Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Case No.: 2006-60
Decision No.: OHSTC-08-016

Interlocutory decision
Decision No.: CAO-07-042 (A)
Decision No.: CAO-06-052 (S)

Canada Labour Code
Part II
Occupational Health and Safety

Mahalingam Singaravelu
appellant

and

Correctional Services Canada (CSC)
respondent

July 10, 2008

Decision OHSTC-08-016 rendered by Appeals Officer Michael McDermott. A hearing took place in Kingston, Ontario, on Thursday, March 27, 2008.

For the appellant
Mr. Singaravelu represented himself.

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

[1] This decision concerns an appeal made on November 10, 2006, pursuant to subsection 129(7), of the *Canada Labour Code,* Part II, (the *Code*) by the appellant, Mr. Mahalingam Singaravelu. The appeal was made against a decision of absence of danger, issued initially on November 8, 2006, by Health and Safety Officer (HSO) Bob Tomlin, pursuant to subsection 129(4) of the *Code*, and subsequently re-stated in the HSO's narrative report of November 17, 2006.

[2] Mr. Singaravelu, an employee of the respondent, Correctional Services Canada (CSC), 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, indicating in writing that he felt 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 CSC Commissioner's Directive.

[3] There have been two preliminary decisions issued by me in this case. The first such decision was with respect to a request for a stay of the "orders" given by the HSO pending disposition of the appeal. The matter was considered during a telephone conference hearing held on January 10, 2007. At the conclusion of the hearing, I dismissed the request on the grounds that an Appeals Officer lacks jurisdiction to grant a stay of a decision of absence of danger made pursuant to subsection 129(7) of the *Code*. An Appeals Officer's discretionary authority to grant a stay, pursuant to subsection 146(2) of the *Code*, applies only when a direction has been issued by an HSO. No direction was issued in this case since a decision pursuant to subsection 129(7) does not constitute a direction within the meaning of the *Code*. My oral ruling was confirmed in a written decision issued on January 17, 2007.

[4] The second preliminary decision concerned an allegation of bias on the part of the Appeals Officer, made initially by the appellant in a letter dated May 15, 2007, to the Director of the Canada Appeals Office. (The Canada Appeals Office has since been renamed The Occupational Health and Safety Tribunal Canada). The allegation of bias included: references to my not having acceded to a request by the appellant to have the appeal decided on the basis of written evidence and submissions; my refusal to grant the appellant blanket access to his intranet e-mail account at CSC; my interpretation of comments concerning "security reasons" made by Counsel for the respondent during a procedural telephone conference call on April 10, 2007, that he perceived as an attack on his integrity and reputation; and, an allegation that I had laughed sarcastically during the same conference call. A hearing was held on the issue of bias in Kingston, Ontario, on October 29, 2007. On November 29, 2007, I issued a comprehensive written decision rejecting the allegation of bias and noting that "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".

[5] The November 29, 2007, decision details the nature and content of the allegations of bias that the appellant made about me and I will not repeat them at length here. While it would appear that he did not accept my reasons for decision in general and continued to oppose my hearing the appeal, it was his request for access to e-mail records that he endeavoured most ardently to revisit during the hearing on March 27, 2008. It is an issue that the appellant has pursued since very early in the proceedings and to which I have been consistent in my response. In a procedural telephone conference call on April 10, 2007, I informed him that I required a written request from him, with a copy to the respondent, listing as much specific information as possible, including names of persons with whom there had been exchanges, subject matter, approximate dates and relevance to the appeal. I reiterated this position in a letter to both parties on May 11, 2007, and confirmed that, on receipt of the request and the respondent's reply, I would consider what order, if any, might be needed to ensure that the appellant had adequate information to pursue his appeal. No such written request was received. In my decision on bias, I paid specific attention to the issue and made reference to jurisprudence on the matter. At the conclusion of the reasons for decision I drew further attention to the need for a written

request for the production of documents and for the need to demonstrate relevancy to the appeal. The issue has continued to inhibit progress on the substance of the appeal of the absence of danger decision. The appellant appears to believe that an Appeals Officer's authority to order the production of documents that the officer considers necessary to decide a matter, pursuant to paragraph 146.2(a) of the *Code*, is an unfettered power. No amount of explanation to the contrary has convinced him otherwise.

[6] While the hearing had been scheduled for March 27 and 28, 2008, in Kingston, Ontario, it only lasted for just over two hours in the morning of the first day and concluded with the appellant withdrawing from the hearing and indicating that he did not wish to proceed under my authority. At the outset, on March 27, I covered the usual preliminary and procedural matters including reference to the decision that is under appeal. The appellant indicated that he would not be calling witnesses. Counsel for the respondent gave notice that she intended to call three witnesses: Mr. Bryan Joyce, Chief Plant, Maintenance at CSC's Joyceville Institution who would also be acting as Counsel's adviser, and Mr. David Kearny and Mr. Wayne Buller also from CSC. The appellant declined his option to request exclusion of witnesses from the hearing room until they were called.

[7] From the outset, it became apparent that the appellant had not prepared a particular approach to presenting his case other than to await what he heard from others and to question and interject as and when they gave their testimony. With respect to documentary evidence, the appellant continued to pursue his claim for full access to his intranet e-mail account at CSC. I recalled the reasons that I had previously given on this issue, including reference to the letter I had written to both parties on this and other procedural matters, that is the letter mentioned in paragraph five above dated May 11, 2007.

[8] A further issue with respect to documentary evidence was the appellant's apparent unwillingness to accept that the considerable documentation he had filed with the Canada Appeals Office previously would need to be formally and properly entered at the hearing. Assuming that the appellant had decided to testify, he would have been afforded the opportunity to demonstrate the validity and relevance of the documents as evidence. The respondent would, of course, have had a reciprocal opportunity to test that validity and relevance in cross-examination. The appellant did not appear to accept that the documents would need to be marshalled and presented in a coherent fashion at the hearing if he wished to use them in making his case. Counsel for the respondent offered to provide relevant documents that she had with her for copying in order to assist the process.

[9] The issue of access to the e-mail documents and the matter of documents previously filed with the Canada Appeals Office needing to be properly entered at the hearing, took some time to address at the beginning of the hearing. I endeavoured to explain the reasons for both procedures but was constantly interrupted by the appellant who said that he was not prepared to attend a hearing without access to the documents he had been asking for. On at least two occasions he did seek to submit a document but I asked him to wait until after the Health and Safety Officer (HSO) had testified.

[10] The first and, as it turned out, the only witness to testify at the hearing was HSO Bob Tomlin. An HSO is not a party to the appeal but is usually summoned, as Mr. Tomlin was in this case, by the Appeals Officer to give a narrative account of his or her involvement and the decision arrived at. Both parties are offered an opportunity to question or cross-examine the HSO. Mr. Tomlin testified that he attended Joyceville Institution on October 27, 2006, following notification of a refusal to work in case of danger. He met with the appellant who had initiated the refusal in the presence of Ms. Lisa Manson-Shillington, employee representative on the work place health and safety committee. He listened to the appellant's reasons for the refusal. He then met with both parties. Mr. David Kearny, at the time Acting Chief of Plant Maintenance at Joyceville, joined the group representing management. Mr. Tomlin said that he listened to the parties' respective positions and was given some documentation by the appellant. He said that, after that meeting, he subsequently met with other representatives of CSC management, Mr. Wayne Buller and Mr. Richard Paquette the Regional Safety Officer. He said that he made his decision of absence of danger based on the fact that the appellant was in a back to work program with duties that required him to work approximately two days per week. His written decision and narrative report of November 18, 2006, elaborated on these reasons noting that only two of the duties assigned to the appellant included responsibilities associated with the Institutional Fire Chief (IFC) function and that the total workload represented about two days per week. He further noted that the appellant had "in the past competently completed duties of the IFC at Millhaven/Bath and the Staff College". The HSO's decision and report were entered as exhibit S-4, along with attached documents almost all of which he had received from the appellant.

[11] In his cross-examination of the HSO, the appellant agreed with Mr. Tomlin's account of the first two meetings, that with himself and Ms. Manson-Shillington and the subsequent one which Mr. Kearny also attended. He then asked Mr. Tomlin to confirm that Mr. Kearny had advised him (the HSO) to meet Mr. Brian Joyce and Mr. Tomlin did confirm that this advice had been given. The appellant then questioned whether subsequent meetings that the HSO had with management staff from CSC, at which neither he or his Health and Safety Committee representative were present, conformed with the requirements of the *Code*. There followed a lengthy exchange on this matter. The appellant maintained that the HSO's decision had been influenced by subsequent meetings and accused him of collusion. For his part, the HSO took the position that when the meeting concluded on October 27, 2006, that part of his investigation was completed and that he was not conducting any further investigations at that point. He stated that he did conduct what he termed other investigations and research outside of the Institution and that he arrived at his decision based on the information he received on October 27 and on information he obtained after leaving the Joyceville Institution. He added that the process he had followed is a very common way of conducting an investigation. He stated that his decision was delivered in the presence of both parties.

[12] Had the hearing continued to a logical conclusion the matter of the correctness of the investigation process could have been further explored. Two of the witnesses that the respondent's Counsel had indicated she would call, Mr. Buller and Mr. Joyce, could have responded to questions on the nature of their contact with the HSO and on the information provided to him.

[13] Counsel for the respondent had two questions for the HSO. The first concerned the HSO's understanding of the role Mr. Kearny was fulfilling when he spoke to him during the investigation. The HSO stated that Mr. Kearny was the Acting Chief Plant Maintenance and the employer's representative. The second question sought clarification of the statement in the HSO's report of November 17, 2006, that two of the appellant's duties included responsibilities associated with those of the Institutional Fire Chief and that the total workload represented two days per week. Counsel suggested that there was some confusion on this matter and that Mr. Kearny would testify that the total workload is more likely two days per month. She asked if Mr. Tomlin would have any reason to disagree with him on that. The HSO replied that his understanding was that it was two days per week but that he would have no reason to challenge the different information.

[14] The appellant's re-examination of the HSO concerned matters relating to his reporting relationship and supervisors, as well as the information on the required hours of work and how it had been obtained. The HSO confirmed that he had obtained the hours of work information from CSC management.

[15] I sought clarification from the HSO on the Assurance of Voluntary Compliance form (AVC) concerning the responsibilities of the Institutional Fire Chief (IFC) position, obtained from CSC and dated November 8, 2006. He said that, after discussions with Mr. Buller and Mr. Paquette, he learned that there had been concerns that training had not been complete and that a committee had been meeting to discuss training requirements for persons performing the IFC duties. I inquired why, given that no danger was found, a document seeking to correct a situation was received. Mr. Tomlin replied that at the time the refusal was initiated, he understood that the appellant was only working two days a week under a back to work program with limited duties and did not see that there was a danger to him or to others.

[16] During the HSO's testimony, the appellant frequently interrupted before the witness completed his answers to the questions asked. He also interrupted me when I asked that he allow the witness time to respond. My question to the HSO seeking clarification on the practice with respect to receiving AVCs caused the appellant to accuse me of putting words in the witness's mouth and he launched an at times heated intervention accusing me of bias. When I intervened to urge getting on with the proceedings he responded to the effect that he had not come to the hearing to discuss this matter but to show how unfairly he had been treated. He demonstrated misunderstanding of procedures that had been explained previously. For example, he implied that his requests for the appearance of witnesses had been ignored. My letter of May 11, 2007, to both parties had explained the summons process followed by the Appeals Office and the requirement for the requesting party to arrange for service of the summons. To my knowledge, no requests for summoning witnesses to appear have been received from the appellant or on his behalf. Just mentioning names in a letter or in passing is not sufficient and the appropriate process had been made clear.

[17] At this point the appellant again sought to submit a document. It was provided to Counsel for the respondent who advised that it appeared to be more in the nature of final argument and that he might want to save it for that purpose. However, after further discussion, the

document was submitted as Exhibit A-5 and the appellant agreed to read it into the record. The document is actually addressed to the Case Management Officer at the Occupational Health and Safety Tribunal and is headed as being "Hand delivered on March 27, 2008, at the hearing in Kingston". Initially it briefly refers to the appellant's objections to the investigation procedures followed by the HSO and to the Assurance of Voluntary Compliance (AVC) the latter received from CSC management. These points are supplemented in two footnotes. The first of which alleges that the HSO did not conduct his investigation in conformity with subsection 129(1) of the *Code* and the second relates, among other things, to the content and follow-up of the AVC.

[18] The balance of the document submitted by the appellant continues his objections to procedural rulings made by me on various matters such as access to documents and re-states his allegations of bias and collusion on my part. Most of the points have been responded to in my interlocutory decision on bias or, as in the case of the appropriate way to summon witnesses, in previous correspondence with both parties. When he states, for example, that he was not provided "with the required documents to summon Mr. Wayne Buller", he overlooks the guidance I gave in my letter of May 11, 2007, to which he did not respond by requesting preparation of a subpoena. In any event, Mr. Buller was to be called as a witness by the respondent and the appellant would have had every opportunity to cross-examine him. With respect to the appellant's reference to my "social acquaintance" with the former Legal Counsel for CSC, he is using a term I employed when, after first becoming aware that Mr. Harvey Newman of Treasury Board Legal Services was scheduled to take over the case from CSC Legal Services, I wrote to both parties on February 5, 2007, informing them of an acquaintanceship that had existed over twenty-five years previously. In the event, Mr. Newman withdrew from the file.

[19] The appellant concludes the document by again alleging bias on my part and expressing his "inability to continue the instant appeal as it is currently constituted under the adjudicative authority of Mr. McDermott." He adds that he does, "not recognize the legitimacy of Mr. McDermott's authority to preside over this hearing and therefore cannot in good conscience bind myself to the necessary oath or solemn affirmation that is required to give evidence and make submissions to this honourable tribunal".

[20] Having read his statement into the record, the appellant began packing his things and prepared to leave the hearing room. In response to my question as to whether or not he was withdrawing his appeal, he said that he was not doing so. However, he maintained when questioned further that he was not prepared to continue with the proceedings under my adjudicative authority and referred me to the wording in his statement to that effect. Counsel for the respondent's comments were confined to her concerns that, since the appellant was refusing to take an oath or to affirm, it would be difficult to proceed with evidence without an opportunity to cross-examine. I adjourned the hearing indicating that I would consider next steps.

[21] On many occasions, as I attempted to explain procedure to the appellant and to advise him that he could not re-visit settled issues, he aggressively interrupted me and made allegations of bias and prejudice when he disagreed with what I was saying.

[22] On May 1, 2008, after reviewing the proceedings of the hearing, as well as those of the previous preliminary hearings and relevant correspondence, I wrote to both parties. I noted the stalemate caused by the appellant's continued refusal of my authority to conduct the appeal and his unwillingness to take an oath or affirm if I stay as the Appeals Officer in this case. I also indicated that I remained of the view expressed in my interlocutory decision on bias of November 29, 2007, that "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". I concluded by asking for their arguments as to whether or not I should proceed to decide the matter on the evidence filed at the hearing thus far, seeking replies by May 15, 2008. The appellant replied on May 9, 2008. The respondent asked for an extension and replied on May 23, 2008. The appellant sent a rebuttal on May 26, 2008.

[23] In his reply of May 9, 2008, the appellant re-visited the matter of access to documents contained in his e-mail intranet account at CSC. He also referred to the documents that he had sent to the Appeals Office previously, ignoring the need explained during the hearing for these documents to be properly entered at a hearing if he wishes to use them to present his case. The issue of my bias was raised again alleging that I have demonstrated a closed mind to his submissions. He once more questioned the legitimacy of my authority to hold a hearing on the bias allegations despite information to the contrary conveyed to him by the Director of the Canada Appeals Office in letters dated May 16 and May 31, 2007. The appellant concluded by indicating that, if I do not recuse myself from the case, he "looked forward to receiving the final decision in this matter".

[24] In her letter of May 23, 2008, Counsel for the respondent stated that, "first and foremost, it is the employer's position that the appellant has either withdrawn or abandoned his appeal". Counsel based this position on the contents of Exhibit A-5 citing, among other points, the appellant's statement therein concerning his "inability to continue with the instant appeal as it is currently constituted under the adjudicative authority of Mr. McDermott". In the event that I do not conclude that the appeal has been withdrawn or abandoned, the employer's position is that I "can and should proceed to decide the matter based on the testimony given and the evidence filed so far". Counsel finds it significant that the appellant did not testify and that she has had no opportunity to cross-examine him. She maintains that the case law is clear and that he who asserts must prove a *prima facie* case. She submits that the only testimony given at the hearing was that of HSO Tomlin and the only evidence before the Appeals Officer is the HSO's finding of absence of danger that she claims remained uncontradicted.

[25] In his rebuttal of May 26, 2008, the appellant states that he did not withdraw his appeal and says that he responded accordingly to my direct question on the matter. He submits that the HSO violated investigative procedures and that he reached his decision of absence of danger arbitrarily. With respect to Counsel for the respondent's comment on not having an opportunity to cross-examine him, the appellant offers "if the Tribunal requests" to submit himself for cross-examination adding that he should also be allowed to cross-examine the respondent's representatives. With respect to the latter point, the appellant's right to cross-examine the respondent's witnesses had never been at issue. In the letter he also re-visits the question of bias stating that the reason why he left the hearing on March 27, 2008, was indicated in the statement that he delivered the same

date (Exhibit A-5). He concludes by once more questioning my authority to have heard the bias allegations and asking the Canada Appeals Office (now the Occupational Health and Safety Tribunal Canada) to consider appointing another Appeals Officer.

[26] Initially, it is necessary to consider whether or not the appellant has in fact withdrawn or abandoned his appeal. In response to my direct question on this matter, posed after he had submitted his document of March 27, 2008, he said that he was not withdrawing his appeal. When as the appellant prepared to leave the hearing I again asked the question, he referred me to the contents of Exhibit A-5. In that document the appellant indicates his inability to continue with his appeal stating clearly that the appellant does not recognize the legitimacy of my authority to conduct the hearing. His letter of May 9, 2008, does not materially modify his position other than to invite a decision to be issued in the event that I do not recuse myself. In his rebuttal letter of May 26, 2008, he maintains that he has not withdrawn his appeal but continues his allegations of bias. He asks again for the Canada Appeals Office to determine whether the matter should be referred to another Appeals Officer. He indicates that if requested by the Tribunal he would submit to cross-examination. This echoes what he said at the March 27, 2008, hearing to the effect that he would respond to a subpoena.

[27] Although the appellant insists that he has not withdrawn his appeal, it is arguable that he has abandoned it by insisting that he will not pursue his case if I remain as Appeals Officer. It is significant that his letter of March 27, 2008, (Exhibit A-5) was prepared prior to the hearing commencing and that he endeavoured to introduce it early in the proceedings. In the least it suggests that his purpose in attending the hearing was not to pursue his appeal but to re-visit issues that had been determined and, as he said at one point, to show how unfairly he had been treated. In his rebuttal letter of May 26, 2008, the appellant states that he would respond to a request from “the Tribunal” to submit to cross-examination. An obvious response is that it is up to the appellant himself to decide to pursue his appeal and not for the Tribunal or the respondent to force him to do so. Apart from that, any weight that might be accorded his late-hour and conditional offer is negated by the appellant’s continued efforts in the same letter to have me, by name, removed from the case. After considering all relevant matters, I have concluded that the appellant has maintained the position he stated in his letter of March 27, 2008, (Exhibit A-5) concerning his “inability to continue with the instant appeal as it is currently constituted under the adjudicative authority of Mr. McDermott”. I responded to the bias allegations in my interlocutory decision of November 29, 2007, and found no grounds to recuse myself. I remain of that opinion.

[28] Despite the prospect that the appellant has abandoned his appeal, I will allow the benefit of the doubt and take his statement that he has not withdrawn his appeal at face value. As such, I will proceed to render a decision as requested in his letter of May 9, 2008. This is also in line with the alternative course proposed in Counsel for the respondent’s letter of May 23, 2008, that if I do not conclude that the appellant has withdrawn his case, I can and should proceed to decide the matter based on the testimony and evidence given at the hearing so far.

[29] It is important to recall that the appeal is of HSO Tomlin's decision of absence of danger issued initially on November 8, 2006, and re-stated in his narrative report of November 17, 2006. That decision did not uphold the appellant's refusal to perform the functions of the Institutional Fire Chief, part of his duties at CSC's Joyceville Institution. As detailed in paragraph two above, the appellant believed that to do so would constitute a danger to himself and others and claimed that he had never received adequate training. That is the substance of the appeal and, as noted by Counsel for the respondent, the only testimony and evidence presented on that substance is that given by HSO Tomlin.

[30] During his cross-examination of HSO Tomlin, the appellant questioned whether the investigation of his refusal had been conducted in accord with subsection 129(1) of the *Code*. The provision requires an investigation to be undertaken in the presence of the employer, the employee and an employee member of the work place health and safety committee. In his testimony HSO Tomlin stated that he met together with the appellant, Ms. Manson-Shillington his workplace safety committee member and Mr. Wayne Buller the employer representative, on October 27, 2006. He took the position that, when the meeting concluded, that part of his investigation was over. He further stated that he subsequently conducted further investigations and research outside of the Institution. Neither the appellant nor his representative were present at such meetings. As noted above in paragraph twelve, had the hearing continued, the nature of the subsequent investigations and research could have been further explored. However, even if I had concluded after further inquiry that the investigation process was flawed, as the Appeals Officer I could have proceeded *de novo* to hear the underlying substance of the appeal, that is the validity of the appellant's refusal pursuant to subsection 128(1) of the *Code*. (See Douglas Martin and PSAC vs. Attorney General of Canada, 2005 FCA 156 at paragraph 28).

[31] Whether heard strictly as an appeal of the HSO's decision or as a *de novo* consideration of the refusal of dangerous work, the appellant would need to make his case. An Appeals Officer's powers pursuant to subsection 146.2 of the *Code* are wide and afford discretion in the way a hearing may be conducted. As such I allowed the appellant considerable latitude in the way he conducted his interventions at the hearing but he chose to use that latitude largely to re-visit decided issues. An appellant must at the very least present his case and expect that any testimony made or evidence submitted will be tested as to validity and relevancy. The appellant has neither testified nor introduced documentary or other evidence into the hearing to support his appeal. He has had ample opportunity to do so. In recognition that he has been self- represented, he has from early on been offered advice on procedures such as the production of documents and the manner in which witnesses may be summoned. That advice has generally exceeded what is normally offered to a party. He has not followed advice and has continued to contest it. He has taken preliminary and procedural decisions he disagrees with to be evidence of bias rather than a reflection of jurisprudence or practice.

[32] On the basis of the testimony adduced and the evidence submitted at the hearing and given the failure of the appellant to present a case to the contrary, I find that the appeal has not been substantiated and that, pursuant to paragraph 146.1(1)(a) of the *Code*, the decision of the Health and Safety Officer is confirmed. Consequently, the appeal is dismissed.

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Michael McDermott
Appeals Officer

Summary of Appeals Officer Decision

Decision: OHSTC-08-016

Appellant: Mahalingam Singaravelu

Respondent: Correctional Services Canada

Provisions: *Canada Labour Code*, Part II 129(7), 129(4), 128, 146(2), 127(9), 146.2(a), 129(1), 128(1), 146.2, 146.1(1)(a)

Keywords: decision of absence of danger, Institutional Fire Chief, interlocutory decision, evidence, withdrawal, abandon,

Summary:

On November 10, 2006, Mr. Mahalingam Singaravelu appealed the decision of absence of danger rendered by Health and Safety Officer (HSO) Bob Tomlin on November 8, 2006.

On Thursday March 27, 2008, a hearing took place in Kingston, Ontario.

Further to his review, the Appeals Officer confirmed the decision of HSO Tomlin. The appeal is therefore dismissed.