Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

**Citation:** Dan Bradford and Correctional Service of Canada, 2013 OHSTC 38

**Date:** 2013-12-19
**Case No.:** 2011-33
**Rendered at:** Ottawa

**Between:**

Dan Bradford, Appellant

and

Correctional Service of Canada, Respondent

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| **Matter:** | Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer. |
| **Decision:** | The decision that a danger does not exist is confirmed. |
| **Decision rendered by:** | Mr Michael Wiwchar, Appeals Officer |
| **Language of decision:** | English |
| **For the Appellant:** | Mr Giovanni Mancini, Counsel, Laplante et associés |
| **For the Respondent:** | Ms Lea Bou Karam, Counsel, Department of Justice, Labour and Employment Law Group |

## REASONS

[1] This matter concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision that a danger does not exist rendered by Mr Patrick Haché, health and safety officer (HSO), Human Resources and Skills Development Canada (HRSDC – now Employment and Social Development Canada), Labour Program, on May 29, 2011.

### Background

[2] In the afternoon of May 27, 2011, at Atlantic Institution, Renoux, NB, a maximum security prison operated by the Correctional Service of Canada (CSC), a live 22 caliber round of ammunition (bullet) was discovered by a correctional officer (CO) in the bottom corner of a doorway where inmates from several living units have access.

[3] The inmates were subsequently locked in their cells and an emergency count was performed. A short time after, the appellant, Mr Dan Bradford, a CO, and another colleague initiated a work refusal as they believed the bullet that was discovered constituted a hazard. Specifically, they believed it was unsafe for staff to carry out searches of cells without properly trained teams capable of handling a situation involving ballistics.

[4] The refusing COs, employer representatives and members of the work place health and safety committee attempted to resolve the concerns being raised. To address the situation and evaluate the risk involved in the circumstances, a threat and risk assessment (TRA) was developed by the employer and it was to be implemented the next day. The TRA concluded that the risk was low. The parties came to a resolution after an agreeable search protocol was established in the evening of May 27, 2011. As a result, the appellant and his colleague discontinued their work refusal.

[5] On the morning of May 28, 2011, the search protocol developed the previous evening was explained at a staff meeting. Management explained that the cell searches would be conducted by two COs who are known as “in line staff” and one member of the emergency response team (ERT). ERT members are COs who are specifically trained and equipped with personal protective equipment (PPE) when encountering possible ballistic situations.

[6] During the meeting, members of the ERT, including CO Vautour, did not agree with the search protocol. Members of the ERT believed the search must be conducted by five ERT members without in line staff. Consequently, CO Vautour exercised his right to refuse dangerous work. Another internal investigation was conducted to address the employees’ concerns however; the issue could not be resolved. The matter was then communicated to HRSDC Labour Program and HSO Haché responded by conducting his investigation.

[7] On May 29, 2011, HSO Haché rendered a decision that a danger does not exist and management directed the staff to conduct routine cell searches without ERT members, ignoring the initial protocol.

[8] Consequently, the appellant continued his right to refuse because the employer directed in line staff to conduct the cell searches and he believed this constituted a danger under the Code.

[9] What follows below is an excerpt from HSO Haché's investigation and decision report dated June 13, 2011, that provides the reasons for his decision.

> As a result of the investigation, the investigating officer has to render a decision [of] – [*sic*] absence or presence of danger. The decision is based on a number of factors that are presented in this section. In order to effectively determine the presence or absence of danger, the investigation requires an objective analysis of the facts.
>
> The complainant had limited information about the hazard other than the fact that a bullet was found on the property. The investigating officer recognize [*sic*] that the risk of being assaulted by an inmate using ammunition or items to use ammunition is present in the institution environment. It is important to point out that danger should not be equated with risk and effective risk mitigation controls does not necessarely [*sic*] constitute a danger. The investigation demonstrate [*sic*] that the employer implemented corrective measures to ensure the safety of the employees by locking down the inmates, conducting a TRA, ensure [*sic*] that employees are properly trained and are provided with the proper protectective [*sic*] equipment to conduct cell search [*sic*] in accordance to [*sic*] the employer's directives. Finally, management indicated that the [*sic*] there is no information suspecting that an inmate is being [*sic*] in possession of ammunition or other items to use ammunition. Based on this information, the investigating officer is of the opinion that the employer implemented measures to mitigate and control the risk.
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> In the complainant work refusal statement, the complainant requires that a search protocol is implemented by the employer to conduct cell search. More specifically, the complainant requires that the cell search are [*sic*] conducted by a team of three members. The investigation demonstrate [*sic*] that the Warden is not of the obligation [*sic*] to develop a specific protocol for the search. The investigation also demonstrate [*sic*] that the Warden is within his authority to order the cell search using post order search procedure which requires two staff members. The undersigned health and safety officer is not qualified to comment or evaluate the post order search procedures or comment on which protocol should be use [*sic*] to search cells nor to determine the number of staff required to conduct cell search. With the above in mind, the investigating officer is of the opinion that the Warden is within his authority to order a search of the cells using the post order search procedure.
>
> During the interviews, the complainant indicated that inmates may be in possession of ammunition and/or items to use ammunition. This information was not based on any facts and the information was hypothetical and speculative. As Hypothetical [*sic*] situations are

> excluded from the concept of danger because they are not based on facts and to [*sic*] not constitute a danger.
>
> Decision
>
> Based on the reasons explained above, there was no evidence to suggest that danger was present at the time of the work refusal. The undersigned Health and Safety Officer considers that a danger does not exist.

[10] On June 3, 2011, the appellant filed an appeal with the Occupational Health and Safety Tribunal Canada (the Tribunal).

[11] On September 11, 2012, I attended a view of relevant areas of Atlantic Institution with the parties and a demonstration of a search involving two line staff was performed. A hearing took place between September 11 and 13, 2012, in Moncton, New-Brunswick.

**Issues**

[12] I must make a decision with respect to the following issues:

i. Was the appellant exposed to a danger as defined under the Code when he exercised his right to refuse work?

ii. If the appellant was exposed to a danger as defined under the Code when he exercised his right to refuse work, is this danger a normal condition of employment?

**Submissions of the parties**

[13] The parties' final submissions were received on November 22, 2012.

**A) Appellant's submissions**

[14] The appellant's case consisted of evidence from the following witnesses from the Atlantic Institution: CO Bradford, the appellant, Mr G. Vautour, CO and ERT team leader and trainer as well as Mr S. Karasek, CO.

[15] According to the appellant, HSO Haché erred in deciding that CO Bradford was not exposed to danger.

[16] In its submissions, the appellant urged the Tribunal to consider the distinctive environment of the Atlantic Institution, being that it is the only maximum security prison in the Atlantic Region. CO Bradford testified to the effect that the Atlantic Institution hosts the most dangerous inmates and that prison life is frequently marked by violent murders, assaults, death threats and gang rivalry. CO Bradford also testified that COs are front line staff who carry out their daily duties in this highly unpredictable and volatile

context, providing examples such as inmates throwing unknown bodily fluids at COs from under doors or when doors are opened.

[17] The appellant argued that HSO Haché placed too much importance on the TRA that was conducted by the employer when issuing his decision that a danger does not exist. The appellant added that the Tribunal has consistently set aside the TRA for having no direct bearing on a presence of danger under the Code. The appellant believed that the TRA actually confirms the danger, based on the fact that the employer believed the hazard existed. To support this argument, the appellant cited the Tribunal decision in *Vandal et al. and Correctional Services Canada,* OHSTC-09-009.

[18] The appellant also argued that the HSO failed to consider that the *Corrections and Conditional Release Act* (CCRA) and any CSC policy or directive are all secondary to the Code when dealing with a work refusal under section 128. To that effect, the appellant stated that when there is a danger, it is irrelevant that the situation meets the standards of CSC policies or even CCRA. In support of its argument, the appellant cited the Tribunal decisions of *Vandal* (cited previously) and *Armstrong* v. *Canada (Correctional Service),* 2010 OHSTC 6, both involving CSC.

[19] The appellant argued that carrying out the cell searches without the ERT while a bullet found in the Atlantic Institution constituted a hazard to the employees. In support of this argument, the appellant cited the decisions of *Verville* v. *Canada*, 2004 FC 767 and *Martin* v. *Canada (Attorney General),* 2005 FCA 156 in which the courts found that a danger arising out of the unpredictable behavior of inmates is covered by the definition of danger.

[20] During the hearing, CO Bradford testified that the bullet was found in a doorway after staff had done a search in the recreational yard where inmates have access. CO Bradford testified that at any given time, unsupervised inmates such as garbage collectors or cleaners can be found working in the recreational yard.

[21] CO Bradford expressed that he believed the bullet constituted an “above normal situation” because a bullet is designed to kill somebody, from a distance or various angles, as opposed to a shank, ( i.e. knife-like weapon fabricated by inmates) which has to be used in close proximity to the COs to create an injury.

[22] According to CO Bradford’s testimony, some inmates had a history of being in possession of materials used for fabricating zip guns inside their cells. One inmate had a severe history of escape attempts and had material to cut through restraints. Another inmate was found to have hidden copper tubing in his cell shortly before finding the bullet. CO Bradford testified it was subsequently discovered that two inmates were in possession of material that could potentially be used to fabricate a zip gun at the time of the work refusal.

[23] CO Bradford testified that inmates could easily disassemble a gun in a very limited time and hide it from COs. He added that inmates use code words to communicate when

cell searches are being conducted, and frequently flush unauthorized or contraband items down the toilet or pass the items from cell to cell in order to hide it from COs.

[24] CO Bradford testified that he has never received any form of training related to the possibility of being struck by a bullet in the course of his functions.

[25] In his testimony, CO Vautour stated that he has been working as a CO for 22 years. He has been part of the ERT for 20 years and is currently a team leader and trainer.

[26] CO Vautour explained that the ERT is comprised of 21 members specializing in emergencies such as riots or cell extractions. ERT members receive different training than non-member in line staff, generally on a yearly basis. The ERT members are trained to respond in a five person team where each individual plays a distinctive role. CO Vautour testified that the members are accustomed to working together, are compatible and get to know each other well.

[27] CO Vautour testified that recently, the ERT was deployed in almost identical situations in the Atlantic Regions of CSC at Dorchester Institution and at Springhill Institution.

[28] CO Vautour stated that the ERT had been called to the Dorchester Institution after a "kite" (anonymous form of information coming from an inmate to a CO) was passed mentioning the presence of a gun in the Institution.

[29] CO Bradford testified that Warden Bourque, who made the decision to have COs perform the cell extractions for searches in this appeal, is the same individual who decided that the ERT would be called to intervene at Dorchester Institution. Warden Bourque was not present at the hearing.

[30] In parallel, CO Vautour testified that the ERT had also been called to Springhill Institution after bullets were found in the parking lot of the institution.

[31] According to CO Vautour's testimony, the proposed plan was to work in a five person ERT team. The team was to be equipped with ballistic shields, helmets and bullet proof vests, to conduct the cell extraction of inmates in a systemic manner under the supervision of a team leader. This is the approach that was used by the ERT at Dorchester Institution as well as the approach that is taught in training.

[32] It is maintained by CO Vautour that there were members of the ERT on duty on the day of the work refusal. He also testified that the equipment, such as ballistic shields and helmets, had been brought to the Atlantic Institution from Dorchester Institution. CO Vautour testified that depending on the length of the ERT intervention, it could have been accomplished at virtually no cost to the employer.

[33] CO Karasek testified that he has been employed as a CO for 26 years. At the time the work refusal took place, he was the union designated health and safety representative. He explained his involvement during the work refusal.

[34] At the hearing, CO Karasek brought two zip guns and he explained how he made one of them in less than half an hour. During his testimony, CO Karasek testified that a zip gun can be made quite easily with materials commonly available in a penitentiary setting. As an example, CO Karasek stated that zip guns have been made with milk shake straws as a barrel, and an elastic band as a firing mechanism.

[35] The appellant also submitted an investigation report drafted by a HSO where the presence of a bullet had been characterized as a hazard in an institution in Grande Cache, Alberta.

**The danger is not a normal condition of employment**

[36] The appellant submitted that a "normal condition of employment" is the residual hazard that remains after the employer has followed all the required steps and put in place all the safety measures to protect the employees against the hazard. To support this position, the appellant cited the Federal Court decision of *P&O Ports Inc.* v. *International Longshoremen's and Warehousemen's Union, Local 500*, 2008 FC 846. The appellant argued that the employer did not meet specific requirements of the "normal condition of employment" by failing to identify each and every hazard or implement safety measures to eliminate, reduce or control the hazard.

[37] The appellant stated that the decision by the employer to order a complete lockdown of all inmates and an emergency cell search after the bullet was found is indicative of the presence of serious motives. This, the appellant argued, is contradictory to Assistant Warden Operations (AWO) K. Hare's testimony to the effect that it was business as usual that day, justifying the decision to conduct routine cell checks without the ERT.

**B) Respondent's submissions**

[38] The respondent's case constituted the testimony of Mr K. Hare, AWO, Atlantic Institution. AWO Hare has been working at Atlantic Institution for 30 years and is recognized as an expert on inmate activities for the purpose of this appeal. He is also responsible for the management of the ERT and was a member of the ERT for 10 years between 2000 and 2010.

[39] The respondent's submissions evolved mainly around two main arguments. The first being that the definition of danger is not being met because of the lack of reasonable expectation that the hazard, in this case, the bullet, would lead to injury. The second argument brought forward is that the dangers and risks that the COs are being exposed to constitute normal conditions of employment under the Code.

[40] In support of the first argument, the respondent submitted evidence related to institutional security, security intelligence officers, the conducting of cell searches, the ERT team and the TRA that was conducted.

[41] With regard to institutional security, AWO Hare testified on the difference between static security and dynamic security. He defined static security as the infrastructure in place to maintain the institution as a secure area. Stating as examples; bars, control posts, fences, guns and handcuffs. AWO Hare then went on to define dynamic security as the interaction that all staff have with the inmates on a daily basis. In AWO Hare's view, dynamic security is more important than static security.

[42] As part of dynamic security, AWO Hare explained that COs are expected to log in any behavior that would seem to them as "out of the ordinary" in a document referred to as Officer's Statements/Observations Reports ("OSORs"). AWO Hare added that the OSORs are shared with management and consulted daily by the security intelligence officers ("SIO") who analyze the information, log the information into a system and conduct investigations when necessary. AWO Hare also indicated that the information contained in the OSORs is shared with COs in the course of daily briefings held at the start of every shift.

[43] AWO Hare testified that in addition to OSORs, inmate behavior information is recorded into log books. He explained that these log books are situated at various locations inside the institution, including at every control post, unit office and mobile tour. AWO Hare added that daily inmate activity and movement is recorded into the log books in order to share information with fellow COs starting a new shift. AWO Hare stated that COs are encouraged to record OSORs in the log books.

[44] AWO Hare also testified regarding management of emergency situations in the institution, referring to the commissioner directives entered into evidence under E-8. AWO Hare stated that the goals when dealing with an emergency were to resolve the emergency with minimum force, to return the operations to normal as soon as possible, to prevent escapes, and to minimize damage to properties.

[45] AWO Hare testified that depending on the type of emergency, the ERT team may be called. He explained that the ERT team is trained for non-compliant cell extraction, riots, to provide security during hostage taking, among other situations. AWO Hare indicated that according to an institution policy, there are to be 20 ERT members in the institution. AWO Hare explained that to become an ERT member, COs must apply upon notification of a vacancy and must agree to be submitted to psychological testing. The candidates must also attend 10 days of basic training. If they succeed all the stages, candidates then become full time ERT members.

[46] AWO Hare testified that the ERT team is only deployed in non-compliant situations. As an example, AWO Hare explained that if an inmate is in his cell, brandishing a weapon while refusing to come out of his cell, the ERT can be called. AWO Hare also added that, in general, if ERT is used for a cell extraction of a non-compliant inmate, other inmates will show behavior to support the non-compliant inmate. Quite frequently, to show their support, other inmates may become belligerent or may break things like windows using weapons.

[47] It was further explained that during emergency situations, the warden must make the decision on what steps are appropriate. Depending on whether inmates are compliant, there are different ways of dealing with a situation. For example, as stated above, AWO Hare indicated that the use of force is warranted with non-compliant inmates who are not reacting to verbal communication.

[48] AWO Hare also testified in detail about how searches are to be conducted at the institution. He explained that the objective of searches was to deter the possession and exchange of contraband and unauthorized items. AWO Hare specified that a contraband item is anything that is not allowed inside the institution. For example, weapons or drugs. An unauthorized item is an item that is allowed in the institution, but not in inmates' cells. For example, a television may be provided to an inmate who is authorized to have it while another inmate may not have similar authority to have one.

[49] AWO Hare testified that various types of searches are conducted within the institution. AWO Hare indicated that searches are conducted by COs. Routine searches are conducted every 30 days. Non routine searches are done when a CO has reasonable and probable grounds to believe that there is an unauthorized or contraband item in the cell. For example, if a CO smells brew (alcoholic beverage made by inmates) or if they see a knife or pills. Non routine searches require the authorization of the institution head. AWO Hare also stated that emergency searches are also an option, if it is believed that the inmate will get rid of the evidence immediately.

[50] AWO Hare explained that the ERT do not conduct cell searches because their equipment is "bulky" and that it is not within their mandate. AWO Hare explained that COs conduct the searches unless there is a "serious incident". AWO Hare indicated that a "serious incident" is one which results in death or serious injury to a staff member through an act of violence. In the event of a "serious incident" involving a search, AWO Hare stated that the ERT would be deployed to conduct the exceptional search of inmates. AWO Hare added that the main reason why ERT generally doesn't take part in searches is because it raises tension in the institution because inmates view it as a violation of their privacy.

[51] Searches are recorded in a search log once completed. If any unauthorized or contraband objects are found, a report is drafted.

[52] AWO Hare also testified that there are three SIOs at the institution, whose duties are to gather, analyze, investigate and disseminate the information collected by COs in the course of their functions. SIOs listen to inmate telephone calls, cooperate with local police forces, asses the reliability of "kites" and participate in regional intelligence meetings. Their responsible for knowing "what's going on" in the institution. In addition, the SIO establishes and maintains a network of confidential human sources within the inmate population. AWO Hare explained that the SIO must be able to understand, evaluate and analyze human and criminal behavior in order to constantly assess risks and threats.

[53] AWO Hare testified that he drafted the TRA stated in this case and that the risk in the circumstances was assessed as low.

[54] AWO Hare testified that a search was conducted as a normal emergency search by line staff. AWO Hare indicated that nothing was found in the cells during the search.

[55] AWO Hare testified that based on his 26 years of experience, he has never known of a CO or an inmate being assaulted with a functional zip gun. AWO Hare explained that in general, zip guns were non-functional and are used by an inmate to strike fear in another inmate or staff. AWO Hare testified that when he was working as a SIO, he once found an item resembling a zip gun created with a pen and two cables connected to it. AWO Hare explained that the inmate had used that object, pretending it was a zip gun.

**Any danger is a normal condition of employment**

[56] In support of the second argument, the respondent submitted evidence related to the CO work descriptions through the cross examination of CO Bradford. The evidence provided by CO Bradford to that effect reflected the work description submitted in exhibit E2-Q. The following are some of the risks listed in the CO job description:

- There is a direct, daily exposure to inmates who may be agitated, unpredictable or uncooperative or who may attempt to intimidate or resort to violence; this can occur when enforcing security measures, explaining decisions, or documenting inmate behavior. There is minimal control over the frequency and duration of difficult situations.
- Intervening in crisis situations to prevent or counteract violence and to protect the public, staff and inmates.
- There is a requirement to intervene in threatening or violent situations to protect the safety of members of the public, staff, inmates, and the institution (e.g. assaults, riots or hostage takings).
- There is a potential for inmates to verbally abuse or physically assault the incumbent.
- There is a risk of verbal or physical assault and/or psychological trauma due to the daily performance of duties in direct contact with potentially volatile inmates who may have low-level cognitive skills and alternate social values/attitudes.
- There is a risk of severe injury and/or death.
- Occasional interaction with inmates under the influence of various substances or in an unstable psychological condition can result in increased/unpredictable risk of verbal or physical assault.

[57] In cross examination, CO Bradford confirmed that as part of their duties, COs are required to engage the inmates on a regular basis by meeting and discussing matters with them. CO Bradford explained that this creates a rapport between the COs and the inmates.

**C) Reply**

[58] In its reply, the appellant stated that the behaviour of CSC in this appeal reflects a position that has been constantly overruled by the Tribunal and the Federal Court. The appellant argued that, although CSC has the means for COs to carry-out their duties as safely as possible, CSC continuously refuses to do so.

[59] Counsel for the appellant cited cases where the initial decisions from an HSO that a danger did not exist for COs employed at CSC were rescinded. As examples, the appellant cited the *Verville* case (cited previously), which dealt with the danger related to COs not being permitted to carry handcuffs; *Armstrong* (cited previously), which dealt with COs not being permitted to carry pepper spray; and the *Vandal* case, which dealt with unarmed COs escorting a high profile inmate.

[60] The appellant is of the view those examples demonstrated CSC's public record of not providing easily accessible protective equipment to their COs when dealing with hazards. It is alleged that CSC is adopting the same attitude in this appeal. The appellant is of the view that CSC has ignored overwhelming evidence, dismissing it as speculation.

[61] Counsel for the appellant points out that AWO Hare admitted that the threat he evaluated in his TRA was the threat that a CO would be injured by a zip gun, when extracting an inmate from his cell.

[62] The appellant stated that is was unquestionable that CSC was dealing with a ballistics threat, more grave than the normal daily threats which exist in the daily tasks inside the institution. The appellant reiterates that the employer could have easily resorted to the ERT, a specialized and highly trained team, to use the bullet proof vests, helmets and shields that were readily available, but that CSC arrogantly refused to do so. Counsel for the appellant is of the view that evidence demonstrated that CSC deployed the ERT to deal with almost identical ballistics threats at the Dorchester and Springhill Institutions.

[63] The appellant ends by stating that conducting cell extractions, in the light of a heightened ballistics hazard, by untrained and unequipped COs, is not a normal condition of employment.

**Analysis**

[64] I must determine whether at the time of his work refusal, CO Bradford was exposed to a danger as defined under 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 or 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

[65] In determining whether a danger existed at the time of CO Bradford's work refusal, I will consider the Federal Court and the Federal Court of Appeal's decision in *Verville* and *Martin* (cited previously), which relates the following when analyzing whether a "danger" exists under the Code:

- There has to be a hazard, condition or activity that can reasonably be expected to cause an injury or illness to an employee, which may not happen immediately upon exposure, but needs to happen before the hazard, condition or activity is altered.
- It is not necessary to establish precisely the time when the hazard, condition or activity will occur, but only to ascertain in what circumstances it could be expected to cause injury and establish that such circumstances will occur in the future, not as a mere possibility, but as a reasonable one.

[66] In order to determine whether a danger existed for CO Bradford, I will ask myself if the activity of carrying out the cell searches as requested by the employer, without the ERT, coupled with the fact that a bullet was found in the institution, could have reasonably been expected to cause injury.

[67] At this stage, I would like to clarify that although I have been provided with ample information related to the ERT, its expertise and its capacity, the question before me is not whether it would have been more appropriate to require the ERT to conduct the searches. Rather, I must determine whether a danger existed for CO Bradford when he was asked to conduct cell searches without the ERT, following the discovery of a bullet inside the institution.

[68] As discussed in *Verville*, in order to establish whether a danger exists it is necessary to ascertain the circumstances in which the activity is expected to cause injury, and to establish that there was a reasonable possibility that these circumstances would have occurred.

**a) In what circumstances could performing the cell searches be reasonably expected to cause injury to COs?**

[69] According to *Verville*, the definition of danger does not require that the cell searches performed without the ERT cause an injury every time. The French version, "susceptible de causer" indicates that an activity must be capable of causing injury at any given time but not necessarily each and every time. I must therefore identify circumstances in which carrying out the cell searches as requested may have been capable of causing injury at any time for CO Bradford.

[70] At the hearing, CO Bradford testified that he feared an inmate would be in possession of a bullet, a fabricated zip gun and would decide to shoot a CO during the cell search. CO Bradford explained that at any time during the walk to the cell, the time where the inmate is being extracted from his cell or when the cell is being searched, a CO could be exposed to the potential of an inmate in possession of a bullet and something to

propel it; like a zip gun. COs could be directly struck by the projectile, or indirectly by ricochet as COs are located in close quarters while conducting the searches.

[71] Therefore, in my view, and taking CO Bradford's testimony into consideration, in order for a CO to have been injured during a cell search as described above, the presence of the following elements would have been required:

i. the presence of an additional bullet(s);
ii. a mechanism to propel the bullet such as a zip gun; and
iii. an inmate prepared to shoot a CO.

[72] Having determined the circumstances in which the activity could have potentially caused a danger to the COs, I will now determine whether there was a reasonable possibility that these specific circumstances would occur.

**b) Was there a reasonable possibility that these circumstances would occur?**

[73] The *Verville* decision provides guidance when determining the reasonable possibility that the circumstances would have occurred, also referred to as the "reasonable expectation of injury". In *Verville*, Justice Gauthier indicated that reasonable expectations cannot be based on hypothesis or conjecture. At this stage, I must determine whether the circumstances which could have led to injury were more than hypothetical in nature, as opposed to a mere possibility.

[74] As stated above, in order for the circumstances to lead to injury, additional bullets were required inside the institution. Having reviewed the evidence provided by both parties, I am of the view that I have not been provided with any evidence suggesting the presence of additional bullets inside the institution at the time of the work refusal. At the hearing, witnesses testified that a bullet was found in an area where inmates have access. The evidence provided to that effect is that this bullet was found and confiscated. In his testimony, CO Bradford suggested that a bullet has very specific purposes: to injure or to hunt. CO Karesek testified that a bullet cannot be easily made because of its complexity, but could potentially be brought in.

[75] That being said, the assumption that if one bullet was found then "there must be others" is speculative and is not supported by any evidence. Because of its speculative nature, it does not meet the threshold of a reasonable expectation of injury as applied in *Verville*.

[76] The second element required for the circumstances to have led to injury is the presence of a functioning zip gun inside the institution. On this element, I am also of the view that the presence of a functioning zip gun inside the institution is speculative. At the hearing, CO Bradford testified to the effect that a zip gun can be made in as quickly as 30 minutes from scratch, and that inmates have access to the materials to fabricate zip guns, such as springs, tools used inside the Atlantic Institution and expended gas canisters for example. CO Bradford stated that materials which could have been used to fabricate a zip gun were found in inmates' cells after the work refusal. CO Karasek testified that he has

made two zip guns in the past, one of which he brought to the hearing was one that he built in less than 30 minutes.

[77] Nonetheless, I have put considerable weight on the following evidence. In cross examination, CO Karasek testified that he has never found a functioning zip gun in his 26-year career. CO Bradford also testified that he was not aware of any OSORs about zip guns or bullets previously in the institution. AWO Hare testified to the effect that he has never known of a CO or an inmate being assaulted with a zip gun. In his experience, zip guns have been used mostly by inmates to strike fear and he has never found "anything coming close" to a functioning zip gun in his career.

[78] In addition, I find that the evidence relating to the gathered intelligence inside the institution at the time of the work refusal is of particular relevance. The TRA, provided as evidence from the respondent, indicated that the security intelligence department were not in receipt of any recent information in the form of intelligence or reports relating to weapons other than shanks (home-made knives used by inmates). The evidence provided shows that the SIO reviewed all reports and intelligence information since January 1, 2011, which contained no information regarding bullets, shotgun shields, explosives, or firearms. The TRA indicated that the SIO department had ongoing contact with inmate sources and had not received any information regarding weapons or bullets. Although the TRA stated that one inmate worked as a tradesman helper and that tools have been missing, it was determined that it was unlikely that this particular inmate would have the ability to build a zip gun.

[79] While I am mindful that finding a functioning zip gun inside the Atlantic Institution is not impossible, I find that the evidence provided in support of that is quite hypothetical in nature to constitute a reasonable expectation of injury. More accurately, I believe that finding a functioning zip gun inside the Atlantic Institution was a mere possibility at best. In coming to this conclusion, I have given weight to the evidence provided to me to the effect that a functioning zip gun has never been found by either CO Karasek or AWO Hare; both very experienced personnel in the correctional setting. I have also considered that the intelligence gathered by the SIO at the Atlantic Institution did not suggest the presence of any information regarding bullets or zip guns. While I accept that it may be fairly uncomplicated to fabricate a functioning zip gun, I find that the evidence provided to me does not lead me to believe that this is more than a mere possibility.

[80] Because of the reasons explained above, I do not believe that there existed a reasonable expectation that CO Bradford would have been injured by conducting cell searches instead of the ERT at the time of the work refusal.

[81] In coming to my decision, I have also considered the evidence provided by CO Vautour in relation to the deployment of the ERT at Dorchester and Springhill Institutions. Even so, I am of the view that these separate incidents, while sharing the common element involving a bullet, do not assist me in determining whether a danger existed for CO Bradford at the time of his work refusal. As stated previously, my role as an appeals officer is to determine whether the employee was exposed to a danger, as opposed to determining whether the ERT should have been deployed as a best practice.

[82] The deployment of in line staff versus ERT members in cell searches further to the discovery of a bullet inside the institution while not a danger under the circumstances of this appeal is nevertheless an issue worthy of further scrutiny. I mention this because of CO Bradford's testimony; that he did not receive any form of training related to ballistics. Pertinent requirements concerning hazard identification, assessment, preventative measures and employee education are set out in Part XIX, Hazard Prevention Program, in the *Canada Occupational Health and Safety Regulations*. I encourage the employer and employees at Atlantic Institution to have more discussions about this issue inside the work place health and safety committee if this has not already been done to date.

[83] Because I have determined that there is no reasonable expectation that the carrying out of the cell searches without the ERT would cause injury in the circumstances of this appeal, I conclude that CO Bradford was not exposed to a "danger" under the Code on the date of his work refusal. As such, it is not necessary that I determine whether the alleged danger was a normal condition of employment.

**Decision**

[84] For the reasons outlined above, I have determined that the HSO did not err when deciding that a danger does not exist further to CO Bradford's work refusal. HSO Haché's decision that a danger does not exist is confirmed and the appeal is dismissed.

Michael Wiwchar
Appeals Officer