

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984
s.29(1) application for hearing

Liquor, Hospitality and Miscellaneous Union – Tasmanian Branch
(T13753 of 2011)

and

Minister administering the State Service Act 2000/Department of Justice

COMMISSIONER JP MCALPINE

HOBART, 20 December 2011

Industrial dispute - suspension from duty – alleged breach of State Service Code of Conduct – investigation in accordance with Commissioner’s Direction No. 5 – employment relationship - jurisdiction found – public interest – procedural fairness – duty of care – decontamination procedure involving chemical agent – reasonable grounds for suspension from duty found – application dismissed

REASONS FOR DECISION

[1] On 24 January 2011, the Liquor, Hospitality and Miscellaneous Union - Tasmanian Branch (the applicant) applied to the President, pursuant to Section 29(1) of the *Industrial Relations Act 1984* (the Act), for a hearing before a Commissioner in respect of an industrial dispute with the Minister administering the State Service Act 2000 (Department of Justice) (the respondent) arising out of the suspension from duty of Correctional Officer Anthony John Burley (CS Burley).

[2] CS Burley has been employed in the Tasmania Prison Service (TPS) for 19 years. His conditions of employment are governed by the *Custodial Officers Award* (the Award). Following three incidents which occurred on Sunday, 31 October 2010 CS Burley was informed that he may have breached the *State Services Code of Conduct* (SSCC). On 8 November he was suspended from duty with full pay under s43 of the *State Service Act 2000* (SSA) and Regulation 34(1)(a) of the *State Service Regulations 2000* (SSR) by way of a letter from the Secretary of the Department of Justice (the Secretary). Accompanying this letter was a second letter from the Secretary informing CS Burley that an investigation in accordance with Commissioner’s Direction No.5 (CD5) would be undertaken into the incidents.

[3] The application cited four areas of dispute with the Secretary regarding the treatment of CS Burley:

- his suspension from duty under s43 of the SSA.
- commencement of an investigation for alleged breaches of s9 of the SSA.
- inflicting a monetary penalty by denying him the opportunity to work overtime.
- failing to state the length of suspension and when it would be reviewed.

[4] The applicant asserted that the Secretary failed to provide the "substance" of the allegations as is mandated by clause 4.4(a) of CD5, prior to the commencement of the investigation and at the time of CS Burley's suspension. The applicant further asserted that the Secretary failed to show that her decision to suspend CS Burley was based on "reasonable grounds" and therefore the suspension should be lifted. The applicant argued that the suspension, the investigation and the length of suspension were in breach of the SSA, SSR and CD5.

[5] The applicant sought an order for the following, in summary, that:

- The decision to suspend CS Burley was not made in accordance with the provisions of the SSA, was against the weight of evidence and was not in the public interest.
- The suspension be immediately revoked.
- CS Burley be credited with accrued leave withheld.
- CS Burley be paid for lost overtime.
- CS Burley be credited with superannuation entitlements arising from overtime lost.

[6] For privacy reasons the subjects of the three aforementioned incidents, namely 2 prisoners and the female partner of one of the prisoners, will be referred to by the first letter of their surname.

BACKGROUND

[7] At the Risdon Prison Complex (RPC) on 31 October CS Burley was supervising the prison visit process in the visiting area, known as "Visits". At approximately 2:30pm prisoner M, was allegedly communicating with his visitor through an external door which is not permitted. He was told to take his seat by CS Burley. It was alleged further that prisoner M initially refused to follow the directions given by CS Burley to sit on a specific chair. Eventually the prisoner did take his allocated seat but then allegedly jumped up in a threatening manner, directed at CS Burley. The matter escalated to the point where a number of Correctional Officers (COs) were required to subdue the prisoner and remove him from the visiting area. The prisoner consequently lost the privilege of a visit on that day.

[8] The second incident followed on from the first. Prisoner M's partner, Ms S, who had arrived for the visit was informed that the visit would not take place because of prisoner M's behaviour. CO Denholm "volunteered" to inform Ms S that her visit had been cancelled. It was alleged Ms S, who was accompanied by her small child, became irritated and verbally abusive and demanded to speak to a manager. It was explained by CO Denholm that the duty manager was not on site and that CS Burley was the supervisor on duty, but she refused to speak to him. CS Burley and she had previous dealings over the conduct of an earlier visit. She continued to remonstrate with the officers present. Eventually CS Burley ordered Ms S to leave the vicinity of the prison. She, it was alleged, became verbally abusive to CS Burley and the other officers. CS Burley at that point radioed the prison control to have Tasmania Police remove Ms S from the premises. CS Burley, with other officers, escorted Ms S from the visitor's area towards the gatehouse.

[9] It was alleged that on the way to the gatehouse Ms S, who was carrying her child in her arms, stopped suddenly causing CS Burley's hand to make contact with the small

of her back. Ms S claimed that she was pushed by CS Burley. It should be noted that there was no CCTV footage made available covering the time Ms S left the visiting area until she arrived at the gatehouse. CS Burley left the gatehouse to return to his duties while COs Denholm and Smith escorted her to the visitors' reception, where she was met by Tasmania Police Officers and escorted to the car park.

[10] The third incident took place in "Visits" later the same day. A "double" visiting period was underway at that time. In this situation the prisoners scheduled for the second visit are brought to "Visits" while the first group of prisoners conclude their allocated visiting period. Consequently visitors are present while prisoners are being transferred to and from the room.

[11] Prisoner B entered the room wearing a white tee shirt over his prison "greens", which is not permitted. CS Burley instructed him to remove the tee shirt, which he did. Subsequently it appears, that prisoner B said something to CS Burley which was allegedly abusive. What followed was an escalation of intervention by CS Burley, initially verbally, then with hand movement towards prisoner B, followed by the deployment of a chemical agent and then the prisoner being struck on the legs with a baton and finally subdued by a number of COs.

[12] Emanating from the three incidents a series of reports were filed by CS Burley and the other COs attending the incidents. The reports by the other COs were consistent overall with CS Burley's version of events. There were also a number of complaints lodged against CS Burley by prisoners involved at the time along with other prisoners not directly involved, by Ms S and from a number of the visitors present during the incidents.

[13] The three incidents were captured in part by CCTV cameras. The footage contains images, but no sound.

[14] On the day of the incidents CS Burley made a verbal report, by telephone, of the incidents to Correctional Manager (CM) Steve Gridley, who was the duty manager at the time. It is alleged that he did not notify CM Gridley that he had used a chemical agent. This was confirmed in an email¹ in response to an inquiry from the Assistant Director of prisons, Robert Bonde. It was also alleged he did not report the use of his baton to subdue Prisoner B in the aforementioned email. It was also alleged he did not report injuries to himself and another CO. It was further alleged that he failed to report the use of a baton as well as failed to report the presence of visitors during the deployment of chemical agent to the General Manager (GM) Jo Maxfield. Procedures require that the use of chemical agents, batons and the occurrence of injuries are reported to senior management.

[15] A Quick Assessment Brief (QAB)² of the incidents was prepared by GM Maxfield. The purpose of this preliminary evaluation appears to have been to establish, in part, if a formal inquiry into the incidents should be recommended. The proposed purpose of a formal inquiry would be to ascertain if CS Burley had breached the SSCC.

[16] The QAB was developed from various sources. It took into account the reports by CS Burley and the other COs as well as the complaints made against CS Burley and an assessment of the CCTV footage. GM Maxfield at pg 6 of the QAB stated "No parties involved have been formally interviewed by me." It follows that neither CS Burley nor the other officers who gave statements contributed personally to the development of the QAB, although copies of their statements were included.

¹ Exhibit R3(Att 4)

² Exhibit A24 and R3

[17] The QAB also took into account opinions from three unnamed COs who were present during some or all of the incidents, each of whom it was reported, challenged CS Burley's approach to the situations and the level of force he used.

[18] Another CO, Michael Flanagan expressed concern to GM Maxfield, by way of email, that CS Burley was some days later³ boasting of his use of chemical agent on a prisoner. He also expressed the opinion that CS Burley's attitude put staff at risk and was unnecessarily aggressive towards prisoners.

[19] In response to CO Flanagan's assertions CS Burley stated that he was not rostered on duty on 2 November, the day in question, so consequently could not have made the inappropriate comments.

[20] The QAB produced findings which, in part, concluded that in GM Maxfield's opinion CS Burley demonstrated poor judgement and in general condemned his actions over the three incidents. In summary she found the following:

- His approach to prisoners and the public appears to be unprofessional. She drew this conclusion from the number and nature of the incidents as well as inmate and public complaints.
- His poor judgement in relation to the three incidents caused them to escalate and a potential risk to COs, inmates and the public.
- He used unnecessary and excessive force with prisoner B.
- He demonstrated a lack of conflict resolution resulting in the necessity to use a baton and chemical agent to subdue prisoner B.
- He failed to decontaminate prisoner B or provide medical review.
- There was no indication that assistance was offered to the visitors and other prisoners with respect to decontamination advice and procedures. As a CS he showed poor judgement.
- He failed to inform the on call manager of his use of a chemical agent and baton.
- He showed poor judgement in allegedly making inappropriate comments about the incident.
- His cavalier, aggressive and intimidating attitude places staff, inmates and the community at significant risk. This was concluded from the incidents leading up to the prisoner B incident as well as opinions from fellow COs.
- His mind set towards the deployment of a chemical agent and use of the baton does not reflect the seriousness of his actions; nor did it demonstrate the appropriate level of concern and professionalism.

[21] As a result of her investigation she recommended the following in the QAB:

"1. That a full investigation is undertaken into the circumstances surrounding all of the incidents, in particular incident No.3 (in this

³ Exhibit R3(Attachment 5)

report) and a determination made as to whether a breach of the Code of Conduct has occurred, in particular in relation to the abuse of inmates and alleged excessive force used to engage compliance by inmate B.

2. *That CS Burley is restricted from contact with inmates and public (sic) pending the outcome of Recommendation 1 (investigations).*
3. *That the disciplinary processes arising from reports submitted against inmates B and M by CS Burley are suspended pending the outcome of Recommendation 1 (investigation)."*

[22] CS Burley was notified of his suspension and the proposed CD5 investigation by way of a letter dated 8 November 2010⁴. The letter cites the following reason for his suspension:

"..... because you may have breached the Code of Conduct as described in the letter attached to this instrument it is in the public interest to suspend you from duty on full pay."

[23] The accompanying letter states:

"The matters to be investigated relate to your conduct as a Correctional Supervisor during and following an incident involving inmate M (my abbreviation) at the Risdon Prison Complex (RPC) Visits Room on 31 October 2010; an incident involving visitor S (my abbreviation) at the RPC Visits Waiting Room on 31 October 2010; and an incident involving inmate B (my abbreviation) at the RPC Visits Room on 31 October 2010.

It is alleged that your conduct during each of these incidents may have breached the following sections of the State Service Code of Conduct."

[24] The correspondence cited the following sections of the SSCC which he may have breached;

- *9(2) An employee must act with care and diligence in the course of State Service employment.*
- *9(3) An employee when acting in the course of State Service employment, must treat everyone with respect and without harassment, victimisation or discrimination.*
- *9(4) An employee, when acting in the course of State Service employment, must comply with all applicable Australian law.*
- *9(6) An employee must comply with any standing orders made under section 34(2) and with any lawful and reasonable direction given by a person having authority to give the direction.*
- *9(13) An employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service Principles.*

⁴ Exhibit A4

- 9(14) An employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service.

[25] On 15 November the applicant sought more and better particulars of the Secretary as to her justification in initiating a CD5 investigation⁵. The letter cites CD5 at 4.4(a):

"That the "substance" of the alleged breaches must be provided, in writing, at the commencement of the investigation."

Substance means the essential elements that have given rise to the allegation of the breach of Code and the specific parts of the Code allegedly breached."

[26] This, the letter argues was not provided in the letters of 8 November. It also argued that because of this failure the suspension of CS Burley was null and void.

[27] On 18 November CS Burley filed an application to review his suspension with the Office of the State Service Commissioner (OSSC).

[28] A further attachment to exhibit A4 is the Secretary's response to the letter of 15 November, dated 23 November rejecting the applicant's request in the terms:

"I believe that the information provided is adequate and meets the expectations of the Act and the Commissioner's Direction, as well as the detail required by Mr Burley so he can understand why the particular actions are being taken."

[29] In a letter to the acting State Service Commissioner (SSC)⁶ dated 2 December, the Secretary supports the content of her letters of 8 November to CS Burley as being adequate:

"Thus Mr Burley had quite precise advice of where the conduct to be investigated occurred, when it occurred and named the three individuals to whom his conduct was allegedly directed."

[30] The Secretary did not specify what exactly the unacceptable conduct "to be investigated" was.

[31] The Secretary continued by alerting the Acting SSC that CS Burley had submitted reports, as required by Director's Standing Order 1.02 Use of Force, relating to the incidents which occurred on 31 October. One must assume the inference being that CS Burley was aware of those aspects of his conduct which were being questioned.

[32] On 15 December the acting SSC heard the matter with respect to the alleged failure of the Secretary to provide the "substance" of the allegations against CS Burley as required by CD5.

[33] On 22 December the Secretary furnished CS Burley with further details regarding the allegations against him⁷. Specifically the complaints from both prisoner M and Ms S and his handling of the prisoner B incident (incident 3). As with the Notice of

⁵ Exhibit A4

⁶ Exhibit A5

⁷ Exhibit A6

Investigation letter⁸ the Secretary cited the areas of the SSCC that CS Burley may have breached, noting that section 9(6) did not apply to the incident involving Ms S.

[34] On 24 December CS Burley sought access to the CCTV footage partly upon which the Secretary had relied in making her decision to suspend him. On 10 January 2011 CS Burley was provided with a copy of the CCTV footage as well as copies of the complaints raised by the prisoners and visitors. Following this the applicant lodged an application on 25 January 2011 with this Commission.

[35] The hearing concluded on 5 May 2011, however on 27 May Mr Tullgren, for the applicant, sought to present further evidence which was not available during the hearing and was, he said, germane to the case. He was granted leave to introduce the evidence.

[36] The new evidence centred on a report emanating from an investigation conducted by Tasmania Police into a complaint of assault on prisoner B. The report recommended no criminal charges be laid against CS Burley. Mr Tullgren asserted CS Burley had not been made aware of the police investigation by the Department. However it was admitted the police had communicated with him seeking to interview him over the incident. He declined to be interviewed, but did furnish the police with his view of the incidents in a written statement.

[37] Mr Tullgren argued that the outcome of the police investigation vindicated CS Burley's handling of the incidents on 31 October. He also argued that the Secretary would have known the result of the investigation while this matter was being heard initially. Further, that the agency failed to act in a full and frank manner in not disclosing the information to CS Burley and this Commission.

[38] Following on from this new evidence Mr Tullgren introduced the training manual to which, he asserted, CS Burley had adhered during the incidents in question. Ms Banman sought and was granted leave to introduce two witnesses to refute the applicant's assertions with respect to his training

[39] Mr Baker, for the Minister, raised a threshold issue in that this Commission did not have the jurisdiction to hear the matter. He asserted the OSSC was the appropriate jurisdiction in which the matter should proceed. He also argued that it was not in the public interest for the matter to be heard in this jurisdiction whilst the same matter was concurrently before the OSSC.

[40] Mr Tullgren asserted that employment conditions and employment relationship matters properly fall within the jurisdiction of this Commission. He also stated that the principal matter before the OSSC was the failure of the Secretary to provide particulars of the breaches of the SSA allegedly committed by CS Burley.

[41] With respect to CS Burley having registered applications with both the OSSC and this Commission, he argued that the SSA was not a complete code and did not preclude a party seeking remedies outside of it. He asserted that the award guards the employment rights of state employees relating to terms and conditions of employment which, he said the SSA fails to do.

[42] He argued that access to both Commissions was open to CS Burley and cited the authority *Ridge v Baldwin*⁹ in support. At pg 11 of the decision the judgement states;

⁸ Exhibit A4

⁹ Exhibit A17 *Ridge v Baldwin* (No1) [1963] UKHL 2 (14 March 1963)

"There are many cases where two remedies are open to an aggrieved person, but there is no general rule that by going to some other tribunal he puts it out of his power thereafter to assert his rights in court; and there was no express waiver because in appealing to the Secretary of State the Appellant reserved his right to maintain that the decision was a nullity."

[43] Mr Tullgren argued that in the instant matter similar conditions exist in that there is no specific exclusion preventing CS Burley taking the matter to both jurisdictions.

[44] It appears the OSSC proceedings were suspended awaiting the outcome of the instant matter before this Commission.

[45] The Commission sought to hear the matter in its entirety and address the jurisdictional issue in the decision.

[46] Mr Tullgren said the case before the Commission arose from the assertion that the agency had no valid reason to suspend CS Burley for want of grounds of evidence. He said because the power to suspend is discretionary it must be exercised reasonably, which in the instant matter it was not.

[47] He submitted that the Secretary's decision to suspend CS Burley was based primarily on the QAB and the CCTV footage. He argued these were not reasonable grounds upon which to make such a decision.

[48] He submitted further that although CS Burley was suspended on 8 November 2010 he was only fully made aware of the allegations against him on 10 January 2011, some two months into his suspension.

[49] Mr Tullgren stated that CS Burley was not given the opportunity to make a case against suspension or to respond to the allegations made by CO Flannigan or the unnamed COs and that any reliance on information to which CS Burley was not given the right of reply infected the decision to suspend him therefore they were not reasonable grounds or in the public interest.

[50] He argued that the evidence from those COs present given in their reports was ignored in favour of the complaints by prisoners, visitors and unnamed COs. He reasoned that ".... because it was Burley...."¹⁰. He inferred on a number of occasions that CS Burley had been targeted by prison management.

[51] He cited the authority *George v Rockett*¹¹ which in part at p5, para8, of the decision says:

"When a statute prescribes that there must be "reasonable grounds" for a state of mind including suspicion and belief it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person."

[52] He argued that the intent of s20.1(d) of the Act requires the Commission to have regard to the public interest when hearing such as the instant matter. He cited the matter before the High Court of Australia; *Queensland Electricity Commission, Ex parte Electrical Trades Union of Australia*¹². At p4, para7 their Honours say:

¹⁰ Transcript 5.5.11. p109, L20

¹¹ Exhibit A23 *George v Rockett [1990] HCA 26*

¹² Exhibit A16 *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987] HCA 27*

"Ascertainment in any particular case of where the public interest lies will often depend on a balancing of interests, including competing public interests, and be very much a question of fact and degree."

[53] He stated CS Burley's suspension was an abuse of the system and that the public interest consideration was to ensure government decision makers are held accountable.

[54] He said the decision to suspend CS Burley would seriously affect his financial position, his reputation and his position within the organisation.

[55] The process lacked procedural fairness. He cited the authority *Kioa v West*¹³. At p23, para32 Mason, J states:

"What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting."

[56] And further his Honour cites the case of *Salemi*¹⁴:

"The critical question in most cases is not whether the principles of natural justice apply. It is what does the duty to act fairly require in the circumstances of this particular case."

[57] He cited a number of authorities on the application of goodwill in dealings between employers and employees which, he argued, was absent from the instant matter. In the matter *Cantor Fitzgerald International v Horkulak*, a judgment of the Court of Appeal in England he cited the following at p9, para30¹⁵. (Note in the transcript A28 is ascribed to the authority *Associated Picture House Ltd v Wednesbury Corporation*. This authority should be A29):

"While in any such situation, the parties are likely to have conflicting interests and the provisions of the contract effectively place the resolution of that conflict in the hands of the party exercising the discretion, it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion."

[58] He argued the Secretary failed to exercise her discretion properly.

[59] Ms Banman, for the Minister, cited s4.1 of CD5;

"Should a Head of Agency have reasonable grounds to believe that a breach of the Code may have occurred, the Head of Agency must appoint, in writing, a person, (the investigator) to investigate the alleged breach of the Code in accordance with these procedures."

[60] She said that "reasonable grounds" are less than a balance of probabilities, and more than mere suspicion. This is consistent with the case law submitted by the applicant.

[61] In initiating the CD5 investigation, the Secretary took into account the QAB prepared by GM Maxfield, inclusive of reports, departmental emails, all complaints

¹³ Exhibit A25 *Kioa v West* [1983] HCA 81

¹⁴ *Salemi* (No.2), at p451, per Jacobs J

¹⁵ Exhibit A28

received and CCTV footage of elements of each incident. She also considered the views of the Acting Director of Prisons and the Director of Corporate Service.

[62] She submitted a file note¹⁶ which outlines the reasoning behind CS Burley's suspension:

- "3) Overall the QA confirmed that there were concerns about the approach of CS Burley. In particular in one incident CS Burley used both capsicum spray and his baton to subdue a prisoner. Of particular concern was whether the amount of force used by CS Burley may have been overly excessive. I(sic) was noted that the CCTV footage appeared to be contrary to the statement provided by CS Burley as well as indicate(sic) the inmate in fact was not a threat to CS Burley.*
- 4) *It was determined that based on the QA a Code of Conduct investigation would be instigated.*
- 5) *The decision then focussed on interim actions with respect to the duties/placement of CS Burley while the Code of Conduct is undertaken. It was determined that based on recent incidents related to CS Burley (sic) aggressive behaviour, which are also subject to concurrent Code of Conduct actions that it would be appropriate that he be suspended from duties as there were no other deployment options that were considered appropriate."*

[63] She stated the Secretary considering the available information came to the conclusion that there may have been a breach of the code of conduct and as such was obliged under s4.1 of CD5 to investigate the matters.

[64] Ms Banman asserted that although there had been previous determinations of breaches of SSCC against CS Burley the current CD5 investigation stands alone and is not reliant on previous incidents.

[65] She cited the recent decision by the Acting SSC in the matter *Pervan v DHHS*¹⁷ where the issues of natural justice and due process were in question with respect to the execution of a CD5 investigation. In his decision acting SSC Frawley said at para 72:

"The CD5 process is a standalone process and one designed to ensure that the applicant will be afforded procedural fairness. Through this process there will be an opportunity for the applicant to be fully informed regarding the issues of concern and be provided with an opportunity to have relevant input throughout the process in a number of ways."

[66] She further cited the decision of Porter J in his decision in the judicial review of *Pervan*¹⁸, at p11, para 48 he says:

".... I take the view that it is necessary to look at the nature of the cl 4.1 decision when put in the context of the overall scheme. Whilst there may be some aspects of the decision itself which suggest that a right of hearing be given, they are not such as to compel consideration of requirements for the decision in isolation from the broader decision-making process. As is apparent, I have accepted that a degree of impact arises from the mere fact of the investigation itself, and I take into account, to the extent established by the evidence, an

¹⁶ Exhibit R4

¹⁷ Exhibit R5 *Michael Pervan and Department of Health and Human Services (RO15-2010/11)*

¹⁸ Exhibit R16 *Pervan v Frawley [2011] TASSC 27*

impact on reputation both in relation to the applicant's immediate personal sphere, and in the wider community. However, the investigation is the first formal step in a much lengthier procedure. It does not of itself lead to any finality, and culminates only in a report, as to the making of which the applicant is to be heard. That leads to a final determination by someone other than the investigator, at which stage the applicant has a further right to be heard.."

[67] Further at para 48:

" the question is then, as noted, whether the provisions for procedural fairness in the later stages are sufficient to "exclude any additional requirements" at the particular stage under consideration; that is, whether the scheme as a whole achieves procedural fairness:....."

[68] And further at para 60 Porter J states:

"There is a very weighty trend towards holding that the rules of procedural fairness do not apply to decisions which merely commence investigatory or similar processes, where those processes do not of themselves involve final determinations:"

[69] Porter J cites the authority *Liversidge v Anderson*¹⁹ with regard to beliefs formed by a reasonable person in exercising the power to suspend or hold an inquiry. Ms Banman asserted that the Secretary clearly understood the meaning of the law applicable in the circumstance. Porter J says at para 69:

"In the main, in relation to provisions which mandate or authorise the exercise of power where there exists a particular belief or state of satisfaction, judicial review is available on the question of whether the decision-maker could have reasonably formed that belief or reached that state:....."

[70] She argued that the Secretary's letter of 8 November²⁰ complied with s4.4 of CD5. She also asserted that it was the respondent's view that the Secretary met all her obligations in the aforementioned letter.

[71] She addressed the authority of the appeal, *Public Service Board of NSW v Etherton*²¹, cited by the applicant, where the applicant in that matter had been expected to appear, unprepared, before a board at which charges would be determined and sanctions applied; which differs markedly from the instant matter.

[72] She argued that CS Burley had been given the full investigation report unlike the plaintiff in the Etherton matter. She also cited the following from Etherton p309 para D:

"In similar, but slightly different circumstances, the failure to provide particulars would not void the proceedings as a whole, but the outcome would be more likely to have been a stay in proceedings until the particulars were provided."

[73] One of the grounds upon which CS Burley's suspension was based was "public interest". Ms Banman cited the definition of public interest contained in Butterworth's Concise Australian Legal Dictionary:

¹⁹ *Liversidge v Anderson* [1941] UKHL 1; [1942] AC 206

²⁰ Exhibit R6

²¹ Exhibit A20 *Public Service Board of New South Wales v Etherton* 3 NSWLR (1985) 1

"An interest common to the public at large, or a significant portion of the public in which may or may not involve the personal property rights of individual people."

[74] Ms Banman submitted that one of the incidents on 31 October had been directly witnessed by members of the public and subsequently reported in the media and the press; another had directly involved a visitor. The agency also received a number of complaints from visitors, other prisoners and officers.

[75] She submitted that the Secretary had a proper interest in maintaining public confidence in the prison system. She had a range of data before her from which she could form an opinion whether to initiate a formal investigation or not.

[76] She further submitted that in making the decision to suspend CS Burley while the investigation was being conducted the Secretary considered the nature of the allegations, the impact on other employees should CS Burley remain in the workplace, his ability to perform his duties to an acceptable standard and the potential disruption of the workplace if he were present.

[77] Although the Secretary considered the potential to reassign him within the agency or the wider State Service, Ms Banman argued that it was not appropriate to place CS Burley in a different work environment given the allegations against him go to his capacity to manage conflict appropriately and to his judgement in assessing conflict situations.

[78] The department has a duty of care to the staff and the inmates and this may have been compromised by placing him in an alternative workplace. She said to remove him from the workplace restricting his capacity to communicate with staff was the most effective means of maintaining the integrity of the evidence to be submitted to the investigation.

[79] She also said that the capacity within the corrective system for staff to bring pressure to bear on colleagues who may be required to give evidence was a significant issue. Mr Tullgren objected to the inference that CS Burley would exert such influence. He argued there was no evidence educed to support the department's position. It should be noted that Mr Tullgren expressed concern that the Commission had permitted the Minister to ".....effectively imply that Mr Burley was some form of thug who would go around and intimidated staff..."²². His concern was noted.

[80] Ms Banman argued the environment within which COs work means they have a strong reliance on each other for support in the safe performance of their duties. This reliance can create the situation where an officer is reluctant to speak out against other staff for fear they may lose the critical support of other officers for "breaking ranks". Given that CS Burley is a supervisor he may well have supervisory control over potential witnesses both staff and prisoners.

[81] She argued that members of the public who have family or friends incarcerated should expect that they be treated fairly and humanely when in the custody of the prison service. The public should not, she said, be subjected to witnessing violence or be exposed to chemical agents while visiting.

[82] She said that when such events do occur, the community has the right to expect that the department take the matter seriously and conduct an investigation; further, that

²² Transcript 5.5.11 p108, L35

the alleged perpetrator be removed from the workplace where he or she can exercise control over the subject prisoners.

[83] Mr Tullgren²³ argued that from the CCTV footage there were no visitors distressed by the chemical agent. In response GM Maxfield asserted that the department had received a written complaint about the effects of the chemical agent from a visitor who was present in Visits at the time.

[84] GM Maxfield was asked what facts she had relied upon to conclude that CS Burley was a continuing risk. She responded²⁴:

"Well possibly from the fact that he had been involved in other incidents, so I thought that this seemed to be an ongoing thing so it needed to be looked at."

[85] When pressed she said that the department had paid out \$20,000 in compensation to a prisoner who, through the deliberate actions of CS Burley, had lost the end of his finger. Mr Tullgren said that CS Burley had "fessed up" to that incident and had been punished under the SSA.

[86] Ms Banman addressed the contention that CS Burley was adversely impacted financially because his suspension prevented his participation in overtime. She said that the award does not provide for an entitlement to overtime. The SSA at part 6, s3 provides for the employee to be allocated overtime at the employer's discretion. She reiterated that CS Burley is receiving his full entitlements while under suspension.

[87] In response to a question from the bench, Ms Banman asserted, contrary to CS Burley's evidence, that incidents of the nature observed in the CCTV footage were not a common occurrence.

[88] She said CS Burley failed to follow the required protocols in not reporting all the relevant facts of the incidents to both GM Maxfield and CM Gridley which was a serious breach. CS Burley asserted he had fully informed both managers as required.

[89] With regard to CS Burley's report to her of the incidents, GM Maxfield said²⁵ at P194, L45:

"At no time did he tell me that he used a baton, and when I reviewed the CCTV footage I was concerned – not only concerned, I was pretty appalled at some of it, and felt that he didn't... Mr Burley didn't use all reasonable effort to avoid the situation on the day – at that stage."

[90] She also confirmed that CS Burley had not informed her there were members of the public, including infants present when he deployed the chemical agent.

[91] Ms Banman cited the authority of an AIRC full bench decision of 2005 in an appeal by an Appellant M and Respondent I²⁶ arguing that the observation is on foot with the instant matter. At p6 para 14 the full bench commented:

"The attack on the suspension decision seems to proceed on the basis that the Commission should make findings about the nature of the alleged misconduct and a range of other matters in order to determine whether the decision-maker

²³ Transcript 24.10.11 p52, L45

²⁴ Transcript 24.10.11 p73, L5

²⁵ Transcript 23.8.11 p194, L45

²⁶ Exhibit R14 *Appellant M and Respondent I PR966488*

took all of the relevant circumstances into account. This approach misses the point. It is not the Commission's role to pre-empt the inquiry envisaged by the agreement by making findings of fact and law after the suspension decision but before the enquiry was concluded. The question is whether the decision to suspend was a valid one when made. Under the terms of the agreement any decision to suspend is taken before the inquiry has concluded. Accordingly the decision is made in the absence of firm findings. But the essential point is that necessarily the exercise of the discretion to suspend precedes the inquiry."

[92] She rejected the applicant's contention that the duration of the suspension was unlawful. She asserted the length of suspension was governed by the CD5 process.

[93] Further at para 15 in the same AIRC matter, their honours said:

"It is true that the length of the suspension, being related to the time taken to complete the inquiry, is uncertain and that the suspension has the potential to affect M's reputation and career prospects. But these are likely consequences whenever the power of suspension is exercised."

[94] The Commission sought clarity with regard to the inference that there was the potential for the continuance of alleged unacceptable behaviour should CS Burley continue in his role. Mr Charlton for the Minister responded that due to the unusual circumstance of the number of incidents occurring within a short space of time and involving the same officer there was cause for concern. Further that the deployment of a chemical agent and the use of a baton in the presence of the public was not a normal occurrence and in congruence with the other incidents supported CS Burley's suspension.

[95] Mr Tullgren asserted that there was no power under any of the relevant legislation to appoint GM Maxfield to undertake the Quick Assessment Brief. He further argued that the use of the QAB in the decision to suspend CS Burley was contrary to the provisions of the SSA, because there is no provision for such a document to be generated.

[96] He stated that GM Maxfield did not seek information from CS Burley, but took into account unsubstantiated allegations made against him by unnamed COs, which was prejudicial. He argued that she did not specify what rules or procedures he may have contravened. Further he argued that she had no statutory power to make the recommendations she did.

[97] He argued that had CS Burley deployed the chemical agent wrongly he should have been charged under s52 of the Criminal Code, which he was not.

[98] He asserted GM Maxfield made no attempt to verify CO Flannigan's statement that CS Burley was boasting of his use of a chemical agent on a prisoner. Also that she accepted, without question, CM Gridley's word that CS Burley had not provided him with the required information during his report of the incidents.

[99] Mr Tullgren argued that there was no evidence educed that CS Burley failed to act according to standing orders because GM Maxfield had not made reference to any specific breach in the QAB nor referred to them in her evidence.

[100] He persisted in attempting to have her identify the specific DSOs and SOPs with which CS Burley had allegedly failed to comply. She consistently responded that that determination of non-compliance lay with the investigator.

[101] GM Maxfield on being pressed as to the identity of the COs who had complained responded at ²⁷P52, L25:

"(name withheld) came and saw me.... but didn't want to have his name put forward because of fear of recriminations and he came and told me that he had it under control and there was no need for Mr Burley to interject at the time."

[102] This statement is with respect to CS Burley's initial dealing with Ms S when she was informed her visit had been cancelled. She also named another officer, CO (name withheld) who had raised concerns over CS Burley's conduct with her privately.

[103] In response Ms Banman cited the *Pervan*²⁸ case where a Ms Sparks had prepared a brief for the secretary, at para 76 and 77 Porter J says:

"It might be easy to overlook the fact that the Sparks investigation was really an assessment of the nature of the allegations and the supporting material. It was not an investigation in any formal sense, and of course did not purport to make any factual findings. By definition it would include untested allegations and hearsay. The nature of much of what is said to be hearsay, particularly as it relates to Ms D, would appear to be admissible in a court under the laws of evidence. Further, whilst Ms Sparks advised the Secretary of some conclusions of hers as to the appropriateness of a CD5 investigation, the Secretary was under no obligation to take them into account. Indeed, the requirements of cl 4.1 would have compelled the Secretary to make up his own mind on the material presented..."

[104] Ms Banman said of GM Maxfield's preparation of the QAB²⁹:

"Yes, we acknowledge that as part of the quick assessment brief allegations weren't put to him, that wasn't the purpose of that, it was the purpose to look at – we have a very significant , which is on the record, a very significant and highly unique and unusual and serious incident at the prison that needs to be looked at and her task was to bring together all that information."

[105] Ms Banman noted that it was CS Burley's conduct as a correctional supervisor which was being investigated under s9(3) of the SSCC which states:

"An employee, must treat everyone with respect without harassment, victimisation or discrimination."

[106] One of the contributing factors in the decision to suspend CS Burley was his alleged failure to conduct proper decontamination of prisoner B after he had been sprayed with chemical agent. Ms Banman argued that the failure to decontaminate correctly was a breach of 9(3).

[107] CS Burley asserted:

"..... exposure to fresh air for 30 seconds can clear the body of all chemical agent and can decontaminate you."

²⁷ Transcript 24.10.11 P52, L25

²⁸ Exhibit R16 *Pervan v Frawley [2011] TASSC 27*

²⁹ Transcript P84, L25

[108] And further he said³⁰:

"..... in an operational sense where you don't have direct access to fresh water, the best way to decontaminate is to face towards the prevailing breeze."

[109] CS Burley's evidence was that prisoner B was moved to a holding cell via a walkway which was outside the building in the open air. In the context of his argument it is reasonable to accept he was implying that this activity was sufficient to adequately decontaminate the prisoner.

[110] The CCTV footage shows prisoner B being taken into and left in the holding cell, his hands restrained behind his back. Mr Tullgren asserted that there was no evidence that CS Burley did not decontaminate the prisoner properly.

[111] In a counter to Mr Tullgren's argument that the training manual³¹, adhered to by CS Burley, did not specify decontamination with water, Ms Banman introduced evidence from Mr Jacks, an expert witness, to refute the assertion.

[112] Mr Jacks, a commander in the Tactical Response Group (TRG) and a trainer has 18 years experience in the correctional service. He said that CS Burley was better "educated" than he in correctional matters. The training received by CS Burley was in line with current standing operating procedures, director's standing orders and legislative requirements.

[113] He said that officers currently use oleo capsicum (OC) spray as the chemical agent. He said CS gas, cited in the training manual³², was used in the past. OC is oil based whereas CS is a fine powder. The dissimilar physical and chemical properties of the two agents require different decontamination procedures; both require the recipient to be decontaminated with running water, but CS may require 2 to 3 minutes under running water whereas OC requires up to 30 minutes.

[114] He said standing in the wind, as asserted by CS Burley, may give some short lived relief, but it would not remove the oil from skin or clothing.

[115] When he was asked if he was familiar with the decontamination procedure for visitors or secondary bystanders³³he responded:

"...I have to be honest and say I don't envisage a situation where they would be exposed. So it has never occurred, if you know what I mean."

[116] He said that the care of recipients suffering the effects of a chemical agent forms part of the operational plan. When the TRG disperse chemical agent at a prisoner he said the procedure is³⁴:

"... now, when we're handing a situation back to the manager, that we have taken a person which was uncontaminated, contaminated them, decontaminated them, had them checked by the nurse and then we would hand the situation back to you so we have that ... process that we fall into for the purposes of our part of the program is complete."

³⁰ Transcript 5.5.11 p52, L20

³¹ Exhibit A33

³² Exhibit A33

³³ Transcript 23.8.11 p187, L15

³⁴ Transcript 23.8.11 p188, L20

[117] He confirmed that CS Burley had participated in such TRG operations as a team leader. He made the further comment with the responsibility for decontamination³⁵:

"....as I understand it, the current DSO is that if you put it on then you're responsible for having it come off."

[118] When asked how long this had been the procedure he replied³⁶:

" Well forever, I think....."

[119] He said that the decontamination procedure should take place as soon as practicable.³⁷ he stated:

".... For me, if he's gassed up, I want to get him into the shower, I don't really care where it is."

[120] He stated further with respect to training³⁸:

"The decontamination process, as I said, is so generic and is so long term I wouldn't, as a commander, deem that it would be relevant to – to do again, it's just sort of like bandaids. we don't teach people how to use bandaids, there's an expectation that that's taught.... So it's– it's not something that we would pick up it would be a given that it's a basic process we've used for, , seventeen years or so."

[121] GM Maxfield confirmed that every officer, including CS Burley, was required to ensure that medical attention was provided to any recipient of a chemical agent which that officer had deployed. Subsequent to the 31 October incident she checked the medical records of prisoner B with respect to the incident and had found no evidence of first aid being provided by CS Burley or anyone else.

[122] She was questioned about the change from CS to the OC chemical agent with respect to the training of operatives in decontamination, she responded³⁹:

"Certainly have, yes. They go to training and do training on it through Mr Jacks, through operation and skills training."

[123] And with respect to TRG training⁴⁰:

"Definitely. I've not seen an operation where chemical agent has been used, that they haven't been decontaminated with water. Fresh air is only a part of it."

[124] Mr Jacks confirmed that all supervisors and acting supervisors were trained, he said⁴¹:

".... both myself and John King trained all supervisors in the use of oleo capsicum and overview on baton."

[125] Mr Tullgren argued that in the matter *Pervan v DHHS*⁴², cited by the respondent, there were no procedures written down. In the instant matter, however, there were

³⁵ Transcript 24.10.11 P20, L40

³⁶ Transcript 24.10.11 p20, L45

³⁷ Transcript 24.10.11 p25, L35

³⁸ Transcript 24.10.11 P28, L10

³⁹ Transcript 23.8.11 p193, L40

⁴⁰ Transcript 24.8.11 p193, L40

⁴¹ Transcript 24.10.11 p19, L20

Standing Orders with which CS Burley had complied, training documentation to which he had adhered and CCTV footage in evidence which showed his actions. He said everything that CS Burley did was within his training and within the scope of the training requirements.

[126] In arguing that CS Burley followed his training in the application of force, he cited two rhetorical questions from the training manual at p16⁴³:

"Who dictates the level of force to be used? THE PRISONER.

Who is responsible for the level of force used? THE OFFICER."

[127] GM Maxfield said there was a current standing order with regard to the use of force issued in October 2007 and a standard operating procedure for chemical agents, 1.02.3.

[128] Mr Jacks under cross examination stated that in any application of force there is an opportunity to tactically withdraw and reassess the situation.

[129] He said officers are trained to use verbalisation during a conflict, initially to ensure the prisoner fully understands the consequence of continuing his actions and secondly to communicate to potential witnesses in and around the situation that the actions to be taken are appropriate.

[130] At ⁴⁴ the following exchange took place between Ms Banman and Mr Jacks:

"....given the potential difference in officers' use of judgement in the application of the force continuum, can you foresee any circumstances where an officer's deployment of gas or baton could warrant an investigation?.... I actually asked Mr Bonde that all applications of gas or baton they be investigated the same as the police do as soon as firearm is discharged. Just so that there's a clarity in – in that we are getting it right."

[131] Ms Banman stated CS Burley was a very well qualified officer and submitted a certificate of his participation in a 2009 assertiveness and conflict resolution course, ⁴⁵ GM Maxfield acknowledged that CS Burley was a very good operator, "when he wanted to be".

[132] GM Maxfield asserted at :⁴⁶,

"Mr Burley exceeds the qualifications relevant to the position of correctional supervisor, especially in relation to the essential requirements,..., how when (sic) carries out his duties as a correctional supervisor or deployed as a TRG leader or operative, , I would expect a higher duty of care from people who are involved, basically because of the training that they've undertaken."

[133] She rejected assertions from Mr Tullgren that she held animosity towards CS Burley despite the fact that they had clashed on a number of occasions.

⁴² Exhibit R5 *Michael Pervan and Department of Health and Human Services* (R015-2010/11

⁴³ Exhibit A33 at p16

⁴⁴ Transcript 24.10.11 p31, L40

⁴⁵ Exhibit R17

⁴⁶ Transcript 23.8.11 p191, L10

FINDINGS

[134] I initially address the threshold matter of jurisdiction. The *Industrial Relations Act 1984* and the *State Service Act 2000* are both silent on the situation of an applicant applying to more than one tribunal over the same matter. There have been sufficient authorities cited to establish that the pursuit of a matter in more than one jurisdiction simultaneously can be acceptable.

[135] Mr Baker argued that the appropriate jurisdiction should be the OSSC for this matter to be heard. He said it was not in the public interest to have the same matter dealt with in two jurisdictions, at the same time. Mr Tullgren put the argument that suspension impacted on the terms and condition of an employee's employment and as such the matter should rightly be heard in this jurisdiction. He also argued that the matter before the OSSC was with regard to the tardiness with which the Secretary was releasing information upon which the CD5 was being conducted.

[136] I have some sympathy with Mr Baker's argument in that "suspension" is only an optional process as part of an investigation. The correct conduct of a CD5 investigation would certainly be of interest to the OSSC. I also agree with him that it is not in the public interest to encourage "jurisdiction shopping".

[137] However, Mr Tullgren's argument that suspension goes to the employment relationship is also a valid point. Given that the applicant further claims financial injury I believe this Commission is an appropriate jurisdiction to have the matter heard. Further there are precedents as cited earlier which support pursuing the same matter in different jurisdictions.

[138] It is within this Commission's jurisdiction to hear the instant matter, I so find.

[139] It is not the Commission's role to pre-empt the outcome of the CD5 investigation; there are aspects of CS Burley's conduct which have been cited as reasons for his suspension that will also form part of the formal investigation.

[140] I turn now to the matter of CS Burley's suspension. The applicant spent considerable time in justifying CS Burley's actions around the three incidents on 31 October. Although it educed useful background, CS Burley's interpretation of the events was not before the Secretary when she made her decision to initiate an inquiry and to suspend him. Indeed the Tasmania Police report introduced belatedly into the proceedings had no bearing on the Secretary's decision to suspend either. With respect to the latter issue, it does not follow that because CS Burley was not charged with assault, he could not have breached the SSCC as was inferred by Mr Tullgren.

[141] Both these issues may well have an impact on the progress of the CD5 investigation, but the conduct of the inquiry does not fall within the instant matter. Separately or collectively they do not progress the instant matter. I have restricted my consideration to information that was available to the Secretary upon which she made her decision to suspend CS Burley.

[142] The Secretary was provided with the mute CCTV footage and the QAB inclusive of statements from COs and the complaints from prisoners, visitors and officers. The QAB also captured a numbers of emails relevant to CS Burley's conduct. She also had the benefit of operational advice from senior prison staff and a management view from GM Maxfield. Another important factor the Secretary had to take into account is that of the public interest.

[143] Section 43 of the SSA provides for the suspension of an employee with or without pay. Section 34 of the SSR states at (1):

"(1) A Head of Agency may, if he or she considers it to be in the public interest or the Agency's interest, suspend, with salary, from duties an employee employed in the Agency if the Head of Agency believes on reasonable grounds that—

(a) the employee has, or may have, breached the Code of Conduct in such a manner that the employee should not continue in the performance of his or her duties"

[144] Mr Tullgren argued that the Secretary did not have reasonable grounds for suspending CS Burley based on a lack of evidence against him.

[145] He attacked the development of the QAB by GM Maxfield and argued there was no power under the applicable legislation to appoint her to generate such a brief. He argued against the inclusion of unsubstantiated complaints against CS Burley particularly since he was not given a right of reply. He also argued that the conclusions and recommendations espoused by GM Maxfield had no validity because there were no statutory grounds for her to make them.

[146] In my view the development of the QAB was simply a management process to gather information, both objective and subjective, around the 31 October incidents. The Commissioner's Directions, the SSA and the SSR are silent on the process by which a decision to initiate an investigation is to be made other than the agency head is to have "reasonable grounds". It follows that the process is not required to fall into a statutory or legislative framework. There was no vehicle to appoint GM Maxfield to develop the QAB, nor was it necessary for the role she played. It was also open to the Secretary to accept or reject in part or in whole GM Maxfield's findings and recommendations.

[147] Had GM Maxfield satisfied Mr Tullgren's assertion, that is, that she should have conducted an interview with CS Burley and verify any opinions given to her, she would have been conducting the formal investigation itself, contrary to the requirements of CD5. She was quite clear that the recommendation of any breaches of the SSCC lay with the investigator and not her.

[148] Mr Tullgren initially argued that not giving CS Burley the opportunity to refute allegations against him prior to suspending him was a denial of natural justice and due process. From the authorities it is quite clear that the investigation process as a whole is required to ensure due process and natural justice. As an element of the whole process the pre-investigation phase however does not require the same rigour.

[149] Mr Tullgren conceded this, eventually. He addressed the authority of the Pervan judicial review⁴⁷:

"The cardinal point in the application for judicial review before Porter J was in relation to this that the Secretary owed Pervan a responsibility for him to be heard before he decided to suspend him. We are not arguing that, and in fact his Honour quite rightly found, in my respectful submission, that the head of agency did not owe that responsibility to Pervan or anyone else."

⁴⁷ Transcript 29.7.11 p148, L5

[150] And further with reference to *Pervan*, Tullgren cited Porter J⁴⁸:

"There are weighty trends to holding that the rules of procedural fairness do not apply to a decision which merely commence investigatory or similar processes when those processes do not themselves involve final determination."

[151] I agree with the sentiment expressed in Porter J's decision, the Secretary in the instant matter was not obliged to give CS Burley a hearing prior to her deciding to suspend him.

[152] GM Maxfield gave evidence that CS Burley failed to properly notify CM Gridley and herself of the details of the incidents of 31 October. This was a contributing factor in his suspension. CS Burley denied this and asserted he had communicated the appropriate details required of him to the two managers.

[153] GM Maxfield was challenged by Mr Tullgren as to why she had not verified CM Gridley's version of events. She said she had no reason to doubt him. Evidence showed that, unrelated to any investigation, communications between the assistant Director of Prisons and CM Gridley around 2/3 November, pre-dating the suspension, revealed CS Burley had not fulfilled his reporting requirements to CM Gridley. I find no reason to doubt the evidence of GM Maxfield or the accuracy of the contents of CM Gridley's emails and that the Secretary had reasonable grounds to conclude that CS Burley may have had breached reporting requirements.

[154] Another aspect of CS Burley's conduct which contributed to his suspension was his alleged failure to properly decontaminate prisoner B after he was sprayed with chemical agent. He argued that he followed his training by taking the prisoner into fresh air before locking him in a holding cell. A training manual was adduced (exhibit A33) outlining the decontamination procedure upon which CS Burley said he relied. However the training manual addresses the decontamination process for CS gas whereas he had deployed OC gas which has widely different physical and chemical properties. OC gas is standard issue and has been for some time. CS Burley made no attempt to distinguish between the two gasses or their decontamination procedures.

[155] Mr Jacks and GM Maxfield both gave congruent accounts of the decontamination process for OC gas inclusive of the requirement to have a nurse attend the recipient once decontaminated. CS Burley made no mention of his obligation to ensure a medical check was carried out on prisoner B. I accept GM Maxfield's statement that she found no evidence that medical assistance had been given to prisoner B after his ordeal, as is required.

[156] Mr Jacks said his depiction of the decontamination process was that used by the TRG of which CS Burley was a long standing member and team leader. He also confirmed that all supervisors and acting supervisors had been trained in the decontamination of OC gas.

[157] Mr Tullgren argued that there was no evidence to support the assertion that CS Burley had not decontaminated prisoner B correctly. CS Burley made no attempt during his evidence to describe anything other than "facing into the prevailing breeze Where you don't have direct access to fresh water" as the decontamination process he used. The evidence of both Mr Jacks and GM Maxfield stressed the importance and the critical nature of applying copious amounts of water at the soonest possible opportunity. They referred to locating the nearest source of water as a priority. CS Burley's evidence did not

⁴⁸ Transcript 29.7.11 p151, L20

imply any urgency to locate water and his actions on the day in question support that attitude.

[158] I prefer the evidence of GM Maxfield and Mr Jacks as being the correct and widely understood decontamination procedure for OC Gas and a practice with which CS Burley would have been fully familiar as an experienced officer and TRG member. Consequently I find that the Secretary had reasonable grounds to conclude that CS Burley may not have fulfilled his obligations to carry out the correct decontamination procedure on prisoner B.

[159] I turn now to the consideration of public interest. There is a certain minimum acceptable level of behaviour expected of those who work in the State Service. This conduct is precisely formulated in the SSCC. Behaviours exhibited by employees of the correctional service and those of the Police service are scrutinised constantly and mercilessly by the media. The employees of these services must be aware that the public's expectation of their conduct is at a much higher level than the average citizen.

[160] The Secretary needs to be sensitive to the perceptions of the public and other observers, such as the media, over any issues arising from the actions of employees of her department. In my view the Secretary must err on the side of caution particularly where dealing with the conduct of employees who have custodial roles. I am cognoscente of Ms Banman's observation⁴⁹:

"This is Tasmania, where members of the community who have family and friends serving time in our prison system can expect that they will be treated humanely and fairly; where those family members can expect to attend for visits and not be subjected to scenes of violence or exposed to chemical agents. Where such events do occur, it's reasonable that the community would expect the department to take the matter very seriously, and investigate the alleged events. It is also reasonable that the community would expect that, until the conclusion of such investigation, the alleged perpetrator of the actions, who is a correctional supervisor, would be removed from the workplace where he exercises control over inmates..."

[161] The point she makes is valid. The public interest goes beyond the individual. She cited a legal dictionary definition of "public interest" as⁵⁰:

"An interest common to the public at large, or to a significant proportion of the public in which may or may not involve the personal property rights of the individual."

[162] In fact Mr Tullgren cited the authority Queensland Electricity Commission v Electrical Trades Union of Australia (ex parte)⁵¹ in the same vein:

"Ascertainment in any particular case where public interest lies will often depend on a balance of interests, including competing public interests, and be very much a question of fact and degree."

[163] The interpretation of "public interest" lies with the Secretary for any particular situation which may impact on the way her department is viewed, by the general populace. This interpretation would also go to her determination of "reasonable grounds". It follows that any action she takes to resolve or address a particular situation is

⁴⁹ Transcript 5.5.11 P99, L30

⁵⁰ Transcript 5.5.11 p96, L5

⁵¹ Exhibit A16 *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia [1987]*

tempered by her judgement of how this will be perceived by the public. As a result the Secretary's decision to suspend CS Burley cannot be seen as contrary to public interest.

[164] A further consideration for suspending CS Burley was the risk that he would put pressure on colleagues and prisoners who may have had to give evidence to the CD5 investigation. Mr Tullgren strongly objected to this matter being raised. He made reference to CS Burley being labelled as a "thug". I have little sympathy for his position. The corrective service is a hierarchical institution. Authority is vested in people by their rank and as there is a demonstrable deference to more senior officers, it is not beyond the bounds of imagination that by his presence of itself, CS Burley would have influence over others in the workplace.

[165] Evidence was adduced of CS Burley's "straight talking", his "direct manner", his "forceful personality" and his "self-confidence", all of which add up to a personality who has influence of himself, not only by his status as a supervisor. Given also that he is in a position of power over prisoners I do not see it as being unreasonable to identify a potential risk to the integrity of any investigation should he have access to witnesses at the workplace.

[166] I also note Mr Tullgren's depiction, under instructions, of the prisoner and the officer who made formal complaints of CS Burley's conduct, he said⁵²:

"All you have got is one whingeing email from one of the inmates – one of the officers...."

[167] I should make it clear that there was no evidence educed to establish that CS Burley would exercise undue influence over potential witnesses, but the risk exists, particularly if the above attitude is prevalent. Given the hierarchical nature of the correction service and CS Burley's demonstrated conduct, the Secretary had reasonable grounds to conclude that influence over potential witnesses may occur.

[168] Another consideration towards CS Burley's suspension was the concern of the risk he may persist with the alleged unacceptable conduct towards prisoners. GM Maxfield, an experienced corrections professional, described the contents of the CCTV footage thus⁵³:

".... when I reviewed the CCTV footage I was concerned – not only concerned, I was pretty appalled at some of it, and felt that he didn't ...Mr Burley didn't use all reasonable effort to avoid the situation....."

[169] She gave evidence that CS Burley had been involved in other incidents, some of which the resolution is still on foot. She said CS Burley's unacceptable conduct appeared to be an ongoing issue. As an example she cited the incident involving CS Burley and the payout of a significant sum of money to an inmate who suffered a permanent injury.

[170] The response that Mr Tullgren gave to the revelation of this incident is⁵⁴:

"Yes and Mr Burley 'fessed up to that.....and he was punished under the State Services Act...?"

⁵² Transcript 5.5.11 p111, L10

⁵³ Transcript 23.8.11 p194, L45

⁵⁴ Transcript 24.10.11 p73, L15

[171] GM Maxfield said in response:

"That's correct, he was."

[172] In my view this response, under instruction, trivialises the seriousness of the incident. If such a stance is prevalent it could put in doubt CS Burley's attitude to prisoners and to prison procedures and processes.

[173] There have been allegations cited of the disparity between CS Burley's conduct as a correctional supervisor and the conduct expected of him by prison management. It has been shown during this matter that there are indeed a number of aspects to CS Burley's conduct which appear to be in conflict with acceptable practices. Not the least of which is CS Burley's view that the incidents viewed on the CCTV footage happened on "a daily basis"⁵⁵ whereas the prison management was "appalled"⁵⁶ at his actions. The Secretary had a valid reason for deeming there to be a risk that CS Burley would persist with his already demonstrated conduct.

[174] I now address the issue of CO Flanagan's complaint to GM Maxfield. After the evidence was led by the respondent CS Burley attempted to throw suspicion on CO Flanagan's motives by declaring that he, CS Burley, was not rostered on duty on the day in question. Later in the proceedings the respondent introduced a printout from the Biometric Scanner⁵⁷ which showed CS Burley had indeed attended the prison on that particular day around lunchtime. The Biometric Scanner is an access security system that records the entry and exit of all staff into the workplace.

[175] This evidence and evidence about a number of other aspects of the matter adduced by CS Burley could be deemed to be misleading.

[176] I turn now to a comment made earlier that the evaluation of "reasonable grounds" lies with the Secretary in the event he or she has to decide to suspend an employee. Ms Banman asserted that reasonable grounds were less than a balance of probabilities and more than mere suspicion. The respondent, in my view, has demonstrated that the decision process relied on facts, a balance of probabilities and the already demonstrated conduct of CS Burley.

[177] Ms Banman made the point that although there were a number of previous incidents concerning CS Burley the CD5 investigation would rely on the events around 31 October. In saying this however there is no reason why, in evaluating risk, that CS Burley's previous conduct could not be considered when deciding whether to suspend him or not.

[178] The respondent has shown that there were reasonable grounds upon which to suspend CS Burley, I so find.

[179] Addressing the other aspects of the application, it follows that the Secretary once she had reasonable grounds to believe there may have been a breach of SSCC, as I have found, is obliged to initiate an investigation under s4.1 of CD5.

[180] The applicant may perceive a monetary penalty has been imposed by access to overtime being removed, however the award does not provide for overtime other than that which is authorised by the prison management. There is no entitlement to overtime.

⁵⁵ Transcript 5.511 p51, L20

⁵⁶ Transcript 27.8. 11 p195, L45

⁵⁷ Exhibit R15

[181] The Secretary is not obliged to stipulate the length of a suspension. The length of the suspension is governed by what evolves during the course of the investigation. Her obligation is stipulated at s34(2) of the SSR in that she must review the suspension at "reasonable intervals".

[182] Accordingly the application is dismissed.

J P McAlpine
Commissioner

Appearances:

Mr P Tullgren for the Liquor, Hospitality and Miscellaneous Union – Tasmanian Branch
Ms T Banman for the Minister administering the State Service Act 2000 with Mr P Baker and Mr B Charlton.

Date and Place of Hearing:

2011
February 3
May 3
May 5
July 29
August 23
October 24
Hobart