Decision No.: 98-008

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

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

Applicant:	Correctional Service Canada Grand Valley Institution for Women Kitchener, Ontario Represented by: Robert H. Jaworski
Respondent:	Union of Solicitor General Employees (Public Service Alliance of Canada) Represented by: Todd Woytiuk
Mis-en-cause:	Rod Noel Safety Officer Human Resources Development Canada
Before:	Douglas Malanka Regional Safety Officer Human Resources Development Canada

Background:

On October 16, 1997, Kathleen Scott arrived at her workplace, the Grand Valley Institute for Women (GVIW), to take her post as officer in charge (OIC) for the night shift[1]. She immediately exercised her right to refuse under Part II of the Canada Labour Code (hereafter referred to as the Code or Part II) because the employer had deviated from past practice when an inmate was in the Crisis Unit, and hired only four staff members for the full night shift. As a result, K. Scott was uncertain how she could react to an emergency involving other staff, the inmate in the Crisis Unit or other inmates in the Institute, some of whom were agitated. She believed that she and her co-workers were in danger because of insufficient staff and unclear procedures for the shift.

As a consequence of K. Scott's refusal to work, the remaining three Primary Workers[2], D. Duquette, E. Farrell and I. Teichert exercised their right to refuse under Part II. Each believed that they and their co-workers were in danger because there was now only three Primary Workers for the night shift and they would be unable to react to an emergency involving other staff, the

[1] For the purpose of this Report, the "day" shift is the shift that works from 0700-1500 hours, the "evening" shift works from 1500-2300 hours and the "night" shift works from 2300-0700 hours.

[2] At GVIW the Correction Officers are referred to as Primary Officers but the terms are interchangeable. In this case, the refusing employees were classified at the CX-2 level.

inmate in the Crisis Unit or other inmates in the Institute. At the time of the refusal, there were 67 inmates in the Institute.

Deputy Warden Blackler investigated the refusals and disagreed with employees that there was a danger. She then contacted a safety officer at Human Resources Development Canada to advise them of the continued refusals to work, and implemented the GVIW Contingency Plan. Under the Contingency Plan, she called management personnel to replace the refusing employees for the remainder of the shift.

The safety officer who investigated the refusals to work decided in the case of K. Scott that there was no danger for her as defined under Part II. However, he decided that the employer had failed to conduct a complete investigation of her refusal to work, and that the employer had failed to establish emergency procedures in consultation with the GVIW safety and health committee. On October 24, 1997, he issued a direction pursuant to subsection 145.(1) of the Code which directed the employer, no later than December 28, 1997, to terminate the contravention.

In the case of the three other refusing employees, he decided that a danger under Part II existed because a three-person staff was less than the minimal staffing requirement established by the employer for the shift, and because the procedures to deal with the inherent dangers of the workplace were unclear. On October 24, 1997, he issued a second direction made pursuant to subsection 145(2)(a) of the Code directing the employer to protect the three employees from the danger immediately.

On November 5, 1997, Lynne Brown, Director, Employee Relations, GVIW, wrote to the Office of the Regional Safety Officer and requested that the two directions be reviewed. An oral hearing was held on March 16-17-18, 1998, in Kitchener, Ontario.

SAFETY OFFICERS

Prior to the hearing, safety officer Noel provided the Regional Safety Officer with a copy of his report and a copy of his directions. The report forms part of the file and will not be reproduced here. A copy of the directions are attached as appendix A and B.

Safety officer Noel arrived at the GVIW with safety officer Danton at approximately 0520 hours, on October 17, 1997. They did not observe any immediate fires, threats from inmates or other similar dangers. However, safety officer Noel clarified that the “danger” referred to in his direction was not related to any immediate physical threat to the employees. Instead, the danger was that there was insufficient staff in respect of the unclear procedures that apply at the Institute.

Safety officer Noel explained that, in a prison environment, there is an ever present or inherent danger of violence directed towards other inmates or staff. This danger is mitigated by the employer by assigning proper numbers of qualified staff to the work and establishing, in consultation with employees, adequate and appropriate procedures to deal with any situation or circumstance that can arise in a prison and threaten the safety and health of employees. Given the nature of prison environment, it is not only possible but likely that an employee or employees will

be injured during any occurrence involving inmates if the protective measures are unclear. He held that danger arising from unclear procedures is not inherent to the work.

Following his investigation, safety officer Noel decided there was no danger in the case of K. Scott. He clarified that this decision was not to imply a blanket approval of four person night shift, but that there was no danger under Part II for a staff of four for that shift. In the case of the three other refusing employees, D. Duquette, A. Farrell, and I. Teichert, he decided that there was a danger because a three-person staff for the night shift was less than the minimal staffing required by the employer and because the procedures were unclear.

In addition, safety officer Noel decided that Deputy Warden Blackler had failed to conduct a complete investigation into K. Scott's refusal to work. This was because she had permitted other employees to participate in her investigation of the refusal to work and because the Security Control Post (SCP) room, where the investigation was held, was too small. He concluded that the number of participants in the investigation and the limited space in the SCP precluded the refusing employees from raising their safety and health concerns and having them dealt with by the employer. He commented that the session in the SCP was more like an information session.

Safety officer Noel also decided that the employer failed to consult with the health and safety committee on emergency procedures related to paragraph 17.5 (1)(a)[3], of Part XVII, Safe Occupancy of the Work Place, of the Canada Occupational Safety and Health Regulations (hereafter referred to as the Regulations). He said that he learned from GVIW management and staff that procedures at GVIW were developed as national standards by headquarters experts without employee input, and that there were no consultations with employees on GVIW Standing Orders. He said that the procedures at GVIW did not seem to mesh with the way the Institute was operated. He could not get a clear picture of what procedures or measures were in place to tell a Primary Worker how to react in a given situation. He observed during a shift that not all Primary Workers carried personal alarms despite procedures that require them.

In addition, safety officer Noel said that the August 1997 minutes of the safety and health committee show that employees had raised safety concerns regarding staffing levels on the evening and night shift to the committee. Instead of dealing with the employee concerns, the safety and health committee referred the matter to a labour management committee as a staff numbers issue. He said he was concerned that issues were not being dealt with quickly by the safety and health committee and found no evidence that the employees' safety concerns regarding staffing levels were resolved.

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[3] Paragraph 17.5(1)(a) of the Canada Occupational Safety and Health Regulations reads:

"17.5(1)(a) Every employer shall, after consultation with the safety and health committee or the safety and health representative of the employees, if either exists, and with the employers of any persons working in the building to whom the Act does not apply, prepare emergency procedures

(a) to be implemented if any person commits or threatens to commit an act that is likely to be hazardous to the safety and health of the employer or any of his employees…"

Safety officer Danton testified that he agreed with safety officer Noel that the investigation of the refusal to work should have been conducted in another room because the refusing employees did not have the opportunity to explain their concerns. He also agreed with safety officer Noel that the danger related to the number of staff and that the unclear procedures did not fit GVIW.

Deputy Warden Blackler

Deputy Warden Blackler joined the GVIW in September 1997, and has approximately 20 years of work experience related to prisons. She testified that she had dealt with a Part II refusal to work at another institute about four years ago. She confirmed that GVIW is intended to house minimum and medium security inmates and began accepting prisoners in January of 1997. It can accommodate approximately 120 inmates and, on the night of the refusals to work, there were 67 inmates.

She explained that GVIW is one of the five new federal prisons for women that were to replace existing federal women's prisons. They were initially designed to house all security levels which include minimum, medium and maximum security. However, following an incident at the new facility in Edmonton, Alberta, Correctional Services Canada (CSC) decided that the new facilities would be limited to minimum and medium security inmates. The objective at the new facilities is to facilitate reintegration of the inmates into the community through appropriate identification of needs, appropriate treatment or programming and release to the community.

She explained that the main population at GVIW are housed in Living Units which are located on the prison grounds separate from the main building. The Living Units are not locked but are electronically monitored. Primary Workers enter the Units during their rounds to verify that inmates are present or to deal with any inmate issues.

An Enhanced Unit and a Crisis Unit are housed in the main building. Unlike the Living Units, these have locked cells. The Enhanced Unit is typically used to quarter new inmates and are also used for protective custody concerns. The Crisis Unit is similar to a segregation unit and houses inmates who are distressed or need discipline due to assaults on other inmates or threats to staff.

Deputy Warden Blackler explained the sequence of events that transpired after she learned that K. Scott was concerned about taking over as OIC. She testified that she met with employees in the SCP and provided the refusing employees an opportunity to specify their concerns. She reviewed the situation concerning the inmate in the Crisis Unit and explained her rationale for not hiring a fifth officer for the full night shift. She explained the Part II refusal procedures to staff when it became increasingly clear that K. Scott was considering not taking her post and that she was facing a refusal to work.

After K. Scott confirmed her continued refusal to work, Deputy Warden Blackler testified that she advised the remaining night staff that she was taking over as OIC and asked if they were prepared to take their posts. When they declined, she instructed them to remain in a safe place in the Institution and implemented the Contingency Plan. Under the Contingency Plan, she called upon management personnel to replace the refusing employees for the remainder of the shift.

Assistant Warden McGinnis

Assistant Warden McGinnis commenced work at GVIW in September, 1994 and had been the employer co-chair of the GVIW safety and health committee since March of 1996. He confirmed that Hayley Martin was the employee co-chair from March 1996 to approximately August 1997.

He referred to an unsigned and undated document that he said was prepared by H. Martin in August 1996. He explained that GVIW was expecting to receive inmates around that time and a to-do list was developed for the GVIW safety and health committee with the aid of the regional safety and health committee. There were construction delays at GVIW and so there was time to do the work on the list. H. Martin and C. Stapleton agreed to review the Contingency Plan and the Standing Orders. He confirmed that the notation "complete" beside that item in the document confirmed that H. Martin and Chris Stapleton had looked into health and safety matters relative to the Contingency Plan.

He referred to the November 5, 1996, safety and health committee Minutes and said that they confirm that the draft Contingency Plans, Post Order and Standing Orders were made available for review and comment to managers, the union, members of the safety and health committee and authorized employees.

He referred to the December 1996 Minutes of the safety and health committee and said that they confirm that the Contingency Plan was signed by the Warden in late November, 1996, and that the Plan was exercised for all shifts including fire drill training. He could not recall if the exercise for the night shift included an inmate in the Crisis Unit.

Assistant Warden McGinnis confirmed that the signed Contingency Plan was distributed to those having responsibilities relative to the Policy including managers, OIC and Primary Workers. He said that the Contingency Plan is not broken down into Post Orders but indicates the responsibility of staff. Staff was given training on the Contingency Plan and know their responsibilities.

In reference to the August 1997 meeting of the safety and health committee, Assistant Warden McGinnis said that the Primary Workers had raised safety concerns with the safety and health committee regarding staffing levels for the evening and night shifts. He said that this item was referred to as a labour-management issue because it related to staff numbers, and because staff did not identify their specific health and safety concerns.

Employee Witnesses

C. Thompson, union representative, USGE, testified that she was called to come to the Institute by a member of the evening shift because there was a refusal to work. She arrived at the prison at approximately 2345 hours to represent K. Scott and attended the meeting in the SCP. She agreed that Deputy Warden Blackler asked K. Scott to go over her concerns but did not feel that Deputy Warden Blackler understood K. Scott's concerns. She explained that K. Scott confirmed her continued refusal to work after Deputy Warden Blackler suggested moving the inmate from Crisis Unit to the Enhanced Unit.

Later in her testimony, she acknowledged that H. Martin represented employees as co-chair of the safety and health committee, and that H. Martin had reviewed the Contingency Plan on behalf of the employees.

K. Scott

K. Scott testified that she arrived at 2250 hours and OIC Agar advised her that there was an inmate in the Crisis Unit and that a fifth officer was only hired until 0200 hours. She further understood, that despite the fact that Reynolds was supposed to stay until 0200, he was at the gate at 2300 hours intending to leave.

She advised Agar that she was exercising her right to refuse, but conceded to do initial rounds when Deputy Warden Blackler agreed to come in immediately to discuss the refusal to work. She said that she noted this agreement in the Duty Office Log when she logged in as OIC.

K. Scott confirmed that Deputy Warden Blackler asked her about her safety concerns at the meeting in the SCP, but felt that she did not understand them.

The issues that she raised included the following:

1) National policy in the Security Manual specifies constant monitoring of inmates on suicide watch via cameras and fifteen minute rounds by a correction officer. In this regard staff must record inmate behaviour, actions and attitudes. There are no cameras in the Crisis Unit and it is impossible to do fifteen minute rounds with a staff of four on the night shift;
2) Management says that Primary Workers are to do different levels of monitoring and speak of various degrees of suicide risk and none of this is reflected in an written policy;
3) There are no post orders for the Enhanced/Crisis Unit post for the night shift.
4) The memo on the subject of Segregation Policy and Procedures specifies two Primary Workers in the Enhanced/Crisis Unit when there is an inmate in the Crisis Unit. It also specifies that two Primary Workers, not including the OIC must be present in the Crisis Unit prior to any cell being opened manually.
5) The night shift had previously been staffed with five when there was an inmate in the Crisis Unit;
6) Neither the OIC or Security Control Post officer can leave their post area. This leaves the two patrol officers without backup and no-one to open the locked front door to allow backup staff in if required, (eg., hostage taking incident);
7) It takes three officers to utilize the Self Contained Breathing Apparatus in an emergency situation;
8) In the event of an emergency, two Primary Workers are required to escort the inmate to the hospital; and,
9) Concerns of responding to a medical emergency involving a Primary Worker.

She testified further that she asked to meet with Duty Officer, Pat Castillo, sometime before the work refusal concerning her safety concerns with staff levels and GVIW procedures. Although a meeting was scheduled to discuss the concerns, it never took place because P. Castillo left GVIW.

She also confirmed that H. Martin represented employees at the safety and health committee and signed off on safety and health committee documents on their behalf.

Submissions:

Mr. Jaworski and Mr. Woytiuk submitted their written submissions following the hearing. These form part of the record and will not be fully reproduced here. Instead, I took from their submissions the following arguments.

Danger:

Mr. Jaworski said that I should rescind the direction issued pursuant to subsection 145.(2)(a) of the Code because there was never any danger for employees D. Duquette, E. Farrell and I. Teichert. Inmates in the Crisis Unit and Enhanced Unit were locked up, there were no fires, or any other emergency. He said that any concerns that they had were speculative and hypothetical, and that any dangers that existed that night were inherent to the work at a prison. Mr. Jaworski noted in safety officer Noel's decision that there was no danger for K. Scott. He held that safety officer Noel failed to take in account that Deputy Warden Blackler had taken over as OIC and so there were four officers for the shift.

Mr. Woytiuk said that Mr. Jaworski's argument that there was not real or immediate danger at the time of the safety officers investigation of the refusal to work is irrelevant in this case. He said that safety officer Noel noted the inherent danger of the workplace, but found the procedures to deal with those dangers to be unclear. Mr. Woytiuk noted there were no night shift Post Orders for the Crisis/Enhanced Unit and no Post Orders for situations where there is an inmate on suicide watch in the Crisis Unit, and four inmates in the Enhanced Unit. He maintained that, since there were no cameras for the Crisis Unit, the past practice at GVIW was to hire an extra when there was an inmate in the Crisis Unit.

Mr. Woytiuk further argued that CSC policies and procedures do not always apply at GVIW because the Institute is different from the other conventional institutions. He reminded me that safety officer Noel noted in his report that he had to refer to the task force report entitled "Creating Choices" to understand why CSC policies do not apply at GVIW. He asserted that Primary Workers Officers at GVIW depend increasingly on clear procedures.

Proper Investigation:

Mr. Jaworski said that I should rescind item 1 of the direction issued pursuant to subsection 145.(1) of the Code because the evidence shows that Deputy Warden Blackler began to address employee concerns over staffing levels for the night shift as early as 1500 hours on October 16, 1997. She later called OIC T. Agar at approximately 2130 hours to check on matters, and attended at site immediately when she learned that there were concerns. She then facilitated a meeting with staff and addressed the concerns of the employees. Mr. Jaworski argued that the legislation does not specify where the employer's investigation is to take place or how to conduct an investigation.

Mr. Woytiuk argued that Deputy Warden Blackler did not complete an investigation of the refusals to work irrespective of when the employees advised her that they were exercising their right to refuse. He said that Deputy Warden Blackler did not address the numerous concerns raised by K. Scott at the meeting in the SCP, and could not recall what issues were raised. After the meeting, she implemented the Contingency Plan and did not investigate the refusal to work further.

Finally, Mr. Woytiuk argued that I should vary the direction of safety officer Noel to include the following:

> (1) that the GVIW Joint Safety and Health Committee be required to have on "call" certified trained members able to conduct work place investigations under section 128 of the Canada Labour Code, Part II.
> (2) that all employees and management be trained as to their responsibilities under section 128 of the Canada Labour Code, Part II.
> (3) that this training be conducted by a joint union/management instructor team.

In response, Mr. Jaworski said these three variations to the direction are unneeded and unwarranted. Mr. Woytiuk's suggestion exceeds Part II requirements and the training has already been given to the safety and health committee following the refusal to work.

Emergency Procedures:

Mr. Jaworski said that I should rescind the direction issued pursuant to subsection 145.(1) of the Code in respect of item (2) because safety officer Noel did not provide any basis for deciding that management had not established emergency procedures in consultation with the safety and health committee. He argued that, on the contrary, the evidence shows that employees were regularly consulted on health and safety matters.

Mr. Woytiuk argued that, while the Fire Safety Plan had been signed off by the safety and health committee, neither the Fire Safety Plan or the Contingency Plan anticipated a night shift with four officers and an inmate in the Crisis Unit. He submitted that Part II requires that the Fire Safety Plan be resubmitted to the safety and health committee as a result of the new staffing level policy implemented by Deputy Warden Blackler. Finally, he agreed that the Contingency Plan was reviewed by Hayley Martin for employees in August of 1996. However, the noted that inmates did not arrive until January of 1997, and that since the Edmonton incident, a number of changes were instituted at GVIW.

Mr. Woytiuk asked that I vary the safety officer's direction and add the following:

> (1) That all GVIW Joint Occupational Safety and Health Committee members be given certified training regarding their responsibilities as committee members under the Canada Labour Code, Part II and the inherent dangers of the work place.
> (2) That all GVIW JOSH Committee members receive the above training forthwith.
> (3) That dangers of a GVIW employee be codified by the JOSH committee and procedures be developed to reduce to a minimum the dangers associated with the work of a correctional officer.

(4) That the committee agree to, and appoint a non-CSC employee who is professionally or technically qualified to advise the committee on the development of the above noted procedures.
(5) To require the employer to appoint to the GVIW - JOSH committee, a management delegate who has managerial and operational responsibilities for correctional officers and as well as authority to make and change procedures at GVIW.

In response, Mr. Jaworski argued that staff had already received proper training to carry out their duties at GVIW and have already received proper training in regards to the Contingency Plan and the Fire Safety Plan. He said that items 3, 4, and 5 are unnecessary as Part II already provides for refusals to work.

Decision:

For this case, I had to review two directions issued by safety officer Noel. The first is the direction issued pursuant to paragraph 145.(1) of the Code concerning the refusal to work by employee K. Scott. The second is the direction issued pursuant to subsection 145.(2)(a) of the Code, concerning the refusals to work by employees D. Duquette, E. Farrell and I. Teichert. As indicated previously a copy of the directions is attached.

Direction Issued Pursuant to Subsection 145.(1) of the Code:

In the case of the direction issued pursuant to subsection 145.(1) of the Code, concerning the refusal to work by employee K. Scott, there are two items that I must decide. First, I must decide if the employer failed to conduct a complete investigation into the circumstances of the employee refusal to work in accordance with paragraph 128.7(a) of the Code. I must also decide if the employer, failed to establish emergency procedures in consultation with the joint safety and health committee for the workplace in accordance with paragraph 125.(o) of the Code, and paragraph 17.5(1)(a) of the Regulations.

Item # 1 Proper Investigation:

Safety officer Noel testified that the employer's investigation of the refusal to work was not complete because the number of participants and the limited space in the SCP room precluded the refusing employees from raising their safety and health concerns by the employer. Mr. Woytiuk argued that the definition of "investigate" in Black's Law Dictionary, 1983, means that the investigation must be stepwise and thorough, and that this was not done.

To decide whether Deputy Warden Blackler investigation was conducted in a complete manner, I refer to subsections 128.(7) and 128.(8) of the Code which read as follows:

128.(7) An employer shall **forthwith** on receipt of a report under subsection (6) **investigate** the report **in the presence of the employee** who made the report and **in the presence of**
(*a*) at least **one member of the safety and health committee**, if any, to which the report was made under subsection (6) **who does not exercise managerial functions**;

(*b*) the safety and health representative, if any; or
(*c*) where no safety and health committee or safety and health representative has been established or appointed for the work place affected, **at least one person selected by the employee**.

128.(8) Where an employer disputes a report made to the employer by an employee pursuant to subsection (6) or takes steps to make the machine or thing or the place in respect of which the report was made safe, and the employee has reasonable cause to believe that
(*a*) the use or operation of the machine or thing continues to constitute a danger to the employee or to another employee, or
(*b*) a condition continues to exist in the place that constitutes a danger to the employee,
the employee may **continue** to refuse to use or operate the machine or thing or to work in that place.
[Words in bold for emphasis]

In accordance with subsection 128.(7) of the Code, the employer is required to investigate the employee's refusal to work forthwith in the presence of the employee. The investigation must also be conducted in the presence of an employee member of the health and safety committee, if any, a safety and health representative or, one person selected by the employee if there is no member or representative. While I would agree with safety officer Noel that the venue and the number of participants could adversely affect the employer's investigation of a refusal to work, the legislation does not specify where the investigation is to be held or how it is to be conducted to constitute a "complete" investigation.

For interpreting the word "investigate", one needs to consider subsection 128.(7) of the Code in light of subsection 128.(8). Essentially, subsection 128.(8) of the Code permits the employee to continue to refuse if, following the employer's investigation, she or he continues to believe that there is a danger. This could be because the employer disagrees that there is a danger, or because the employee believes that the measures taken by the employer to eliminate the danger or to protect the person are inadequate. In this way, the legislation protects the employee, and ensures that it is in the employer's best interest to conduct a thorough and complete investigation of the refusal to work to avoid unnecessary loss of time while a safety officer comes in to investigate the refusal to work. Perhaps this is why the legislation does not specify where the investigation is to be carried out or what constitutes a "complete" investigation.

In the case at hand, I am convinced that the employees had indicated the fact that they were refusing at the beginning of their shift at approximately 2300 hours. I say that because the refusing employees were consistent in their statements to this effect. In addition, C. Thompson's written testimony was that she was called at approximately 2315 hours concerning a refusal to work. For her part, K. Scott's entry in the Duty Office Log confirms that she is signing in as OIC and doing initial rounds only because Deputy Warden Blackler has agreed to come in immediately. Later, Deputy Warden Blackler testified that it became increasingly apparent to her, as the meeting progressed that she was facing a refusal to work. Finally, the issues raised by Scott in the SCP related to her refusal to work.

Having arrived at this conclusion, I am satisfied that Deputy Warden Blackler investigated the refusal to work in the SCP between the hours of approximately 2430 hours and 0130 hours. She provided the employees with the opportunity to express their views, and given her knowledge, training and experience was able to make an informed decision when she disagreed with the refusing employees that there was a danger.

That being the case, I **HEREBY RESCIND** item 1 of the Direction.

That stated, it appears that the employer's investigation of the refusal to work was still flawed because of the absence of an employee member of the safety and health committee present at the investigation in the SCP. However, testimony at the hearing established that one of the evening staff had called C. Thompson to come to the Institute and participate in the refusal to work. This may have been because Deputy Warden Blackler had consulted C. Thompson earlier that day, or because the position of employee co-chair for the GVIW safety and health committee was vacant. Regardless, there was no employee member of the safety and health committee present during the employer's investigation.

In this regard, I note that safety officer Noel did not refer to this in his direction or raise it during the hearing. I further note the legislation gives a safety officer the discretion to issue a direction. Subsection 145.(1) of the Code reads:

> **145. (1)** Where a safety officer is of the opinion that any provision of this Part is being contravened, the officer **may** direct the employer or employee concerned to terminate the contravention within such time as the officer may specify and the officer shall, if requested by the employer or employee concerned, confirm the direction in writing if the direction was given orally.
> [Words in bold for emphasis]

I therefore conclude that safety officer Noel exercised his discretion under subsection 145.(1) of the Code by not issuing a direction with regard to the failure of the parties to advise an employee member of the safety and health committee of the refusal to work and the failure to include her in the investigation. For the aforementioned reasons regarding Thompson's participation in the investigation, I agree with the safety officer's decision not to address this in his direction.

Item # 2 Emergency Procedures:

Safety officer Noel clarified that his direction referred to paragraph 17.5(1)(a) and not paragraphs (b), (d) or (e). That is, the employer failed to consult with the safety and health committee on emergency procedures " to be implemented if any person commits or threatens to commit an act that is likely to be hazardous to the safety and health of the employer or any of his employees."

However, safety officer Noel testified that the employer was in violation of paragraph 17.5(1)(a) because the safety and health committee had not been consulted on the day to day standing orders and other procedures that apply in respect of the duties carried out regularly by Primary Workers. He said that there is an ever present or inherent danger of violence in a prison environment

directed towards other inmates or staff, and that this is mitigated by the employer by assigning proper numbers of qualified staff to the work and establishing adequate and appropriate procedures to deal with any situation or circumstance that can arise. In addition, he testified that the August 1997 Minutes of the safety and health committee show that employees had raised safety and health concerns regarding staffing levels on the evening and night shift. Instead of dealing with the concerns, the matter was referred to a labour management committee.

Close examination of paragraph 17.5(1)(a) reveals however, that instead of applying to the day to day procedures, this requirement pertains to "emergency" procedures. The word "emergency" is defined in The New Shorter Oxford Dictionary, dated 1993, as, "a situation, especially of danger or conflict that arises unexpectedly and requires urgent action." In the Le Nouveau Petit Robert, dated 1997, "procédures d' urgence" is defined as that which must be handled immediately.

As a result, it is my view that paragraph 17.5(1)(a) cannot be interpreted to apply in respect of the day to day operational procedures. Instead, there are other provision in Part II that safety officer Noel could have considered. These include:

Section 124 of the Code reads as follows:

> **"124.** Every employer shall ensure that the safety and health at work of every person employed by the employer is protected",
>
> and

Paragraph 126.1(g) of the Code reads as follows:

> **126. (1)** While at work, every employee shall
> (*g*) report to the employer any thing or circumstance in a work place that is likely to be hazardous to the safety or health of the employee, the other employees or other persons granted access to the work place by the employer;

These provisions may very well have motivated safety officer Noel to apply paragraph 17.5(1)(a) of the Regulations to address what he regarded as the lack of clear procedures to protect the safety and health of employees. However, in my view there was insufficient specificity in his report and testimony regarding the unclear procedures for me to consider exercising my powers under subsection 146.(3) of the Code to vary the direction and to address them.

Paragraph 17.5(1)(a) of the Regulations refers to emergency procedures, which in the case of GVIW is the Contingency Plan, and I am satisfied from the evidence in this case that the employer consulted with the GVIW safety and health committee concerning the Contingency Plans.

For this reason **I HEREBY RESCIND** item # 2 of the direction.

With regard to Mr. Woytiuk's proposed amendments in respect of the direction issued pursuant to 145.(1) of the Code, there are no provisions in Part II along the lines he suggests. As a result, I am not authorized to vary the direction in the ways he recommends. However, from the facts in the case, I understand his motivation for having requested the variances.

Before leaving discussions on this topic, I note that Assistant Warden McGinnis testified that issues of staffing raised by employees to the safety and health committee were deemed to be a labour and management issue. Mr. Jaworski also argued that the refusal to work was better characterized as a the result of an ongoing labour relations issue. In reply, I would refer Assistant Warden McGinnis to the Darrell Dragseth case where Justice Mahoney of the Federal Court of Appeal noted:

> "It was suggested in argument that the Department of Labour has decided that staffing disputes are collective bargaining, not safety, questions. Surely, in an environment like a maximum security penitentiary, they may be both…"

Direction Issued Pursuant to Subsection 145.(2)(a) of the Code:

In the case of the direction issued pursuant to subsection 145.(2)(a) of the Code, the issue that I must decide is whether there was a danger for employees D. Duquette, E. Farrell and I. Teichert .

Mr. Jaworski argued that there was never a danger at GVIW. He pointed out that, even if it was established that there was a danger for three employees to complete the shift, and it was not, Deputy Warden Blackler had taken over as OIC from K. Scott, so there were four employees for the shift. In passing, I am satisfied that Deputy Warden Blackler did make this known to the refusing employees.

I must confess to have been drawn into examining at length the question of whether or not Deputy Warden Blackler had clarified to D. Duquette, E. Farrell and I. Teichert that she had taken over as OIC, relative to the question of danger for the three refusing employees. However, I find that these issues are essentially irrelevant in respect of the direction.

In this case, safety officer Noel decided, following his investigation, that there was no danger for K. Scott. That is, he decided that there was no danger for K. Scott because a four person staff was sufficient and the procedures were sufficiently clear for the shift. This being the case, K. Scott, pursuant to subsection 129.(5)[4] of the Code, no longer had any right under Part II to refuse.

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[4] Subsection 129.5 of the Code reads:

"129.(5) Where a safety officer decides that the use or operation of a machine or thing does not constitute a danger to an employee or that a condition does not exist in a place that constitutes a danger to an employee, an employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing or to work in that place, but the employee may, by notice in writing given within seven days of receiving notice of the decision of a safety officer, require the safety officer to refer his decision to the Board, and thereupon the safety officer shall refer the decision to the Board."
(underlined for emphasis)

Once safety officer Noel decided that there was no danger for K. Scott, there were four staff members for the shift. Therefore, there was no basis for him to determine that there were only three persons for the remainder of the shift and that there was a danger for employees D. Duquette, E. Farrell and I. Teichert. For this reason **I HEREBY RESCIND** the direction.

Decision rendered August 21, 1998.

Douglas Malanka
Regional Safety Officer

ANNEX A

IN THE MATTER OF THE CANADA LABOUR CODE
PART II - OCCUPATIONAL SAFETY AND HEALTH

DIRECTION TO THE EMPLOYER UNDER PARAGRAPH 145(2)(a)

On October 17th, 1997, the undersigned safety officer conducted an investigation following the refusal to work made by Ingrid Tiegert(sic), Aaron Farrell and Debbie Duquette in the work place operated by the CORRECTIONAL SERVICE OF CANADA, being an employer subject to the **Canada Labour Code**, Part II, at The Grand Valley Institution for women, 1575 HOMER WATSON BLVD., KITCHENER, ONTARIO, the said work place being sometimes known as Grand Valley Institution.

The said safety officer considers that a condition in any place constitutes a danger to an employee while at work.

At the commencement of the 11PM shift on the evening of Thursday, Oct. 16/97, Correctional Service employees Ingrid Tiegert(sic), Aaron Farrell and Debbie Duquette refused to work for reasons of danger. They refused to work immediately following the refusal of their Officer-In-Charge (OIC), Kathleen Scott.

Officers Tiegert(sic), Farrell and Duquette believed they would be in personal danger if they continued to work as a three-person staff duties of guarding the approximately 68 inmates at the institution while ensuring their own safety and the safety of their co-workers. There were insufficient staff and unclear procedures in place to deal with the inherent dangers of the workplace.

At the time of their refusal, Officers Tiegert(sic), Farrell and Duquette believed they would have to complete the shift as a three-person staff, which is less than the minimal staffing requirement as established by the employer.

Given the interim measures taken by the employer to deal with the refusal to work were only temporary crises measures and are not the norm for the workplace, the danger to the refusing employees still existed at the time of this investigation.

Sect. 124 of the Canada Labour Code requires an employer to ensure that the health and safety of all employees employed by that employer are protected.

Therefore, you are **HEREBY DIRECTED,** pursuant to paragraph 145(2)(a) of the **Canada Labour Code**, Part II, to protect any person from danger immediately.

Issued at Kitchener, this 24th day of October 1997.

ROD NOEL
Canada Safety Officer
#1768

To: CORRECTIONAL SERVICE OF CANADA
GRAND VALLEY INSTITUTION FOR WOMEN
1575 HOMER WATSON BLVD.
KITCHENER, ONTARIO
N2P 2C5

ANNEX B

IN THE MATTER OF THE CANADA LABOUR CODE
PART II - OCCUPATIONAL SAFETY AND HEALTH

DIRECTION TO THE EMPLOYER UNDER SUBSECTION 145(1)

On October 24th, 1997 the undersigned safety officer conducted an inquiry in the work place operated by CORRECTIONAL SERVICE CANADA, being an employer subject to the **Canada Labour Code**, Part II, at CORRECTIONAL SERVICE OF CANADA, 1575 HOMER WATSON BLVD., KITCHENER, ONTARIO, the said work place being sometimes known as Grand Valley Institution for Women.

The said safety officer is of the opinion that the following provisions of the **Canada Labour code**, Part II, are being contravened:

1. CLC Sect. 128(7)(a)
   The employer failed to conduct a complete investigation into the circumstances of employee refusal to work.

2. CLC Para. 125(o) and Canada Occupational Safety and Health Regulation 17.5
   Emergency procedures have not been established in consultation with the Joint Health and Safety committee for the workplace.

Therefore, you are **HEREBY DIRECTED**, pursuant to subsection 145(1) of the **Canada Labour Code**, Part II, to terminate the contravention no later than December 28th, 1997.

Issued at Kitchener, this 24th day of October 1997.

ROD NOEL
Canada Safety Officer
#1768

To: CORRECTIONAL SERVICE OF CANADA
GRAND VALLEY INSTITUTION FOR WOMEN
1575 HOMER WATSON BLVD.
KITCHENER, ONTARIO

Decision: 98-008

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Correctional Service Canada

Respondent: Union of Solicitor General Employees (Public Service Alliance of Canada)

KEY WORDS

Danger, right to refuse, investigation, crisis unit, staffing levels, unclear procedures, inherent danger, safety and health committee, emergency procedures, contingency plans, labour relations.

PROVISIONS

Code: 124, 125.(o), 126.(1)(g), 128.(7)(a), 128.(8), 145.(1),145.(2)(a), 146.(3).

Regulations: 17.5(1)(a)

SUMMARY

A safety officer investigated a multiple refusal to work by Primary Workers at Grand Valley Institute for Women who had just arrived to start the night shift. The Primary Worker assigned as officer in charge (OIC) refused to work because there was only three other Primary Workers for the full shift. The past practice in the Institute was to hire a fifth Primary Worker for the night shift with an inmate in the Crisis Unit. The OIC said that there was insufficient staff and unclear procedures for the shift. As a consequence of her refusal to work, the three other Primary Workers refused to work because now there was only three employees for the shift.

Following his investigation, the safety officer decided that there was no danger under Part II for the OIC for four officers to operate the shift. However, he issued a direction to the employer pursuant to subsection 145.(1) because he was of the opinion that the employer had failed to conduct a proper investigation of the OIC's refusal to work, and that the employer had failed to consult with the safety and health committee on the emergency procedures for the Institute. In the case of the other three Primary Workers, he decided that a danger existed for them and issued a direction to the employer pursuant to subsection 145.(2)(a).

While the Regional Safety Officer (RSO) appreciated the safety officer's concern, with the investigation, he decided that the employer's investigation of the OIC's refusal to work was in compliance with Part II. He also determined that there was sufficient evidence to show that the employer had consulted with the safety and health committee concerning emergency procedures.

The RSO also concluded that, once the safety officer had decided that there was no danger for the OIC, the shift was restored. Consequently there was no danger for the three other Primary Workers.

The Regional Safety Officer **RESCINDED** the two directions.