Decision No. 96-020

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code. Part II
of a direction issued by a safety officer

Applicant:	Correctional Service of Canada Represented by: Harvey Newman and AgnPs LJvesque Counsel to the Treasury Board of Canada Secretariat from the Department of Justice Canada
Respondent:	Brad Brown Correctional Service of Canada Represented by: Guy Beasley and Richard Taylor of the Public Service Alliance of Canada
Mis en Cause:	Chris Mattson Safety Officer Human Resources Development Canada
Before:	Serge Cadieux Regional Safety Officer Human Resources Development Canada

An oral hearing was held in Kingston, Ontario, on September 17, 1996. Mssrs. Brown and Taylor from the Public Service Alliance of Canada agreed that Mr. Beasley would speak for Mr. Brown, the refusing employee.

Background:

On January 15, 1996, Mr. Brad Brown was assigned to act-up[1] from a CO-I to a CO-II position on the second floor of Unit 3 (Three). A short time after reporting to Unit 3, Mr. Brown informed Mr. K. Allen, his supervisor, that he was exercising his right to refuse dangerous work for personal health and for safety reasons. Mr. Allen investigated the refusal in the presence of the safety and health committee consisting of: Mr. Brown; Mr. C. Willows, Union of Solicitor General Employees (USGE) Representative; Mr. A. Audet, Joyceville Institution safety and health committee representative; and Mr. D. Hutchinson, Co-Chair, health and safety committee. No actual site investigation was carried out. Following the investigation, Mr. Hutchinson disagreed that a danger existed and the parties notified a safety officer at the Department of Human Resources Development Canada.

[1] For the purpose of this case review, the term Aact-up@ or Aacting-up@ refers to the situation where a Corrections Officer at the CO-I level of classification works at a higher classification level as a CO-II.

Safety officer Chris Mattson investigated the refusal in the presence of the parties. The AStatement of Refusal@ signed by Mr. Brown reads as follows:

> AOn January 15, 1996, I invoked Part II of the Canada Labour Code for Personal Health Issues and for Safety Issues.@

Mr. Brown told safety officer Mattson that he was not trained to act-up as a CO-II, and this, coupled with his medical condition, created a condition of danger to himself. He said that he could obtain a letter from his doctor confirming his medical condition. He also provided safety officer Mattson with a copy of a national acting-up policy document, and a Joyceville Institution acting-up policy. He said that the policies were developed for safety reasons and were not followed by the employer when they selected him to act-up as a CO-II. The national policy clarifies that only fully qualified employees are to be selected for acting positions. The Joyceville Institution document advises supervisors to first fill acting CO-II positions from the list of CO-I=s who are qualified and have indicated a willingness to act-up. Then, they are to use CO-I=s from the list who have previously acted-up as a CO-II. Mr. Brown further stated that the employer refused to confirm in writing that he would only be required to perform the security functions of a CO-II, and not the CO-II case work responsibilities. He said he was willing to fill the vacant CO-II position as a CO-I. The employer did not agree to this.

Following his investigation, safety officer Mattson decided that assigning Mr. Brown to a CO-II position constituted a danger to the employee while at work because Mr. Brown was not medically fit and trained nor qualified to do the job of a CO-II. His direction reads as follows:

> ATherefore, you are HEREBY DIRECTED, pursuant to paragraph 145.(2)(a) of the Canada Labour Code, Part II to not to use Mr. Brown in a CO-II position unless he is qualified and medically fit to do the job.@

Submission for the Employer:

Mr. Harvey Newman, legal counsel for the employer, stated at the hearing that safety officer Mattson erred when he decided that a situation of danger existed and that his direction should be rescinded. This position was supported in a written document submitted by Mr. Don Hutchinson, Assistant Warden, Administrative Services, Joyceville Institution prior to the hearing. The document forms part of the official record and will not be repeated here. Mr. Newman=s arguments at the hearing dealt principally with the legislation and its application to this case. The following points were noted:

1. Mr. Brown=s refusal to work is not related to a Adanger@ within the meaning of paragraph 128.(1)(b) of the Canada Labour Code. The dangerous condition alleged by Mr. Brown related to his own health condition and not to a hazard in the workplace. The Bliss case[2] was cited in support of this position.

[2] Bliss Case - PSSRB 165-2-18

2. The Canada Labour Relations Board (CLRB) and the Public Service Staff Relations Board (PSSRB) have confirmed in past decisions[3] that the right to refuse applies only where the danger is real and immediate. He stated that the danger alleged by Mr. Brown was hypothetical, not real, and was not immediate. Nothing presented at the safety officer=s investigation established that anything specific was about to occur the moment that Mr. Brown acted as a CO-II.

3. The Joyceville Institution acting-up policy documents that employees had given to safety officer Mattson were no longer in force because it has been discontinued. Other CO-I=s had complained that the policy was not fair and that all CO-I=s should act-up.

4. Paragraph 128.(2)(b) prohibits an employee from exercising his or her legislative right to refuse where the danger is inherent in the employee's work, or is a normal condition of employment. Mr. Newman cited cases[4] where the Boards have determined that the right to refuse did not apply because the work was deemed to be normal to the job. Mr. Page, the Unit Manager, testified that acting-up and performing the security responsibilities of a CO-II is normal to the job of a CO-I. The CO-II security functions are similar to those in the CO-I job description.

5. In past decisions, the PSSRB has confirmed that the employer is the one to decide who is adequately trained and to assign work accordingly. Cases[5] were cited.

6. The CLRB has confirmed in past cases[6] that the right to refuse cannot be used to deal with collective bargaining issues. This right to refuse case is related to a longstanding labour-management relations issue, and not to a danger. Reference was made to a union letter signed by Linda Cross, then Local President of the Union of Solicitor General Employees (USGE) and dated April 26, 1995. The letter counsels USGE members on invoking the right to refuse dangerous work under Part II of the Code on the basis that they are not qualified to act-up as CO-II=s. Mr. Brown is the current USGE Local President at the prison.

7. The right to refuse was not Brown=s only course of action. Mr. Brown should have quit or refused to do the work and have the matter dealt with through the grievance process.

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[3]
i. Montani Case CLRB 1089 - PG 12, 13 and 14
ii. Walton, J. Case - PSSRB - 165-2-21 - PG 10 and 12
iii. Webber, B et AL - PSSRB - 165-2-92, PG 8
iv. Evans B. - PSSRB - 165-2-23, PG 12, 22 and 24
v. Evans B. - PSSRB - 165-2-32, PG 23 and 24
vi. Bidulka, J. v. Treasury Board - Federal Court
vii Bonfa et AL v. Treasury Board - Federal Court of Appeal

[4]
i Evans B. - PSSRB - 165-2-87, PG 2
ii. Spadafora and Canadian Airlines International Ltd., - CLRB - 950-208

[5]
i. Evans B. - PSSRB - 165-2-32, PG22
ii. Evans B. - PSSRB - 165-2-31, PG 21 and 22
iii. Evans B. - PSSRB - 165-2-87, PG 8

[6]
i Gallivan W. Case - CLRB # 332 - PG 241
ii. Brailsford S. Case - CLRB # 921 - PG 2 and 14

8. The Department is not satisfied that Mr. Brown=s doctor had all the facts related to the two job descriptions or the long standing labour-management situation when he wrote his letter. The Department had asked Brown to see a medical doctor at Health Canada.

9. The Ontario Labour Relations Board case[7] cited by the employee representative did not confirm that occupational health and safety legislation applies to stress resulting from the interaction of people. The Bliss case is the best case law as it relates directly to the Canada Labour Code, Part II.

Submission for the Employee:

Mr. Brown did not give evidence at the hearing, but had provided safety officer Mattson with a written follow-up statement concerning his refusal. The statement is contained in the official record and will not be repeated here.

Mr. Guy Beasley presented arguments on behalf of Mr. Brown at the hearing. The following points from Mr. Guy Beasley=s arguments were noted:

1. Mr. Brown exercised his right to refuse to work on January 15, 1996 for personal health and safety reasons, and not as part of any union plot. In fact, his refusal was exercised approximately 8 months after the date of the union letter referenced by the employer spokesperson.

2. Mr Brown had previously exercised his right to refuse for the same reason on January 5, 1996. At that time, he told Mr. Page that he had a medical condition that would be aggravated if he were required to act as a CO-II. The letter from his doctor states that Mr. Brown has high blood pressure for which he is being treated and, because Mr. Brown feels that he is neither trained or suited for a CO-II position, acting-up could disadvantage his health status.

3. The employer took no action concerning Mr. Brown=s medical condition and, on January 15, 1996, insisted that he act as a CO-II even though other CO-I officers were willing and able to do the work. This showed disregard for Mr. Brown=s health and left him with no other option than to exercise his right to refuse. Since the employer failed to carry out his Part II responsibilities to protect the health and safety of Brown, it became the responsibility of the safety officer to act.

4. Section 12 of the Interpretation Act requires that any undefined word in legislation be given the broadest meaning. As the term Ahazard@ is not defined in the Part II, the safety officer had a duty to investigate the matter and decide on Mr. Brown=s right to refuse.

6. This case is different from the Evans - PSSRB cases cited by the employer representative in that those cases dealt with the training of others.

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[7] Ontario Labour Relations Board - 1517-94-OH

7. In a recent decision[8], the Ontario Labour Relations Board expressed the view that a hazard or condition can refer to a person and so safety officer Mattson had jurisdiction to decide the matter.

8. Employer spokesperson says that there is no material differences between training for security functions of CO-I or CO-II jobs. How was Brown to tell his employer if he had any training deficiencies.

9. Mr. Brown could have complained to the Canadian Human Rights Commission about the employer=s failure to accommodate him, but this could take from 6 months to several years to resolve. Therefore, the only mechanism left to Mr. Brown to protect his health and safety was to exercise his right to refuse.

Decision:

The issue before me to be decided is whether a dangerous condition existed for Mr. Brown at the time of the safety officer=s investigation. The safety officer=s report speaks for itself, but I take from his report the following facts that led him to decide that a danger existed at the time of his investigation:

1. Mr. Brown was never trained as a CO-II;
2. management refused to formally confirm in writing to Mr. Brown that he did not have to perform CO-II case management work;
3. the acting-up procedures at Joyceville Institution were not followed;
4. Mr. Brown has a medical condition that could be adversely affected if he were required to perform CO-II case management work, and management did not take any action after he informed them on January 5, 1996, of his medical condition.

From the positions of the parties and the report of the safety officer, I retain the following facts concerning the question of whether or not Mr. Brown was trained to act-up as a CO-II:

1. Mr. Page, the Unit Manager, testified that acting-up and performing the security responsibilities of a CO-II is normal to the job of a CO-I. This position is confirmed in item 5 of the CO-I Position Description document submitted by Mr. Hutchinson.

   > *Item 5 - Performs other duties as required such as acting in senior or lateral positions, assisting with special assignments within the unit, assuming extra casework responsibility and keeping abreast of technological and operational advances in the field of corrections.*

2. On April 14, 1994, Leslie Jones, Chief , Human Resources Management, Joyceville Institution, wrote to the A/Deputy Warden and copied AWMS Unit Managers. The memorandum, among other things, confirms that, according to Staffing at Regional Headquarters (Ontario), every CO-I is qualified to act-up in a CO-II position.

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[8] Ontario Labour Relations Board - 1517-94-OH

3 Mr. Page gave evidence that CO-Is acting-up as CO-IIs are only required to perform the CO-II security related tasks. That is, they are not required to perform CO-II case management duties. It was further stated that CO-Is acting as CO-IIs are paid at the CO-II rate as a matter of regional policy.

4. Mr. Page testified that, following Mr. Brown's first refusal on January 5, 1996, to act-up as a CO-II, he accompanied Mr. Brown to Unit 1. He advised him that the purpose was to provide Mr. Brown with familiarization and any necessary training with regard to the duties he would be required to perform as a CO-I assigned to a CO-II post. He also confirmed for Mr. Brown that that CO-Is acting-up as CO-IIs are only required to perform the CO-II security related tasks and are not required to perform case management work. According to Mr. Page, Mr. Brown read the Post Orders and said that he did not require any training to perform the security duties of a CO-II. Mr. Page confirmed at the hearing that he regards Mr. Brown to be fully qualified to act-up as a CO-II on a limited basis for up to four months. The limitation is that he is not trained to do CO-II case work.

From this, I take the position in this case that: since every CO-I is qualified to act-up: since the employer is removing tasks from a position rather than adding new responsibilities, since the CO-I and CO-II job responsibilities are similar with the CO-II case management responsibilities removed, and the employee acknowledges that he is qualified to perform the CO-II security responsibilities, I find that Mr. Brown was trained and qualified to act-up as a CO-II with the CO-II case management responsibilities removed. For the same reasons, I am not persuaded that the employer's refusal to confirm the removal of CO-II case work responsibilities in writing alters the fact that Mr. Brown was qualified to act-up as requested.

From the positions of the parties and the report of the safety officer, I retain the following facts concerning the acting-up policy referenced in safety officer Mattson's report:

1. the employer testified that the policy was discontinued when Mr. Brown agreed, both as a employee and as president of the local of the Union of Solicitor General Employees that the use of lists mentioned therein should be discontinued.

2. Mr. Brown did not confirm or deny to the safety officer that he had agreed with the employer to discontinue the use of lists. However, he maintained that the policy to use willing and able CO-Is was still in force, and that they should have been approached before him. Evidence was given that there were other such CO-Is available.

This stated, there is nothing in either of the two acting-up policies to indicate that CO-Is could refuse to act-up when the lists became exhausted. On the contrary, the aforementioned letter signed by Ms. Jones, Chief, Human Resources Management, Joyceville Institution confirms that all CO-Is are qualified to act-up. As a result, I find that the policy requiring supervisors to select CO-Is who are willing and have direct experience does not exclude other CO-Is who may not have indicated their willingness to act-up.

From the positions of the parties and the report of the safety officer, I retain the following facts concerning Mr. Brown's medical condition.

1. According to Mr. Page, when Mr. Brown informed him of his medical condition at the January 5,1996, refusal, he did not indicate that his medical condition would prevent him from acting-up, or that he would exercise the right to refuse if asked again.

2. Mr. Newman said in his rebuttal argument that the medical report is non-specific about the condition or the nature of Mr. Brown=s medical condition and should not be considered.

3. The medical report states that Mr. Brown feels that acting-up could be detrimental to his health because he is neither trained or suitable for acting-up. However, it does not specify what aspects of work could be detrimental to him.

I find that the medical report is insufficient to be considered in this refusal case. The report only confirms that emotional stress could be detrimental to Mr. Brown=s health, and that Mr. Brown feels he will suffer such stress if required to act-up as a CO-II without training. Given the sometimes stressful environment in a prison, the medical report could be interpreted to mean that a stressful day as a CO-I could have a similar adverse impact on Mr. Brown=s health.

Having considered the safety officer=s rationale that led to his decision that a dangerous condition existed, the issue that remains before me is to decide whether I agree that a dangerous condition existed for Mr. Brown at the time of the safety officer=s investigation. In addition, since the safety officer used paragraph 145.(2)(a) of the Code, I must also ask myself if it was necessary for him to direct that Mr. Brown not be assigned to act-up as a CO-II unless he is qualified and medically fit to do the job.

> A*Paragraph 145.(2)(a) specifies - Where a safety officer considers that the use or operation of a machine or thing or a condition in any place constitutes a danger to an employee while at work,*
>
> > *(a) the safety officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer immediately or within such period of time as the safety officer specifies*
> >
> > > *(I) to take measures for guarding the source of danger, or*
> > > *(ii) to protect any person from the danger; and...@*
>
> In order to answer these questions, I must consult the definition of Adanger@ in subsection 122(1) of the Code and apply this definition in light of the case law. ADanger is defined as follows:
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> > A*Subsection 122.(1*) - *danger means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected@.*

For the reasons indicated in my previous decision in Air Canada and CUPE, see case 94-007 (R), the current case law has established that for the right to refuse provisions in Part II to apply, the danger must be immediate and real. Accordingly, the danger must be more than hypothetical, or

there must be more than a small probability of it becoming a reality. The danger must be immediate and real, and no doubt must remain regarding its imminence. It must be something sufficiently serious to confirm and justify Mr. Brown=s statement that his health would be adversely affected if he were to act-up as a CO-II. Given these principles, I have decided that the facts in this case fail to demonstrate that a real danger existed for Mr. Brown at the time of the safety officer=s investigation, or that the danger perceived by Mr. Brown was immediate. Having arrived at this decision, I similarly find that there is no justification for the direction issued by safety officer Mattson.

For these reasons, **I HEREBY RESCIND** the direction of safety officer Mattson issued on Monday, January 15, 1996, to Correctional Service of Canada at the Joyceville Institution located in the Province of Ontario.

Decision rendered on December 11, 1996.

Serge Cadieux
Regional Safety Officer

Decision No. 96-020

SUMMARY OF DECISION OF A REGIONAL SAFETY OFFICER

Applicant: Correctional Service of Canada, Joyceville Institution

Respondent: Brad Brown, Correctional Officer

KEYWODS

CO-I, CO-II, Correctional Officer Level, training, medical condition, danger real, immediate, qualified.

PROVISIONS

Code: 145(2)(a)

SUMMARY

Mr. Brad Brown, a Correctional Officer at the CO-I level, refused for personal health and safety reasons to accept an acting CO-II position assigned to him. He said that he was not trained as a CO-II, and this, coupled with his medical condition, created a condition of danger to himself. The safety officer agreed that assigning Mr. Brown to a CO-II position constituted a danger to the employee while at work because Mr. Brown was not medically fit and trained nor qualified to do the job of a CO-II.

The Regional Safety Officer felt that the facts in the case failed to demonstrate that a real danger existed for Mr. Brown at the time of the safety officer=s investigation, or that the danger perceived by Mr. Brown was immediate. Consequently, the Regional Safety Officer rescinded the direction of the safety officer.