Canada Appeals Office on Occupational Health and Safety
Bureau d'appel canadien en santé et sécurité au travail

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Canada Labour Code
Part II
Occupational Health and Safety

Stewart R. Doell and Lorne Knihniski
applicants

and

Treasury Board of Canada
(Correctional Service Canada)
respondent

Decision No.: 04-014
March 19, 2004

Corrections Officers Stewart R. Doell and Lorne Knihniski refused to work on December 27, 2002. Health and safety officer Mr. Dorian Paydli investigated the refusals to work on December 28, 2002 and following his investigation decided that a danger did not exist for the employees. The employees appealed his decision under subsection 129.(7) of the Canada Labour Code (Code), Part II, and a hearing was held in Saskatoon, Saskatchewan on November 28, 2004.

Appearances:

Applicant:
Mr. Jean-Jacques Beauchamp, Union Advisor, CSN
Mr. Francois Massie, Union Advisor, CSN
Mr. Stewart R. Doell, Corrections Officer II Regional Psychiatric Centre
Lorne Knihniski, Corrections Officer I, CSC, Regional Psychiatric Centre
Mr. Ryan DeBack, Corrections Officer

Respondent:
Mr. Richard F. Fader, Counsel, Treasury Board Secretariat, Legal Services
Mr. Gerry Michayluk, Regional Return to Work/Occupational Safety and Health Coordinator, Red Deer Parole Office, Red Deer, Alberta.
Mr. Glen Beatty, Acting Executive Director RPC
Mr. James Beaulieu, Corrections Officer III, Supervisor, RPC
Mr. Y. Ng-How'Tseung, Supervisor of Nurses, RPC
Mr. Dorian Paydli, Health and Safety Officer, Human Resources Development Canada (HRDC).

[1] On December 27, 2002, Corrections Officer (CO) Lorne Knihniski employed at the Regina Psychiatric Centre (RPC) in Saskatoon, Saskatchewan reported to the Bow Unit at 15:00 hours as part of his shift assignment. He was informed by his supervisor that the Bow Unit would operate with 4 Corrections Officers, instead of the normal 5, and that the PC10 (Yard Corrections Officer or Yard Officer) who served as backup to the Units was absent and would not be replaced. CO Knihniski immediately informed his supervisor that he refused to work under the *Canada Labour Code*, Part II, hereto referred to as the *Code* or Part II.

[2] That same day, CO. Stewart Doell reported to the Clearwater Unit post in the RPC at 15:00 hours. He learned that the Clearwater Unit would operate with one CO instead of the normal two officers, and that the PC10 yard officer was absent. He was additionally informed that, since the PC10 yard officer was absent, he would have to cover the Bow Unit in the event of an alarm. He informed his supervisor shortly thereafter that he refused to work.

[3] Health and safety officer Paydli investigated the refusals to work on December 28, 2002, the day following the refusals to work. At the completion of his investigation that day, health and safety officer Paydli informed COs Knihniski and Doell that a danger did not exist for either of them. Both Mr. Knihniski and Mr. Doell appealed his decision to an appeals officer. A hearing was held in Saskatoon, Saskatchewan on November 28, 2003.

[4] Health and safety officer Paydli submitted his report to the Tribunal and testified at the hearing. I retain the following from his report and testimony.

[5] Officer Paydli investigated the refusals to work by CO Knihniski and Doell on December 28, 2002. As part if his investigation he interviewed Mr. Glenn Beatty, acting Executive Director, RPC and COs Knihniski and Doell. He also conducted a tour of the Bow Unit, the Clearwater Unit and the activity area. He learned from his investigation that there were 23 inmates in the Clearwater Unit and 85 or more inmates present in the Bow Unit at the time of the refusals to work. He also learned that the activity area could have up to 85 minimum, medium or maximum security inmates. He noted that corrections officers in the RPC typically rotate from post to post during their shift, as was the case with COs Knihniski and Doell, and that the December 27, 2002 attendance roster confirmed that 3 corrections officers had booked off sick that day.

[6] Employee members of the RPS health and safety committee investigated the refusals to work by COs Knihniski and Doell prior to contacting a health and safety officer at HRDC. According to their report, the health and safety committee agreed with COs Knihniski and Doell that a danger existed when the Institution was not fully staffed and inmate activities were not modified. However, they agreed that a danger did not exist after inmate activities were cancelled.

[7] Health and safety officer Paydli testified that everything appeared normal at the RPC when he investigated on December 28, 2003, that staff seemed competent, and that he never was concerned for his health and safety. He noted that nurses carry a personal alarm.

[8] In his decision report, health and safety Paydli stated that a danger did not exist for CO Knihniski or CO Doell at the time of their refusals to work for the following reasons:

- *The possibility that injury might occur is a risk that is inherent in the job of a Corrections Officer when carrying out his (sic) duties. It is, however, a risk that does not constitute a "danger" as defined in the code. (sic) At the time of the refusal there was no indication that any violent altercation would ensue.*

- *Management cancelled inmate activities which freed up three (3) officers to assist in units that were short due to unforeseen illness.*

[9] CO Knihniski testified at the hearing regarding his refusal to work on December 27, 2002. I retain the following from his testimony.

[10] Mr. Knihniski began his work shift in the Main Communications Control Post (MCCP) of the RPC at 06:45 hours. He was scheduled to work there until 15:00 hours and then to work in the Bow Unit from 15:00 hours to 19:00 hours. Between noon and 13:00 hours, he spoke with Mr. Beatty who confirmed that the Bow Unit would operate with 4 Corrections Officers instead of the normal 5 after 15:00 hours, and there would not be a PC10 Yard Officer to serve as backup. When CO Knihniski arrived at the Bow Unit at 15:00 hours, he confirmed with his supervisor that the Unit was being operated below minimum staffing levels and immediately refused to work. He complained that there would not be an adequate number of correction officers to supervise in the Bow Unit and that the control centre in the Bow Unit was not secured.

[11] He testified that there were typically 85 inmates in the Bow Unit during the day and that inmates could vary from minimum to medium to maximum security levels. He stated that, some inmates were locked up for 23 hours per day and others for 14 hours a day. However, the majority of inmates could come and go in the Bow Unit as they wished. He further noted in his refusal to work that the Clearwater Unit was similarly short staffed and held that the entire Institution would be short staffed as the PC10 Yard Officer covers the whole Institution. CO Knihniski agreed that there are inherent risks connected with his work, but felt that the risk associated with operating short staffed exceeded the normal risk and thereby constituted a danger.

[12] Notwithstanding his direct testimony, CO Knihniski agreed with Mr. Fader that a danger no longer existed on December 27, 2002 after inmate activities were cancelled freeing up three (3) officers to respond to an emergency. He further agreed with Mr. Fader that a danger did not exist on Saturday, December 28, 2002, when health and safety officer Paydli conducted his investigation of his refusal to work.

[13] CO Knihniski further conceded that, despite the inmate report of shanks in the court yard on the day of his refusal to work, none were ever found. Furthermore, he was unable to recall any assault with a shank at RPC during the past 2 to 3 years. CO Knihniski also agreed with Mr. Fader that weapons may exist at the RPC on any given day in a prison and so it is somewhat normal for weapons to exist on any day. He responded that the average response time following an alarm is 10 to 20 seconds.

[14] Correction Officer Stewart Doell also testified at the hearing regarding his refusal to work. I retain the following from his testimony.

[15] CO Doell began his shift on December 27, 2002 at 06:45 hours in the Bow Unit and worked there until 11:00 hours. He was on lunch break from 11:00 to 11:30 hours and then worked in the MCCP from 11:30 to 15:00. When he arrived for his post at the Clearwater Unit at 15:00 hours, his supervisor confirmed that he would be the only Correction Officer on the Unit as opposed to the normal two, and that since the PC10 Yard Officer post was absent he would have to cover the Bow Unit if an alarm occurred. CO Doell refused to work at 15:30 hours because of staff shortage and because he was concerned that, if he had to leave the Clearwater Unit to respond to an emergency, he would be vulnerable to a surprise attack by an inmate when he returned as there was no correction officer to supervise the Unit while he was away. He held that nurses did not replace corrections officers.

[16] He testified that inmate tension was escalating at RPC because normal day routines at the RPC were altered over Christmas. He recalled that an assault had occurred on December 20, 2002, and commented that vandalism had recently occurred involving damage and graffiti seemingly made by gangs. He noted there was in incident in the Churchill Unit on December 27, 2002, whereby a female inmate had to be extracted from her cell. He also referred to the inmate report that day that shanks had been deposited in the court yard and noted that the yard had not been closed or searched.

[17] He disagreed with Mr. Fader that a danger no longer existed on December 27, 2002 after the inmate activities were cancelled. He maintained that some danger continued to exist but did not elaborate. He agreed, however, that a danger did not exist on Saturday, December 28, 2002, when health and safety officer Paydli conducted his investigation of his refusal to work. He also conceded that nurses and cleaning staff are sometimes left alone in the Clearwater Unit.

[18] Mr. Glenn Beatty testified at the hearing regarding operations at the RPC. He described the various static and dynamic systems in place at RPC and the training and equipment provided to corrections officers. Regarding equipment, he said that officers are equipped with 2-way radios, restraint equipment, OC (*sic*) spray and fire arms. He opined that the response time to an emergency call could be up to one minute depending on the relative location of the alarm and the responding corrections officer.

[19] He testified that he consulted with Mr. Beaulieu, CO Supervisor, and decided to operate the RPC at reduced staff levels on December 27, 2002, because it was relatively quiet in the Institution and because they were operating on a weekend schedule whereby normal inmate programs were modified. He considered continuing to operate the RPC at reduced staff levels when CO Knihniski refused to work, but decided to cancel inmate activities when CO Doell refused to work because there were insufficient corrections officers to respond to a personal protective alarm with the second refusal.

[20] With regard to the inmate report on December 27, 2002, that a shank or shanks had been deposited in the court yard, he stated that such reports are often fabricated at RPC and, moreover, the court yard was snow covered making it difficult to find anything. He confirmed that staffing levels were normal on December 28, 2008 and that everything was quiet at the RPC.

[21] Mr. Beaulieu testified that RPC was operating on weekend routine on December 27, 2002 and that it is not uncommon to operate with 2 officers below minimum staffing levels. He also confirmed that there was no danger on December 27, 2002 as everything was quiet at RPC until the time when corrections officer had to perform a cell extraction.

[22] In his summation, Mr. Beauchamp conceded that a danger did not exist for COs Knihniski and Doell on December 27, 2002, after management had cancelled inmate activities which freed up three (3) officers for security. He also agreed that a danger did not exist for COs Knihniski and Doell on December 28, 2002, when health and safety officer Paydli investigated their refusals to work. However, he maintained that I should rescind health and safety officer Paydli's decision and find that a danger existed for COs Knihniski and Doell on December 27, 2002, before the activities were cancelled because the RPC operated below minimum staffing levels at the Institution for corrections officers without modifying inmate activities.

[23] Mr. Beauchamp maintained that the minimum staffing level for an institution is based on a risk assessment process that considers the minimum of staff to run an institution safely for staff, inmates and the public. He further held that operating the RPC below the minimum staffing levels constituted a hazard which could reasonably be expected to cause injury before the situation is corrected unless something was done to mitigate the hazard. He added that the RPC houses inmates requiring psychiatric care and corrections officers had not been provided specialized training to deal with such inmates.

[24] He held that a danger existed on December 27, 2002, for Corrections Officers Knihniski and Doell when the RPC operated below minimum staffing levels without modifying inmate activity and so there were insufficient correction officers to respond to an emergency call or cell extraction. He added that CO Doell was in danger because he would have been vulnerable to a surprise attack if he had to leave the Clearwater Unit to respond to a call and had to return to the unsupervised Unit. He held that nurses are not trained as corrections officers and cannot be considered to have replaced a corrections officer who has had to leave a Unit.

[25] Since Mr. Beauchamp agreed that a danger did not exist on December 27, 2002 after inmate activities had been cancelled or on December 28, 2002, the day following the refusals to work, I asked him if he was contending that my role, as an Appeals Officer acting pursuant to subsection 146.1(1) of the *Code*, was to decide if a danger existed "at the time of the employee's refusal to work", as opposed to "at the time of the health and safety officer's investigation". Subsection 146.1(1) reads:

> *146.1 (1) If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may*
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> *(a) vary, rescind or confirm the decision or direction; and*
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> *(b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).* [My underline.]

[26] Mr. Beauchamp responded negatively, but nonetheless maintained that a danger existed for Corrections Officers Knihniski and Doell when the RPC was operated below minimum staffing levels for correction officers and activities were not modified by RPC management in order to mitigate the hazards associated with operating below the minimum staffing levels. I interpreted from his response that the danger which provoked COs Knihniski and Doell to refuse to work arises each time minimum staffing levels are not maintained and activities are not modified by management to mitigate the increased risk.

[27] In his summation, Mr. Fader asked that I confirm the decision of health and safety officer Paydli that a danger did not exist for Corrections Officers Knihniski and Doell at the time of his investigation because everything was quiet at the RPC and any danger that may have existed was normal to the work of a corrections officer.

[28] He argued that health and safety officer Paydli was correct when he focused his investigation on the circumstances of the refusals to work that existed at the time of his investigation rather than those that existed at the time of the refusals to work. He referred specifically to subsections 129.(4), (6) and (7) all of which refer to a danger in the present tense, " i.e., "exit(s). This he maintained confirms that the role of the health and safety officer is to decide if a danger exists at the time of the officer's investigation and, based on the officer's finding, decide what happens next. Subsections 129.(4), (6) and (7) read:

> *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.*
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> *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.*
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> *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.*

[29] Mr. Fader then referred me to the paragraphs [15], [18] and [38] of the Federal Court of Appeal decision in the case of Canada (Attorney General) v. Fletcher, designated as [2003] 2F.C. 475, [2002] F.C.J. No. 1541, 2000 FCA 424, Court File No. A-653-00 (hereto referred to as the Fletcher case). He held that the decision confirms several aspects regarding the proper interpretation of the refusal to work provisions in the *Code* and of the investigation provisions by a health and safety officer. In this regard, he noted that the right to refuse provision is an emergency measure given to employees, who, at a specific time and place, may refuse to do work that exposes the person to a dangerous situation. In such cases, the role of the health and safety officer is to decide if a danger exists when they arrive and investigate based on the case specifics facts. Paragraphs [15], [18] and [38] read:

> *[15] That being said, however, the existence of a danger at the time of the refusal to work does not in and by itself give the safety officer or, ultimately, the Board, jurisdiction to give directions to the employer with respect to that danger. <u>It is only with respect to a danger that exists at the time</u>*

> *of the investigation that directions may be given. In the case at bar, the Board, having found that no danger existed at the time of the investigation, erred in law in finding that a dangerous condition existed with respect to Units 3 and 4. The only option open to the Board was to confirm the report of the safety officer.* [My underline.]
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> *[18] The mechanism is an ad hoc opportunity given employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation. It is the short-term well-being of an employee which is at stake, not a hypothetical or speculative one.*
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> *[19] The mechanism is an emergency measure. It is a tool placed in the hands of the employee when faced with a condition that could reasonably be expected to cause injury or illness to him before the hazard or condition can be corrected. See Scott C. Montani (1994), 95 di 157, at page 7.*
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> > *The Board has stated that Parliament did not intend to deal with danger in the broadest sense of the word. See David Pratt (1988), 73 di 218, and 1 CLRBR (2d) 310 (CLRB no. 686). Danger within the meaning of the Code must be perceived to be immediate and real. The risk to employees must be serious to the point where the machine or thing or the condition created may not be used until the situation is corrected. Also, the danger must be one that Parliament intended to cover in Part II of the Code.* [My underline.]
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> *[38] Moreover, neither the safety officer nor the Board, could consider the "minimum staffing policy". The mechanism provided by the Code calls for a specific fact-finding investigation to deal with a specific situation. It is not meant to provide a forum for an analysis of an employer's policy.* [My underline.]

[30] Mr. Fader reiterated that there was no danger when employees refused to work because staffing levels were appropriate for a week-end program which was in effect on the day of the two refusals to work, and because any danger that may have existed was normal to the work of corrections officers. He added that the employees could have raised their concerns under section 127.1 of the *Code* or via the health and safety committee if they had issues with staffing levels. Subsection 127.1(1) reads:

> *127.1 (1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.*

[31] Mr. Fader argued in the alternative that, even if I decided that subsection 129.(4) requires the health and safety officer to decide if a danger existed "at the time of the refusal to work" as opposed to "at the time of the health and safety officer's investigation", the concerns raised by Correction Officers Knihniski and Doell were speculative in nature and the facts submitted in support of their refusals to work were insufficient to support a finding of danger. In this regard, he referred me to paragraph [33] of my decision in the Byfield and Canada (Correctional Service) [2003] C.L.C.A.O.D. No. 7, Decision No. 03-007 and dated March 10, 2003 and to paragraphs [80] and [81] of my decision in the Chapman and Canada (Customs and Revenue Agency), [2003], C.L.C.A.O.D. No. 17, Decision No. 03-019 and dated October 31, 2003. Paragraph [33], [80] and [81] read respectively:

[33] Thus her refusal to work of October 25, 2001, was not based on anything specifically occurring or expected to occur on or in connection with the SLE. Rather it was based on PW staffing levels in the SLE and her conviction that her numerous health and safety concerns confirmed the danger. However reasonably this may have seemed to PW Byfield, such a view is not consistent with the definition of danger in the Code or the case law cited. To the contrary, the definition establishes that a hazard, condition or activity only constitutes a danger if the hazard, condition or activity is one that could reasonably be expected to cause injury to any person exposed thereto before the hazard or condition can be corrected or activity altered. That is, the mere existence of one or more hazards, conditions or activities does not automatically confirm the existence of a danger. Instead, a danger is confirmed where the relevant facts confirm the reasonableness of the expectation that the hazard, condition or activity in question exists, or is capable of coming into existence; that the hazard, condition or activity will cause injury or illness to a person exposed thereto and that the injury or illness will occur immediately, even if the injury or illness is latent; that the illness or injury is serious as opposed to an irritation; and that the hazard, condition or activity is one that arises out of, linked with, of occurring in the course of employment to which Part II applies. None of this was established in connection with PW Byfield's refusal to work.

[80] Taking all of this into account, and with reference to the aforementioned criteria, it is my opinion that, for a finding of danger in respect of a potential hazard or condition or future activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that:

- *the potential hazard or condition or future activity in question will likely present itself;*
- *an employee will likely be exposed to the hazard, condition or activity when it presents itself;*
- *the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and,*
- *the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.*

[81] It follows, in the case of an existing hazard or condition or current activity, the health and safety officer must form the opinion, on the basis of the facts gathered during his or her investigation, that

- *an employee will likely be exposed to the hazard, condition or activity;*
- *the exposure to the hazard, condition or activity will likely cause injury or illness to the employee exposed thereto; and,*
- *the injury or illness will likely occur before the hazard or condition can be corrected or activity altered.*

[32] Finally, he argued in the alternative that any danger that may have existed at RPC either "at the time of the refusals to work" or "at the time of health and safety officer Paydli's investigation" was normal to the work at the RPC and not one upon which an employee could refuse to work.

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[33] The issue in this case is whether or not a danger under the *Code* existed for Correction Officers Knihniski and Doell. For this, it is helpful to consider the legislation, past precedence and the individual facts in the case.

[34] According to the definition in section 122.1 of the *Code*, "danger" includes any existing or potential hazard or condition that could reasonably be expected to cause injury or illness before the hazard or condition can be corrected. The definition of "danger" reads:

> *122.1 "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;* [My underline.]

[35] In the Welbourne Case, Appeals Officer Cadieux wrote in paragraph [18] that danger can be prospective to the extent that the potential hazard, condition or future activity is capable of coming into being or action and is reasonably expected to cause injury or illness before the hazard or condition is corrected or activity altered. He qualified in paragraph [19] that, since the existing or potential hazard or condition, or current or future activity must be one that can reasonably be expected to cause injury or illness to a person exposed thereto before the hazard, condition can be corrected or activity altered, the concept of reasonable expectation excludes hypothetical or speculative situations. He wrote:

> *[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.* [My underline.]
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> *[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.* [My underline.]

[36] In accordance with this interpretation, with which I agree, for a finding of danger, the health and safety officer must determine objectively that an existing hazard, condition or current activity exists that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected or activity altered, or that a hazard or condition capable of coming into being (e.g., potential) or future activity could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected or activity altered. For deciding if a potential hazard or condition is capable of coming into being, it may be necessary for the officer to consider the hazard or condition as it existed at the time the employee refused to work. However, this look back in time by the officer

is solely for deciding if the hazard, condition or activity is, in fact, capable of coming into existence (e.g., reoccurring). It is not for deciding if a danger existed at the time of the refusal to work.

[37] In this regard, I agree with Mr. Fader that subsections 129.(4), (6) and (7) of the *Code* confirm that the health and safety officer is required to decide if a danger exists at the time of the officer's investigation, as opposed to the time when the employee refused to work. As advanced by Mr. Fader, subsections 129.(4), (6) and (7) all refer to a danger in the present tense, (i.e., "exit(s)). Moreover, subsections 145.2(1) and (2.1) specify that the health and safety officer must issue a direction if that officer is of the opinion that a danger exists. Clearly, the officer is deciding whether it is safe for the employee to resume the work in question and, if not, directing the employer to immediately correct the hazard or condition or alter the activity or protect the health and safety of any person. Moreover, the health and safety officer is required by subsection 145.(2.1) to direct the employee to discontinue the use, operation or activity or cease to work in the work place until the employer has complied with the direction issued to the employer. In my opinion, all of this is aimed at dealing with the factual situation that exists at the time of the investigation of the refusal to work and excludes speculation or hypothetical situations. Subsections 145.2(1) and (2.1) of the *Code* read:

> *145.2(1) 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*
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> *(i) correct the hazard or condition or alter the activity that constitutes the danger, or*
> *(ii) to protect any person from the danger; and*
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> *145.1(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.* [My underline.]

[38] In this case, Mr. Beauchamp agreed that the role of the health and safety officer is to determine if a danger existed at the time of the officer's investigation, as opposed to the time when the employee refused to work, and, in fact, agreed that a danger did not exist at the time of health and safety officer Paydli's investigation. Yet, he continued to maintain that I should vary health and safety officer Paydli's decision and find that a danger existed for COs Knihniski and Doell because the RPC was operating below minimum staffing levels on December 27, 2002, and the inmate activities had not been cancelled at the time of their refusals to work.

[39] While Mr. Beauchamp never completely explained this seeming dichotomy of viewpoint, I believe that he was saying that management at the RPC only opted to cancel inmate activities after Correction Officer Knihniski and Doell refused to work. It was his premise that management could opt again at any time to operate the RPC below minimum staffing levels without taking measures to mitigate hazards connected thereto and, if they did, a danger would

again exist. In that way, opting to operate the RPC below minimum staffing levels without taking measures to mitigate hazard constituted a potential danger.

[40] However, I would refer Mr. Beauchamp to paragraph [38] of the aforementioned Fletcher case which confirms that role of the safety officer or the Tribunal is not to consider the minimum staffing policy but rather to conduct a fact finding investigation into the circumstances of the refusal(s) to work and to decide if the facts support a finding of danger. Paragraph [38] reads:

> *[38] Moreover, neither the safety officer nor the Board, could consider the "minimum staffing policy". The mechanism provided by the Code calls for a specific fact-finding investigation to deal with a specific situation. It is not meant to provide a forum for an analysis of an employer's policy.* [My underline.]

[41] I would also refer Mr. Beauchamp back to paragraph [31] of this decision wherein I proposed the standard of proof that applies for a finding of danger. Having reviewed the facts presented in this case, I find that the evidence does not support a finding that a danger existed for either CO Knihniski or CO Doell at the time of health and safety officer Paydli's investigation of their refusals to work. That being the case, I confirm health and safety officer Paydli's decision made on December 28, 2002, that a danger did not exist for COs Knihniski or Doell.

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Douglas Malanka
Appeals Officer

Summary of Appeals Officer's Decision

Decision No.: 04-014

Appellant: Stewart R. Doell and Lorne Knihniski

Respondent: Treasury Board of Canada (Correctional Service Canada)

Provisions:

***Canada Labour Code*:** 122(1), 127.1(1), 128, 129, 145, 146.

Keywords: Danger, Regional Psychiatric Centre, minimum staffing levels, inmates, nurses, yard officer, inmate activities.

Summary:

On December 27, 2002, Corrections Officers (COs) Lorne Knihniski and Stewart Doell employed at the Regina Psychiatric Centre in Saskatoon, Saskatchewan reported to the their respective post units at approximately 15:00 hours. Corrections Officer Knihniski was informed by his supervisor that his Unit would operate for the remainder of his shift with 4 Corrections Officers, instead of the normal 5, and that the PC10 Yard Corrections Officer who served as backup to the Units was absent and would not be replaced. He immediately refused to work.

Corrections Officer Doell similarly learned that his post Unit would operate with one Correction Officer instead of the normal two officers, and that the PC10 yard officer was absent. He was additionally informed that, since the PC10 yard officer was absent, he would have to cover the Bow Unit in the event of an alarm. He informed his supervisor shortly thereafter that he refused to work.

Health and safety officer Paydli investigated the refusals to work on December 28, 2002, the day following the refusals to work. At the completion of his investigation, he informed COs Knihniski and Doell that a danger did not exist for either of them. Both Corrections Officers appealed his decision to an appeals officer. A hearing was held in Saskatoon on November 28, 2003.

The Appeals Officer reviewed the facts in the case and confirmed the decision of the health and safety officer that a danger did not exist for either employee at the time of the health and safety officer's investigation.