

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR,
represented by Public Service Secretariat
(Department of Justice - Her Majesty's Penitentiary)
(hereinafter called the "Employer")

GRIEVANCE: Policy grievance re Captain positions

COUNSEL: For the Union

Frank Pittman

For the Employer

David Martin

ARBITRATION BOARD: James C. Oakley, Chairperson
David Reynolds
Don Saturley

The Arbitration hearing was held at St. John's on November 5, 6, 8 and 9 and December 17, 2007.

The parties agreed as follows:

1. The Arbitration Board was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance. The Employer advised that it may object to the Board's jurisdiction as part of its closing submissions.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitration Board would remain seized of the matter for sixty (60) days following publication of the Award in the event there was a question of interpretation or compensation arising from the Award.
5. The parties agreed to waive any applicable time limits for the filing of the Award.
6. Any person who could be affected by the outcome of the Award had received adequate notice of the hearing.
7. Witnesses were excluded from the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Correctional Officers' Collective Agreement between Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board and Newfoundland and Labrador Association of Public and Private Employees signed January 28, 2003, expires October 31, 2003
- Consent 2 - Grievance Form dated March 10, 2001, No. SJ 046 and letter dated March 9, 2001 from Leo Puddester, Senior Negotiator for the Union to John Scoville, Superintendent
- Consent 3 - Letter amending Article 26.01 (b)
- Consent 4 - Correctional Officers' Collective Agreement between Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board and Newfoundland Association of Public Employees signed July 9, 1999, expires October 31, 2000

- Consent 5 - Ring Report on the Investigation into the circumstances surrounding the escape of Richard Ryan (confidential)
- Consent 6 - Confidentiality Agreement dated November 8, 2007 between the Employer and the Union with respect to the Ring Report
- Consent 7 - Arbitration Award between Her Majesty the Queen in Right of Newfoundland and Labrador, represented by Treasury Board and Newfoundland and Labrador Association of Public and Private Employees dated March 30, 2004 (Fagan, Chairperson)
- Consent 8 - Interest Arbitration Award dated September 9, 1991 (Alcock, Chairperson), extract
- LP - 1 Letter dated December 3, 1991 from Newfoundland Association of Public Employees to Newfoundland Labour Relations Board
- LP - 2 Letter dated January 29, 1991 from Marvin J. McNutt, Director of Adult Corrections to Newfoundland Labour Relations Board
- LP - 3 Decision of the Newfoundland Labour Relations Board with Reasons for Decision dated August 18, 1992 between Newfoundland Association of Public Employees and Government of Newfoundland and Labrador (Department of Justice) as represented by Treasury Board
- NB - 1 Position description - Captain, Her Majesty's Penitentiary dated October, 2000
- NB - 2 Job posting - Captain, Her Majesty's Penitentiary, closing date March 2, 2001
- NB - 3 Job posting - Renewal of current roster - Captain, Her Majesty's Penitentiary, closing date January 14, 2005
- SG - 1 Position description - Duty Lieutenant dated January, 1990
- SG - 2 Job Posting - Notice of temporary assignment - Captain - HMP (until March 31/07 - may be extended) dated June 23, 2006
- JS - 1 Captain's roster dated June 20, 2007

Nature of the Grievance

The Employer created 5 Captain positions and eliminated 5 Duty Lieutenant positions. The Union Grievance dated March 10, 2001 grieves that the Employer violated the Collective Agreement by usurping the Lieutenant's promotional roster. The Employer denies any violation of the Collective Agreement.

Collective Agreement

The Collective Agreement in effect on the date of the grievance was entered as exhibit Consent 4, expiry date October 31, 2000. There were no changes to the relevant collective agreement language in the subsequent Collective Agreement, entered as exhibit Consent 1, expiry date October 31, 2003.

The relevant Articles of the Collective Agreement are as follows:

Article 1 Purpose of Agreement

1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Association, to set forth certain terms and conditions of employment relating to remuneration, hours of work, employee benefits and general working conditions affecting employees covered by this Agreement and to ensure that all reasonable measures are provided for the safety and occupational health of the employees.

...

1.05 The Employer and the Union agree that there shall be no discrimination with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge, assignment of work, or otherwise by reason of age, race, creed, color, national origin, political or religious affiliation, sex, mental and physical disability, or marital status, nor by reason of his/her membership or activity in the Union.

...

Article 3 Recognition

3.01 The Employer recognizes the Association as the sole and exclusive bargaining agent for the following classes of employees:

Sergeant
Correctional Officer
Correctional Officer II
Correctional Officer Recruit
Classification Officer I
Prison Stores Supervisor
Prison Stores Clerk
Prison Administrative Clerk

NOTE: It is understood and agreed that the term Correctional Officer includes the old titles of Cook and Carpenter Warder as well as Warder.

...

Article 4 Management Rights

4.01 All functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by management.

...

Article 9 Arbitration

...

9.13 An arbitration board may not alter, modify or amend any provisions of this Agreement but shall have the power to set aside a decision of the Employer and to modify disciplinary measures imposed by the Employer.

...

Article 26 Promotions

26.01 (a) All promotions of employees within the bargaining unit shall be processed in accordance with the Promotional procedure set forth in this Article.

(b) Subject to 26.01 (c), only employees who have completed five (5) years of continuous service may be candidates for promotion.

(c) Employees with less than five years of service may be considered by the Superintendent for promotion where no employees with five or more years of service is able to qualify, or declines to complete for promotion. Such employees will be considered in order of their seniority.

(d) A permanent employee who obtains a temporary position shall retain his/her permanent status.

...

26.03 Promotional Board

- ...
(b) Qualifying Level

Candidates must achieve a weighted qualifying level of:

30 percent in written examination
12 percent for Promotional Board interview

for a weighted total of 42 percent in both in order to qualify for service evaluation. A weighted minimum of 28 percent must be obtained in the service evaluation in order for a candidate to be placed on the Roster for which he/she has applied.

- (c) Subject to 26.09, the Superintendent will then promote qualifying members in order of seniority.

- ...
26.08 (a) There shall be one line of promotion as follows:

Correctional Officer
Lieutenant

A Correctional Officer who is not performing as determined by the evaluation programme and after being called in and so advised by his/her immediate Supervisor, will be given six (6) months in which to attain the level established under the evaluation programme. The employee will be reviewed every two (2) months during this six (6) month period and be given a written report of his performance, a copy of which will be forwarded to the President of the Association. If after the six (6) month period, the employee fails to achieve the level established by the evaluation programme, he/she shall be subject to disciplinary action which may include demotion or removing his/her name from the roster if he/she is on one.

- (b) There shall be maintained one (1) separate and distinct roster as follows:

Promotional roster #1 for Lieutenant

26.09 An employee shall only be eligible to write the exam within ten (10) years of becoming eligible. An employee who fails to take the examination or who fails to achieve the required pass and applies at a later date, within the eligibility period, and is successful, he then takes his position on the

promotion roster in respect to his seniority. Notwithstanding the above, all employees who had more than fifteen (15) years of service prior to April 18, 1986 will have at least three successive opportunities to write the referred to exam commencing with the first schedule exam after April 18, 1986.

26.10 Six Month Trial Basis

The senior member from the appropriate promotional roster shall be given the promotion on a trial basis of six (6) months, provided a vacancy exists. Should he be demoted because of alleged failure to meet the work requirements of the position, he shall have the right to appeal such decision in accordance with the grievance procedure.

26.11 Employees may refuse to accept the promotion in accordance with the roster. Employees who refuse promotion will maintain their position on the roster. In the event no employee is willing to accept promotion, then the Employer has the right to promote the employee with the least seniority and who is qualified to perform the duties required.

...

Article 29 Seniority

29.01 (a) For the purpose of this Agreement, seniority shall be the total period of service an employee has within the bargaining unit commencing from his last date of employment.

(b) Where the qualifications of an employee are sufficient, seniority will be the governing factor in determining preference for promotions and requested transfers.

...

29.05 (a) Job Posting

When a vacancy occurs or a new position is created in the Newfoundland and Labrador Penitentiary system, either inside or outside the bargaining unit, other than Lieutenant, the Employer shall post notices of the position in accessible places in the Employer's premises for a period of not less than seven (7) calendar days. Copies of all postings are to be supplied concurrently to the Local President.

(b) Information on Posting

For vacancies, or new positions inside the bargaining unit, such notices shall contain the following information: title of position,

qualifications, skills, wage or salary rate or range. Such qualifications may not be established in an arbitrary or discriminatory manner.

...

Memorandum of Understanding
RE: Promotions - Head Warders/Lieutenants

It is our understanding that for the future the parties agree to waive the terms of Article 26: Promotions, where necessary, for the filling of Head Warder/Lieutenant positions.

In addressing the needs of the Correctional System to provide promotional opportunities for meritorious service and to maintain the ability to grant Lieutenants lateral transfers the following provisions shall apply:

- 1) The filling of Lieutenant positions at Her Majesty's Penitentiary (St. John's) shall be on the basis of total length of service within the Province of Newfoundland and Labrador Adult Correctional Service among qualified applicants. This provision in no way restricts management's rights to deny a lateral transfer in which case the next candidate in order of length of service shall be offered the position.
- 2) The filling of Lieutenant positions in all other institutions shall be management prerogative, except that every third vacancy filled shall be on the basis of total length of service within the Correctional Service among qualified applicants. If management's prerogative is exercised in favour of a bargaining unit employee, it shall be the senior qualified applicant.
- 3) Notwithstanding Clauses 26.01 (c) and 26.11, the Employer reserves the right to require the junior qualified bargaining unit employee to accept the position, regardless of whether it requires a transfer or not, where there are no qualified applicants. Refusal of the junior qualified employee(s) to accept the position will result in his/her (their) removal from the roster and he/she (they) shall not be permitted to requalify for one year from the date of the refusal.
- 4) Article 26 shall apply in all respects except as modified above.

Memorandum of Understanding

RE: Sergeants Classification

As agreed during negotiations, the Employer will promote existing Sergeants to Lieutenants effective February 1st, 1989. The Employer will reorganize the

workplace to maintain the additional Lieutenants and the parties recognize that with the additional Lieutenants there will no longer be a need for the Sergeant classification. The Union will not seek to re-establish the Sergeant classification once the additional Lieutenant positions are in place.

It is understood that with the deletion of the Sergeant classification/rank Article 26: Promotions will be modified to provide for one promotion roster from Correctional Officer to Lieutenant.

1988 08 15 First Issued

1991 10 18 Revised - Arbitration Decision September 9, 1991 of David Alcock

Evidence

The witnesses called by the Union were Leo Puddester, Paul Foley, Barry Whitty, Noel Brown, Stephen Gatherall, Patrick Gearin, and Patrick Myers,. The witnesses called by the Employer were Gary Maguire, and John Scoville.

There are seven adult correctional facilities in the Province, namely Her Majesty's Penitentiary in St. John's (the "Penitentiary"), the Women's Correctional Centre in Clarenville, the Bishop's Falls Correctional Centre, the West Coast Correctional Centre in Stephenville, the Labrador Correctional Centre in Happy Valley-Goose Bay, the St. John's Lock-Up and the Corner Brook Detention Centre. The largest institution is Her Majesty's Penitentiary in St. John's. The other institutions are called satellite institutions. The Superintendent of Prisons is John Scoville, who was appointed to the position effective August, 2000. There are Assistant Superintendents who report to the Superintendent, including Assistant Superintendents at Her Majesty's Penitentiary, and an Assistant Superintendent in charge of each of the satellite institutions. The persons in charge of the St. John's Lock-Up and the Corner Brook Detention Centre have the rank of Captain.

The grievance was filed after 5 Captain positions were created and 5 Duty Lieutenant positions were eliminated at the Penitentiary. As a result, the total number of Lieutenant positions at the Penitentiary was reduced from 9 to 4, and the total number of Lieutenant positions in the province was reduced from 26 to 21. The 4 remaining Lieutenant positions at the Penitentiary were called

Unit Managers. In the province, there is a total of about 300 correctional facility staff which includes about 190 permanent Correctional Officers, about 60 casual Correctional Officers, and about 30 Management employees and other staff. The positions of Lieutenant, Captain, Assistant Superintendent and Superintendent are outside the Bargaining Unit. The position of Correctional Officer and the former position of Sergeant are within the Bargaining Unit. The Collective Agreement provides for a promotional roster and a line of promotion from Correctional Officer to Lieutenant. Correctional Officers with 5 years of service may apply to be placed on the Lieutenant's promotional roster pursuant to Article 26. Placement on the promotional roster is decided by a promotional board and is based on the mark on a qualifying examination, an interview by the promotional board, and a performance evaluation. A candidate who attains the required score is placed on the Lieutenant's promotional roster. A promotion from the roster to the permanent position of Lieutenant, or an assignment to fill a temporary vacancy as Acting Lieutenant, is based on seniority. It is not unusual for Correctional Officers to be assigned to the position of Acting Lieutenant for a temporary period and then to return to the position of Correctional Officer.

A job posting with a closing date of March 2, 2001 was posted for the Captain positions. John Scoville, Superintendent, testified the applicants were assessed in a merit based competition. As a result of the competition a Captain's roster was established. Selection for either a permanent or temporary Captain's position was made from the Captain's roster. The Captain's roster was in effect for 2 years. A competition to establish a new roster was held every 2 years. Mr. Scoville testified that seniority or placement on the Lieutenant's roster were not factors considered in the job competition for the Captain's roster. To be eligible for assignment to Acting Captain it was necessary to be placed on the Captain's roster. Performance in the role of Acting Captain was a factor that could be considered when making appointments to a permanent Captain's position. Promotion from the Captain's roster to a permanent position was based on merit and not on seniority. Mr. Scoville testified that the first 5 Captain positions were not necessarily filled by Lieutenants or Acting Lieutenants. Those 5 Captains were Walter Walsh, an Acting Lieutenant at the Salmonier Correctional Centre, Morris Power, a Lieutenant at the Bishop's Falls Correctional Centre, Graham Rogerson, a Correctional Officer at Her Majesty's Penitentiary, Chris Rideout, a Duty Lieutenant at Her Majesty's Penitentiary and Noel Brown, an Acting Duty Lieutenant at Her Majesty's Penitentiary.

Mr. Scoville testified that immediately prior to the elimination of the 5 Duty Lieutenant positions, 3 positions were vacant, 1 position was filled, and 1 position was occupied by Patrick Myers, who

was on long term sick leave. Patrick Myers testified that in March, 2001 he informed Mr. Scoville of his intention to retire. He was then called to a meeting by Marvin McNutt, the Director of Adult Corrections, and was offered a redundancy package. Mr. Myers said that he accepted the redundancy package and retired. Mr. Scoville testified that there was a position available for Mr. Myers at the Labrador Correctional Centre, but the Employer decided not to require Mr. Myers to transfer to Labrador, having regard to the circumstances of his case.

Mr. Scoville testified with respect to the Employer's decision to eliminate the 5 Duty Lieutenant positions and create 5 Captain positions. The decision was made by the Treasury Board of the Newfoundland and Labrador Government before he commenced his role as Superintendent. The decision was made in response to the escape of an inmate Richard Ryan, who escaped when he was absent from the Penitentiary under escort by a Correctional Officer. Richard Ryan had a history of serious offences, and at the time of the escape he was an inmate on remand awaiting trial for further offences. After the escape, Ryan remained at large for a lengthy period of time before he was taken back into custody. A report of an investigation into the circumstances surrounding the escape of Richard Ryan was prepared for the Deputy Minister of Justice by Ed Ring, Director of Compliance and Investigation for the Public Service Commission (the "Ring Report"). The Ring Report was entered as an exhibit, subject to a confidentiality agreement signed by the parties. Mr. Scoville testified that, as a result of the Ring Report, several staff members were disciplined, including both bargaining unit and management staff. The relevant part of the Ring Report refers to the roles of the Unit Manager and the Duty Lieutenant. One of the recommendations of the Ring Report was that strict guidelines be developed as to which officer is in charge, in order to remove any confusion as to the person from whom the Correctional Officer should obtain details concerning the inmate escort. Mr. Scoville testified that deploying staff and giving instructions for inmate escort duty was the responsibility of the Duty Lieutenant, however at the time of the Richard Ryan escape, deployment was made by the Unit Manager. Mr. Scoville testified that when 2 officers hold the same rank it is usually the senior officer who takes the lead in decision making. Most Unit Managers had more seniority than the Duty Lieutenants. The hours of work of the Unit Managers are day shifts from Mondays to Fridays. Duty Lieutenants work both day and night shifts, 7 days per week. The hours of work of Unit Managers were viewed as more desirable. When a position of Unit Manager became available, it was usually filled by a senior Lieutenant.

Mr. Scoville testified that Treasury Board decided to create the rank of Captain, a higher rank than Lieutenant, to replace the Duty Lieutenant, with the intent to eliminate confusion as to who was in

charge. A position description was developed and the position of Captain was evaluated for the purpose of classification and pay. Based on the duties, responsibilities and accountabilities, the Captain position was placed at the HL 21 pay level. The Lieutenant position was placed at the HL 20 pay level. The Unit Manager positions continued in effect after the Duty Lieutenant positions were eliminated.

The position description for Captain stated, in part, as follows:

Government of Newfoundland & Labrador
Position Description

Position:	Captain, Her majesty's Penitentiary
Incumbent:	Vacant
Department:	Justice
Division:	Corrections & Community Services
Location:	HMP, Forest Road, St. John's, NF
Date:	October, 2000

General Accountability:

This position is a management position that is accountable for the effective running of a medium/maximum security correctional institution on an assigned shift. This position is responsible for planning, organizing and directing the day-to-day operations of Her Majesty's Penitentiary. This position is also responsible for security, safety and well being of all staff and inmates within HMP as stipulated by policies and procedures directives.

Structure:

This position is one (1) of five (5) Captains reporting to the Assistant Superintendent of Security and Operations. There are eleven (11) to twenty-two (22) Correctional Officers reporting to this position on an assigned shift. This position also supervises the Living Unit Managers (Lieutenants), including the clarification and interpretation of policy and is the officer-in-charge of HMP in the absence of the Assistant Superintendent of Custody and Operations.

Nature & Scope:

Environment

The Adult Institutional Section, as one component of the Corrections & Community Services Division, is a critical part of the criminal justice network that is responsible for administering the most severe sanction that the state can impose, i.e., the detention and incarceration of accused and sentenced persons. Her Majesty's Penitentiary is a medium/maximum security Institution and is one of six correctional institutions located throughout the province. Its ideal objective is the protection of the public by meeting the sentencing objectives of the courts, through incarceration, deterrence and rehabilitation. This institution provides secure confinement, humane treatment and social development opportunities for inmates.

Functions

The Captain is responsible for the implementation and enforcement of the policy and procedures of the institution. The Captain reports to the Assistant Superintendent (Security & Operations) and assumes the role of the Officer-in-charge during evenings, late night shifts, weekends, statutory holidays or other times that the Assistant Superintendent of Security and Operations is absent from the institution. Functions include providing supervision to the Living Unit Managers (Lieutenant) and other subordinate staff, admitting prisoners; discharging of prisoners; orientation and initiation of new inmates; transfers of inmates to and from other provincial institutions; transfers of federal prisoners to federal institutions; transfer to and from courts; release and return of daily temporary absence prisoners; prisoners to be taken to and from hospital appointments and emergencies; processing of warrants of committal from courts. The position is also responsible for proper care of cash, valuables and property of prisoners; responsible for cell allocations; responsible for daily counts; participates and facilitates staff training; housekeeping and cleanliness of the institution; health and safety of staff and prisoners; makes first level decision on all offence reports; resolves minor offences; refers serious offences to disciplinary panel; makes court appearances when required; assist in the preparation of the annual budget and the fiscal management process by monitoring expenditures.

Major Challenges

The most significant challenge is the protection of lives and safe-keeping of prisoners detained in Her Majesty's Penitentiary. Maintenance of a tenuous balance between public safety and the fundamental rights of prisoners (security and humanistic).

Secondly, the implementation of the policies, practices and procedures of the institution and also keeping a harmonious relationship with labour within the

guidelines of the collective agreement. Thirdly, to secure and rehabilitate prisoners so that they become more productive members of society.

Freedom to Act

Under the supervision of the Assistant Superintendent the Captain has a considerable degree of latitude in the operation of the institution. However, the daily operational activities of the institution are managed within the parameters of statutory provisions and policy directives issued by the Department. Other mitigating factors with regard to freedom to act are the Correctional Officers Collective Agreement, the *Charter of Rights and Freedoms* and the *Prisons Act*.

Contacts

Contacts are maintained with both government and non-government agencies to ensure the effective management of HMP. Contacts will include:

[list omitted]

Specific Accountabilities:

1. To ensure compliance with governing federal and provincial legislation and contemporary standards of human value so that appropriate balance is maintained between the need for public safety and the fair treatment of prisoners;
2. To ensure that the policies, practices and procedures are implemented in compliance with the *Prisons Act*, prison rules and regulations, policy and procedure manual, and the operations manual and take any disciplinary action required;
3. To maintain secure custody and control of the prison;
4. To ensure the humane treatment of prisoners;
5. To ensure the health and safety of staff and prisoners;
6. Motivate the development of the Correctional Officers leadership skills by counselling and advising;
7. To ensure effective personnel management through providing direction to Living Unit Managers (Lieutenants) and direct supervision of Correctional Officers in daily performance of their duties;

8. To maintain liaison with appropriate agencies to ensure that the interests of the institution are protected;
9. To fill the role as Officer-in-Charge of HMP when the Assistant Superintendent of Security and Operations is absent from the Institution.

The position description for Duty Lieutenant stated, in part, as follows:

Province of Newfoundland and Labrador

Position Description

Position: Duty Lieutenant, Her Majesty's Penitentiary
Incumbent: Patrick Gearin
Department: Justice, H.M. Penitentiary (Medium/Maximum Institution)
Division: Adult Corrections, Newfoundland and Labrador
Location: Forest Road, St. John's, Newfoundland
Date: January, 1990

General Accountability

This position is accountable for the supervision of subordinate staff and release of all inmates entrusted into Her Majesty's Penitentiary. Maintains security, safety and well being of all staff and inmates within the environs of Her Majesty's Penitentiary as stipulated by Newfoundland Labrador Corrections policies and procedures directives.

Structure

This position is one (1) of seven (7) report to the Assistant Superintendent (Officer-in-charge). The other six (6) Lieutenants also report to the Assistant Superintendent (Officer-in-charge). There are thirteen (13) to twenty-two (22) Correctional Officers reporting to this position.

Assistant Superintendent
Lieutenant
Correctional Officer

On any assigned shift there are thirteen (13) to twenty-two (22) Correctional Officers reporting to this position. The Correctional Officer is responsible for the daily care and control of an average of 152 inmates and for general security and safety throughout the institution.

Nature and Scope

Her Majesty's Penitentiary is a medium/maximum security institution and one of seven correctional institutions located throughout the province. The other six are minimum security satellite institutions. Its ideal objectives is the protection of the public by meeting the sentence objectives of the courts, through incarceration, deterrence and rehabilitation. This institution provides secure confinement, humane treatment and development of opportunities for medium/maximum prisoners.

The Lieutenant performs all admissions and releases of inmates, including the computation of fines. On occasion the Lieutenant has to become involved in the physical as well as the supervisory aspects during inmate disturbances. The Lieutenant is responsible for in-service-training when there is no on-going training program available. He must be knowledgeable in fire safety and hold valid first aid and C.P.R. certificates.

The Lieutenant assigns overtime whenever staff shortages arise due to emergencies or illness. The maintenance of proper conduct and order among inmates and between staff and inmates is essential and offers the Lieutenant challenging opportunities to deal with differences in human behaviour.

The Lieutenant must maintain liaisons with police detachments, Department of Immigration, Parole and Probation Services, within the jurisdiction to facilitate and maintain a consistently maximum inmate occupancy and to obtain community assessments necessary for Temporary Absence applicants. The Lieutenant is a member of the Temporary Absence Board, the Labour/Management Committee and the Disciplinary Hearing Committee.

The Lieutenant maintains an on-going liaison with

[list omitted]

Freedom to Act

Under the supervision of the Assistant Superintendent the Lieutenant has a fair degree of latitude in the operation of the prison. Day to day operation, however, is governed by policy as set down in the Policy and Operations Manuals. Other mitigating factors with regard to freedom to act are the Correctional Officers Collective Agreement, *The Charter of Rights* and the *Prisons Act*.

Specific Accountabilities

1. To ensure that the policies, practices and procedures are implemented in compliance with the *Prisons Act*, prison rules and regulations, policy and procedure manual, and the operations manual.
2. To maintain secure custody and control of the prison.
3. Humane treatment of prisoners.
4. Health and safety of staff and prisoners.
5. Motivate the development of the correctional officers leadership skills by counselling and advising.
6. To ensure effective personnel management through direct supervision of Lieutenants and correctional officers.

Union witnesses testified with respect to the Duty Lieutenant position. Leo Puddester was a member of the Correctional Officer's local executive from 1968 to 2005 and also provided services to the Correctional Officers bargaining unit as a Union staff representative and as President of the Union. He testified that the job of Duty Lieutenant was formerly performed by the Head Warder, a management position, on the day shift and by the Sergeant, a bargaining unit position, on the evening and night shifts. Mr. Puddester testified that during evening and night shifts the Sergeant was in charge of the Penitentiary and was responsible for sending inmates to hospital, placing inmates in isolation and reprimanding staff. There were two promotional rosters, one for Sergeant and one for Lieutenant. In about 1988, as a result of a request from the Employer to have a management person in charge of the Penitentiary on all shifts, the Employer and the Union agreed that persons in the Sergeant positions would be promoted to Lieutenant and there would be one promotional roster for Lieutenant. The position of Duty Lieutenant replaced the Sergeant's position. Although the Lieutenant position was outside the bargaining unit, the members of the bargaining unit would have

access to Lieutenant positions based on seniority pursuant to the promotion Article in the Collective Agreement. Mr. Puddester testified that the agreement made by the parties was set out in a Memorandum of Understanding re Sergeant's Classification attached to the Collective Agreement. The Memorandum included the agreement of the Union not to apply to the Labour Relations Board to have the Lieutenant position included in the bargaining unit. That provision was later deleted by a decision of an interest arbitration board chaired by arbitrator David Alcock dated September 9, 1991 on the grounds it was contrary to the *Public Service Collective Bargaining Act*. The Union then applied to the Labour Relations Board to include Lieutenants in the Bargaining Unit. The Labour Relations Board conducted a hearing and issued a decision on August 18, 1992 in which it reviewed the duties of the Lieutenant positions and found that they were management employees and therefore excluded from the bargaining unit.

Mr. Puddester testified that the Captain performed the same duties as the Duty Lieutenant, and the Duty Lieutenant performed the same duties as the Sergeant. The Duty Lieutenant designated work assignments each day, supervised the movement of inmates, responded at the first level to inmate grievances, responded at the first level to Correctional Officer grievances of an oral reprimand, and called in Correctional Officers to work overtime. Mr. Puddester testified that the replacement of Duty Lieutenants by Captains was just a change of name that had the effect of denying bargaining unit members the use of the promotional roster to obtain a promotion. Mr. Puddester testified that the Captain's rank existed prior to the creation of the 5 Captain positions to replace the Duty Lieutenant positions. There were Captains in charge of the St. John's Lockup and the Corner Brook Lockup. The duties of those Captains included preparing the budget and performing investigations. Mr. Puddester testified that prior to the creation of the 5 Captain positions, the Union was always involved with any changes to the promotional roster.

Paul Foley testified that he has been a Correctional Officer for 23 years and has been the local Union president for 7 years. There was no consultation with the Union when the Captain position was created and replaced the Duty Lieutenant. Mr. Foley said that some persons were appointed Captain without being on the promotional roster for Lieutenant. Barry Whitty testified that he is on the Lieutenant promotional roster and he has worked as an Acting Lieutenant at the same time as being a member of the local Union executive. When the Captain position was posted he applied for the position and was placed on the Captain's roster. He was given an exemption from the requirement to accept an offer to serve as Acting Captain when he was on the local Union executive. He was told that he could not be on the local Union executive and the Captain's roster at the same time because

there would be a conflict of interest. He felt this amounted to discrimination on the basis of Union activity.

Noel Brown was employed at the Penitentiary from 1975 to 2006, when he retired. He was on the Lieutenant's roster from 1986 to 2001. During that time he had more hours of work as an Acting Lieutenant than he had as a Correctional Officer. He successfully applied for the position of Captain, and served in that position from 2001 to 2006. He testified that as Acting Duty Lieutenant he did not discipline staff, call in staff to discuss sick leave usage or hold disciplinary court, but these were all duties performed by the permanent Duty Lieutenant. He developed written policies as the Acting Duty Lieutenant, which included policies on suicide prevention. He also developed policies as a Captain. Before he was promoted to Captain he wrote an exam and attended an interview. His promotion to Captain was not based on seniority or his place on the Lieutenant's promotional roster. When he applied for the position of Captain he received a copy of the position description. Mr. Brown said the duties of the Captain were the same as the duties of the Lieutenant, and included being in charge of the institution in the absence of the Superintendent or Assistant Superintendent, giving approval for inmate absences, arranging for staff to escort inmates to court and hospital, calling in staff when needed for replacements, managing emergency situations such as escape or hostage taking, implementing court orders for custody of inmates, supervising staff, discipline of staff by oral reprimand, speaking to staff about use of sick leave, and investigating inappropriate behaviour of staff and reporting the findings to the Superintendent.

Stephen Gatherall has worked at the Penitentiary since 1973. In 1986 he was promoted to Sergeant. In 1989 his position was reclassified to Lieutenant and he was assigned to the position of Duty Lieutenant. He was later assigned to other Lieutenant positions as Unit Manager and then store room Lieutenant. Mr. Gatherall testified that when he was Sergeant, his duties included assigning staff to escort inmates outside the Penitentiary, and assigning staff to positions in the Penitentiary, such as tower duty. The Sergeant on the day shift reported to the Head Warden/Lieutenant. The Sergeant on the evening and night shift was in charge of the Penitentiary. He said the promotion of the Sergeants to Lieutenants followed negotiations between the Union and the Employer. The Sergeants promoted to Lieutenant received a significant increase in pay. The parties also agreed that Lieutenants in the satellite institutions had to have seniority over the Correctional Officers on the Lieutenant's roster at the Penitentiary to be transferred to a position at the Penitentiary. The responsibilities of the Duty Lieutenant included providing a safe, secure and humane environment for staff and inmates, performing inmate counts, assigning staff to escort inmates, assigning staff to

work overtime, granting temporary leave of absence to inmates, holding disciplinary court in the absence of the Superintendent, evaluating probationary employees, placing inmates in segregation, supervising searches of cells for contraband and assuming the role of the Superintendent in his absence. Mr. Gatherall compared the job descriptions of Duty Lieutenant and Captain. The general accountability and structure was the same, except that the Captain had a higher rank. The functions were the same, except that the Captain assisted in the preparation of the budget. The major challenges, the freedom to act and specific accountabilities were all the same. Mr. Gatherall said the Duty Lieutenant had authority to give direction to the Unit Managers. Mr. Gatherall testified that as Lieutenant he attended some management meetings. After the Captain position was created the Lieutenants did not attend senior management meetings. John Scoville told them that he did not want anyone attending the senior management meetings who he did not appoint to the management position. Mr. Gatherall is not on the Captains's roster and does not serve as Acting Captain. On occasion a Correctional Officer on the Captain's roster who has less seniority than Mr. Gatherall may relieve a Captain. In that event he will be the supervisor of Mr. Gatherall. However, when he returns to the Correctional Officer position he is supervised by Mr. Gatherall. In 2006 an additional position of Captain for security was posted. The job competition was only open to Captains and Correctional Officers on the Captain's roster.

Patrick Gearin was employed at the Penitentiary from 1973 to 2004, when he retired. He testified that before the Sergeants were promoted to Lieutenants in 1989, the Sergeants looked after the operation of the prison, the escorts of inmates and inmate work details. The Duty Lieutenant had the same duties as the Sergeant. Mr. Gearin signed the job description form for Duty Lieutenant that was entered as an exhibit. He confirmed that it was accurate. He said the Unit Manager reported to the Duty Lieutenant and the Assistant Superintendent. If there was any trouble in the unit, the Unit Manager would call the Duty Lieutenant to manage the incident. Mr. Gearin referred to the job description of the Captain. He testified that the duties were the same as the duties he performed as the Duty Lieutenant. Lieutenants were involved in policy development. Lieutenants did not assist with preparation of the budget. He said that there was no confusion about the fact the Duty Lieutenant was in charge. If there was an incident in a unit and the Unit Manager needed additional staff, than the Duty Lieutenant would assign staff. If the Correctional Officers at the St. John's Lock-up needed assistance during the shifts when the Captain was not present at the Lock-up, they would call the Duty Lieutenant for assistance. The Duty Lieutenant coordinated staff and assigned replacements for sick leave. Mr. Gearin testified that he did not apply for a Captain position because

he did not want to do shift work. He heard John Scoville say that he did not want persons he did not promote attending the senior management meetings.

Gary Maguire has been employed for about 20 years and has held the positions of Correctional Officer, Lieutenant and Acting Captain. He held positions of Lieutenant for 6 years at the Bishop's Falls Correctional Centre and for 5 months at the Correctional Centre for Women. He served as Acting Captain for 4 months at Her Majesty's Penitentiary in 2007. He also served as Acting Duty Lieutenant at Her Majesty's Penitentiary in 1999 and 2000. He testified that there were differences between the Duty Lieutenant and Captain positions. After the Captain position was created, there was a different line of authority, which was from Correctional Officer to Lieutenant to Captain to Assistant Superintendent. The Captain has more accountability, develops policy, conducts security inspections, and attends security meetings and management meetings. The Captain conducts leave management interviews with Correctional Officers and has input into the Provincial Offenders Management system. The two jobs are the same with respect to the day to day running of the Penitentiary. The duties that were the same or similar included supervision of inmates, deployment of staff, weekly inspections, and calling in staff to discuss sick leave usage. As the officer in charge of the Penitentiary in the absence of the Superintendent or Assistant Superintendent, the Captain gives advice to other institutions in the province when requested. The Captain may conduct an investigation and may issue a letter of suspension when authorized by the Superintendent. The Captain does not have authority on his own to issue a suspension. Mr. Maguire agreed that the Duty Lieutenant had the same level of authority as the Captain to discipline employees, to the extent that both could issue a verbal or written reprimand.

John Scoville testified that there were differences between the Captain and the Duty Lieutenant positions. The Captain has a higher level of accountability and responsibility on a province-wide basis. The Captain acts at a higher level in the areas of planning, analytical functions and policy development. The Captain has responsibility for developing costs during the budget process which was similar to the responsibility of the Assistant Superintendent in the satellite institutions. On a province-wide basis the Captain coordinates Lieutenants in other institutions. Mr. Scoville said that some duties of Captain and Duty Lieutenant were the same, such as deployment of staff and calling in staff for overtime.

Mr. Scoville testified that of the persons in the position of Sergeants who were promoted to Duty Lieutenant in 1989, none were in the position of Duty Lieutenant in 2001 when the position was

eliminated and the Captain position was created. They had either retired or moved into other positions. Stephen Gatherall and Patrick Gearin had been Sergeants and they held the position of Unit Manager. Mr. Scoville testified that the decision to create the Captain position was made by Treasury Board prior to his commencement in the Superintendent position. As a result of the creation of the Captain position, Mr. Scoville believed there were no opportunities lost for promotion. The 5 Lieutenant positions were replaced by 5 Captain positions and the same number of opportunities for promotion remained. If the Captain position had not been created, then the Employer would have filled Duty Lieutenant positions from the Lieutenant's roster. Mr. Scoville testified that Union Executive members did not wish to accept Acting Captain positions because there was a potential conflict of interest. The Employer informed the Union Executive it was not appropriate to be both a member of the Local Union Executive and to be on the Captain's roster. There were 3 additional Captain positions created recently. The positions were for security, training (temporary) and occupational health and safety (temporary).

Union Submission

The Union submitted that the grievance should be allowed on the grounds of (1) violation of Articles of the Collective Agreement, (2) past practice, (3) a management decision that was arbitrary, discriminatory and in bad faith, and (4) estoppel. The Union reviewed the facts of the dispute and submitted that the Sergeant, Duty Lieutenant and Captain all had the same duties and responsibilities. In 1988 the parties agreed that Sergeants would be promoted to Lieutenant, the Sergeant roster would be eliminated and there would be one promotional roster for Lieutenant. The Collective Agreement has provided for the procedure for promotion to Lieutenant for many years, even though the Lieutenant position is outside the bargaining unit. The Captain and Duty Lieutenant have the same duties, including supervising Correctional Officers, directing the movement of inmates and calling in Correctional Officers to discuss use of sick leave. The testimony of the Employer's witness, Gary Maguire, was incorrect when he said a Captain could suspend a Correctional Officer. Only the Superintendent has authority to issue a suspension under the *Prisons Act* and Regulations. The Captain's authority was limited to delivering a letter from the Superintendent. The Union's witnesses testified there was no confusion about the Duty Lieutenant being in charge. The recommendations in the Ring Report could be satisfied by the Employer issuing a directive as to which Lieutenant was in charge. The Ring Report did not recommend that the Employer create Captain positions. The Employer's actions were contrary to Articles 1, 3, 26, 29 and two Letters of Understanding attached to the Collective Agreement. The Employer's actions undermined the

promotional roster and seniority rights. The Employer did not follow the Lieutenant's roster when making promotions to the position of Captain. The Employer acted in bad faith by disregarding the Lieutenant's roster. The senior qualified person on the Lieutenant's roster was entitled to be promoted to Lieutenant, but there was no guarantee that the same person would be promoted to Captain. The seniority rights of persons on the Lieutenant's roster also apply to assignments to temporary Lieutenant, but not to assignments to temporary Captain. There is less opportunity for Correctional Officers to move to the Lieutenant position with the number of Lieutenants reduced. The Employer acted to usurp the promotional roster and promote whoever it wished to the position of Captain. The Employer has unilaterally altered the promotional roster by eliminating the Duty Lieutenant position and creating the Captain position. There was an implied duty on the Employer to act reasonably and in good faith and not undermine the provisions of the Collective Agreement. In that regard the Union referred to *Photo Engravers and Toronto Printing Pressmen and Assistants Union* (1980) 25 L.A.C. (2d) 88 (Adams) and *Blue Line Taxi and R.W.D.S.U., Local 1688* (1994) 35 C.L.A.S. 84 (Lavery). The Employer did not act reasonably when it created the Captain position and did not consult with the Union. The Employer had consulted with the Union when it created the Duty Lieutenant positions and promoted the Sergeants to Lieutenants. The Employer acted in bad faith when it did not allow the Lieutenants to attend senior management meetings and it did not allow members of the local Union executive to be promoted to Captain. The Employer was estopped from making a unilateral change to the Lieutenant's promotional roster and appointing Captains. The Employer was estopped by its conduct of a lengthy history of negotiation of the management positions with the Union. The Employer had represented by its conduct that it would not make changes without first negotiating with the Union. The bad faith by the Employer was shown by the fact that the Employer filled the Duty Lieutenant positions on a temporary basis at the same time as it was planning to eliminate those positions. The Employer referred to *Department of Transportation and Works v. N.A.P.E.*, July 30, 2007 (Scott) (the "Highway Depot" case) where the arbitration board found the employer was estopped from laying off employees as a result of a prior agreement with the Union. Throughout the grievance process, the Employer did not raise any objection as to jurisdiction and it was bad faith for the Employer to raise an objection at this stage of the proceedings. The Union referred to case authorities stating that an employer was not allowed to raise an objection as to jurisdiction on judicial review when the objection was not raised before the arbitration tribunal. The prior case authority referred to by the Employer in *Her Majesty the Queen in Right of Newfoundland v. NAPE*, November 26, 1992 (Browne), was distinguishable from the present case. The principle of *res judicata* did not apply because the prior award dealt with a different issue. The Union referred to additional text and case authorities in support of its position.

The Union requested that the grievance be allowed, that the 5 Captain positions be abolished and the 5 Duty Lieutenant positions be reinstated.

Employer Submission

The Employer submitted that the grievance raised an issue that falls outside the Collective Agreement, i.e. the reorganization of management positions. The Arbitration Board would be adding language to the Collective Agreement, contrary to Article 9.13, if it were to find that promotions to the Captain position were required to follow the promotional procedure for Lieutenants in Article 26. The Employer is not barred from raising an issue of jurisdiction. The case authorities submitted by the Union applied to an issue of jurisdiction raised for the first time on judicial review and were not relevant in this case. Even if the Board considered the issue from the perspective of work of the bargaining unit there was a minimal intrusion. The obligation of the Employer was that if there was a Lieutenant position to be filled, it was to be filled according to the promotional procedure in the Collective Agreement on the basis of seniority. The Captain and Lieutenant positions were different. The Captain had a higher rank and classification. There was no language in the Collective Agreement obligating the Employer to maintain a minimum number of Lieutenant positions or preventing the Employer from reorganizing management positions. There was no language to obligate the Employer to maintain 26 Lieutenant positions and not reduce the number of Lieutenants to 21 positions. The issue was *res judicata* as it was already decided in *Her Majesty the Queen in right of Newfoundland v. NAPE*, November 26, 1992 (Browne). The prior award between the same parties considered a similar case where the employer eliminated a number of Lieutenant positions. The prior award decided that the Letter of Understanding re Sergeants attached to the collective agreement protected the persons who held the former Sergeant positions, and were promoted to Lieutenant, but did not require the employer to maintain a minimum number of Lieutenant positions. The Arbitration Board in this case was bound to follow the prior arbitration award unless there was a compelling reason not to follow it. None of the persons who held the former Sergeant positions were affected by the decision to create the Captain position. Under Article 26 the line of promotion applied to the Lieutenant position and not to the Captain position. There was no evidence of any loss of benefit to any member of the bargaining unit. The evidence of past practice was irrelevant. There was no Article in the Collective Agreement that was ambiguous. There was only one occasion when the Employer had negotiated promotions to a higher rank and that was when the former Sergeants were promoted to the Lieutenant position. The onus was on the Union to prove a violation of the Collective Agreement. The Employer referred to other

case authorities, including *Government of Newfoundland and Labrador (represented by Treasury Board) v. Royal Newfoundland Constabulary Association*, July 19, 2005 (Scott). The Employer did not have a duty to act fairly and reasonably in the exercise of management rights. Even if the Employer was required to act fairly and reasonably, it had done so in this case. The Employer had valid business reasons to create the Captain position, based on the Ring Report, which concluded there was confusion about which Lieutenant was in charge and who had authority to make decisions on escorts of inmates. The Employer acted to reduce the future risk of inmate escape. The Employer has authority to make such decisions under the *Prisons Act* and the *Financial Administration Act*. The Arbitration Board could not substitute its own decision for the decision of management. The Union's case authorities on management rights were not applicable because the position in dispute was outside the bargaining unit. There was no discrimination on the basis of Union membership. The 5 Captain positions were all filled by members of the bargaining unit. Barry Whitty, the Union executive member, chose not to apply for a Captain position. The elements of estoppel were not proven. There was no representation by the Employer that it would keep the Lieutenant positions forever. There was no intention by the Employer to make a representation that could be relied on by the Union. There was no language in the Collective Agreement that restricted management's right to reorganize the workforce. The Employer's actions did not impair the integrity of the bargaining unit. The *Highway Depot* case was distinguishable because in that case the employer made a representation in a memorandum of understanding, that highway depots would be organized in a certain way. The Employer requested that the grievance be denied.

Considerations

The Union grieves the action taken by the Employer in 2001 to create 5 Captain positions and to eliminate 5 Duty Lieutenant positions at the Penitentiary. The issues before the Arbitration Board are: (1) Did the Employer violate any specific Articles of the Collective Agreement, namely Articles 1, 3, 26, 29, or Letters of Understanding attached to the Collective Agreement? (2) Did the Employer improperly exercise its management rights? and (3) Is the Employer estopped from taking the action that was taken.

The Lieutenant and Captain positions are both outside the bargaining unit. However, the procedure for promotion to Lieutenant is set out in the Collective Agreement. A Correctional Officer who achieves the required score is placed on the promotional roster, and is eligible for promotion to a permanent position of Lieutenant or assignment to acting position of Lieutenant on the basis of

seniority. Promotion to the Captain position did not follow the promotional procedure for Lieutenant, but followed a promotional procedure established by the Employer. Those persons successful in the job competition were placed on a Captains' roster and were then eligible for promotion to permanent positions of Captain or assignments to acting positions of Captain. Promotion to Captain was based on merit and not on seniority. Having a place on the Lieutenants' promotional roster was not a factor considered by the Employer when deciding promotions to Captain. The Union submits that senior persons on the Lieutenants' promotional roster have lost an opportunity for promotion because there are fewer Lieutenant positions, and the Employer does not follow the Lieutenants' roster when making promotions to Captain.

When the Captain position was created at the Penitentiary, the organizational structure changed. The new structure consisted of the Superintendent in charge, with the order of rank being Assistant Superintendent, Captain, Lieutenant, and Correctional Officer. Under the new structure the Lieutenants report to the Captains. After the Duty Lieutenant position was eliminated, the total number of Lieutenants at the Penitentiary was reduced from 9 to 4 positions. The 4 remaining Lieutenant positions were the Unit Managers, a day shift job from Mondays to Fridays. There are also Lieutenant positions at the satellite institutions outside St. John's. The total number of Lieutenant positions in the Province was reduced from 26 to 21 positions, the reductions being the 5 Duty Lieutenant positions at the Penitentiary.

The Arbitration Board has considered the similarities and the differences between the Captain and Duty Lieutenant positions having regard to the testimony of the witnesses and the position descriptions entered as exhibits at the hearing. With respect to similarities, both positions were in charge of the institution in the absence of the Superintendent or Assistant Superintendent, were responsible for security, safety and well being of staff and inmates, supervised the admission and release of inmates, implemented policies and procedures, supervised Correctional Officers, were responsible for humane treatment of inmates, maintained a liaison with outside agencies, assigned overtime when there were staff shortages, called in Correctional Officers to discuss their use of sick leave, and imposed discipline in the form of a reprimand.

There were substantive differences between the positions of Captain and Duty Lieutenant. The Captain is a higher rank and a higher classification, being classified one level higher than the Lieutenant. The Lieutenants were required to follow orders of the Captain because a lower rank follows the orders of a higher rank. The Captain gives advice or direction to the Lieutenants in the

satellite institutions. The Captain has input into the budgeting process similar to the input of the Assistant Superintendent at the satellite institutions. The Captain also has a higher level of authority than the Lieutenant in the areas of planning, analytical functions and policy development.

The Employer submits that the reason to create the Captain positions in place of the Duty Lieutenant positions followed from the escape of an inmate, the investigation into the escape and the subsequent recommendations in the Ring Report. The Board notes that the Ring Report refers to confusion over who is in charge of inmate escorts, the need to ensure adequate personnel is available for inmate escorts and other duties, and the requirement that Correctional Officers be briefed on the inmates to be escorted. It was recommended by the Ring Report that there be clarity regarding whether the Duty Lieutenant or the Unit Manager is in charge. The Ring Report did not expressly address the creation of the Captain position. The Employer submits that it exercised its management rights and acted in a reasonable manner based on the recommendations of the Ring Report. By creating a Captain position with a higher rank, there would be no confusion as to who is in charge, as the Captain would have authority over the Unit Manager. Some Union witnesses disputed that there was any confusion as to who was in charge and thus disputed the findings of the Ring Report. The Union also submitted that there were other options available to the Employer if it chose to accept the recommendations in the Ring Report, such as issuing a policy directive stating that the Duty Lieutenant was in charge. The Employer's submission that its decision was based on the Ring Report will be discussed further by the Arbitration Board when it considers the issue of the Employer's exercise of management rights.

The Employer submits that the same issue was decided by a prior arbitration award in a dispute between the same parties in *Her Majesty the Queen in Right of Newfoundland (represented by Treasury Board) v. NAPE*, November 26, 1992 (Browne) (the "1992 Lieutenants Award"). The Employer submitted that this Arbitration Board is bound to follow the prior award based on the principle of *res judicata*, unless there are compelling reasons not to follow the prior award. The Board has considered the findings that were made in the prior award. The fact situation before the arbitration board in the prior award was that the Employer reduced the number of Lieutenant positions by abolishing 4 positions. The Union grieved the reduction of the number of Lieutenants. The arbitration board considered the language in the Letter of Understanding attached to the Collective Agreement headed "Re Sergeant Classification" stating that the Employer would "maintain the additional lieutenants". The arbitration board ruled that the Letter of Understanding was not a guarantee of a minimum number of Lieutenant positions. The Letter contained a

commitment by the Employer to the persons who formerly held the Sergeant classification and were promoted to the position of Lieutenant. In other words, the Employer had committed to maintaining Lieutenant positions for those persons, but had not committed to maintaining any specific number of Lieutenant positions in the organizational structure. The arbitration board stated as follows:

The Board is satisfied that the issue before us is addressed by the letter of understanding found on page 98 of the Collective Agreement. That letter provides for the promotion of existing Sergeants to Lieutenants. Based on this language the Board is of the opinion that the commitment contained in this letter was to the eleven Sergeants who were reclassified to Lieutenants. The letter makes no reference to those persons who were already Lieutenants. The reason for that would appear to be obvious. Those persons were already a part of management and the Union would not be concerned with individuals outside the bargaining unit; however, their interests would be with the Sergeants who are members of the bargaining unit and were now to be Lieutenants and a part of management. The new Lieutenants therefore no longer enjoy the protection of the bargaining unit and the letter of understanding was an effort to give them some security as they left the bargaining unit.

The Board can find no basis in the Collective Agreement for the Union's assertion that the letter was intended to maintain nineteen Lieutenant positions, the eleven Sergeants who were in the bargaining unit and promoted to Lieutenant pursuant to the letter of understanding and the eight management personnel who were outside of the bargaining unit when the letter was negotiated. The Board can find no language in the letter which could possibly support such an interpretation. The Board finds instead that the language supports the Employer's position. The plain and ordinary meaning of the words "additional Lieutenants" would be an obvious reference to the Sergeants who were being promoted to Lieutenants. The letter of understanding was a commitment by the Employer to these individuals. There was no commitment contained in the letter to the eight other individuals who were already Lieutenants in management positions. Based on the language of the letter of understanding therefore the Board finds that the grievance must be denied.

The Arbitration Board notes that the principle of *res judicata* applies to arbitration proceedings, with the effect that a party is not permitted to relitigate an issue already decided between the same parties. The purpose of the principle is to have finality in the dealings between the parties. The application of the principle of *res judicata* by arbitrators is discussed in Brown & Beatty, *Canadian Labour Arbitration*, 3rd edition, at paragraphs 2:3220 and 2:3221. The applicability of the doctrine of *res judicata* to administrative tribunals was discussed by the Supreme Court of Canada in *Danyluk v.*

Ainsworth Technologies Inc. [2001] 2 S.C.R. 460 (“*Danyluk*”). The *Danyluk* case outlined the prerequisites established at law for the application of *res judicata* and examined, in greater detail, the category of *res judicata* called issue estoppel. The *Danyluk* case found that even where the prerequisites for the application of the doctrine of *res judicata* were met, there was still a discretion to hear the issue when it is in the best interests of justice to do so. The *Danyluk* case discussed the requirements for issue estoppel commencing in paragraph 24 as follows:

Issue estoppel was more particularly defined by Middleton J.A. of the Ontario Court of Appeal in *McIntosh v. Parent*, [1924] 4 D.L.R. 420, at p. 422:

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [Emphasis added] . . .

The preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle, supra*, at p. 254:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

The Employer submits that the issue in this case was already decided in the prior award, which is an argument based on the category of *res judicata* called issue estoppel. The Board will consider what issues were decided in the *1992 Lieutenants Award*. The decision in the prior award was based upon the interpretation of the Letter of Understanding re Sergeants classification. The prior award decided that the Letter of Understanding did not guarantee any minimum number of Lieutenant positions. The issue in the prior award was whether the Letter of Understanding prohibits the Employer from eliminating Lieutenant positions. This case raises the issue of the Letter of Understanding, but also raises other issues, such as the effect of other Articles of the Collective

Agreement, the exercise of management rights and estoppel. The factual context of this case concerns the creation of 5 Captain positions and the elimination of 5 Duty Lieutenant positions. Therefore the same issue was not decided in the prior case and *res judicata* does not apply.

The Board has also considered the principle that an arbitrator should follow a finding or collective agreement interpretation in a prior award between the same parties, unless there are compelling reasons not to do so (see Mitchnick and Etherington, *Labour Arbitration in Canada*, 2006, page 51). The Board accepts this principle and finds that there are no compelling reasons not to follow the interpretation of the Letter of Understanding in the *1992 Lieutenants Award*. Therefore, the Board accepts the finding in the prior Award that the Letter of Understanding protected the persons who were promoted from Sergeant to Lieutenant in 1989, but did not guarantee any specific number of Lieutenant positions. With respect to the application of the Letter of Understanding Re Sergeants Classification to the facts of this case, the Board notes that the Employer's action to create Captain positions did not affect any persons who were Sergeants and were promoted to Lieutenant in 1989. Therefore there is no violation of this Letter of Understanding.

With respect to the Letter of Understanding Re Promotion - Head Warders/Lieutenants, this Letter addresses the filling of Lieutenant positions at the Penitentiary on the basis of total length of service in the Province, and states that the filling of Lieutenant positions in other institutions shall be a management prerogative, except that every third vacancy shall be filled based on total length of service. That Letter is not applicable to the facts of this case. The Board finds there is no violation of either Letter of Understanding.

Article 3 of the Collective Agreement provides for the recognition of the Union as bargaining agent for the classes of employees in the bargaining unit. The Employer's actions affect management employees, and do not affect bargaining unit work. There is no violation of Article 3.

Article 26 describes the operation of the promotional roster for Lieutenant. Article 26.08 (a) states there shall be one line of promotion from Correctional Officer to Lieutenant. Before the Sergeant classification was eliminated in 1989, there were two promotional rosters, one for Sergeant, and one for Lieutenant. Article 29 is headed "Seniority" and states that seniority is the governing factor in determining preference for promotions. Articles 26 and 29 have remained in operation after the creation of the 5 Captain positions. The Lieutenant promotional roster is still in effect for the purpose of filling permanent or acting Lieutenant positions. There is no reference in Articles 26 or

29 to any prohibition against the Employer creating Captain positions or eliminating Lieutenant positions.

The Arbitration Board has considered whether the Captain positions were in substance the same as Duty Lieutenant positions with the effect that the Employer was required to fill the positions from the Lieutenants' roster on the basis of seniority under Articles 26 and 29. When the duties and responsibilities of the Captain are compared to the Duty Lieutenant, it is evident that the organizational structure, the higher rank, and the additional duties of a Captain, have the effect that the Captain position is not in substance the same as the Duty Lieutenant position. The jobs are similar to the extent of responsibility for the day to day running of the Penitentiary, however, there are substantive differences between the positions as outlined above. The Employer was not required to use the Lieutenants' promotional roster, under Article 26, to fill the Captain positions, because Article 26 does not apply to Captain positions, and as stated, the Board finds that the Captain positions were not in substance the same as the Lieutenant positions. For the Arbitration Board to find that Captain positions are required to be filled from the Lieutenants promotional roster would have the effect of adding language to the Collective Agreement, which the Board is not permitted to do by Article 9.13. There is no violation of Articles 26 or 29.

The Union submits that the Employer's action to create 5 Captain positions and eliminate 5 Duty Lieutenant positions is an improper exercise of management rights. The Employer submits that it has an absolute discretion to create management positions and the Collective Agreement does not restrict the Employer's authority in this regard. With respect to management rights, the Arbitration Board has considered the express reservation of management rights in Article 4 of the Collective Agreement, and whether there is an implied term that management act fairly and reasonably and in good faith in the administration of the Collective Agreement.

With respect to the exercise of management rights, the Board refers to Mitchnick and Etherington, *Labour Arbitration in Canada*, 2006, at pages 280 to 282 as follows:

16.2.2 General Duty of Fairness

The question of whether, in the absence of express language in the collective agreement, employers are required to act fairly and reasonably in exercising their managerial authority has been addressed by the courts on several occasions. . . .

Arbitrator Bendel summarized these judicial decisions in his frequently-cited award in *Blue Line Taxi Co. and R.W.D.S.U., Local 1688* (1992), 28 L.A.C. (4th) 280. He noted, first, that if a provision of the collective agreement expressly confers a discretion on the employer, it can be presumed that the parties understood that it would be exercised fairly and reasonably. Second, even in the absence of explicit restrictions in the collective agreement, the employer is not entitled to exercise its management rights unreasonably if to do so would negate or undermine some other provision of the agreement.

Conversely, it is an error for an arbitrator to impose on the employer a general requirement to exercise its management rights reasonably, without linking that requirement to an express or implied term in the collective agreement: *Toronto Transit Commission v. A.T.U., Local 113* (2005), 194 O.A.C. 322 (Div. Ct.).

...
The recognition of an implied duty to exercise a discretion fairly, it may be added, is consistent with what the courts are doing in the commercial field. In *Marshall v. Bernard Place Corp.* (2002), 58 O.R. (3d) 97 (C.A.), for example, an agreement for the purchase of a residential property provided that the purchase was conditional upon receipt of an inspection report satisfactory to the purchaser “in his sole and absolute discretion”. The Court affirmed that even clauses such as this are subject to an implied requirement to act honestly and in good faith.

The award of Arbitrator Bendel referred to in the text was also discussed in *Blue Line Taxi and, R.W.D.S.U., Local 1688* (1994) 35 C.L.A.S. 84 (Lavery), where it was stated as follows, at page 9:

In this respect, it is true that the case law in Ontario has recognized an implied obligation on the part of the Employer to administer the collective agreement in a fair or reasonable manner. However, an arbitrator can only intervene, according to this case law, in specific situations. These were described as follows by arbitrator Bendel in the award referred to earlier [*Blue Line Taxi*], at pages 14 and 15:

“Firstly, if a provision of the collective agreement expressly confers a discretion on the employer, an arbitrator could conclude that it was intended that the discretion be exercised fairly or reasonably. Secondly, it has been held that an employer is implicitly precluded from acting unreasonably (in areas not expressly regulated by the collective agreement) if that might lead to specific provisions of the agreement being negated or undermined; see *Municipality of Metropolitan Toronto v. Canadian Union of Public Employees, Local 43* (1990), 69 D.L.R. (4th) 268 (Ont. C.A.), and *Re Westin Harbour Castle and Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351*, (1991), 23 L.A.C. (3d) 354 (R.M. Brown).

As I understand the law, therefore, the employer will only be answerable for the exercise of a management discretion if a link to the collective agreement can be established. Such a link might be found to exist if (1) the collective agreement expressly confers or recognizes a management discretion, or (b) the exercise of management discretion might lead to specific provisions of the agreement being negated or undermined.”

The Arbitration Board accepts the principles discussed in the text and case authorities, and finds that in the exercise of its management rights, there is a duty on the Employer to exercise its authority reasonably and in good faith. However, the duty must be linked to a provision of the Collective Agreement. In this case, the link could be established if the effect of the exercise of management rights is to undermine a provision of the Collective Agreement.

The Employer submits that, even if there is a duty to act reasonably and in good faith, it complied with the duty in this case. The Employer submits that the decision to create the Captain position and eliminate the Duty Lieutenant position was a bona fide business decision and was made pursuant to the Employer’s statutory responsibilities under the *Prisons Act* and the *Financial Administration Act* to ensure the safe and secure custody of inmates. The Employer referred to the Ring Report and submitted that it created the higher rank of Captain in place of the Duty Lieutenant so as to eliminate any confusion as to who was in charge as between the Unit Manager and the Duty Lieutenant. The Employer’s action was a reasonable response to the Ring Report. There could have been other reasonable responses. However, it is not appropriate for the Arbitration Board to manage the Employer’s business, or to substitute its decision for the Employer’s decision, on the basis that the Employer could have reasonably taken other action in response to the Ring Report.

The Union submits there was discrimination or bad faith for two additional reasons. The Union submits that the fact Duty Lieutenant positions were vacant at the time the Captain positions were created indicates bad faith by the Employer. However, positions may be vacant for many reasons and there is insufficient evidence for the Board to find this indicates bad faith by the Employer. The Union also submits that the Employer discriminated against Union executive members by not permitting them to be on the Captain’s roster. However, these events occurred subsequent to the date of the grievance and do not support a finding that the Employer discriminated on the basis of Union activity at the time the Captain positions were created.

Has the Employer's action undermined any provisions of the Collective Agreement? The Arbitration Board has considered whether the Employer's actions have undermined the Lieutenant's promotional procedure or the Lieutenants' roster in Article 26. This is not a case where all Lieutenant positions have been eliminated, which, if it occurred, would be an event that could render Article 26 meaningless. However, Article 26 was not rendered meaningless. After the Captain positions were created, there remained 21 Lieutenant positions in the Province and 4 Lieutenant positions at the Penitentiary. Having a place on the Lieutenant's promotional roster continues to have meaning to the extent that the Lieutenant position remains part of the organizational structure. There continue to be opportunities for promotion to permanent Lieutenant positions or assignment to Acting Lieutenant positions on the basis of Article 26 and the principle of seniority in Article 29. There is nothing in Articles 26 or 29 or the Letters of Understanding that guarantees any specific number of Lieutenant positions. The Employer's actions have not undermined any provision of the Collective Agreement. The provisions continue to have meaning. Therefore there was no violation of a management duty to act reasonably and in good faith.

The Union also submits that the Employer is estopped from creating the Captain positions, without first negotiating with the Union any reduction in the number of Lieutenant positions. The requirements of estoppel, as set out in *Brown & Beatty, Canadian Labour Arbitration*, 3rd edition, at paragraph 2:2210, consist of a representation by deed or conduct, reliance on the representation in the form of some action or inaction, and detriment resulting from the reliance. The Arbitration Board has reviewed the evidence of the history of the organizational structure at the Penitentiary, in particular, the events related to the promotion of the Sergeants to Lieutenants in 1989. The Board finds that there was no representation by the Employer that it would not reduce the number of Lieutenants or take action to eliminate the Duty Lieutenant position, without first negotiating with the Union. The *Department of Transportation* case, relied upon by the Union, may be distinguished from this case on the basis that the parties in that case signed a Memorandum of Agreement setting out a structure for layoffs, and the Employer in that case was estopped from proceeding with the layoffs in violation of the agreed structure. When the Sergeants were promoted to Lieutenants, the parties negotiated a Letter of Understanding, however as discussed above, the Letter does not assist the Union in this case. Therefore, the Employer is not estopped from creating the Captain positions and eliminating the Duty Lieutenant positions.

In summary, (1) the Employer did not violate any Articles of the Collective Agreement or the attached Letters of Understanding; (2) the Employer did not exercise its management rights in a

manner that was unreasonable, in bad faith or undermined the provisions of Article 26, or any other Article of the Collective Agreement; (3) the principle of estoppel does not operate because the Employer did not make a representation that it would negotiate with the Union before it eliminated any Lieutenant positions.

Decision

The grievance is denied for the reasons stated in the Award.

DATED this 13th day of March, 2008.

James C. Oakley
Chairperson

(Dissent attached)

David Reynolds

Don Saturley

Dissent of Union Nominee

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR,
represented by Public Service Secretariat
(Department of Justice - Her Majesty's Penitentiary)
(hereinafter called the "Employer")

GRIEVANCE: Policy grievance re Captain positions

I have read the award of the majority of the Board of Arbitration and, with respect, I must dissent from their findings in this matter.

There do not appear any major differences between the parties or among the members of the Board with respect to the fundamental facts of this case. The source of conflict is centred on the terms of the collective agreement, their application to the facts before us and the effect of an earlier award between the parties (*Her Majesty The Queen in Right of Newfoundland and The Newfoundland Association of Public Employees (Browne) Nov 26, 1992*) hereinafter referred to as Browne.

My divergence with the majority commences with article 1.03 of the collective agreement with states:

*1.03 In the event that there is a conflict between the **context** (emphasis added) of this Agreement and any regulation or policy made by the employer, this Agreement shall take precedence over the said regulation or policy.*

The use of the word “context” is, unusual and, in my view, significant. The parties, by their words, have said that they will not only be bound by the rigid legal interpretation of the collective agreement but also the context in which it has been negotiated and operates between the parties. In effect, the parties have agreed that the collective agreement is to be interpreted in a broad, purposive manner.

Applying such a contextual analysis also requires that a board of arbitration turn its attention to the context of the events that are alleged to be violations of the collective agreement and, likewise, to examine the context in which other disputes between the parties have been adjudicated and determine whether or not the context of the instant case can be differentiated or distinguished.

The promotional roster contained in the collective agreement regulates the movement of employees, both union and excluded, into the position of Lieutenant, a management position. Article 26.08 of the collective agreement states, in part:

*26.08 (a) There shall be **one** (emphasis added) line of promotion as follows:*

Correctional Officer

Lieutenant

A Correctional Officer who is not performing as determined by the evaluation programme and after being called in and so advised by his/her immediate Supervisor, will be given six (6) months in which to attain the level established under the evaluation programme. The employee will be reviewed every two (2) months during this six (6) month period and be given a written report of his performance, a copy of which will be forwarded to the President of the Association. If after the six (6) month period, the employee fails to achieve the level established by the evaluation programme, he/she shall be subject to disciplinary action which may include demotion or removing his/her name from the roster if he/she is on one.

- (b) *There shall be maintained **one (1) (emphasis added)** separate and distinct roster as follows:*

Promotional Roster #1 for Lieutenant

There was evidence presented that there are other management positions in the adult corrections system to which promotion is unrestricted by the collective agreement. Indeed the Superintendent, Mr. Scoville who attended and gave evidence was promoted from a different area and his promotion, and one would assume, promotions to Assistant Superintendent positions are beyond the ambit of the collective agreement and there was no evidence offered that there has ever been any dispute as to how these positions are filled.

The position of Lieutenant and the position of Duty Captain differed from those positions in that they were responsible for the day to day operations within the walls of the penitentiary and the other correctional facilities. These were - and are - direct operational positions involved in regular, ongoing and continual contact with the prison population and can be differentiated on that basis from the other management positions.

The context of the promotional provisions in the collective agreement can and should be interpreted to address just such positions which can be viewed as a natural progression from the position of Correctional Officer as opposed to the more administrative positions which are somewhat further removed from the day to day operations. Because the employer's actions have led to the creation of a second promotional roster for these operational management positions I believe that they violate the clear language of article 26.08 and the MOU Re: Promotions – Head Warders/Lieutenants.

The intent of the collective agreement was to provide for a mechanism whereby correctional officers could advance into the ranks of management on the basis of total service with the employer. Although the parties referred to the terms service and seniority interchangeably throughout the hearing, the MOU Re: Promotions – Head Warders/Lieutenants clearly refers to service as being the basis for promotion.

It was the evidence of Mr. Leo Puddester that prior to the elimination of the Sergeant positions in 1988 there were two promotional rosters; One from Correctional Officer to Sergeant and one from Sergeant to Lieutenant. With the elimination of the Sergeants classification the parties negotiated the current provision regulating the movement to the Lieutenant position. This was the quid pro quo for agreeing to transfer what, to that point had been bargaining unit work, to positions which were excluded from the unit. In exchange for the Union agreeing to relinquishing its claim to the work and agreeing not to attempt to re-establish the classification of Sergeant in the future, the employer agreed that future promotions to Lieutenant's positions at Her Majesty's Penitentiary (HMP) would be on the basis of total service and that promotions at the satellite institutions would also be regulated, but to a much lesser degree.

Given that the parties differentiated the promotional procedure at HMP in crafting the language of the collective agreement it is important to consider the effect of the employer's actions on the promotional procedures and promotional opportunities for the employees at HMP as a result of the creation of the Captain positions and elimination of the Duty Lieutenants. It was clear from the testimony of the witnesses that although there is a single classification of Lieutenant, in practice there are three "sub-classes" of Lieutenants. These are 1. Duty Lieutenants at HMP, 2. Unit Managers at HMP and 3. Lieutenants employed in Satellite facilities. The impact of the the employer's actions

directly affected the first group which constituted five of the nine, or 55%, of the Lieutenant positions at HMP.

By eliminating more than half of the positions in the employer's largest facility the employer's actions significantly reduced the opportunity for advancement for employees in that facility in particular. It is reasonable to conclude that the exigencies of the employer's operations would likely be such that unexpected employee absences would require immediate coverage in order to maintain safety and security. Since Lieutenant positions at HMP must be filled from the roster these were positions which were guaranteed to be filled on the basis of service.

Further, the employer's actions in the instant case can be differentiated from the circumstances considered in Browne because in that case the decision was a broad brush reduction of management levels throughout the public service, and the effect within adult corrections was incidental to that larger agenda. In the instant case the act was more surgical in nature – the elimination of the Duty Lieutenants and the creation of the Duty Captain positions at HMP. Ostensibly this decision was based on the recommendations contained in the Ring report, however while Ring discusses the need to clarify the chain of command, at no point does he refer to the elimination of positions or the creation of a new classification.

In my view these differing circumstances alter the context in which a board of arbitration should interpret the collective agreement. On the one hand we have a reduction in management levels across the public service. In the other a specific act to eliminate a sub-class of positions within a specific institution.

This is of particular significance in a case where the duties being transferred to another classification outside the bargaining unit were being performed by the Sergeants, within the bargaining unit, prior to 1988.

The majority speak of the need for certainty for the parties as one of the basis for the principle of deference to earlier awards between the parties. While I do agree in general with that principle I find it somewhat ironic when one considers that at the time of the Browne award, one of the parties, the employer, was using the power of the legislature to alter the terms and conditions of collective agreements that it had freely negotiated with the Unions representing its employees. It would appear,

that at that time, a settled state of labour relations and stability of interpretation were certainly a lesser consideration for the employer.

With respect to the issue of whether or not the Duty Captain is a different position than the Duty Lieutenant I must also differ from the majority. The core function of the position is almost identical and the fact that the Captains are more highly paid and that the Lieutenants answer to the Captains as a basis for differentiating the two is a somewhat circular argument. The fundamental function of the Duty Captain is, in my view, identical to the fundamental functions which were being performed by the Duty Lieutenants and which were being performed by the Sergeants up until 1998.

The employer's actions in 2001 can be distilled to two discrete and inter related acts. The first was the elimination of the Duty Lieutenants. The second was the creation of the Duty Captains. While I would agree with the majority that the creation of the Duty Captains, in and of itself, was not a violation of the collective agreement, the use of the Duty Captains to replace the Duty Lieutenants and the substantive impact of that act on the rights of the employees covered by the collective agreement did constitute a violation of the agreement.

For the foregoing reasons, therefore, I must conclude with respect that the Union interpretation is the correct one and that the grievance ought to be upheld.

Respectfully submitted this 9th day of March 2008.

David J. Reynolds

Union Nominee