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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

KIMOY MARSTON

Grievor

and

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

Respondent

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

In the matter of an individual grievance referred to adjudication

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

For the Grievor: Herself

For the Respondent: Amanda Bergmann succeeded by Calvin Hancock, counsel

Heard by videoconference,
May 10 to 13 and October 11 to 14, 2022, and January 16 and 17, 2024,
and at Edmonton, Alberta,
April 25 to 28, June 6 and 7, and November 28 to December 1, 2023.

REASONS FOR DECISION

I. Summary

[1] Kimoy Marston (“the grievor”) was rejected on probation as a correctional officer (primary worker (PW) classified PW-1) at the Edmonton Institution for Women (EIFW or “the institution”) in Edmonton, Alberta. Despite receiving top marks in her pre-employment training, the evidence clearly established that she struggled to perform her work competently while on duty at the institution. Ultimately, the Correctional Service of Canada (“the employer” or CSC) determined that her poor performance had become an urgent situation as it formed the opinion that her judgement, reactions, and situational awareness put at risk her health and safety and that of other staff members and inmates.

[2] Ms. Marston grieved being rejected on probation and alleged that the employer’s decision was tainted by racial discrimination as she self-identifies as a Black Jamaican-Canadian. She pointed to many instances of being singled out for what the employer called extra training and performance-management efforts and claimed that she was treated in a different and detrimental manner compared to the other PWs. The grievor argued that due to this racial bias that she faced from the beginning of her work, she was never given a chance to succeed and lost all her self-confidence, which caused her poor performance in training and assessment scenarios that led to her being rejected while still on probation.

[3] The hearing proceeded at a slow and cautious pace to allow the grievor to take notes and to prepare each of her questions in her, in some cases, two-day cross-examinations of some witnesses. Due to several challenges with securing the grievor’s presence and active participation in the videoconference part of the hearing, plans were prepared to continue the hearing in person during the COVID-19 pandemic, to ensure that the hearing continued efficiently for the benefit of both parties.

[4] After carefully considering the many days of witness testimony and the many hours spent reviewing video evidence and listening to the closing submissions, I conclude that the employer established that the grievor was on probation when she was rejected, and that she was given notice in writing as well as two weeks of severance pay. It also presented days of evidence that established that the grievor had

serious work-performance shortcomings, which rebutted the allegations that it had acted in bad-faith or that its decision was disguised discipline and a sham.

[5] The burden of proof then shifted to the grievor to establish on clear and cogent evidence that she was treated differently, to her detriment, which was at least in some way linked to her race. After carefully considering the many days of witness testimony and the many hours spent reviewing video evidence and listening to the closing submissions, I concluded that she failed to adduce clear and cogent evidence to support a finding on a balance of probabilities that the different and detrimental treatment that she received was in any way connected to her race.

[6] Given my conclusion that there was no clear, cogent, or compelling evidence upon which I could conclude that the grievor established a *prima facie* case that racial bias tainted, even slightly, the employer's decision to reject her on probation, I allow the employer's motion to dismiss on the ground that the Federal Public Sector Labour Relations and Employment Board ("the Board") does not have jurisdiction to consider the grievance.

II. The relevant evidence

[7] The hearing of the case followed a very unfortunate path as the first Board Member assigned conducted a week of the hearing in 2019 but then passed away suddenly before the hearing could continue. A new Board member was assigned and promptly scheduled the hearing to begin anew in September 2019 and scheduled a continuation for February 2020. However, the parties jointly gave notice that the matter was settled, and the hearings dates were cancelled. However, the Board was notified later that the grievor refused the agreement, and her bargaining agent subsequently withdrew its representation. She continued with the carriage of her grievance self-represented, as she stated her desire to speak the truth. The appointment term of the Member who was assigned those hearings then expired.

[8] Finally, the current panel of the Board was assigned and chaired several case management sessions. The hearing covered most of six weeks, spanning two years and began via videoconference during the COVID-19 pandemic. Early in the hearing process, the grievor was challenged in terms of attending the proceedings, and the employer moved abandonment and asked that the hearing be suspended and the file closed. The grievor was unavailable at several times during hearing days and claimed

that personal health, family, and employment issues precluded her attendance. Her request to effectively split-shift the hearing and begin each day at 4:00 a.m. Mountain time and then break for her workday, with another late-day session commencing at 5:00 p.m. and also to conduct hearing days on weekends, was declined.

[9] The grievor's brief career was spent working as a PW (classified CX-I) at the EIFW, which housed approximately 150 inmates in separate maximum-, medium-, and low-security housing units.

[10] Correctional Manager (CM) Amanda McQuaid was the grievor's immediate supervisor and had a significant amount of interaction with her. Ms. McQuaid described her management style as fair and reasonable and added that she helped staff members when she could.

[11] She explained that a PW could be posted to the Secure Unit Control Post (SUCP), which had communications functions with other PW staff members on patrol in that unit and controlled granting access to and egress from that unit. The staff members assigned to patrol had several duties, including inmate counts at different times, and were to respond rapidly to incidents and emergencies anywhere in the institution.

[12] There was also a Main Control and Communication Post (MCCP), which was responsible for access and egress through all other areas of the institution, including the main entrance, through remote door controls.

[13] Ms. McQuaid testified that the main skills of a PW included security skills, such as applying handcuffs, controlling an inmate by means such as verbal commands, deploying OC (pepper) spray, de-escalating situations, and performing case-management work with inmates and their files.

[14] She also explained that responding to medical emergencies was very important. This included first-aid and CPR certification and the knowledge required to isolate a person in medical distress. This required radio calls to seek backup and potentially to open and close locked doors, so that other inmates could be removed from the medical-incident vicinity and to ensure a safe place to conduct the first aid.

[15] Ms. McQuaid said that a PW's oral communications are critical for their work, as they must try to control inmates and situations with the lowest level of force possible,

which is by voice, using verbal commands. She explained how the level, tone, and cadence of the voice must be measured, to control inmates and de-escalate situations.

[16] She also explained that the grievor received 14 weeks of instruction and training and that upon her successful completion of it, she was hired for a probationary position and then received 10 days of on-the-job training (OJT) at the EIFW, with specific attention to the different units, posts, shift briefings, and duties there, to orient new staff members to the location-specific details of their new duties. She also explained how some posts are stationary and how the PWs must remain at the M CCP, SUCP, or main entrance while assigned, as opposed to mobile patrol posts, which are designed to allow the PWs to be ready to respond immediately to calls for help or other duties throughout the institution.

[17] Ms. McQuaid testified that within weeks of the grievor completing her training and commencing work at the EIFW, she had become concerned about the grievor not performing her duties to the required standard of competency. She said that therefore, a file was opened, to document the concerns and the many efforts to assist and offer more training to the grievor. She said that it led to the grievor being put on a performance improvement plan, in consultation with her bargaining agent.

[18] However, she testified that little improvement was observed in the grievor's performance. She said that often, other staff members came to her and told her that they felt unsafe working alongside the grievor and that they had become frustrated that the grievor seemed unable to perform her duties properly. She said that more than once, a PW came to her in tears, expressing concern over working with the grievor and asking to not be assigned again to patrol with her as a partner.

[19] Ms. McQuaid testified that when faced with real-life situations in the institution, the grievor would "just freeze" and would get in the way of other PWs who attempted to control the situations. She noted the grievor's repeated failure to handcuff an inmate properly and her poor communication when directing inmates and on the radio with her co-workers or with the EIFW's Dispatch office.

[20] She also testified that the grievor never mentioned any concerns about harassment but did say that she would like some positive reinforcement, which Ms. McQuaid said is hard to do so when a staff member performs so poorly, as did the grievor. When asked if any of her other reports required the same amount of effort in

terms of improvement and performance management, she replied that none had ever required so much effort to seek to improve their work.

[21] Ms. McQuaid testified she had not witnessed any racist behaviour or incidents directed at the grievor and that she felt no racial bias whatsoever in her views of the grievor. She added that she had supervised other racialized persons and that she had not had any problems working with them; nor had she had any concerns about their work performance, and none was ever placed on a performance improvement plan.

[22] Heather Kowalchuk was a CM at the EIFW during the times at issue. She testified and stated that she often worked shifts together with Ms. McQuaid. She testified that Ms. McQuaid was very upbeat and motivating with other staff members and that while she was friendly in a professional manner at work, she did not mix socializing outside the workplace with people from work. She added that Ms. McQuaid was always on top of her work and that she held many meetings with the staff whom she supervised. And she added that Ms. McQuaid did not treat any of her PW staff members differently.

[23] When asked about her interactions with the grievor, Ms. Kowalchuk stated that she recalled the grievor being abrasive and unreceptive to work-related feedback. She said that the grievor did not communicate well and that she lacked good judgement related to understanding the urgency of some workplace situations.

[24] Ms. Kowalchuk explained that new PWs are regularly paired with a more experienced PW for two to eight weeks, to support their familiarization with the institution and to add an extra measure of risk management, given that dangerous situations can arise while on duty. However, she testified that the grievor required a longer period of these special pairings with shift partners. She said that it was required because the grievor's response technique to calls and incidents was lacking.

[25] The employer provided detailed evidence about the following incidents to support its submission that the grievor was rejected on probation for employment-related reasons and that its reasons were not in bad faith or a sham and disguised discipline.

A. First-aid training

[26] Ms. Kowalchuk testified that she was asked to assist in a mock medical incident on May 8, 2015, as part of the grievor's OJT. She said that the grievor and her patrol

partner were dispatched to respond to a medical emergency. She said that all staff members were given such scenarios, to ensure their training and the maintenance of their skills, but that this one occurred when the grievor was already on a performance improvement plan. She testified that several problems arose with the grievor's response to the medical emergency and that the grievor failed to take charge of the situation and did not communicate well on the two-way radio by not calling for assistance; nor did she communicate well verbally with the other participants. Errors were also described in how the grievor attempted to provide first aid.

[27] Ms. McQuaid was present for this training exercise and explained that the grievor failed to deploy the safety mouth-to-mouth resuscitation mask properly. The grievor bent over and appeared to be about to put her mouth on the mock victim's mouth, to perform rescue breathing. She was prompted to deploy a rescue-breathing protective barrier device that protects the rescuer from coming into contact with the victim's bodily fluids, like saliva or vomit. She added that despite being trained otherwise, the grievor proceeded to take the device and put it on her own mouth rather than on the victim, where it is designed to be placed. The grievor also failed to comprehend the victim's hand gestures that indicated that she was choking.

[28] Ms. Kowalchuk explained that the grievor appeared to not take the training scenario seriously, and she was directed to act as if it were a real medical emergency. She noted that in the debrief session, the grievor said that she did not take the exercise very seriously, as it was not real. It was also stated that the grievor was not receptive to the debriefing feedback provided after the training exercise. (SEE Employer Book of Docs EBD Tab 6)

[29] Katie Hastey, who was a PW and served as an acting CM, testified to that medical-training scenario and referenced a memo that she wrote and sent to Ms. McQuaid on July 27, 2015. She noted that she was present at the event and that the grievor had been dispatched by radio to a "code blue", which meant a medical emergency. She said that it was apparent to her that the grievor was "out of her element" and that she had to be prompted on what to do. She also noted that upon arriving at the scene and expecting a real medical emergency, the grievor laughed and asked if it was just a training scenario. It was also noted that Ms. Hastey was trained, that she had served on the EIFW's Emergency Response Team (ERT), and that her

knowledge and experience were relied upon so that she could provide special observation of the grievor in the medical-training scenario.

[30] Lindsay Keelaghan was the PW who was asked to act as the medical victim in the training scenario. She testified that as in all such training exercises, the grievor and her partner were dispatched to a medical emergency and upon arrival on scene were told that it was a training exercise and to act as if it were a real incident. She explained that nearly all new staff members receive one such training scenario during their probationary period and that the junior PW arriving on scene (in this case, the grievor) is told to take the lead. She also said that she was a veteran member of the ERT and that she mentored junior staff members in emergency-response matters.

[31] Ms. Keelaghan testified that upon the grievor's arrival on the scene, being told to treat it as if it were real, and to be the lead, the grievor had virtually no interaction with her as she lay on the floor, pointing to her neck and making choking noises. She said that finally after some time, she whispered this to the grievor: "I'm choking". She then proceeded to explain the many things that the grievor should have done to direct her partner to help, call for backup, call for the medical team to respond, etc. Most of all, she said, the grievor just did nothing to help her in her role as a choking victim.

[32] Ms. Keelaghan then explained that after the failure to help her restart breathing, she acted as if she had gone unconscious and again was forced to whisper to the grievor that she was in that state. She testified that then once she acted unconscious and informed the grievor of it, the grievor took out her safety apparatus for rescue breathing but put it on her instead of on the victim, where it is designed to be used. When asked if this scenario was too advanced or complicated for the grievor, who then was a relatively new PW, Ms. Keelaghan said that it is one of the most basic and entry-level first-aid scenarios used for staff training.

[33] In cross-examination, Ms. Keelaghan rejected the grievor's assertion that others in the room, including the managers, should have actively helped her with the medical response. She testified that such scenarios are for training new or junior staff members and that it was for the grievor to respond and take action, which the grievor had been told. The grievor also challenged her by asking whether it was true that the grievor did start CPR on her. Ms. Keelaghan replied that she did not recall. When this

issue was revisited in reply questions, Ms. Keelaghan was shown a memo that noted that the grievor did attempt CPR on her but that it was done incorrectly.

[34] In her testimony about this medical scenario, the grievor said that the management representatives laughed at her, made unwelcome comments, and told her to put on the safety barrier, so she thought they meant that they wanted her to wear it. It was a simple miscommunication, in her opinion. She also said that she tried to direct her partner, Ms. Hastey, to provide assistance but that she refused, which the grievor said was done to make her look bad and to set her up to fail.

[35] The grievor testified and said that in fact, other staff members and a manager at the mock incident began laughing and did not take it seriously. She also said that she thought that it was unrealistic and unfair that her patrol partner, who was dispatched to the mock incident with her, did nothing to help. In her cross-examination, Ms. McQuaid said that no other people laughed or smiled at the incident, only the grievor.

[36] The grievor also testified that she thought she did what she was told to during the scenario when Ms. McQuaid told her to “put on the safety mask” for mouth-to-mouth resuscitation. In cross-examination, Ms. McQuaid explained that all the staff is trained on the proper use of safety equipment, including the mask, and that the grievor should have known that the mask was not to go onto her own mouth. When challenged by the grievor in cross-examination, Ms. McQuaid denied that the training scenario was designed simply to ridicule her.

[37] Testifying more generally to these scenario training exercises, the grievor said that it was unfair that she had to do them. She said that they were unrealistic and that she had to do more than did other employees, which was unfair and contributed to her becoming self-conscious and losing her confidence. In her cross-examination on this point, Ms. McQuaid said that all the staff is regularly required to undergo training scenarios as part of nationally mandated standards. She added that the grievor was given additional training scenarios because her skills were deficient, and that the extra training opportunities would help her develop the necessary skill competencies.

B. Unlocking a door so that a CX could move an inmate

[38] PW Mallory Rodgers testified to an incident in which she responded to an inmate who was self-harming in a cell in the Secure Unit. The grievor was posted to

work the SUCP and was responsible for allowing all access and egress into and out of the unit, including the cell doors. Ms. Rodgers explained that upon being dispatched to and arriving at the cell where the incident was occurring, she raised her hand, which is universally understood at the institution to mean that the SUCP should then open the door, as the staff posted there always watch the movement of the staff and inmates in the unit on the CCTV monitors in the SUCP.

[39] She said that since the door was not opened after she raised her arm, she called the SUCP by radio and asked the grievor to open the cell door. She said that she waited and then made the call again. After waiting yet again, she had to call a third time before the grievor finally responded and opened the cell door where Ms. Rodgers was waiting. She said that she waited at least two minutes for the grievor to respond to her repeated calls, which she said caused her serious concerns due to the fact that the SUCP must constantly monitor and make rapid responses to activity in the unit, to ensure the safety of the staff and inmates.

[40] She added that after this incident, she found time to speak with the grievor, explain her concerns, and discuss the expectations of performing the duties in the SUCP. But the grievor was not receptive to the feedback and just made excuses as to why she had been unable to respond to the calls from Ms. Rodgers any sooner.

[41] Ms. Rodgers testified that she did not feel safe working with the grievor due to the grievor's lack of being able to respond to situations. She added that she expressed to Ms. McQuaid her concerns for her safety and that she asked not to be assigned to patrol with the grievor again.

[42] When asked in cross-examination if Ms. McQuaid took the initiative to ask for negative feedback about the grievor, Ms. Rodgers said that it was not so, as she approached Ms. McQuaid to raise concerns. She also stated in cross-examination that it normally takes a couple of seconds for the SUCP to open a locked door once the PW on the scene has signalled by raising her hand.

C. The medical emergency with an incapacitated inmate in a full bathtub

[43] Ms. McQuaid testified that a serious incident occurred in which the grievor put her and her partner at risk along with the life of an inmate in distress. One morning, at 6.25 a.m., she had just arrived at her CM office and was preparing her gear to begin her

shift, when she heard a garbled radio transmission from the grievor. MCCP then asked that the transmission be repeated. She said that she could make out the words “unconscious inmate” and that she then proceeded immediately to the housing unit where she had seen the grievor and her partner entering upon her arrival at the office. She said that when she got there, she saw the grievor standing outside the bathroom door doing nothing but that she could also see water all over the floor. She said that she went into the bathroom and saw the grievor’s partner struggling to get a large inmate out of a bathtub that was filled to overflowing and that the water was still flowing into the tub. She said that the partner was holding up the unconscious inmate’s head and that due to the large size of the inmate, the partner was unable to get her out of the tub on her own.

[44] She said that she went into the bathroom and that she helped the other PW pull the unconscious inmate out of the water. She then asked the grievor to get a blanket for the inmate but said that the grievor replied that she did not know where they were kept. Ms. McQuaid then asked an inmate to get the blanket. She also said that she had to radio MCCP to call 911 for the medical emergency, as the inmate was not responsive.

[45] Ms. McQuaid testified that after this incident, the grievor’s partner (PW Reina Linares), who was in the bathroom holding the inmate’s head out of the water, told her that she was very upset by the grievor’s lack of response during the incident. PW Linares also told Ms. McQuaid that before the unconscious inmate was discovered in the tub, they were doing a head count at 6:00 a.m. in the inmate’s housing unit, and the grievor had seen water flowing on the floor out of the bathroom with the door closed but that she did not tell PW Linares until she told the grievor that she had discovered an empty bed where an inmate should have been at that time of day. That delayed the response to the emergency situation. PW Linares also told her that upon the first sight of the inmate in the tub, she directed the grievor to radio for backup. She said that she was left with the impression that the grievor did not think that she had to work to improve her work performance.

[46] When asked in her examination-in-chief why the employer did not reject the grievor on probation after this incident, Ms. McQuaid testified that significant effort had been invested into helping the grievor improve her skills and that the hope was

that with more support, training, and mentoring, the grievor could improve and do well in her position.

[47] In a summary comment on this incident, Ms. McQuaid said that the grievor was no help at all during this incident and that she should have immediately made a clear radio call to request backup and a 911 call and finally helped her partner get the inmate out of the water, to help preserve life. She added that she did not think that the grievor understood the gravity of the medical emergency in the incident or the fact that her lack of response added risk to the situation by leaving the unconscious inmate in the water longer than she had to be left there and by delaying the dispatch of backup and a 911-call medical response. She added that in a debrief after the incident, the grievor took no responsibility for her lack of action and instead blamed her partner, stating that her partner was the senior PW and should have taken more action to call for backup responders to be sent.

[48] In her cross-examination of the employer's representatives on this incident, the grievor raised several related seemingly cogent issues, including the need to stand watch at the bathroom door in case inmates awoke and approached the small bathroom such that both the grievor and her partner could potentially have been trapped in the small room, with no other egress.

[49] The grievor also testified about this issue and said that her partner, who was the senior officer on the scene, told her to stand at the bathroom door and keep watch, which is what she did. She also testified that the incident occurred very early in her PW tenure, that she felt shocked at seeing the incapacitated inmate naked in the bathtub, and that it might well have hindered her response and contributed to her not using the two-way radio properly to call for backup.

[50] Ms. McQuaid responded to these assertions made in cross-examination by affirming that PW Linares might indeed have directed the grievor to wait at the door but that it would have been a normal response for the grievor to briefly enter the small bathroom to help her partner get the large, incapacitated inmate safely out of the tub, which was full. She then repeated her assertion that when she arrived at the scene, she found it not secure, with inmates starting to wake up and approach the bathroom as they were curious as to what was going on. She said that it should have been under the grievor's control; she should have directed them all to remain in their sleeping

quarters and that backup should have been urgently called to the scene immediately upon seeing the inmate in the bathtub.

D. An aggressive inmate resisted a PW in the shower

[51] Ms. Kowalchuk testified about an incident in which she dispatched patrol officers, including the grievor, to where an inmate was to be showered after OC spray was used to subdue her. The inmate was belligerent and resisting efforts by two PWs to control her in the shower room. Ms. Kowalchuk described how another responding PW (Ms. Lapointe) wrote a report detailing how upon her arrival at the scene, she saw the two PWs struggling to control the inmate who was in the shower and was banging her head against the wall. She also testified that PW Lapointe described to her how the grievor stood and watched but did nothing and that she had to push the grievor out of the way to get into the shower and restrain the inmate, to stop the attempt to self-harm.

E. The handcuffing video of July 12, 2015

[52] Ms. McQuaid testified that one of the basic and critical skills required of a PW when they begin work after their training course is how to handcuff an inmate. She testified that the proper technique is to use a firm but calm verbal communication to direct the inmate as to what to do. That is done to ensure control of the area, so that there are no distractions or interruptions and to speak to the inmate about what is going to happen once they are standing still, as directed by the PW.

[53] She explained that often, an inmate can have their hands cuffed in front of their torso and that a more aggressive and stronger control method that is seldom used is to handcuff them behind their back. She also stated that the grievor had been observed not handcuffing inmates confidently or with the technique from the training. She said that she had given the grievor additional training on the handcuffing technique.

[54] Ms. McQuaid narrated video evidence presented at the hearing that showed the actual work of the grievor taking an inmate out of a common area and placing her in handcuffs to escort her, with other staff members, to a high-security unit. Ms. McQuaid testified that staff members, including the grievor, were assembled and that a briefing was given as to the fact that they were to take an inmate into high-security; roles were assigned. She said that the grievor then walked away and that she had to be called back.

[55] While watching the video, Ms. McQuaid described what was obvious to all those in the hearing room, which is that the grievor appears very unsure of herself and fails to take adequate steps to take the initiative and control the situation and the inmate to be handcuffed. The inmate is initially compliant and calm when Ms. McQuaid informs her that she is being taken to high-security custody; however, the inmate becomes loud, profane, and agitated when the grievor incorrectly places the handcuffs and pinches the inmate's skin in the handcuffs while tightening them.

[56] The grievor was also clearly observed to be unsure as to whether to position herself in front of or behind the inmate, and she initially appeared to want to handcuff the inmate's hands behind her back.

[57] The grievor testified to this event and said Ms. McQuaid began to speak to the inmate and caused the disruptions. The grievor also admitted that her verbal commands to the inmate could have been louder and clearer. She added that she knew the standard practice that the staff used was to handcuff that inmate from behind. She also testified that despite her voice not being audible on the video presented at the hearing, she did speak quietly to the inmate and directed her as to what was required.

F. The handcuffing video of July 31, 2015

[58] With a similar report as the one for the handcuffing video of July 12, Ms. McQuaid narrated a video taken on that date in which an inmate was taken from a common area and placed into segregation. Those at the hearing observed the grievor on the video failing to take control of the inmate as the inmate begins to walk away from the grievor before being handcuffed. Another staff member had to direct the inmate to return and remain still, at which point the grievor struggles to get the keys into the lock, to secure the handcuffs. Ms. McQuaid testified that while the grievor initially made good verbal communications with the inmate, she failed to maintain control, as the inmate began to walk away before she was handcuffed.

[59] She also noted that the grievor should not have had to struggle with her keys to lock the handcuffs securely, which caused a risk in that the inmate could have become agitated or could have begun to physically resist the delayed handcuffing process. Ms. McQuaid said that all new PWs are expected to be able to competently handcuff an inmate when they complete their basic training course and that the grievor by then had also received supplemental training and tutoring on how to handcuff an inmate.

[60] In her testimony on this matter, the grievor said that she was not supplied a proper key-holder clip to fasten her keys to her equipment belt; she had to purchase her own. She said that her key clip was too tight and that it caused her complications when trying to deal with handcuffing inmates. She said the employer was responsible for giving her the proper key clip.

G. The high suicide watch

[61] The hearing viewed a security video taken in the early hours of August 1, 2015, in which an inmate is placed in a temporary room under high suicide watch (HSW). CM Candace Perry testified that she was the manager on duty that night and that the inmate in the video had a very volatile history of self-harm and of making threats to harm the staff. On that night, the inmate was being put under the HSW while awaiting medical staff members who would arrive on the day shift and would medically assess her mental health. Ms. Perry testified that inmates on an HSW must have a PW who constantly has eyes on them and is poised in a ready position at the door, prepared to immediately enter the room and intervene in a potential self-harm or suicide situation. She explained that every PW is trained in these HSW requirements in their basic training course before they start their employment.

[62] She testified that she had several PWs dispatched to the HSW, to ensure that the inmate was safely placed in the room and that the staff members doing the placement were provided relief, as management recognized the stress of such inmate movements and placement and always tried to ensure that the PWs who conducted the move and placement were then allowed relief from the HSW, to have a “cooling-off” opportunity.

[63] Ms. Perry testified that all staff members responding to her dispatch request would have been told that they were attending an HSW. She added that all staff members attending the HSW would be briefed on their role, as this was part of the CM's checklist for an HSW. When asked specifically how the grievor would have known about her assignment to this HSW incident, she responded that the grievor would have been told either when dispatched or when she arrived at the scene.

[64] In the video shown at the hearing, the grievor is clearly seen entering the hallway area where Ms. Perry and five other PWs are standing outside the door with a glass window to a room in which the inmate was placed temporarily. She noted that

the room was an interview room not a normal holding cell and that the room was prepared to not have anything available to the inmate to assist her in any self-harm.

[65] Ms. Perry testified to what was shown at the hearing and noted that the PW directly at the door is in a ready position with her hand on the doorknob to the room in which the inmate is being held and does not once take her eyes off the inmate as she looks through the glass window, which continues for over 10 minutes.

[66] After some time, the PW observing the inmate has the grievor approach from the side of hallway, where she has been standing for several minutes, and place herself directly behind the PW who has been performing HSW for over 10 minutes. Shortly after that, the PW performing HSW leaves the door and enters the staff office. The other PWs remain on the scene. Ms. Perry noted that this was the cooling-off period that she had explained and that the staffroom where the other PWs went to adjoined the one in which the inmate on the HSW was being held.

[67] Immediately upon the other PW leaving the HSW post at the door, the grievor advances herself to the door and looks directly into the room containing the inmate on the HSW. However, after only 2 minutes at the HSW post, the grievor turns her head away from the window, through which she has been watching the inmate on the HSW, and then walks away and steps into the doorway of the office where the other PWs are standing and talking. She appears to say something to the other PWs, and then, after a 10-second absence from the HSW post, she returns to the door and turns her gaze into the window and onto the inmate again.

[68] Ms. Perry testified that the grievor leaving the HSW was strictly forbidden and that it posed a real danger to the well-being of the inmate as it could have provided enough unobserved time for her to self-harm. She added that there could not be any valid reason to leave the HSW post and that even if a problem or something urgent arose, the grievor should have used her radio to call for backup or simply called out to the PWs in the adjoining room.

[69] When asked in examination-in-chief if the grievor possibly told the other PWs that the inmate could see and hear them from where she was being held, Ms. Perry said that the other PWs already knew this and that it was not a valid reason for the grievor to leave her HSW post.

[70] Ms. Perry said that a PW on an HSW can never leave their watch with their eyes on the inmate until and unless they are relieved by another PW, who takes up the HSW. She repeated that the grievor would have known that she was being dispatched to an HSW when she was called on the radio to attend or was told upon her arrival with the other PWs what was happening.

[71] As the video continues, the grievor is seen looking down the hallway for no apparent reason. She then leaves her post a second time to once again approach the PWs in the adjoining office. Ms. Perry testified again that the grievor looking away from the inmate, gazing down the hallway, and then leaving her post a second time was very unacceptable and again put the inmate at risk of being allowed to self-harm while not being watched.

[72] In her cross-examination on this incident, Ms. Perry said that she did not personally brief the grievor when she arrived at the HSW and said that she was not aware if in fact the other PWs did not communicate with the grievor upon her arrival on the scene.

[73] When the grievor challenged her that the grievor had not been aware of the HSW and was not even dispatched there but had been only walking by, and since she knew the inmate and just stopped to communicate with her and basically say hello, Ms. Perry said that she had no knowledge of any of that. When challenged by the grievor that the inmate told her that she could see and hear the PWs in the adjoining office through windows and that she tried to go to the other PWs and tell them as much, Ms. Perry said that she had no knowledge of it.

[74] When asked to clarify her assertion that the other PW conducting the HSW necessarily abandoned her post just before the grievor approached the door and window to the HSW inmate, the grievor affirmed that that was correct, and that the other PW did abandon her HSW watch.

[75] When called in re-direct examination to comment upon the grievor's accusation that the PW assigned to the HSW had abandoned her post, Ms. Perry said that this was a very serious allegation and that even if it were true, then the grievor or any other PW should have properly assumed the HSW immediately and not looked away and walked away from it twice, as the grievor was observed doing.

[76] She also testified that the grievor's explanation of just happening to walk by the whole event and choosing to independently strike up a conversation with the inmate who was on the HSW did not seem possible, as she said that the grievor approached the door while the other PW performed the HSW and stood directly behind her, as a PW is trained to do when taking over an HSW and relieving the other PW. She said that the grievor's action showed proper HSW relief and not just some random patrol and decision to drop by to visit the inmate. She added that there were no incident reports of the PW on the HSW abandoning her post before the grievor approached the door.

[77] In her testimony on this incident, the grievor stated that she had not been assigned to be at the placement of the HSW inmate into the observation room but rather was just doing a mobile patrol and happened to walk up to the whole group and recognized that she knew the inmate from her work and thought that she would stay a while to visit with the inmate.

[78] When she watched the video of this incident, the grievor testified that she stood there for several minutes, not knowing what anybody was doing, but when all the other staff members present went into a side office, she approached the door where the inmate was being held and had a visit with her. She stressed that the other staff members all left without briefing her on the situation and that nobody told her that it was an HSW.

[79] The grievor explained further while viewing the video again that after a brief time, in which she talked to the inmate through the glass window in the door, she then left the door to go into the adjoining office, where the other staff had assembled. She said that because she had been reported in the past, at this point, she thought that she should figure out what was going on and what she was supposed to be doing.

[80] She added that she knew that staff members were "out to get" her, so she said that she wanted to go to the office and talk to them. She then said that the assembled staff members told her to return to the door where she had been talking to the inmate.

[81] The grievor said that she was often shunned from staff conversations, so she just assumed that these staff members were having a private chat. She went back to talk to the inmate. She then added that she had gone to the office to tell the staff members there that the inmate could hear and see them through another window.

[82] She also said that she was aware that she was being “set up” and thought at the time that maybe this is what the other staff members were doing when they told her to return to the inmate’s cell door, even though she was not assigned to work there and was not assigned to the HSW.

[83] While being cross-examined on this incident, the grievor testified that maybe she had been called to report to the HSW, that maybe she had just heard radio chatter about it, or that maybe she just walked into the incident while on mobile patrol.

[84] When challenged with CM Perry’s testimony that she had dispatched the grievor to the incident, the grievor replied that that is not normally done because if she was assigned to the HSW, then there would not have been a mobile patrol available in case another emergency arose at the same time.

[85] The grievor was asked to watch the video again. It was put to her that for 10 minutes, she stood and observed PW “M”, who had her eyes locked onto the inmate and a hand on the door to the holding room in a ready position. Then it was pointed out that the grievor assumed a position very close to the back of PW M and that when she left the door, the grievor immediately stepped into the same position at the door, with her eyes on the inmate in the room. The grievor was challenged to admit that it was textbook positioning and technique, as explained by Assistant Warden Henry Shea, for the grievor to relieve PW M and assume the HSW. The grievor replied that she did not agree and that she did not know why the inmate was being held in the room, and she repeated again that she had not been assigned to the HSW.

[86] The grievor was asked why she stood for 90 seconds with her eyes focused on the inmate and then chose to walk away from the door to speak with the other PWs in the adjoining room. She replied that she had to tell them that the inmate could see and hear them. When asked why she returned to the door to watch the inmate again briefly and then left again, the grievor replied that she did not know that the inmate was on an HSW and that she just went there to visit with the inmate.

H. The two simultaneous emergency incidents

[87] Ms. Kowalchuk referenced a memo that she wrote about August 25, 2015, when two different emergency incidents arose simultaneously while the grievor was on general patrol. She explained that an inmate had a medical seizure in the courtyard at

the same time as an assault occurred in a different location. Ms. Kowalchuk said that the grievor was dispatched to respond to one of these emergencies; however, the grievor did not respond to the radio dispatch. She said that the grievor's partner arrived alone to assist at the reported assault but that the grievor presented herself at her office in a heightened emotional state and complaining of a headache.

[88] Ms. Kowalchuk said that she immediately dispatched another PW to respond to the assault where the grievor was to have been and that she assigned the grievor to a control post position, to find another PW who was able to respond. She added that due to a staff shortage that evening, the failure of the grievor to respond left the institution in a difficult spot and that the Secure Unit inmates had to be locked down due to the shortage of staff when the grievor then reported as ill and as having to leave work.

[89] Ms. Kowalchuk testified that earlier that shift, the grievor said that she was not well, but after the grievor communicated with both her and the bargaining agent, the grievor said that she was ok to continue work. She said that the grievor's failure to respond delayed the response to the assault, as her partner could not enter the inmate housing alone, and the delay could have put inmates at serious risk of harm.

[90] In her cross-examination, Ms. Kowalchuk denied telling the grievor earlier in that shift that she was not allowed to go home due to suffering a migraine. She also denied that she agreed to reassign the grievor to a desk to do case-file work that shift and repeated that the institution was short-staffed that evening and that she would not have agreed to such a reassignment. She also repeated that when the grievor was asked earlier in the shift, the grievor said that she was ok to continue work. She also added in cross-examination that the emergency dispatch for the grievor occurred before she went to her office and that she would have taken the grievor off patrol if she had been told that the grievor was too ill to perform her duties.

[91] Also in cross-examination, the grievor referred Ms. Kowalchuk to a "statement observation report" signed by PW Rob Skoronski, who wrote that he had observed the grievor being unwell and unable to perform her duties in an emergency situation, that "this will need to be addressed", and that, "[h]er lack of action at the time did cause the additional unneeded stress for the CM office during the noted situations."

[92] In her testimony in reply to this issue, the grievor said that her feeling of being unwell became worse throughout her shift, such that she was unable to continue. She

added that when she first felt too ill to work, she phoned dispatch and said that she could not work, but that soon after that, a radio call came to her and her partner to respond to a medical emergency. She said that when this call came, she was walking to the CM's office to say that she would need a sub to take her spot, due to illness. She said that the CM told her to ensure that the medical emergency dispatch had been cleared, but then another emergency was dispatched to her that she did not answer.

[93] The grievor also noted that upon her return to work shortly after that day when she was ill, she was met in the hallway at work by PW Skoronski, who asked her if she had faked being ill and then told her that he had heard that she would be fired. The grievor said that this was an example of the gossip and the hostile and harassing work environment that she faced and said that Warden Brigitte Bouchard admitted in her testimony that the EIFW was a bad place to work.

[94] I interrupted the grievor at that point and said that that was not correct, that I had no recollection of it, and that if it had been said, I would most certainly have recalled it because it would have been a remarkable comment for the Warden to make.

[95] When asked in cross-examination why she did not respond to the dispatches, even just to say that she could not respond, when she was dispatched to the assault emergency, the grievor said that at exactly the same time she was given this dispatch, she was entering the CM's office to say that she was ill, so she did not have to respond to the dispatch.

[96] The grievor complained many times during the weeks of the hearing that she had EIFW staff members who could testify to management's conspiracy to have her fired and to racist incidents but that none would agree to testify, as they feared reprisals. The grievor was reminded each time that anyone with direct knowledge of the issues before the hearing could be ordered by the Board to attend as a witness, but she declined each offer.

I. The rejection-on-probation decision

[97] Ms. McQuaid testified that many staff members came to her, some in tears, upset and fearing for their safety and asking not to be assigned again to shifts with the grievor after working with her and having had bad experiences with what they saw as

her failures to respond properly to incidents. Ms. McQuaid offered an unsigned emailed note from PW and Acting CM Hastey as an example of these communications.

[98] The grievor challenged Ms. McQuaid on the matter of staff-member complaints and asked whether it was true that Ms. McQuaid in fact solicited those complaints from them once the decision was made that the grievor's employment was to be terminated. Ms. McQuaid replied that when staff came to her with concerns about the grievor's poor performance, she asked them to put their concerns in writing for her.

[99] Ms. McQuaid testified that no single incident caused the grievor's employment to be terminated, but rather, it was a long list of concerns and incidents. She said that it was important to note that out of all these things, it was alarming to her that the grievor remained defiant and refused to accept responsibility and instead deflected and blamed others at work for whatever it was that had gone wrong or was told to her as deficient in her work. She said that this demonstrated a lack of accountability by the grievor and a lack of understanding or recognizing her actions.

[100] Ms. McQuaid testified that as early as June 18, 2015, in a meeting with the grievor and her bargaining agent representative, it was stated that she had to improve her performance or she could be rejected on probation. A performance-improvement action plan was tabled and discussed in detail at the meeting.

[101] The grievor challenged Ms. McQuaid in her cross-examination about harbouring an anti-Jamaican sentiment. She asked whether it was true that Ms. McQuaid had been to nightclubs on Jasper Avenue in Edmonton and had a bad experience with Jamaican men. Ms. McQuaid said that she never spoke about anything to do with Jamaican men. She also challenged Ms. McQuaid to admit that she laughed at the grievor when she was told of the grievor's career aspirations to become a warden. Ms. McQuaid denied it. When challenged as to why no positive feedback was given to encourage the grievor at work, Ms. McQuaid said that it is tough to provide positive feedback where there is so little positive performance.

[102] Warden Bouchard, who was the decision maker in this matter, appeared as a witness at the hearing and testified to her decision. She explained that almost immediately after starting as the warden in early August 2015, she was presented with serious concerns by her management team about the grievor's poor job performance. She said that the concerns dated back to the grievor's start as a PW.

[103] She said that they were serious problems and that her managers reported that despite significant efforts to offer extra training and support to the grievor, they were not seeing much if any improvement in her work. She testified that she convened an August 25 meeting of the grievor and her bargaining agent representative, Ms. McQuaid, and Assistant Warden Shea to discuss these problems. She said that a detailed action plan, outlining all the concerns, incidents, and required improvement was sent to the grievor's representative two days in advance of the meeting.

[104] Ms. Bouchard said that it was rare that a staff-performance problem had to come to her for action, as nearly all such problems were resolved by managers, but that she went into the meeting with an open mind and without any predetermined outcomes as to the next steps. She said that after the meeting, she concluded that the grievor took no accountability for her actions and poor performance and that in fact, she did not acknowledge any deficiencies in her work.

[105] In reaching her decision to terminate the employment of the grievor while on probation, she described how she engaged with the CSC's National Headquarters after the August 25 meeting and that serious incidents with the grievor after the meeting convinced her that the many efforts made to help and to offer more training to the grievor would not be successful. She explained that finally, by late September, it was clear that the grievor's poor performance and lack of good judgement could put her and her partner at serious risk of harm or death. She decided that the grievor had to be put on immediate suspension while the papers to terminate her employment on probation were prepared.

[106] She testified that her senior management prepared the suspension to begin on September 29 and that she made sure that every precaution was taken to treat the grievor with respect and to protect her dignity in how she was given the news and escorted out of the institution and off the property before the main entrance became busy with the morning shift change.

[107] However, she explained that this plan did not work, as the grievor refused to cooperate and refused to take direction from CM McQuaid and CM Christy Vollrath and that due to these delays, the exit from the institution took place in the middle of the shift-change rush of staff members. She added details, as she said that she had been

able to observe the grievor standing outside the main entrance and refusing to leave for some time.

[108] She also said that she was aware of the grievor's allegations that she made after she received notice that she suffered harassment, bullying, and racial bias from management but said that the grievor never mentioned a word of this to her and that the grievor could have done so, as she regularly walked the hallways of the institution at least once a day, to be visible and accessible to all the staff.

[109] Ms. Bouchard said that once the final termination-of-employment letter was prepared, she requested a meeting with the grievor and her bargaining agent representative. They asked to delay it from October 5 to October 8. She said that care was taken to conduct the meeting away from the EIW, to avoid a repeat of the very public incident that occurred upon the grievor's departure from work. She said that the grievor appeared angry at the meeting and that the meeting was followed by a letter from the grievor that itemized the issues and incidents that had occurred during her employment and in which she blamed other staff members or management for being at fault in each occurrence. She said that this confirmed her earlier impression after the August meeting that the grievor lacked accountability and awareness of the problems with her poor performance at work.

[110] When asked in her examination-in-chief to comment on the management performance of Ms. McQuaid, Ms. Bouchard said that she was a tough but always fair manager and that all her PW staff were strong performers. She added that when she was off shift and away from the institution, she knew that things were in good hands with Ms. McQuaid on duty. She said that she knew that any problems would always be handled properly when Ms. McQuaid was involved and that she observed that all staff were treated fairly by Ms. McQuaid and without fear of racial bias.

[111] During her cross-examination, Ms. Bouchard denied that she blindly accepts as truth everything she is told by her managers and said that in the grievor's case, she double- and triple-checked everything and received evidence of the grievor's alleged poor performance that ultimately made her decide that the grievor had to be urgently removed from the workplace.

[112] Ms. Bouchard said that she was unaware when told by the grievor that she reported being harassed by Ms. McQuaid to Acting Wardens Shea and Laura Contini.

When challenged with the assertion that the grievor and her bargaining agent representative had no advance notice of the August 25 meeting, Ms. Bouchard said that she was shocked to hear it, as her standard practice is to give notice through a phone call and or an email. She also added that she found it unusual that both the grievor and her representative were available with no notice at all to attend the meeting, as the grievor asserted in cross-examination.

[113] When asked by the grievor why she was not allowed to speak at the August 25 meeting, Ms. Bouchard said that this was not accurate and that both the grievor and her bargaining agent representative were there to ask questions and to provide feedback to the concerns being raised by the employer.

[114] Ms. Bouchard testified that she could not recall the exact details or date but that she did clearly recall there being a life-threatening incident at the institution that involved the grievor and that convinced her that the grievor could no longer be on duty in the institution.

[115] The grievor sought to enter into evidence as an exhibit and to cross-examine Ms. Bouchard on an October 2015 consulting report titled, “EIFW Workplace Climate Review” (“the climate report”). The report spoke of staff members who had expressed concerns about harassment but who said that they were too fearful of retribution from management to speak out or make reports.

[116] The employer’s counsel objected to the report being entered for the truth of its contents, as its authors were not called as witnesses to be cross-examined and on the grounds of relevance, as the report takes a high-level view of the EIFW and does not address the grievor’s individual situation.

[117] Counsel for the employer argued that this would prejudice the employer’s case without providing any facts of the grievor’s personal situation in the institution. The grievor argued that the report accurately captured the poor situation of staff members being treated badly by management and that it was evidence supporting her allegations.

[118] I declined to accept the report as an exhibit or to rely on any of its findings, as they are not specific to the grievor and thus had a high risk of being unfairly prejudicial to the employer’s case.

[119] In addition to the climate report that was not allowed as an exhibit, the grievor tabled this February 4, 2016, memo to all the staff from Warden Bouchard and signed by the bargaining agent representative, Danisa Jara, who represented the grievor during her time on the job at the EIFW. It addresses the same issues of problems at the EIFW:

EIFW Workplace Climate Commitment

Following the EIFW Workplace Climate Review, Union Representatives and Senior Management, in collaboration with the Office of Conflict Management have come together in partnership. We acknowledge that many staff at EIFW have been subjected to an unhealthy work environment. We apologize for the impact this may have had on you.

All partners are committed to work together to promote positive change, leading to an environment of mutual respect and trust, and to address all concerns in the report.

We ask you to partner with us in creating a healthy workplace and change our culture.

...

[120] The grievor challenged Ms. Bouchard by asserting that she had been subjected to differential and detrimental treatment during her employment at the EIFW, due to being a Black Jamaican person. The grievor pointed to this memo and asked Ms. Bouchard whether it was an admission of all that she claimed happened to her.

[121] Ms. Bouchard denied it and said that everything that the grievor complained about was solely due to her poor job performance and need for improvement. Ms. Bouchard explained that when she commenced her work as the EIFW's warden in 2015, she pledged to be as open as possible and to work with the staff and its bargaining agent representatives, to make the workplace as healthy as possible. She said that when she was presented with concerns from staff members that an old report had been ignored, she agreed to have a new report done and then sent the memo to signal to the staff that she was committed to working to improve the institution, but she stressed that neither the report nor the memo addresses any of the grievor's specific circumstances.

J. The grievor's suspension and escort off EIFW property

[122] Ms. McQuaid testified that preparations were made to inform the grievor of the warden's decision to reject her while on probation and to escort her off the EIFW's

property at approximately 7:00 a.m. on September 29, 2015. She explained that care was taken during planning, to have the escort and exit be as discreet as possible, to minimize the risk of the grievor being embarrassed in front of other staff members. She testified that the grievor was called to come to the CM's office and that she and CM Vollrath met the grievor. CM Vollrath was assigned to assist with the planned departure of the grievor, as she was a member of the EIFW's stress support team. A management team had previously met and planned an escorted exit at that time of day, to avoid the busy time of the shift change around 8:00 a.m. The main entrance was to be closed briefly, to avoid meeting any staff members in that enclosed area.

[123] However, Ms. McQuaid testified that the exit did not go as planned, as the grievor repeatedly refused to follow directions and became agitated. Ms. McQuaid said that upon being given the news and being told that she had to leave the property, the grievor refused to leave the office computer, on which she had been checking her email. After some time passed, when Ms. McQuaid and CM Vollrath insisted that the grievor close the computer, she demanded that she be able to walk some distance through the offices to go to her locker to gather items and later go to the mail slots to check her mail, despite being assured that all such items would be gathered and delivered to her home.

[124] In her testimony on this point, the grievor explained that she had been directed to make a computer entry accepting her final performance-management action plan. She said that she refused and that she tried several times to say that she had questions about it and that she did not agree with some of the critical comments in it. She also testified that she did not trust the managers, as she knew that they were lying and conspiring against her, to make her look bad and to have her fired. She testified that she was not sure what they were trying to do to her that morning, but she thought that they might be trying to make her look bad and to use it as a pretext for firing her.

[125] The grievor said that she then decided to go through her emails and to print them before she left, to be able to defend herself later on. She also testified that she did not think that the CMs could just tell her to leave without having paperwork confirming the details and that they could not do this without allowing her to have someone present to accompany her and to have bargaining agent representation.

[126] She said that she asked them at the early morning meeting if she could call her bargaining agent representative to join her there, but they would not allow it. She said that they also asked her to remove and return her equipment to them, but she thought that it was part of a trick to later use against her if she had no equipment. So, she tried to refuse this as well, as they had nothing in writing confirming what they were doing.

[127] Ms. McQuaid said several times during these events, demands were made for the grievor to comply and exit the property immediately. She also said that during their walk down the long hallway from the locker room, another staff member was seen, and that the grievor loudly exclaimed this to that person: "They're firing me."

[128] Ms. McQuaid testified that by the time that the grievor insisted on checking her email on an office computer and then had walked the distance to her locker and then checked her mail slot, the main entrance had started to become busy with staff members arriving for the morning shift change.

[129] In her testimony, the grievor explained that she did not trust the managers, as other staff members had told her to watch her back since management was out to get her. She said that she heard that management might put something into her mailbox to use against her, as a ground to fire her, so she wanted to be sure that nothing like it was in her mailbox. She also said that after visiting the mailboxes, she had to go to the locker room since she had her own lock on her locker, which she wished to retrieve.

[130] Ms. McQuaid described how the grievor finally exited the building and then insisted on staying outside the main entrance, on the edge of the staff parking lot, where there was a staff smoking area. Ms. McQuaid said that the grievor became quite loud at that point and continued to yell her name, "McQuaid", angrily over and over again, blaming Ms. McQuaid for losing her job. Ms. McQuaid used the words "obsessing over me" to describe the grievor's actions while they were outside the main entrance. She said that she told the grievor many times that she had to leave immediately but that the grievor refused to.

[131] In the grievor's testimony on this point, she said that she simply went outside and admitted to being upset but said that listening to Ms. McQuaid testify about her yelling and flailing her arms was the first time she had ever heard of that. She denied doing it. She said that she was too emotional to drive, so she phoned a co-worker, who told her that she should have been given advance notice of the morning's meeting and

that she should have had her bargaining agent representative present. So, she said that she saw that nobody would stand with her or defend her and that she thought that it was just the Canadian way of doing things.

[132] The grievor said that Ms. McQuaid came outside to the smoking pit, where she had been speaking with CM Vollrath, and that Ms. McQuaid told her that she would have to leave immediately or that the Royal Canadian Mounted Police (RCMP) could be called. The grievor shared how shocked she was and how upset this made her feel, as she was a peace officer, but she was being threatened with having the RCMP called, to remove her. She felt that management just wanted her gone and that it had no consideration for her well-being or safety.

[133] Ms. McQuaid testified that it was unnerving for her and that she became fearful as the grievor became angry and agitated while standing outside the institution. Ms. McQuaid said that it was after 8:00 a.m. by then and that with her shift over, she would have normally been able to go to her car near where they were standing but that she feared doing so, in case the grievor saw her car and tried to follow her home.

[134] When asked in her examination-in-chief if she had ever experienced such a confrontational situation at work, Ms. McQuaid replied that she had never experienced such a level of anger and aggression as she felt the grievor directed at her during this incident.

[135] When cross-examined on the matter of her feelings while she tried to get the grievor to leave the property, Ms. McQuaid was asked if she considered the grievor a threat. She replied that she observed the grievor being unstable and that she did not feel comfortable being there with her outside the institution. When asked if she felt that way about the grievor during her time of employment at the EIFW, Ms. McQuaid replied that she did not and that she never felt physically uncomfortable being around the grievor.

[136] When asked in cross-examination why she left the smoking pit and then returned to yell at the grievor, Ms. McQuaid said that she did not yell at the grievor. She added that when the grievor repeatedly refused to leave the property, she went back inside and spoke to the warden, who could observe the scene from an office window, and that the warden told her that the grievor had to leave the property immediately.

[137] Ms. McQuaid said that she returned to the smoking pit to tell the grievor that the warden said that she had to leave immediately. When asked, Ms. McQuaid denied threatening to call the RCMP and added that she remembered it clearly. She repeated that she did not yell or raise her voice at the grievor during the effort to have her exit the institution and property.

[138] When challenged to explain why she had testified in her examination-in-chief that she felt unsafe during this interaction with the grievor, Ms. McQuaid affirmed that she indeed felt unsafe at that moment, when the grievor refused to leave the property and was quite agitated and continued to wave her arms in the air and yell her name, McQuaid, over and over while blaming Ms. McQuaid for being fired from her job, all the while in a heightened emotional state.

[139] Ms. McQuaid denied the allegation put to her that she racially profiled the grievor as an angry Black woman who was capable of violence and possibly following her home from work. Ms. McQuaid said that she did not consider the matter as racially motivated but rather that the grievor was very agitated and in a heightened emotional state repeated her name loudly. She stated that she felt quite concerned by these actions of the grievor.

[140] The grievor asserted that CM Vollrath came to her and was quite supportive; she even apologized for what was happening and contrasted this with her testimony that Ms. McQuaid yelled at and threatened her. When this was put to Ms. McQuaid in cross-examination, Ms. McQuaid said that she did not agree that she showed the grievor racially motivated hatred in how she treated her during the long time it took to get the grievor to exit the institution and property outside its front gate.

[141] Ms. Bouchard was asked about the plans to escort the grievor off the property. She explained that she always assigned two staff members to such duties in case there was an incident, as two would be better able to handle whatever might arise.

[142] When challenged in cross-examination about the situation that arose outside the institution when the grievor was escorted out, Ms. Bouchard replied that she honestly saw it as a shared responsibility. She added that she was aware that the grievor refused to follow directions and that for some time, she refused to leave the institution, after being repeatedly directed to.

[143] The employer called Ms. Vollrath to testify. When these incidents happened, she was a CM at the EIFW and served as a first-aid trainer. She was also on the critical incident and stress management support team. She testified that as a CM, she never supervised the grievor, but she would have occasionally assigned her to posts or dispatched her to respond to incidents. She described being assigned to assist at the meeting and to escort off the premises the grievor, who was to be suspended pending her rejection on probation.

[144] Ms. Vollrath explained that upon the bad news being shared with the grievor, she refused to listen or follow directions once she was told that she had to exit the institution immediately and that her belongings would be packaged and delivered to her. She also said that the grievor quickly became agitated and that she escalated the interaction by arguing with Ms. McQuaid.

[145] Ms. Vollrath testified that it should have been approximately 40 steps from the office where they met to the main entrance and that the brief meeting with the grievor should have enabled her to be exited very quickly from the institution, to ensure that her dignity was preserved. However, Ms. Vollrath said that the grievor repeatedly demanded and then finally began to move in a direction to walk approximately 15 minutes across the entire institution to check her mailbox and gather some personal items from her locker.

[146] She added that these actions by the grievor, which were contrary to what she was instructed to do, caused an unfortunate spectacle at the main entrance when they finally arrived there. She said that 15 or 20 staff members were being held back from entering but that this pause lasted many minutes longer than it should have, such that when the grievor finally passed through the main entrance, many staff members observed her exit.

[147] Describing the grievor's behaviour during the extended walk across the institution and finally to the main entrance to exit, Ms. Vollrath said that the grievor acted erratically, walked ahead of the two escorting CMs, spoke in an angry and raised voice in a disrespectful manner to the two CMs, and spoke loudly to the staff members whom they passed in the hallway, stating that she was being made to leave. Ms. Vollrath said that this behaviour and disrespect by the grievor was shocking and that she asked the grievor to stop it.

[148] Ms. Vollrath testified that partly to give an appearance of normalcy, as just the two of them passed through the main entrance, she continued walking with the grievor to the open area adjacent to the main entrance and parking lot known as the “smoking pit”, where the staff could congregate outside on break. She said that she walked there with the grievor, to give the appearance that they were just going to the smoking pit on a break. She said that she explained this to the grievor and said that they should just chat for a couple of minutes, so as not to appear unusual. She also ensured that the grievor was able to call a family member to seek support and any required assistance.

[149] She continued to explain that after a few minutes of their conversation, Ms. McQuaid rejoined them and told the grievor that she would need to leave the property as requested by the warden. She said that the grievor replied by yelling at them that she was leaving. Ms. Vollrath testified that Ms. McQuaid was at all times professional and respectful and that she did not raise her voice or otherwise become agitated. She also denied that any mention was made of the RCMP when told that the grievor would testify that Ms. McQuaid threatened to call the RCMP to remove her from the property.

[150] Ms. Vollrath said that during the exchange in the smoking pit, the grievor was agitated, was in a heightened emotional state, used a loud, angry voice, and spoke in a disrespectful manner to both her and Ms. McQuaid.

[151] In cross-examination, Ms. Vollrath was challenged to admit that the grievor’s emotional response was normal, given the bad news she had just received about being suspended. Ms. Vollrath replied that the grievor’s behaviour while they tried to get her to exit the property escalated beyond normal.

[152] When challenged that she had been disrespectful, Ms. Vollrath reminded the grievor that she had called the two CMs liars and that she had spoken very curtly to them. Ms. Vollrath said that she did not feel threatened by the grievor during this incident and clarified that she was shown her notes to file after the incident, in which she wrote that the grievor yelled at Ms. McQuaid in the smoking pit and did not yell at both of them. When challenged on this difference between her notes written at the time of the event and the testimony given eight years later, Ms. Vollrath said that it was just a memory lapse due to the passage of time.

[153] When asked by the grievor if she raised her arms and flailed them in the air during their conversation, Ms. Vollrath replied, “No, not with me.” Ms. Vollrath also

said that she did not feel it necessary to call the RCMP and confirmed that there were security cameras that would have had a view of where they stood in the smoking pit during this exchange. When pressed twice to agree that Ms. McQuaid said that she would call the RCMP while the three spoke in the smoking pit, Ms. Vollrath replied both times that that did not happen. Ms. Vollrath also said that she was not aware of Ms. McQuaid being afraid of the grievor.

[154] When challenged by the grievor to admit that she was not concerned for the grievor's well-being when she was to depart the property and drive her car, despite being in a heightened emotional state, Ms. Vollrath said that she saw another staff member walking toward them, who said that she would speak to the grievor.

[155] The grievor was reminded during her cross-examination on this incident of the fact that both Ms. Vollrath and Ms. McQuaid denied that anything was said about the RCMP during their efforts to get her to exit the property. The grievor was then asked that in light of the emphasis that she placed on this allegation that she made about being threatened with a call to the RCMP, why did she fail to mention it in her lengthy email to the warden dated October 1, 2015?

[156] The grievor gave a lengthy and rather circular reply in which she stated three times that she did not mention it because she did not want to get Ms. McQuaid in trouble. She added that she thought then that Ms. McQuaid would already be in trouble for taking away all her equipment when she left the institution once she was suspended from work.

[157] When reminded of her testimony that Ms. McQuaid approached her in the smoking pit after being asked to leave the property and raised her voice and yelled at her but that Ms. Vollrath and McQuaid both denied it, the grievor said that she did not say that Ms. McQuaid yelled or raised her voice.

K. The Assistant Warden, Mr. Shea's testimony

[158] The employer called Mr. Shea to testify. He has risen through the ranks at the CSC from beginning in 2007 as a CX-I and CX-II to a security and intelligence officer and then to a CM and finally the assistant warden for operations at the EIFW.

[159] His several days of testimony is captured in a separate sub-section of this decision due to the central role it played in the hearing. Unlike the grievor's immediate

supervisor, Ms. McQuaid, the grievor made no suggestion of strain in her working relationship with him. I found his testimony on the various aspects of the employer's assessment of the grievor's poor performance to be detailed, precise, supported by relevant CSC authorities and finally, credible.

[160] He also spoke of his being a racialized person and described how this motivated him to provide extra help and give extra consideration to the grievor's challenges at work. These aspects of his testimony stood unchallenged at the hearing. Thus, adding further credibility to his testimony.

[161] He gave a great amount of detail about the training and duties of a PW at the EIFW and stressed that every PW must be fully capable and competent to fulfil all the duties assigned to them on their first day of work at the institution. He said that the safety of the staff and inmates demands that competency.

[162] He also provided detail of the OJT orientation to the facility and the training mock scenarios provided to all staff. He provided details of each mentor who was assigned to the grievor. He noted that her first mentor had a conflicting shift schedule, which made it difficult for them to meet in person. He said that the grievor showed significant performance problems early such that that other highly experienced and respected mentors, who were more available, were provided.

[163] Mr. Shea testified that he recalled meeting the grievor on her first day of work and that he had a positive first impression of her. He said that she seemed keen and that she had good, shiny boots. He added that as a self-identifying visible minority, he has always taken special pride in seeing another visible minority person begin their career, and that more visible minority staff members will help the EIFW.

[164] When asked in examination-in-chief about the grievor's performance record, Mr. Shea said that he became aware of her problems with poor performance early in her tenure, and he continued to recount from memory, many of the incidents and issues described in detail throughout this decision. He said that he spoke with the grievor many times and that he offered assistance to her. In describing the many reported incidents of her poor performance, Mr. Shea took a very methodical approach to explain what the grievor should have done according to her training and according to the situations that she found herself in.

[165] However, Mr. Shea testified that often, he found that the grievor used poor judgement and either did not communicate with other staff members or with dispatch on her radio or that she did it so poorly that it delayed the proper response to an incident. He added that after each incident, a pattern arose in which she refused to accept responsibility or feedback related to what had happened.

[166] He reviewed a June 18, 2015, meeting related to the grievor's action plan, at which she and a bargaining agent representative were informed that her performance had to improve, that she had to take the feedback being offered to her seriously, and that the Employee Assistance Program (EAP) was available to her should she feel in need of help for any reason.

[167] When asked if he was aware of the incident in which the grievor incorrectly applied handcuffs to a previously compliant inmate who was being taken into segregated custody and then became agitated and reached a heightened emotional state, Mr. Shea said that he was aware of this incident, which was caused by the grievor.

[168] He explained that when he was informed of it and watched the video, he took the initiative to offer the grievor one-on-one help on the proper handcuffing technique. He also explained the extra care he takes with visible minority staff members, whom he stated he has a special interest in seeing do well in their careers. To this end, he described how he started a support group for other visible minority and LGBTQ staff members, to offer support and encourage peer support for these employees to enhance their chances for advancement and success with the CSC.

[169] When asked if the grievor voiced concerns or asked for help due to problems or reported any harassing or racist treatment while at the EIFW, Mr. Shea replied that she did not, even though he asked her if everything was ok and invited her to come to him if she needed anything.

[170] Mr. Shea said that when he worked with the grievor to help with her handcuffing training, he invited a bargaining agent representative, and that while he saw some improvement in her technique, he said that she paused after getting one of the two handcuffs applied. He described how that can be very dangerous in a real situation and asked her if there was a problem. She said that she just needed a moment. Mr. Shea said again how dangerous it would be with a real inmate, as it could allow them to

become aggressive and to resist being handcuffed all while the PW is in very close proximity and somewhat exposed by their position of trying to handcuff the inmate.

[171] Mr. Shea added that the ability to handcuff an inmate is one of the most basic skills taught to every PW during their basic training course and that every PW must be fully competent in this skill when they begin work. So, he said that he was very concerned for the grievor's ability to properly do her job when she could still not confidently and competently apply handcuffs after almost seven months on the job.

[172] After describing the training that all PWs receive about suicide and harm prevention and in particular suicide watch posts before they start their careers, he continued to describe what he said was a disturbing incident that a PW brought to his attention who had been on the scene and who had witnessed the grievor fail to watch an inmate who was on an HSW.

[173] Mr. Shea explained that this is the highest level of watch for an inmate who poses an immediate risk of self-harm or an attempt to take their life, as reported by medical staff members. An HSW requires PWs' eyes to be on the inmate at the cell door 24/7. Again, all the staff is trained in it, including the Commissioner's Directives stating these facts of the requirements of such a posting.

[174] He said that it was reported that the grievor had relieved another PW who was on an HSW and that very shortly after that, the grievor left her post to speak with other PWs in an adjacent room. She then left her post again a short time later after having been told the first time to return to her post.

[175] Mr. Shea testified that after reviewing the video of the grievor leaving her post on the HSW, he called her, to discuss the matter. He said that she told him that she was not assigned to the HSW but rather had just been walking past it while on patrol and saw the inmate, whom she knew, and thought that she would chat with the inmate.

[176] Mr. Shea said that he took this information to CM Perry, who was in charge of the staff members working that shift, and she said that it was not true and told him that she had assigned all the PWs present in the video, including the grievor, to be on the HSW post.

[177] Mr. Shea was presented with this video at the hearing and described how PW M begins the HSW, for what was observed to be 16 minutes never takes her eyes off the

inmate and remains ready with her hand on the doorknob to enter if an incident were to arise. He said that that was textbook-proper technique to perform an HSW. He then described how the grievor leaves the edge of the hallway area where she was standing and takes a position very close directly behind PW M. PW M then leaves the inmate's door, and the grievor immediately steps forward to replace PW M so that the grievor is now at the door of the inmate's room and for 50 seconds has her eyes on the inmate other than twice, when her eyes become distracted, and she looks away from the door.

[178] But then after only 52 seconds on the HSW, the grievor leaves the post to walk to the doorway adjacent to the inmate's room and then speaks with other PWs. She is absent from her post for 16 seconds, leaving the inmate unobserved. She then returns to the post for 15 seconds, during which time she looks away and looks at her feet and then after another 15 seconds, she leaves the post again and leaves the inmate unobserved again as she goes to speak with the other PWs one more time.

[179] Mr. Shea testified that it was dangerous to leave the inmate unobserved as she had already self-harmed that day and was at high risk to do it again. He said that in the time that the grievor left her post, the inmate could have self-harmed again such as banging her head on the wall or possibly cutting herself with a concealed sharp object.

[180] Mr. Shea said that even had the grievor not been assigned to the HSW at this post, contrary to what he had been told by the CM on site, any normal PW would have recognized the situation at the HSW, and if in fact PW M abandoned her post, as alleged by the grievor, then any other PW would have known that it was their duty to immediately take up the post and ensure that the inmate was not left unobserved. He said that the actions of the grievor that he observed on the video showed a very poor lack of judgement by her as she abandoned her HSW post twice, despite being told both times to return to her post. He said that took this up with the warden.

[181] He then said that after his meeting with the warden, the grievor and her bargaining agent representative were called into a meeting on August 25, 2015, and were told that she had not sufficiently improved her performance at work and that the rejection-on-probation process was being started. In response to a question from her representative, the warden told the grievor that her mind was not closed and that the opportunity still existed for the grievor to improve her performance to keep her job.

[182] Mr. Shea then testified about another incident involving the grievor later the same day as the meeting with the warden. He explained that the grievor complained to her CM (CM Kowalchuk) at 8:00 p.m. of having a headache but said that she was ok to accept her regular shift and to be assigned to mobile foot patrol as a responder that evening. One hour later, the grievor was dispatched to an urgent incident involving an inmate assault, but she failed to respond to the radio dispatch. This caused her partner to respond to the urgent incident alone, which Mr. Shea said should not happen; it raised risk of that single PW being put into a dangerous situation. He said that the grievor was called again on her radio and again failed to respond. At this point, he said that the CM had other PWs dispatched to the incident, and the grievor was located and assigned to the MCCP then went home due to feeling ill.

[183] In her testimony about this incident, the grievor said that she was feeling poorly but thought that she could perform her shift. However, when her symptoms worsened and she felt ill, she walked to CM McQuaid's office, and at the same time she was being dispatched to the urgent assault incident, she told the CM that she was too ill to work.

[184] In her cross-examination on this point, the grievor said that maybe a minute passed from the first dispatch call to her until she reached the CM's office and that after she told the CM that she was too ill to be on mobile patrol and was told that she should report to the command post bubble to work, she then said that she asked a fellow PW to call dispatch and say that she would no longer be able to staff the mobile patrol and that she would be unable to respond. This occurred before the second urgent dispatch call was made to her.

[185] Mr. Shea then testified about what was the grievor's final incident, which the warden explained caused her to feel an urgency to remove the grievor from the EIFW. He said that after the meeting with the warden, at which the grievor was told that the employer was preparing to reject her on probation but that she still had an opportunity to show that she was competent, he set out the next day to prepare another mock training scenario. Mr. Shea said that he personally wanted to oversee an assessment of the grievor's skills and on-the-job ability to make decisions and exercise good judgement.

[186] He said that he prepared a mock emergency incident to occur at the EIFW's private family visit house, where inmates are allowed to enjoy private time with family.

The scenario had staff members play the roles of an injured and bleeding female inmate and her male visiting partner, who had stabbed her and who was still in the house. A large knife was visible on the floor. The grievor's PW partner was told of the plan and was instructed to allow the grievor to lead the response at the scene. Mr. Shea said that the grievor did not know that it was only a mock training exercise until she came into the house and saw him with a video camera and other staff members playing roles.

[187] In the afternoon of August 28, 2015, the grievor and her partner were dispatched by radio to a code red and code blue, meaning a violent-assault emergency and a medical emergency, respectively, at the private family visit house. Mr. Shea had prepared the event to be recorded on both audio and video, and the mock incident included fake blood splattered on the floor and on the mock female inmate.

[188] As the video taken from inside the house begins, the grievor can be seen to open the door and enter the house, with no apparent attempt to communicate with the victim inmate, despite the victim crying and screaming loudly, "... he has a knife ... he's going to stab me again."

[189] With what would be clear to even an untrained observer, the grievor enters and remains in the house in a manner that is oblivious to the fact that a violent attacker is in the small, enclosed area and is armed with a weapon. The bloodied victim is seated on the floor at the edge of the kitchen in a way that she would be discovered immediately when the grievor opens the entrance door.

[190] Mr. Shea testified that this was a very high-risk incident that posed a danger to the PW responders, given that a person had already been stabbed and that the attacker remained in the house. After watching the video, he testified that the grievor showed no regard and had no awareness at all of how dangerous the situation was and how she put herself at significant risk of also being attacked and stabbed by walking into the house and remaining there for several minutes as she spoke to the stabbing victim. He also noted that she made no attempt to search the victim for the possible possession of a weapon that could have been used to attack the grievor and her partner.

[191] He also noted how the victim can clearly be heard loudly trying to prompt the grievor by saying, "... he's going to stab me again", after which the attacker also begins

to yell. The grievor makes no response at all that would show recognition of the danger that she has put her and her partner in by entering and remaining in the house. At one point in the video, the grievor walks closer to where she can hear the attacker yelling as he is behind a corner and out of sight of her.

[192] In her testimony, she claimed that she could see him, but from the camera angle of the video, it is uncertain that she could have seen around the corner. More importantly, Mr. Shea noted that it made no sense for her to walk closer to the armed attacker, as she was unarmed and could have also been attacked.

[193] Mr. Shea explained that a proper response that every PW at the institution must know is first to verify and secure the situation and then to ensure the personal safety of the PW responders. He said it would have been a disaster had PW responders entered the scene and then been attacked by one or both people inside and then been injured or worse due to entering the house with an armed attacker inside.

[194] He said that the grievor should not have just walked into the house without first trying to verify who was in there and the victim's condition. He noted that in this scenario, the victim could have been armed and dangerous and could have attacked the grievor. He also noted that the victim had been stabbed in the arm such that she could have possibly been spoken to without staff members entering the home and could have possibly been told to exit the home without staff members entering the home and endangering themselves.

[195] Hours were spent during the hearing examining the video of the mock incident with witnesses commenting and being cross-examined by the grievor. Mr. Shea described in precise detail many more deficiencies with her performance. Among others, they included that the grievor did call for the medical response team to attend. However, upon its arrival outside the door of the house where the grievor had finally taken the victim, they asked her four critical questions about the site, including was it secure, the victim's state, if more PWs were on site, and if 911 had already been called for medical transport.

[196] Mr. Shea said that the grievor appeared overwhelmed, as she replied to only one of the four critical questions. The backup team of two PWs then arrived at the door to the house, at which point the grievor told them to go into the house and that there was

a man in there with a knife. Mr. Shea said that that was improper procedure and that it was extremely dangerous to send more PWs into a very dangerous situation.

[197] He said that no staff members should have entered the house while the armed attacker was in it. He said that the EIFW and all its staff know of a proper response plan to such a situation, which could possibly involve dispatching the EIFW ERT or calling the local police.

[198] In his summary of this training scenario, Mr. Shea said that even though she had been a PW with several months of work experience, the grievor's performance was a complete failure. He said that she failed every aspect of her duties and that worst of all, she had had no awareness, respect for, or ability to protect her safety or that of her fellow staff members.

[199] And finally, Mr. Shea explained that to reduce any risk on his part of any bias in his assessment of the grievor's skills, he discussed his report of her performance with the CMs, the bargaining agent, and the warden. He added that as a visible minority, he gives extra opportunities and tries to be more understanding as part of his efforts to support the employer's pledge to hire and promote visible minority persons.

[200] He said that if as the grievor stated at the hearing she experienced harassment and racism while on the job at the EIFW, he had offered her his assistance, and that she could have confided in him but that she made no mention at all of these things. And he said that he would have acted immediately to intervene and stop any racist treatment that the grievor now states that she experienced.

[201] When asked in examination-in-chief about the grievor's written rebuttal of her action plan and the related harassment accusations once she was placed on suspension, Mr. Shea said that he read the email and that he investigated it. But he found nothing to support her allegations and said that her concerns of being treated badly by her CM, Ms. McQuaid, were only a performance-management problem caused by the grievor's poor performance and her difficulty being managed and urged to improve.

[202] He said that he was not aware of the grievor's alleged request to be assigned to a CM other than Ms. McQuaid. He also added that he felt that Ms. McQuaid's background as a high-ranking bargaining agent representative before she became a CM

provided added experience in that she had a better understanding of the issues being faced by the PWs.

[203] During his two-day cross-examination by the grievor, Mr. Shea was asked why she was not allowed to speak during her meeting with the warden on August 25, 2015. Mr. Shea replied that that was not accurate and that her bargaining agent representative was present and spoke several times on her behalf during the meeting.

[204] When the grievor asserted that she was mistreated by Ms. McQuaid and that she used the refusal to pay her “short sub” pay when the grievor had been called in from home for an extra shift as an example, Mr. Shea replied that this had happened but that the pay problem had been corrected and that the grievor was paid for it.

[205] When challenged that several of her performance improvement action plan items were one-time-only issues, Mr. Shea responded that some of them, such as taking protected inmate files out of the institution, might have been one-time issues but that it stood as a notice of a serious error in good judgement by the grievor. When she challenged him that he and EIFW management set her up to fail and that his final, violent family visit training scenario was part of this setup, he denied that her responding partner had been told to do nothing. Rather, he said that he told her partner that day to let the grievor take the lead and that the grievor failed to give proper direction to her partner.

[206] The grievor sought to challenge Mr. Shea by reviewing the family visit mock exercise video and by pointing out the things that she said were in fact proper procedure, such as telling her partner to check the bedrooms, in case there were other people in the house. Mr. Shea responded by saying that the grievor should have never entered the house under the circumstances of a violent-assault emergency and a medical emergency a code red and code blue, which should have told her that there had been a violent attack and that it was unsafe to just walk into the house, at least without having backup officers on scene and better equipment, including defensive tools, to provide some protection from the attacker.

[207] He added that at most, the grievor could have peeked through the door to ascertain the victim’s condition. He also said that when the grievor entered the house and saw the victim covered in blood, it was clear from observing the grievor that she had no idea what to do next, as she nervously stepped forward and backward.

[208] When challenged by the grievor that she had properly assessed the victim's state and later safely taken the victim out of the house, he replied that it was wrong to enter the house and to stay there. And further, that when they finally exited the house, the grievor followed several steps behind the victim; thus, she was not in proper control of the inmate. When challenged by the grievor to agree that she secured the scene once the victim was out of the house, Mr. Shea replied that she was wrong and that she placed the backup-responding PWs in grave danger by telling them to enter the house, given that the attacker and a weapon were still inside.

[209] The grievor again challenged Mr. Shea by stating that upon their arrival on scene, she directed the backup PWs to enter the home and secure the site by retrieving the weapon. Again, he replied by saying that that was the wrong thing to do and that she placed the backup PWs in grave danger. He also noted that no call was made to dispatch a CM to the incident and that no radio call was made for dispatch to call 911, to respond to the medical emergency, which was the stabbing.

[210] The grievor also challenged Mr. Shea by stating that she told her partner to look for a compress or towel in the house to help stop the victim's bleeding. He replied by repeating that they were all in grave danger of being attacked and that this was the only priority that should have been in her mind, not staying in a dangerous, unsecure small house trying to provide first aid to the victim.

[211] The grievor also challenged Mr. Shea by suggesting that she gave proper direction to the backup-responding PWs by stating that someone was inside. He replied by pointing out in the video that the grievor can also be heard telling her backup to enter the house and that an inmate is inside. He also said that the grievor gave no useful information to the backup PWs, such as how many people were in the house, their genders, and where they were located.

[212] In her testimony about this training incident, the grievor explained that she took the lead and that upon entering the location and seeing the victim on the floor with blood on her, she asked the victim what was happening. She said that she called dispatch to send medical staff members and that she then directed her partner to check the other rooms in the small house.

[213] She said that she could see the feet of the other person around a corner and that she could see him, along with blood on the floor. She told her partner to get a

towel to use as a compress on the victim's bleeding stab wound and then asked the victim if she could stand up, and they then walked out.

[214] While observing the video again, the grievor said that when the backup PWs arrive, she tells them that there is a man inside with a knife and that they should go into the house. She testified that she thought that she had done things properly by attending to the victim's injury and asking her partner to get a towel to place on the wound, to help stop the bleeding.

[215] While being cross-examined on this incident, the grievor agreed that she could hear the victim yelling from outside the door of the house before she entered it. She also agreed that she did not attempt to communicate with the victim before walking through the doorway and into the home. She also agreed that she did not attempt to ask the victim if she was able to leave the home on her own before the grievor entered. She also agreed that she could not see the attacker and did not know where he was when she entered the building and started to speak with the victim. She also agreed that she called dispatch to send medical help but that she did not call for a further PW patrol unit to respond as backup to her. She added at this point that she had a hunch when she was dispatched to this incident that it might be a training scenario.

[216] The grievor was asked and agreed that over two minutes of the event elapsed with her in the building when the victim begins to loudly exclaim this: "He's going to stab me again, he's going to get me again." And then the attacker is heard saying this: "I will." She explained that at this juncture, she began to try to get the victim off the floor and to exit the building. The grievor also agreed with the assertion that she did not reply to the medic who arrived on the scene outside, when he asked her if the scene was secure. She also agreed that she did not on her own or through a radio call to dispatch call 911 to report the medical emergency. She added that she could not do it all herself.

[217] The grievor also challenged Mr. Shea about the details of her incident in August when she did not respond to an emergency dispatch for an assault, and her partner had to respond alone. She asserted that she had told CM Kowalchuk that she had a headache and that she was walking to CM McQuaid's office when the dispatch was made. He replied that it did not matter that she was walking to see the CM, as she should have responded to the emergency radio dispatch, and that he checked with CM

Kowalchuk, who said that she had spoken to the grievor, who told her that she was ok for duty.

[218] The grievor also cross-examined Mr. Shea about his statements about the video of the inmate on the HSW that was presented at the hearing. She challenged him by telling him that she was not assigned to that event but rather that she was on mobile patrol and just happened onto it. She alleged that all the other staff members visible in the video footage conspired to make her look bad.

[219] Mr. Shea rejected this assertion and said that CM Perry had told him that the grievor was assigned to staff the inmate's placement on the HSW. Mr. Shea testified that the grievor assumed the proper position behind the PW who had for over 15 minutes been on the HSW at the door of the room where the inmate was being held and that the grievor positioned herself properly to assume the HSW and then did so immediately after the first PW exited the position to take a break in an adjoining room.

[220] He rejected the grievor's assertion that she had no idea what was going on when she walked into the hallway while on mobile patrol and that she simply stopped by to chat with the inmate being held in isolation. The grievor doubled down on her questions and said that although she was not assigned to watch this inmate, she wanted to tell the group of PWs assembled in the next room that the inmate could see them through a glass window. Mr. Shea replied by saying that if the grievor was really on mobile patrol at that time, she should not have even been in that part of the building, as it was not included in any mobile patrols.

[221] The grievor then accused PW M of leaving her post in the video clip that was shown at the hearing several times. She challenged Mr. Shea that when the post was abandoned, she simply stepped in to visit with the inmate, whom she said she knew from her work in the institution. Mr. Shea rejected the assertion that PW M had abandoned her post.

[222] When the grievor challenged Mr. Shea that her superior, Ms. McQuaid, had harassed her, he replied that it was not true. Rather, he said that this was purely an issue of the grievor performing poorly and of her supervisor trying to get her to improve her work. He said that he looked into this allegation and that he talked to others and determined that it was unfounded. He added that many other CMs were

involved in observing and trying to help the grievor, which helped ensure that there was no risk of an individual bias by any of the CMs.

[223] The grievor also challenged Mr. Shea about the circumstances of how she was suspended and escorted off the property. She asked him to respond to how she was made to feel like a criminal by having two managers escort her past many staff members and how the staff was given written notice that she was being terminated from her employment and was told not to contact her. She also asked if her photo was posted or circulated. She pointed to this email, which Mr. Shea sent to the CMs and that is dated October 10, 2015:

CMs,

Please be advised that Ms. Marston was released on probation yesterday due to her job performance not meeting the standards of a Primary Worker. Ms. Marston appeared to be not satisfied with the decision and stated that she may go public regarding her employment with CSC.

Please be advised that other PWs can be informed that Ms Marston is not permitted to return on site. However please do not encourage or participate in any further discussion, or disclose any further details regarding the rejection on probation.

This is a difficult situation, I understand that this may have emotional impact on our staff. If you feel any staff, or yourself need assistance, please do not hesitate to seek for any support from EAP, CISM, management and another supporting staff.

If you have any questions, please let me know and I can be reached at in person, via emails or phone calls.

Henry Shea,

AWO

EIFW

[Sic throughout]

[224] The grievor challenged Mr. Shea about what she said was his direction to the staff to not talk to her. And she said that this was done to ensure that she had no support from colleagues when she needed it. He replied that that was not correct and that in fact, he spoke with both the grievor's bargaining agent representative, who was on staff at the EIFW, and CM Vollrath, who was trained in stress counselling, to ask them to support the grievor and offer her assistance from the EAP that she wished to receive. He denied the allegation put to him that the staff was threatened not to speak with or offer support to the grievor.

[225] Mr. Shea replied that plans were made with care to preserve the grievor's dignity upon her exit from the EIFW but that she refused to cooperate, made the exit take much longer than it had to, and drew attention to herself during the slow exit. He said that he was not aware of her photo being posted or circulated and that he was not aware of any bulletins, posters, or emails to all the staff about her but affirmed that a note is sent to the main entrance as standard practice in circumstances such as the grievor's when a person no longer has access to the institution.

[226] When asked, he said that there was no standard protocol for how staff members are terminated and exit the property but that he had personally walked staff members off the property when their employment was terminated. When asked if it was common to call the RCMP when staff members are escorted off the property, he said that it was not but added that he had never seen staff members refuse to leave the property as the grievor did. He said that in his experience, staff members have been happy to leave as soon as possible once they are told that they must leave. He also denied telling the grievor's bargaining agent representative what to do or not to do, as he said that he would never do that.

III. The grievor's testimony

[227] The grievor was the only person to testify in support of her case. She began her testimony by describing how her work at the EIFW fulfilled a career goal for her, as she worked very hard to achieve it and had moved from eastern Canada to take the job. She said that she won an award for her excellence during the PW training and that she was working toward spending her career with the CSC; she aspired to advance to the ranks of management. However, she said that within weeks of her arrival at the EIFW, she was shocked when she shared these goals with her supervisor, Ms. McQuaid, who laughed and replied that she would never make it to management and never be a warden. She testified that during that conversation in the control post bubble, Ms. McQuaid told her about having had a bad experience with Jamaican men. She said that she noticed how MS. McQuaid's attitude toward her changed, and she began to treat the grievor badly after that conversation.

[228] The grievor testified that she requested to be placed under a different supervisor, as she claimed that Ms. McQuaid harassed her and treated her with racial bias. She recounted the bathtub-emergency incident when Ms. McQuaid said to the

grievor that she did not respond properly and then mocked her by saying sarcastically, “And you want to be a CM someday ...”.

[229] The grievor also said that after this incident, they had a debriefing discussion, and that Ms. McQuaid criticized her and said that she was not open to feedback. The grievor said that she then just shut down and began replying “ok” whenever she was criticized by Ms. McQuaid. She said that these replies were then judged as showing a lack of accountability, which she said was not accurate and was unfair to her.

[230] She added that had she had another supervisor who treated her fairly and said that she had deficiencies in her performance, then she would maybe admit that she did.

[231] The grievor also testified that she tried to speak out several times at meetings with managers but that they would dismiss her thoughts or cut her off and try to silence her. She noted with emphasis the June 19 meeting with Ms. Contini, Mr. Shea, and Ms. McQuaid. She said that Ms. McQuaid cut her off several times in that meeting.

[232] The grievor explained that she thought that her action plan was largely unfair, as it did not offer her measurable goals, was vague (for example, the proper use of the radio), recorded only what was allegedly her poor performance, and did not track when she did well. She also said that some “one-time” issues were listed on it in perpetuity.

[233] The grievor testified that upon her commencement at the EIFW, she was not given a safety vest. In her testimony, she alleged that the employer did not have a vest that fitted her properly when she started. She said that this precluded her from performing OJT in the Secure Unit, as the vests are mandatory in that unit.

[234] She then suggested in argument that this later led to her reported problems while posted in that unit, as noted previously. In cross-examination, Ms. McQuaid contested the fact that the grievor was not given a safety vest and said that that was not accurate, as she recollected.

[235] I note the necessary implication of the grievor’s testimony and argument on this point of missing her safety vest and thus missing her OJT in the Secure Unit is that she accepted being posted at the critically important SUCP despite apparently not knowing what she was doing due to her lack of an orientation there.

[236] By the grievor's admission, then, this conduct clearly exhibited a lack of judgement on her part by accepting a post assignment that was critical to staff and inmate safety while not knowing how it functioned. This goes beyond the grievor's mere poor performance of her duties.

[237] The employer testified about what was considered deficient casework in the grievor's inmate files. She pursued this in her cross-examination of Ms. McQuaid and challenged her as to the accuracy of what had been described as deficiencies. The alleged deficiencies were explained again. The grievor also sought to get Ms. McQuaid to admit that she had told the grievor not to sit in the back office on the computer while assigned to the mobile patrol post. Ms. McQuaid did not deny it but said that all PWs have time during their day to do what is necessary on their casework reports but to also actively walk and perform the dynamic security of inmates while assigned to the mobile patrol post.

[238] In her testimony on this matter, the grievor did not argue that her casework was competent but instead suggested that the employer should not have expected her to do casework along with all the other things she was doing and had to improve. She testified that there were not enough computers at work for her to access one when she needed to, to get her reports done on time. Ms. McQuaid testified that casework is a normal part of all PW work and is expected of all PWs and rejected the assertion that the grievor lacked access to a computer at work.

[239] The grievor similarly argued in response to the evidence that she was incapable of performing duties at the SUCP competently and that she should have been assigned to a less-demanding post, one presumably more accommodating of her (deficient) skills.

[240] The employer replied by pointing to Ms. McQuaid's evidence. She explained that rotating shifts and the need for backup staff members required that all PWs be competent and capable to be assigned to any post at the institution. In her cross-examination on this point, Ms. Bouchard replied to the grievor and said that all PWs must be capable of working at all posts in the institution and that it is not possible to assign a PW to only one or two posts if those are the only assignments that they can competently perform. She added that after eight months on the job, a PW must be fully

competent on every post and task at the institution, and that the grievor was not, despite significant efforts to assist and mentor her and to offer her extra training.

[241] The grievor vigorously pursued several issues in her cross-examination of Ms. McQuaid and asserted that each one was evidence of false allegations that were made against her. She pointed to Ms. McQuaid incorrectly stating after viewing a video that the grievor had put her head inside the doorway when an inmate was being placed into a segregation cell. She also examined an issue in which she was alleged to have been late for work or had an unexplained absence and established that she had received insufficient notice on a day of rest to have been able to report to work.

[242] She also asserted that she was “set-up” to violate the federal privacy law when she was told to take inmate files home to do case reports and then was called to meet Ms. McQuaid outside the institution at the smoking pit, where the grievor was told that she was in violation of the privacy law.

[243] Many questions and issues were also pursued about the several iterations of the grievor’s action plan to improve her skills. She asserted that some of the items in her action plan were one-time occurrences and that they should not have been included or at least not allowed to persist over the many weeks in which she tried to work through the plan.

[244] In her testimony on this matter, the grievor said that she was baited into bringing the files to the smoking pit, at the request of Ms. McQuaid. The grievor explained that Ms. McQuaid was outside smoking and that she told the grievor to bring the case files for an inmate out there for them to discuss them. The grievor said that she did what was requested but that she never took the files home.

[245] The grievor explained that one of the things mentioned on her action plan and that was used against her was a “short sub” mistake, when she was not given any notice on a day of rest to work a newly assigned shift and was notified of it only by office email, which Ms. McQuaid knew that she could not see while she was off work.

[246] The grievor testified that for the many management meetings that were held to discuss her performance, she rarely if ever received advance notice. She alleged that this violated her collective-agreement rights of two days’ notice and bargaining agent representation. She also admitted that her representative was indeed invited to several

of these meetings but that even if the representative had received notice, the grievor had not, which was part of the employer's effort to silence her, as she could not prepare for the meetings.

[247] The grievor pointed to correspondence that demonstrated the warden writing of the grievor being terminated from her employment as early as August 6, which she suggested meant that the comment made later about the grievor still having an opportunity to show that she was competent was insincere.

[248] The grievor sought to enter into evidence phone texts that she said were from co-workers at the EIFW who warned her that they had heard that management was out to get her. The employer objected to these texts being accepted as evidence as they were unattributed (they had no name and no phone number), and as such, it would not have been possible to call the texts' authors as witnesses, to cross-examine them to ascertain the context of the messages, etc.

[249] I did not accept the texts as exhibits given that first, they were vague as to who was doing what and the source of this gossip, and second, as noted by the employer, if there was to be some cogent information to be gleaned from them, then their authors' names would have had to be introduced at the hearing, so that potentially, they could have been called to testify and be cross-examined.

[250] The grievor established and the employer conceded that her payment in lieu of notice was not made until November 9, 2022, which was seven years after the termination of her employment. She said that she also had to exert a great deal of effort and that she received help from Mr. Shea after her termination, to receive compensation owed her for "short sub" pay. She said that it amounted to a net payment of \$187 after the statutory deductions.

[251] The grievor noted that she made several attempts through emails to Mr. Shea and then access-to-information (ATIP) requests to obtain copies of files, emails, and video of things, such as the smoking pit and parking lot when she was escorted out of the institution, to help her prove her allegations of suffering racist treatment by the employer. She said that the video that Mr. Shea admitted would have shown the main entrance and smoking pit area was never provided to her.

[252] The grievor also testified that she asked Mr. Shea to provide her with a letter of reference but that after her departure, he ceased answering her messages making this request.

[253] The grievor also pointed to the fact that it took seven years for the employer to send her the payment for severance in lieu of notice. She pointed to this unreasonable delay and the equally unreasonable delay of over six years to reply to her ATIP request and argued that these facts bear witness to how she was treated with disrespect throughout and even after her CSC employment, which was rooted in a racial bias against her because she is a Black Jamaican-Canadian.

[254] During her cross-examination, the grievor confirmed that she had signed her letter of offer, dated January 12, 2015, which included details of the fact that she would begin her employment with a probationary period.

[255] When asked about the incident in which the inmate was incapacitated, the grievor confirmed that she did not radio dispatch to report a medical emergency and that she did not call for backup to be sent to the scene. Rather, she said that she called her CM. She said that this happened because it was her first real emergency incident and that she had been in shock.

[256] When asked about a reported patrol on July 11, 2015, on which PW Lindon said that the grievor left her alone in a housing unit with an inmate who had escalated, the grievor gave a long reply that culminated by alleging that PW Lindon, in fact, had left the grievor alone with inmates while on patrol.

[257] When challenged in cross-examination that she did not give a verbal direction to the inmate, as seen in the video when the grievor pinches the inmate's skin when trying to apply handcuffs, the grievor affirmed in reply that she did give verbal directions to the inmate twice but that she did not comply. The Board notes that the grievor's words are not audible on the recording and further that her mouth and lips do not move during the time she claims to have given a verbal direction to the inmate.

[258] When challenged on the report that she left the scene of an aggravated inmate who was resisting her partner and who had to be put in a shower after being sprayed with OC, the grievor explained that she did not walk away "for no reason" but rather that she had OC spray in her mouth too and had to rinse it. When she was reminded

that testimony from PW Rodgers set out that she was directed to return to the scene to assist but that the video shows her standing outside the shower room with other PWs arriving and brushing past her to help subdue the inmate, the grievor said that she saw that there were enough officers on site and that they did not need her.

IV. The parties' submissions and the analysis and reasons

[259] The caselaw is well established in this matter and was uncontroversial in the closing submissions of the parties. Their closing submissions and this decision focus upon applying the evidence to the law.

[260] The grievor in this matter did not attempt to establish that she performed her duties competently at work; rather, she alleged and sought to demonstrate in evidence that from the beginning of her CSC employment, she was subjected to differential treatment to her detriment due to being a Black Jamaican and that the employer set her up to fail and conspired to make her look bad in the performance of her duties.

[261] The Board has stated that employers enjoy broad discretion when assessing employees' suitability during a probationary period, as cited as follows in *Kagimbi v. Deputy Head (Correctional Service of Canada)*, 2013 PSLRB 19 (*Kagimbi*) (affirmed in: *Kagimbi v. Canada (Attorney General)*, 2014 FC 400 and *Kagimbi v. Canada (Attorney General)*, 2015 FCA 74):

...

69 In 1978, in Jacmain v. Attorney General of Canada et al., [1978] 2 S.C.R. 15, the Supreme Court of Canada ruled that the employer's right to reject an employee on probation was very broad and that that right is unobjectionable unless the employer acted in bad faith. The Court ruled as follows at page 37:

The employer's right to reject an employee during a probationary period is very broad. To use the words of s. 28 of the *Public Service Employment Act*, mentioned above, it is necessary only that there be a reason. Counsel for the appellant forthrightly acknowledged at the hearing that at first glance the legislative provision allows the employer to advance almost any reason, and that the employer's decision cannot be disputed unless his conduct was tainted by bad faith...

...

[262] The employer had only to establish that the grievor was on probation when terminated, that she was provided with a letter setting out the reasons for the

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

termination, and that payment in lieu of notice was provided (see para. 111 in *Tello v. Deputy Head (Correctional Service of Canada)*, 2010 PSLRB 134).

[263] As stated in *Kirlew v. Deputy Head (Correctional Service of Canada)*, 2017 FPSLRB 28, and *Tello*, the Board does not have jurisdiction to hear a grievance against a dismissal during probation. The grievor's dismissal was done under s. 62(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; *PSEA*) which provides that the deputy head of an organization, including the CSC, may notify an employee on probation that his or her employment will be terminated at the end of the designated notice period.

[264] According to s. 211(a) of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the Act"), individual grievances about terminations of employment made under the *PSEA* cannot be referred to the Board for adjudication.

[265] As noted in *Kirlew* and *Tello*, the Board will have jurisdiction over a termination during probation if the grievor can establish that the termination constituted a sham or camouflage, in bad faith, disguised discipline or tainted by discrimination on a protected ground. Such discrimination need only be shown to have been just one of many factors to vitiate what could have otherwise been a valid exercise of employer discretion.

[266] In the matter before me, the employer had the initial burden of establishing the low threshold that the grievor was on probation when terminated, that she was provided with the reasons for the termination, and that payment in lieu of notice was provide.

[267] The employer submitted in closing that the many incidents documented by the oral testimony and the several audio and video exhibits clearly established that the grievor had serious performance problems and that despite months of extra training, she did not perform at an acceptable standard. In fact, in the final analysis in August 2015, she had been found to present a danger to herself, other staff members, and inmates due to her poor judgement and poor performance.

[268] The grievor argued at times and challenged witnesses that in fact she performed some tasks well or responded and reacted well during incidents. I note, for example, her testimony and the well-prepared cross-examination of witnesses addressing the

incident of the incapacitated inmate in the bathtub. The grievor raised a reasonable question as to her more-senior partner telling her to wait at the bathroom door and her desire to remain at the door, to not risk both PWs potentially becoming trapped in a very small room by inmates, with no other route of egress.

[269] The grievor also made allegations with respect to issues like not receiving a protective vest upon her commencement and the escort of an inmate to a segregation cell, about which she had been criticized, but she answered that she had been unable to walk beside the inmate, as the corridor had been too narrow.

[270] I listened carefully to days of testimony and observed hours of video through which the grievor sought to show that in fact, her performance in the incidents was not faulty. I refer to the incapacitated inmate in the full bathtub, as part of which incident the grievor said that her partner told her to stand watch at the door, to help ensure that they were not both trapped inside the small bathroom if the other inmates in the housing unit chose to become aggressive. Deductive logic suggests that this could be a plausible concern and possibly a valid response to the incident.

[271] The employer did not call evidence on this matter of a small bathroom rescue for the Board to ascertain a proper PW response pursuant to any relevant training. The grievor also accurately found a mistaken identity error in the testimony of Ms. McQuaid, who had said that the grievor improperly leaned into a segregation cell doorway such that she put herself at risk of harm had the inmate suddenly become violent and the door was closed while her head remained in the space of the door.

[272] I am also cognizant of the grievor's uncontradicted testimony that she did properly apply handcuffs on occasion, including an impromptu mock exercise of her own making when she walked into Ms. McQuaid's office, interrupted her work, and surprised her by placing her in handcuffs.

[273] However, even if I were to accept all the submissions of the grievor that she performed her duties well, it would not overcome the otherwise clear and compelling evidence of the reasons that the employer had to exercise its discretion to terminate her employment while on probation.

[274] The evidence clearly established that on the most significant instances when the grievor had to use proper judgement, her performance lacked. The uncontested

evidence set out that she left her partner struggling in a shower to subdue an agitated inmate. The uncontested evidence shows that she did not respond in a timely way to open a door for a colleague in the SUCP, which could have caused a dangerous incident.

[275] The uncontested evidence that the grievor chose not to respond to her dispatch twice when called to respond to emergencies. The clear video evidence established that the grievor walked away twice from her HSW of an inmate who had already that same night engaged in self-harm and was on the HSW.

[276] And finally, as described by Mr. Shea, the video shows the grievor being completely unaware of the perilously dangerous situation she has put herself into for over two minutes in the training scenario as she enters the housing unit and remains there to talk to the stabbing victim, who urgently tries to tell the grievor that they are both in danger of being attacked by the man who stabbed her and who is only a few feet away while the grievor speaks to the victim and steps nervously forward and backward.

[277] Up to and including the conclusion of the hearing, it was evident from the grievor's testimony and closing submissions that she failed to recognize and comprehend the single most important and urgent issue in her response to the violent stabbing training scenario, which was her and her partner's safety and the grave risk posed to their lives in that situation, as explained in detail in Mr. Shea's testimony.

[278] It is important to note that despite the weeks of evidence spent in the hearing assessing the grievor's performance, this decision does not involve considering a termination for non-disciplinary reasons in which the Board is tasked to determine if the employer's conclusion on the matter of unsatisfactory performance was reasonable. That would be a higher standard for the employer to meet and would necessarily require the close scrutiny of the grievor's performance and the employer's assessment of it, as well as efforts to help the employee, with training.

[279] Rather, in the matter before me, the employer had only to meet the lower standard that it issued the grievor a letter stating its reasons for the decision to reject her on probation, and also that the proper notice period or payment in lieu was given and to confirm her probationary status. The evidence before the hearing confirmed all these requirements.

[280] Once that conclusion was reached, the burden then shifted to the grievor to establish that her dismissal was a sham or camouflage, made in bad faith and was a tainted by racial bias (see *Jacmain v. Attorney General (Canada)*, [1978] 2 SCR 15). Clear and cogent evidence of racial bias playing even the slightest role in the termination, as alleged by the grievor, would bring the matter within the Board's jurisdiction.

[281] The Board in *Kirlew* stated this at paragraph 131:

131 In order for the Board to make a finding that discrimination was a factor in the his [sic] training and assessment, as he contends, the grievor must first establish a prima facie case of discrimination; that is, present evidence that covers the allegations made, and which, if believed, is complete and sufficient to justify a verdict in his favour in the absence of an answer from the employer (see O'Malley). In determining whether a prima facie case has been established, the respondent's answer to the allegations should not be taken into account (see Lincoln at para. 22). [The noted cases are Ontario Human Rights Commission v. Simpsons-Sears, 1985 CanLII 18 (SCC), and Lincoln v. Bay Ferries Ltd., 2004 FCA 204.]

[282] In her closing submissions, the grievor spoke of many examples of what she submitted were prejudiced acts against her. In fact, most of what the employer brought up at the hearing was pointed to by the grievor as mistreatment, harassment, and a conspiratorial effort by it to hire her to show progress on affirmative action hiring and then a mean-spirited and racist effort to get rid of her because the employer and her supervisor, Ms. McQuaid in particular, did not like Jamaican people.

[283] The grievor argued that not being issued her mandatory safety vest at that start of her time at the EIFW was due to racial bias and that it was part of the plan to make her fail. She argued that without her vest, she could not participate in the SUCP OJT, and that her later problems in the unit were due to the lack of training due to the vest.

[284] I disagree. The evidence of the vest not being available to her was linked to its proper sizing to fit the grievor. I heard no submissions about the sizing of the vest being related to a prohibited ground of discrimination.

[285] I reject the grievor's claim about her poor performance in the SUCP and failing to be available to open doors in a timely way to ensure the safe passage of co-workers. If in fact, as she claimed, she was not properly oriented to the operation and

responsibilities of the SUCP and in essence did not know what she was doing, she should have never accepted a posting there.

[286] To be assigned to a post that is critical to the safe operations of the institution and by the grievor's own testimony, not be adequately trained on how to properly discharge duties there is, as stated in testimony by Mr. Shea, evidence of poor judgement by the grievor.

[287] This same argument and outcome showing bad judgement by the grievor is present in the HSW incident. She testified that she did not know what the other PWs were doing at the HSW location and that for 10 minutes, she observed other PWs standing and doing nothing, and after that, they all began to leave the door of the HSW room. The grievor admitted that she did not ask what was happening, but testified that she simply visited briefly with the inmate on the HSW.

[288] Again, by her own testimony, as stated by Mr. Shea, even if she was not dispatched to the HSW, she should have recognized the HSW from her training, and also that she showed poor judgement by not asking to be informed.

[289] The HSW incident raises another significant problem in the grievor's case, which is that her narrative that she just randomly happened to walk by the HSW while on mobile patrol and that she did not know what was happening. Again, as noted by Mr. Shea, her actions as documented on video are completely consistent with how a PW is trained to assume an HSW to relieve a partner.

[290] The grievor stood by on scene for nearly 15 minutes and then took a position very close to PW M's back, who had been at the door with her eyes glued to the inmate for 10 minutes, and then waited there for 90 seconds before stepping forward to the door of the room to watch the inmate inside once PW M left.

[291] I find that the grievor's testimony that she simply walked by the event and waited around long enough to visit with the inmate lacks credibility. As noted by Mr. Shea, even if the grievor did really just happen to walk by the event and see all the other PWs abandon their post and the HSW, any competent PW would have recognized the HSW situation and would have known that they had to assume the HSW position and either call the other PWs back or radio dispatch, to possibly engage a CM to rectify the assignment.

[292] I also note that the grievor's testimony strained her credibility in her response to other incidents. In her reply to one of the handcuffing videos, in which it was alleged that she failed to verbally direct and be in control of the inmate, she testified that she spoke quietly to the inmate, to direct her. However, while the grievor's voice is inaudible in the video, I note importantly that her mouth can be seen but that it does not move during the time she claims that she quietly speaks to the inmate directing her.

[293] The grievor's claim that Ms. McQuaid told her to put on her safety mask during the mock medical incident lacks credibility in that the evidence established that the grievor was trained on the proper use of the mask. She testified that she received top marks in her training course, which included first aid and proper safety mask use. It seems unreasonable that since she was trained in proper mask use, the grievor would have, as she claimed, misunderstood the direction to "put on the safety mask" when she was preparing to perform rescue breathing without the mask.

[294] The grievor's admission that she left her partner alone while trying to subdue an aggressive inmate who was resisting control in a shower speaks for itself. The employer's witnesses who spoke about it said that a PW should never leave their partner in a potentially dangerous situation such as that one. I simply point out the weakness of the grievor's assertion that she had to leave to wash her eyes and that other backup arrived to help her partner such that she did not need to join the incident response.

[295] I find it unlikely that as the grievor claimed, she did not report the alleged threat to have the RCMP called to remove her when, on October 1, 2015, she wrote a long email to the warden claiming that she was treated so badly upon her exit from the institution, to protect Ms. McQuaid. When challenged on this point in her cross-examination, the grievor replied that she did not include this matter in her email because she knew that Ms. McQuaid would already be in trouble for taking away her equipment when she was asked to leave the EIFW, and she did not want to add to Ms. McQuaid's problems by telling the warden that Ms. McQuaid had threatened to call the RCMP. This whole explanation seems unlikely, given the animosity that the grievor expressed toward Ms. McQuaid as well as how important the threat to call the RCMP factored into the grievor's case at the hearing of this matter.

[296] I also find that the grievor's implied assertion that PW M abandons her post on the HSW video lacked credibility. She confirmed her allegation that PW M abandoned her HSW watch when I asked her. The video shows PW M standing at the HSW with her eyes glued to the inmate, whom she views through a window, and her hand on the door handle, ready to enter the cell should an emergency arise. In the presence of several other PWs, PW M then leaves the inmate's cell door once the grievor takes over the position from close behind her for 90 seconds.

[297] The grievor then immediately steps forward to the doorway and begins watching the inmate. It seems highly unlikely that PW M would have abandoned her HSW post in such a structured manner in front of so many other PWs and that the grievor would have been in perfect textbook-training position to relieve her at the moment PW M decided to abandon her HSW post, all as explained by Mr. Shea and CM Perry.

[298] With these more notable and more significant evidentiary examples in mind, I reject the assertion that the employer's decision to terminate the grievor was made in bad faith or was a sham and camouflage and related to disguised discipline

[299] Finally, the grievor alleged that the employer's decision was tainted by racial bias. She argued that the way it treated her from the beginning at the EIFW was differential and detrimental to her. She noted that she was not provided a safety vest and therefore was unable to do her SUCP OJT. She said that throughout her brief tenure, she was subjected to many more special training scenarios than were any other PWs. She pointed to what she testified was the conversation during a night shift, in which Ms. McQuaid admitted to having bad feelings toward Jamaican men since she had had a bad experience with one.

[300] The grievor noted the sarcasm of Ms. McQuaid, who she testified said to her that she would never be a warden. She said that she asked to be assigned under a different supervisor other than Ms. McQuaid but that this request was ignored. The grievor made several serious allegations that both the employer generally and Ms. McQuaid specifically harboured racist sentiments against people of Jamaican ethnic origin.

[301] The grievor sought to rely upon the climate report that I have previously noted was rejected as an exhibit and that I note was also rejected by the Board in *Kirlew*. I am

unconvinced by the allegation that Ms. McQuaid denied, which is that she spoke of having anti-Jamaican feelings due to earlier experiences unrelated to the grievor.

[302] The grievor also presented well-researched jurisprudence in which racial bias had been found to exist and argued that the same should be done in this matter. All the cases she noted in her submissions were read, and the ones relevant to this matter are analyzed as follows.

[303] She pointed first to a decision of the Human Rights Tribunal of Ontario, *Bageya v. Daydem International*, 2010 HRTO 1589 at paras. 59 to 64 and 101, which concluded that a manager who terminated the employment of a Black African man harboured racial bias due to her fear fueled by the racial stereotype of Black African men being threatening and violent. The Tribunal reached this conclusion in part based upon the testimony of the grievor's manager, who admitted to feeling frightened of the grievor after he became unhappy about being required to move his desk in the office. After undertaking its own cross-examination of the manager, the chairperson of that proceeding noted some slight changes in the manager's effort to explain and justify her fearful feelings and relied in part upon a finding of her testimony lacking credibility. I distinguish that case, as I have no evidence before me to support a finding that the employer's witnesses lacked credibility in their testimonies.

[304] The grievor also noted my decision in *Grant v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 59, in which I upheld a claim of a human rights violation based upon racial bias. In that case, the decision-making member of management either could not or would not explain, when asked to clarify, what was going through his mind when he directed that the self-described large, Black grievor be escorted off the property and placed upon suspension and when he then placed a photo of the grievor in view of other staff members at the main-entrance security desk and told the other staff members that the grievor was prohibited from being on the property. Given the lack of not just a reasonable and *bona fide* non-discriminatory reason but any justification for his decision, I concluded that an inference of racial bias was required, based upon the same hurtful stereotype as noted in *Bageya* of Black men being violent and dangerous.

[305] I note importantly that *Grant* did not involve a rejection on probation but rather a termination for non-disciplinary reasons and an additional grievance alleging a

violation of the no-discrimination clause of the relevant collective agreement. In *Grant*, I concluded that there was overwhelming evidence to support the employer's determination as reasonable that the grievor's performance was below standard.

[306] But on the second, no-discrimination grievance, I did infer racially biased treatment in how he was treated upon being suspended. The matter before me now challenges only the rejection on probation and does not include a second grievance alleging a violation of a no-discrimination clause, which would have required the grievor in this matter to have the representation of her bargaining agent, which was withdrawn earlier in the process.

[307] I also distinguish the *Grant* decision, as the employer in the matter before me now provided credible evidence to support its decision to terminate the grievor's employment and its efforts to have her depart the EIFW's property.

[308] In her submissions, the grievor relied heavily on having been subjected to racial bias in how she was treated in her exit from the EIFW and in how she alleged she was treated while lingering outside the institution in the smoking pit. She pointed to feeling shamed in front of many other staff members, who were held back at the door while she exited, and then she testified to being mistreated by Ms. McQuaid at the smoking pit.

[309] The employer replied to this submission and noted the testimonies of Mr. Shea, Ms. McQuaid, and Ms. Vollrath, who all said that efforts were made to plan for a very low-key not-busy time before the shift change to share the bad news with the grievor and to ask her to leave the institution. They described how the grievor caused a scene when she refused to follow directions and delayed the whole process. It noted that the grievor withdrew her testimony of Ms. McQuaid yelling at her during their interaction at the smoking pit later, during her cross-examination.

[310] The grievor also drew attention to the testimony of Ms. McQuaid, who admitted to being fearful of the grievor and to being concerned that the grievor was so upset that she might follow her home and impliedly do something to her. The grievor submitted how badly this made her feel when she heard the suggestion that she could be capable of harming another person.

[311] And finally, the grievor argued that the employer's bungling, in how it took over six years to respond to her ATIP request and seven years to pay her in lieu of notice, demonstrated a racially motivated disrespect that bore witness to its prejudiced treatment of her throughout her employment at the EIFW.

[312] The evidence confirmed that on October 29, 2015, the grievor wrote a letter requesting correspondence about her from a long list of other staff members and any video related to her action plan and assessment of it. She also wrote on December 15, 2015, requesting any document or file (audio-visual and written) concerning her, as authored by a long list of persons. Later, on October 31, 2018, the grievor again requested a list of video files on seven dates spanning her CSC employment, including video available from the smoking pit on her final day at the EIFW, September 29, 2015.

[313] After expressing frustration with the failure of the smoking-pit video to be produced to her, the grievor's request for an order to produce the video was issued during the pre-hearing preparations.

[314] The employer responded by suggesting that it is overburdened in terms of responding to ATIP requests and that the failure to deliver the severance pay for seven years might have been due to the many problems at that time with the public service centralized pay centre.

[315] The employer noted that in a similar case involving the CSC, the Board has previously decided that failing to deliver severance pay to an employee rejected on probation does not vitiate an otherwise valid exercise of the employer's discretion, as follows (see *Kagimbi*):

...

76 Ms. Kagimbi did not agree with the evidence submitted by the employer about the shortcomings in her work. She believed that she acted appropriately during the incidents involving inmates RC and CO. She admitted to losing the handcuff key and to asking the person on the other end of the radio to repeat what he said. However, she claimed that such incidents sometimes happen to others. She denied the gate and portable alarm incidents. Even if the incidents that she denied were left out, nonetheless, the employer discharged its burden of proof. My task is not to precisely determine whether Ms. Kagimbi acted appropriately in the different situations presented to me. The employer's burden was to prove to me that Ms. Kagimbi was on probation and that it was

dissatisfied with her abilities to hold the correctional officer position. The employer discharged that burden.

77 Ms. Kagimbi referred me to Wallace, in which the Supreme Court of Canada pointed out that job loss is always traumatizing for an employee and that employers ought "... to be held to an obligation of good faith and fair dealing in the manner of dismissal ...". That statement should be put into context because the Court was examining the process or manner of dismissing an employee. Nevertheless, in a rejection on probation, the employer must demonstrate good faith in its decision to terminate employment during probation. It cannot use a rejection on probation to camouflage another form of dismissal. However, it does not mean that the employer is required to be transparent with the employee during his or her probation and to inform the employee of shortcomings in his or her work, to give the employee a chance to correct them. Common sense and good management practices would dictate doing so, but the law does not require it.

78 Ms. Kagimbi pointed out errors that the employer made in its management of the notice at the end of the probationary period. First, the employer made no mention of a notice in the letter of dismissal, and it dismissed Ms. Kagimbi effective immediately on September 17, 2007. Then, it paid her two weeks' salary in lieu of notice six months after dismissing her. Finally, during the hearing, in other words, five years after the dismissal, the employer admitted that it should have paid her one month's salary in lieu of notice. There is no doubt that Ms. Kagimbi is entitled to one month's salary in lieu of notice and that the employer must pay her that amount. The employer also admitted its error at the hearing and undertook to pay Ms. Kagimbi the amount owed her.

79 The employer's error does not invalidate the rejection on probation. Subsection 62(1) of the PSEA provides that an employer may terminate an employee's employment during probation at the end of the notice period and that the employee ceases to be an employee at the end of that notice period. Subsection 62(2) of the PSEA provides that the employer may also pay the employee monetary compensation equivalent to the value of the notice. It is clear that the employer did not comply with the PSEA, but that failure does not confer substantive rights other than the right to obtain payment in lieu of notice, as should have been done from the start. Payment in lieu of notice has nothing to do with the appropriateness of the dismissal decision, and if it is incorrectly paid, it does not mean that the dismissal should be overturned. The notice provides an employee with time to help him or her adjust to the new situation, and it provides financial support. If a delay or an error occurs with a payment in lieu of notice, the employer's obligation is limited to fully and properly correcting those errors.

...

[316] For the same reasons as in *Kagimbi*, I decline to recognize the employer's failure to process the grievor's ATIP request and her pay in lieu of notice as evidence of its bad faith or racial bias.

[317] The grievor asked that I make an adverse inference of employer witness credibility with respect to the smoking-pit interactions based upon the employer's failure to provide the requested video files of them.

[318] I decline to do so. I will comment in detail later in this decision on the employer's well-established practice of preserving inculpatory video evidence of incidents but not necessarily all video evidence that could be arguably relevant and could also possibly provide a grievor with exculpatory evidence.

[319] However, for the purposes of deciding this matter, I do not find the alleged discrepancies that might have possibly been resolved by having this video evidence as having much probative value. At issue would be the alleged waving of hands in the air by Ms. McQuaid, which she denied doing, as was supported by the testimony of Ms. Vollrath.

[320] The grievor also submitted that the racial bias of the employer was evidenced by the alleged threat of Ms. McQuaid to call the RCMP to remove the grievor from the property and the fear that Ms. McQuaid said she felt due to the grievor's heightened emotions and loud anger being directed to her. Ms. McQuaid testified that she was scared of the grievor.

[321] As the Board found in *Kirlew*, even if I accept that Ms. McQuaid's admitted fear of the grievor had some consciously or subconsciously motivated racial prejudice, I find the evidence overwhelming that this played no role whatsoever in the decision of the employer to reject the grievor on probation.

[322] Therefore, the third step of the test enunciated in *Moore v. British Columbia (Education)*, 2012 SCC 61, fails, as the differential treatment to the grievor's detriment must have had some link to her race and ethnic origin.

[323] Furthermore, even had I accepted all the grievor's allegations and accepted that there was a link to her race such that a *prima facie* case of discrimination was made out, I find that the employer led evidence that convincingly demonstrated that her probation was terminated because of the significant and extensive deficiencies in her

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performance and that the employer's decision that relied upon her poor performance was not in any way linked to discrimination.

[324] I reach these conclusions for the same reasons as noted as follows in *Kirlew*:

...

99 Unpleasant things might have happened in the workplace, but they did not amount to discrimination being a factor in the dismissal. The deficiencies that had been identified were real, and they were not linked to discrimination. No prima facie case was established, as required by the jurisprudence (see Ontario Human Rights Commission v. Simpsons-Sears, 2 SCR 536 ("O'Malley") and Lincoln v. Bay Ferries Ltd., 2004 FCA 204).

100 Even if the grievor's allegations of untoward behaviour by some officers were true, they did not play a determinative role in his assessments nor in management's decision to dismiss him. He claimed that he was treated differently. From all the evidence in the reports, it seems that this was because he was not functioning at the expected level. That was why the OJT was prolonged.

101 There were certain credibility issues with the grievor's account of some events....

...

[325] As in *Kirlew*, and with specific reference to the admission of Ms. McQuaid that she became fearful during the grievor's agitated and prolonged departure from the institution and later the smoking pit, I find the evidence overwhelming that this did not play any role at all in the decision of the employer to reject the grievor on probation.

[326] And unlike my findings in *Grant*, I cannot conclude upon the evidence before me that the grievor's race played any role whatsoever in how she was treated by the CSC and the actions surrounding her departure from the EIFW upon her being informed of her being suspended and rejected on probation.

[327] For these reasons, I conclude that the Board has no jurisdiction to consider the grievance, and the employer's motion to dismiss this case is granted.

V. The preservation, disclosure, and production of evidence

[328] Hours of time were spent in case management and then at the hearing dealing with what the grievor alleged were actions of the employer to deny her and to destroy relevant evidence. She submitted that some of the video files relied upon by the

employer were not produced in response to her ATIP requests but then appeared just before the first Board hearing started.

[329] The evidence established that the grievor requested information through an ATIP request, as noted previously. After hearing these allegations, counsel for the employer correctly noted that no request for main-entrance and smoking-pit video was made in the initial December 2015 ATIP request. It was requested much later, in January 2024.

[330] However, the problem is not whether the grievor used the exact and proper phrase in her request. The employer would have presumably replied that the video files were no longer in its possession as past cases before the Board have elicited the response that video files are retained in memory for only 30 days and are then erased.

[331] It is an unacceptable and unjust practice that inculpatory and incriminating evidence contained in electronic video files is quickly copied and retained by the employer possible use later in a Board hearing to defend itself. But that video files that could potentially contain exculpatory evidence to possibly help the case of a grievor are not retained and are then destroyed. As the employer has explained that video files are stored only for a period of a few weeks and then are automatically erased as computer memory for the video files becomes fully expended.

[332] This panel of the Board has already found the employer guilty of obstructing the administration of justice in *Lyons v. Deputy Head (Correctional Service of Canada)*, 2022 FPSLRB 95 at para. 10.

[333] I consider its failure to preserve arguably relevant evidence as raising the same concern.

[334] The CSC should implement policies to preserve not only the evidence, including video files, that it considers inculpatory, but also all other related files and video evidence that are arguably relevant once a grievance is filed and which could possibly be of use to a grievor in presenting her case before this Board.

[335] The CSC shall take notice that its continued failure to preserve arguably relevant evidence, including video files, which could possibly help the Board render fair and just decisions based upon a review of all the relevant evidence may eventually lead to another finding that it has obstructed the administration of justice before the Board.

VI. Sealing order

[336] The employer requested two exhibits containing detailed site map drawings of the EIFW and the video file exhibits which clearly show the identity of several inmates be sealed. The grievor did not oppose this request.

[337] As the Board determined in *Sahadeo v. Deputy Head (Canada Border Services Agency)*, 2024 FPSLRB 12 at paragraph 12, I find that protecting the inmates' identities is an important public interest, as they were all third parties, with no direct interest in the grievances. Sealing the videos is necessary to protect their identities, and there are no reasonable alternative measures available to prevent the risk.

[338] I also find that protecting the layout and other details of the EIFW from public scrutiny is an important public safety issue. There is no reasonable alternative measures available to prevent the risk to public safety. I find that the benefits of protecting the layout and details of the EIFW outweigh any negative effects of the sealing order. (*Sahadeo*, paragraph 13)

[339] Consistent with the decision of this Board in *Sahadeo* and with the recent pronouncement on such orders in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38) I conclude that the sealing order as requested by the employer be granted.

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

(The Order appears on the next page)

VII. Order

[341] The grievance is denied.

[342] Exhibits V-1 and V-2 and E-2 and E-3 are sealed.

November 18, 2024.

**Bryan R. Gray,
a panel of the Federal Public Sector
Labour Relations and Employment Board**