

Occupational Health
and Safety Tribunal Canada



Tribunal de santé et
sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Nelson Hunter v. Canada (Correctional Service), 2013 OHSTC 12

Date: 2013-03-14

Case No.: 2009-14 &
2009-20

Rendered at: Ottawa

Between:

Nelson Hunter, Appellant

and

Correctional Service of Canada, Respondent

Matter: Appeal under subsection 129(7) of the Canada Labour Code of
decisions rendered by health and safety officers.

Decision: The decisions that a danger does not exist are confirmed.

Decision rendered by: Mr. Douglas Malanka, Appeals Officer

Language of decision: English

For the appellant: Ms. Georgia Stewart, Union Advisor, UCCO-SACC-CSN

For the respondent: Mr. Joshua Alcock, Counsel, Department of Justice Canada, Labour and
Employment Law Group

Canada

REASONS

Background

[1] This matter concerns two appeals that Mr. Nelson Hunter, a Correctional Officer (CO) employed at Joyceville Institution by Correctional Service of Canada (CSC) made to the Tribunal pursuant to subsection 129(7) of the *Canada Labour Code* Part II (Code). Appeals Officer Pierre Guenette reviewed the two appeals and advised Parties by letter dated February 4, 2010, that both appeals would be held together. Mr. Guenette reasoned that both appeals are based on the implementation of the fire safety plan (FSP) at Joyceville Institution on the morning shift and Commissioner's Directive 004 entitled *National Standards for the Deployment of Correctional Officers* (hereto referred to by me as the NSDCO). The two appeals are as follows.

Appeal: Decision of Health and Safety Officer Bob Tomlin Dated April 7, 2009 (File 2009-14)

[2] On March 25, 2009, CO Hunter refused to work pursuant to subsection 128(1) of the Code. Mr. Hunter held that there would be insufficient staff on the morning shift to implement the FSP in the event of a fire if CSC proceeds with its plans to implement the NSDCO at Joyceville on April 6, 2009. The new NSDCO expected to be implemented on April 6, 2009, reduced the number of COs on the morning shift from 11 to 10.

[3] On March 27, 2009, Health and Safety Officer (HSO) Tomlin visited Joyceville Institution and conducted a preliminary investigation into CO Hunter's refusal to work. CO Hunter was unable to be present because he was working the morning shift. HSO Tomlin proceeded with his investigation without the participation of CO Hunter or his designate and decided that the danger alleged by CO Hunter constituted a normal condition of employment. HSO Tomlin confirmed his finding to CO Hunter in writing on March 31, 2009.

Appeal: Decision of Health and Safety Officer Francesco Misuraca on May 29, 2009. (File 2009-20)

[4] On May 22, 2009, following the implementation of the NSDCO, CO Hunter refused to work pursuant to subsection 128.1 of the Code. CO Hunter believed that the reduced number of staff on the morning shift constitutes a danger to him, other employees and inmates.

[5] HSO Misuraca investigated CO Hunter's refusal to work on May 23, 2009. CO Hunter submitted a refusal to work statement to HSO Misuraca which stated that: Joyceville's approved FSP had been out of date for several years; Joyceville has not established a Fire Safety Organization as required by Treasury Board Standards; Joyceville has not appointed or trained staff, including himself, to act as a Floor Emergency Officer (FEO) or a Deputy FEO on every floor; and there is insufficient staffing after the 23:00 hour prisoner count to fulfill the obligations of the FSP relative to responding to emergencies and monitoring disabled inmates.

[6] CO Hunter further told HSO Misuraca that he is unable to abandon his post to respond to an emergency or to carry out the Floor Fire Safety Plan (FFSP) properly as he is responsible for providing the necessities of life to the inmates under his supervision. CO Hunter held that abandoning his post would put him at risk of being in contravention of section 215 of the Criminal Code of Canada. CO Hunter complained that there is no FFEO for every floor at all

times during the morning shift and complained that there are insufficient officers to monitor disabled inmates in accordance with the FSP which requires the FFEO to assign a least two monitors to each disabled person.

[7] Prior to HSO Misuraca's investigation of CO Hunter's refusal to work, the employer conducted its own investigation of CO Hunter's refusal to work. In his written complaint to his employer, CO Hunter stated that at least 2 additional COs over the normal complement of 11 COs are needed to implement the FSP at Joyceville. Without this, CO Hunter maintained that there is: insufficient staff on morning shift to evacuate inmates in the event of fire; no approved functioning safety fire plan; no established fire emergency organization; insufficient staff to facilitate access to the Institution by the fire department; insufficient staff to respond to PPA, fixed point or cell alarm in a are unaffected by fire during a fire should one occur; and insufficient staff to protect the public from an escape or the security of the Institution where staff have been deployed to a fire emergency.

[8] Following his investigation, HSO Misuraca decided that a danger did not exist for CO Hunter and on May 29, 2009 wrote to CO Hunter and the employer and confirmed his decision.

[9] On June 9, 2009 CO Hunter appealed the decision of HSO Misuraca to an appeals officer pursuant to subsection 129(7) of the Code.

[10] Prior to the hearing being held, CSC, the respondents in these appeals, filed a motion to dismiss the appeals because CO Hunter was no longer employed at Joyceville rendering the appeals moot. My decision regarding CSC's motion is dealt with in this decision.

Preliminary Issue

[11] The preliminary motion before me concerns the following question:

- whether the appeals are moot since CO Hunter is no longer employed at Joyceville and the FSP at for the Joyceville Institution has been replaced;

Submissions of the Parties

A) Applicant's submissions:

[12] Mr. Alcock submitted that the general test for determining whether an issue is moot was articulated by the Supreme Court in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342. Mr. Alcock noted that the Court held that an appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of parties. In addition, the controversy must be present, not only when the action or proceeding is commenced but also when the Court is called upon to reach a decision. To decide whether the dispute is moot, the Court must determine whether the requisite tangible and concrete dispute has disappeared, rendering the issues academic.

[13] Mr. Alcock cited the case of *David Laroche v. Attorney General of Canada*, 2011 FC 1454, where the Court stated in paragraph 24 that if the dispute is moot, the Court must then decide whether it should nonetheless exercise its discretion to intervene and hear the case despite it being moot. In this regard, Mr. Alcock referred to *Borowski* where the Supreme Court identified the factors which should guide the Court in deciding whether to exercise its discretion. These factors are:

- The presence of an adversarial context;
- A concern for judicial economy; and
- An awareness of the Court's proper law-making function.

[14] Mr. Alcock submitted that it is the respondent's position in this case that the appeals are moot because the appellant no longer works at Joyceville; and the Joyceville Institution FSP that is the subject of the Appellant's appeal has subsequently been replaced by a new FSP. Mr. Alcock also submitted that it is due to this latter reason that the present appeals are distinguishable from the *Laroche* decision.

[15] Mr. Alcock noted that the Federal Court stated in paragraph 25 of the *Laroche* decision that the issues that the appeals officer had to decide involved a specific right to refuse in specific circumstances and that a subsequent policy change by the employer did not change in any way the debate regarding the right to refuse exercised by the applicant. Mr. Alcock held that that paragraph, when read in isolation, could be interpreted as saying that there are no situations in which an appeal before the Occupational Health and Safety Tribunal Canada (OHSTC) could be considered moot since all appeals concern a specific right to refuse work exercised with respect to a given situation. Mr. Alcock held that such a conclusion would offend common sense and defy the principles articulated by the Supreme Court in *Borowski*. Mr. Alcock maintained that the interpretation of paragraph 25 in *Laroche* must be considered in the context in which the decision was rendered.

[16] Mr. Alcock submitted that the context of *Laroche* was that the employer raised the issue of mootness after the appeals officer had already rendered a decision on the merits of the case. In addition, the policy change at issue in *Laroche* involved a binary choice that was entirely within the discretion of the employer.

[17] Mr. Alcock held that, clearly, there can be situations where an intervening event can effectively resolve the controversy between the parties to an appeal in the time between the original determination of danger by a HSO and the hearing of an appeals officer. In this regard, Mr. Alcock cited the *Maureen Harper v. Canadian Food Inspection Agency 2011 OHSTC 19* where Ms. Harper had retired in the intervening time period such that there no longer was a live dispute.

[18] Mr. Alcock argued further that, in *Harper*, it made no sense to persist with the hearing as the result would not have any impact on the right of the parties. He added that section 128 of the Code creates an individual right; an appeal to the OHSTC cannot be representative in nature.

[19] Mr. Alcock submitted that when the Federal Court noted in paragraph 26 of the *Laroche* decision that the employer could reverse its decision to implement a policy against assisting outside police agencies, the Court was making the link to the part of the *Borowski* test that focuses on whether a decision will “potentially” affect the rights of the parties.

[20] Mr. Alcock concluded from all of this that the decision of the Federal Court in *Laroche* cannot be taken to mean that the general test for mootness set out in *Borowski* does not apply to appeals before an appeals officer. On that basis, Mr. Alcock postulated that the pertinent question in these appeals is whether the grounds of mootness brought forward in the present appeals more closely resemble those dealt with in *Laroche* or whether they are of a different kind such as in *Harper*.

[21] Mr. Alcock held that the fact that CO Hunter has been employed at Bath Institute since December 31, 2010 and has not worked at Joyceville for more than 18 months makes the appeals to be more like *Harper* than *Laroche*. Mr. Alcock held the view that the concerns that lead to CO Hunter’s refusal to work must be resolved in order for him to potentially pursue employment at Joyceville at an indeterminate future date in a yet undefined position, stretches the concept of “potentially affecting the rights” of the parties to the breaking point.

[22] Mr. Alcock added that the second ground is that the Institutional FSP that is subject of the appellant’s appeals has been superseded by a new FSP is more like *Harper* than *Laroche*. In addition, the adoption of the new FSP is neither a binary choice nor one that is within the sole discretion of the employer. He noted that FSPs must be approved by Human Resources and Skills Development Canada (HRSDC).

[23] Mr. Alcock concluded from all of this that the appeals are moot.

[24] Mr. Alcock argued that this tribunal should not exercise its discretion to rule on the merits if it finds that the appeals are moot. He held that, while there is an adversarial context in the present appeals, the other two factors in *Borowski* mitigate against the Tribunal’s intervention. Mr. Alcock further held that in light of the replacement of the FSP in force at Joyceville, it is unclear what remedy the Tribunal could provide in respect of those aspects of the Appellant’s complaint which deals specifically with the FSP. In this context, the Tribunal’s decision would not have a practical impact on operations as the old FSP has already been replaced.

B) Application - Respondent’s submissions:

[25] Ms. Stewart held that CO Hunter’s appeals are not rendered moot by the fact that he left Joyceville after his work refusal because he did so because of his safety concerns. Ms. Stewart submitted that refusing to decide the matter on its merit would have the effect of punishing CO Hunter.

[26] Ms. Stewart stated that the FSP in effect at the time of CO Hunter’s refusal to work was not the only issue raised by CO Hunter in his refusal to work.

[27] Ms. Stewart maintained that the circumstances in the case are not similar to those in the *Harper* decision as Ms. Harper had retired from her position with the Canadian Food Inspection Agency by the time her appeal was heard, and that therefore there was no longer a live issue. Ms. Stewart held that there is still an active employment relationship between the appellant and the respondent. Ms. Stewart argued that CO Hunter may wish to take advantage of employment opportunities at Joyceville but his ability to do so would be seriously hampered unless and until his safety concerns are resolved.

[28] Ms. Stewart submitted that the Respondents' contention that CO Hunter's concerns with the FSP at Joyceville have been dealt with is incorrect and that, even if that was the case, the appeals were not rendered moot because CO Hunter's concerns were not limited to the FSP. Ms. Stewart stated that the safety concerns of CO Hunter included staffing levels in the morning shift, adequacy of training and fire drills, safety of the 2+1+1 self-contained breathing apparatus (SCBA) response, and evacuation of inmates with disabilities. Ms. Stewart added that CO Hunter's concerns not only dealt with FSP but also with its enforcement.

[29] Ms. Stewart took issue with the fact that the Respondent raised the issue of mootness as a preliminary matter days before the appeals were to be heard by an Appeals Officer. Ms. Stewart, argued that this is problematic because the employer knew that CO Hunter had had redeployed to Bath Institution since December 31, 2010.

[30] Ms. Stewart argued in the alternative that if I find the matter to be moot that I should exercise my discretion and hear the appeals.

Analysis

[31] In *Borowski* the Supreme Court stated that the approach with respect to mootness involves a two step analysis. The first step is to determine whether the requisite tangible and concrete dispute has disappeared, rendering the issue academic. If so, the second step is to decide if the Court should exercise its discretion to hear the case.

[32] For determining if a tangible and concrete dispute it remains it necessary to consider two important aspects in this case. The first is that CO Hunter transferred to Bath Institution shortly after his refusal to work and is no longer stationed at Joyceville. The second issue is that the employer maintains that the FSP at Joyceville has been replaced.

[33] Based on my review of the facts and evidence presented to me, I find that there is a live issue or controversy in this matter, the resolution of which can potentially have a tangible, concrete or practical effect on the rights of the parties. I find this to be the case for two reasons.

[34] Firstly, an active employment relationship between CO Hunter and CSC still exists. For this reason, this case is not like *Harper v. Canadian Food Inspection Agency 2011 OHSTC 19*, where Ms. Harper had retired, which thereby ended the employment relationship. Because of the ongoing employment relationship, there is potential for the ruling in this appeal to have a practical impact on the rights of the employer and/or employee, even if the former is at a different correctional institution than the one at which he exercised his right to refusal.

[35] Secondly, CO Hunter's concerns for safety went beyond the FSP, but also had to do with staffing levels on the morning shift, sufficiency of training and fire drills, safety of the 2+1+1 SCBA response, and evacuation of inmates with disabilities. Also, as argued by Ms. Stewart, the complaint did not just concern the existence of the FSP, but also its enforcement. This enforcement issue concerning the FSP, along with the other standing concerns outside of the FSP fall within the unilateral and discretionary authority of the Respondent. They are live issues because they remain unresolved.

[36] For these reasons, I find that these appeals are not moot, as the debate regarding the appellant's right to refuse dangerous work has not changed. As such, the application to dismiss the appeals on the basis of mootness is denied.

[37] Now that I have addressed the preliminary motion raised in these appeals, I will now move to treating the appeals together on their merit.

On the Merits of the Appeals

Issue

[38] The issue in both appeals is whether or not a danger existed for CO Hunter and, and if a danger existed, whether that danger constitutes a normal condition of employment.

Evidence of the Appellant

[39] The following witnesses testified for the Appellant's case:

- CO Hunter, Appellant;
- Ms. Roxanne Campbell, CO, CX-1;

Testimony of CO Hunter, CO-2

[40] CO Hunter testified that he had worked for approximately 19 years at Joyceville with the majority of time on the morning shift which runs from 2300 to 0700 hours and is often referred to as the midnight shift. CO Hunter stated that, prior to the implementation of the NSDCO, the security post coverage for the morning shift consisted of two CO-2s and nine CO-1s for a total of 11 COs. CO Hunter said that: one CO-2 was assigned to the Security Office which served as a second in command (IC) desk, and the other CO-2 was assigned to the Main Communication Control Post. CO Hunter also stated that nine CO-1s were assigned respectively to the principal entrance; Living Unit # 1; Living Unit #2; Living Unit #3; Living Unit #4; Segregation Unit; Administrative Control; and to Perimeter Mobile Patrol (two CO-1s).

[41] CO Hunter testified that one of the perimeter mobile patrol officers was removed with implementation of the NSDCO. CO Hunter also stated that in 2001 there were three substitute positions on every morning shift which were not backfilled if COs booked off. For most winters there were substitutes. According to CO Hunter, the substitutes conducted the escorts or replaced someone else who did the escort and would walk about the stairs looking for fires and unlocked doors.

[42] CO Hunter testified that he was increasingly uncomfortable with dwindling staff and events occurring in other institution where staffing levels decreased. CO Hunter cited an instance at the Grand Valley Institution for women where a CO was charged with negligence and fired. CO Hunter held that the CO was at risk being charged under the Criminal Code of Canada. CO Hunter added that he started studying the matter when he learned that there was a FSP at Joyceville and realized that he had duties and responsibilities under the FSP for which he was not informed or trained.

[43] CO Hunter stated that he did not know where staff would come from in the event of a fire or other emergency that necessitated dealing with: fire alarms and smoke detectors; smoke and fires; medical emergencies where the fire occurred; and rendering first aid and evacuating inmates including disabled inmates.

[44] CO Hunter testified that he received core training when hired in 1991 and the training included the use of self contained breathing apparatus (SCBA). CO Hunter testified that the course covered donning and doffing respirators, face fitting respirators and smoke house training where trainees had to find the dummy placed in the smoke house. CO Hunter said that COs were instructed during SCBA training to work in pairs and not go into a location alone when wearing SCBA. This was subsequently referred to as the 2+2+1 system whereby two COs with SCBA equipment respond to the fire emergency, two COs similarly equipped with SCBA equipment observe and act as backup to the two responders and a monitor observes the response to ensure that no further assistance is required. CO Hunter added that the training included information on basic fire extinguishers including their different ratings and use.

[45] CO Hunter then testified that he had also received approximately 2 weeks of orientation training when he arrived at Joyceville, but this orientation training did not include fire safety training. CO Hunter also stated that COs receive SCBA refresher courses every 2-3 years but noted that the training is a group effort and is very informal. CO Hunter added that he participated in a fire drill after his refusal to work.

[46] CO Hunter testified that he was never made aware of Joyceville's FSP, had never received training on the FSP nor ever participated in a fire drill. He could not recall a fire drill during the morning shift all the time he worked the shift. CO Hunter stated that a CO from the upper or lower unit would simply take a fire extinguisher in the event of a fire and extinguish the fire. The inmate would be then taken to the common room until the smoke left the cell. CO Hunter added that a CO would normally not be wearing SCBA.

[47] CO Hunter stated that a CO arriving for the morning shift checks the log book to determine if there are any inmates on suicide watch. CO Hunter said that when medical or other emergencies arise, the CM is advised to arrange for a response such as a medical escort. When this occurs, CO Hunter stated that the normal routine is changed. CO Hunter testified that, prior to the NSDCO being implemented an extra officer or 2nd Mobile Officer would be assigned to the escort of redeployed to replace whoever other CO was deployed for the escort.

[48] CO Hunter testified that he never had to deal with a suicide incident but that was always a possibility as some inmates engage in self harming. CO Hunter held that morning is usually the

first choice of inmates to escape. CO Hunter recalled four incidents where inmates had attempted to escape or there was evidence of an escape plan.

[49] CO Hunter further stated that inmates tend to use fire to distract COs from their activities or to combat boredom especially during lock downs. CO Hunter testified that fire alarms are the target of inmates who attempt to deactivate them and sprinklers have been tampered with and set off. CO Hunter stated that he had gone down with another CO on two different occasions to extinguish a fire in a cell with an extinguisher. CO Hunter confirmed that he had never participated in an evacuation of inmates.

[50] CO Hunter noted that cell door locks are manually operated and held that it would take longer to evacuate a range. CO Hunter stated that inmates have a common area and inmates eat and shower on the range.

[51] CO Hunter stated that the Municipal Fire Department would not enter Joyceville until the Institution is secure and held that there would be no officer to supervise an evacuation or to direct the fire department to the fire. CO Hunter held that securing the Institute would be a problem as there was nowhere besides the Courtyard to evacuate inmates if they had to evacuate inmates from the common areas on the ranges.

[52] CO Hunter confirmed that the Joyceville document entitled, "Fire Orders" require that the FFEO for an area be specified and that the officer specified was the officer posted to the floor. CO Hunter held that this is problematic during the morning shift because no one is on a floor all the time during the shift.

[53] CO Hunter referred to the Joyceville FSP Training Manuals dated December 2008, version 1 and to the Joyceville FSP Training Manuals dated January 2011, version 1.1. CO Hunter confirmed that the procedure for initiating a SCBA response was changed in the December 2008 edition from a 2+2+1 system to a 2+1+1 system. Under this arrangement there would only be one officer equipped with SCBA equipment to act as back up to the two first responders equipped with SCBA equipment. CO Hunter testified that this was contrary to the safety training he had previous received and had never been instructed on the new system as a user or supervisor. CO Hunter added that he had never been trained on organized evacuation of inmates.

[54] CO Hunter testified that he deployed to Bath Institute because he didn't feel his health and safety was protected. When asked if he would ever return to Joyceville, CO Hunter replied that he would want to have the safety concerns at Joyceville resolved first.

[55] CO Hunter agreed in cross examination that he would not have any difficulty leaving his range to do joint rounds but not on the other side of the Institution and that the substitutes of whom he had spoken are not part of the FSP.

[56] CO Hunter testified that he was present when an inmate attempted to set up an escape during a morning shift despite the employer's evidence that no escape attempts had occurred at Joyceville from 1995 to 2011. CO Hunter testified that he was outside with the Deputy Warden.

[57] CO Hunter confirmed that he was aware of three fire incidents during the morning shift at Joyceville during his 19 years there. CO Hunter confirmed the inmates involved were moved to a common room during the 4–5 minutes needed to extinguish the fire and no general evacuation of inmates was required connected with any of the fire incidents.

[58] CO Hunter confirmed that he had never donned SCBA in his 19 years at Joyceville but he was close to doing so during a fire in the Pilot Room. CO Hunter agreed with Mr. Alcock that this represented a fourth fire incident that had not been reported.

[59] CO Hunter confirmed that he feared criminal liability for having to leave his post floor to respond to a fire response, a medical emergency and joint rounds. CO Hunter added that his concern is also that another CO fearing the risk of liability might not come to help him during an emergency.

[60] CO Hunter also confirmed in cross examination that the visitor security was staffed but held that that Officer is required to remain at the post to meet with police and fire officials.

Testimony of Ms. Roxanne Campbell, CO-1

[61] CO Campbell testified that she joined Joyceville in October of 1999 and received her core training in August of 1999. CO Campbell testified that during the core training a Fire Marshall came in the evening and delivered approximately 1-2 hours of training. According to CO Campbell, the training included donning and doffing SCBA equipment, conducting 2+2+1 fire responses and reviewing responsibilities of everyone on the 2+2+1 response team. CO Campbell stated that participants were also instructed on the use of hoses and the course ended with a smoke house simulation.

[62] CO Campbell testified that in a 2+2+1 response, two people don SCBA and respond directly, two others don SCBA and remain close and ready to assist the first responders if a problem arises and a fifth person observes the activities of the other four officers. CO Campbell stated that the CSC fire response at the time she was hired was the 2+2+1 response.

[63] CO Campbell testified that CSC converted to the 2+1+1 response in 2008 and that this response is taught at during refresher courses. However, CO Campbell pointed out that the 2008 and January 2011 edition CSC Fire Safety Training Manual specifies that Officers are always to work in pairs. CO Campbell held that this is consistent with the training she initially received. CO Campbell added that the refresher course does not explain the duties of the unpaired third officer with the SCBA are relative to responding to a situation where the first responders require assistance.

[64] CO Campbell testified that she was a health and safety representative at Joyceville at the time of CO Hunter's refusal to work on May 22, 2009 and participated in the employer's investigation of CO Hunter's refusal. CO Campbell stated that, after CO Hunter refused, a meeting was held to discuss a simulation of response to alarms on the morning shift. According to an email that Mr. Vermette sent to HSO Tomlin on Monday, April 6, 2009 (2:37 pm) Mr. Trevor McQuaig (title not identified) attended the meeting and confirmed that Joyceville

officers are told during training that CSC policy is 2+2+1. CO Campbell held that Mr. Vermette's email, Mr. McQuaig also confirmed that officers at Joyceville are trained in pairs for safety reasons in accordance with the National Fire Prevention Association and they have never been trained on 2+1+1 response. It was also raised that having manual locks on cell doors would require longer response times.

[65] CO Campbell referred to CSC Fire Safety Manuals dated 2005-12-01 and the more recent 2009-09-24 edition and noted that in section 4, item 6, the Manual requires that "Correctional staff shall receive training on fire safety and the use of equipment in accordance with the duties expected of them under normal or emergency conditions, prior to post assignment." Also, "Personal shall receive refresher training on the use of fire equipment every three years." CO Campbell testified that she has never received the refresher training. CO Campbell said that this includes training on the 2+1+1 emergency response procedure.

[66] CO Campbell testified that on May 4, 2009, Mr. Howard Page, UCCO-SACC-CSN Health and Safety Representative, Ontario Region, sent an email to HSO Tomlin regarding a meeting of the Joyceville joint health and safety committee (JOHS) at Joyceville to deal with the safety issues raised by CO Hunter's refusal to work. Mr. Page wrote that the unanimous consensus at the JOHS meeting was that it was unsafe for one officer to respond alone.

[67] CO Campbell testified that there was an additional concern regarding the 2+1+1 response policy during the morning shift. CO Campbell stated that COs must vacate one whole side of the Institution to conduct a 2+1+1 emergency response. Since all other officers would be busy managing the other inmates, there would not be any one to assist the response team if they required assistance.

[68] CO Campbell testified regarding fire issues at Joyceville. She stated that inmates have access to matches despite the ban on smoking there and inmates are known to engage in arcing or shorting electrical outlets to start fires in their cell.

[69] CO Campbell testified that she had never participated in a fire drill despite the fact that fire drills must be conducted every 3 months.

[70] CO Campbell referred to and testified regarding the Joyceville and Pittsburgh Institution "Agreement of Institution Emergency Staff Response Fire Evacuation" and noted that the agreement confirms that, "At no time the Pittsburgh Officer will have to take over any duties relating to SCBA."

[71] CO Campbell testified that, as the local union present at Joyceville, she is concerned that the Pittsburgh agreement is subject to operational requirements at Pittsburgh and all posts at Joyceville have SCBA whereas Pittsburgh Officer are not trained or permitted by the agreement to take responsibilities relating to SCBA. CO Campbell held that Pittsburgh officers cannot help in a 2+1+1 fire emergency response if the team requires assistance.

[72] CO Campbell stated that the previous versions of the FSP for Joyceville did not provide instruction on where to assemble inmates during a fire emergency and this is an issue for COs.

CO Campbell added that she is dubious regarding plans in the yet unapproved version of the FSP to assemble inmates in the courtyard, common areas and the area around segregation.

Evidence of the Respondent

[73] The following witnesses testified for the Respondent's case:

- Mr. Randy Gaw, Manager Fire Safety Program, Technical Services Branch, CSC;
- Mr. Mike Velichka, Manager, Deployment Standards and Scheduling;
- Mr. Dave Finucan, Warden Joyceville Institution.

Testimony of Mr. Randy Gaw

[74] Mr. Gaw testified that he has 25 years of service with CSC and is responsible for establishing and monitoring policy and procedures, training equipment related to fire safety.

[75] Mr. Gaw stated that his credentials include 3 years as Fire Commissioner, Saskatoon Fire Commission, membership in the National Fire Protection Association (NFPA) and various CSA committees. Mr. Gaw also stated that he had authored a paper entitled, *Fire and Life Safety Issues in a Correctional Environment* and delivered it at the 2003 international conference of the NFPA.

[76] Mr. Gaw testified that fire prevention entails fire prevention, detection and containment and that prevention is the most important element and especially in a correctional environment. Mr. Gaw said that it is necessary to have detectors and fire suppressor and diligent staff. He stated that it is necessary to evacuate and suppress the fire directly or indirectly via fire suppression systems when a fire occurs.

[77] Mr. Gaw testified that Joyceville was built in 1950 and is constructed of concrete and steel. He stated that the individual cells are fire separated and are equipped with sprinklers and fire and smoke detectors throughout. Mr. Gaw added that there is good separation by distance and doors between parts of the Institution with fire extinguishers, fire hydrants and fire hoses available in functional areas like shops and living units.

[78] Mr. Gaw stated that Joyceville limits and controls the fire loading of flammable material in a cell that could act as fuel in the case of a fire. This includes limiting books and furniture and using mattresses that have been treated with a fire retardant. Mr. Gaw stated that the fire loading is monitored and controlled via cell inspections every 30 days.

[79] Mr. Gaw stated that fire sprinklers protect against fires when fire fighters can't get to the fire immediately and they are attached to the alarm board. Mr. Gaw stated that fire sprinklers control and extinguish fires and provide life safety for occupants and property. Mr. Gaw said that the role of staff is to investigate the size and scope of fires and to try to extinguish a manageable fire with a fire extinguisher or fire hose with the use of SCBA.

[80] Mr. Gaw testified that Commission Directive (CD) 345 entitled, *Fire Safety*, provides the overall policy direction and requires that positions are to be assigned in specific ways. Mr. Gaw

added that the *CSC Safety Manual*, is a support document to CD 345 and expands on best practices and to do things.

[81] Mr. Gaw confirmed that CSC collects information regarding the incidents of fires in Institutions via the *CSC Offender Management System* and this includes how the fire started and damage resulting.

[82] Mr. Gaw testified that he looked at the number of fires that had occurred at Joyceville during the morning shift and found that only one fire had been reported.

[83] Mr. Gaw confirmed that CSC's Correctional Training Program (CTP) covers initial SCBA training and refresher courses on SCBA is institutional.

[84] Mr. Gaw referred to the Fire Safety Training Manual dated January 2011– version 11 and testified that the CTP course alerts course participants that they must find, read and understand individual site specific information at each Institute regarding institution layout, nature of inmates housed in the Institution and the nature and implication of the security level at the Institution. Mr. Gaw stated that COs must be aware of what they are required to do in an emergency.

[85] Mr. Gaw explained that when SCBA were introduced to COs in 1985, CSC adopted the 2+1+1 emergency response requirement to comply with Canadian Standards Association (CSA) Code CSA Z 94.4. Mr. Gaw said that the 2+1+1 response remained in place for 25 years until CSC Fire Safety Manual was modified in 2005. At this time, the Manual adopted the 2+2+1 response to comply with an NFPA standard.

[86] Mr. Gaw explained CSC's rationale for reverting to the old 2+1+1 response. He testified that the correctional environment in the United States of America does not require fire detectors and fire suppressor including sprinkler systems in cell. As a consequence, the NFPA assumes a higher risk of a structural fire where fire fighters are expected to go into a high temperature fire with bunker gear. Since institutions under CSC are equipped with fire and smoke detectors for early detection and fire suppressors, including fire sprinkling systems, CSC decided that the 2+2+1 response was unnecessary. Mr. Gaw added that the 2+1+1 response is safe given the normal concrete and steel design of CSC Institution, the fact that fire loading is monitored and controlled in cells and the fact that cells are equipped with fire and smoke detectors and fire sprinkling system to suppress fires.

[87] Mr. Gaw testified that the Fire Safety Training Manuals are consistent with the Fire Safety Manuals relative to 2+1+1 response procedures and all members of the SCBA team must withdraw if the monitor loses visual contact with them or if any member was injured or in distress.

[88] Mr. Gaw turned to *CSC Fire Safety Manual* 345 dated 2009-09-24 and testified that the section entitled *Response to Fire Alarms* contains the same *2 minute response* requirement specified in previous editions of the Manual. According to the *2 minute response*, staff has to have evaluated the validity of an alarm and begun evacuation procedures as necessary within 2 minutes of the receipt of an alarm. Mr. Gaw testified that the modified wording in the more

recent Manual reflects the fact that CSC has fire and smoke detectors and fire suppressing sprinklers in each cell that would not permit fire to progress to flash-over. The Manual now states that: *staff shall acknowledge and begin validating the fire alarm within 2 minutes in accordance with local procedures*. Mr. Gaw held that because of the faster detection of fires, fires that are potentially cooler with less smoke and more time for early intervention. CSC specifies that evacuation is initiated when determined to be needed.

[89] Mr. Gaw testified that in a 2+1+1 response three officers carry SCBA equipment and act as a team. Two officers enter the hazard area only when a third officer is present and the third officer equipped with SCBA only goes in if the two other officers require assistance. The fourth CO, the observer, remains outside of the hazardous area in visual and radio contact with the team and calls for assistance if it is required. Mr. Gaw stated that all members of the team must withdraw if the monitor loses visual contact with the team or if any member is injured or in distress.

[90] Mr. Gaw confirmed that inmates are known to tamper with fire detection and suppressant devices in cells. Mr. Gaw also agreed that it would take longer to evacuate cell where the cell locks are operated manually and that COs are solely responsible for evacuating inmates regardless how serious the fire is.

Testimony of Mr. John Velichka

[91] Mr. Velichka, Manager, Deployment Standards and Scheduling testified that he oversaw the development of the NSDCO. Mr. Velichka stated that the group developing the standards looked at the workload and risks that are present at institutions during the morning shift. Mr. Velichka noted that inmates are secured in their cells during the morning shift and the primary duty role of COs is patrols. Mr. Velichka stated that incident data was considered for all shifts and determined that risk is infrequent during the morning shift. Mr. Velichka testified that there are fewer incidents on the morning shift as inmates are secured in their cells and have less opportunity to be mobile and to crowd together. Mr. Velichka looked at the data for fires at Joyceville during the morning shift and stated that it was typical of medium security institutions.

[92] Mr. Velichka referred to CSC Security Bulletin 2010-13 dated 2010-11-29 entitled, *Mobilization of Security Staff on the Morning Shift-Fire Response* and stated that Bulletin specifies a 2+1+1 fire response team response in accordance with the Fire Safety Manual.

[93] Mr. Velichka testified that if a 2+1+1 fire emergency response was necessary on the morning shift, the Bulletin instructs that the corrections officers for the response would come from the CO posted to the unit, 2 multifunctional officers and a CO from another living unit. Mr. Velichka stated that any of the officers responding is permitted to perform the role of monitor who might be required to wear a SCBA if circumstances warrant it. Mr. Velichka held that CSC was not concerned with CO physically leaving their post at other living units to participate in the 2+1+1 response because each cell has a call button to unit officers or the MCCP and fire alarms to ensure the safety of inmates.

[94] Mr. Velichka referred further to the Bulletin and noted that the correctional manager is to immediately initiate the *Augment Recall Plan* (described later) to augment the initial SCBA

response. Mr. Velichka also noted that the Bulletin permits the suspension of all unit patrols for a short period in an emergency until additional officers arrive on the site to assist.

[95] Mr. Velichka testified that the *Threat Risk Assessment Joyceville Institution* dated October, 2010 confirms that the number of incidents of violence towards staff by inmates was lower when compared with other institutions.

[96] On the subject of the manual cell locks at Joyceville, Mr. Velichka agreed that it would take longer to open the cell doors but this would avoid the COs being overwhelmed by a fast release of inmates from their cells.

Testimony of Warden Dave Finucan

[97] Warden Finucan testified that he is responsible for the overall management of Joyceville. Warden Finucan confirmed that he has been employed by CSC for approximately 24 years of which includes approximately the last 5 years at Joyceville. Warden Finucan was appointed as Warden at Joyceville in 2010.

[98] Warden Finucan testified that it is common at Joyceville to have two Corrections Officers per 38 inmates. Warden Finucan described the morning shift and stated that all inmates are secured in their cells at 2300 hours and counted before the day staff leaves. During the morning shifts COs observe inmates and do inmate counts. Warden Finucan stated that the correctional manager is informed if an inmate is not feeling well and the CM must decide if the situation can be managed until the day shift arrives as there is no nurse during the morning shift. If necessary, the CM must muster staff to take the inmate out of the cell for medical attention.

[99] Warden Finucan testified that following the implementation of the NSDCO there are 10 COs and one Correctional Manager on duty at Joyceville for the morning shift that commences at 2300 hours and ends at 0700 hours. These 10 COs are distributed in the Institution as follows: four COs are assigned to the ranges which house the living units or cells; one CO is assigned to the Segregation Unit; one multifunctional CO is assigned to the administration control booth; one multifunctional CO is assigned to the 2nd IC (*in command*) desk; one CO is assigned to the Main Communication Control Post (MCCP); one CO is assigned to the principal entrance; and one CO is assigned to the perimeter. Warden Finucan confirmed that two COs were previously assigned to the perimeter of Joyceville for the mornings shift prior to the implementation of the NSDCO.

[100] Warden Finucan further testified that in the event of a fire emergency, the response could include seven COs as follows: the four COs assigned to the ranges; the CO assigned to the segregation unit; the multifunctional CO is assigned to the administration control booth; and the multifunctional CO is assigned to the 2nd IC (*in command*) desk. Warden Finucan added that in certain circumstances, the on Duty Correctional Manager could relieve the CO at the principal entrance to the Institution and permit him to participate in the response.

[101] Warden Finucan confirmed that the data on reported fires at Joyceville shows that there was only one fire reported in 16 years. Warden Finucan opined that the number of cell fires reported is low because inmates know that they are locked in their cell and vulnerable to any fire

and so only a suicidal inmate is inclined to start a fire in his cell. Warden Finucan stated that he is aware that inmates will start a fire on the day or evening shift if they are not getting along with another inmate in the hope of being reassigned to another cell. Warden Finucan held that the risk of a fire is not high as demonstrated by the fire data. Warden Finucan added that dynamic security is effective for spotting problems and taking early action to intercede or prevent something. In cases where the CM decides that there is a high risk an inmate will self harm, the CM, by CSC policy, can hire additional CO and post the officer outside the cell of the inmate until the inmate can be assessed by a psychiatrist in the morning.

[102] Warden Finucan confirmed that there had not been any recorded escape attempts during the morning shift between the periods of 1995 to 2011.

[103] Warden Finucan testified regarding the *Augment Recall Plan* which has been implemented at Joyceville to enable management to call back staff to the Institution in an emergency. Warden Finucan said that the CM on the morning shift, who is acting as the interim manager, can implement the plan and call in additional COs in the event of an emergency. Warden Finucan stated that CMs are instructed to act early and then decide if it is necessary to evacuate.

[104] Warden Finucan testified that in the event of fire during the morning shift where the fire alarm is verified and/or there is the CM may call in more staff to evacuate the inmate or inmates to a common area in another unit including Segregation.

[105] Warden Finucan stated that in the event of lots of smoke and there is a need to evacuate some or all inmates: a CO would verify the fire and report to the CM; COs would isolate and contain the fire via a 2+1+1 emergency response team; the CM would decide how many staff are needed to remove an inmate or inmates and where to place them; and the CM would decide whether or not to implement the *Augment Recall Plan*.

[106] Warden Finucan testified that in the event of a fire in one area and an incident in another area, the MCCP can advise the CM of the two situations and the CM will decide which incident is primary and decide how to respond. Warden Finucan stated that the preservation of life is the primary goal.

[107] Warden Finucan testified that training scenarios have been done on where to put inmates in the case of a fire. Warden Finucan stated that the inmates on 2A would go to the common room on 2B. Staff to do this would come from the 4 available officers in the Living Units, then from the Segregation Unit, the Entrance, and multifunction COs. Warden Finucan testified that the officers would work systematically down the range and remove inmates. Inmates would then be separated into compliant and non-compliant inmates. At this point, the CM could call for additional staff.

[108] Warden Finucan addressed the memorandum of understanding between Joyceville Institution and Pittsburgh Institution. He stated that the purpose was to assist Joyceville in having ready access to at least one CO from Pittsburgh in the event of an emergency. Warden Finucan stated that CO from Pittsburgh have had core training but they are not trained to use SCBA and cannot form part of a 2+1+1 emergency response team.

[109] Warden Finucan addressed the concern of COs that they could be charged with abandoning their post and not protecting inmates in situations where they are instructed to leave their post to assist other officers during an emergency situation. For this, Warden Finucan referred to CSC Security Bulletin 2010-13 dated 2010 and entitled *Mobilization of Security Staff on the Morning Shift-Fire Response*. Warden Finucan held that Bulletins are rarely so specific relative to what is expected of COS in the event of an emergency and, as such, COs are not a risk regarding personal liability.

[110] Warden Finucan clarified that the document introduced by Appellant regarding the number of fire drills from April 2009 to March 2010 was incomplete and did not reflect the true number of drills during that period of time. He submitted a corrected version of the document obtained from Head Quarter which showed that one drill was completed on the morning shift on September 26, 2009. Warden Finucan stated that the records error was at the regional office.

[111] Warden Finucan testified that Joyceville's FSP revised on March 9, 2000 specified the duties of Floor Fire Emergency Officer (FFEO) on the last page.

[112] Warden Finucan testified regarding Joyceville's Institutional Operational Procedure #345 dated August 10, 2011, entitled, *Fire Safety – Monitors for the Disabled*. Warden Finucan conceded that the policy was not clear when he read it following CO Hunter's refusals to work. Warden Finucan said that the population at Joyceville changes approximately two times per year and this necessitates having a system for identifying disabled inmates. Warden Finucan stated that the Health Care Unit has been assigned this responsibility. When an inmate is identified, the CM goes on the Living Unit and informs the inmate of the policy. The information then goes into the Office Information System and a tag board is maintained in the Keeper CM's hall. Warden Finucan testified that the information is maintained in the two locations for planning and reacting. Warden Finucan testified to the fact that COs have a duty in their job description to be fully aware of the post order for the post that the CO occupies.

[113] Warden Finucan testified that the assignment of monitors for the disabled is done by the CM and is a function of the amount of smoke and how many COs needed to move an inmate.

[114] Warden Finucan agreed that the *Responding to Alarms Protocol* in effect at Joyceville in 2009 confirmed that the CO 1 Mobile Patrol could respond to an emergency situation if directed to do so by the CM. Warden Finucan added that the situation was now clarified. Warden Finucan stated that the Post Order entitled *Officer in Charge, Correctional Manager – Morning Shift*, number A1 - Midnights and dated April 2009, confirms that a CO 1 is in charge if a CO 2 is unavailable.

[115] Warden Finucan stated that COs in the Segregation Unit can be used in the event of an emergency provided that the inmates there are locked up and compliant. Warden Finucan said that there would be two COs in the Segregation Unit if a suicidal inmate was being watched.

[116] Warden Finucan testified that the CSC Security Bulletin 2010-13 entitled *Mobilization of Security Staff on the Morning Shift-Fire Response* does not specifically tell staff that they will not be liable for leaving their post to respond to an emergency. Rather the Bulletin tells COs

what CSC expects them to do in an emergency. Warden Finucan testified that the Bulletin was not emailed to all COs but was sent to CSC users and expected that all staff would read the Bulletin.

Arguments of the Parties

A) Appellant's arguments

[117] Ms. Stewart held that the definition of danger in the Code includes any existing or potential hazard, condition or future activity. Ms. Stewart further held that, since the Code refers to “potential” hazard, conditions and “future” activities, the Code is not limited to a specific factual situation existing at the time of the employee refused to work. Ms. Stewart referred to my decision in the case of *Cole and Coleman v. Air Canada OHSTC 4, 2006*, and held that it provides a proper approach for determining if a danger exists for an employee. Paragraph 70 of the *Cole and Coleman* decision reads:

[70] Taking the above noted Code provisions and the findings of Justices Tremblay-Lamer and Gauthier, it is my opinion that a danger exists where the employer has failed, to the extent reasonably practicable, to:

- eliminate a hazard, condition, or activity;
- control a hazard, condition or activity within safe limits; or
- ensure employees are personally protected from the hazard, condition or activity; and one determines that:
- the circumstances in which the remaining hazard, condition or activity could reasonably be expected to cause injury or illness to any person exposed thereto before the hazard, condition or activity can be corrected or altered; and
- the circumstances will occur in the future as a reasonable possibility as opposed to a mere possibility or a high probability.

[118] Ms. Stewart submitted that, prior to the implementation of the NSDCO; the standard complement on the morning shift at Joyceville (2300 to 0700 hours) consisted of 11 staff (nine CO 1s and two CO 2s). Ms. Stewart argued that CO Hunter and other staff were already concerned about the staffing levels on the morning shift and CO Hunter began investigating the *National Fire Code of Canada* (the Fire Code) requirements for FSPs and procedures. Ms. Stewart stated that once CO Hunter looked into the Fire Code, he concluded that the employer was not meeting its obligations in this regard and that a danger existed for him in the circumstances present at the workplace. Ms. Stewart summarized the evidence relative to the circumstances where the risk to health and safety is elevated to a danger as follows:

Fire Safety Plan

[119] Ms. Stewart referred to CO Hunter's testimony that he had never received a copy of the FSP, was unaware of the plan and thus was also unaware that he was appointed as a FEO or Deputy FEO under that plan. Ms. Stewart also argued that CO Hunter had never received training on the plan or his duties and responsibilities under it.

[120] Ms. Stewart maintained that the FSP required that sufficient supervisory staff be on duty in the care and detention facilities at Joyceville to carry out the FSP and that staffing was not to be on an emergency call back basis.

Evacuation of Inmates

[121] Ms. Stewart held that evidence shows that the FSP at the time of CO Hunter refusal to work only addresses up to the evacuation of inmates and does not provide specifics on: access to the Institution by the fire department; where inmates are to be kept following an evacuation of cells; how inmate counts are to be performed following an evacuation; which employees or posts are to act as monitors for inmates with disabilities; and who is responsible for assisting them inmates.

2+1+1 SCBA Response

[122] Ms. Stewart stated that the appellant's evidence was that that COs are expected to follow a 2+1+1 SCBA response, but both CO Hunter and CO Campbell confirmed that they had only been trained on the 2+2+1 SCBA response. Ms. Stewart maintained that a 2+2+1 response requires two persons wearing SCBA gear to be on standby. Ms. Stewart noted that the Joyceville joint health and safety committee had unanimously agreed at an emergency meeting that it was unsafe for one officer to respond alone in a 2+1+1 SCBA response if an emergency arose.

[123] Ms. Stewart maintained that the prospect of a SCBA-responder needing medical assistance is reasonable because smoke in a cell or other confined area would mean a medical emergency is quite possible. Ms. Stewart held that the third responder would have to go in alone, contrary to training, and with only one radio, if the first pair of responders wearing SCBA encountered difficulty. Ms. Stewart also expressed concern that the fourth person in a 2+1+1 fire emergency response, the observer, does not have to be in visual range.

Multiple Emergencies Such as Fire or Escape Can Arise

[124] Ms. Stewart argued that because Joyceville houses between four and five hundred inmates at any given time, multiple simultaneous emergencies are a reasonable possibility, and that that possibility is not allowed for in the FSP. The Appellant held that the FSP and NSDCO did not adequately address the risk of multiple emergencies such as fire, escape and escort occurring at the same time.

[125] Ms. Stewart held that the presence of smoke detectors, alarms, and sprinkler systems constituted inadequate supervision of inmates given the propensity of inmates to tamper with such devices or to use fires and alarms as a diversionary tactic. Ms. Stewart submitted that CO Hunter also came to believe that this was contrary to s. 2.8.2.2 of the Fire Code requiring supervisory staff to be present.

Locks

[126] Ms. Stewart held that it takes longer to evacuate a range because all of the cell doors are manually locked and there is no centrally operated electronic mechanism to control the doors.

Courtyard

[127] Ms. Stewart held that the courtyard layout is significant because Joyceville is a four story medium security facility in which the ranges are built around a central courtyard. The risk connected with this is that inmates who have been evacuated must be secured elsewhere in the Institution before fire trucks will enter it.

Leave Post

[128] The Appellant was concerned about the legal and disciplinary implications connected with a CO leaving his range in an emergency to assist on another range leaving no one on his range to deal with an emergency. The evidence was that CO Hunter and CO Campbell inquired into the legality of requiring a single officer to be responsible for multiple floors of a building and this was noted as an ongoing issue at Joyceville joint health and safety committee meeting on November 3, 2009. Ms. Stewart stated that CO Campbell testified that her inquiries in this regard have not yet been met with a response.

[129] Ms. Stewart also argued that COs are not permitted to leave many posts, such as the segregation unit where a CO is conducting a suicide watch, to respond to a secondary alarm.

[130] It was further argued by the Appellant that the substitute positions were removed along with the 2nd perimeter patrol officer when the NSDCO was implemented. As such, it was no longer possible to effect a 2+2+1 SCBA response for which CO Hunter and his colleagues had been trained.

Disabled Inmates

[131] Ms. Stewart noted Warden Finucan's evidence that a new system for tracking inmates who may require assistance during evacuation was recently implemented. Ms. Stewart expressed concern that the tracking system has only been in place a matter of weeks. In addition, Ms. Stewart held that it was unclear from the evidence as to whether staff is aware of their responsibilities under the new plan for disabled inmates and how feasible it will be for staff to be responsible for both assessing inmates with disabilities and attending to their other responsibilities under the FSP.

[132] Ms. Stewart maintained that it is highly likely that there will be a need at Joyceville to evacuate disabled inmates given the number of them at the Institution, and that this shown by the fact that there is now a plan in place for evacuating disabled inmates.

Conclusion

[133] Ms. Stewart submitted that all of these conditions constitute potential dangers and lead to greatly increased risk in circumstances of multiple emergencies, evacuation of inmates with disabilities and SCBA equipped first response requiring assistance.

[134] The Appellant submitted that, although numerous improvements had been made in relation to fire safety at Joyceville, dangers still exist that can be remedied, and requested that the appeals be allowed and the Appeals Officer render whatever decision deemed appropriate.

[135] Ms. Stewart asked that I rescind the HSOs

B) Respondent's arguments

[136] Mr. Alcock cited *Wade Unger v. Canada (Correctional Service)* 2011 OHSTC 8 at paragraph 33 and *Verville v. Canada (Correctional Service)* 2004 FC 767 at paragraph 36 and argued that a danger does exist for CO Hunter because he has not met his burden to determine the circumstances in which the hazard could be expected to cause injury and to establish that there is reasonable possibility that these circumstances will occur. Mr. Alcock also held that a reasonable expectation of injury cannot be based on hypothesis or conjecture.

[137] Mr. Alcock cited *David Laroche v. Canada Border Services Agency*, 2010 OHSTC 12 at paragraph 101 and maintained that for the Tribunal to conclude that there was a danger under the Code, the Tribunal member must: identify the hazards associated with the work; identify the circumstances in which it is reasonably possible that these hazards could cause injury to the Appellant; and determine whether these circumstances could have occurred on the dates on which the appellant made his refusal to work, not as a mere possibility but as a reasonable one.

Fire Safety Plan

[138] Mr. Alcock wrote that if CO Hunter was not aware that Joyceville had a FSP, it can only be because he did not take the necessary steps to become familiar with the Plan. He stated that the Fire Safety Training Participants Manual dated December 2008 is used at both the Core training and refresher training. Mr. Alcock pointed out that the document states on page 34 that COs should follow the Institution fire plan when smoke is encountered. Mr. Alcock added that an updated document entitled, "Fire Response Training" states on page 13 that employees are to "find, read and understand the Institutional FSP for the Institution you are working in."

[139] Mr. Alcock noted that CO Hunter had written in his complaint under 127 of the Code that "Joyceville Institution has an approved FSP; it is dated by several years." Mr. Alcock maintained that this is proof that CO Hunter was both aware of the FSP and its contents.

[140] Mr. Alcock held that, while CO Hunter alleged that he was unaware of his duties as FFEO or Deputy Floor Fire Emergency Officer (DFFEO) he did not lead any evidence to show how this absence of that knowledge contributed to a danger for him or show that the duties of the FFEO or DFFEO would not be performed. Mr. Alcock maintained that the duties of the FFEO or DFFEO correspond the work ordinarily performed by COs assigned to a post. Mr. Alcock said that CO Hunter would be performing these duties whether he was aware of it or not.

[141] Mr. Alcock held that CO Hunter's allegations regarding his knowledge of the FSP are now moot as the updated FSP is posted on the Institution's website that is accessible to all employees.

Evacuation of Inmates

[142] Mr. Alcock pointed to the evidence of Warden Finucan that it is impossible to specify exactly where evacuated inmates will be kept during a fire emergency because the location depends on the location and severity of the fire. Mr. Alcock added that Warden Finucan testified that Correctional Managers at Joyceville are trained in crisis management and they simulate emergency situations to practice how they will respond to the situation. Mr. Alcock referred to CO Hunter's testimony that he had been involved with fires on at least two occasions where the inmates were moved to a nearby common room. Mr. Alcock held that CO Hunter did not indicate that he had any confusion relative to where to move the inmates.

[143] Mr. Alcock submitted that CO Hunter has not provided any evidence to support the latter's allegation that the FSP is deficient as it only covers up to the evacuation of inmates and does not provide specifics on where the inmates are to be kept, how the counts are to be performed following an evacuation, and who is responsible for assisting inmates with disabilities. Mr. Alcock further submitted that CO Hunter did not submit evidence that the alleged deficiencies are reasonable likely to come into being during which he may be injured.

2+1+1 SCBA Response

[144] Mr. Alcock further maintained that there is no need for practical training on how to safely implement a 2+1+1 SCBA response because the training is already in place.

[145] Mr. Alcock argued that CSC has used a 2+1+1 response continually since the early 1980s except for the period between December 2005 and April 2006 and that the role of each responder is described in the Fire Safety Training Participants' Manual dated January 2011.

[146] Mr. Alcock maintained that the Appellant has not presented any evidence to suggest that this 2+1+1 standard is unsafe or in any way creates a danger for staff. Mr. Alcock held that the evidence of Mr. Gaw was that all three responders in a 2+1+1 response wear a SCBA and operate as a three person team. All must remain in visual contact at all times and if visual contact is broken or any one of them experiences difficulty, all three responders must leave the contaminated area.

[147] Mr. Alcock noted Mr. Gaw's testimony that employees are trained on the 2+1+1 response during basic core training and during regular refresher courses. A record was presented that confirmed that the Appellant had received the training. Mr. Alcock also referred to Mr. Gaw's evidence that the 2+2+1 response was devised for structural fires which are beyond the role of COs. Mr. Alcock held that there is already enough staff now to implement a 2+2+1 response if one becomes necessary and there was no proof that a 2+1+1 SCBA response is unsafe.

[148] Mr. Alcock referred to Warden Finucan's testimony that there are 10 COs and one Correctional Manager on duty at Joyceville for the mornings shift that commences at 2300 hours and ends at 0700 hours following the implementation of the NSDCO. Mr. Alcock maintained that the uncontradicted testimony of Warden Finucan establishes that there are seven COs to respond on the scene of a fire and eight COs in certain circumstances. Mr. Alcock concluded that there were more than sufficient COs on duty to respond to a 2+2+1 standard if that was required.

[149] Mr. Alcock also argued that the COs on the evening shift are not sent home until it is confirmed that inmates are all in their cells and inmates are secured in their cells during the morning shift. The additional position of the Respondent was that there is always sufficient capacity to respond to an emergency situation should one arise.

Multiple Emergencies: (Fire/Escapes)

[150] Mr. Alcock held that there is no evidence or logical basis for the Appellant's allegation that multiple simultaneous emergencies are likely to occur. Mr. Alcock reiterated that over the last 16 years there has only been one reported fire and there have been no reported escape attempts on the morning shift. He noted that there have only been seven medical emergencies on the morning shift during the last six years. Mr. Alcock held that the risk of multiple simultaneous emergencies can be expressed statistically and that the risk is so low that it cannot be considered to be reasonably likely to occur. Mr. Alcock further held that most fires at Joyceville are nuisance fires; the likelihood that there would be a significant fire and another emergency at the same time is even lower.

[151] Mr. Alcock maintained that it would be very difficult for a fire to spread from one cell to another or from one area of the facility to another because Joyceville's physical structure is made up of concrete and steel and the living units are physically separated from both, each other, and other areas of the facility. In addition, all cells are equipped with smoke detectors, automatic sprinklers and cell call alarms and there are manual pull alarms and fire extinguishers and hoses.

[152] Mr. Alcock added that the contents of cells are controlled so that the fire loading is kept to a minimum for each cell. For example, the mattresses and blankets are flame retardant and a card specifies the permitted personal effects for each cell and there are routine inspections conducted every 30 days to verify the contents.

[153] In addition, Mr. Alcock submitted that Joyceville has a high level of dynamic security which permits COs to constantly gather intelligence about what is going on in the Institution, including planned escapes.

Locks

[154] Mr. Alcock held that the appellant did not submit any proof in support of his allegation that the manual locks on the cell door constituted a hazard. Mr. Alcock submitted, to the contrary, that the evidence of Warden Finucan was that the manual locks reduce risk because: COs can control the timing and number of cells opened; familiarity with the use of the keys to access other doors during an emergency; and knowledge that the keys will function as expected with less possibility of a technical glitch.

Courtyard

[155] Mr. Alcock also noted that the appellant did not submit any evidence to support his allegation that the layout of the Institution adds risk in the event of a fire emergency because the inmates must be secured before firefighters will enter the court. Mr. Alcock submitted that this

assumes that it would be necessary to evacuate inmates to the courtyard in the event of a fire. Mr. Alcock maintained that such an option would not be necessary at Joyceville because the evidence submitted in the case demonstrated that fires at Joyceville tend to be small, contained and easily extinguished. Mr. Alcock held that the only examples of fire that involved limited or no evacuation and, where an evacuation occurred, it was to a nearby common room for a short period of time. Mr. Alcock concluded that CO Hunter's allegation that the central courtyard design at Joyceville represents a risk to his health and safety and should be dismissed.

Leave Post

[156] Mr. Alcock maintained that the Appellant's concern for his personal liability in the event that an inmate under his supervision was injured when left unattended to respond to an emergency in another part of the Institution is not within the jurisdiction of the Tribunal. Mr. Alcock held that the Appellant did not present any evidence as to how he would be personally injured and, for that reason, his claim should be dismissed as it relates to this issue.

[157] Mr. Alcock then referred to the testimony of Warden Finucan which challenged the appellant's allegation that certain posts, such as the CO in the segregation unit on suicide watch, cannot be left by staff to respond to an emergency. Mr. Alcock held that this allegation is incorrect because the testimony of Warden Finucan was that an extra CO is hired for the segregation unit when there is a suicide watch. Mr. Alcock concluded that the regular CO assigned to the segregation is available to respond to an emergency.

[158] In this regard, Mr. Alcock submitted that the evidence of Warden Finucan, CO Hunter and Mike Velichka was that COs are expected to leave their post in an emergency if the situation requires it. Mr. Alcock stated that this expectation has been articulated in an information bulletin that is distributed to all of staff. Mr. Alcock noted that CO Hunter testified that he had routinely left his post to assist in the performance of rounds and counts.

Disabled Inmates

[159] Mr. Alcock submitted that Joyceville now has a policy in place regarding monitors for disabled inmates. Mr. Alcock noted that CO Hunter had not provided evidence on how the lack of policy in this regard constituted a danger for him. As such, Mr. Alcock maintained that there is no basis for this Tribunal to consider CO Hunter's allegations on this point. Mr. Alcock further maintained that CO Hunter bears the burden of proof to prove that the new policy regarding monitors for disabled inmates is untested and, since he had no proof, the questions he raises are insufficient to impugn the new policy.

[160] Mr. Alcock submitted that the Appellant has not produced evidence to show that the corrective measures implemented at Joyceville are not sufficient and CO Hunter's allegations regarding Joyceville's FSP should be dismissed.

[161] Mr. Alcock further argued in the alternative that, if the Tribunal concludes that the risk of fire constitutes a danger, the risk is a normal condition of employment for CO Hunter.

C) Appellant's Reply Submissions

Fire Safety Plan

[162] Ms. Stewart maintained that the employer has a duty under the National Fire Code and the Joyceville Fire Safety Manual to inform employees of their obligations as a Deputy Floor Emergency Officer regardless of the fact that they CO may have been performing the duties without knowledge of their appointment and without training. Ms. Stewart added that the employer's notion that employees ought to make themselves aware of their responsibilities in the event of an emergency represents their cavalier attitude towards safety.

[163] Ms. Stewart clarified that CO Hunter never claimed to be unaware of the FSP at the time of his work refusal; rather his testimony was that he was not aware of the FSP when he first became concerned about the safety issues arising from staffing levels.

[164] Ms. Stewart rejected the Respondent's notion that he was responsible for familiarizing himself with Joyceville's FSP and cited the employer's obligation in subparagraphs 125(1)(l),(o),(q),(s) and (z) of the Code.

Multiple Emergencies (Fire/Escape)

[165] Ms. Stewart stated that the Appellant acknowledges the Respondent's submission that a number of fire safety devices like sprinklers and smoke detectors are present at Joyceville. However, Ms. Stewart reiterated that CO Hunter pointed out repeatedly in his testimony, confirmed by the testimony of other witnesses, that some inmates have tampered with such devices and that tampering is not always discovered immediately. Ms. Stewart further argued that sprinklers do not reduce the danger posed by smoke and smoke inhalation which is why the SCBA is required.

[166] Ms. Stewart acknowledged that there are restrictions at Joyceville regarding the contents of cells which has the effect of reducing the fire loading potential in cell and there are cell searches. However, Ms. Stewart held that one cannot assume that inmates comply with rules or that searches will find every illicit item before it becomes a danger.

[167] Ms. Stewart submitted that, while the Respondent states there was only one reported fire on the morning shifts from 1995 to 2010, it was the testimony of CO Hunter that he was present for more than one fire during this period. Ms. Stewart questioned how fire incidents are being reported and recorded.

[168] Ms. Stewart held that the Respondent's claim that there were no escape attempts on the morning shift between 1995 and 2011 does not take into account that preparations for escape attempts were discovered by COs thwarting an escape attempt. Ms. Stewart further held that the Respondent's claim does not account for escape attempts on morning shifts before 1995 of which there were at least two when the appellant was working. Ms. Stewart submitted that the zero escape attempts statistics are misleading and do not represent the potential for escape attempts.

[169] Ms. Stewart held that in the Respondent's attempt to determine the possibility of multiple simultaneous emergencies arising based on frequency of events does not consider the potentially severity of any such emergencies.

[170] Ms. Stewart rejected the Respondent's argument that future fires will follow the pattern of previous fires at Joyceville which have been small, contained and easily extinguished. Ms. Stewart held that the fundamental principle of emergency preparedness is to be ready for the unlikely but potentially serious events.

SCBA 2+1+1

[171] Ms. Stewart reiterated the evidence of CO Hunter and CO Campbell who testified that their Core training only dealt with a 2+2+1 response and participants were told that members were only to work in pairs.

[172] Ms. Stewart held that the Appellant has met the burden of showing that a danger exists and that the circumstances presented as potentially presenting danger are far from speculative or improbable.

[173] Ms. Stewart disputed the Respondent's claim that all responders in a 2+1+1 leave the hazardous area if visual contact is lost. Ms. Stewart held that the responders may not be capable of leaving without assistance. Ms. Stewart clarified that CO Hunter's testimony was that he never had an opportunity to put the theoretical instruction into practice and so has not received sufficient training to ensure his own safety and that of his fellow COs. Ms. Stewart added that, in the same way, reading a FSP does not constitute sufficient preparation for an emergency evacuation if fire drills are not performed.

[174] Ms. Stewart maintained that CO Hunter had every reason to believe the joint health and safety committee was fulfilling its mandate to address health and safety in the work place when it strongly supported the reasonableness of CO Hunter's belief that the 2+1+1 response was and is potentially unsafe.

Leave Post

[175] Ms. Stewart responded that the health and safety concern of CO Hunter with respect to the legal ramifications of a CO leaving his post to respond to an emergency is not for inmates but for COs where a CO is reluctant to leave his or her post and respond to the emergency.

[176] Ms. Stewart held that the Respondent neglected to account for the number of staff needed as monitors for disabled inmates and their availability relative to assisting with the original emergency or secondary events. Ms. Stewart maintained that it is unrealistic to expect that every CO will actually be available to assist in an emergency.

Locks

[177] Ms. Stewart pointed out that CO Hunter and CO Campbell both testified that the amount of time to unlock manually locking cell doors when they are double locked in the morning shift present a hazard to COs in the event of a fire on the range.

Analysis

Did a Danger Exist For CO Hunter?

[178] For the purpose of disposing CO Hunter's two appeals, I will first decide whether a danger as defined in section 122 of the Code existed for CO Hunter at the time of his refusals to work. If I find that a danger existed, I will then consider the measures that have been taken at the Institution since CO Hunter's refusals to work and decide if a danger continues to exist. Finally, if I find that a danger continues to exist, I must determine if the danger constitutes a normal condition of employment for CO Hunter.

[179] The term "danger" is defined by subsection 122(1) of the Code:

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury of illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[180] Regarding the applicable test for determining the presence of an existing or potential hazard within the meaning of section 122(1) of the Code, Madame Justice Gauthier, in the Federal Court's *Verville* decision, at paragraph 36, stated the following:

I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in *Martin* above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in which circumstances it could be expected to cause injury and that it be established that such circumstances will occur in the future, not as a mere possibility but as a reasonable one.

[181] The following quote from paragraph 51 of *Verville* is also important to note here:

[T]here is more than one way to establish that one can reasonably expect a situation to cause injury. One does not necessarily need to have proof that an officer was injured in exactly the same circumstances. A reasonable expectation could be based on expert opinions or even on opinions of ordinary witnesses having the necessary experience when such witnesses are in a better position than the trier of fact to form the opinion. It could even be established through an inference arising logically or reasonably from known facts.

[182] Based on the above quotes from *Verville*, in order to find a danger within the meaning of the Code, I must:

- i. identify the hazard associated with carrying out the work activity;
- ii. identify the circumstances in which it is reasonably possible that this hazard could cause injury; and determine whether these circumstances could have occurred on May 10, 2008, not as a mere possibility, but as a reasonable one.

What is the hazard associated with carrying out the work activity?

[183] From the Appellant's submissions, I understand CO Hunter's position to be that the potential hazard in this case is the occurrence of a fire emergency at Joyceville which constitutes a danger when coupled with one or more of the following:

- an insufficient number of COs during the morning shift to deal with a fire emergency;
- a fire emergency plan for Joyceville that is inadequate because it does not deal with multiple simultaneous emergencies such as riot, medical emergencies, escape attempts and secondary fires that may arise during a fire emergency;
- CO Hunter's lack of training regarding his roles and responsibilities during a fire emergency; and
- the implementation of a 2+1+1 SCBA response.

[184] As there was no actual fire emergency that was taking place at the time of CO Hunter's refusal to work, my reasons will deal with the potential hazard of a fire emergency occurring at Joyceville during the morning shift.

Circumstances in which it is reasonably possible that this hazard could cause injury

1. Insufficient Staffing on morning Shift to Deal with a Fire Emergency

[185] What I gather from Warden Finucan's testimony is that there are 10 COs and one Correctional Manager on duty at Joyceville for the morning shift that commences at 2300 hours and ends at 0700 hours following the implementation of the NSDCO.

[186] It was also noted by Mr. Alcock that the testimony of Warden Finucan is uncontradicted in relation to the point that there are seven COs to respond on the scene of a fire and eight COs in certain circumstances. These points were used by Mr. Alcock to demonstrate that there were more than sufficient COs on duty to respond to a 2+2+1 standard if that was required. Considering the totality of evidence, my findings are consistent with Mr. Alcock's submissions on this point.

[187] Warden Finucan's testimony has also revealed that an *Augment Recall Plan* to enhance the number of staff in a crisis has been established at Joyceville and included in the Joyceville Institution FSP dated July, 2011 which consists of a staff emergency call back list. The CM on the morning shift, who is acting as the interim manager, can implement the *Augment Recall Plan* and call in additional COs in the event of an emergency.

[188] The memorandum of understanding with Pittsburgh Institution included with the document evidence has the effect of ensuring that the same number of staff are available to deal with a fire emergency during the morning shift as existed prior to CO Hunter's refusal to work. In addition, the *Augment Recall Plan*, also implemented after CO Hunter's refusal to work provides that additional COs can quickly be recruited to assist in an emergency if the CM deems this to be necessary.

[189] Taking all of this into account, staffing levels can quickly be increased in the event of a fire to levels prior to the NDPCO and more.

[190] As such, I find that the evidence does not demonstrate that there is insufficient staff to deal with a fire emergency if the occasion arose. As such, I am not persuaded that the level of staffing during the morning shift at Joyceville constituted a circumstance where the hazard of fire emergency could reasonably be expected to cause injury to CO Hunter or another employee before the hazard could be corrected.

2. Fire Safety Plan

[191] Concerning the adequacy of the FSP in the event of an actual fire, I will first address the concern raised regarding multiple simultaneous emergencies. The position of the Appellant is that multiple simultaneous emergencies are reasonably possible since Joyceville houses between four and five hundred inmates and that the FSP at Joyceville and the National Deployment Standard did not deal with the possibility of multiple simultaneous emergencies including escape, riot, medical emergencies or secondary fire.

[192] The evidence of Warden Finucan was that the evening shift COs do not leave until inmates are confined and accounted for in their cells, and inmates remain in their cells during the morning shift. Notwithstanding the number of inmates at the Institution, I am persuaded that this lockup significantly reduces the risk of a fire emergency or other simultaneous emergencies. I find this to be so in light of the points that follow.

[193] The testimony of Warden Finucan was that no escapes and only one fire had been reported during the morning shift in the past 16 years. His further testimony was that there have only been seven medical emergencies during the last six years. Mr. Alcock argued that this demonstrates that the risk of multiple simultaneous emergencies or situations is so low that it cannot be considered to be reasonably likely to occur.

[194] That stated, I have not found sufficient evidence regarding: the occurrence of additional fires; the preponderance of inmates to tamper with fire alarms and fire sprinklers; and the preponderance for inmates to take more flammable material in their cells during the morning shift. As a result, I have little opportunity to assess the risk for determining the adequacy of the FSP on these bases.

[195] Mr. Alcock referred to Warden Finucan's testimony that anything beyond a nuisance fire is unlikely because of the concrete and steel construction of the cells, the fact that fire load in cells is controlled and the presence of fire alarms and fire suppression sprinklers. These factors

further reduce any risk associated with a fire emergency and other simultaneous emergencies. He also referred to the testimony of Warden Finucan that attested that dynamic security at the prison can provide an alert in advance of the possibility of an escape plan. I find this testimony persuasive.

[196] Taking all of this into consideration, I am of the opinion that the risk of a fire during the morning shift is extremely low, including at the time of CO Hunter's refusal to work, and that the occurrence of multiple simultaneous emergencies with a fire emergency is a hypothetical possibility and not a reasonable one.

[197] Moreover I find that even if there were to be multiple simultaneous emergencies, the evidence does not provide me with reasonable grounds to find that the Appellant would be injured or would have likely been injured in the event of multiple simultaneous emergencies.

[198] I now turn to CO Hunter's concern that where a fire were to break out, such an occurrence, along with the FSP, would constitute a danger because the FSP only dealt with the initial evacuation of inmates but did not provide specifics relative to: access by the Municipal Fire Department into the Institution during an emergency; the further evacuation of inmates should a fire persists and grow; inmate counts during an emergency; and assisting inmates with a disability during a fire emergency.

[199] CO Hunter testified that the Municipal Fire Department will not enter the main entrance courtyard unless and until inmates are secured, but that the FSP does not specify where inmates are to be evacuated if the fire intensifies and it is necessary to relocate these inmates outside of the prison.

[200] It is my view that it would be preferable to have advance plans in place to deal with the evacuation matters raised by CO Hunter. However, notwithstanding CO Hunter's submission that the FSP required that sufficient supervisory staff be on duty as opposed to calling back staff in a fire emergency, the evidence in its entirety has failed to reveal to me how the alleged deficiencies in the FSP in relation to evacuation procedures could reasonably be expected to cause injury to a person before the situation could be corrected.

[201] I will now address concerns related to the manual cell locking mechanism at Joyceville, which was also argued to be a danger when coupled with the event of a fire emergency.

[202] CO Hunter and CO Campbell testified that it would take longer to evacuate a range in the event of a fire because all doors are manually locked as opposed to being opened via a centrally operated electronic mechanism to control the doors.

[203] Warden Finucan testified that the manual locks reduce risk because COs can control the timing and number of cells opening during a fire emergency and the fact that a simple mechanical system such as key operations are superior to electronic systems in an emergency.

[204] Given the evidence and arguments presented to me, I do not find there to be sufficient grounds to enable me to rule that having to deal with manual cell locks in the event of a fire

could reasonably lead to injury to CO Hunter. I find such a determination would be overly speculative.

[205] The final point raised by the Appellant regarding the alleged inadequacy of the Fire Safety Program concerns the assisting of disabled inmates during a fire emergency.

[206] The evidence of Warden Finucan was that Joyceville now has a program in place regarding monitors for disabled inmates.

[207] Ms. Steward further argued that the new system for tracking inmates with disabilities is unproven alone or in conjunction with the FSP. She further held that it is unclear from the evidence that staff are aware of their responsibilities under the plan and how feasible it will be for staff to assist inmates with disabilities and attending to their other duties in the event of a fire emergency.

[208] Mr. Alcock responded that CO Hunter had not submitted any evidence to show that program for assisting disabled inmates dealing could reasonably be expected to cause injury to a person in the event of a fire.

[209] Additionally, CO Hunter expressed concern that the FSP may be inadequate due to potential legal liability he could face for leaving his post to respond to an emergency, especially when monitoring disabled inmates.

[210] In order for me to find a danger in this instance, it is my role as an Appeals Officer to concentrate my analysis on dangers posed to employees, such as CO Hunter and/or his co-workers at CSC. As such, it would be beyond my jurisdiction to make a finding of danger based solely on these issues.

[211] I will now move on to address the second major concern raised by CO Hunter, namely the alleged danger resulting from the level of training he received on the FSP.

3. Training and Fire Safety Plan

[212] CO Hunter held that a danger existed at the time of his refusal to work because: he had never received a copy of the FSP at Joyceville; he had not received training regarding the FSP and his roles and responsibilities as a FEO or DFFEO. CO Hunter had also made the comment at the time of his refusal to work that the FSP at Joyceville was outdated. The evidence of CO Hunter and CO Campbell was also that she had never participated in a fire drill. CO Hunter conceded, however, that he had participated in a fire drill following his refusal to work.

[213] While CO Hunter alleged that he was unaware of his duties as FFEEO or DFFEO he has not provided any evidence to show how the absence of that knowledge contributed to a danger for him or to show that the duties of the FFEEO or DFFEO would not be performed. The evidence presented to me indicates that the roles and duties of the FFEEO or DFFEO correspond to the work ordinarily performed by COs assigned to a post. As such, I am persuaded that CO Hunter would be performing these duties whether he was aware of it or not.

[214] I am of the view that the employer is responsible for ensuring that its employees are trained to deal with emergencies and that it is not up to the employees to make themselves aware of their responsibilities in the event of not receiving proper training. However, I am not convinced by the evidence I have seen that there was an absence of training or that this alleged absence of training regarding the Appellant's roles and responsibilities during a fire emergency event constituted a danger to him. I conclude, therefore, that CO Hunter's concerns are more speculation, and are not reasonably founded.

4. The implementation of the 2+1+1 SCBA response

[215] The evidence of CO Hunter and CO Campbell was that they were instructed on the 2+2+1 response and they believe that a 2+1+1 SCBA response is unsafe because situations could arise during a fire where a CO would have to enter a location alone. Their 2+1+1 SCBA response training was that employees are to work in pairs. The evidence also showed that the workplace joint health and safety committee at Joyceville also regarded the 2+1+1 SCBA response to be unsafe.

[216] Mr. Alcock held that the Appellant had not submitted evidence to show that the 2+1+1 response is unsafe.

[217] The evidence demonstrates to me that CSC had originally adopted the 2+2+1 SCBA model because it this model was cited in the National Fire Code. This evidence also indicates to me that when CSC became aware that the 2+2+1 SCBA model applied to firefighters fighting structural fires while equipped with bunker gear, it decided that the work of COs only required a 2+1+1 model for SCBA use.

[218] In light of this recognition, it appears that CSC has used a 2+1+1 SCBA response continually since the early 1980s except for the period from December 2005 and April 2006. I am satisfied that COs are trained on the 2+1+1 SCBA response during their core training and during regular refresher training. I am also satisfied by the evidence produced indicating that CO Hunter took SCBA refresher training on February 2, 2008, and May 14, 2009.

[219] Considering the evidence of both parties, I am not persuaded that in the event of a fire, a SCBA response with one less person amounts to a danger. In other words, I do not find that the use of a 2+1+1 SCBA response makes it reasonable to expect that the hazard of a fire emergency at Joyceville could cause injury to CO Hunter or another employee before the hazard could be corrected.

Conclusion

[220] In sum, I find that the Appellant was not exposed to a danger as defined in the Code.

[221] Given my finding of no danger, issues regarding normal condition of employment need not be addressed.

Decision

[222] For all of the reasons cited above, the decision by HSO Bob Tomlin dated March 31, 2009, which for the purposes of this Tribunal amounted to a finding of no danger, as well as HSO Francesco Misuraca's no danger decision dated May 29, 2009, are confirmed.

Douglas Malanka
Appeals Officer