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

Correctional Service of Canada (CSC)
applicant

and

Dwight Guthro
employee

Decision No. 04-016
April 6, 2004

This case was heard by appeals officer Michèle Beauchamp, in Halifax, Nova Scotia, on May 7, 2003.

Appearances

For the applicant
Richard E. Fader, Counsel, Justice Canada
Alfred Legere, Deputy Warden, Springhill Institution, CSC

For the employee
Dwight Guthro, Correctional Officer, Springhill Institution, Correctional Service Canada (CSC)
Carlyle Brown, Correctional Officer, Springhill Institution, CSC

Health and Safety Officer
Matthew Tingley, Labour Program, Human Resources Development Canada

[1] This case concerns an appeal made under subsection 146(1) of the *Canada Labour Code* (the *Code*), Part II, by Correctional Services Canada (CSC), Springhill Institution, against a direction issued to CSC by health and safety officer Matthew Tingley on February 12, 2002.

[2] I retain the following from health and safety officer Tingley's written investigation report and testimony, as well as from the parties' written documents and testimonies.

[3] Correctional officer (CO) Dwight Guthro refused to work on February 10, 2002, pursuant to section 128 of the *Canada Labour Code*, for the following reason, noted in health and safety officer Tingley's investigation report:

> My reasons for doing this are that the large amount of syringes, plus scalpels that were taken from this crash cart, also the liquid drugs that were taken. I feel that the danger posed by the above is very real and feel that my working environment is not safe.

[4] At that time, CO Guthro was at work in Unit 11, in the men's side of the institution. He decided to refuse to work after being informed at the morning briefing that someone had broken into a crash cart at the Health Services Centre on February 9. He found it dangerous that although an inventory of what was missing, *i.e.* drugs, syringes and possibly scalpels, had been made on that day, no action had been taken to search and recover these items.

[5] Following CO Guthro's refusal to work, management implemented the Internal Resolution Process established under the *Code*. The institution was locked down and an exceptional search of the inmates and of the cells for the missing items was conducted.

[6] Springhill Institution accommodates both a male and a small female population. The institution is divided so as to prevent contact between these two groups and the female segregation unit is itself separate and apart from the female unit. At that time, there were a number of female inmates in the general female population and one female inmate in segregation.

[7] Management also conducted a risk assessment to determine if the one segregated female offender was to be included in the exceptional search. Based on this assessment, it was concluded that

- the female inmate was searched on January 21, as part of standard operating procedures prior to being placed in segregation;
- this search lasted more than four hours, during which the inmate was uncooperative and violent;
- there was a very remote possibility of her coming into contact with anyone in possession of the missing items;
- to search this female offender would most probably require the use of force;
- resorting to force could possibly result in the staff and/or the offender being injured and represent a dangerous situation in and of itself.

[8] On February 12, as a result of management's decision not to search the lone segregated female inmate, CO Guthro reiterated his work refusal of February 10 and HRDC was advised of his refusal to work.

[9] CO Guthro declared at the hearing that he thought that it was possible that the segregated female inmate could have had access to the stolen items. He was concerned about the possibility of being assigned to Unit 7 and the potential danger that her violent behaviour could represent to him. He decided to refuse to work because he wanted the missing items to be found. His main concern, he said, was to ensure the health and safety of the staff, as well as of himself.

[10] Health and safety officer Tingley investigated CO Guthro's refusal to work on that same day. He reported the following comments from a telephone conversation he held with CO Guthro on his continued refusal to work:

- That we didn't search all the inmates. When we had our meeting they said all inmates would be searched. She's had contact with the inmate committee at least twice.
- The inmates have supplied drugs to female inmates before. We've caught inmates by unit & before. They've jumped the fence.
- The inmate committee told IPSO Carlyle Brown that the cart had been broken into on Tuesday February 5th.

[11] Health and safety officer Tingley established that at the time of the work refusal, agreement had been reached between management and employees to begin going from a full lockdown to resuming normal activities. A fulltime guard was to be posted outside building 7, Women's Unit, Segregation Section, and security was to be enhanced within the unit so that contraband could not be transferred between the segregated female inmate and other female inmates.

[12] Health and safety officer Tingley determined that some 26 contraband items had been seized during the lockdown and search. This left many missing items unaccounted for and raised the possibility of contraband with the segregated female inmate. Given the nature of the seized items (sharpened tooth brushes, combs, sticks and drug paraphernalia), it was thought that contraband could be produced from common items obtained by inmates.

[13] With regards to the sole segregated female inmate, health and safety officer Tingley took into account that

- according to guards, she was in possession of a broom handle, a spray bottle of cleaning product and a heavy metal statue;
- she had covered the window and surveillance camera for her cell, so that every 15 minutes, guards had to do visual checks through her cell door hatch, during which checks she would apparently kick the hatch door, attempt to poke with the broom handle, throw food trays and spray chemical cleaner at the guards;
- she had lubricated her exterior to prevent guards from being able to restrain her;
- she had allegedly collected urine in containers and accumulated feces to deter being physically handled;

- one member of the Women's Institute Emergency Response Team felt that the team was properly trained and equipped to search the inmate and that it therefore would not jeopardize her health and safety;
- the general consensus of guards in Unit 7 was that there should be no exception to the search, in order to recover all possible contraband;
- members of the women's inmate committee claimed to have known that the crash cart had been broken into on Tuesday, although management did not come to know of it until the Saturday weekly inspection; and
- members of that committee had visited the segregated inmate during the week.

[14] Following his investigation, health and safety officer Tingley decided that a condition existed in the work place that constituted a potential danger for CO Guthro while at work. Consequently, he issued to Correctional Services a direction (Appendix A) stating that

> [a] search has not been conducted of all areas and inmates to affect recovery of contraband that may be used to harm employees during the course of their interactions with inmates.

and directing it, pursuant to paragraph 145(2) of the *Code*,

> to take measures to correct the condition that constitutes the danger no later than February 13, 2002.

[15] Correctional Services questioned the procedure used by CO Guthro to invoke Part II of the *Code*. In a letter sent on April 4, 2002, counsel Kerry Scullion pointed out to the appeals officer that the employee had re-activated his refusal to work while he was working in Unit 11 and because of the warden's decision not to search the lone segregated female offender.

[16] Counsel Scullion wrote:

> Officer Guthro was not "at work" on February 12, 2002 when H&S Officer Tingley issued his direction. His original refusal took place while he was at work in Unit 11. The reasons and conditions for his refusal while working in Unit 11 were reviewed and addressed by management. Those same reasons and conditions were not present on February 12, 2002.
>
> A review of all the facts i.e. separate female facility, segregation of the female offender, and the risk assessment conducted by the Warden suggest that the finding of danger above what is inherent in the workplace was not supported by the evidence and in the circumstances unreasonable and unjustified.
>
> CSC also submits that to comply with the direction issued, management had no alternative but to order the search one inmate and one cell. This is a substantial and, in these circumstances, unwarranted intrusion into management's right to manage. It is CSC's position that the direction was as unreasonable as the finding of danger by the H & S Officer as described above.

[17] He also proposed the following arguments in support of CSC's appeal of health and safety officer Tingley's direction:

> It should be noted that while the search for contraband is a constant and important procedure within the correctional environment, this particular exceptional search was conducted on specific grounds, namely the missing articles form the crash cart. Furthermore, for two consecutive days every inmate and every area within the institution was in fact searched, save and except the lone female offender and her cell in the female segregation unit.
>
> Management's decision not to search this offender was based on a risk assessment which consisted of a thorough, professional and objective review of all the information and circumstances including the health and safety of staff.
>
> CSC questions the procedure adopted on February 12, 2002 of re-activating or formalizing Officer Guthro's refusal to work of February 10, 2002. The February 10, 2002 refusal took place in another part of the institution and under different circumstances. Officer Guthro was not present in the female unit on February 10, or February 12, 2002, he has never been assigned to the female unit of the institution since its creation nor is he likely to be assigned to the female unit anytime in the future.
>
> CSC also maintains that management has the right to manage. A correctional facility is a complex environment where many interests and stakeholders are involved. The type of micro-managing that took place in these circumstances where a direction essentially orders the search of one inmate and one cell usurps management's authority and has the potential to create a dangerous precedent.
>
> The Warden reviewed the application of the exceptional search to the lone female offender in the segregation unit. He considered the following:
>
> a) The prime suspect in the theft was [XXX] whose cell was found to contain some of the missing items.
>
> b) There was no contact between the male population and any female offender let alone the female offender in segregation.
>
> c) The only contacts between the female inmate in segregation and the general population inmates were brief meetings with the chairwoman of the inmate committee who was frisked searched upon entering the segregation unit.
>
> d) None of the missing items were suspected of being in the female unit and after a thorough search of the entire area and the inmates nothing was found.

> Decisions, including decisions on intrusive searches and staff safety, are not and cannot be made based on remote possibilities and speculation. However, decisions are made based on probabilities, after careful and reasoned assessments by competent individuals.
>
> In the entire institution only one inmate and one 9' by 5' area was not searched. Based on this fact and this fact only the H & S Officer concluded that a danger above and beyond the danger inherent in the workplace existed. In issuing his direction the H & S Officer demonstrated a total disregard for the Risk Assessment conducted by management thereby appropriating management's role and authority

[18] For his part, counsel Richard Fader argued at the hearing that, as declared by the Federal Court in *Fletcher v. Canada (Treasury Board)*[1], the right to refuse was "an *ad hoc* opportunity … to ensure that their immediate work will not expose [employees] to a dangerous situation ... an emergency measure…". He also maintained that the right to refuse should not be based on hypothetical situations, nor is it meant to be used to challenge an employer's operational policy.

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[19] The only fundamental issue to be decided here is whether CO Guthro was indeed facing a danger within the meaning of the *Canada Labour Code*, Part II, when health and safety officer Tingley investigated his refusal to work on February 12, 2002.

[20] Paragraph 122(1) of Part II defines what constitutes a danger:

> "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.

[21] Paragraph 128(1) of Part II stipulates in what situations an employee may refuse to work:

> 128(1) 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
>
> (*a*) the use or operation of the machine constitutes a danger to the employee or to another employee;

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[1] Federal Court of Appeal, *Fletcher v. Canada (Treasury Board)*, [2002] F.C.J. No. 1541, 2002 FCA 424, Docket A-653-00, November 5, 2002

(*b*) a condition exists in the place that constitutes a danger to the employee;
(*c*) the performance of the activity constitutes a danger to the employee or another employee.

[22] There has been a number of decisions made by appeals officers and by the Federal Court on the definition of danger. One decision referred to in the employer's book of authorities, *Canada (Correctional Service) and Schellenberg*[2], clearly explains in a nutshell how to interpret the notion of danger, being an existing or a potential danger.

[23] Appeals Officer Douglas Malanka states, in paragraph 41:

> For a health and safety officer to find that a danger 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.

[24] Appeals officer Serge Cadieux's decision in *Leclair and Canada (Correctional Services)*[3], also referred to in the employer's book of authorities, explains what are the parameters within which an employee is authorized to refuse to work. He writes, in paragraphs 25, 26 and 27:

> [25] Section 128(1) provides specific conditions under which this right may be exercised by an employee in the workplace. Specifically, under paragraph 128(1)(a), the employee may refuse to use or operate a machine or thing if that employee while at work has reasonable cause to believe that the use or operation of the machine or thing constitutes a danger to the employee or to another employee. In this particular case, Mr. Leclair was not using or operating a machine or thing and therefore this aspect of the right to refuse is not an issue in the case. Clearly then, paragraph 128(1)(a) has no application in this instance.

[2] Appeals Officer Doug Malanka, *Canada (Correctional Service) and Schellenberg*, Decision 02-005, May 9, 2002
[3] Appeals Officer Serge Cadieux, *Leclair and Canada (Correctional Services*), Decision 01-024, November 19, 2001

[26] Similarly, under paragraph 128(1)(b), the employee may refuse to work in a place if the employee while at work has reasonable cause to believe that a condition exists in the place that constitutes a danger to the employee, the employee in this case being Mr. Leclair. Mr. Leclair has clearly stated in his testimony that there was no direct danger to him at any time and that he never felt that his health or safety could be jeopardized while he is working at his post. This is important because it could be argued that this provision could have some application to Mr. Leclair if he felt that the actions of the Institution were placing him at risk of injury. Since this is not the case, paragraph 128(1)(b) also has no application to Mr. Leclair, or to any other person for that matter, since this paragraph restricts its application to the refusing employee, not to other employees or inmates who, in passing, are not covered by the *Code*. Mr. Leclair was refusing because he felt that the actions of the Institution i.e. allowing four inmates to clean the Institution on the morning shift, would place the inmates, the cleaning supervisor and the guards that would accompany the inmates to their cells at risk of being injured. Mr. Leclair had a general concern for the people inside the Institution but manifestly, he had no concern for himself. Consequently, paragraph 128(1)(b) also has no application in the instant case.

[27] Finally, under paragraph 128(1)(c), the employee may refuse to perform an activity if the employee has reasonable cause to believe that the performance of the activity constitutes a danger to the employee or to another employee. However, the activity of Mr. Leclair on the day of his refusal to work was to provide essential security services within the Institution by working at the central post. There is simply no evidence that this activity was the source of any danger to Mr. Leclair or for that matter to any other employee, such as Mr. Finnigan who was working with the inmates, or to other guards on his shift. This provision may have found application had Mr. Finnigan refused to work with the inmates or had the guards refused to accompany the inmates to their cells however this was not the case although I am uncertain as to whether they would have been any more successful than Mr. Leclair given that performing those duties are a normal condition of employment as specified under paragraph 128(2)(b) above. The end result of this analysis is that paragraph 128(1)(c) also has no application to Mr. Leclair's refusal to work.

[28] The circumstances reported by Mr. Leclair do not authorize him to exercise a refusal to work. However, since the general concern expressed by Mr. Leclair related to health and safety concerns outside of section 128, his concerns should have been addressed through the Internal Complaint Resolution Process found at section 127.1 of the *Code*. That process concerns the general type of complaints that are expressed by employees outside the refusal to work provisions.

[25] I totally agree with these two Appeals Officers opinion. The three paragraphs, 128(1)(*a*), (*b*) and (*c*), demonstrate that one element is absolutely essential when refusing to work: the employee who refuses must, while at work at his post, be exposed to the existing or potential hazard that he claims represents a danger for him or for other employees. In other words, the employee must be "directly facing" the alleged danger while at his post.

[26] I must therefore ask myself if, in the present case, CO Guthro was indeed exposed to a condition that constituted a danger within the meaning of the *Canada Labour Code*, Part II, when health and safety officer Tingley investigated his refusal to work on February 12.

[27] It has been argued by the employer that CO Guthro was working in Unit 11, in the men's side of Springhill Institution, when he refused to work on February 10 regarding items stolen in the crash cart located within Health Services.

[28] CO Guthro himself confirmed that he was indeed working in Unit 11 when he refused to work on February 10 and when he reiterated his refusal to work on February 12, that he had not worked in or been assigned to Unit 7 and that he was not expecting to be assigned to Unit 7.

[29] When CO Guthro refused to work on February 10, management reviewed and addressed the reasons and conditions of his refusal, even though he was working in Unit 11. The warden implemented an Exceptional Search of the inmates and an Emergency Search of the cells for the missing items. The Health and Safety Committee Chairpersons' Written Investigation Report into CO Guthro's complaint confirmed that the complaint was founded and that the actions taken by management were appropriate.

[30] The employer maintained that those same reasons and conditions were not present on February 12, when CO Guthro reactivated his refusal to work and health and safety officer Tingley did his investigation.

[31] During his testimony at the hearing, health and safety officer Tingley did recognize that CO Guthro was not scheduled nor assigned to work in the female unit. He also declared that the segregated inmate did not pose a direct threat to CO Guthro, but that he was concerned that she could potentially represent a threat to other employees.

[32] Nevertheless, health and safety officer Tingley decided that

> … a condition in a place constitutes a danger to an employee while at work:
>
> A search has not been conducted of all areas and inmates to affect recovery of contraband that may be used to harm employees during the course of their interactions with inmates.

[33] I have to disagree with health and safety officer Tingley's decision that there was a danger for CO Guthro while at work.

[34] CO Guthro was not working in Unit 7 at the time of health and safety officer Tingley's investigation, nor was he expecting to be assigned to that unit. I believe that the facts clearly establish that there was never any condition at any time that represented a danger to CO Guthro while he was at his post in Unit 11.

[35] Furthermore, CO Guthro did not feel that the measures taken by the Institution were placing him at risk of injury. He felt that the fact that the measures did not include a search of the segregated female inmate and of her cell could pose a potential risk of injury to the correctional officers working in the female unit.

[36] To quote Appeals Officer Serge Cadieux again, "paragraph 128(1)(*b*) of the *Code* has no application to [CO Guthro], or to any other person for that matter, since this paragraph restricts its application to the refusing employee, not to other employees[4]."

[37] Consequently, I am rescinding health and safety officer Tingley's direction issued to the employer on February 12, 2002.

Michèle Beauchamp
Appeals Officer

[4] Appeals Officer Serge Cadieux, *Leclair and Canada (Correctional Services*), Decision 01-024, November 19, 2001

APPENDIX

In the Matter of the *Canada Labour Code*
Part II – Occupational Health and Safety

Direction to the Employer Under Paragraph 145(2)(a)

On February 12, 2002 the undersigned health and safety officer conducted an investigation following the refusal to work made by Dwight Guthro in the work place operated by Correctional Services Canada, being an employer subject to the *Canada Labour Code*, Part II, at Springhill, NS the said work place being sometimes known as Springhill Institution.

The said health and safety officer considers that a condition in a workplace constitutes a danger to an employee while at work:

A search has not been conducted of all areas and inmates to affect recovery of contraband that may be used to harm employees during the course of their interactions with inmates.

In accordance with the *Canada Labour Code*, Part II, section 124.
"Every employer shall ensure that the health and safety at work of every person employed by the employer is protected."

Therefore you are HEREBY DIRECTED, pursuant to paragraph 145(2)(a) of the *Canada Labour Code*, Part II, to take measures to correct the condition that constitutes the danger no later than February 13, 2002.

Issued at Springhill this 12th day of February 2002.

Matt Tingley
Health and Safety O-fficer

To: Correctional Services Canada

Summary of Appeals Officer's Decision

Decision No.: 04-016

Applicant: Correctional Services Canada

Employee: Dwight Guthro

Key Words: Existence of danger, direction

Provisions: *Canada Labour Code* 128(1)(*a*), (*b*) and (*c*), 145(2)
Regulations

Summary

After a correctional officer (CO) working on the men's side of the institution refused to work because someone had broken into a crash cart located in the Health Services Centre, management locked down the institution and made an exceptional search of the inmates and of the cells for the missing items.

The CO reiterated his refusal because even though an inventory of the missing items had been made, he found it dangerous that not all cells or inmates had been searched since the warden had decided not to search one segregated female inmate whose cell was located in Unit 7, the separate female unit.

After investigating, the health and safety officer decided that a condition constituted a danger for the refusing employee because not all areas and inmates had been searched to recover the items that could have been used to harm employees.

The appeals officer rescinded the health and safety officer's direction because paragraph 128(1)(*b*) of the *Code* has no application to the refusing employee since its application is restricted to the refusing employee and there was never any condition at any time that represented a danger to him while he was at his post in Unit 11: the employee had not been working nor was he expecting to work in Unit 7, he did not feel that the measures taken by the Institution were placing him at risk of injury but he felt not searching the segregated female inmate and her cell could pose a potential risk of injury to the other correctional officers working in the female unit.