Bureau d'appel canadien en
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Canada Appeals Office on
Occupational Health and Safety

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CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Jim Moore
Joe Beauchene
applicants

and

Correctional Service of Canada
(CSC)
employer

Decision No. 02-031
December 20, 2002

This case was heard by appeals officer Michèle Beauchamp in Aggasiz, British-Columbia, on March 14, 2002.

Appearances:

For the applicants
Jim Moore, Correctional Officer, Correctional Service Canada (CSC)
Joe Beauchene, Correctional Officer, CSC
Jason Polesello, Acting Preventive Security Advisor, CSC
Chris de Haan, Parole Officer, CSC
Ronan Byrne, Unit Manager, CSC
Mike Ruscan, Supervisor, CSC

For the employer
Craig Henderson, Justice Canada
Ron Tarlton, Parole Officer, CSC
David S, Dick, Acting Assistant Warden, Management Services, CSC
Mr. Hammond, Acting Deputy Warden, CSC

Health and Safety Officer
Marlene Yemchuk, Labour Program, Human Resources Development Canada

[1] This appeal was submitted under subsection 129(7) of the *Canada Labour Code*, Part II, (the Code), by Jim Moore and Joe Beauchene, correctional officers at Kent Institution, in Aggasiz, British Columbia, following the decision of absence of danger given on August 8, 2001 by health and safety officer Marlene Yemchuk as a result of her investigation of their refusal to work.

[2] On August 7, 2001, while being briefed by the acting deputy warden and the preventive security officer about the unarmed security escort of an inmate that they were to carry out together on the same day, both correctional officers refused to work under subsection 128(1) of the Code, for the following reasons:

- Jim Moore refused to escort the inmate to a funeral in the community unarmed;

- Joe Beauchene refused to take the inmate on an unarmed escort for a funeral of his brother.

[3] Health and safety officer Yemchuk investigated the employees' refusal to work on the same day with Melinda Lum, secondary officer from HRDC. Accompanying her were: Bryden Nelmes, regional safety advisor, Ronan Byrne, unit manager, Chris DeHaan, parole officer, Jason Polesello, acting preventive security officer, Irv Hammon, acting deputy warden, Ron Tarlton, parole officer, and Gail Pitcher, recording officer, all from SCC.

[4] I retain the following from health and safety officer Yemchuk's written investigation report, from the parties' written documents and from the testimonies of the health and safety officer, the employees and the employer at the hearing.

[5] Both employees felt that the danger represented by this unarmed escorted temporary absence (ETA) was not an inherent risk of their job and that it could be avoided with either proper management or not allowing the escort.

[6] Both employees expressed the following concerns about the inmate:

- The inmate was a high profile inmate because of the nature of the crime he had committed. He never expressed remorse for his crime.

- The inmate had done only two of his fifteen year sentence, and both his father and brother also led a criminal lifestyle.

- As a result of completing the Cognitive Living Skills program and the Anger and Emotions Management program and because he was charge and incident free since in detention, the inmate was lowered to a medium security classification. However, his risk to public safety remained high.

- This was the inmate's first federal offence. He had numerous juvenile offences, including sexual assault of a staff member at a juvenile facility. As an adult, his criminal history included manslaughter and breach of recognizance and he had outstanding charges of break and enter, assault with a weapon and robbery, stemming from a home invasion.

[7] About the escort itself, both employees knew that:

- The escort was to be without weapons.

- The escort was to be in a CSC marked van driven by one of the correctional officers.

- The inmate was to be in a cage in the back.

- The inmate was to be handcuffed.

- The inmate was to be kept within sight and sound at all times.

- The correctional officers could do a risk assessment en route and implement emergency procedures if needed.

[8] Both employees expressed the following concerns about management's decision process in granting the ETA:

- Unlike the usual procedure, the inmate knew four days in advance that he was to attend the funeral. Therefore, he had the opportunity to inform friends and family, who in turn could have notified one or all of the three white supremacist groups to which he is associated. Also, inmates in the other four institutional units knew that he was to attend the funeral.

- On the week-end, the acting deputy warden of security had a supervisor advise the inmate of the possibility of his not attending the funeral because some things still needed to be done, *e.g.* prior victim notification (victims wishing to be notified of an ETA are listed for contact).

- Not all the case management team members were advised of or present at the decision process meeting, contrary to Standing Operating Practices 700--16, paragraph 16, according to which the team should be chaired by the unit manager and composed of the correctional supervisor, parole officer, CO-II, program staff and other ad hoc members.

- The police had advised not to worry about the newspaper mention of a $20,000 contract on the inmate's life. However, the newspaper is on the World Wide Web and is distributed to about 350,000 people, it has sister

papers throughout the Fraser Valley, the Surrey area has one of the largest concentrations of Indo-Canadians in B.C. -- which in itself puts undo danger to the escort --, and the inmate's crime was discussed in the media internationally and in the Provincial Legislature and Parliament.

- The institutional chaplains who recommended that the inmate attend the funeral were not part of the case management team and had not been involved in the risk assessment.

- Two institutional parole officers completed the risk assessment for the escort. One thought that the escorting officers should be armed. The warden decided that the officers would be unarmed but the inmate would wear shackles in addition to handcuffs.

[9] Both employees had previously performed numerous escorts and never refused to do one before. However, they felt that this particular escort posed an undue risk to themselves, to the public and to the inmate, and that other arrangements could have been made to reduce the risks involved. For example, it was suggested to the deputy warden that a memorial service be held with the inmate's family in the institutional chapel.

[10] Both employees understood the inherent risks involved with their job. They knew that assessing risks and taking the necessary action to minimize any danger are part of their daily job. They felt that the assessment team did not take all factors into account and that the escort posed a danger that was not manageable, that the escort would have been dangerous either armed or unarmed and that serious injury could have resulted from it.

[11] For his part, the employer believed that it was not the decision itself but the decision making process that was called into question, because risk assessments had ceased to be part of the employees' job four months before due to quality control.

[12] The inmate had been initially classified as a maximum security inmate and was upgraded to medium security in October 2000. He was awaiting transfer to a medium security facility where there were no members of the gangs to which he was associated. His institutional adjustment was considered moderate, his threat to public safety was estimated to be high as he had two offences, and his escape risk was evaluated moderate to high.

[13] To lessen the employees' concerns about the information published in a regional newspaper concerning the $20,000 hit rumoured to be placed on the inmate, the employer contacted the RCMP, the police and the Canadian Security Intelligence Services (CSIS). They found no substance to that rumour, although a $15,000 reward had eventually been paid out for information leading to the conviction of those associated with the crime. The funeral was taking place in an

area that was not predominantly Indo-Canadian and even if the crime had been high profile at the time it was committed, there was now very little publicity about it in the area. The police had given clearance to the escort, they wanted to be informed of its time and date, and they would have considered having one or two plain clothes officers watching the area had the inmate attended the funeral.

[14] The warden decided, based on a Risk Threat Analysis and as authorized by section 17 of the *Corrections and Conditional Release Act*, that the inmate's compassionate escorted temporary absence was an assumable risk in relation to public safety. The acting deputy warden held an assessment briefing meeting with the assigned correctional officers on Monday August 7, at 7:00 am, during which security aspects were reviewed. He noted that experienced correctional officers had been selected for the escort to allay concerns.

[15] According to the ETA Referral Decision Sheet, the inmate had no history of escape or escape attempts. He would remain within sight and sound of the escorting officers at all times. Restraint equipment would be used throughout the duration of the escort. The escorting officers would be able to terminate the escort at any point if they deemed it appropriate.

[16] The warden did not approve the issuance of firearms to the escorting officers. In this regard, section 15 of the Security Manual – Security Escort provides that "[u]nder ordinary circumstances, firearms shall not be carried by CSC officers during an escorted temporary absence." As well, the manual states that "[w]hen a security escort for a dangerous inmate is unavoidable, or when an external factor poses a threat to CSC staff or the public during a security escort, the institutional head shall approve the use of weapons for the escort, but only to the degree deemed absolutely necessary."

[17] The usual process for a compassionate leave is the following: the inmate requests the ETA; the parole officer and unit manager prepare an Assessment for Decision report; the assessment team meets to review the report; and the warden prepares an Escorted Temporary Absence Referral Decision Sheet, after discussion with two unit managers and the parole officer.

[18] In the present case, the assessment team was composed of the warden, the acting deputy warden, the unit manager, the case management coordinator, the institutional parole manager, the parole officer and the institution preventive security officer.

[19] The assessment team acknowledged that the inmate was a known member of a white supremacist organization based in Surrey, BC. The team considered that the risk toward the public was manageable by the inherent controls of a one-time structured and monitored ETA. The team thought that

there were no indications that the inmate would pose an undue risk to the community during the ETA. There were no dissenting opinions to approve the ETA.

[20] There was an oversight in the approval process that had to be dealt with over the weekend: the victim notification requirements could not be determined because the Computerized Offender Management System was not operational. The acting deputy warden confirmed on Saturday August 4 that no entries had been made for victim notification. When he was told that the inmate knew that he was going to attend the funeral, he asked the correctional supervisor to inform the inmate that a final decision had not yet been made. He also advised an institute chaplain about the situation, and the chaplain subsequently decided to talk to the inmate. It was expected that the decision would be locked off at the case management meeting on Tuesday morning August 7, and the case management coordinator would enter the decision of the warden.

[21] According to the health and safety officer's report, an entry in the log book confirms that parole officer de Hann informed the inmate on Friday August 3, at 4 p.m., that he would be attending the funeral. The parole officer recommended the ETA but had he foreseen that the inmate would know four days in advance that his ETA was approved, he would have recommended that the escorted officers be armed. The parole officer also believed that while the inmate was manageable in the institution, it could be different in a group situation.

[22] Based on the facts gathered during her investigation, the health and safety officer decided that there was no danger for the two employees to escort the inmate unarmed, due to the fact that he had been classified as requiring medium security and that the ETA was supported by law enforcement agencies.

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[23] The issue to be decided here is whether correctional officers Moore and Beauchene were facing a danger within the meaning of the *Canada Labour Code*, Part II (the Code), when health and safety officer Marlene Yemchuck investigated their refusal to work on August 8, 2001?

[24] Danger is defined as follows in subsection 122(1) of the Code:

"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and	*"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*

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.	*visée toute exposition à une substance dangereuse susceptible d'avoir des effets à long terme sur la santé ou le système reproducteur.*

[25] Since the coming into force of that definition, in September 2000, appeals officers have issued numerous decisions related to the concept of danger. These decisions basically reflect the following two principles, expressed by appeals officer Serge Cadieux in *Darren Welbourne and the Canadian Pacific Railway Company* (Decision 01-008, March 2001):

- the concept of what hazard, condition or activity could reasonably be expected to cause an injury excludes all hypothetical situations, and

- regardless of whether that condition, activity or hazard "exists" or "is possible," steps must be taken to correct or alter it before there is an injury.

[26] Many of these decisions were also directly linked to the Correctional Service institutional environment and dealt with the concept of danger as related to the possibility of an inmate being violent towards employees. Appeals officer Douglas Malanka offered, in *Correctional Service of Canada, Drumheller Institution, and Larry DeWolfe* (Decision 002-005, May 2002), the following guidelines on how to decide if a danger exists in respect of a potential hazard:

> [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.

[27] I agree with these principles and guidelines. I must ask myself, first, what the hazard is in the present case and, second, if the facts are persuasive enough to establish that the potential hazard will come into being.

[28] The answer to the first question is obvious: in the present case, *i.e.* the unarmed escort of an inmate, the hazard corresponds to the violence that the inmate could exercise towards the escorting officers during the outing.

[29] To answer the second question, I must keep in mind that, under the actual definition of danger, the concept of what hazard could reasonably be expected to cause an injury excludes all hypothetical situations, as declared by Serge Cadieux in *Darren Welbourne and the Canadian Pacific Railway Company*.

[30] Therefore I must ask myself if there is a reasonable degree of certainty that the inmate will become violent during the escort. In other words, are the facts persuasive enough to establish that the potential hazard will come into being?

[31] As an employer governed by the *Corrections and Correctional Release Act* as well as by the *Canada Labour Code*, Correctional Service is compelled to be aware of the risks attached to inmates and to apply measures that will reduce and control these risks as much as possible.

[32] In that context, the employer must "evaluate and quantify" the possibility of the inmate becoming violent when he is assessing if he will grant an ETA and, if he decides to grant it, under what conditions for both the inmate and the escorting officers. That is why CSC applies specific procedures and criteria to make decisions about escorted temporary absences.

[33] These criteria include taking into account:

- the escorting officers' training and experience in escorts;
- the equipment that they would carry;
- the restraining equipment that would be used on the inmate;
- the security classification of the inmate;
- the inmate’s potential for violence; and
- the inmate’s links with criminal circles.

In the present case, Correctional Service has applied these criteria.

[34] What are the relevant facts applicable here?

- The escorted temporary absence was granted for compassionate reasons.
- The inmate had been re-classified as a medium security inmate and was awaiting transfer to a medium security institution.
- Since in detention, the inmate had been free of incident and had never attempted to escape.
- The inmate was to be kept under leg and arm restraints at all time during the escort.
- The inmate was to be kept by the escorting officers within sight and sound at all time during the escort.
- The police was not concerned about the presence of the inmate at the funeral and had considered keeping an eye on things.
- The escorting officers were experienced and had done numerous escorts.
- The escorting officers could implement emergency procedures as needed.
- Usually, if an inmate's outing represents such a high risk that the escorted officers must be armed, the ETA will not be granted.

[35] There was one departure from the usual CSC's procedure of informing inmates of an ETA a few hours in advance. In this case, the inmate learned four days in advance that he would be attending the funeral and therefore he had the opportunity to inform outside contacts of his escort. However, inmates are aware that the institutional phones are taped and there were no statements nor records presented at the hearing to indicate that the inmate had done so.

[36] I have said in Decision 01-023 regarding a similar case at Cowansville Institution that it is not my responsibility to determine whether CSC's procedures, established under the *Corrections and Correctional Release Act*, should require escorting officers to be armed at all times when going on an outing with such-and-such a category of inmate. I stand by the principle that this determination is strictly the responsibility of CSC in the present case also.

[37] Based on the evidence and testimonies made known at the hearings, I believe that there were no facts to establish that the potential hazard represented by the violence that the inmate would come into being.

[38] I also believe that CSC took the necessary preventive measures and such steps required so that the risk faced by the escorting officers during the escort would be maintained within the normal parameters of their work, even if it meant that they would perform this ETA unarmed.

[39] Did this escort constitute a danger because it involved more than the performance of a job which, by its very nature, implies interacting with inmates who can be potentially violent. I don't find so.

[40] In that regard, it may be useful here to repeat the conclusion at which arrived Judge Nadon, Federal Court, Trial Division, in *The Attorney general of Canada and Mario Lavoie*, Decision T-2420-97. Judge Nadon declared, in reference to the risk of violence in a correctional institution:

> [25] The risk faced by the respondent on April 24, 1997 was nothing other than the risk inherent to his work. This risk, under paragraph 128(2)(*b*) of the Canada Code, did not justify a refusal to work by the respondent.
>
> [26] I fully agree with the applicant's comments at paragraphs 39 and 75 of her factum:
>
> > [Translation]
> > 39. Indeed, a mere possibility of assault by two inmates who in the circumstances manifested no sign of aggressiveness or mental disorder did not constitute in the circumstances, for the respondent, a dangerous situation in his work place that necessarily had to be remedied before he began to work;

[41] Health and safety officer Marlene Yemchuck did a detailed and thorough investigation of the correctional officers' refusal to work and rendered a well-founded decision of no danger.

[42] For the above reasons, I confirm her decision of no danger.

Michèle Beauchamp

Appeals Officer

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SUMMARY OF APPEALS OFFICER DECISION

Decision No.: **02-031**

Applicant: Jim Moore
Joe Beauchene

Employer: Correctional Service Canada

Key Words: Refusal to work, unarmed escort

Provisions:
Code 129(7)

Summary

Two correctional officers at Kent Institution, in Aggasiz, British Columbia, refused to work under subsection 129(7) of the *Canada Labour Code* because they believed that escorting an inmate to his brother's funeral without being armed was dangerous. After investigating, the health and safety officer decided that the unarmed escort did not represent a danger for the employees.

The appeals officer confirmed the health and safety officer's decision of no danger because there was no evidence that the inmate would become violent towards the employees, Correctional Service had taken the necessary measures to maintain the risk faced by the escorting officers during the unarmed escort within the normal parameters of their work, and the unarmed escort did not involve more than the performance of a job which, by its very nature, implies interacting with inmates who can be potentially violent.