Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Date: 2014-08-25
Case No.: 2011-53

Between:

Dennis Fletcher, Appellant

and

Correctional Service of Canada, Respondent

Indexed as: *Fletcher* v. *Correctional Service of Canada*

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision rendered by a health and safety officer.
Decision:	The decision that a danger does not exist is confirmed.
Decision rendered by:	Mr Michael Wiwchar, Appeals Officer
Language of decision:	English
For the Appellant:	Mr Jack Haller, Bargaining agent, UCCO-SACC-CSN Atlantic
For the Respondent:	Ms Caroline Engmann, Counsel, Treasury Board, Department of Justice
Citation:	2014 OHSTC 15

REASONS

[1] This matter concerns an appeal brought under subsection 129(7) of the *Canada Labour Code* (the Code) of a decision that a danger does not exist rendered by Mr Matthew Tingley, health and safety officer (HSO) on September 23, 2011.

Background

[2] The appellant is employed as a correctional officer (CO) in the structured living environment (SLE) at the Nova Institution for Women in Truro, Nova-Scotia. The Nova Institution for Women is based on a residential housing, residence style living units and direct observation living units. The SLE is a separate living unit which operates to support the "intensive intervention strategy for women" with a goal of providing additional mental health and security for women. The SLE can accommodate up to eight offenders that require specific mental health intervention. Inmates residing in the SLE are evaluated as medium security and live at the SLE on a voluntary basis.

[3] COs employed at the SLE are referred to as "primary workers" (PW). At the time of the work refusal, there was one PW assigned to the SLE per shift (day and evening shift). A PW is assigned to the SLE between the hours of 7:00 am and 11:00 pm.

[4] The SLE is staffed on a 24-hour basis and is operated on an interdisciplinary approach involving PWs and mental health professionals such as behavioral counselors (BC).

[5] In the summer of 2011, prior to his work refusal, the appellant provided an 11-page submission to the warden requesting a second PW be posted to work during the day-shift in the SLE. The request was denied.

[6] On September 1, 2011, an additional PW was temporarily assigned to the SLE for the arrival of a new offender ("inmate A") while the appellant was on duty. Around 11:00 am on September 2, 2011, the second PW was assigned to different duties, away from the SLE. As a consequence to the second PW being assigned to different duties away from the SLE, the appellant exercised his right to refuse to work pursuant to section 128 of the *Canada Labour Code*.

[7] The appellant explained in his work refusal statement that current working conditions at the SLE have changed, namely, that the SLE was not being operated in accordance with the SLE's operational plan. He stated that the normal working conditions at the SLE have changed for the following reasons:

1. Inter-Disciplinary Team on 2011-09-01 identified at risk offenders ie: offenders not medication compliment, inter-personal issues, etc
2. An increase in High needs inmates; history of violent assaults, including a recent assault with a weapon on a staff member
3. Sporadic clinical support
4. Unable to isolate and contain violent offenders; limited static controls
5. Recent assaults and numerous escalated verbal assaults in the SLE

6. Current Section 127 by USGE

[8] The appellant was requesting that a second PW be permanently assigned to the SLE between 7:00 am and 11:00 pm in order to resolve his work refusal.

[9] In the course of his work refusal, a meeting was held between the appellant, the union representative and the duty correctional manager. During that meeting, the appellant explained that the motives for which he refused to work arose from the limited psychological services and clinical support in comparison to the past. According to him, the clientele had significantly changed in the last two and a half years which consequently lead to an exponential increase in the number of offenders with a violent history; an increase in verbal arguments; offender assaults; offender refusal to follow staff directions, along with the situation of high needs offenders getting worse since April 2011. He added that there was a danger for COs arising from the absence of proper clinical support and training to establish standards, because the employer had not taken all necessary steps to eliminate, reduce or control the hazard.

[10] As a result, the employer conducted a threat risk assessment (TRA) as part of their investigation. The employer cited the following reasons in denying the appellant`s refusal request:

1. All offenders housed in the SLE are assessed at medium or medium security and as such, the offenders currently housed in the SLE have been deemed an assumable risk;
2. All offenders currently residing in the SLE were assessed via a coordinated care committee (CCC) consisting of SLE staff as being suitable SLE candidates;
3. Weekly interdisciplinary team meetings (IDT) are conducted in the SLE with the purpose of discussing each offender's progress within the SLE;
4. All PWs are provided with a personal portable alarm (PPA) and handcuffs as part of their standard uniform. Nova's standing practice involves officers responding to all PPA alarms in the institution;
5. All PWs are trained in the "situation management model, self-defence, arrest & control and use of force" procedures;
6. All PWs posted to the SLE have access to OC spray located in a secure cabinet in the SLE office;
7. There have been no staff assaults in the SLE or uses of force at least as far back as January 1st 2011;
8. In regards to the incident dated August 22, 2011, whereby an inmate assaulted another inmate, at no time did the inmate threaten or assaulted a staff. The said offender was placed in administrative segregation following the assault and she complied with all staff directions concerning such placement;
9. Verbal altercations between offenders are expected from the offenders residing in the SLE, and not considered outside the norm. It is also expected that SLE offenders will be dysregulated and have interpersonal difficulties, which are some of the criteria of admission to the SLE Unit;

10. An offender not following staff direction is not considered out of the norm either, since PWs from other housing units within the institution are confronted with similar behaviour;
11. Concerning the appellant's belief that there is no sufficient clinical support provided to women, one additional BC will be assigned to the SLE between 2:30 pm and 11:00 pm, from September 2nd till September 5th inclusive. Given the holiday weekend; there would not be a psychologist on site during this time. An additional BC would assist with the SLE's new admission of inmate A late on September 1, 2011, which was expected to cause some dysfunction.

[11] After the appellant was notified that a second PW would not be permanently assigned to the SLE, he informed the employer that he would uphold his work refusal.

[12] HSO Tingley conducted his investigation between September 19 and 22, 2011. As a result of his investigation, the HSO found that "although the SLE has been subject to changes, the measures in place provided an environment that would constitute normal conditions of employment in a correctional institution" and therefore he concluded that a danger did not exist.

[13] A hearing was held in Halifax, Nova Scotia, between April 8 and 11, 2013, including a visit of the SLE on the morning of April 8, 2013.

Issues

[14] The issue to determine in this matter is whether the appellant was exposed to a danger when he refused to work on September 2, 2011, and if so, whether this danger was a normal condition of employment.

Submissions of the parties

[15] The parties' final submissions were received on June 5, 2013.

A) Appellant's submissions

[16] In addition to the appellant's own testimony the following witnesses were called: Ms M. Ellsworth, Ms B. Harrison, Ms P. Marchbank, Ms M. Wallace, Ms S. Bulmer, Ms O. Tynes, all of whom are PWs at the Nova Institution for Women as well as P. Maynard, a BC.

[17] The appellant submitted that he was justified in invoking his statutory right to refuse to work in the SLE on September 2, 2011, because of an existing danger and a potential condition, namely, the arrival of inmate A who he characterized as violent. The appellant sustained that, based on the needs of inmates in the SLE, the violent history of inmate A, the lack of adequate psychological services to monitor the women in the SLE and the recent history of assaults, he reasonably expected to experience an incident in the SLE at some point in time, causing him injury before the hazard could be corrected by the employer.

[18] The appellant's submissions centered around four main arguments as to why it was believed a danger was present on the day of the work refusal:

1. The SLE does not follow the SLE operational plan;
2. Changes in the climate of the SLE including increased violence, assaults and non-compliance;
3. The arrival of inmate A created a hazard of assault on the day of the work refusal; and,
4. The difficulty to isolate and contain incidents.

[19] The appellant testified to what he viewed as contraventions to the SLE operational plan. First, he indicated that he was aware of one inmate who was obliged to receive treatments within the SLE or she would be relocated to the maximum security unit. He also stated that another inmate was required to reside in the SLE by her parole officer, which is, according to him, contrary to the SLE operational plan which states that the residents reside in the SLE on a voluntary basis. In parallel, the appellant testified that he knew of another unclassified inmate living with the SLE with a history of assaults, whereas the SLE operational plan states that only minimum and medium classified inmates can reside in the SLE. The appellant added that even though the SLE operational plan states that after-hour admissions are not permitted, inmate A was admitted after-hours. It is the appellant's view that the after-hours admission of inmate A was potentially dangerous as her mood had not been assessed by a manager prior to her arrival within the SLE. The appellant also explained that maximum security inmates were left unescorted in the SLE, which is also contrary to the operational plan.

[20] The appellant submitted that maximum security inmates were being reclassified purposefully to medium security so they could reside in the SLE. Last, he testified that only one quiet therapeutic room was available at the time of his work refusal, whereas the SLE operational plan stated that two quiet rooms should be available. According to the appellant, all these changes to the SLE are in contravention to the operational plan and increase the hazard and it does not constitute a normal condition of employment for the sole officer in the SLE.

[21] In regard to changes in the climate of the SLE, including increased violence, assaults and non-compliance, the appellant testified to an escalation in incidents in the SLE prior to the work refusal, he cited a violent incident between two inmates a few weeks prior to his work refusal. Ms Marchbank and Ms Maynard also testified with regard to a violent assault between inmates which occurred a few weeks prior to the work refusal.

[22] The appellant testified that the arrival of inmate A concerned him because of her violent past. Ms Marchbank provided evidence to the effect that inmate A was admitted to the SLE the night before the work refusal. Evidence provided at the hearing revealed that inmate A had assaulted a staff member with a chair at her former institution, in July 2011, causing injury. It was noted by the appellant that inmate A's previous institution benefited from a full-time psychologist whereas women in the SLE received sporadic

clinical support. According to the appellant, he was exposed to a danger due to the removal of the second PW on the morning of inmate A's arrival which changed his working conditions.

[23] Testimony was presented to the effect that PWs were to use their personal portable alarms (PPA) when they need support to isolate and contain a situation. Mr Macleod, deputy warden, testified that the PPA carried by officers often went off accidentally or periodically malfunctioned. The appellant explained that the PPAs notify officers from different units to assist in the event of an incident once the PPA is activated. The appellant highlighted the distance between the SLE and the main building where other officers come from to respond. He added that the PPA only alerts central control of the building where a PPA is depressed, not the exact location of the incident inside the building. The appellant also pointed out to the absence of a camera inside the building and that OC spray is locked in a cabinet in the office which makes it difficult to use in the event of an incident. The appellant claimed that PPAs are not reliable as Ms Tynes testified that the PPA was often malfunctioning, as well, Mr Macleod indicated that the PPAs would often go off accidentally.

[24] Ms Ellsworth testified about being assaulted by an inmate in the SLE in July 2009, causing her injury. Also, that it took approximately 10 minutes for responding officers to arrive after a serious injury from the assault was experienced.

[25] The appellant submitted from the testimony of witnesses that the different deficits between dialectical behavior therapy (DBT) and psychological rehabilitation (PSR) clients, saying that in his view, these populations should not be mixed. The appellant testified to the lack of DBT training for the front line workers and that PSR training was no longer offered.

[26] The appellant testified that having a second officer would mitigate the risk, as offenders are more compliant when a second officer is present. He added that a second officer can isolate and contain a situation better, without having to wait for an officer from another unit to respond to the PPA. He explained that the only other areas within the institution where officers work alone are the areas of visitors and correspondences, admission and discharge, principal entrance, dog handler and security maintenance office. The appellant argued that none of those areas have the same level of risk than the SLE.

[27] The appellant testified that he disagreed with the HSO's decision that a danger did not exist and pointed out to what he considered as shortcomings with the HSO's investigation. He testified that the HSO did not have access to the notes on inmate A, that he did not interview officers who had witnessed an assault after his work refusal nor did he interview an officer who had suffered injuries further to an assault by an SLE inmate. The appellant is of the view that the HSO based his opinion that a danger did not exist on an inmate assault that took place after this work refusal when two PWs were present. The appellant also raised that the HSO did not interview key witnesses or read the incident report related to the assault. In addition, the appellant is of the view that the HSO should have inquired further on an assault on Ms Ellsworth, which was not done. Last, the

appellant claimed that the HSO did not give enough weight to the concerns of the appellant, as an experienced CO.

[28] In support of its arguments, the appellant referred to *Crystal Glaister* and *Correctional Service Canada*, CAO-07-008. In that case, Ms Glaister, a CO, exercised her right to refuse to work when she was posted to work alone in a gym. The appeals officer found that there was a reasonable possibility that she would be subject to injury during an assault by an inmate. The appellant drew my attention to paragraph 45 of the decision which stated that, in the eventuality of an attack, an officer may not be able to activate his PPA. In addition, the appellant cited paragraph 47, where it is explained that, because Ms Glaister's tasks were modified to include the added responsibility of doing rounds alone in the gym, this no longer constituted a normal condition of employment.

[29] The appellant pointed out that the appeals officer in *Glaister* stated that the definition of danger required the determination of the circumstances in which the activity could be expected to cause injury, and that it be established that such circumstances will occur in the future, not as a mere possibility, but as a reasonable one. The appellant then cited the appeals officer who stated that:

> when an employer changes the conditions of employment by significantly modifying the responsibilities of an employee, those controls, security policies and procedures must be reviewed through a job hazards analysis, to determine if any new hazards can be identified, if the measures in place can adequately respond to those new hazards or if new measures will need to be put into effect. Implementing a modification without doing so, exposes the employees to a potential hazard for which there may be no procedure to deal with.

[30] The appellant maintained that the HSO erred when he found there was no danger in his decision dated September 2, 2011. The appellant also specifically requested that I order that a second CO be posted on every shift in the SLE at Nova Institution for Women.

B) Respondent's submissions

[31] The respondent's case consisted of the testimony of the following witnesses: Mr S. MacLeod, deputy warden, Ms D. Pyle, manager, and Ms L. Bernard, assistant warden.

[32] In its written submission, the respondent agreed with the HSO's finding that an absence of danger ought to be upheld in this case and concurred with the HSO's decision that although the SLE had been subject to changes, the measures in place provide an environment that would constitute "normal conditions of employment" in a correctional institution.

[33] The respondent submitted that the potential hazard identified by the appellant appears to be "inmate assault - verbal and / or physical", directly or indirectly resulting from inmate contact. The respondent pointed that in a correctional setting, the hazard of

"inmate assault" is not possible to completely eliminate in accordance with the measures set out in section 122.2 of the Code and that, in such instances, control measures must be put in place in order to bring the hazard within safe limits. The respondent disagreed with the appellant's view that because the hazard of inmate assault cannot be entirely eliminated, the solution would be to post a second PW to the SLE. The respondent is of the view that a second PW would neither act as a deterrent against inmate assault nor facilitate the PW's ability to "isolate and contain" in the event of an assault.

[34] The respondent submitted that the combination of controls and measures put in place properly reduce and control the hazard of "inmate assault", thereby, reducing the risk to the appellant.

[35] The measures and controls cited by the respondent include:

a) Closely assessing, monitoring and reviewing inmate classification, selection and placement within the SLE;
b) Ongoing therapeutic support for SLE inmates;
c) The required general and specialized training of COs working in the SLE;
d) Dynamic security, ongoing assessing, monitoring and information-sharing through shift briefings, unit log books, minute books and offender management system;
e) Correctional Services policies relating to inmate charges and discipline; and,
f) Personal protective equipment issued to correctional officers, including PPAs, radios, phones, spit mask, OC spray and protective gloves.

[36] The respondent denied the allegation that it did not adhere to the SLE operational plan, clarifying that the operational plan provided for a "model that will evolve as staff work together in a team environment". In response to the appellant's assertions that maximum security inmates were purposefully reclassified as medium security to reside in the SLE, the respondent claims that this is incorrect. The respondent indicated that inmate reclassification can occur at any time if there is a specific event triggering a change in the situation of the inmate or otherwise, the general review period for assessment if every 6 months.

[37] With regard to the appellant's testimony to the effect that some inmates were forced to stay at the SLE, the respondent stated that this is hearsay since no evidence was adduced to that effect. Further, with respect to the appellant's claim that inmate A was admitted after-hours, in contravention to the operational plan, the respondent directed me to the section of the operational plan referring to after-hour admissions which stated that "Flexibility for admission may be exercised by the Co-ordinated Care Committee".

[38] The respondent also clarified that inmate A's parole officer stayed until her arrival to ensure her smooth transition to the SLE. The respondent also spoke to the allegation that maximum security inmates were left unescorted in the SLE and indicated this also was incorrect. The respondent explained that maximum security inmates were escorted at all times to and from the SLE, and stayed in the custody of employees responsible of SLE programs. It is asserted by the respondent that at all times relevant to the present appeal;

decisions and actions were consistent with the basic tenets of the SLE operational plan and did not create a situation of danger for the appellant.

[39] Regarding the appellant's allegation that inmate A created an additional hazard, the respondent submitted that she had been evaluate by the coordinated care committee (CCC), like all other inmates residing in the SLE, and that she was assessed as a medium security offender.

[40] Responding to the appellant's argument that removing the second PW from the SLE on the day of the work refusal changed his working conditions, the respondent explained that the appellant's working conditions were not changed, rather, they were simply brought back to normal. The respondent stated that the appellant's normal working condition is to work as the only PW in the SLE, along with the other staff.

[41] Referring to the Federal Court of Appeal decision *Canada (Attorney General)* v. *Fletcher*, 2002 FCA 424 at paragraph 38, the respondent has taken the position that a HSO or appeals officer investigation is not meant to provide a forum for an analysis of the employer's policy. It submitted that the implementation of such policy combined with various security and administrative control measures in place do not expose employees to a danger within the parameters of the Code. According to the respondent, day and evening shifts at the SLE are sufficiently staffed to safely carry out the requisite security activities. It is the respondent's position that the exposure to potential violence from inmates along with the degree of unpredictability of human behaviour is inherent to the duties of the PW.

[42] Regarding the right to refuse to work set out in section 128 of the Code, the respondent argued that it is an ad hoc opportunity given to employees at a specific time and place to ensure that their immediate work will not expose them to a dangerous situation; that the short term well-being of an employee is at stake, not hypothetically or speculatively. In support of its argument, the respondent referred to *Fletcher* and *C. Byfield and Correctional Service of Canada, Decisions No: 03-007*.

[43] The respondent submitted that the refusal to work mechanism is an emergency measure, a tool in the hands of employees when faced with a condition that could reasonably be expected to cause injury or illness to him or her before the hazard or condition can be corrected. Such right is limited and must be exercised in a particular context; it is not meant to be used as a means to interfere with the employer's ruling policy. It put forward the argument that within the parameters of the Code, the danger being the substratum of the refusal to work, must be perceived to be immediate and real, the risk to the employees must be serious to the point where the machine or thing or condition created may not be used until the situation is corrected. Such danger, the respondent argued, must not be inherent in the work so as to constitute a normal condition of work.

[44] Furthermore, the respondent submitted that the determination of the existence of a danger by the HSO must be persuasive, taking into consideration all the aspects of the definition of danger and coming to the conclusion that they are supported by facts. This

would mean according to the respondent, in reference to *Correctional Service of Canada and Larry DeWolfe and Neil S. Campbell, Decision No. 02-005* and the above mentioned *Byfield*, that the facts must persuade that (1) a hazard or condition will come into being, (2) an employee will be exposed to the hazard or condition when it comes into being, (3) there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto and, (4) the injury or illness will occur immediately upon exposure to the hazard or condition.

[45] In addition to the aforementioned arguments, the respondent referred to the test for danger articulated by the Federal Court in *Canada Post Corporation* v. *Pollard*, 2007, FC 1362, and confirmed by the Federal Court of Appeal in the same case 2008 FCA 305, which established that: (1) the existing or potential hazard or condition, or the current or future activity in question will likely present itself; (2) an employee will be exposed to the hazard, condition, or activity when it presents itself; (3) exposure to the hazard, condition, or activity is capable of causing injury or illness to the employee at any time, but not necessarily every time; and (4) the injury or illness will likely occur before the hazard or condition can be corrected or the activity altered.

[46] It is the respondent's position that the assessment of the nature of the hazard is twofold: subjective and objective. In support of this opinion, the respondent referred to a case from the Canada Labour Relations Board (CLRB), *Brunet* v. *St. Lawrence and Hudson Railway Company Limited* (Re Brunet), [1998] CLRBD No. 21. The appellant suggested that the circumstances in *Brunet* where it was held that the sensational aspects of the conditions caused by the ice storm crisis should not overshadow the real nature of the risk involved, were similar to the ones in the case at hand, where the sensational aspect of the admission of inmate A to the SLE should not overshadow the real nature of the hazard or risk involved, and therefore calling for the same finding.

[47] The respondent provided me with ample case law related to the case at hand, referring first to the *DeWolfe* decision from this tribunal. The issue in that case, as the respondent explained, was to determine whether a potential hazard or condition existed so as to constitute a danger according to the definition of the Code. The allegation in *DeWolfe* was the employee was in danger because management had understaffed their units, tension was high, and inmates had threatened the complainants on the day of the work refusal. In that case, the appeals officer held that in order to conclude to the existence of danger within the context of a correctional officer, it is necessary to establish that an inmate would act upon it specific threat then and there, or at any moment in the future, otherwise the threat would remain hypothetical or speculative. The respondent suggested that as in *DeWolfe*, no evidence suggested in the case at hand that inmate A would have become violent in the SLE.

[48] The respondent indicated that the provisions of the Code provide an exception to an employee's right to refuse unsafe work where it can be demonstrated that the condition or danger is a normal condition of employment. Such danger is the residual danger with remains after all measures have been undertaken in order to eliminate or mitigate it. The responded referred to the test articulated by the Federal Court and Federal Court of Appeal in *Pollard*, in which the court distinguished between methodology and

the essential characteristics of the job, stating that "a normal danger is not a danger connected with a methodology that could usually be altered in order to eliminate or avoid the danger." Affirming that general exposure to inmates is an essential characteristic of the position of a correctional officer, the respondent contended that such exposure is not a method by which COs perform their job, it is indeed their job.

[49] The respondent also referred to *Jack Stone and Correctional Service of Canada Decision No. 02-019* where much of the debate was centered on whether the absence of staff at a CO's post increases the risk of assault on COs to the point where the staff is in danger as defined in the Code. Based on the decision of the appeals officer who determined that the right to refuse provisions in the Code are not meant to address longstanding problems, the respondent asserted that where the employer has in place effective measures that serve to mitigate the risk, the employer would have met its obligation under section 124 of the Code. That approach was, according to the respondent, confirmed in *Patrick Romo and Correctional Service of Canada, 2010 OHSTC 17*where the issue involved a refusal to work because of the reduction in staffing level on the morning shift for the perimeter patrol and where the appeals officer concluded that the employer implemented measures that served to reduce the possibility that the risk at issue would occur.

[50] The respondent submitted that the appellant's work refusal was not justified because it was not based on a reasonable expectation of injury. The respondent argued that even though there was evidence of inmate assault during the period at issue; such risk was alleviated by management by assigning an additional PW to the SLE from 2:30 pm until 11:00 pm between September 2 and September 5 inclusively. The respondent claimed that there was no evidence that inmate A was dysregulated or posed a threat to the appellant during her admission. Moreover, the respondent submitted that although it was the appellant's opinion that the reduction in the level of psychological services on the SLE was a factor in his refusal, the evidence supported the respondent's position that this circumstance in itself did not constitute a danger. It is admitted that there were challenges in hiring and retaining a dedicated psychologist for the SLE; however, this situation did not mean that SLE residents were not provided with the therapeutic support they required. The employer is of the view that it had taken steps to adapt the operation of the SLE to the reality it faced vis-à-vis the recruitment and retention of a SLE dedicated psychologist.

[51] The respondent concluded by stating that the protection and recourse mechanisms of Part II of the Code, are not meant to be used as a mechanism to attack employer policies, namely, the employer's staffing policy. It is submitted that the appellant failed to establish that he was exposed to a danger in the work place within the meaning of the Code when he refused to perform his duties on September 2, 2011, as a PW on the SLE.

C) Appellant's reply

[52] The appellant submitted that the TRA which was prepared following the appellant's request for a second PW was inadequate, because it did not properly assess the risk posed by having a dangerous inmate, inmate A, with an assault history. It added that the operational plan for the SLE was not being followed as presented by various witnesses. Furthermore, it argued that acting warden MacLeod's review of the local joint health and safety committee investigation was flawed, because he did not properly assess the hazard of inmate A's presence in the SLE, explaining that the acting warden had testified that he based his decision on the national deployment standards, which did not eliminate all hazards the day of refusal. The appellant argued that the Code does not permit an employer to base its decision of the absence of danger on a pre-existing policy, standard or directive if there is a reasonable possibility of a foreseeable danger to an employee. For the appellant, the well-being of an employee supersedes prescribed staffing level.

[53] The appellant added that despite the fact the HSO admitted that the SLE had experienced changes; he failed to give enough weight to the presence of a potentially violent inmate living in a dysregulated housing unit. The appellant reiterated that a second PW working in the SLE during the day and evening shifts would act as a deterrent and would help to isolate and contain the inmates if an incident were to occur. The appellant maintained that the minimum staffing levels the day of the work refusal were inadequate, given the changes to the SLE. The appellant added that the evidence provided was that the inmates in the SLE cannot manage themselves, due to emotional, behavioural or cognitive deficiencies, therefore it can be very challenging for the PW to work with inmates who can be dysregulated. According to the appellant, in the event of an assault, the BC has no security training, which adds to the difficulty for the PW to access the OC spray in the locked cabinet or to isolate and contain a situation by himself while he is responsible for supervising eight inmates in a large housing unit.

[54] The appellant denied that the work refusal was aimed to defy the national deployment standards, citing the actual reasons contained in the written work refusal. The appellant believed that the potential danger was not hypothetical, but reasonable, since there were 36 incidents in the SLE in approximately two years, 14 of which were related to aggressive behaviour, and six of them; assaults. It is the appellant's opinion that to have one PW manage an incident and wait for backup is challenging at the best of times, especially if his primary function is to preserve life. The arrival of inmate A added according to the appellant a new risk to the SLE, and such risk was not mitigated by the employer, which made the situation reasonably dangerous, given the recent violent past of that inmate.

[55] With regard to the PW's job description, the appellant stated that the PW is to "intervene in threatening violent situations to protect the safety of members of the public, staff, inmates and the institution". The appellant argued that an officer must be given adequate tools to fulfill this function and concluded that the appellant was exposed to a danger within the meaning of the Code at the time of his work refusal.

Analysis

[56] I must determine whether at the time of his work refusal, CO Fletcher was exposed to a danger as defined under subsection 122(1) of the Code:

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

[57] In determining whether a danger existed for the appellant, I will need to determine whether working as the lone PW in the SLE exposed him to a hazard or condition that could reasonably be expected to cause him injury. I will ask myself questions regarding the hazard associated with the appellant's work and whether there was a reasonable expectation that an injury would occur in the circumstances while working that day.

Is there a hazard associated with working as the lone PW in the SLE?

[58] In its submissions, the appellant explained that it is believed a hazard was present on the day of the work refusal and that it was reasonable to believe an injury could have been suffered relating to an inmate assault. In the appellant's view, a second PW would help mitigate the hazard as a second PW could assist in isolating and containing the assault as well as act as a deterrent. It is the respondent's view that a second PW would not mitigate the risk of assault, as demonstrated by previous incidents where more than one PW was present.

[59] It is generally accepted that inmate behavior is unpredictable, and that assaults can occur at any time in an open correctional setting where employees interact closely with inmates. It is this type of inmate assault that the appellant perceived to be the hazard on the day of his work refusal.

[60] There have been previous decisions on this concept. The words below of Justice Gauthier in *Verville* v. *Canada (Service correctionnel)*, 2004 FC 767 in paragraph 41 of her decision are of particular interest in the case at hand.

> […] the customary meaning of "potential" or "éventuel" hazard or condition does not exclude a hazard or condition, <u>which may or may not happen based on unpredictable human behaviour.</u> If a hazard or condition is <u>capable of coming into being or action</u>, it should be covered by the definition. As I said earlier, one does not need to be able to ascertain exactly when it will happen. The evidence is clear that in this case, spontaneous assaults are indeed capable of coming into being or action.
>
> [Underlining added]

[61] The presence of a potentially violent inmate in a dysregulated living unit, in my mind and based on sound case law, represents a hazard. That being said, the next step is to expand the analysis into the possibility of this hazard occurring.

Was there a reasonable expectation of injury to CO Fletcher in the circumstances?

[62] The Federal Court and the Federal Court of Appeal have provided some guidelines with respect to determining whether a hazard, condition or activity can reasonably be expected to cause injury. In the *Verville* decision cited previously, the Federal Court states the following:

- It is not necessary to establish precisely the time when the hazard, condition or activity will occur, but only to ascertain in what circumstances it could be expected to cause injury and establish that such circumstances will occur in the future, not as a mere possibility, but as a reasonable one.

- A finding of danger cannot be based on speculation or hypothesis, and that the tribunal has to weight the evidence to determine whether it was more likely than not that what the applicant is asserting will take place in the future.

[63] I will now examine the circumstances and evaluate whether the circumstances at the time of the work refusal could reasonably lead to injury.

[64] In its submissions, the appellant raised what I have deduced as the circumstances under which the appellant could have been injured by an inmate assault, specifically, the volatile climate of the SLE and the arrival of inmate A. I will now examine each circumstance and evaluate whether there was a reasonable expectation that each could lead to injury.

[65] I will begin by evaluating the circumstance the appellant described as the volatile environment in the SLE, including the increase in inmate assaults and the allegations of non-compliance with the SLE operational plan.

[66] The appellant claimed that the inmates in the SLE were not getting proper psychological assistance in accordance with the SLE operational plan. The respondent on the other hand, indicated that although the institution had been having trouble retaining a psychologist on a permanent basis, the inmates were still being provided with the services they required. It was submitted by the appellant that maximum security inmates were being reclassified to medium to be housed in the SLE. Conversely, the respondent submitted that this is incorrect, and that inmate classification can change any time that a revaluation occurs. The appellant also submitted that some inmates were being forced to stay in the SLE, whereas residence in the SLE is supposed to occur on a voluntary basis; the respondent indicated that this is hearsay.

[67] The appellant tendered that after-hour admissions are not permitted according to the SLE operational plan. The respondent however stated that this is incorrect, indicating

that the SLE operational plan does provide for flexibility with admissions. Last, according to the appellant, maximum security inmates are left unescorted in the SLE. The respondent explained again that this is incorrect, that the maximum security inmates are always either escorted or in the custody of a program advisor.

[68] With regard to the alleged difficulty to isolate and contain offenders and the changes with increase in violence, assaults and non-compliance, the respondent maintained that this is part of the job description of the PW and that PWs are trained to handle these situations.

[69] Having considered all the evidence adduced by the parties, I am not convinced that there was non-compliance of the operational plan combined with the climate of the SLE at the time of the work refusal. As a result, there was not a reasonable expectation that the appellant could be assaulted or injured on the day of his work refusal and what follows are my reasons.

[70] While I recognize psychological services are important to rehabilitating inmates in the SLE, the appellant's view that they were lacking within the SLE does not lead me to believe that it was more likely than not that an inmate would assault and injure CO Fletcher on the day of his work refusal. Although the respondent admitted that there were some problems with securing a full time psychologist for the SLE, the inmates were still getting the psychological support they needed through other programs. The evidence provided by the appellant does not support the argument that limited psychological support automatically equates to a higher risk of assault leading to injury for the appellant.

[71] In addition, I share the respondent's view that after-hours admissions are permitted in accordance to the flexibility provided by the SLE operational plan with regards to admissions. With regard to inmates being reclassified from maximum security to medium security, I have not been provided with any evidence to that effect, nor have I been provided with any evidence demonstrating that inmates are residing in the SLE on a non-voluntary basis. In coming to my decision, I am also mindful that inmate classification can change with a new evaluation, as stated by the respondent.

[72] Turning now to the more volatile climate in the SLE at the time of the work refusal. The evidence presented indicated that since 2009, the numbers of incidents in the SLE related to assault were strictly related to assaults between inmates. The only assault involving a PW was submitted in evidence by Ms Ellsworth who testified that she had been the victim of an assault from an inmate in 2009, resulting in injury. Evidence provided at the hearing showed that there has been no inmate assault involving staff since the assault against Ms Ellsworth in 2009.

[73] I am of the view that given the nature of the correctional setting, it is impossible to entirely eliminate the risk of inmate assault to a PW. As evidence provided by the respondent suggests, it is part of the job of a PW to isolate and contain inmates in situations of assault and they are trained to accomplish those tasks.

[74] Even after considering Ms Ellsworth's assault in 2009, the evidence before me does not convince me that it was more likely than not that there would be an assault on the day of the work refusal. I am also not convinced that a second PW would discourage assaults since they could occur spontaneously and, as the evidence provided from the employer showed, that inmate assaults do happen even when more than one CO are present.

[75] I find that the issue regarding the slow response, up to 10 minutes as in the case of Ms Ellsworth, following the activation of a PPA is not particularly relevant to the question at hand because it would not necessarily prevent an injury from an imminent inmate assault from occurring. Nonetheless, a prompt PPA response may play a role in diminishing the extent of an injury but it only becomes a factor once it is decided that there is a reasonable expectation of injury which is not the case.

[76] For all the above reasons, I am not persuaded by the evidence before me that the allegations of non-compliance with the SLE operational plan combined with the more volatile climate in the SLE could have elevated the risk of assault for the appellant above a mere possibility on the day of his work refusal.

[77] The second circumstance identified was the arrival of inmate A, who according to the appellant had a past history of assault on staff at her former institution. Evidence adduced indicated that the staff assault from inmate A occurred a few months prior, in July of the same year. The assault in question involved a staff member and caused injury.

[78] The respondent on the other hand denied the presence of a hazard on the day of the work refusal, explaining that inmate A had been assessed and accepted by the CCC and that she was classified as a medium security inmate.

[79] Evidence introduced indicated that inmate A was admitted after hours on the night before the work refusal. Inmate A's parole officer was present to ensure a smooth transition in the SLE. Evidence provided by both parties also show that a second PW was posted on the morning of the arrival of inmate A. The second PW was later posted to other duties because the arrival of inmate A went without incident. The appellant on the other hand, exercised his right to refused to work when he learned that the second PW would be posted elsewhere in the institution, claiming that working alone constituted a danger for him on that day. The respondent submitted that PWs are trained and equipped with the proper tools to handle violence, assaults and non-compliance from inmates in the SLE, and that it is in fact part of the job description of a PW to do so.

[80] On the day of the work refusal, was it more likely than not that CO Fletcher would be assaulted as a result of inmate A's arrival? After having considered the totality of the evidence put forth by both parties, I have come to the conclusion that it was not.

[81] First, I have put significant weight on the evidence provided to the effect that inmate A was accepted by the CCC, the general procedure for acceptance of inmates in the SLE. Second, inmate A was classified at the same security level as other inmates residing in the SLE at the time: medium security. In addition, inmate A's parole officer

was present to ensure smooth transition for her into the new environment. The employer also posted an additional PW in the SLE on the morning of inmate A's arrival. When the employer noticed that the arrival went without incident, they posted the second PW to other duties. While this is certainly not determinative of my decision, I would like to note that the evidence provided determined that inmate A had been compliant and that there had been no incidents since her admission to the SLE after the work refusal. I also note that evidence was provided to the effect that PWs are equipped with training to isolate and contain inmate assaults.

[82] While I recognize that there was a possibility of an inmate assault on that day, like any other day in the correctional setting may I add, I find that the measures taken by the employer to prepare for the arrival of inmate A convince me that the risk was lowered to the level of a mere possibility. In other words, all the factors listed above lead me to believe that, it was not more likely, that CO Fletcher would be assaulted by inmate A on the day he exercised his right to refuse dangerous work.

[83] The appellant also referred to the *Glaister* decision, arguing that it should apply in this case. I do not agree. I share the respondent's view that the facts are different. In this case, although the appellant is asked to work as the sole PW he is not alone in the SLE, other staff is also present.

[84] Because I have determined that there was no reasonable expectation that the appellant could be injured at the time of his work refusal under both circumstances, the definition of "danger" under the Code is not being met. Therefore, it is not necessary that I address whether this constituted a normal condition of employment.

Decision

[85] For the reasons outlined above, I have determined that the HSO did not err when deciding that a danger does not exist further to CO Fletcher's work refusal.
HSO Tingley's decision that a danger does not exist is confirmed and the appeal is dismissed.

Michael Wiwchar
Appeals Officer