Canada Appeal Office
on Occupational Health
and Safety

Canada

Bureau canadien d'appel
en santé et sécurité
au travail

Case No.: 2006-60

Interlocutory decisions
Decision No.: CAO-07-042 (A)

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Mahalingam Singaravelu
appellant

and

Correctional Services Canada (CSC)
respondent

November 29, 2007

This is a preliminary decision made by Appeals Officer, Michael McDermott, arising from an allegation of bias on his part made by the Appellant. A hearing was held in Kingston, Ontario, on Monday, October 29, 2007.

For the appellant
Mr. Singaravelu was initially represented in this case by Hameed Farrokhzad LLP but ceased to be so from March 13, 2007, and has represented himself since that date.

For the respondent
Ms. Jennifer Lewis, Counsel, Treasury Board Legal Services.

[1] This is a decision concerning an allegation of bias on the part of the Appeals Officer made by the Appellant, Mr. Mahalingam Singaravelu. The Appellant's substantive appeal was made pursuant to section 129(7) of the *Canada Labour Code,* Part II, (the Code) against a decision of no danger, issued initially on November 8, 2006, by Health and Safety Officer (HSO) Bob Tomlin, pursuant to section 129(4) of the Code, and subsequently re-stated in the HSO's narrative report of November 17, 2006.

[2] The allegation of bias, made initially in the Appellant's letter of May 15, 2007, centres mainly on certain of the contents of a telephone conference call with the Appellant and Counsel for the Respondent, convened by the Appeals Officer on April 10, 2007, and related comments in a letter sent by the Appeals Officer to both parties, on May 11, 2007. A compact disc recording of the telephone conference call was entered as Exhibit A.1 and the letter was entered as Exhibit A.3. At the hearing, the Appellant submitted a letter detailing his allegation, dated October 29, 2007, and entered as Exhibit A.2. To briefly paraphrase the Appellant's letter, he states that I was heard "laughing sarcastically" at one point in the conference call and that I was willful in my responses to his requests for access to his intranet and e-mail documents and in my interpretation of certain statements made by Counsel for the Respondent. These matters will be addressed below, following a summary of the background to the appeal and the steps taken since it was made.

[3] Mr. Singaravelu (the Appellant) an employee of Correctional Services Canada (the Respondent) invoked his right to refuse, pursuant to section 128 of the Code, on October 27, 2006. Specifically, he refused to perform the functions of the Institutional Fire Chief, part of his duties at CSC's Joyceville Institution, expressing the feeling that to do so would constitute a danger to the life, health or safety of himself, other CSC staff and inmates at the Institution. He claimed never to have been given adequate training by qualified instructors in order to perform the functions to the standard set out in the Commissioners' Directive.

[4] In his notice of appeal of the no danger decision, Mr. Singaravelu requested suspension of the "orders" given by the HSO pending the disposition of the appeal. This request was considered during a telephone conference hearing held on January 10, 2007. An oral decision, given at the conclusion of the telephone hearing, refused the request for a stay on the grounds that the Appeals Officer lacked jurisdiction to grant the request. The Appeals Officer's discretion to order a stay, pursuant to Section 146 (2) of the Code, only applies if a direction has been issued and the HSO did not issue a direction in this case. My oral decision was confirmed in a written preliminary decision issued on January 17, 2007.

[5] Subsequent to the telephone hearing, the Appellant, through Counsel who at the time represented him, expressed a preference to have the appeal resolved through written submissions. For example, in a letter to the Canada Appeals Office (CAO) dated February 23, 2007, his Counsel advised that "my client has taken the position that a hearing may not be necessary under the circumstances due to the strength and volume of the documentary evidence before the CAO". Counsel for the Respondent took the position that a full oral hearing was required because, among other reason, the employer wanted an opportunity to cross-examine the Appellant's witnesses. Given the lack of agreement, I requested the CAO to continue with steps to schedule mutually acceptable dates for hearing the substantive matter under appeal.

[6] A number of factors led to a delay in setting hearing dates that I do not find to be directly relevant to the Appellant's allegation of bias. Suffice it to say that it had become increasingly clear that the Appellant might benefit from clarification of the scope and procedural nature of the appeal process pursuant to Section 127(9) of the Code. It was also evident from material on file that there had been a history of differences between the Appellant and CSC dating back some time before he invoked the right to refuse on October 27, 2006. In the circumstances, I believed that mediation could offer avenues towards settlement or at least serve to provide clarification of the issues and procedures. Therefore, I asked the CAO to arrange a telephone conference call to discuss such a prospect.

[7] The telephone conference call took place on April 10, 2007. Prior to the call, the appellant wrote to the CAO on March 29, 2007, indicating that he would be participating in the conference call. He listed a number of matters for the Appeals Officer to consider before the call took place. Most specifically, he made seven requests ranging from a stay of the HSO's decision, through the suspension of financial penalties, the summoning of witnesses, production of documents, unlimited access to his intranet account and e-mail system and the conduct of at least part of the hearing at the Joyceville Institution.

[8] During the April 10 conference call, the Appellant indicated that his previous experience with CSC in mediation led him to believe that it would not be of assistance in this instance and he declined to accept it. Given that a hearing needed to be scheduled, I took time to address a number of the requests made in his letter of March 29, 2007, that, if left without comment would risk adding considerable and unproductive time to a hearing. I prefaced my remarks by pointing out that my role in this case is to hear and determine the appeal of the HSO's decision of no danger and that I would need to be convinced of the relevance of other matters. With respect to the specific requests, the Appellant appeared to have realized that I did not have jurisdiction to re-visit my preliminary decision on a stay application and

that jurisdiction on matters of financial penalties and discipline resides elsewhere. That left calling of witnesses, access to documents and holding of part of the hearing in Joyceville Institution to be addressed. It is the access to documents and to the Appellant's intranet and e-mail system, which are most relevant to the allegation of bias.

[9] The list in the Appellant's letter of March 29, 2007, included a specific request for his "supervising officers" to provide him "with a clear copy of all the confiscated documents, which they removed from my locker in my absence, by breaking open my personal padlock". The Appellant described these documents earlier in his letter as fire safety plans on which he had made markings. During the telephone conference they were also referred to as floor plans. Another request, more general in scope, sought to "arrange with the Respondent to provide unlimited access to my Departmental intranet account and to my emails system".

[10] Access to the intranet and e-mail system figured prominently during the telephone conference call. In summary, the Appellant maintained that he needed unlimited access to his personal accounts in order to ascertain what, among their contents, he required for his appeal. Counsel for the Respondent took the position that the intranet and e-mail system referred to and their contents were the employer's rather than the Appellant's personal property. She opposed unlimited access which, at one point, she characterized as a fishing expedition. She did, however, agree to respond to any specific requests for relevant e-mail exchanges and documents. With respect to the floor plans, Counsel for the Respondent agreed to consult the Institution to find out if they could be located. However, she stressed the extreme confidentiality of the floor plans relating as they do to a prison institution and said that, if located and produced, she could not agree to their leaving the hearing room.

[11] I was not prepared and did not believe that I had the authority at that point to grant a wide ranging and all embracing order for access to documents and e-mail exchanges. During the conference call, it appeared that the Appellant already had some knowledge of the documentary and e-mail exchanges that he required, in addition to those already in his possession. Parenthetically, I note that, as referred to in paragraph five above, he had at an earlier point expressed preference for proceeding on the basis of written submissions due to the strength and volume of documentary evidence he or his Counsel had already submitted. In order to move the process along, I advised the Appellant that he should provide a written request, with as much specific information as he could offer, with respect to the names of the correspondents, the approximate dates and subjects of the exchanges, and an indication of their relevance to his appeal. I added that the request must obviously be shared with the Respondent whose Counsel had

indicated the employer would endeavour to trace and supply relevant documents. Any further steps that might be required could be assessed in the light of the employer's response.

[12] The Appellant took particular exception to references made by Counsel for the respondent with respect to his access to the intranet and e-mail system having been blocked for security reasons. He said that it had only been blocked after he invoked Section 128 of the Code. He further indicated that there are no records to confirm that his access had been denied for security reasons and that there was no reason to doubt his reliability. The first rationale given by Counsel for the Respondent regarding the blocking of the Appellant's access to the intranet and e-mail was for "internal reasons". She made a subsequent reference to "for security reasons" at which point no comment was made. The Appellant did, however, become quite incensed after "for security reasons" was again cited by the Respondent's Counsel in the context of the request for production of the Joyceville floor plans referred to above. I appreciated that the Appellant had been offended by this reference to "security reasons" and sought to assure him that I had not taken it as a reflection of his security status. Counsel for the Respondent confirmed that her remarks were about the security of the Institution and that she was not insinuating or inferring that the appellant had security issues. Despite these assurances the reference to "security reasons" remained an issue for the Appellant and my response to and interpretation of the phrase figures significantly in his allegation of bias on my part.

[13] Following the telephone conference call on April 10, there was some further correspondence. In a letter to me, dated April 12, 2007, the Appellant requested that the statement made by Counsel for the Respondent with regard to security concerns be removed from the record of the telephone conference and that she provide him with a letter of apology. He also asked to be provided "access to my supporting evidences, which I have stored in my intranet account". On April 23, 2007, Counsel for the respondent replied stating that the employer has no intention of withholding documents that are relevant to the appellant presenting his case. However, she also indicated that the employer is not prepared to provide him with unlimited access to his e-mail account that had been frozen, adding, "such a request is tantamount to a fishing expedition". The same reply asked the Appellant to provide more specific information respecting the e-mails being sought. With respect to documents removed from his locker, she advised that four pieces of paper were found and sent to him. She added that the floor plans were not in his locker but that they had been found and the employer sought clarification as to their relevance. The Appellant wrote again the same day re-iterating his request for an apology from Counsel for the Respondent and stating that he did not formally authorize the Respondent's representatives to have access to his intranet account because he did not trust them.

[14] Sensing that the back and forth correspondence could continue, I wrote to both parties on May 11, 2007. In effect, the letter repeats and amplifies some points I endeavoured to make during the telephone conference call of April 10. Since it was entered at the hearing as Exhibit A.3, I will not detail its contents other than to say that my intention was to offer guidance on procedure and the scope of my jurisdiction and authority as the Appeals Officer. As indicated in the letter, I hesitated to comment on the matter of an apology and my only purpose in doing so was to assure the respondent that I had not taken anything said during the conference call as a reflection on his personal integrity. Although I made reference to the first reason given by Counsel for the Respondent for blocking the Appellant's access to the intranet and departmental e-mail, as "internal reasons" and referred to her later statement on "security reasons" when production of the Joyceville floor plans was being discussed, I did not include reference to her intervening and first mention of "security reasons". This omission appears to have contributed significantly to the Appellant's allegation of bias on my part.

[15] My May 11 letter asked the Appellant to provide the requested information, that is details of the documents he wished to access, by May 21, 2007. On May 15, 2007, the Appellant wrote to the Director of the Canada Appeals Office alleging that I was not dealing with his appeal "in accordance with the Canada Appeal Office mission (independent, unbiased quality service to all parties by treating them equally, fairly, and with understanding, respect and dignity)". Specific mention was made to my having said during the telephone conference call that I had "never heard" the references made to "security reasons" by the Respondent's Counsel and that I had reiterated my statement in the May 11 letter. Reference was also made to my having declined to advise the Respondent to provide the Appellant with the required access to his official e-mail account and to produce the required documents. The Appellant also alleged that I had instructed him to authorize the Respondent's representatives to have access to his e-mail account. He noted that I had denied his request to have the Respondent's Counsel apologize to him, adding that he did not wish his witnesses or himself to be crossed-examined by her until a letter of apology was received. The Appellant concluded his letter by requesting that another Appeals Officer be appointed to hear the appeal.

[16] On May 16, 2007, the Director of the Canada Appeals Office replied to the Appellant, with copies to me and the Respondent's Counsel, indicating that he did not have authority to change the assigned Appeals Officer and that the Appellant should address his grievance to me. On May 18, at my request, the CAO Acting Case Management Officer wrote informing both parties that I had instructed him to schedule two days of hearing in Kingston, Ontario, and offering the dates of my availability for the balance of

May and the month of June. He indicated that it was my intention to address the bias issue at the outset of the hearing and that, depending on its outcome, the parties should be prepared to proceed to the substantive matters under appeal. On May 22, 2007, the Appellant wrote again to the CAO Director saying that he failed to understand why another Appeals Officer could not be appointed and asking that I withdraw from the case. No reference was made to dates available for a hearing. (On May 26, 2007, the Legal Assistant to the Respondent's Counsel did reply to the May 18 letter indicating the employer's availability on June 19 and 20, 2007). The CAO Director replied to the Appellant on May 31, 2007, reiterating that he did not have authority to change the assigned Appeals Officer and again advising him to take his grievance up with me.

[17] Other exchanges of correspondence followed after the end of May. As I pointed out in a letter to both parties dated July 27, 2007, in essence the Appellant's allegations of bias had been repeated and even expanded, culminating in an allegation in his letter to the CAO Acting Case Management Officer, dated July 5, 2007, that I had colluded with Counsel for the Respondent. In the same letter, the Appellant indicated that he was willing to attend an appeal hearing in Kingston. However, this offer was virtually negated by his continued requests for my withdrawal from the case and the appointment of another Appeals Officer and, unless an apology was forthcoming from the Respondent's Counsel, for the employer to name a new Counsel.

[18] The purpose of the letter I sent to the parties on July 27, 2007, was to review the standing of the file as it then stood and to take steps to establish a date in October to hear the allegation of bias against me. The Appellant subsequently continued his requests to have me removed from the case and to express his unwillingness to attend a hearing convened by me. On August 29, 2007, the CAO Acting Case Management Officer wrote to both parties to schedule a one-day hearing in Kingston, Ontario, on October 4, 2007. The date was postponed and the hearing finally was held on October 29, 2007.

[19] At the hearing the Appellant submitted the letter of October 29, 2007, referred to in paragraph two above and entered as Exhibit A.2. At my suggestion he read the letter into the record. Before asking if Counsel for the Respondent wished to comment, I sought one clarification from the Appellant with respect to his written statement that the compact disc recording of the April 10 telephone conference call, received by him on October 27, 2007, "seems to have almost 99%" of the call and that some of his statements seem to "have been edited/excluded". It was unclear to me whether the Appellant's statement referred to a difference between the content of the disc he received from the CAO on October 27 and that of the disc sent to him by the Acting Case Manager on April 13, 2007, or whether

it referred to a recording of the call made by the Appellant himself. It is my understanding that the contents of the discs supplied to the Appellant by the CAO are identical with respect to the conference call of April 10. I have no knowledge of the content of the recording made by the Appellant. The issue was never fully clarified to my satisfaction even when I took it up subsequently during the hearing. However, the Appellant did indicate that he did not regard any differences in the recordings as substantial. That and the fact that he had not given any specific examples to substantiate his inferences of editing or exclusion led me to proceed without further consideration of the matter.

[20] On page two of his letter of October 29, 2007 (Exhibit A.2) the Appellant states that during the April 10 conference call, I and the Respondent's Counsel "responded by laughing sarcastically". I will address his concern about me in this respect below. When commencing her comments on the Appellant's letter, Counsel for the Respondent said that, if for any reason Mr. Singaravelu thought she was laughing at him personally, she wanted to make it clear that she would never laugh at a complainant. She added that the employer takes these matters seriously and indicated that if she laughed it was not intended to be a slight against the Appellant.

[21] With respect to other matters raised in the Appellant's letter of October 29, the Respondent Counsel's comments could be summarized under two related headings: the Appellant's concerns about references to "for security reasons", and requests for access to his internet account. With respect to the first concern, Counsel stated that she was not alone during the conference call but sitting with a representative from the employer who advised her that the Appellant's access to his internet account was blocked for security reasons. Counsel added that it was not a statement that she came up with on her own and that she had not previously intended to deal with the issue during the call. In response to the Appellant's comment at the top of page four of his letter, Counsel for the Respondent refuted his submission that her stating his access had been blocked for security reasons was a "deliberate attempt" to discredit him in the hearing. She explained that she was not in any manner attempting to discredit him when, at the time, discussing matters of relevance and disclosure of certain documents in his e-mail account.

[22] With respect to the Appellant's request for access to his internet account and to documents it contains, Counsel for the Respondent in effect repeated and expanded on the position taken by the employer given in her e-mail of April 23, 2007. While the employer is not prepared to provide the Appellant with unlimited access to his e-mail account, Counsel maintained that at no time has the employer indicated that disclosure would be withheld in response to requests for relevant documents. She elaborated that requests should give names of correspondents and specific dates and also

address the relevance to the appeal of the documents sought. With such information, the employer could make a search. Counsel did mention the Appellant having orally listed names of correspondents and subjects of correspondence during the April 10 conference call (also referred to in the last paragraph, page four of his October 29 letter, Exhibit A.2) but said that there had been some fading in and out during the call and that a written request was required. On a related matter of the Appellant's claim for personal ownership of his intranet and internet e-mail accounts, the Respondent's Counsel took the position that work and work related e-mails are the property of the employer and not of the employee.

[23] Counsel for the Respondent did express some understanding for the Appellant having different views from her and her client on his access and ownership rights with respect to e-mails and other documents. She felt that it could be daunting for an individual who makes a request for access to have parameters placed around that request. But she characterized this as part of the judicial system with which she, as Counsel, is familiar. In concluding, she introduced some case law relevant to the issue of bias that will be referred to below.

[24] In his response to the Respondent Counsel's comments, the Appellant emphasized his concerns over the references made to his access to the e-mail system having been blocked for security reasons. He maintained that the Respondent's Counsel should not simply have repeated what she had been told without having facts to substantiate her statement and that I should not have made a ruling without checking the record. With respect to the case law cited by Counsel for the Respondent, he expressed the opinion that the hearing is supposed to be of a quasi-judicial nature and that it is not necessary to bring in rulings of the Federal or Supreme Courts to complicate a simple administrative process.

[25] Following Counsel for the Respondent's remarks and the Appellant's response, I decided that it would be useful to listen to the sections of the compact disc recording of the April 10 telephone conference call referred to in the Appellant's letter of October 29, 2007 (Exhibit A.2). I wanted to ensure all parties to the hearing had together heard the same sections of the recording cited by the Appellant.

* * *

[26] In Volume 2, Chapter 11 of "Judicial Review of Administrative Action in Canada" (Crossback Publishing, Toronto) the authors Brown and Evans stipulate that the duty of fairness "requires the performance of functions free from material interest in the outcome and from bias or a reasonable apprehension of bias". As such, adjudicative decision-makers must both be and appear to be unbiased. They must not be subject to improper

influences or considerations when performing their duties and must base their decisions on an assessment of the evidence and the statute in question. With respect to a general test for reasonable apprehension of bias, Brown and Evans rely on that set out in the Supreme Court of Canada by de Grandpre J., writing in dissent, in Committee for Justice and Liberty v. National Energy Board. [1978] 1 S.C.R. 369 at p.394. This same test is cited in one of two cases referred to the hearing by Counsel for the Respondent namely, Baker v. Canada (Minister of Citizenship and Immigration) [1999] 2 S.C.R. 817, at paragraph 46. The relevant part of the Liberty reasons reads as follows:

> [T]he apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [T]hat test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude'. Would he think it more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

In the same reasons, the Justice adds, "The grounds for this bias must, however, be substantial" and he agrees with the Federal Court of Appeal which "refused to accept the suggestion that the test be related to the 'very sensitive or scrupulous conscience.' "

[27] The Baker decision, the first of the two decisions referred to the hearing by the Respondent's Counsel, resulted in a finding of a reasonable apprehension of bias on the part of a Canada Immigration Officer. The decision states that "the well-informed member of the community would perceive bias when reading" the Officer's comments that "do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes". It adds that the comments left the impression that the Officer "may have been drawing conclusions based not on the evidence before him".

[28] The second decision referred to the hearing by the Respondent's Counsel is a decision of the British Columbia Court of Appeal, Bennett v. British Columbia (Superintendent of Brokers) [1994] B.C.J. No. 2489. Without going into great detail, the case involved an allegation of apprehended bias against two members of a panel of the B.C. Securities Commission who had previously heard and participated in decisions on preliminary applications in an insider trading case. The third member of the original three-member panel had a financial interest in the success of the complaint against the applicants and, following an appeal, a new four-person panel was constituted that included the remaining two members of the original panel. An application for disqualification of the two original members, on grounds that their impartiality was tainted, was rejected by the new panel. The Appeal Court dismissed the subsequent application for leave to appeal the panel's ruling. The decision, at paragraph 17, notes that "[O]ther things

apart, it is, of course, reasonable to apprehend that a decision-maker presented for a second time with the same question on the same evidence and argument will be likely to decide that question in the same way. The next paragraph poses one short question, "[B]ut does this have anything to do with bias?" The question is answered in paragraph 19 as follows:

> The answer surely must be that if the decision-maker has decided the matter properly in the first place, then the fact that the second decision turns out to be the same as the first will show no more than that the decision-maker continues to take the same view as before of the law and the evidence. That surely has nothing to do with bias. There may well be an apprehension of consistency of judgment but surely it is impossible that a reasonable apprehension of consistency in judgment can be equated with a reasonable apprehension of bias.

Earlier in the decision, the Judge, at paragraph11, had stated the following with respect to bias:

> An allegation of bias is a serious charge against those who have accepted the obligations of independence which go with judicial or quasi-judicial office....To charge such persons with bias is not merely to say that they would be likely to decide matters in a particular way, but to say that they would do so improperly.

[29] No case law was cited at the hearing with respect to disclosure. Given the close similarity between the powers of an Appeals Officer with respect to production of documents considered necessary to decide a matter (Section 146.2 (a) of Part II of the Code) and the powers of the Canada Industrial Relations Board (CIRB) with respect to the production of documents it deems requisite to the full investigation and consideration of any matter (Section 16 (a) of Part I of the Code) Board jurisprudence in this respect is arguably relevant. In Air Canada et al., [1999] CIRB no. 3, at paragraph 28, the Board, after canvassing certain labour board and arbitral rulings on the scope of a summons for documents or a *subpoena duces tecum,* provides a clear and succinct list of the following six principles:

1. Requests for production are not automatic and must be assessed in each case.
2. The information requested must be arguably relevant to the issue to be decided.
3. The request must be sufficiently particularized so that the person on whom it is served can readily determine the nature of the request, the nature of the request, the documents sought, the relevant time-frame and the content.
4. The production must not be in the nature of a fishing expedition; that is, the production must assist a complainant in uncovering something to support its existing case.

5. The applicant must demonstrate a probative nexus between its position in the dispute and the material being requested.
6. The prejudicial aspect of introducing the evidence must not outweigh the probative value of the evidence itself, regardless of any possible "confidential" aspect of the document.

While the above cited reasons for decision relate specifically to the case then before the Board, the list of principles is of more general application and for the most part consistent with my understanding of procedures regarding access to and the production of documents in proceedings before administrative tribunals.

* * *

[30] The Appellant ceased to be represented by Counsel in March 2007 and has relied in a number of instances on his own understanding of the law and of procedures appropriate for hearings held by administrative tribunals. For example, he did not accept the responses and advice from the Director of the Canada Appeals Office with respect to the Appeals Officer's jurisdiction to hear and decide, in the first instance, the allegations of bias. I can understand the Appellant questioning the process but it has logic and I see no reason to challenge the CAO Director's response. Similarly, the Appellant's remarks at the hearing, after Counsel for the Respondent had canvassed jurisprudence, are at odds with accepted practice. The premise that an Appeals Officer possesses powers that remove the need to take account of Federal and Supreme Court jurisprudence is not sustainable. Again, I understand why the Appellant might draw such a conclusion but that does not make it correct. I make these observations because I believe that the Appellant's views on the law and process have contributed to his feeling that his appeal is not being conducted fairly.

[31] The Appellant first claimed that I was not dealing with his appeal in an independent and unbiased manner in his letter of May 15, 2007, to the Director of the CAO, the contents of which are briefly summarized in paragraph 15 above. He elaborated on his allegation of bias in his letter of October 29, 2007, introduced as Exhibit A.2 at the hearing in Kingston on the same date. I will respond first to the issue the Appellant raises with respect to my having denied his request for access to the intranet and e-mail accounts; secondly, I will address his concerns regarding the references to security reasons; and lastly, I will consider the matter of my laughter during the recording of the telephone conference call of April 10, 2007.

[32] Underlying the issue of access to the Respondent's intranet and the e-mail system and the documents they contain is the Appellant's strongly held opinion that the accounts in his name are his property. He also appears to

interpret an Appeals Officer's ability to compel the production of documents, pursuant to Section 146.2 (a) of the Code, to be an unfettered power. In the first place, I accept the Respondent Counsel's submission that the intranet and e-mails system and work and work related documents created by an employee while in the employ of an employer, belong to that employer. That does not mean that an employee does not have a right to access particular documents, in this case documents necessary to pursue an appeal. However, an Appeal Officer's powers do not automatically grant authority to throw the door wide open and grant blanket access. Issues of specificity and relevance in accord with the principles outlined in the CIRB reasons for decision cited in paragraph 29 above must be taken into account. I find this applicable even in this case where the Appellant has originated or been involved in an exchange of the documents sought.

[33] As indicated, earlier in the appeal proceedings the Appellant, at the time through his Counsel, had proposed proceeding on the basis of "the strength and volume of the documentary evidence before the CAO". During the April 10 conference call he orally cited a number of exchanges of correspondence. Both instances suggest that he would be able to provide a written request with sufficient specific information that would enable the employer to search for the documents concerned. The respondent's Counsel does not need to excuse a preference for a written request because there was some fading in and out on the line during the conference call. It is reasonable that she and her client should expect a written request with as much specific information and indications of relevance as the Appellant is able to muster.

[34] The Appellant has claimed that access to his e-mail was blocked after he invoked the right to refuse pursuant to Section 128 (1) of the Code and that it continued to be blocked in order to deny him access to documents needed for his appeal. It has not been made altogether clear to me whether it was access to the e-mail alone that was blocked or whether it was part of a broader issue of the employer restricting access to its premises, imposing financial penalties and other disciplinary measures. Both the Appellant and the Respondent's Counsel have referred to other proceedings being underway. I have no detailed knowledge of such matters and need none. However, if there is an allegation of financial and disciplinary steps having been taken against the Appellant because he exercised the right to refuse, then the appropriate manner in which to pursue a complaint would be pursuant to Section 133 of the Code.

[35] Assuming that the Appellant's allegation is restricted to the continued blocking of his e-mail in order to deny him access to documents needed for the appeal, I have yet to be convinced that such specific blocking is taking place. Counsel for the Respondent stated during the conference call of April 10, 2007, and confirmed in her e-mail of April 13, that "the employer

had no intention of withholding documents that are relevant..." However, the process requires that the Appellant make a request in the form described above which is the same form I set out orally during the conference call and repeated in writing in my letter to the parties of May 11, 2007 (Exhibit A.3). The Respondent would be given an opportunity to respond to the request, either by producing some or all of the documents concerned, seeking an opportunity for argument on relevance, or denying some or all of the request with reasons. As Appeals Officer I would then have to decide on next steps. As stated in the letter of May11, "On receipt of such a request and the respondent's reply, I will consider what order, if any, might be needed to ensure that the appellant has adequate information to pursue his appeal". There has to date been no such written request received and therefore no reason for the subsequent steps to be followed. Another consequence is that no case has been substantiated that the Appellant would be deprived of access to documents relevant to his appeal. Such a matter could only be determined after proper process has been observed.

[36] In summary on access, I accept the Respondent's submission that the e-mail system and the work and work related documents contained therein are the employer's property. I maintain the position that I am not prepared to issue a blanket order for the Appellant's access to the system but acknowledge that he is entitled to access documents relevant to his appeal. However, to facilitate his access he should make a written request to commence the process described above. Any similarity in these views with the positions taken by the Respondent is simply a consequence of sharing similar opinions on the scope of the law and the nature of procedures relating to access to documents. It is not, as alleged by the Appellant, evidence of my bias or of collusion with the Respondent's Counsel.

[37] In my letter of May 11, 2007, to both parties (Exhibit A.3) I hesitated to address the Appellant's concerns about references to "for security reasons". I again hesitate to comment because there is the potential that I might further aggravate the matter. That is certainly not my intention. The Appellant was deeply offended by the references and I fully understand why that was so. However, in a strict sense, the security issue is not germane to the appeal or clearly within my powers as the Appeals Officer to rule on. The employer has given security reasons for blocking the Appellant's access to its e-mail system. Again, it is not clear to me whether this was an action taken by the employer only with respect to the e-mail system or whether it was in the context of broader restrictions. If it was the latter, it involves matters beyond my jurisdiction. If it was the former, it is possible that I would have sufficient jurisdiction to inquire further and make a ruling. However, I could only do so if I concluded, as the Appellant in effect alleges, that the employer's rationale of "for security reasons" is a sham and that the intention is solely to block his access to documents needed to

pursue his appeal. I do not see how I could ever get to the point of considering such a prospect while the Appellant continues to refrain from following accepted procedures with respect to requests for access to documents. As outlined above, those procedures involve considerations of specificity and relevance.

[38] The Appellant's claim that I showed bias with regard to the "for security reasons" issue rests essentially on the different interpretations he and I have of the term in the context in which it was stated. There is also the related matter of what "I heard" or "did not hear" during the April 10 conference call. The Appellant took the references to mean that his personal security clearance status was being questioned. He earnestly complained that he had no security violations recorded against him and that the Respondent had no information on which to base such statements. He judged that the Respondent's intention was to discredit him in the eyes of the Appeals Officer. He referred to his lengthy career and subsequently sent me testimonials from former employers and supervisors including a very favourable performance review signed by the Director of CSC's Ontario Regional Staff College, dated June 13, 2006 and covering the period he worked there.

[39] My interpretation of the references made during the April 10 conference call to "for security reasons" was that they referred to the security of a correctional institution and to the employer's control of its documents. The Appellant's reference in his letter of October 29, 2007 (Exhibit A.2) to my saying that "I did not hear Ms. Lewis saying anything on security matters" is a somewhat restrictive version of my remarks. I did elaborate to the effect that I did not hear anything in the remarks to spoil his image or question his personal reliability. I included similar sentiments in my letter to the parties of May 11 (Exhibit A.3) and endeavoured to assure the Appellant that I had not taken anything the Respondent's Counsel said "as a reflection on his personal integrity". I was using the verb to hear in a figurative but often used sense when I said "I did not hear" or "that's not what I'm hearing". I was not claiming that something was had not been said but simply indicating my understanding of what had been said.

[40] In summary, my jurisdiction with respect to matters arising from the Appellant's security status and related remarks made during the April 10 conference call, is narrow. In contrast, the Appellant's and my interpretation of the term "for security reasons", as used in the course of that call, differ widely. Even on the assumption that I could have been convinced at some subsequent point to share the Appellant's view of the remarks, the fact that I differed from him at the time does not constitute bias or warrant an apprehension of bias.

[41] Laughing during the conference call of April 10, 2007, is the issue I have found the most delicate to consider. In his letter of October 29, 2007 (Exhibit A.2) the Appellant characterizes the incident as "Mr. McDermott and Ms. Lewis responded by laughing sarcastically" and adds that "an unbiased/average person....would agree that their laughing would have been humiliating". It was not an issue that he had dwelt on in correspondence he sent before October 29 but he did elaborate on his concern during the hearing. Whether or not the laughing merits the qualifier "sarcastically", it is clear that the Appellant thought so and I sincerely regret any offence or anguish caused to him. I want to assure him that I was not laughing at him or failing to take his appeal seriously.

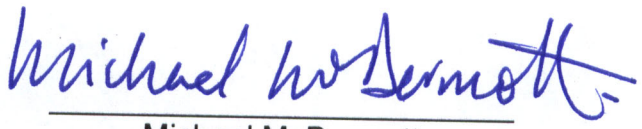
[42] I have listened several times to the complete recording of the April 10 telephone conference call. The laughing cited comes after the Appellant has concluded his statement indicating that he does not wish to participate in mediation. I then ask Counsel for the Respondent to comment. Ms. Lewis starts by saying "hello" followed by a short and, to me, somewhat nervous sounding laugh. Then an even shorter laughing sound is heard from me before Counsel continues with her comments. At the hearing, Ms. Lewis stressed that she was not laughing at the Appellant personally and that it was not meant as a slight against him. For my part, I can only repeat that I was not laughing at the Appellant or in anyway denigrating his appeal. My brief laugh, scarcely a laugh and not sarcastic, was unfortunate but involuntary. It constitutes at most a second in a conference call of over an hour and I do not believe that any reasonable and independent person, informed of the full content of the call, would apprehend bias on its account.

[43] I have endeavoured throughout my consideration of the allegation of bias to look at the evidence presented and the submissions made from the perspective of the reasonable persons envisaged in the quotation from the Liberty case cited in paragraph 26 above. I have posed the question, again using the criteria set out in the quotation, would those persons having informed themselves, having viewed the matter realistically and practically and having thought the matter through, conclude that I had not made rulings fairly? In the more succinct words of Bennett et al, would "well informed members of the community" discern an apprehension of bias in the way I had conducted the telephone conference call and communicated in writing with the parties? Would independent but fully informed observers find that I had been subject to improper influences as the Immigration Officer in the Liberty case had been found to be, or would they find, in words used by Brown and Evans, that I had based my rulings "on an assessment of the evidence and the statute in question"?

[44] I have examined the three elements of the allegation of bias in the light of these questions. With respect to access to the employer's e-mail system and documents therein, I based my ruling on my understanding of the law,

jurisprudence and procedures governing the production of documents and I believe that reasonable and well-informed persons would not apprehend bias in this regard. Insofar as the "for security reasons" issue is concerned, even though my interpretation of the remarks differed from that of the Appellant, I maintain that well-informed members of the community would find my interpretation reasonable in the context of the telephone conference discussion and free from bias. Lastly, with respect to laughter, I do not believe that an independent observer who listened to the complete recording of the telephone conference would conclude that such a momentary and involuntary act would constitute an apprehension of bias. In short, I conclude that, in all three respects, there is nothing to indicate that I have made rulings thus far improperly or that I would not continue to decide fairly in this appeal.

[45] For the reasons stated I do not find merit in the Appellant's allegation of bias. I retain jurisdiction to hear the appeal. I remind the Appellant of the need to provide a written request for the production of documents he deems necessary to conduct his appeal in the form specified in the second full paragraph on page two of my letter to the parties of May 11, 2007 (Exhibit A.3). The issues raised in this allegation of bias have taken proceedings some distance from the substance of the appeal, namely a Health and Safety Officer's decision of no danger following a refusal pursuant to Section 128 (1) of the Code. I urge that any request for the production of documents should demonstrate some relevance to the substance of that decision and the appeal. The request should be sent to the undersigned Appeals Officer and copied to Counsel for the Respondent no later than December 21, 2007. The Respondent should reply no later than January 11, 2008.



Michael McDermott
Appeals Officer