Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Date: 2018-11-14
Case No.: 2016-06

Between:

Brian Zimmerman, Appellant

and

Correctional Service of Canada, Respondent

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

Matter:	Appeal under subsection 129(7) of the *Canada Labour Code* of a decision that a danger does not exist issued by an official delegated by the Minister of Labour.
Decision:	The decision that a danger does not exist is confirmed.
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Ms. Corinne Blanchette, Union Advisor, CSN
For the respondent:	Ms. Zorica Guzina, Counsel, Treasury Board Legal Services
Citation :	2018 OHSTC 14

REASONS

[1] The present decision concerns an appeal filed by Mr. Brian Zimmerman (the appellant), a correctional officer (CO) employed by the Correctional Service of Canada (CSC) at Kent Institution (the institution), a maximum security institution located in Abbotsford, British Columbia.

[2] This appeal was filed pursuant to subsection 129(7) of the *Canada Labour Code*, R.S.C. (1985), c. L-2 (*Code*) against a decision of absence of danger rendered by an official delegated by the Minister of Labour, Harmony Hemmelgarn (the ministerial delegate) on February 12, 2016, at the conclusion of the latter's investigation into the work refusal registered by the appellant on February 10, 2016. That decision of absence of danger concerns a situation that occurred at the institution on February 8, 2016, and which involved a fixed point alarm (FPA) and the deployment of staff for officer assistance to the wrong unit of the institution as a result of what has been described as a malfunction of the FPA.

Background

[3] On February 8, 2016, at approximately 12:21 p.m., at the institution, an FPA transmission appeared on the computer display screen in the institution's main communication and control post (MCCP). The MCCP monitors all alarms and radio transmissions in the institution. The FPA transmission identified an FPA activation for the institution's residential unit A. That alarm was acknowledged by the MCCP officer and staff were deployed to unit A to provide assistance. However, the single control post officer for contiguous units A and B had to make a staff assistance call via the institution's radio system to divert responders to the correct unit, which was unit B, with the result that the actual response was delayed.

[4] The appellant was not working at the time of the incident, but was informed by colleagues that the A/B units control post officer had depressed the Bravo (unit B) FPA several times to get officer assistance for a situation of an inmate fight in unit B, but that the responding staff were initially deployed to unit A. The appellant invoked his right to refuse dangerous work on February 10, 2016. He felt that the issue of the FPA system had not been properly addressed by the employer and he had a loss of confidence in the institution's alarm system, more specifically the FPA, which he viewed as a danger to his life or health. At the time of his initial refusal to work on February 10, 2016, the appellant was conducting duties of Inmate Movement Control and Supervision, CX2, Sector Coordinator.

[5] In the course of the initial refusal investigation by the employer, the latter's representatives and the alarm system on-site technician from ADGA Group Consultants Inc. (ADGA), Mr. Yee, met with the appellant to review the computer logs of the February 8, 2016 incident that caused the appellant to refuse to work on February 10, 2016. ADGA is the manufacturer of the FPAs at the institution. The ADGA technician confirmed that the system was working correctly and a determination of absence of danger was arrived at by the employer at the conclusion of its investigation, as the latter was of the opinion that there were other modes of communication to mitigate a situation such as what had occurred on February 8, 2016, and committed to assessing the alarm system further through more comprehensive tests.

[6] With the appellant maintaining his refusal to work, a further investigation involving members of the local health and safety committee (the committee) proceeded via a comprehensive review of the alarm system and devices, specifically all PPAs (Personal Protective Alarms) and FPAs. Each issued PPA and FPA was tested (activation and transmission) three times and verified with the ADGA technician on February 10 and on February 11, 2016. From these tests and a review of recorded tests conducted up to two weeks prior to that date, there were three occurrences where an FPA failed to register a signal on the first attempt of activation out of approximately 900 tests. On one of those occurrences, the failure was due to a sticky button on the FPA and in the two other occurrences, the signal registered properly on the second attempt. That investigation by the committee failed, however, to lead to a common conclusion and/or recommendation as no consensus was reached on the question of whether a danger existed. As a consequence and with the appellant continuing his work refusal, the ministerial delegate conducted her investigation into the matter.

[7] The information collected through the investigation led the ministerial delegate to render a decision of absence of danger. That conclusion was based on the following rationale: Malfunction of the FPA system used to summon assistance in situations that are high risk and may require the assistance of additional responders for use of force is a hazard as it can be a source of harm. There is a reasonable expectation that a threat exists in specific circumstances where a correctional officer is involved in an incident that requires staff assistance and such staff assistance cannot be summoned, due to a malfunction of the FPA system. The work refusal by the appellant and other refusing employees who did not appeal the ministerial delegate's decision of absence of danger failed, however, to satisfy the two criteria or test that comprises the definition of danger, specifically that the hazard "is imminent and serious", to use the words of the ministerial delegate. One needs to note, however, that while using the joining word "and" between the words "imminent" and "serious" in the first paragraph of the latter's rationale for decision after having cited the definition of "danger" in the *Code*, the ministerial delegate dealt separately with a hazard posing an imminent threat and a hazard posing a serious threat in the remainder of the latter's rationale for a decision of no danger.

[8] As stated by the ministerial delegate regarding the first criterion of the definition, that of "imminent threat", the hazard did not pose an imminent threat to the correctional officer as it was not likely to occur at just any moment. Extensive testing of the FPA system did not prove system malfunction. There was only one recorded event where an FPA signal registered for a location other than where the alarm was "allegedly" activated (incident on February 8, 2016), and of the approximate 900 tests conducted on the PPA/FPA system within fourteen days prior to and including February 11, 2016, there were three recorded incidences where an FPA did not activate upon first attempt (pressure on activation button).

[9] Regarding the second criterion of the definition, that of "serious threat", the ministerial delegate stated that the hazard did not represent a serious threat due to the availability of additional mitigating factors relating to correctional officers, more specifically the existence of other modes of communication to summon assistance. According to the ministerial delegate, "control post officers have several modes of communication" available to them when needing to summon assistance: FPA, hand-held radios, desk radios, and telephone. Correctional officers are

all issued a PPA as well as a hand-held radio prior to commencing their shift. In addition, correctional officers involved with inmate movement at the institution, Kent being a maximum security federal penitentiary, work in pairs and therefore "may not be in a situation of serious threat when an FPA is activated for assistance."

[10] The hearing concerning this matter was held in Vancouver from November 27 to December 1, 2017, and on January 18 and 19, 2018.

Issue

[11] I have to determine the following issue: was the decision of absence of danger rendered by on February 12, 2016 well founded, and, thus, was the appellant exposed to a danger as defined under the *Code* when the latter exercised his right to refuse to work?

Appellant's Submissions

[12] The appellant called 6 witnesses who described their experience as correctional officers using the FPA system and alternative communication modes. More specifically: the appellant testified about the rationale behind his work refusal; Mr. E. Raymond testified about PPAs; Mr. Nick Elton testified about the operations of a control post, security incidents and response to such incidents; Mr. Ripley Kirby testified about the operations of the MCCP; Mr. Karmen Aulakh testified about the response to security incidents and unpredictable inmate behaviour; and, Mr. Simbo Conteh testified about maintenance of the communication equipment and the Institution Joint Occupational Safety and Health (IJOSH) committee.

[13] The appellant's position is that the ministerial delegate's decision of absence of danger was not founded in facts and was rendered based on two errors in law related to the application of the definition of danger. The alleged errors identified by the appellant are that the definition of danger does not require a hazard to be imminent *and* serious, and secondly that a hazard needs to present an imminent *or* serious threat rather than an imminent *and* serious threat of injury.

[14] The appellant asks the appeals officer to find that the malfunctioning of the FPA/PAA constitutes a danger and that the danger identified is not a normal condition of employment, or alternatively, were the appeals officer to find that there was no danger, that he issue a direction to terminate contraventions to the *Code* and non-compliance issues.

[15] The appellant first establishes that correctional officers have the designation of peace officers under the *Criminal Code*, and that, according to the Commissioner's Directive 567 (CD-567) concerning the management of security incidents, and to the work descriptions of correctional officers of CX-01 and CX-02 classification, correctional officers have a duty to intervene and resolve incidents with inmates as soon as possible. The documents hereby referred to were submitted as evidence at the hearing.

[16] The appellant then refers to the interpretation of the definition of "danger" in *Correctional Service of Canada v. Ketcheson,* 2016 OHSTC 19 (*Ketcheson*), in which the test to be applied to assess the existence of danger is summarized as follows:

> [199] To simplify matters, the questions to be asked whether there is a "danger" are as follows:
>
> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[17] Addressing whether or not a danger existed on February 10, 2016, based on the test developed in *Ketcheson* to determine the existence of "danger", the appellant first identifies the hazard in the situation that led to his work refusal as the possibility of being injured or developing a more serious injury due to a delayed or disorganized response to a high risk situation because of the malfunctioning of the PPAs/FPAs.

[18] As to the second part of the test, the appellant does not propose to argue that the hazard identified could reasonably be expected to be an *imminent* threat to his life or health, but argues there is no doubt that the consequences of an assault can represent a *serious* threat to the life or health of correctional officers. In order to make this assessment, the appellant relies on a number of decisions rendered by appeals officers, the Federal Court and the Federal Court of Appeal, dealing with the previous definition of danger, which was in effect between 2000 and 2014.

[19] The first decision brought up by the appellant is *Armstrong v. Canada (Correctional Service)*, 2010 OHSTC 6 (*Armstrong*), in which the appeals officer stated that correctional officers at Kent Institution are exposed to spontaneous assaults by maximum security inmates without provocation or warning. The appellant then raises the Federal Court's decision in *Verville v. Canada (Correctional Services)*, 2004 FC 767 (*Verville*), in which spontaneous assaults and unpredictable human behaviour were discussed. In that decision, Justice Gauthier stated that if a hazard is capable of coming into being or action, it should be covered by the definition of danger and that one does not need to ascertain exactly when the danger will happen.

[20] The next decision discussed by the appellant is *Martin v. Canada (Attorney General)*, 2005 FCA 156 (*Martin*), in which the court concluded that an appeals officer had erred in finding that, because law enforcement activity inherently involves the unpredictability of human behaviour, the unpredictability of human behaviour could not constitute a danger within the meaning of the definition. Such a conclusion, according to the Federal Court of Appeal, would exclude a finding of danger in respect of any law enforcement activity.

[21] Under the current definition of danger, the appellant points out that the appeals officer in *Ketcheson* wrote that exposure to a potentially violent inmate, without being provided with protective personal equipment (PPE) such as handcuffs and OC Spray, could be a hazardous condition and that engaging in an activity with a potentially violent inmate could be a hazardous activity.

[22] Still concerning the current definition of danger, the appellant refers to the decision in *Correctional Service of Canada v. Laycock*, 2017 OHSTC 21 (*Laycock*) in which the appeals officer found that "[a]ssaults on correctional staff may occur without warning, in a matter of a few seconds, and without having received intelligence or indicators that attacks against staff were contemplated."

[23] To put it simply, the appellant is arguing that potential and future hazards are not excluded from the new definition of danger as long as the risk to an employee's health is serious. In the present case, based on all testimonies and especially on the one of Mr. McCoy, a correctional manager at the institution, the appellant states that there was a reasonable expectation that he could have been exposed to violence from inmates and harmed on the day of the work refusal since violent incidents occur several times monthly and there is no way to predict when these incidents will occur. To support this point, the appellant refers to *Keith Hall & Sons Limited v. Robin Wilkins*, 2017 OHSTC 1 (*Keith Hall & Sons Limited*), where the appeals officer wrote: "Again, to conclude to the existence of a serious threat, it is not necessary to establish precisely the time when the threat will materialize." The appellant also brings up the aforementioned *Laycock* decision, in which the appeals officer wrote that when attempting to ascertain whether a condition could reasonably be expected to be a serious threat, one is necessarily dealing with events that may only materialize in the future. The appeals officer in *Laycock* also opined further that, for a serious threat to exist, the events that may only materialize in the future "must be found to be reasonably expected to occur, as a reasonable possibility".

[24] In order to make a finding of danger, the appellant explains that, based on the *Verville* decision, an appeals officer may rely on expert opinion, on experience-based opinion of ordinary witnesses and on inference arising logically or reasonably from known facts. The appellant also notes that in *Armstrong*, the correctional officers who had testified were found to be "thinking, rational and disciplined professionals". The appellant therefore submits that the correctional officers who testified in the case at hand have the necessary experience to identify a situation that could cause injury.

[25] The appellant asserts that any delay in summoning assistance and responding to a call for assistance can result in injury to a correctional officer. To illustrate this fact, the appellant refers to the decision in *Zimmerman v. Canada (Correctional Service)*, 2013 OHSTC 34, in which the appeals officer wrote that the unchallenged evidence of this case demonstrated that "33 stab wounds and 50 head blows could be delivered by someone in as little as seven seconds".

[26] The appellant states the motivation for his work refusal was not only out of concern for his own safety, but also for the safety of co-workers and inmates, since inmates' assaults are a risk for correctional officers as they have the duty to respond, to run to incidents, to provide first aid and to use force. The appellant posits that there is no evidence that the work refusal process in this case was used to promote a labour relations agenda, unlike what was found in the *Ketcheson* decision.

For those reasons, the appellant is of the opinion that significant weight should be given to the testimonies of the correctional officers since they have the necessary experience to reach sound conclusions about the unreliability of the PPAs and the FPAs.

Activity corrected

[27] The appellant points out that, following the failure of the FPA in unit B's control post to transmit an alarm, all the FPAs of the institution were tested. At the hearing, however, CO Elton testified that the FPA in unit B's control post did not trigger an alarm on the first attempt when that testing was done, and the appellant notes that a correctional manager experienced the same failure on the same apparatus on the night of the testing. CO Conteh testified that he experienced a ghost alarm three weeks prior to his testimony. Those testimonies, according to the appellant, demonstrate why correctional officers lack confidence in the reliability of the PPA/FPA systems.

[28] At the hearing, the appellant points out that, following the failure of the FPA located in unit B's control post to transmit an alarm, two new receivers were installed. According to the appellant, this addition creates an added delay for an alarm to register on the MCCP computer, thus resulting in an added delay in the response to an alarm.

[29] Based on Mr. Arnold's testimony, the appellant asserts that the installation of two new receivers, without first conducting a coverage test and without involving the local workplace health and safety committee contrary to paragraph 135(7)(i) of the *Code*[1], was preferred over other alternatives because it was the cheapest solution. The appellant also asserts, based on Mr. Arnold's testimony and looking at the February 2016 monthly report on the repair, overhaul and maintenance of security/safety related electronic systems for Correctional Service of Canada for the Pacific region, that at the minimum security William Head Institution, Senstar Stellar, the manufacturer of the FPA system there, came on site to test sensors and said it would perform calibration on the next visit. In the case at hand, at Kent Institution, the appellant states the manufacturer was not even contacted, despite the correctional officers' claims that the PPA/FPA system does not function properly.

[30] Regarding the PPA/FPA system's alleged failures, the appellant holds that no evidence was tendered by the respondent about a hazard prevention program specific to Kent Institution addressing the issue, as required by subsection 19.5(1) of the *Canada Occupational Health and Safety Regulations* (the *Regulations*).

[31] The appellant argues that Ms. Collett submitted an outdated contract with ADGA from May 2012 in response to the Assurance of Voluntary Compliance (AVC), while the February 2016 monthly report on the repair, overhaul and maintenance of security/safety related electronic systems for Correctional Service of Canada for the Pacific region was available. The appellant believes this is telling of the non-compliance of CSC with the *Code*.

[32] The appellant argues that it is clear that the testing done by ADGA technicians is done under perfect and ideal circumstances, when the tested apparatus has a new battery, when the

[1] In its submissions, the appellant referred to section 135(1)(7)(i) of the *Code*. However, as this section does not exist, I believe the appellant meant to refer to paragraph 135(7)(i) of the *Code*.

technician is able to slowly depress the alarm with sequenced and repeated transmissions, without the adrenaline or the stress the correctional officers are under in emergency situations. The appellant relies on the decision in *Correctional Services of Canada v. Union of Canadian Correctional Officers - CSN*, 2013 OHSTC 11 wherein the appeals officer determined that an employer having only a generic job hazard analysis that does not consider the specific issues of a work place was in contravention of the *Code*, and that the workplace health and safety committee needed to be involved in matters such as the one raised in that case. This reasoning, according to the appellant, applies to the current appeal.

[33] The unchallenged evidence in the present case is not only that the employer did not involve the workplace health and safety committee, but that it impeded and hindered the work of that committee by refusing to disclose documents to the employee co-chair, Mr. Conteh, and directing him to file an access to information and privacy request. The appellant contends this is a serious contravention to subsection 135(7) of the *Code*.[2]

[34] Based on what precedes, the appellant submits the potential hazard could reasonably be expected to cause injury to a CO before the hazard could be corrected, and, therefore, that a danger exists.

Normal condition

[35] The appellant submits that the danger identified does not constitute a normal condition of employment, and that the decision in *Canada v. Vandal*, 2010 FC 87, establishes that a danger that constitutes a normal condition of employment is residual in nature and that it is the danger that remains after the employer has taken all necessary steps to eliminate, reduce or control the hazard, condition or activity and for which no direction can reasonably be issued under subsection 145(2) of the *Code* to protect the employees.

[36] The appellant also submits that a danger constitutes a normal condition of employment when the danger is one that remains after the employer has taken all necessary steps to eliminate, reduce or control the hazard, condition or activity, and that this analysis was recently applied by the appeals officer in *Laycock*. Given the high risk faced by correctional officers due to the unreliability and inconsistency of the PPA/FPA system, the appellant argues it cannot be said that all necessary measures were taken to eliminate and reduce the hazard.

[37] The appellant points out that in *Armstrong v. Canada (Correctional Services)*, 2010 OHSTC 6, it was decided that, according to the "low frequency, high risk" principle also discussed in *Parks Canada Agency v. Douglas Martin and PSAC,* 2007 OHSTC 15, mitigating measures to prevent an event from occurring must be taken, regardless of the likelihood of the event occurring. The appellant submits the "low frequency, high risk" principle should apply to the present case as the respondent's witnesses agreed that an assault against a correctional officer could lead to death.

[2] In its submissions, the appellant referred to section 135(1)(7) of the *Code*. However, as this section does not exist, I believe the appellant meant to refer to subsection 135(7) of the *Code.*

[38] The appellant writes that there was little in the evidence about the steps taken to eliminate and reduce the hazard posed by the unreliability of the PPA/FPA system and is of the view that the maintenance program of the PPA/FPA system is deficient because there is no schedule for inspection, adjustment, cleaning and replacement of the apparatuses, because there are issues with the record keeping of the work done on the apparatuses and because there was no assessment on the effectiveness of the system. Moreover, the appellant states that, according to Mr. Arnold's testimony, there has been no discussion or thought about alternatives to the current PPA/FPA system, of which the life duration is unknown. The appellant expresses concern with what it perceives as the workplace health and safety committee being excluded from this important aspect of injury prevention.

[39] The appellant asks that the appeals officer vary the decision issued by the ministerial delegate to find that a danger existed, issue a direction for the respondent to protect the employees from the danger of an unreliable and malfunctioning PPA/FPA system, and issue another direction to undertake to revamp a proper maintenance program for the PPA/FPA system as mandated under Part XIX of the *Regulations.* Alternatively, if the appeals officer finds that there is no danger, the appellant asks that the appeals officer issue a direction under section 145.1 of the *Code* to correct the contravention of subsection 135(7) of the *Code*.

Respondent's Submissions

[40] The respondent called a total of 5 witnesses. The first was Ms. Sheila Collett, who was Acting Assistant Warden, Management Services, at the institution at the time of the work refusal. She was responsible for the health and safety portfolio and spoke to the overall process followed in this work refusal as the employer's representative. The second witness was Mr. Tony Yee. He is a technician employed by ADGA, assigned to Kent Institution and he testified about the PPA/FPA system and its functionalities, the PPA/FPA system maintenance, the tests conducted on the PPA/FPA system and the results of these tests. The third witness called by the respondent was Mr. Curtis McCoy. At the time of the work refusal, Mr. McCoy was a correctional manager at the institution and was the employer representative during the joint investigation. Mr. McCoy spoke to the joint investigation, to the applicable institutional policies and testified on the various duties of COs as well as control measures in place in order for COs to safely perform their duties.
Ms. Bobbi Sandhu, who was warden at Kent Institution at the time of the work refusal, was the fourth witness called by the respondent. Ms. Sandhu testified to safety control measures available, staff deployment, as well as to relevant CSC policies and their application at the institution.
Finally, the respondent called Mr. John Arnold, who was the regional electronic program officer in the Pacific region for Correctional Service of Canada at the time of the work refusal. Just like Mr. Yee, Mr. Arnold testified about the PPA/FPA system and its functionalities, the PPA/FPA system maintenance, the tests conducted on the PPA/FPA system and the results of those tests.

Preliminary matters

[41] The respondent first raised two preliminary matters. First, the respondent points out that the appellant has attempted to blur issues about the FPAs with those related to PPAs and has used the terminology interchangeably, while the FPAs and the PPAs are two separate safety measures available to COs. The internal wiring is the same, but the way the two systems are

activated is different. The eleven FPAs at the institution are only found in control posts, except in the MCCP, while the PPAs are worn by each officer on shift and have been in place for many years. FPAs, on the other hand, were installed in 2015 and represent an additional control measure available to officers. Furthermore, the preventative maintenance manual filed as exhibit provides for separate maintenance schedules for PPAs and FPAs.

[42] Second, the respondent specifies that the complaint that is the subject matter of this appeal is the malfunctioning of the FPAs and the consequent alleged delayed response and that it is personal to the appellant. The respondent argues that the appellant and the witnesses called to testify on his behalf tried to raise new issues at the hearing, namely low battery and battery replacement; sticky buttons; radio issues; telephone issues; delays in transmission; and ghost alarm/lack of signal registration. The respondent submits that the attempt to broaden the scope of this complaint and include any and all issues that COs might have experienced over the years is inappropriate, improper and constitutes a misuse of the proceedings. The respondent submits that a hearing in front of an appeals officer is a *de novo* hearing, but argues that the appellant may not raise new issues on appeal and that the new issues raised by the appellant that are not the subject matter of the complaint ought to be disregarded. Without prejudice to its central position, the respondent nonetheless addresses briefly all the said additional issues as follows.

Low battery and battery replacement delays

[43] As regards this issue, testimony was received to the effect that an alarm will still go through despite a low battery situation and signal. Additionally, there is a buffer in that the system will report a low battery well before the battery is dead. Furthermore, despite claims of lengthy delays to get battery replacements, the evidence provided by the permanently assigned technician to the institution was that generally batteries are replaced within a day.

Sticky button

[44] On this, the permanent technician's evidence was that he has never experienced such issue with FPAs, only at times with PPAs. His uncontested testimony in this regard was that, if such a concern arises, the matter is addressed by replacing the button or the unit itself ,with officers being provided with a spare if the PPA assigned to them needs maintenance, therefore addressing the concern and making this a non-issue.

Radios

[45] Testimony was received about radio problems such as dead zones and garbled communications, and the respondent acknowledges that no tool is perfect at all times and that there may at times be areas for which hand-held to hand-held communication transmissions have not been completely effective. However, evidence was provided to the effect that additional receivers had been added to improve reception, thereby demonstrating a continuous effort to improve the effectiveness of the tools provided to the officers. It is the respondent's view that this needs to be considered in light of the fact that radios are supposed to be used in conjunction with other communication means such as PPAs, FPAs, cameras and the presence of a partner.

Telephones

[46] Much was said by appellant witnesses about telephones' effectiveness, or lack thereof, during emergencies, pointing to the possibility of a "busy" line or the impracticality of having to leave an incident to which they would be responding in order to make a call. The respondent addresses this by pointing to the fact that the telephone is one of the modes of communication available to officers to use to call for assistance, that there is sketchy evidence that officers have actually experienced a busy line signal, with their evidence being to the fact that the telephone is not an effective way to summon assistance and they have never used such for that purpose. As a whole regarding means of communication, it is the respondent's position that no evidence was provided that there was ever a collective failure when modes of communication were used or that assistance failed to arrive by using different modes of communication. While acknowledging that some means may not be perfect all the time, respondent argues that perfection is not required, noting also that no alternatives were offered by the other side that could be considered in the future.

Preventive maintenance and transmission delays

[47] The respondent disagrees with appellant's submissions and notes that maintenance occurs as per the preventative maintenance manual which applies to the entire security system at CSC, including Kent Institution, thus providing for daily, monthly as well as yearly inspections. The respondent submits that this should be considered in conjunction with the fact that officers are required to test their communication tools at the start of every shift, with officers being required to report any difficulty or problem so that it can be adequately addressed.

[48] As regards transmission delays, the evidence from technician Yee was that the transmission time between an FPA or a PPA to the central equipment room computer (CER) is one quarter of a second, which is in accordance with the manufacturer's manual, although transmission of the signal from CER to the MCCP computer causes an additional delay (over which there are no rules or benchmarks), said delay being possibly increased with the button being pressed repeatedly in rapid succession. The respondent differentiates the situation at the institution from that at another institution (William Head Institution) in explaining having only provided additional receivers as opposed to other measures, noting that at that institution, recalibration of the communication system had been required because part of that institution had been torn down, which is not the case at the institution.

Ghost alarms/alarm registration

[49] Ghost alarms or alarms not registering on initial press have occurred very few times in recent years, according to the respondent's evidence, and for the most part if not all the time, while testing and involving practically only PPAs. It is the respondent's view that, even if such incident may have occurred, this has no bearing on the issue at hand. Furthermore, as regards registering of an alarm, the respondent notes that while having to press a second time may have happened a few times over the last few years, this has also happened at testing, with witnesses not being aware of this occurring in real life instances or even with any regularity at testing. According to the respondent, this must also be considered together with evidence that the lack of registration might be due to officers not pressing the button hard enough or hitting the said

button too fast. Notwithstanding this, the respondent also underlines the evidence from an MCCP officer to the effect that if there was a problem encountered with an FPA or a PPA in terms of not registering at first press, the officer would be asked to press a second time and if the alarm registers, the apparatus would be deemed functional and remain in service.

Main issue

[50] The respondent admits that a faulty FPA could potentially constitute a hazard, since staff assistance could potentially not be summoned or delayed, but claims there was no serious threat in the circumstances of this case.

[51] The respondent argues, based on *Ketcheson*, that there is a difference between a "hazard that is a danger and a hazard that is not", and that the relevant time period to be assessed for the work refusal under the *Code* in this case is February 10, 2016, the day on which the appellant refused to work. The respondent also argues that, for the FPA to be a danger, it must pose a danger to staff, and despite the appellant's assumption that it does, the evidence clearly does not support this conclusion, since the evidence before the appeals officer is clear that on the date of the work refusal, there was nothing out of the ordinary occurring relative to the FPA system. The respondent points out that there was no evidence of malfunction of an FPA, there were no threats of assaults on officers by inmates, there were no security issues, there was no evidence of the appellant experiencing any problems with the fixed point alarm and there were no actual assaults or injuries on officers as a result of delayed response from a malfunctioning FPA. Because of this lack of evidence, the respondent is of the view that the appellant's work refusal was not based on any specific situation occurring at the institution on the day of the refusal, but rather on a belief that the FPA system is not a reliable system because of an information that the appellant had received about the malfunction of an FPA that happened two days prior to his work refusal. February 10, 2016 was, therefore, business as usual, since there was no serious threat at the time of the refusal as it was not likely that the appellant was exposed to the same hazard that day, or that this hazard would likely present itself that day.

[52] The respondent notes that the appellant does not use an FPA as part of his duties, since he does not work in the control posts where FPAs are located, that there is no FPA at the MCCP where he works from time to time and that he is a secondary responder, which essentially means that he might only be called to intervene once the correctional manager on duty assesses the situation. The respondent states that, therefore, there is no evidence that the appellant would have had to respond on the day of his work refusal or that anything happened on that day that would pose a danger that related to the appellant's duties.

[53] Regarding what precedes, the respondent raises the decision in *Canada (Attorney General) v. Fletcher,* 2002 FCA 424 (*Fletcher)*, at para. 18, to say that the ability to refuse work is a mechanism given to employees at a "specific time and place to ensure that their immediate work will not expose them to a dangerous situation. It is the short-term well-being of an employee which is at stake, not a hypothetical or speculative one.", and states that the present case is failing to abide by the entrenched principle that a complaint has to be personal to the appellant. The respondent further adds that the mere existence of a hazard does not automatically equate to finding a "danger".

[54] The respondent notes that FPAs continued to be used, that there were no further work refusals on this issue and that, according to CO Elton's testimony, a similar malfunction has not been experienced, CO Elton being the officer who reported the malfunction on February 8, 2016. CO Elton also testified that the same issue was also not replicated during the testing conducted following the work refusal. The respondent also notes that CO Kirby testified that in all his years of experience, there were only two or three times where PPAs indicated a wrong area on the MCCP screen, pointing out in addition that it is not clear whether the witness was referring to FPAs or PPAs or both, as the latter used the words interchangeably.

Response times

[55] Regarding response times, the respondent claims there is contradictory evidence on the response time on February 8, 2016, the day the fixed point alarm malfunctioned, and that Warden Sandhu was clear in her testimony that based on her viewing of the video of the incident, the response time was acceptable and even if one finds that there was an additional delay in responding on February 8, 2016, there was no injury as a result of a malfunctioning fixed point alarm or a delayed response on that day. In light of what precedes, it is the position of the respondent that there is no basis to suggest there was any danger two days later, on February 10, 2016, when the appellant refused to work. The respondent adds in this regard that the joint testimony of both the warden and assistant-warden is to the effect that Kent has one of the best response times in Canada.

[56] The respondent contends that there was no evidence of any assault or injuries to staff involving a delayed response ever occurring as a result of a malfunctioning FPA at the institution or at any other institution. Since an appeals officer has previously held in *Weagant v. Canada (Correctional Service)*, 2013 OHSTC 22, at paras 74 and 75 that, while the absence of past incidents does not rule out a future occurrence, it is "reasonable to take the record into account when considering whether the prospects for such incidents occurring in future are likely or unlikely", the respondent is of the opinion that the fact that the appellant's concerns had not materialized at the time of work refusal is a reasonable indication of the effectiveness of the measures in place.

[57] Given the evidence, the respondent contends there is no reasonable expectation that a delayed response as a result of a malfunctioning FPA would lead to an injury, and therefore that a danger does not exists within the meaning of the *Code*.

Mitigating risks

[58] On this point, the respondent notes that the right to refuse is an emergency measure justified solely in specific and exceptional circumstances that must exceed normal conditions of employment. The respondent thus puts forth that the risks inherent to the job of a correctional officer are being managed and mitigated by a plethora of safety measures, such as static security (gates, barriers, fences, cameras, inmate observation), dynamic security (interacting with inmates), FPAs, PPAs, training, use of force, a standing order regarding the response to alarms, personal protective equipment (stab proof vests, radios, handcuffs, OC spray, duty belt, protective footwear) and the testing of equipment by the officers themselves.

[59] However, the respondent points out that the evidence presented by COs suggests that the testing of the equipment is not always done as required, and that if an officer fails to use the available options, tools and powers that are open to him/her, that does not warrant a finding of "danger" against an employer, because such a finding would grossly expand the definition of "danger". The respondent finds support for this position in *Westcoast Energy Inc. v. Canada (Labour, Regional Safety Officer),* [1995] F.C.J. No. 1584, at para. 31, in which the Federal Court held, in reference to other sections of Part II of the *Code* and the *Regulations*, that legal obligations should not be imposed on an employer for the actions of employees who admit to their own irresponsibility, particularly when there is no evidence that the employer encouraged or condoned such complacency.

[60] Based on the above, the respondent submits that the evidence does not support a conclusion that on the day of the appellant's work refusal, the latter was in danger as a result of a malfunctioning fixed point alarm, which, in any event, he does not use in his duties. The hazard that may be posed by the malfunctioning FPA is a normal condition of employment, given that the institution has sufficient control measures in place to mitigate the identified hazard. The respondent also submits that, because the risk can never be fully mitigated or removed, there is no reason to think that the risk could be better mitigated than it actually is, given the evidence presented. The respondent requests that the appeal be dismissed.

Reply

[61] In its reply submissions, the appellant wished to focus on three main topics: the scope of the appeal, the credibility of witnesses and the concept of reasonable expectation.

Scope of the appeal

[62] While the respondent takes the position that the appeal is strictly limited to the malfunction of the FPA, the appellant states that, based on subsection 146.1(1) of the *Code* and on the tribunal's jurisprudence, an appeals officer has to consider the overall circumstances of the case, including the ministerial delegate's investigation and the work refusal registration. Since the ministerial delegate rendered a decision of absence of danger in part due to the existence of alternative modes of communication, the appellant is of the opinion that the appeals officer has jurisdiction to consider issues related to the malfunction or the adequacy of those alternative modes of communication.

[63] The appellant clarifies that they use the terms FPA and PPA interchangeably because FPAs and PPAs have the same internal components, they send the same signal, they use the same electronic system and they sound the same alarms on the same screens to the same people in the MCCP.

[64] In reply to the respondent's preliminary remark that low battery and battery replacement issues, sticky buttons, delays in transmission, ghost alarms and lack of signal registration are new issues, the appellant states that these issues are evidence relevant to the case because they are in facts the reasons why the FPAs and PPAs malfunction.

[65] Concerning the respondent's preliminary remarks that radio and telephone issues are new issues, the appellant claims that those issues were raised in response to the employer's argument that there are other security options in place in case of an FPA or PPA malfunction.

[66] The appellant then argues that the *Fletcher* decision is not relevant to this case because it concerns amendments to the *Code* that were made before 2000 and that the case law emerging from the previous definition of danger is not as relevant anymore.

[67] It is therefore the appellant's submission that one cannot dissociate the malfunction of the FPAs and PPAs from the inadequacy of alternative modes of communication as well as the non-compliance of the maintenance program, as those matters are a subset of the main issue.

Credibility

[68] On this particular subject, the appellant essentially challenges the credibility of one respondent witness, that witness being ADGA technician Tony Yee. The appellant argues that, despite what Mr. Yee stated in his testimony, CO Conteh and CO Raymond testified that they have never seen any technician in their control post perform maintenance. The appellant contends that Mr. Yee's testimony should not be given greater weight because of Mr. Yee's position as a technician, because the latter has limited experience as a technician at the institution, whereas the COs who testified are experienced and seasoned employees.

[69] In attempting to undermine Mr. Yee's testimony and credibility, the appellant suggests that the former's testimony was guided as well as problematic in that he was unable to answer simple, easy and factual questions, such as when he started working at the institution for ADGA or when the FPAs were installed in the control posts. The appellant also puts forth that Mr. Yee should have known how long it takes for the PPA computer to send an alarm to the MCCP computer. Moreover, the appellant states that Mr. Yee said he was not aware of what could cause sticky button problems despite having to deal with sticky buttons for PPAs and that he could not recall if he had drilled holes in each FPA to let the antenna outside the casing.

[70] The appellant submits that the evidence given by Mr. Yee is not clear, coherent or credible and that it should not be given greater weight as it is not in harmony with the preponderance of probabilities (*Faryna v. Chorny*, (1951) B.C.J. No. 152).

Reasonable expectation

[71] The appellant states that the respondent reads too much into the date of the work refusal because, when determining whether or not a danger existed, potential and future hazards as well as future activities need to be considered in assessing the reasonable expectation of occurrence. To illustrate this position, the appellant relies on paragraph 107 of the *Laycock* decision:

> [107] As the Court reasoned in Martin and Verville, when attempting to ascertain whether a condition could reasonably be expected to be a serious threat, one is necessarily dealing events that may only materialize

> in the future. In that sense, for a serious threat to exist, those potential events must be found to be reasonably expected to occur, as a reasonable possibility.

[72] The appellant also relies on the decision in *Keith All & Sons Limited* to reinforce the argument that future hazards and activities need to be considered when determining whether or not a danger existed at the time of a work refusal:

> [36] In my opinion, it would also be an error to interpret this phrase as restricting the concept of danger to those hazards, conditions, or activities that could cause harm immediately or shortly after the exposure.
>
> […]
>
> [38] […] even if the threat is not on the verge of materializing into harm, a danger may be found to exist to the extent that a hazard, condition or activity could reasonably be expected to be a "serious threat to the life or health of a person exposed (…)".
>
> […]
>
> [40] […] A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the Code, to cause injury or illness to employees.

[73] The appellant suggests that when comparing the decisions in *Ketcheson*, in *Keith Hall & Sons Transport Limited* and in *Laycock*, all appeals officers agree that it is not necessarily that every time the hazard, condition or activity occurs, it will cause injury, that it is not necessarily that the hazard, condition or activity will cause injury immediately, nor is it necessary to establish precisely when the future hazard, condition or activity will happen. The appellant thus opines that the absence of injury in the same circumstances is not fatal to the appellant's case.

[74] The appellant states that both Ms. Sandhu and Mr. McCoy conceded in cross-examination that non-transmission of a FPA/PPA alarm or a delay can occasion serious injury to a correctional officer, and that the absence of injury, threat or assault by an inmate is not determinative in this case.

[75] Given the frequency of serious incidents at the institution, the unpredictable behaviour of maximum security inmates, the vital role of summoning assistance without delay and immediate and efficient response, it is the appellant's submission that it can be inferred logically that the malfunctioning of the FPAs and the PPAs represented a serious threat to the life or health of the appellant, and that this is not a mere possibility, but a reasonable one.

[76] Additionally, the appellant formulates a number of supplementary observations regarding some of the points put forth by the respondent. As such, the appellant suggests that even though in *Arva Flour Mills Ltd*, 2017 OHSTC 2, the appeals officer must have concluded that there was a hypothetical concern, based on the perception by a long-time and experienced employee, that decision remains in harmony with the essence of the *Ketcheson, Keith Hall & Sons Transport Limited* and *Laycock* decisions regarding the threshold for reasonable expectation. Furthermore, the appellant argues that the availability of replacement methods of communications in the

instance of failure of the primary method that is the FPA should not be given undue significance due to the time span involved in turning to a secondary method when time is of the essence in providing assistance when it is requested.

[77] As to the inspection of FPAs and PPAs, the appellant draws attention to the testimony to the effect that, while those are tested daily at the start of every shift, this does not amount to daily, monthly or yearly inspections. Furthermore, the appellant submits that no evidence was provided indicating employer measures to control the effect of heat on the speed of transmission or explaining why the computer engineering an alarm from a PPA or FPA needs to go through nine sensors before the alarm is triggered at MCCP, thus constituting a possible delay.

[78] Finally, the appellant submits that a number of precedents put forth by the respondent in support of its position should not be given much weight, as they preceded the 2000 amendments to the *Code* or their impact was cancelled by subsequent decisions, markedly those of the Federal Court and the Federal Court of Appeal in *Verville* and *Martin*, which have served to clarify the notion of reasonable expectation, solidify the principle that unpredictable human behaviour is not excluded from the notion of danger, and have recognized the acceptability of experience-based testimonial evidence, and established that the weight to be given to the job description of correctional officers must be assessed in light of the hierarchy of controls defined in the *Code* in the satisfaction of the purpose of the legislation.

Analysis

Preliminary matters

[79] I will first address the two preliminary remarks made by the respondent. First, the respondent suggested that the appellant had tried to blur issues about the FPAs by using the terms PPA and FPA interchangeably. I disagree. Mr. Yee, the respondent's witness, enlightened the Tribunal about the PPA/FPA system and its functionalities. Unlike what the appellant claims, I find that Mr. Yee's experience-based opinion was credible. Mr. Yee has been a technician at the institution since the FPA system was implemented and explained that the FPAs and the PPAs have the same circuitry, the same antenna, the same battery, and that their identifiers are programmed the same way. To put it simply, FPAs are PPAs fixed to a wall. I understand the way the two systems are activated may be different, but I do not hold the opinion that the appellant attempted to blur the issue by using the terms PPA and FPA interchangeably. That being said, this decision will primarily deal with the FPA system, which brings me to the second preliminary matter raised by the respondent.

[80] The respondent claims the subject matter of this appeal solely has to do with the malfunctioning of the FPAs and is personal to the appellant. In order to assess the scope of this appeal and respond to the respondent's second preliminary remark, I must look at the appellant's work refusal.

[81] On February 10, 2016, the appellant exercised his right to refuse to perform dangerous work pursuant to subsection 128(1) of the *Code*, which reads as follows:

> **128(1)** Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that
>
> **(a)** the use or operation of the machine or thing constitutes a danger to the employee or another employee;
>
> **(b)** a condition exists in the place that constitutes a danger to the employee; or
>
> **(c)** the performance of the activity constitutes a danger to the employee or another employee.

[82] The appellant registered his refusal to work under subsection 128(1) of the *Code* in the following terms:

> On 2016-02-08 al 1221 hours. a PPA was in alarm on the MCCP FPAS display screening noting a PPA had been depressed in Alpha Unit. The fixed point alarm was, in fact, depressed on the Bravo Unit side which has been verified through officers on shift that day. The Officers working Bravo Unit while responding to the radio call for the PPA in Alpha Unit, were diverted by the Control Post Officer to their own lower tier where the actual fight was occurring. The responding officers, as described in Standing Order 567-2, were attempting to gain access to Alpha Unit as that was the location where they had been sent. The A/B Control Post Officer had to make a Staff Assistance call on the radio to Bravo Unit to get responders to the proper location. The two Officers in Bravo Unit [who] were involved in the Use of Force had their safety compromised due to the delayed response.

[83] On February 11, 2016, the day after his work refusal, the appellant clarified the rationale behind his work refusal in a signed handwritten note that stated the following: "Clarification of fixed point PPA units: 128 was invoked due to this incident, and other documented malfunctions of the fixed point alarms throughout Kent Institution."

[84] According to his words, the situation that prompted the appellant to exercise his right to refuse to work has to do with "malfunctions of the fixed point alarms throughout Kent Institution" following an FPA having been depressed in unit B, but staff having been deployed to the wrong unit, namely unit A, due to the MCCP console having displayed that an FPA had been depressed in unit A.

[85] During his cross-examination, the appellant testified that on the day of his work refusal, he was working as a sector coordinator, and admitted that sector coordinators do not work in control posts where FPAs are located. This goes to show that the appellant does not use an FPA as part of his sector coordinator duties, given that he does not work in the control posts where FPAs are located. The appellant also testified that there is no FPA at the MCCP where he works from time to time. The appellant also stated that the motivation for his work refusal was not only out of concern for his own safety, but also for the safety of coworkers and inmates. Regardless of these facts, FPAs are designed to be depressed by control post officers when they observe, from

their post, a potentially dangerous situation involving correctional officers, inmates, or both. Even if the appellant's duties do not involve operating the control posts, the malfunction of the FPA system, which consists of the hazard in the work place identified by the appellant, could potentially constitute a danger to the appellant.

[86] Should I accept the respondent's argument that we must look at this work refusal as a single moment-in-time incident, this would serve to almost ensure a confirmation of the finding of absence of danger, as it is obvious that neither on the 8th of February, the date of the malfunction, when the appellant was not at work, nor on the day of the work refusal when there was no recorded malfunction, could the appellant claim a danger, however flexible or expanded the defined notion of danger could be interpreted. Accordingly, I believe the appellant did not make an unjustified use of his right to refuse to work and I reject the respondent's argument that I must only take into consideration the circumstances prevailing on February 10th, 2016 at the exact time when the appellant refused to work.

[87] Moreover, during the course of this hearing, the appellant introduced elements into the debate that were not part of how the original work refusal was formulated by the appellant. Nowhere in the appellant's work refusal is it a question of low batteries, battery replacement, sticky buttons, radio issues, telephone issues, delays in FPA/PPA transmission, ghost alarms or lack of signal registration. The appellant's work refusal initially had to do with the FPA system's ability, or lack thereof, to properly identify and register an alarm.

[88] Despite what precedes, I do not agree with the respondent that the evidence related to PPAs, radios and the telephone should be excluded. I conducted this appeal in a *de novo* manner and I will consider all relevant evidence relating to the circumstances that prevailed at the time of the work refusal. The respondent agrees that evidence that was not before the ministerial delegate may be considered, but that the appellant may not raise new issues. However, the mitigating factors available to correctional officers discussed at the hearing have, in fact, been examined by the ministerial delegate in his investigation. In the rationale for her decision of absence of danger, by which I am not bound, the ministerial delegate wrote as follows:

> The hazard is not a serious threat as additional mitigating factors are available to the Correctional Officers. Firstly, other modes of communication are available to summon assistance. Control Post Officers have several modes or communication when presented with the task of summoning assistance: FPA, [h]and-held radio, desk radio, and telephone. Unit staffs are issued a PPA and hand-held radio prior to their shift. Secondly, Unit Staff involved with inmate movement at Kent Institution, a maximum security federal penitentiary, work in pairs and therefore may not be in a situation of serious threat when an FPA is activated for assistance.
>
> [emphasis added]

[89] Consequently, since the information above mentioned was used by the ministerial delegate in order to reach her decision of absence of danger, I am not prepared to exclude the evidence related to PPAs, radios and the telephone. This being said, I will now deal with the main issue of this case, namely whether the decision of absence of danger rendered by the ministerial delegate on

February 12, 2016, is well founded, and thus whether the appellant was exposed to a danger as defined under the *Code* when the latter exercised his right to refuse to work.

Main issue

[90] Subsection 146.1(1) of the *Code* sets out the authority of an appeals officer when a direction concerning a danger is appealed. An appeals officer may vary, rescind or confirm the direction:

> **146.1 (1)** If an appeal is brought under subsection 129(7) or section 146, the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it and may
>
> **(a)** vary, rescind or confirm the decision or direction […]

[91] Subsection 122(1) of the Code defines "danger" as follows:

> **122(1)** Any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard, condition can be corrected or the activity altered.

[92] As noted specifically in the parties' submissions, the test developed in *Ketcheson* that is used to determine the existence of a danger as defined under the *Code* is set out as follows:

> [199] To simplify matters, the questions to be asked whether there is a "danger" are as follows:
>
> 1) What is the alleged hazard, condition or activity?
>
> 2) a) Could this hazard, condition or activity reasonably be expected to be an imminent threat to the life or health of a person exposed to it?
>
> Or
>
> b) Could this hazard, condition or activity reasonably be expected to be a serious threat to the life or health of a person exposed to it?
>
> 3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[93] I believe that the above mentioned test properly applies to the situation at hand. Thus, I will now apply that test to the facts of the present case.

1) What is the alleged hazard, condition or activity?

[94] The first part of the test requires the identification of the "hazard, condition or activity" that allegedly constitutes a danger as defined in the *Code*. In the present case, the hazard identified by the appellant is that there is a risk of being injured or of developing a more serious injury because of a delayed or disorganized response to a high risk situation, due to the FPA system's failure to properly identify and register an alarm.

2) Could this hazard, condition or activity reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it?

[95] Neither the appellant nor the respondent made submissions regarding the first criterion of the second part of the test, namely the imminence of the threat to the life or health of a person exposed to it. I consider that the parties have thus conceded that the hazard could not, at the time of the appellant's work refusal, reasonably be expected to constitute an imminent threat to the life or health of a person exposed to it.

[96] Regarding the second criterion of the second part of the test, namely the seriousness of the threat to the life or health of a person exposed to it as established in *Ketcheson*, the appellant has to demonstrate that he would be faced in the days, weeks or month ahead, with a situation that could cause him serious harm as a result of an FPA not being able to properly register and identify an alarm.

[97] I must first point out that one cannot ignore the particular context of working in a correctional setting, more particularly the risks associated with working in a maximum security institution. Correctional officers are constantly exposed to assault and harm by inmates, an exposition that is mainly due to the unpredictability of human behaviour. The risk of being assaulted is always present and is inherent to a correctional officer's job. The risks to health linked to the performance of a correctional officer's duties are detailed in both the CX-1 and the CX-2's work descriptions submitted at the hearing:

> **(2) Risk to Health**
>
> There is a risk of verbal or physical assault and/or psychological trauma due to the daily performance of security duties in direct contact with potentially volatile inmates who may have low-level cognitive skills and alternate social values/attitudes. The incumbent is required to closely monitor inmates throughout the shift and may be asked to disseminate unfavourable information.
>
> There is a requirement to intervene in threatening or violent situations to protect members of the public, staff and inmates, including incidents when the use of force may be necessary. There is potential for inmates to verbally abuse or physically assault the incumbent, which involves a risk of severe injury and/or death. There is also a risk of Post Traumatic Stress Syndrome following traumatic incidents to which the incumbent is subjected (e.g. the permanent impairment or death of members of the public, staff or inmates) and the necessity for the incumbent to use force which may be lethal.

[98] Despite the risks to health specified in the work descriptions of CX-1 and CX-2, the respondent is under the legislative obligation to drive down the risks related to the duties of correctional officers as low as possible by first eliminating hazards, then reducing hazards, and finally, by providing personal protective equipment to correctional officers in order to prevent accidents and injuries that could occur in the course of the performance of correctional officers' duties. This concept is commonly referred to as the hierarchy of controls and is codified at section 122.2 of the *Code*, along with the purposive clause of Part II of the *Code* at section 122.1:

> **Purpose of Part**
>
> **122.1** The purpose of this Part is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment to which this Part applies.
>
> **Preventive measures**
>
> **122.2** Preventive measures should consist first of the elimination of hazards, then the reduction of hazards and finally, the provision of personal protective equipment, clothing, devices or materials, all with the goal of ensuring the health and safety of employees.

[99] Since it has been well established in the Tribunal's jurisprudence that the unpredictability of human behaviour is a risk that cannot be completely eliminated or reduced, I must decide if the respondent has driven down this risk as low as it can reasonably go in the setting of a maximum security institution. In other words, has the employer ensured the health and safety of correctional officers by providing them with the personal protective equipment, clothing, devices or materials necessary to face the risks that could not be eliminated or reduced?

[100] I have no doubt that an FPA system's failure to properly register and identify an alarm could provoke a delayed response to an incident and that such delay could compromise the safety of correctional officers and contribute to the gravity of the injuries that could be inflicted to a correctional officer in need of assistance. However, it has been well-established by appeals officers that in order for a threat to be considered serious, there has to be a reasonable possibility for a hazard materializing. In *Ketcheson*, the appeals officer described what constitutes a "serious threat" using the concept of reasonable expectation:

> [210] A serious threat is a reasonable expectation that the hazard, condition or activity will cause serious injury or illness at some time in the future (days, weeks, months, in some cases years). Something that is not likely within the next few minutes may be very likely if a longer time span is considered. The degree of harm is not minor; it is severe. A reasonable expectation includes a consideration of: the probability the hazard condition or activity will be in the presence of a person; the probability the hazard will cause an event or exposure; and the probability the event or exposure will cause harm to a person.

[101] This position was reinforced in *Arva Flour Mills Ltd v. Matthews*, 2017 OHSTC 2; in that matter, the appeals officer stated at paragraph 99 that "[a] conclusion of danger must be based on more than a hypothetical threat. A serious threat requires an assessment of the probability that the threat will cause harm as well as the consequences of the harm, which have to be severe." The issue was also considered in *Keith Hall & Sons Limited*, where the appeals officer wrote that "to conclude that a danger exists, there must be more than a hypothetical threat. A threat is not hypothetical where it can reasonably be expected to result in harm, that is, in the context of Part II of the *Code*, to cause injury or illness to employees".

[102] Based on what precedes, I believe it is fair to state that to amount to a serious threat, the hazard does not need to be a certainty but cannot be purely hypothetical, and as the Federal Court

recently noted in *Canada (Attorney General) v. Laycock*, 2018 FC 750, the decision in *Verville* continues to offer useful guidance on the likelihood or expectation of injury from an extant hazard. The Federal Court, in *Verville*, stated as follows:

> [36] […] I do not believe either that it is necessary to establish precisely the time when the potential condition or hazard or the future activity will occur. I do not construe Tremblay-Lamer's reasons in Martin above, particularly paragraph 57, to require evidence of a precise time frame within which the condition, hazard or activity will occur. Rather, looking at her decision as a whole, she appears to agree that the definition only requires that one ascertains in what circumstances it 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.
>
> [emphasis added]

[103] In order to assess whether the possibility that the FPA system could fail to properly identify and register an alarm is reasonable, I must review the evidence submitted by the parties in this case. As the appeals officer in *Brinks Canada Limited v. Dendura*, 2017 OHSTC 9, found:

> [143] The determination of whether a threat is a real possibility as opposed to a remote or hypothetical possibility is not always an easy task. It is a matter of fact in each case and will depend on the nature of the activity and the context within which it is executed. Statistical information is relevant to make an informed factual finding on that question, although in the final analysis, it involves a question of appreciation of facts and judgement on the likelihood of the occurrence of a future event, in the present case an event that is linked to unpredictable human behaviour.
>
> [emphasis added]

[104] Appreciating the facts and the evidence of the present case, the testimonies of Mr. Yee, a technician employed by ADGA and assigned to the institution, and of Mr. Arnold, the regional electronic program officer in the Pacific region for the Correctional Service of Canada, along with the evidence submitted in this case, are rather telling as to the possibility of an FPA not being able to properly register and identify an alarm.

[105] Mr. Yee explained that when an FPA is depressed, it transmits a sequence wirelessly to what is referred to as the PPA computer, which is located in the central equipment room (CER) next to the MCCP. The PPA computer then transmits the received sequence to the MCCP console, in the MCCP. Mr. Yee then explained that each of the eleven FPAs in the institution is paired with a unique identifier (ID). When the sequence is received in the MCCP, the MCCP officer receives a signal accompanied with an ID letting the MCCP officer know which of the FPAs in the institution was depressed in order to send reinforcements. Mr. Arnold testified that the time from the moment an FPA is depressed to the moment the signal is received in the MCCP can range from the blink of an eye to a few seconds, and that an FPA is only programmed to register in the MCCP with the identifier with which it is paired. Both Mr. Yee and Mr. Arnold mentioned in their respective testimonies that they have not experienced or heard about a failure by the FPA system to properly register and identify an alarm, except on the day of the incident. The ministerial delegate also indicated in her report that he only identified one recorded event

where an FPA signal registered for a location other than where the alarm was allegedly activated, and that event was the one of February 8, 2016. The evidence also revealed that out of 900 test conducted on February 10 and 11, 2016, as well as up to two weeks prior to February 11, not one occurrence of an FPA registering for another location than the one for which the alarm was depressed was recorded.

[106] Mr. Elton, the control post officer for contiguous units A and B who depressed the malfunctioning FPA for unit B on February 8, 2016 after witnessing a fight between two inmates during a meal routine, mentioned during his testimony that once unit B was secured and the inmates were in their cell in segregation, he tested the FPA for unit B and was unable to recreate the issue, specifically a misidentifying of unit B by the FPA with which it is paired. In fact, Mr. Yee, the technician to whom the issue was reported also testified to the effect that he tested the FPA paired with unit B several times and was unable to replicate the issue that was reported to him. The testimonies of Mr. Elton and Mr. Yee, two of the individuals involved in the testing of the FPA paired with unit B after the incident of February 8, 2016, denote that, even when trying to replicate the issue that caused staff to be deployed to the wrong unit on the day of the incident, the odds that the FPA paired with unit B could, after being depressed, register and identify another unit than the one with which it is paired, are extremely low. This reinforces the fact that the probability that the situation which gave rise to the appellant's work refusal will repeat itself is slim to none.

[107] The question here is not whether COs will be exposed to violence from inmates, but whether the malfunctioning of the FPA system could reasonably be expected to cause the appellant serious harm in the days, weeks or month following his work refusal. I agree that it is not necessary to establish precisely when the future hazard, condition or activity will happen, but it is, however, necessary to demonstrate the probability that the hazard identified by the appellant is more likely than not to materialize. In this case, the evidence submitted does not allow me to conclude that there is a reasonable probability of the identified hazard materializing.

[108] Nonetheless, the appellant's argumentation is mainly centered on the reasonable expectation that a correctional officer is exposed to violence from inmates daily, because of the unpredictability of human behavior, which I concede. The appellant also states that no steps were taken to reduce the alleged hazard posed by the unreliability of the PPA/FPA system. However, the evidence shows that in addition to FPAs, correctional officers are also equipped with PPAs and radios, that they patrol in pairs and that surveillance cameras are installed throughout the institution. All these measures are put in place by the respondent in order to prevent accidents and injuries that could occur in the course of the performance of correctional officers' duties. In this respect, one has to comment that an FPA or a PPA as well as all other means of communication brought forth by both parties in their submissions are all mechanical or technical apparatuses. A 100 per cent guarantee of faultless operation of these apparatuses falls in the realm of hopefulness or wishful thinking rather than certainty. There will always be the possibility of technical or technological malfunctions, but the chance of a "perfect storm" during which the FPAs, the PPAs, the radios, the telephone and the closed-circuit television fail simultaneously is extremely remote.

[109] I am persuaded, on a balance of probabilities, that that the evidence given by the respondent, particularly that of Mr. Yee and Mr. Elton, is enough to tip the balance in favor of the respondent, thus arriving at the conclusion of absence of danger. After having considered the evidence submitted in this case, the probability that the FPA system will fail to properly register and identify an alarm is too low to reasonably be expected to constitute of a serious threat to the life or health of the appellant. In other words, said probability, or more properly said possibility, remains in the realm of remote and hypothetical. Hence, the hazard alleged by the appellant does not meet the test to be considered a danger as defined in subsection 122(1) of the *Code*. Despite having concluded that the probability that the hazard identified by the appellant is not more likely than not to materialize, I believe it is necessary to address the third and last question of the test as to whether the threat to life or health will exist before the hazard or condition can be corrected or the activity altered.

3) Will the threat to life or health exist before the hazard or condition can be corrected or the activity altered?

[110] Based on the facts of this case, one cannot ignore that a malfunction of an FPA was registered, the cause of which remains unexplained, and with the result that assistance was misdirected for a very brief moment until other means of communication at the disposal of other correctional officers were used to correct the situation. In this respect, one has to comment that an FPA or a PPA as well as all other means of communication brought forth by both parties in their submissions are all mechanical or technical apparatuses where breakage or other forms of malfunction can occur. As such, the expectation of uninterrupted faultless operation at all times cannot be a certainty and there needs to be available substituting means and readily available maintenance. The evidence in this case has shown that it is the case. In this regard, even if one accepts that the FPA in this case malfunctioned once, an occurrence that could not be replicated, thus making such reoccurrence remote at best, one certainly cannot ignore the panoply of other means of communication to raise alarm, not the least of which is the PPA assigned to every officer and registered to the area where the officer is working and this evidences the fact that a scale of equipment dedicated to ensure the health and safety of employees is available with the possibility of simultaneous malfunction of each being even more remote. Furthermore, the assignment to site of a technician dedicated to maintenance and problem solving, even if remote, has been established.

[111] As I already mentioned, the risk of assault and injury in a correctional environment is always present and cannot be discounted. The task of the employer is to provide systems and equipment to its employees that will reduce to the highest degree reasonably possible that risk. In the present case, it has been put in evidence that a panoply of measures, systems and equipment has been provided by the employer towards that purpose.

[112] It is my opinion that the measures, systems and equipment discussed above allow the hazard identified in this case to be corrected before there is a serious threat to life or health. As mentioned in *Ketcheson*, a hazard is not a danger if there is a reasonable expectation that the hazard can be corrected before there is an imminent or serious threat from the said hazard.

Request for additional instructions

[113] The appellant also requested that the appeals officer issue a direction to undertake to revamp a proper maintenance program for the PPA/FPA system as mandated under Part XIX of the *Regulations* or alternatively, if the appeals officer finds that there is no danger, that the appeals officer issue a direction under section 145.1 of the *Code* to correct the contravention to subsection 135(7) of the *Code*. The respondent did not make any submissions regarding the appellant's request for additional instructions.

[114] As it is well established in this Tribunal's jurisprudence, a *de novo* hearing for an appeal of a decision rendered under subsection 129(7) of the *Code* has to deal with a specific situation and is not intended to raise issues that were not initially before the ministerial delegate (*Fletcher*). I will therefore not address the new claims of violation of Part XIX of the *Regulations* and of subsection 135(7) of the *Code.*

Decision

[115] For the reasons above, the appeal is dismissed and the decision that a danger does not exist rendered by the ministerial delegate on February 12, 2016 is confirmed.

Jean-Pierre Aubre
Appeals Officer