grieve the 20-day suspension.

[39] On February 7, 2018, the respondent sent the grievor a letter inviting him to a meeting on February 12, 2018, at which he was to be provided with a decision. A copy of it is at Tab 16 of the joint book of documents.

[40] On February 12, 2018, the respondent terminated the grievor’s employment for the December 21, 2017, email incident and his decision to let an inmate drive an

respondent vehicle. A copy of the termination letter is at Tab 17 of the joint book of documents.

[41] On February 14, 2018, the grievor wrote a letter to explain why he let the inmate drive an institutional vehicle, which he provided to his bargaining agent's representative. A copy of it is at Tab 22 of the joint book of documents.

[42] On February 26, 2018, the grievor grieved his termination. A copy of the grievance is at Tab 18 of the joint book of documents.

[43] On March 8, 2018, the respondent issued the grievor's final performance evaluation for the 2017-2018 evaluation period. A copy of it is at page 327, Tab 26, of the joint book of documents.

[44] On September 24, 2019, the respondent issued its final-level grievance decision in which it denied the termination grievance. A copy of it is at Tab 20 of the joint book of documents.

[45] On October 20, 2019, the grievor referred the termination grievance to adjudication.

IV. Additional facts

[46] Springhill is a medium-security facility. It has a large number of buildings, including inmate units and maintenance, storage, and administrative buildings, all of which are surrounded by a perimeter fence. The doors to the inmate units are lock-controlled, but inmates have a certain amount of freedom of movement within Springhill, subject always to the overall supervision of Springhill's correctional officers and staff.

[47] One of the buildings (Building B) housed a plumbing shop that contained plumbing tools, equipment, and supplies. The grievor and a colleague plumber ran it. Their responsibilities included maintaining Springhill's plumbing systems as a whole as well as training and supervising inmates whom correctional staff (and the grievor and his colleague) had approved to work in, or learn, the plumbing trade. Plumbing work and repairs could be carried out in the shop or in the buildings and inmate units anywhere within the perimeter fence. The shop consisted of at least three rooms: the shop, an office, and an inner office or storage room.

[48] The maintenance and control of the plumbing tools and supplies was an important and daily responsibility of the grievor. The inmates could use the tools as weapons. They were hung on things named "shadow boards", which were painted to make it clear when one had been taken, or they were kept in locked cabinets. The control of the plumbing supplies was also important because they could be used to brew illicit moonshine. All this meant that the activities of the inmates when they worked in the plumbing shop — or performed a plumbing task somewhere in Springhill — had to be under the supervision and control of the grievor or his colleague.

[49] The grievor's job description (Exhibit 1, Tab 3) captured this role. It included the following client service results:

> …
>
> *Provision of maintenance in such areas as: plumbing, hot water heating, chilled water, low pressure steam, gas, fire protection, potable water, natural gas heating, sanitary, compressed air lines, and storm sewer services for the occupants and staff of a Correctional Service of Canada institution.*
>
> *Supervision and training of inmates.*
>
> …

[50] The key activities included the following:

> …
>
> *Supervises, trains and instructs offenders in the performance of plumbing, gas, fire-protection, potable water, heating, sanitary & storm sewer tasks; in safe work practices and in the safe and proper use of hand tools and portable power tools; maintains and controls shop inventory and tools; monitors the quality control of services provided by offenders; completes inmate assessment report; and controls the offender's behavior and movement.*
>
> *Performs case management activities for assigned inmates. Enters inmate work evaluations into the Offender Management System (i.e., documenting inmate behaviour).*
>
> …
>
> *The incumbent of this position as Peace Officer Designation.*
>
> …

[51] For the purposes of this grievance, it is necessary to know that Building B was adjacent to one of the inmate units — Building A; they were about 100 m apart. The door to the shop in Building B was on the side opposite the one facing Building A. The shop had no windows facing Building A, which meant that an inmate exiting the plumbing shop to go to Building A could not be observed either coming or going.

[52] There was also a plumbing van. It contained supplies and, at times, plumbing tools and was usually parked by the plumbing shop's door. It was locked at all times. At all times, the grievor or his colleague had to have the van, tool cabinets, and plumbing shop keys on them, or they were kept locked in a controlled-access key box.

V. Background to the events surrounding the termination

[53] The grievor was terminated for two reasons.

[54] First, on December 21, 2017, at 1:18 p.m., he sent a blank email to Mr. Mitton, a correctional manager, with the following subject line: "What goes around comes around".

[55] Second, earlier that morning, he gave the keys to the plumbing van and some tools to an inmate and assigned to him the task of fixing a shower head in the washroom of Building A. He did not supervise the inmate, who by himself travelled to Building A, fixed the shower, and then returned.

[56] As already noted, the grievor conceded that both incidents warranted discipline. The first was discourteous and unprofessional, and the second breached his obligation to supervise inmates and, in particular, to maintain control of the plumbing van, its keys, and the tools and supplies at all times.

[57] However, in support of its decision to terminate the grievor, the respondent provided and sought to rely upon evidence about two other incidents. One was the grievor's physical altercation with his colleague, which took place in August 2017. The grievor was reprimanded for it on January 4, 2018, via a 20-day suspension without pay, which he did not grieve.

[58] The second incident occurred on December 20, 2017. It formed the pretext for the grievor's email, which in turn became one of the respondent's two justifications for terminating him. Two correctional managers, Mr. Mitton and Mr. MacLeod, were doing

a routine security sweep of Building B. They entered the locked plumbing shop and came upon the grievor, who was sleeping in the office or storage room with the lights out and with earmuffs on. They woke him and then left to complete their rounds. They reported the incident.

[59] The respondent's position appears to have been that it was an incident of sleeping on the job and hence was unacceptable conduct. The grievor's position was that he had been sleeping during his lunch break and hence had been on his own time. That rest helped his back (which he had injured some time before), and in any event, the respondent knew about his habit of sleeping during his lunch break.

[60] At the hearing, the respondent maintained that those two incidents were part of the record and that they could have been used to support the respondent's decision to terminate the grievor. The grievor objected strenuously and repeatedly to the use or introduction of such evidence. He maintained that the respondent could rely only on the reasons set out in its termination letter, which did not specifically mention either incident.

[61] In the end, I decided to allow the introduction of that evidence. As it turned out, the sleeping incident was the pretext for the email. And while the physical altercation was not specifically mentioned in the termination letter, the respondent took into account his "previous discipline" when it decided to terminate the grievor. As well, the sleeping incident, the resulting email, and the unsupervised-inmate incident all happened in close proximity in terms of time, which makes it difficult to separate them. For that reason, I will discuss them together.

A. The unsupervised inmate and the email resulting from the sleeping incident

[62] As already noted, Mr. Mitton and Mr. MacLeod found the grievor sleeping while doing their rounds on December 20, 2017. The grievor testified that their visit was very brief and that they left without giving him a chance to explain that it was his lunch hour and that he had slept to help his bad back. The two then reported the incident to management. When the grievor learned at some point later that day or early the next that the report had been made, he became very upset. He felt that the report was one-sided (because it did not contain his explanation) and that it made him look bad.

[63] The next morning, December 21, 2017, Mr. Rushton met with the Acting Warden and the Acting Deputy Warden. They felt that the incident was not acceptable, and Mr. Rushton agreed to discuss the matter with the grievor.

[64] While that was going on, something else happened. The grievor had come into work. He has arthritis in his foot, which sometimes causes it to swell painfully, making it impossible for him to wear regulation safety shoes. He had a work order for a defective shower head in Building A. He called the correctional officer in charge of that building and said that he would send the inmate to fix the shower. He then gave the keys to the plumbing van, together with some tools (which he counted both before the inmate's departure and after the inmate's return), to the inmate and told him to take the van, go to Building A, fix the shower, and then return. He did not go with inmate, who went there and then returned on his own.

[65] When the inmate returned, he told the grievor that a correctional officer at Building A had said that he, as an inmate, should not have gone there unsupervised. At that point, if not before, the grievor realized that he had committed an infraction of his duties and responsibilities and that he should not have provided the keys to the van to the inmate or left him unsupervised to travel to and from Building A.

[66] Shortly after the inmate returned to the shop, Mr. Rushton showed up, at about 11:50 a.m. He was unaware of what had happened with respect to the inmate. He was there to discuss the sleeping incident. But before he could say anything, the grievor said, "I know why you're here." Mr. Rushton prepared a written report that included an account of what then happened (at the hearing, the grievor accepted it as essentially accurate), as follows:

…

> *… I asked what took place in 58? His response was "we had a work order in 58 and I called the unit and told them I was sending my inmate up and they said ok. When the inmate plumber arrived at the unit another CX advised the inmate that he should be supervised and not coming there on his own". We discussed that briefly and then Paul said "look, I gave the inmate the van and sent him up to the unit because my foot is really bothering me today so I sent him". We then had a discussion regarding inmates driving the van or any of the vehicles. Paul attempted a brief debate regarding inmates driving as they are allowed to drive tractors but I made it very clear that they are NOT to be driving*

> *other vehicles and I said to him that he knows better than to do that.*
>
> …

[67] I note that the evidence as to other inmates driving vehicles while unsupervised came down to the following.

[68] First, some inmates, provided that they had been properly vetted, were permitted to drive tractors (which the parties repeatedly referred to as "Kubotas"; I took that to mean the small tractors and ride-on mowers often used in landscaping) on the Springhill grounds to mow lawns or plow snow. Vetting involved discussions with officers — including security, parole, and correctional officers — as to whether it was appropriate. As well, inmates operating the vehicles were not completely unsupervised since an officer would check on them from time to time, although not continuously.

[69] Second, and with particular reference to inmates working out of the plumbing shop, at some point in the unspecified past, there had been a practice of using inmates called "roaming plumbers", who worked out of the plumbing shop and had been approved to move about Springhill unsupervised, to perform different small plumbing tasks. They carried a small bag with a few tools for such repairs, such as a screwdriver, wrench, or a plumber's snake to clear blocked drains. None of the witnesses testified as to when exactly the practice stopped; all they could say was that it had been sometime in the past. However, I was satisfied that it existed when the grievor first started at Springhill and that it had fallen out of use or had been stopped some time after he started working there.

[70] Returning to the grievor and Mr. Rushton's conversation, they then discussed the incident when the grievor was found sleeping. The grievor became agitated about it being reported. Mr. Rushton's concern (at least as set out in his written statement) was that the grievor might sleep beyond lunch until 4:00 p.m., but the grievor said that that would not happen. Mr. Rushton noted that the grievor seemed to settle down as they talked about the incident. In the end, Mr. Rushton told him "… to let it go, it's done we are going to move on" (Exhibit 1, Tab 12). They then discussed some work and an item that the grievor was working on. Mr. Rushton then left, after satisfying himself that the grievor seemed alright.

[71] However, this did not end the discussion about the sleeping incident. The grievor was still upset, and at 12:30 p.m., he called the works office and spoke to Mr. Murray, who then walked over to the shop to speak to the grievor. Mr. Murray found the grievor upset. He explained to the grievor that correctional managers had a duty to report what they saw or found on their rounds or in tool inspections. Mr. Murray reported that the grievor said that he "… would have a hard time not saying anything to those Correctional Managers if he saw them …". Mr. Murray tried to calm him down. Mr. Murray said that the managers were just doing their job and that they had a duty to report things that they had observed. Nevertheless, the grievor said that he would be inclined to mention his displeasure if he ran into either of the managers. Mr. Murray told him that there was nothing personal in what happened and asked for the grievor's assurance that he would let it lie. It seemed to Mr. Murray that the grievor then calmed down. The conversation then shifted to the work to be done that day. (Mr. Murray wrote his observations in a statement, which the grievor reviewed at the hearing before me and did not dispute in any material way (Exhibit 1, Tab 13).)

[72] However, the grievor did not let things go. Shortly after his meeting with Mr. Murray, he sent a blank email to Mr. Mitton at 1:18 p.m. that contained only the subject line, "What goes around comes around" (Exhibit 1, Tab 11).

[73] Mr. Mitton testified that he found the email very disturbing and threatening. He had often received threats from inmates but never from co-workers. The vagueness of the perceived threat added to its impact, since he did not know whether he or his family was under a threat or what kind of threat (physical or reputational) was involved. He became quite emotional while providing this testimony.

[74] And that was certainly how the respondent took it at the time. Shortly after the email was sent, the Acting Deputy Warden had the grievor escorted out of Springhill and placed on administrative leave, pending an investigation.

B. The fallout

[75] A disciplinary hearing was held on January 4, 2018. Mr. Snedden attended. Two things happened.

[76] The hearing was recorded. The recording, as well as the testimonies of Mr. Snedden and the grievor, make it clear that the discussion included the physical

altercation with the co-worker on August 30, 2017, the email, and the grievor's decision to give an inmate the keys to the plumbing van and allow him to leave and perform the work in Building A without being supervised.

[77] At some point, the grievor was handed a discipline letter dated January 4, 2018, which dealt with the August 30, 2017, physical altercation. The incident had been the subject of a disciplinary hearing on September 6, 2017 (with Mr. Snedden). The letter stated that the incident breached the respondent's *Standards of Professional Conduct*, its *Code of Discipline*, and the *Values and Ethics Code for the Public Sector*. In the letter, the respondent imposed the 20-day suspension and included the usual warning that future acts of misconduct could lead to more discipline, up to and including termination.

[78] The grievor then left the meeting, to await a decision with respect to the email and the unsupervised-inmate incident. He remained on paid administrative leave. On February 7, 2018, he was advised to attend a meeting to receive the respondent's decision on the two incidents.

[79] On February 12, 2018, the grievor attended the meeting. He was handed a letter bearing that date and authored by Mr. Snedden. It began by observing that Mr. Snedden had reviewed the facts and circumstances of the case and continued as follows:

> …
>
> *… based on the evidence gathered and by your own admission, you did in fact allow an federal offender to drive an institutional vehicle by himself and report to aunit to compelte a work order without supervision. Furthermore, you sent an email containing a veiled threat to another employee. As such, you have committed a severe act of misconduct which is in clear contravention of the Correctional Service Canada (CSC)* Standards of Professional Conduct, Code of Discipline – Commissioners Directive (CD) 060, *and the* Values and Ethics Code for the Public Sector.
>
> …
>
> [*Sic* throughout]

[80] As for the unsupervised use of the van, Mr. Snedden referred to the following specific rules or codes of conduct:

> …

> ***Standards of Professional Conduct - Standard One – Responsible Discharge of Duties:*** *staff shall conduct themselves in a manner which reflects positively on the Public Service of Canada, by working cooperatively 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.*
>
> ***Infraction:*** *an employee has committed an infraction, if he or she:*
>
> *- fails to conform to, or to apply, any relevant legislation, Commissioner's Directive, Standing Order, or other directive as it relates to his/her duties;*
>
> *- 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 person(s), either directly or indirectly.*
>
> …
>
> [Emphasis in the original]

[81] As for the email, Mr. Snedden referenced standards two and three of the *Standards of Professional Conduct*, the gist of which required employees to conduct themselves professionally in word and deed and not to engage in abusive, discourteous, or threatening behaviour.

[82] Mr. Snedden concluded by finding that both infractions had "… strained the employment relationship to an untenable level" and added that when determining the appropriate discipline, he had considered the following:

> …
>
> *… all aggravating and mitigating factors including your years of service, employment record, previous discipline on your file, the information you presented during your disciplinary hearing as well as the fact that you hold a position of trust in a correctional setting.*
>
> …

[83] Based on all those factors, Mr. Snedden concluded "… that this misconduct is severe to the point that the bond of trust which is fundamental to the employment relationship has been irreparably damaged." Accordingly, he terminated the grievor, effective February 12, 2018 (Exhibit 1, Tab 17).

[84] At the hearing, Mr. Snedden testified that he had taken into account the grievor's seniority as both a mitigating and aggravating factor, the latter because the grievor should have known better, given those years of service. He also took into account the discipline for the physical altercation. He acknowledged in cross-examination that he did not conduct an investigation into the van incident. He had not, for example, considered the possibility that the correctional officer or officers in Building A appeared to have done nothing about the inmate's lack of supervision. No search of the van was conducted to determine if any supplies were missing. And, as far as tools were concerned, nothing contradicted the grievor's testimony that he had listed the tools taken by the inmate before he left and had carried out a tool check on his return.

VI. Summary of the submissions

A. For the respondent

[85] The respondent made extensive, detailed, and forceful submissions, the thrust of which was that each of the email and the grievor's decision to let the inmate have the keys to — and drive — the plumbing van incidents was sufficient alone to warrant the termination. Together, they underlined — and fully supported — Mr. Snedden's view set out in the termination letter that the bond of trust between the respondent and the grievor had been irreparably damaged.

[86] The grievor's decision to send the email, even after he had discussed the issue that precipitated it with Mr. Rushton and Mr. Murray, and even after they had advised him to take no action, was faulty. The email was clearly threatening, on its face. Despite the grievor's professed willingness to apologize to Mr. Mitton, in fact, he did not do it. He ought to have known that an email like the one he sent — particularly in the context of a correctional environment — would be perceived as threatening. It was also in line with the conduct — the physical altercation — for which he was awaiting a disciplinary decision. One would have thought that he would have been on his best behaviour while awaiting that decision, but he was not.

[87] The decision to allow the inmate to take the plumbing van's keys and to drive it unsupervised was conduct verging on gross and dangerous negligence. No plumbing emergency arose that required making a split-second decision to send an unsupervised inmate to deal with it. The work involved a defective shower head, and it could have

waited. Moreover, if the grievor's foot was so bad that he could not work, then he should have called in sick and let someone else who could do it and supervise the plumbing inmates take the shift instead. The grievor knew that before inmates could do things unsupervised, they had to be vetted by more than just one person.

[88] Other reasons made the grievor's decision unwise, suspect, and dangerous. The van could have been used to harm other inmates or staff or to effect an escape by driving through the perimeter fence. It might also have contained piping that inmates could have used to make an illicit drink called "brew". By his own admission, the grievor did not check the van before or after the inmate used it and so could not say whether any supplies were missing. Also present was the concern that by granting the inmate the privilege of the unsupervised use of the van, the grievor might have put him at risk. Other inmates might have suspected that the inmate was informing on them because of the favours he was granted.

[89] To the same effect was the grievor's testimony that he had read the inmate's sentencing decision months before the van incident. While the decision contained a reference to the inmate as having been a good employee, it also made it clear that he was prepared to lie to the police and to deceive them and others about his actions and conduct. For the grievor to trust such a person was foolhardy and even in a way arrogant. He knew that the inmate had been approved or vetted only to work in the plumbing shop, or on jobs around Springhill, and only under supervision.

[90] All this underlined a dangerous lack of judgment on the grievor's part, one that put not only him but also his co-workers, the inmate, and other inmates at risk.

[91] Each incident had in common a lack of judgment on the grievor's part. That lack of judgment was also exhibited in the physical altercation because, as Mr. Snedden testified, the grievor followed his co-worker after the initial altercation to again confront him. Sleeping with ear muffs, which exposed him to danger in the event that an alarm sounded that he could not have been able to hear, exhibited a similar lack of judgment.

[92] All this was more than sufficient to warrant the respondent's decision to terminate the grievor. His conduct irreparably damaged the employment relationship.

[93] In the alternative, if the termination is considered too severe of a penalty for what happened, the respondent submitted that the appropriate penalty would be a suspension until the date of this decision. For its submission, it relied upon *Matthews v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 38, and *Dekort v. Deputy Head (Correctional Service of Canada)*, 2019 FPSLREB 75.

B. For the grievor

[94] The grievor began by emphasizing that he agreed that discipline was warranted for the email and the van incident. However, the respondent had the burden of establishing that the penalty imposed was reasonable. The grievor submitted that the respondent failed to meet that threshold, and accordingly, termination was too severe and too unreasonable of a penalty in the circumstances.

[95] The grievor noted that the facts were not really in dispute. The grievor acknowledged that he had made a mistake and confessed it from the very start. His mistake was due in part to the fact that he had seen other inmates use vehicles (or at least Kubotas) without supervision, and knew that it had happened, and because of the past practice of the roaming plumber. His foot was causing him a great deal of pain, which led to the faulty judgment call.

[96] As for the van incident, the grievor pointed out that there was no evidence as to what if anything was in the van at the time at issue, so there was no evidence that any plumbing supplies had in fact gone missing. The only evidence with respect to tools was from the grievor, which was that none went missing.

[97] The grievor also noted that the correctional officer in Building A might have thought that the inmate should have been supervised, but there was no evidence that his concern went any further than saying that to the inmate. The correctional officer certainly did not stop the inmate from doing his work or leaving the unit to return to the plumbing shop unsupervised. Nor did Mr. Snedden give any thought to conducting an investigation into that officer's conduct.

[98] The question then was if the grievor's decision to let the inmate travel about the grounds unsupervised was such a serious breach of policy and conduct, why was no one else investigated? Why was the grievor the only one punished, when the correctional officer in Building A also allowed the inmate to move about unsupervised?

[99] Turning to the email, the grievor submitted that he acknowledged that it had been perceived as threatening. He felt remorse about its effect on Mr. Mitton, which he expressed both at the discipline meeting with Mr. Snedden and before me. The grievor acknowledged that the email was wrong and worthy of discipline but stated that the Board's jurisprudence does not support a lengthy penalty, certainly nothing near termination.

[100] The grievor pointed to *Cahill v. Treasury Board (Solicitor General Canada - Correctional Service)*, PSSRB File 166-02-28730 (19990830), in which a threat, "If you spit in my face, I would punch you in your face", was found to warrant only a written reprimand (rather than a 5-day suspension), and *Cyr v. Parks Canada Agency*, 2016 PSLREB 111, in which an employee's explosive reaction to his employer's decision to put him on sick leave, and his threat that his supervisor would "pay for this", had a suspension of 10 days reduced to 3. The grievor also pointed to *Graves v. Treasury Board (Revenue Canada - Customs, Excise and Taxation)*, PSSRB Files 149-02-199 and 166-02-28758 (19990611), in which a 5-day suspension for assault was reduced to 3 because of the employee's remorse.

[101] As for the sleeping incident, the grievor repeated the objection he made throughout the hearing that it was irrelevant and inadmissible for the purposes of considering the grievance. The termination letter did not mention it. Nor was there any clear evidence that sleeping on one's personal lunch break is in any event an offence that would attract discipline.

[102] The grievor also submitted that the respondent could not reasonably rely on the 20-day suspension for the August 2017 incident to establish progressive discipline. The principle works because employees who have been disciplined for similar offences in the past have a chance to reflect on their conduct and improve their behaviour. In this case, the respondent kept the grievor in suspense until after the email and van incidents. Nor could that discipline be used to support the discipline for the van incident because it was not of the same nature; see *Doucette v. Treasury Board (Department of National Defence)*, 2003 PSSRB 66.

[103] The grievor also submitted that the respondent's alternative penalty — a suspension until this decision is issued — is unreasonable. Since the grievor has retired, it would leave him with no benefit.

[104] The grievor submitted that a more appropriate penalty for the email incident would be something between a written reprimand and a three-day suspension. For the van incident, he submitted that a reasonable range would be a suspension of between three and six months.

C. The respondent's reply

[105] With respect to the correctional officer's failure to take any action for the inmate's lack of supervision, the respondent submitted that this it an oversight but that another employee's oversight did not diminish the seriousness of the grievor's conduct. The respondent submitted that the lack of a written policy about vetting inmates (that is, when they could be allowed to work at Springhill without supervision) was not determinative. Common sense alone made it clear that one did not permit inmates to work unsupervised with tools. The respondent distinguished some of the authorities that the grievor relied on.

VII. Analysis and decision

[106] This is a disciplinary grievance, which gives rise to these three questions:

- Was discipline warranted?
- If so, was the penalty imposed excessive?
- If so, is there a lesser penalty that would be better suited to the offence (see *Basra v. Canada (Attorney General)*, 2010 FCA 24 at para. 29)?

[107] The grievor acknowledged that his email and his decision to let the inmate attend to the task at Building A unsupervised deserved discipline. Indeed, the grievor was the first to reveal to the respondent that he had made a mistake by allowing the inmate to drive the van the plumbing van and perform the work unsupervised.

[108] Given that admission, I need only deal with the second and third questions. The respondent had the onus of establishing that the penalty was not excessive. In the event that it failed to meet its onus, the analysis would shift to the third question, in which the onus with respect to the appropriate penalty would be on both parties to persuade me as to the appropriate one.

[109] Was the termination penalty excessive? When considering this question, I took into account two things — the evidence and other decisions.

[110] First are the evidence with respect to both incidents.

[111] As for the email, essentially, it was sent in the heat of the moment. The grievor had just learned about the report about him sleeping. He was worried that his reputation would receive a black mark without him having a chance to provide his side of the story, which was that he slept on his time, not the respondent's, and he did so to deal with the consequences of his injury. Having said that, the email was threatening in substance and tone. The expression, "What goes around comes around", is commonly understood to mean that negative consequences of some sort will be visited on the recipient of the message. However, the email was in the grievor's name. It was not anonymous. Had it been anonymous, clearly, the degree of the threat would have been more severe. And the grievor expressed remorse for the email and offered to apologize (which he could not do because he was sent home).

[112] Turning to the incident involving the inmate, again, it represents a serious lapse in judgment on the grievor's part. He knew and understood that decisions as to whether an inmate could move about or work unsupervised could be made only after consulting other correctional employees who were familiar with the inmate. That decision could not be made unilaterally on the spur of the moment simply because one did not want to take the time — for whatever reason — to provide or to arrange for supervision.

[113] On the other hand, there was evidence that in the past, there had been a practice of permitting inmate plumbers to roam unsupervised — with which the grievor had experience. It is also clear that some inmates were permitted to work unsupervised, without incident. Moreover, the correctional officer at Building A who first raised the issue did not stop the inmate from continuing with his assignment unsupervised and did not send the inmate back to the plumbing shop, and there was no evidence to indicate that the correctional officer reported the incident to anyone. (That conduct is to be contrasted with the report that was made when the supervisors found the grievor sleeping in the shop.) Nor, for that matter, was there any evidence that the respondent checked the van or conducted any investigation into how at least one other correctional employee knew that the inmate was unsupervised, but did nothing.

[114] Second, there are the other decisions that dealt with correctional- or security-related disciplinary actions. I focused on those because they involved situations with similar safety concerns in correctional- or weapons-related environments.

[115] In *Cahill*, a correctional officer responded to a subordinate's statement with respect to a hypothetical situation they were discussing at that time, which was, "If you would cross my picket line, I would spit in your face", with the words "If you spit in my face, I would punch you in your face." An inmate heard the comment and complained to the warden about the incident. The officer was disciplined with the loss of five days' pay. He grieved, and the adjudicator who heard the grievance allowed it in terms of penalty and substituted a written reprimand for the loss of pay.

[116] The employee in *Labadie v. Treasury Board (Correctional Service of Canada)*, 2006 PSLRB 53, was a correctional officer. On the day in question, he was in the "H" Block control post at the Donnacona Institution in Quebec, which is a maximum-security penitentiary. An incident occurred involving inmates, and the employee left the control post to take action with them while wearing his weapon (a revolver) on his belt. That was a breach of the safety policies that required officers to store their weapons before entering the control post (and hence before mixing with inmates). The employer imposed a penalty equal to the loss of four days of pay. At the hearing, the employer focused on the employee's failure to store his weapon and on how he left the control post. An adjudicator denied the grievance, noting as follows at paragraph 53:

> *[53] I find that the grievor showed negligence by placing his weapon back on his belt before the meal period was over and before there were no longer any inmates in the corridor. Thus a disciplinary measure is appropriate. The grievor's co-workers felt threatened, and the grievor minimized the importance of what he had done. In the circumstances, I consider the disciplinary measure imposed by the employer appropriate.*

[117] The employee in *Eden v. Treasury Board (Canada Border Services Agency)*, 2011 PSLRB 37, a border services officer, failed to properly secure his duty firearm, ammunition, or OC (pepper) spray in his firearm locker. Officers were required to unload and store their firearms in an individual, designated storage container in a secure, restricted access room called an arming room. The employee was sick one day and decided to return home. He left his loaded firearm in a filing cabinet rather than in the arming room. He was disciplined for that lapse with a 10-day suspension without pay. An adjudicator concluded that the penalty was too severe and substituted a 5-day suspension.

[118] The employee in *Kinsey v. Deputy Head (Correctional Service of Canada)*, 2015 PSLREB 30, was a correctional officer. He received a financial penalty, an 18-day suspension, and ultimately a discharge for insubordination, negligence, and absenteeism. The respondent alleged that the employee refused to comply with directives to complete leave requests, to wear the appropriate rank insignia, or to properly store pepper spray. The respondent's evidence was that he had a history of insubordination, misconduct, and negligence; failed to report to work on time; carried a cell phone while on post; and, most seriously in the respondent's view, allowed an inmate to be released without a gate pass. The employee acknowledged his lapse on that point but noted that four other officers were present and were not treated the same way. The respondent viewed the last incident as culminating and terminated him.

[119] In response, the employee in *Kinsey* argued that the respondent failed to prove its allegations and argued that an 18-day suspension could not properly be viewed as progressive discipline. He argued that he stored pepper spray in accordance with the practice at an institution he had formerly worked at (regardless of the written procedures). The employee admitted to not wearing proper rank insignia. The respondent tolerated the presence of cell phones while on post, and the employee was the only one of five officers present at the inmate's release who was disciplined.

[120] The adjudicator in *Kinsey* ruled that despite the employee's problematic history with the respondent, he was entitled to fair treatment, and that his employment should not have been terminated for just cause without clear and cogent evidence. She upheld the 18-day suspension but found that the termination was too severe of a penalty and substituted a 3-month suspension in its place.

[121] In *Matthews*, the employee was a correctional officer who was terminated for breaching the respondent's policies relating to, among other things, conducting inmate escorts. While he and another officer escorted by car an inmate from Springhill to a halfway house and back, the following happened:

(a) the employee went to a pub for lunch;
(b) the employee permitted the inmate to go to the pub washroom unaccompanied;
(c) they stopped at a market, where the employee went to the washroom, leaving the inmate outside; and
(d) the employee was part of a discussion and agreement among the three of them to say that they went to a McDonald's fast-food restaurant rather than a pub.

[122] The employee in M*atthews* filed an observation report that misstated where they had gone for lunch. An adjudicator found flaws in the respondent's investigation and was concerned by its sole focus on the employee as opposed to his colleague on the trip. The adjudicator noted that the employee showed sincere remorse, albeit late in the process, for his conduct. Based in part on the evidence of some of the witnesses who felt that the employee was redeemable, the adjudicator allowed the grievance to the extent of substituting a reinstatement order as of the day of the order, without pay. (Given that the termination was effective in May 2014 and that the order was made in June 2016, it worked out to a suspension without pay of approximately two years.)

[123] The employee in *Yayé v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 51, was a correctional officer. On the evening of February 14, 2014, he was responsible for verifying the existence of living, breathing bodies in each cell on his range. The next morning, the officer who relieved him at the end of his shift found that one of the inmates had committed suicide. The video recording of the employee's rounds that evening demonstrated that he had hurried past the cells without checking each one carefully. After an investigation was held, he was terminated. He temporized in his evidence as to whether he had looked in the cells and how he could have missed the inmate hanging from the ceiling in the cell. The Board denied the grievance, thus upholding the termination.

[124] In *Dekort*, the employee was a correctional officer who was assigned to a mobile patrol post. The job involved patrolling the outside perimeter of the medium-security institution where he worked. The post was described as the last line of defence against escapes and the first line of defence against intrusions. He was found asleep in his parked vehicle. He was terminated. He agreed that he was guilty of misconduct that warranted discipline but not with the severity of the penalty that was imposed.

[125] The Board found that while the misconduct was extremely serious, it did not warrant termination. The Board took into account the lack of any detailed investigation by the respondent (other than a 10-minute fact-finding exercise), the employee's 9 years of service, and his acknowledgment of his wrongdoing. The grievance was allowed to the extent of reinstating him as of the date of the order, without pay. (Given

the termination in May 2017 and the date of the order in July 2019, it translated into a suspension without pay of a little over two years.)

[126] The employee in *Smith v. Deputy Head (Canada Border Services Agency)*, 2021 FPSLREB 9, was a border services officer. He was a full-time superintendent at a port of entry. He received a three-day suspension for two incidents. In one, he permitted three officers to take orders from him and other officers to leave the port of entry to buy beer that was on sale in a duty-free store in the United States. In the other, he allowed a similar incident to take place a few hours later.

[127] The employer alleged that the employee breached or neglected his duties by allowing the officers to leave during their shift and that he allowed preferential treatment to occur by failing to ensure that they paid duty and taxes on the beer they brought in, which included his two cases of beer The employer alleged that by doing so, the employee breached several sections of its code of conduct.

[128] The Board accepted that the employee's conduct represented a lapse of judgment. However, the evidence was that the officers made the beer run on their breaks and that the employee did not understand or realize that as a supervisor, he had to ensure that they complied with tax and duty requirements. The Board was concerned that the employer did not investigate or discipline anyone else involved in the two incidents. In those circumstances, the Board allowed the grievance, voided the suspension, and directed that all mention of the incidents be expunged.

[129] The employee in *Besirovic v. Deputy Head (Correctional Service of Canada)*, 2021 FPSLREB 33, was a correctional officer. She was assigned to a suicide/self-injury watch on February 24 and 27, 2017. It was alleged that she slept while on duty on February 24 and that she did homework while on duty on February 27. On both dates, she failed to maintain direct and constant supervision of an inmate and failed to document his activities, as she was required to under the respondent's policies. She was terminated.

[130] The Board agreed that the employee's misconduct was serious but also noted her remorse and her ready willingness to accept responsibility for it. The Board substituted a penalty of an 18-month suspension for the termination. By doing so, the Board was satisfied that "… this lengthy suspension will send a message both to the grievor and to other correctional officers that misconduct while watching inmates on high suicide/self-injury watch is very serious", at paragraph 191.

[131] From the extensive canvass of the decisions presented to me by both parties, most of which deal with correctional officers, I note the following.

[132] First, in only one case — *Yayé* — was the employee's termination upheld. In that case, an inmate, whose life and safety was an express and direct responsibility and function of the employee's duties, died by suicide as a direct result of the employee's dereliction. Moreover, the employee acknowledged any fault only with hedging and reluctance.

[133] Second, in all the other cited cases, reinstatement was ordered. The difference is in the range of the substituted penalty, which was from written reprimands or suspensions without pay of a few days or weeks at the low end to dates at the high end that coincided with the reinstatement dates (in those cases, upward of two years).

[134] Third, all the cases dealt with correctional or border services officers, not civilian employees. On this point, I acknowledge the respondent's submission that the grievor, even as a civilian employee, was clothed by law with the authority of a peace officer. However, it is also true that he was not uniformed in the quasi-military fashion of a correctional or border services officer. While he might have been responsible for the inmates, that responsibility was not of the same type or quality that would be exercised by — and be expected of — a correctional or border services officer. The grievor was, in essence, a plumber and an instructor, not a correctional officer.

[135] Fourth, I note that in a number of the cases, the decision makers placed some weight on the fact that security breaches in such organizations often result from a collective failure. That is, they are often situations in which more than one officer was responsible for what amounted to a security breach. An employer's failure in such a case to investigate everyone involved in an alleged breach of duties, or to treat them all in the same manner as the employee who was disciplined, often played a role in determining whether the disciplinary action was excessive.

[136] In the case before me, the respondent's concern about the grievor's decision to let the inmate drive the plumbing van to the job site unsupervised did not seem shared by the correctional officer who let the inmate into Building A. Nor, for that matter, did the respondent seem concerned about that officer's failure to do anything other than to tell the inmate (rather than the grievor) that he should not be unsupervised. Nor, for that matter, was the van searched to see if anything was missing, or was there any

investigation or discipline of the officer who let the inmate go about his business unsupervised.

[137] Fifth, whether the breach led to what animated the respondent's concern in the first place also appears to have played a role. Compare, for example, the result in *Yayé* with that in *Besirovic*. Both correctional officers in those cases were in effect on suicide watches. Both officers failed to perform the required inmate watch. In the former, an inmate died by suicide; in the latter, no inmate died or self-harmed. The Board in the first case upheld the dismissal. In the latter, the Board substituted an 18-month suspension without pay. And so, in the case before me, I note that none of the respondent's fears — the inmate escaping using the van, the loss of tools that could have been used as weapons, or missing plumbing supplies.

[138] Finally, all the cited decisions — as well as the general adjudication case law in the federal public sector — make it clear that an employee's remorse and willingness to acknowledge fault is always a factor when assessing the severity of the disciplinary action imposed. In this case, the grievor recognized his mistake as soon as the inmate returned to the shop. He made no effort to hide it from Mr. Rushton and in fact was the first to raise it and to acknowledge that he had made a mistake. His acceptance of fault was continuous throughout the resulting investigation and before me, at the hearing.

[139] Based on that review and on the facts of the matter, I am satisfied that the grievor's conduct of sending the email and of allowing the inmate to drive the van and perform the task without supervision warranted discipline. He was correct to acknowledge that from the start. However, I am also satisfied for the same reasons that the termination was far too severe of a penalty.

[140] With respect to the email, I appreciate that it was sent out of a sense of frustration that arose from the grievor's concern that his side of the story had not been communicated to the respondent. On the other hand, he had a chance to discuss the issue with Mr. Rushton and with Mr. Murray. He was urged not to succumb to his irritation and frustration but then sent the email anyway. And instead of telling the recipient why he was frustrated (which might have drawn any poison associated with such an email), he constructed and worded the email in a way that is commonly — and reasonably — understood as a form of threat. That being the case, the act was similar

in nature if not degree to the assault for which he later received the 20-day suspension without pay. Applying the principles of progressive discipline to the matter, I am of the opinion that a 30-day suspension without pay would have been — and is — the appropriate penalty for that conduct.

[141] With respect to the decision to let the inmate drive the plumbing van and perform the plumbing repair in Building A unsupervised, I note that this misconduct was different in nature and type to that of the email. It related to the grievor's duty to supervise inmates, rather than his obligation to be respectful and not to threaten anyone. It deserved discipline, but in my view, this conduct is at the lower or middle end of the scale based on my review of the cases presented to me. I take into particular account the fact that he was a civilian employee and that a correctional officer was aware of the decision to send the inmate unsupervised in the van and yet did nothing about it. Taking all this into account, I am satisfied that a suspension without pay for three months would have been — and is — the appropriate penalty for such conduct.

[142] Finally, in terms of whether the two penalties should be concurrent or sequential, I take into account (a) that both incidents fell within the scope of an employee's duties and responsibilities, and (b) that the principles of progressive discipline should for that reason be followed.

[143] Accordingly, I direct that the two penalties for the two disciplinary decisions should be considered to apply sequentially. I am satisfied that a total suspension of four months without pay, effective February 12, 2018, should be substituted for the termination.

[144] Since the grievor retired some time after February 12, 2018, the parties will have to discuss the effect of this order on any pay or benefits that might otherwise have been owed to him. I will retain jurisdiction of this issue for 60 days from the date of this decision to deal with any such questions that arise out of it.

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

(The Order appears on the next page)

VIII. Order

[146] The grievance is allowed in part.

[147] The grievor's termination on February 12, 2018, is set aside, and in its place is substituted a suspension of four months without pay.

[148] I will retain jurisdiction for 60 days from the date of this decision to decide any question as to the pay or benefits, if any, which the grievor might be owed as a result of this decision.

July 7, 2023.

Augustus Richardson,
a panel of the Federal Public Sector
Labour Relations and Employment Board