

CANADA LABOUR CODE
PART II
OCCUPATIONAL SAFETY AND HEALTH

Review under section 146 of the Canada Labour Code, Part II
of a direction issued by a safety officer

Applicant: Correctional Services of Canada
Warkworth Institution
Scarborough, Ontario
Represented by: Roger Lafrenière, Counsel

Respondent: Public Service Alliance of Canada (PSAC)
Represented by: Claudine Salama
Health and safety representative

Mis en Cause: Mary Duncan
Safety Officer
Human Resources Development Canada

Before: Serge Cadieux
Regional Safety Officer
Human Resources Development Canada

A hearing was held on May 7, 1997 in Peterborough, Ontario.

Background

A correctional officer of the Warkworth Institution refused to escort an inmate to a local hospital because the employee assigned to assist him transport the inmate was not a trained and qualified correctional officer.

On December 16, 1996, an inmate was to be escorted to the hospital for a medical appointment. The employee assigned to accompany Mr. Vella, the refusing correctional officer, is an employee of the Institution but is not a trained and qualified correctional officer. The employee in question is a truck driver who holds a license to operate the vehicles used in off-site inmate escorts. The employee is deemed by management of the Institution to be capable of competently responding to any emergency which might arise during the escort.

When Mr. Vella was given the off-site assignment he sought clarification of the security escort policy by consulting, among other things, the Correctional Service of Canada (CSC) Security Manual. He interpreted the policy to mean that two correctional officers are required to escort one inmate outside the Institution and one additional correctional officer would be required for

each additional inmate. Mr. Vella felt that the truck driver was not adequately trained to intervene in an emergency situation. He informed his supervisor that he did not believe that the escort assignment could be done safely without the assistance of another trained correctional officer and refused to carry out the assignment on that basis.

Investigation by the safety officer

The investigation by the safety officer was not carried out on site. She testified that an agreement had been reached between herself and the parties involved in this matter that there was no need to attend the Institution to resolve this matter.

The safety officer testified that she believed that the security escort issue had been resolved. The Supervisor in charge, Mr. Broadbent, had agreed to appoint two fully trained correctional officers to carry out the assignment . However, the assignment was quickly changed back to one correctional officer and the driver.

On the basis of the agreement she had made, the safety officer investigated Mr. Vella's refusal to work by conducting telephone interviews with the parties and supplementing the information obtained with additional research and relevant documentation.

As a result of her investigation, the safety officer reported that she established the following facts:

- Mr. Vella was a trained and qualified correctional officer and had six years of experience on the job;
- he had conducted numerous off-site inmate escorts in the past;
- the employee assigned to assist Mr. Vella had no prerequisite correctional officer training;
- over ninety percent (90%) of Warkworth inmates are serving sentences for violent crimes;
- the great concern of correctional officers, and that of Mr. Vella on the day of the refusal, is an inmate's attempt to escape custody while off-site on an escort and the high probability of violence against the officers; and
- the Institution's Security Escort policy prescribes a standard staff-to-inmate ratio of two officers for the first inmate, with one of the officers also driving the escort vehicle, and one "corrections officer" for each additional inmate.

On the basis of those facts, the safety officer decided that a danger existed to Mr. Vella. A direction was issued to the employer under subsection 145(2) of the Canada Labour Code, Part II (hereafter the Code) to remedy the situation. The danger is described in the direction in the following manner:

"The said safety officer considers that a corrections officer assignment to escort an inmate off-site without a second fully trained and qualified corrections officer also on the assignment constitutes a danger to the safety of Correctional Service of Canada employees while at work."

This direction is the subject of this review.

Witnesses for the Employer

Mr. F. Phillips, Coordinator for Correctional Operations, testified that he had brief communications with the safety officer. He explained that Ms.Duncan “informed” him there was no need for her to attend the Institution since she would be making a “policy ruling”.

The security escort policy was discussed. Mr. Phillips stated that he communicated to Ms.Duncan his interpretation of the policy. The policy is referred to in paragraphs three (3) and five (5) of the section of the Security Manual dealing with Security Escort¹. Essentially, the security escort is to be made up of two officers i.e. a correctional officer to accompany the inmate, and another officer to drive the vehicle. The latter officer may be the truck driver since he is an employee of the Institution who holds the designation of peace officer.

Mr. E. Broadbent, Correctional Supervisor at Warkworth Institution, testified that the inmate to be escorted was to be taken to the hospital in a secured van with a cage. The inmate would have restraint equipment i.e. leg irons and handcuffs, on him at all times. The officers in the van would be in contact with the Institution through short wave radios. Emergency procedures are to be followed in the event that an incident occurs en route.

Submission for the Employer

The detailed written submission of Mr. Lafrenière is on record. Essentially, Mr.Lafrenière has argued that the investigation of the safety officer was flawed for the following reasons.

The safety officer failed to comply with subsection 129(1) of the Code: the safety officer did not attend the Institution and investigate, as she is required to do so under subsection 129(1) of the Code, “in the presence of the employer and the employee or the employee’s representative. The employer was seriously prejudiced in this case because the employer was denied an opportunity to present his/her side of the case.

She exceeded her jurisdiction: the safety officer is required to determine whether the workplace presents at the time of her investigation a danger to the employee. Rather than doing this the safety officer embarked on an inquiry involving hypothetical or speculative circumstances. There is no evidence that the safety officer considered the risk factors associated with the inmate to be escorted on December 16, 1997.

Several critical elements were not considered by the safety officer during her “investigation”. She ignored that offenders incarcerated at Warkworth Institution, a medium security Institution, have been assessed as meeting the requirement for reduced security. The safety officer did not consult

¹ 3. Security escorts require the continued safe custody of inmates and only CSC members or peace officers, as defined in the Criminal Code of Canada, shall perform these functions.

5. For ground security escorts for maximum- and medium-security institutions, the minimum staff-to-inmate ratio should usually be two officers for the first inmate. One of these escorts is the driver of the escort vehicle.

the Security Classification Profile of the particular inmate to be escorted. A profile is developed which takes into consideration the risk of escape for each inmate. Also, prior to an inmate leaving the Institution, a risk assessment is made each time by the Correctional Supervisor and an escort is assigned accordingly. An Escort Briefing form is provided for each off-site escort, a document which provides specific security information about the inmate to be escorted. There is no evidence that the safety officer consulted this document as well.

She improperly took into account extraneous matters : the safety officer referred in her decision to the prisoner escort policy of the Metropolitan Toronto Police where two police officers are required to escort an offender. This is an improper reference because the Metro Toronto Police deal primarily with unfamiliar offenders who have recently been arrested. These are potentially volatile offenders who have yet to undergo any type of assessment as to their risk of violence. This is in contrast with the extensive assessment of inmates in CSC custody, particularly those in medium security facilities.

She failed to take relevant considerations into account : the safety officer focused on the Security Escort section of the CSC Security Manual regarding the ratio of officers to inmate. She ignored that the document is a guideline for institutional managers subject to the discretion of the Institutional Heads where a particular situation needs their discretion. The safety officer interpreted the generic term “officer” to mean trained correctional officer when the conduct of security escorts was not intended to be restricted in that manner.

Also, there is no indication that the safety officer consulted the detailed guidelines, found in the Security Escort section of the above noted manual, regarding the use of restraint equipment i.e. handcuffs and leg irons. In this case the Standing Orders regarding escort procedures, which must be adhered to by all employees, require the use of the restraint equipment when an inmate is escorted for a medical appointment.

Mr. Lafrenière submits that before a refusal to work can be invoked, a real and immediate danger must exist. The danger cannot be one that is inherent in the job of a correctional officer. In light of the decisions rendered to date by the Canada Labour Relations Board (CLRB) and the Public Staff Relations Board (PSSRB), and particularly the two decisions² of the CLRB submitted as the applicable jurisprudence, Mr. Lafrenière is of the view that the safety officer erred in upholding Mr. Vella's refusal to work. For these reasons the direction should be rescinded.

Witnesses for the Employees

Mr. W. McCrory is an experienced correctional officer and co-chairperson of the safety and health committee at the Institution. Mr. McCrory was adamant: the policy to escort an inmate outside the Institution has always been that the inmate would be in some type of restraint and two correctional officers would accompany the inmate at all times without ever losing contact. This is necessary firstly to ensure full control of the inmate particularly in situations where the inmate is a heavy person or where the age or size of the correctional officer puts him at a disadvantage, and secondly because of the violent nature of the inmate population at the Institution which falls in the range of 90-95% at all times etc..

² 1. Scott C. Montani, CLRB Decision No. 1089, 1994
2. David Pratt, CLRB Decision No. 686, 1988

It has also always been understood that reference to an officer at the Institution is a reference to a correctional officer. The driver of the vehicle would also be a correctional officer so that the Institution would not be required to have dedicated drivers in addition to the two correctional officers. It would be unsafe to escort an inmate without two fully trained correctional officers because of the violent nature of inmates. Hence, a truck driver should not be expected to do the job of a correctional officer particularly if there should be violence. At the same time, a correctional officer should be able to rely on another trained correctional officer for assistance in emergency situations.

Mr. Doug Vella, the refusing correctional officer, testified that he felt his life would be put into jeopardy if he had gone forward with the escort. The driver had not received the training of a correctional officer which is necessary to carry out the escort duties. The training would include self-defense, the proper use and techniques of placing and removing restraint equipment, how to restrain an inmate who becomes violent and how to defuse difficult situations by using the skills that correctional officers have been taught to use in such circumstances.

Mr. Vella explained that, on December 16, 1996, he was given generic type of information about the inmate to be escorted. However, he was not given specific information about the personal nature of the inmate such as the purpose of his incarceration or his reaction with staff or the public, although that information was readily available to him. Mr. Vella stated that he was personally aware of situations of assaults occurring on security escorts.

Mr. Vella was asked what happened to the security escort on that day. He replied that, after meeting with management around 9:00 a.m. to discuss the refusal to work, the escort was terminated around 9:30 a.m. by the Institution because of the impossibility to re-schedule the medical appointment of the inmate for the same day. The Institution had called the hospital to inform them they would be late for the appointment. The hospital called back to say they could not register the inmate for another appointment that day and they would re-schedule for another day. The appointment was canceled and, as a consequence, the escort was terminated.

Finally, when asked what was the danger he feared on the escort, Mr. Vella described a number of scenarios that could occur where assistance would be required. In those circumstances, Mr. Vella explained that the driver of the vehicle would be unable to give assistance because he is not qualified to respond to emergency situations.

Submission for the Employees

Ms. Salama submitted that Mr. Vella was in a situation of danger when he refused to work on December 16, 1996. As Mr. McCrory and Mr. Vella have testified, there have been in the past situations where inmates being escorted have committed violent acts against the officers. The probability that such situations repeat themselves is not speculative and can reasonably be expected to occur particularly since the ratio of trained escort officers to inmates in this case was one to one.

Also, the truck driver assigned to the escort has no specific training in carrying out the duties of an escort officer or in restraining an inmate in an emergency situation. It is important to consider this in light of the directive concerning the ratio of two officers for the first inmate and the duties that Mr.Vella would have been required to perform at the hospital. He may be required to remove the restraint equipment and attend to the inmate on his own.

Ms. Salama is asking me to look at whether the practice of escorting an inmate with a truck driver is a normal condition of employment in a medium security Institution. The risk that Mr.Vella was required to take is not one that can reasonably be viewed as a normal condition of employment. While a correctional officer must assume some risks, he should not be expected to assume all risks to his health and safety as part and parcel of his job. The fact that Mr.Vella is asked to escort an inmate with an untrained truck driver increases the risk of assault and escape. The employer must therefore take the necessary measures to decrease the risk to an acceptable level. In this case, it means providing two correctional officers to escort the inmate. Two decisions³ were submitted by Ms. Salama as the applicable jurisprudence in this case in addition to the decisions already submitted by Mr.Lafrenière.

Reasons for Decision

On December 16, 1996, Mr. Vella exercised his right to refuse to do dangerous work. Whether rightly or wrongly, Mr. Vella believed that his health and safety would be jeopardized if he went ahead with the security escort on that morning. As a result of the refusal to work, both parties notified a safety officer. The employer expected the safety officer to attend the Institution and investigate the refusal in the presence of the affected parties, as required by subsection 129(1) of the Canada Labour Code, Part II (hereafter the Code) which provides:

129. (1) Where an employee continues to refuse to use or operate a machine or thing or to work in a place pursuant to subsection 128(8), the employer and the employee shall each forthwith notify a safety officer, and the safety officer shall forthwith, on receipt of either notification, investigate or cause another safety officer to investigate the matter in the presence of the employer and the employee or the employee's representative.

As it turns out, the safety officer did not attend the Institution to investigate the refusal to work. As a result, a decision of danger was hand-delivered by Ms.Duncan to the employer without his full participation in the investigation.

In my opinion, the investigation was seriously flawed because the Code imposes a mandatory requirement on the safety officer to investigate in the presence of both the employer and the employee or the employee's representative. In view of the current wording of the legislation, it is practically impossible to carry out such an investigation without being physically present at the workplace. To ignore this obligation is contrary to the law and adverse to the rights and interests of the parties.

³ 1. Revenue Canada and Robin Edwards, unreported RSO Decision No. 91-023, 1991
2. Elnicki and Loomis Armored Car Service Ltd., CLRB Decision No. 1105, 1995

However, there may be circumstances where it would be impossible for the safety officer, or not reasonably practicable for him/her, to attend a work site immediately and investigate a refusal to work in the presence of both parties. Those circumstances would be the exception to the rule. In my opinion, the safety officer was not faced with such exceptional circumstances on December 16, 1996.

In a refusal to work situation, the role of a safety officer is very specific. It is not to make a ruling on a policy issue. It is to decide whether a condition exists in the workplace of the refusing employee that constitutes a danger to the employee. In *Bonfa v. Minister of Employment and Immigration*, Decision No. A-138-89, the Honorable J. Pratt of the Federal Court of Appeal commented on the role of the safety officer when investigating a refusal to work. He wrote:

"...the function of the safety officer is solely to determine whether, at the time he does his investigation, that place presented such dangers that employees were justified in not working there."

The issue that was before the safety officer on December 16, 1996, was whether a condition existed in Mr. Vella's workplace that constituted a danger to him. Had the safety officer attended the Institution forthwith, she could have concentrated on the particular circumstances of Mr. Vella's refusal to work. In all likelihood, the parties would have made Ms. Duncan aware of the risk factors associated with "Inmate X" to be escorted on that morning and the protective measures taken to protect Mr. Vella from any danger, assuming that danger did exist.

Most importantly, the safety officer would have been apprised of the status of the assignment to escort "Inmate X" to the local hospital. Mr. Vella testified that after meeting with management around 9:00 a.m. to discuss the refusal to work, the escort was terminated around 9:30 a.m. by the Institution because of the impossibility to re-schedule the medical appointment of the inmate for the same day. Hence, Mr. Vella was no longer in a situation of danger and a decision of no danger should have been rendered by the safety officer. This would have brought an end to the investigation of the safety officer into Mr. Vella's refusal to work.

This does not mean that the safety officer could not have pursued her investigation into the circumstances of this case as they relate to the security escort policy. On the contrary, once the specific danger feared by Mr. Vella has been dealt with, the safety officer can then look at whether the procedure proposed by management was sufficient to protect the health and safety of employees of the Institution. Under section 124 of the Code, the employer must "ensure the safety and health at work of every employee is protected". Where the safety officer determines that this is not the case, an appropriate direction can be issued to remedy the situation.

The security escort policy is, as explained by Mr. Lafrenière, a guideline for institutional managers. The guideline is subject to the discretion of the Institution Heads where the circumstances require their discretion. In my opinion, it is important that a policy of this nature be and remain flexible in order to adapt to the various situations involving either medium or high risk factors. Each case must be assessed on its merits. The case of Mr. Vella required that the safety officer investigate the specific circumstances of his refusal to work and not embark on an inquiry into the adequacy of the policy.

There are inherent dangers related to escorting inmates. In the case of escorting inmates off-site, the risk of violence does increase and the protective measures taken must be sufficient to reduce the risk to a level where it is acceptable. The danger in escorting an inmate can only be assessed by taking into consideration the risks associated with escorting a particular inmate, in this case "Inmate X", in relation to the measures taken to protect the escorting officers. In this particular case, the assignment to escort "Inmate X" to the hospital had been terminated and, as a consequence, no condition existed which constituted a danger to Mr. Vella.

Decision

For all the above reasons, **I HEREBY RESCIND** the direction issued under subsection 145(2) of the Code on January 8, 1997, by safety officer Mary Duncan to Correctional Service of Canada.

Having decided the above, I feel compelled to make the following comments. The employer acknowledges that an assault may occur during a security escort. In the Position Description of the truck driver, the incumbent is required to "assist in custodial duties in emergency conditions." Consequently, the driver of the vehicle, who is not a trained correctional officer, is expected to put his health and safety at risk in an emergency situation without the benefit of any training in these situations. I would encourage the parties to address, at the safety and health committee level, this aspect of the security escort function. As a minimum, the employee providing assistance in emergency situations should have the necessary knowledge, training and experience to do this in a safe manner.

Decision rendered on June 2, 1997

Serge Cadieux
Regional Safety Officer

SUMMARY OF REGIONAL SAFETY OFFICER DECISION

Applicant: Correctional Services Canada - Warkworth Institution

Respondent: Public Service Alliance of Canada - PSAC

KEYWORDS

Danger, security escort, in the presence of.

PROVISIONS

Code: 145(2)

SUMMARY

A correctional officer refused to escort an inmate to a local hospital because the employee assigned to assist him transport the inmate was not a trained correctional officer. The safety officer (s.o.) investigated the refusal to work by telephone and interpreted the Security Escort policy of correctional Services Canada (CSC) to mean that two correctional officers are required during a security escort. Upon review the Regional Safety Officer (RSO) found the investigation of the s.o. to be seriously flawed since she did not investigate the refusal to work in the presence of the parties. The RSO found that if the s.o. had attended the Institution she would have been made aware that the security escort assignment had been terminated that morning because it was impossible to re-schedule the inmate's appointment for that same day. As far as the refusal to work was concerned, the RSO found that the s.o. should have decided at that point that the correctional officer was no longer in danger and issue a decision accordingly. For these reasons the R.S.O. **RESCINDED** the direction.