

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

**Correctional Service of Canada - Drumheller
Institution**

applicant

and

Mr. Larry DeWolfe
**Co-Chair Work Place Occupational Health and
Safety Committee, Drumheller Institution (a.k.a.
Drumheller Penitentiary)**

for the employees

and

Neil S. Campbell

health and safety officer

Decision No. 02-005
May 9, 2002

Appeals officer Doug Malanka heard this case in Calgary, Alberta, on
December 12 to 14 (inclusive), 2001.

Appearances

Mr. Richard Fader, Counsel, Drumheller Institution.

Mr. Larry DeWolfe, Co-chair Work Place Occupational Health and Safety Committee, Drumheller
Institution.

- [1] On May 10, 2001, correctional officers James Schellenberg and Dan Wood commenced their evening shift on living units 8 and 11 respectively at Drumheller Institution. Shortly thereafter, around 15:45 hours, both officers refused to work. They complained that a potential danger existed because management had understaffed their units, because tensions were high in the Institution and because the inmates had threatened them earlier in the day.
- [2] Following his investigation of the refusals to work, health and safety officer Campbell decided that a danger existed for the employees and issued a direction to Mr. Tim Fullerton, Warden, Drumheller Institution. The direction, which is appended, ordered Mr. Fullerton to take measures immediately to correct the condition that constitutes the danger. It read:
- ...“minimum staffing levels established by post order for cell block supervision post (amended 01-04-09) for all shifts are not being maintained and this condition poses a danger to the health and safety of correctional officers working in the living units.”...
- [3] On June 7, 2001, Mr. Kerry Scullion, Counsel, Correctional Service of Canada appealed the direction pursuant to subsection 146.1(1) of the *Canada Labour Code*, Part II (hereto referred to as the Code or Part II). An oral hearing was held in Calgary, Alberta, on December 12 - 14, 2001 inclusively.
- [4] Health and safety officer Campbell submitted his report and testified at the hearing. I retain the following from his report and testimony.
- [5] Health and safety officers Neil Campbell and Terry Baker arrived at Drumheller Institution at approximately 21:00 hours to investigate the refusals to work. They met first with Warden Tim Fullerton who told them that the prison had been locked down following the refusals to work, and that everything was quiet on the units. He told the officers that the level of tension at Drumheller Institution is assessed daily and that tensions were not abnormally high that day. He further advised them that, even when four correctional officers are posted to a living unit, two are responsible for other posts sometimes leaving only 2 officers in the living units.
- [6] The health and safety officers subsequently met with correctional officers Schellenberg and Wood who had refused to work. They told the health and safety officers that the Post Order stipulates four correctional officers on the living units during evening shifts. Of the four, one is assigned to patrol the courtyard and outside inmate occupied areas while the other three officers remain in the unit. With three officers in the unit, two can respond to an inmate incident while the third remains in the security control room (commonly referred to as the “bubble”). The correctional officers held that staffing a unit with only three officers creates an unsafe condition. With only two officers in the living unit, only one officer is available to respond to an incident involving an inmate or inmates because the other must remain in the bubble.

- [7] Officer Campbell noted in his report that a Post Order entitled, "Cell Block Supervision Posts" (amended 01-04-09) specifies four correction officers for the evening shift. He decided that staffing units 8 and 11 with only 3 officers created a danger. He also referred to the case of Ken Fletcher, Claude J. Gallant, Fred W. Johnson, L.P. Leblanc, Philippe Leclerc, James A. McLeod, Steven J. Richard and J. R. Hebert and Treasury Board of Canada, File 165-2-209 to 216, Citation 2000 PSSRB 86. In that case, Board member Anne Bertrand ruled that minimal staffing gives rise to a condition of danger. He said that Ms. Bertrand also ruled that a danger resulting from minimal staffing below 3 officers in a living unit is not a normal condition of work for correctional officers.
- [8] Health and safety officer Campbell confirmed that he had not examined the duty roster or asked management at Drumheller Institution if any other officers were available that evening to assist units 8 or 11, if required. He also confirmed that he had not ask management at Drumheller Institution how the Post Order for Cell Block Supervision Posts has been interpreted and applied at Drumheller Institution in the past. Finally, he confirmed that he was not aware that correctional officers at Drumheller were instructed by management not to respond to an incident in a unit without assistance of another officer. Health and safety officer Campbell agreed that the prison was locked down at the time of his investigation and that everything appeared under control.
- [9] Messrs. Schellenberg, Wood and Roberts testified at the hearing. I retain the following from their testimony.
- [10] Mr. Schellenberg reiterated why he had refused to work on May 10, 2001. He testified that he had learned from a parole officer report that day that an inmate in unit 8 had threatened earlier in the day to harm him. He had also learned that an inmate in unit 11 had assaulted correctional officer Wood the previous day during a drug bust. He felt that the drug bust further annoyed inmates because the two inmates involved had been placed into segregation.
- [11] Mr. Schellenberg held that, with only two officers on the unit, no one could provide him with immediate assistance if he were attacked because the second officer had to remain in the control bubble. He maintained that it could take up to 2 minutes for someone on yard patrol or from another unit or building to respond. Mr. Schellenberg also testified that he had not planned his refusal to work prior to his shift, and that he had not been coerced by anyone to refuse to work. He agreed that the lock-down following the refusals to work went without incident and that the cell doors in the unit were locked at its completion.
- [12] Mr. Wood stated that he was a Correctional Officer I and had only been employed at Drumheller since January 2000. On May 9, the day prior to his refusal to work, he had carried out a drug bust on unit 11. During the incident, he suffered a contusion to his hip and the inmate threatened him with further harm. Later that day, other inmates in unit 11

made threatening gestures to him during his regular inspection rounds on the unit. He concluded that information regarding his drug bust had spread throughout unit 11 and that tensions were high.

- [13] The next day, being May 10, he was deployed to unit 11 as a Correctional Officer II. When he arrived for his evening shift he noticed 6 to 8 inmates standing in the breezeway to unit 11. When he passed by them, they made threatening gestures towards him. Later in the shift, he and other correctional officers had to proceed to the “back forty”, an area in the prison off limits to inmates, to disperse a prohibited card game. Mr. Wood testified that some of the approximate 20 inmates present had golf clubs and were holding them in a threatening manner.
- [14] Mr. Wood reiterated that he refused to work because unit 11 was minimally staffed with 3 officers that evening, and because incidents and tensions in the prison were escalating. He added that an inmate on unit 11 was scheduled to be escorted to a “AA” meeting later that evening and this would have left the unit under staffed by two officers.
- [15] Mr. Terrel Roberts stated that he is a Correctional Officer II at Drumheller Prison and a member of the work place health and safety committee. He testified that he had been threatened on May 9, 2001, and that he was aware of the incidents to which correctional officers Schellenberg and Wood had referred during their testimony. When he arrived for duty on May 10, he realized that there was minimum manning on units 8 and 11. Since he felt that there was a level of violence beyond the normally accepted level, he spoke with correctional officers Schellenberg and Wood by telephone as their work place occupational health and safety committee representative. He advised them of their right under the Code to refuse to work and explained the right to refuse provisions under Part II. He insisted that the refusals to work by correctional officers Schellenberg and Wood were not staged or organized.
- [16] During his further testimony, Mr. Roberts further held that the two-way radios used by correctional officers at Drumheller to call for help are not equipped to indicate the charge status of batteries. Consequently the radios have failed unexpectedly in the past. He added that correctional officers are not provided with individual personal alarms to call for assistance if attacked.
- [17] Mr. Goruik was Deputy Warden of Drumheller Institution at the time of the refusals and testified that he had worked at Drumheller during his 35 years of service. He stated that Drumheller is a medium security prison and that such prisons generally pose less risk to correctional officers than maximum-security prisons. As with other medium security prisons, Drumheller is program-orientated and so inmates can move about the prison and participate in academic and vocational shop programs. They can also have temporary absence passes from the institution.

- [18] According to Mr. Goruik, the security risk posed by a prisoner is regularly reviewed and assessed at Drumheller using a Correctional Service of Canada matrix. Among other things, the matrix considers the inmate's original crime, the inmate's behavior while in prison, and the inmate's willingness and efforts towards rehabilitation. Inmates can progress from maximum to medium to minimum-security classification, or regress from minimum to medium to maximum security. When the status of an inmate changes, the inmate is transferred to a corresponding institution.
- [19] Every living unit at Drumheller Institution consists of 3-two level ranges, and a control station or bubble located centrally to the ranges. It is common in medium security prisons that the door to the control bubble remains unlocked. Officers in the control bubble can see down most of the upper ranges and down some of the lower ranges. The parts of the upper and lower ranges not visible from the control bubble are equipped with video cameras monitored from the control bubble. Mr. Goruik conceded that inmates could temporarily obstruct the view of the cameras if they were determined to do so.
- [20] Cells at Drumheller are equipped with steel doors and each range has 2 security barriers consisting of a screened range barrier gate and a steel fire and riot barrier. Closure of these barriers is controlled from the bubble. However, Mr. Goruik conceded that inmates could prevent the closure of the riot barrier by placing objects in the path of the doors.
- [21] For the protection of correctional officers, the control bubble on each living unit is equipped with a personal protection alarm, a two-way radio and a telephone. The personal protection alarm (PPA) is not worn by the correctional officers but is kept in the control bubble. Once a PPA is sounded, an alarm is relayed to other officers in the institution by two-way radios so that they can respond. If there is an incident, the bubble door can be locked and correctional officers can further retreat into another security room located at the back of the bubble. The back security room can be locked and has a further escape route.
- [22] With regard to the Post Orders, Deputy Warden Goruik testified that assigning three officers to units 8 and 11 is consistent with the post order, and that this interpretation and practice has been in effect without incident for 20 to 30 years at Drumheller Institution. He stated that staffing can be increased, and is increased, if events at Drumheller Institution confirm that extra staffing is needed to avoid trouble. He testified that, on the day of the refusals to work, there was no indication from security intelligence at Drumheller Institution that tensions were abnormally high and there was a need to increase staff. Referring specifically to the duty roster for the prison that evening, Mr. Goruik held that 13 to 16 people could have responded to an incident, and that help would have arrived within seconds or, at the most, a couple of minutes.

- [23] Even though it is contrary to policy at Drumheller Institution, he said that he was aware that some officers respond to incidents without waiting for backup knowing that the officer in the bubble has called for back up. He said, however, that he was shocked to learn at the hearing that officers have left their unit to respond to a call for help in another unit while the remaining officer stays locked in the control bubble.
- [24] Mr. Goruik testified that the institution was locked down following the refusals to work and that everything was under control when the health and safety officer Campbell investigated the refusals to work. He added that exposure to inmates is normal in a prison and does not constitute a danger.
- [25] Mr. Yeman, Coordinator Correction Operations, Drumheller Institution testified that he has worked there since 1973 and is currently responsible for the overall security at Drumheller Institution. He said that living unit shift supervisors must submit a report to his office following every shift and report every inmate incident. His office in turn informs him if there is any indication of potential problem. If there is a problem, he informs the deputy warden and recommends appropriate action to him. This could include assigning additional persons to the units, segregating inmates, and, if necessary, locking down the Institution. Following the refusals to work, Mr. Yeman reviewed the incident reports at Drumheller Institution for the entire month of May 2001. He determined that none of the incidents recorded for that period confirmed increased tensions or incidents at the Institution. He reiterated that exposure to inmates is normal in a prison and does not constitute a danger.
- [26] Mr. Fader argued that health and safety officer Campbell erred in his decision that a danger existed for correctional officers Schellenberg and Wood. He said that the officer erred because he relied on statements from the correctional officers relative to the interpretation of post orders and minimum staffing levels without consulting with management. He then speculated as to the circumstances that he believed existed at the time of the refusals to work.
- [27] Mr. Fader held that, in the investigation of a refusal to work, the officer is principally deciding whether or not it is safe for the employee to do the work in question. As such, the potential hazard or condition, or future activity alleged by an employee must exist at the time of the health and safety officer investigation of the refusal to work and be one that could reasonably be expected to cause injury or illness before corrected or altered. He held that the officer is not there to decide whether a danger existed in the past or to resolve ongoing labour issues in the work. In support of his position, Mr. Fader referred me to paragraph 128.(1)(b) and subsections 128.(8), 129.(4), (6) and (7) of the Code which read as follows:

128.(1)(b) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
...(b) a condition exists in the place that constitutes a danger to the employee, or ... [my underline]

128.(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it. [my underline]

129.(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

129.(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

129.(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision in writing to an appeals officer within ten days after receiving notice of the decision. [my underline]

[28] Should I not accept this argument, Mr. Fader argued alternatively that the facts in the case do not support the finding of danger at the time of the refusal to work by correctional officers Schellenberg and Wood. He referred me to item E4 of the “operational adjustments” section in the post orders and argued that this section contemplates that the forth officer on shift is an extra and can be reassigned to other duties. The post order reads:

POST ORDER
CELL BLOCK SUPERVISION POSTS

...Staff required for this post are:

Days - Three C.O. II's
Evenings - Four C.O. II's
Mornings - One C.O. I

OPERATIONAL ADJUSTMENT

...During Evening Shift, Officers assigned to the Unit are responsible for:

E1 – I/C Unit; Cell Block supervision
E2 – Case Management responsibilities and Cell Block supervision
E3 – Yard and Recreation Patrol plus Cell Block supervision
E4 – As this post is an extra support post it assumes responsibilities such as Cell Block supervision; Escort plus Yard and Recreation Patrol [Underlined for emphasis.]

- [29] He held that the deployment of 3 officers for the evening shift on units 8 and 11 was in compliance with the post order and did not create a danger for the officers. He reiterated that the post order has been interpreted this way for the past 20 to 30 years at Drumheller Institution, without incident. He also recalled the testimony of deputy warden Goruik and Mr. Yeman that the level of tension was not unusually high the day of the refusals to work.
- [30] If I did not accept his previous two arguments, he finally argued that any danger that existed for the correctional officers at the time of their refusals to work was normal to their work.
- [31] Mr. DeWolfe argued that a danger existed for officers Schellenberg and Wood because inmates had threatened them earlier on the day of their refusals to work. He also held that the level of tension amongst inmates at Drumheller Institution was running high and escalating. Mr. DeWolfe recalled that the Code was recently revised and maintained that the new definition of danger no longer specifies that the risk of injury or illness be imminent.
- [32] With regard to the post orders, Mr. DeWolfe held that the past practice of interpreting the “operational adjustments” to staff below the levels specified in the post orders for the units at Drumheller Institution does not confirm that the practice is safe. He further held that past practice with regard to “operational adjustments” portion of the post orders does not establish that operating at staffing levels below the post order is a normal condition of work for correctional officers.
- [33] Mr. DeWolfe further maintained that I should disregard Mr. Yemen’s testimony that security intelligence records at Drumheller Institution do not confirm that tensions were high the day of the refusals to work. He explained that correctional officers often develop an intuition over the years for sensing trouble. He said that their sense that trouble is developing is often based on a number of subtle incidents rather than one single incident. According to Mr. DeWolfe, correctional officers seldom report these subtle incidents in their reports. So security intelligence reports at Drumheller Institution are not always reliable for assessing the level of tension at Drumheller Institution. He added that the overall incidence of inmate unrest and riot at Drumheller Institution is historically above average relative to other institutions and that the assessment Correctional Service of Canada matrix used for assessing inmate risk includes subjective criteria. Finally, he reminded me that, except during lock downs, inmates at Drumheller Institution are free to mingle with guards, and so inmates on a range could easily over power a guard.
- [34] On a separate matter, Mr. DeWolfe complained to me on the last day of the hearing that his supervisor had informed him the previous evening that he would not receive salary or travel expenses for his participation at the hearing. Mr. Fader indicated that he was not aware of what the employer would finally do, but suggested that Mr. DeWolfe was not a party to the hearing because he was at the hearing to represent Drumheller Institution employees.

- [35] The issue to be decided in this case is whether or not a potential hazard or condition existed that constituted a danger under the Code for Mr. Schellenberg or Mr. Wood. If I find in the affirmative, I must also decide whether or not I should vary the direction issued by health and safety officer Campbell.
- [36] To decide if a danger under the Code existed for Mr. Schellenberg or Mr. Wood, I will address myself to the applicable legislation, past precedence in respect of interpreting the legislation, and the pertinent facts in the case.
- [37] In September of 2001, the definition of “danger” was redefined at subsection 122(1) of the Code as follows:

“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.

“danger” Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l’intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d’avoir des effets à long terme sur la santé ou le système reproducteur.

- [38] Appeals officer Mr. Cadieux interpreted the new definition of danger in the case of Welbourne and CPR, Decision No. 01-008, dated March 22, 2001. In that case, he found that:

- [16] This new definition of danger is similar to the previous definition of danger that existed in the pre-amended Code, which read:

“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.

- [17] The current definition of “danger” sets out to improve the definition of “danger” found in the pre-amended Code, which was believed to be too restrictive to protect the health and safety of employees. According to the jurisprudence developed around the previous concept of danger, the danger had to be immediate and present at the time of the safety officer’s investigation. The new definition broadens the concept of danger to allow for potential hazards or conditions or future activities to be taken into account. This approach better reflects the purpose of the Code stated at subsection 122.1, which provides:

The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.

[18] Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer's investigation but can also be potential or future. The New Shorter Oxford Dictionary, 1993 Edition, defines "*potential*" to mean "possible as opposed to actual; capable of coming into being or action; latent." Black's Law Dictionary, Seventh Edition, defines "*potential*" to mean "capable of coming into being; possible." The expression "*future activity*" is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the Code, the danger can also be prospective to the extent that the hazard, condition or activity is capable of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.

[20] The expression "*before the hazard or condition can be corrected*" has been interpreted to mean that injury or illness is likely to occur right there and then i.e. immediately¹. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or future activity, thus appearing to remove from the previous concept of danger the requisite that injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity altered. With this knowledge in hand, one cannot wait for an accident to happen, thus the need to act quickly and immediately in such situations.

[39] While I agree with my colleague's findings in this case, I believe there is a need to elaborate on his findings to address arguments made by Mr. Fader in this case. Specifically, Mr. Fader argued that, for a danger under the Code, the circumstances related to a potential danger must exist at the time of the investigation by the health and safety officer.

[40] According to subsection 129.(1) of the Code, when a health and safety officer is notified that an employee is continuing to refuse to work, the health and safety officer is required to investigate or cause another officer to investigate the refusal to work without delay. On completion of the investigation, the investigating officer is required, pursuant to subsection 129.(4), to decide whether or not a danger under the Code exists. If the officer decides that a danger exists, then the officer is required by subsection 129.(6) to issue a direction

¹ *Brailsford v. Worldways Canada Ltd. (1992)*, 87 di 98 (Can. L.R.B.)
Bell Canada v. Labour Canada (1984), 56 di 150 (Can. L.R.B.)

pursuant to subsection 145.(2) requiring the employer to, amongst other things, take measures to correct the hazard or condition or alter the activity, or to protect any person from the danger. The officer is also required to issue a direction to the employee(s) in question to cease the work in question until the employer complies with the officer's direction under 145(2)(a). If the officer decides that a danger does not exist, then according to subsection 129.(7), the employee is not entitled under section 128 to continue to refuse to work. The officer is clearly deciding whether or not a danger under the Code exists at the time of his or her investigation and, relative to subsection 145.(2.1), whether or not the employee(s) may work in a place or do the work in question. Subsections 129.(1), (4), (6) (7) and 145.(2) and 145.(2.1) read:

129.(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another health and safety officer to investigate the matter in the presence of the employer, the employee and one other person who is

- (a) an employee member of the work place committee;
- (b) the health and safety representative; or
- (c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.

129.(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.

129.(6) If a health and safety officer decides that the danger exists, the officer shall issue the directions under subsection 145(2) that the officer considers appropriate, and an employee may continue to refuse to use or operate the machine or thing, work in that place or perform that activity until the directions are complied with or until they are varied or rescinded under this Part.

145.(2) If a health and safety officer considers that the use or operation of a machine or thing, a condition in a place, or the performance of an activity constitutes a danger to an employee while at work,

(a) the officer shall notify the employer of the danger and issue directions in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to

- (i) correct the hazard or condition or alter the activity that constitutes the danger, or
- (ii) protect any person from the danger; and

(b) the officer may, if the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, issue a direction in writing to the employer directing that the place, machine or thing or activity in respect of which the direction is issued not be used, operated or performed, as the case may be, until the officer's directions are complied with, but nothing in this paragraph prevents the doing of anything necessary for the proper compliance with the direction.

145.(2.1) If a health and safety officer considers that the use or operation of a machine or thing by an employee, a condition in a place or the performance of an activity by an employee constitutes a danger to the employee or to another employee, the officer shall, in addition to the directions issued under paragraph (2)(a), issue a direction in writing to the employee to discontinue the use, operation or activity or cease to work in that place until the employer has complied with the directions issued under that paragraph.

129.(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision in writing to an appeals officer within ten days after receiving notice of the decision.

[Underlined for emphasis.]

[41] For deciding if a danger exists, the health and safety officer must consider all aspects of the definition of danger and, on completion of his or her investigation, decide if the facts in the case support a finding of danger under the Code. This determination must be done on a factual basis and the facts must be persuasive since the right to refuse and danger provisions under the Code are considered to be exceptional measures. For a health and safety officer to find that a danger under the Code exists at the time of his or her investigation in respect of a potential hazard or condition, as in this case, the facts in the case must be persuasive that:

- a hazard or condition will come into being;
- an employee will be exposed to the hazard or condition when it comes into being;
- there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and
- the injury or illness will occur immediately upon exposure to the hazard or condition.

[42] It follows that, where a hazard or condition actually exists at the time of the health and safety officer's investigation, the facts in the case must only be persuasive that:

- an employee will be exposed to the hazard or condition;
- there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and
- the injury or illness will occur immediately upon exposure to the hazard or condition.

[43] As Mr. Cadieux indicated in the Welbourne and CPR decision, danger can be prospective, but the concept of reasonable expectation excludes hypothetical or speculative situations. It is also important to note that, if the facts in the case do not support a finding of danger, a contravention of the Code may still exist.

- [44] Looking at the specific facts in this case, Mr. Schellenberg and Mr. Wood indicated that they refused to work because inmates had threatened them and because they considered the level of inmate tension to be high. They also refused to work because the level of staffing in their units that evening was below what they interpreted from the post orders in effect at Drumheller Institution.
- [45] With regard to the threats made by inmates, there was no evidence that the inmates were about to act on their threats at the time of their refusals to work, or that the potential for this occurring later was more than speculative in nature. I am not suggesting that the fears of correctional officers Schellenberg or Wood were imagined or without some basis. Mr. DeWolfe stated that correctional officers develop an intuition over time with regard to inmates. But to find that a danger existed for Mr. Schellenberg or Mr. Wood, it is necessary to establish that an inmate or inmates would act upon their specific threats then and there at any moment in the future. I can well appreciate that this is difficult in a prison because one is dealing with the unpredictability of human behaviour in a setting where inmates have demonstrated a proclivity to offend. However, in this case, the evidence was not persuasive that an inmate would act on his threat. Without this, the threat remains hypothetical or speculative.
- [46] Similarly, there was no evidence to confirm that tensions were abnormally high at Drumheller Institution on the day of the refusals to work such that a “potential” hazard or condition contemplated under the Code existed. Mr. Schellenberg and Mr. Wood referred to the “drug bust” the previous day and general inmate unrest. However the testimonies of Mr. Goruik and Mr. Yeman that tensions at Drumheller Institution were not abnormally high was supported by the incident reports. I give weight to Mr. Fader’s argument that Messrs. Goruik and Yeman were more experienced and in a better position to assess tension in the Institution than Mr. Schellenberg and Mr. Wood. I therefore consider that the level of tension on the evening in question was normal to the work of the officers who refused to work.
- [47] With regard to the post orders, I had the undisputed testimony from Deputy Warden Goruik that assigning three officers to units 8 and 11 is consistent with the post order and that this interpretation and practice has been in effect without incident for 20 to 30 years at Drumheller Institution. In my opinion, item E4 of the post order (see paragraph 28) is somewhat ambiguous. It confirms that four correctional officers are required during the evening shift, but specifies that it is not necessary for the fourth officer to remain in the unit. As a result, I am not persuaded by the facts in this case that operating a unit at Drumheller Institution with 3 correctional officers, in and of itself, constituted a danger. Moreover, I was not persuaded by the facts in the case that the long standing practice at Drumheller Institution constituted a potential hazard or condition the evening of the refusals to work that could reasonably be expected to cause injury before it could be corrected.

- [48] For the reasons hereto specified, I find that a danger under the Code did not exist for Mr. Schellenberg and Mr. Wood and rescind the direction that health and safety officer Campbell issued to Correctional Service of Canada, Drumheller Institution on May 14, 2001 pursuant to paragraph 145(2)(a) of the Code.
- [49] Notwithstanding my decision, I heard evidence that the two-way radios used by correctional officers to communicate during an emergency could fail during a critical moment because they lack a device for indicating imminent battery failure. I also learned that some cell walls were constructed with cement blocks and could be breached by prisoners. The only issue in dispute amongst parties was the length of time for inmates to do it. I also heard evidence that some officers respond alone to incidents on units, and Deputy Warden Goruik said that he was shocked to further learn at the hearing that officers have left their living unit to respond to a call for help in another unit. This meant that an officer was left alone on a unit locked in the control room. Finally, as indicated in my decision, I am of the opinion that the post order is somewhat ambiguous relative to staffing requirements for correctional officer safety.
- [50] I find this troubling from an occupational health and safety perspective. Section 124 of the Code requires employers to ensure that the health and safety of their employees is protected. This includes consulting with their employees for identifying hazards in the work place and for establishing measures to eliminate or mitigate the hazards. Despite my finding of no danger, the above matters might very well constitute a contravention under the Code. It seems to me that they are worthy of early attention by management.
- [51] With regard to the question of Mr. DeWolfe's status at the hearing, I refer to subsections 146.1 and section 146.2 of the Code which refer to a "party." They read as follows:
146. (1) An employer, employee or trade union that feels aggrieved by a direction issued by a health and safety officer under this Part may appeal the direction in writing to an appeals officer within thirty days after the date of the direction being issued or confirmed in writing.
- 146.2 For the purposes of a proceeding under subsection 146.1(1), an appeals officer may
- (g) make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has substantially the same interest as one of the parties and could be affected by the decision;
- (h) determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;

- [52] I interpret from subsection 146.(1) and paragraph 146.2(*h*) that a party includes an employee, employer or trade union that feels aggrieved by a direction. Paragraph 146.2(*g*) authorizes an appeals officer to make a party to a hearing any person or group that in the officer's opinion, has substantially the same interest as one of the parties and could be affected by the decision.
- [53] In this case, Mr. DeWolfe was a correctional officer directly affected by the decision. He appeared as spokesperson for employee and to present evidence and submissions. I am of the opinion that Mr. DeWolfe was a party to the hearing.

Doug Malanka
Appeals Officer

APPENDIX

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

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

On May 10, 2001, the undersigned safety officer conducted an investigation to a refusal to work under Section 128.(1)(b) of the *Canada Labour Code*, Part II, in the workplace operated by Correctional Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at Drumheller Institution, the said workplace being sometimes known as Drumheller Penitentiary.

The said safety officer considers that a condition exists in the place that constitutes a danger to the employees while at work:

Minimum staffing levels established by post order for cell block supervision post (amended 01-04-09) for all shifts are not being maintained and this condition poses a danger to the health and safety of correctional officers working in the living units.

Therefore, you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures immediately to correct the condition that constitutes a danger.

Issued at Calgary, this 14th day of May, 2001.

Neil S. Campbell
Safety Officer
#AB 1635

To: Correctional Services Canada
Drumheller Institution
PO Box 3000
Drumheller, Alberta
T0J 0Y0

SUMMARY OF APPEALS OFFICER DECISION

Decision No.: 01-005

Applicant: Correctional Service of Canada

Employer: CO's Schellenberg and Wood, Correctional Service of Canada

KEY WORDS:

Correctional officers, prison, inmate tensions, threats by inmates, staffing levels, danger, potential hazard or condition, factual determination, at the time of the investigation,

PROVISIONS:

Code: 122, 128, 129, 145, 146,

SUMMARY:

On May 10, 2001, 2 correctional officers commenced their evening shift on their respective living units at Drumheller Institution. Shortly thereafter, both officers refused to work. They complained that a potential danger existed because management had understaffed their units, because tensions were high in the Institution and because they inmates had threatened them earlier in the day. The health and safety officer who investigated their refusals decided that a danger existed for the correctional officers and ordered the Warden to take measures to protect the health and safety of any person.

Following his review of the case, the appeals officer decided that a danger did not exist for the correctional officers. The appeals officer found that the facts in the case did not confirm the existence of an existing or potential hazard or condition that could reasonably be expected to cause injury or illness to the correctional officers before the hazard or condition could be corrected. The appeals officer confirmed that, for a health and safety officer to find that a danger under the Code exists at the time of his or her investigation in respect of a potential hazard or condition, as in this case, the facts in the case must be persuasive that:

- a hazard or condition will come into being;
- an employee will be exposed to the hazard or condition when it comes into being;
- there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and
- the injury or illness will occur immediately upon exposure to the hazard or condition.