



Human Resources  
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Canada Appeals Office on Occupational Health and Safety • Bureau d'appel canadien en santé et sécurité au travail

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Decision No. 01-015  
May 23, 2001

*CANADA LABOUR CODE*  
PART II  
OCCUPATIONAL HEALTH AND SAFETY

Howard Page  
*applicant*

and

Correctional Services Canada  
*employer*

and

Chris Matson  
*health and safety officer*

This case was heard by Serge Cadieux, appeals officer, in Kingston, Ontario, on April 19, 2001.

Appearances:

Mr. Michel Bouchard for the employee, Mr. Howard Page for the Confédération des syndicats nationaux (CSN).

Ms. Cindy Harrington, Chief of Human Resources at the Collins Bay Institution, Correctional Services Canada.

[1] This case concerns an appeal made by Mr. Howard Page under subsection 129(7) of the Canada Labour Code, Part II (the Code), of a decision of no danger given on November 10, 2000, by health and safety officer Chris Matson from Human Resources Development Canada (HRDC).

[2] Mr. Page is a correctional officer at the Collins Bay Institution (CBI). He refused to work on November 7, 2000. Mr. Matson testified that he was notified of Mr. Page's refusal to work on November 9, 2000. The health and safety officer verified that it was not urgent for him to be at the site on that day since, he said, "it was not a situation where anybody was actually doing a function at the time but rather a training that was going to be given. My understanding was that Mr. Page and another employee had refused to take part in the training." It was agreed that he would attend the site on November 10, 2000 and investigate the matter.

[3] Upon his arrival at the CBI, the health and safety officer investigated the other employee's refusal to work and waited on Mr. Page to hear about his refusal to work. The reason for this is that officials of the CBI had not been made aware of Mr. Page's refusal to work and therefore had not met with Mr. Page when the health and safety officer arrived. A pre-meeting with management and Mr. Page took place to look into Mr. Page's concern and to explain the steps that had been taken in the other employee's refusal to work. When it was decided that they could not agree on the resolution of the matter, Mr. Matson intervened and investigated.

[4] The issue, said Mr. Matson, was that a live round was found with the dummy ammunition at a previous date i.e. November 6, 2000. Mr. Page explained his reason for refusing to work in a written statement in the following manner:

I refuse to work on the firing range at Millhaven due to a live round found amongst dummy rounds. I feel that safety procedures are not in place or followed to ensure this will not reoccur.

[5] Mr. Matson investigated Mr. Page's refusal to work and ruled that Mr. Page was not in a situation that constituted a danger as defined under the Code. In support of his decision of absence of danger, the health and safety officer explained that the live round had been found on a previous date, and that part of the training with weapons i.e. recognition of rounds, handling, loading and unloading, is to check the equipment, including whether the rounds being used are dummy rounds or live rounds.

[6] Mr. Matson noted that there was nothing happening at the time of Mr. Page's refusal to work and that his concern resulted from an incident that had happened during a training session on the sixth of November, while he was absent, when a live round was found mixed with dummy rounds. He ruled that no danger existed to Mr. Page after ensuring that some modifications would be made to make the dummy rounds more visible and that the method of storage would be improved. He found that Mr. Page's concern was hypothetical.

[7] Mr. Page explained that dummy rounds are very similar to live rounds. They have the same shape but are inert because they do not have a primer on them. The ones used on the sixth and the seventh of November are made of the same metal material i.e. brass. Visually, they look very similar.

[8] Mr. Page acknowledged that in handling dummy rounds during a training session, he would have to follow strict safety procedures. For example, under no circumstances would a trainee be allowed to direct the firearm towards another student. His concern was primarily that if, for any reason, an undetected live round were to be fired in the classroom, the risk of ricochet and injury would be very high.

[9] Mr. Page was concerned that following his refusal to work, no investigation had taken place to determine how the live round became mixed with the dummy rounds. The procedure, said Mr. Page, is that "dummy rounds are always kept separate from live rounds". He added that at the time he invoked his right to refuse, there had been no change in the procedures as far as the coloring or the storage of the dummy rounds. When he showed up on the seventh for training,

Mr. Page noted that the dummy rounds “were still stored in an empty coffee tin.” One of his concerns with this method of storage is that, “at a glance, it would be impossible to tell if a dummy round is missing or if a live round had been mixed in with the dummy rounds.”

[10] Mr. Page explained that when he arrived at the Millhaven range on the seventh for the training, he was not aware that a live round had been found the previous day. It is one of the student who informed the class that a live round had been found the previous day. Mr. Page stated that while he agreed that there might not have been immediate danger to himself at that moment, he felt that if no investigation is carried out and there is no change in the procedures, the potential for danger still exists. Although there had been some verbal agreement between the health and safety officer and CBI's armourer, Mike Smith, to take some steps to improve procedures, he felt that since his refusal was not upheld, there were no direction given to the Institution to ensure that changes would be made.

[11] Ms. Harrington acknowledged that neither senior management nor the Human Resources Office of CBI had been made aware of the incident that occurred on the sixth. Proper steps have been taken since then, she said, to correct that situation. She noted that Mr. Babcock, the training instructor, had found the live round very quickly on the sixth and removed it immediately. She added that other instructors had said they could as well identify immediately a live round mixed with dummy rounds. They said that identifying live and dummy rounds is part of the training module in that students must always inspect physically each round prior to loading and unloading. Following those guidelines is a condition of training.

[12] Ms. Harrington added that the keys to the ammunition are very strictly controlled and in the possession of instructors only and the armourer. While in the past, instructors would also prepare ammunition for the training day, now only the armourer is authorized to prepare them and instructors receive the ammunition from the armourer. Training ammunition has now been changed to plastic and the colour orange. The container used to hold the training ammunition has also been changed.

[13] Mr. Bouchard argued that in a classroom environment there should never be a live round. It is nice, said Mr. Bouchard, that steps have been taken to prevent this type of situation from happening again, however, nothing had been done and management was unaware of what had happened on November 6 and 7, 2000. In this appeal, said Mr. Bouchard, we are looking at the events that occurred on the seventh. The ruling of the safety officer at that moment is incorrect and should have been that there was a potential danger.

[14] Ms. Harrington acknowledges that the situation that prevailed on the seventh should not have happened. However, she is confident that Mr. Babcock ensured there were no live ammunition in the tin can on the seventh after his experience of the sixth where he found a live round mixed with the dummy rounds. While CBI agrees with Mr. Page, it feels that none of the employees of CBI were in danger on the seventh.

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[15] The issue to be decided in this case is whether Mr. Page, or any other employee, was in a situation of danger, as defined in the Code, when he refused to work on November 7, 2000. I have dealt with the concept of danger in *Darren Welbourne v Canadian Pacific Railway Company*, unreported Appeals Officer Decision No. 01-008 in which I wrote:

[15] “Danger” is defined at subsection 122(1) of the Code as follows:

*“danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.*

*“danger” Situation, tâche ou risque - existant ou éventuel - susceptible de causer des blessures à une personne qui y est exposée, ou de la rendre malade - même si ses effets sur l’intégrité physique ou la santé ne sont pas immédiats -, avant que, selon le cas, le risque soit écarté, la situation corrigée ou la tâche modifiée. Est notamment visée toute exposition à une substance dangereuse susceptible d’avoir des effets à long terme sur la santé ou le système reproducteur.*

[16] This new definition of danger is similar to the previous definition of danger that existed in the pre-amended Code, which read:

*“danger” means any hazard or condition that could reasonably be expected to cause injury or illness to a person exposed thereto before the hazard or condition can be corrected.*

[17] The current definition of “danger” sets out to improve the definition of “danger” found in the pre-amended Code, which was believed to be too restrictive to protect the health and safety of employees. According to the jurisprudence developed around the previous concept of danger, the danger had to be immediate and present at the time of the safety officer’s investigation. The new definition broadens the concept of danger to allow for potential hazards or conditions or future activities to be taken into account. This approach better reflects the purpose of the Code stated at subsection 122.1, which provides:

*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.*

[18] Under the current definition of danger, the hazard, condition or activity need no longer only exist at the time of the health and safety officer's investigation but can also be potential or future. The New Shorter Oxford Dictionary, 1993 Edition, defines "*potential*" to mean "possible as opposed to actual; capable of coming into being or action; latent." Black's Law Dictionary, Seventh Edition, defines "*potential*" to mean "capable of coming into being; possible." The expression "*future activity*" is indicative that the activity is not actually taking place [while the health and safety officer is present] but it is something to be done by a person in the future. Therefore, under the Code, the danger can also be prospective to the extent that the hazard, condition or activity is capable of coming into being or action and is reasonably expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected or the activity altered.

[19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.

[20] The expression "*before the hazard or condition can be corrected*" has been interpreted to mean that injury or illness is likely to occur right there and then i.e. immediately<sup>1</sup>. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or future activity, thus appearing to remove from the previous concept of danger the requisite that injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity altered. With this knowledge in hand, one cannot wait for an accident to happen, thus the need to act quickly and immediately in such situations.

[16] In the instant case, Mr. Page was made aware that a live round was found mixed with dummy rounds on a previous date. This type of situation is obviously unacceptable and cannot be tolerated. If the live round was intentionally placed in the tin can either as a prank or with malfeasance, the culprit should be found and appropriately disciplined. If, on the other hand, this is an honest mistake which is the result of inadequate safety procedures, as alleged by Mr. Page, then the situation needs to be corrected to ensure the same situation does not repeat itself. I understand that CBI has taken appropriate steps to correct the situation following Mr. Page's refusal to work. Consequently, I need not dwell on this aspect any further. Rather, I will concentrate on dealing with the facts of the case.

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<sup>1</sup> *Brailsford v. Worldways Canada Ltd.* (1992), 87 di 98 (Can. L.R.B.)  
*Bell Canada v. Labour Canada* (1984), 56 di 150 (Can. L.R.B.)

- [17] Based on the facts of this case, I am of the opinion that the situation feared by Mr. Page does not constitute a danger, as defined in the Code, for the following reasons.
- [18] Mr. Page has never been exposed to the situation where he had to handle a live round of ammunition during training and there is no reason to believe that he would ever be exposed to such a situation as live rounds are not intentionally mixed with dummy rounds. Exposure to a potential hazard, such as having a live round mixed with dummy rounds, is an essential condition of the existence of danger as defined in the Code. In this case, the fact that a live round was mixed with dummy rounds is highly suspicious of a criminal act which is clearly outside the purview of the Code.
- [19] The first person to handle the ammunition from the tin can, on the sixth of November, was an experienced trainer who has detected immediately the live round. Other trainers consulted have also stated that they would also detect a live round at first sight. I give much weight to an early detection of live rounds by expert trainers since they have the ultimate responsibility for the distribution of rounds. The fact that dummy rounds should be distinguished from live rounds by colour would certainly facilitate the identification of the ammunition, however this does not mean that the existing ammunition cannot be distinguished one from another. One should not rely on colour only to identify the ammunition as this could be misleading and, in the case of a criminal act, dangerous. As for storing ammunition in a tin can, I believe this represents a lack of respect for ammunition that is unprofessional and unacceptable. I nonetheless recognize that a live round could find its way in the hands of students.
- [20] Part of the training with weapons i.e. recognition of rounds, handling, loading and unloading, is to check the equipment, including whether the rounds being used are dummy rounds or live rounds. Clearly, since the identification of rounds is an essential component of training, I can only conclude that a live round would normally be detected prior to the weapon being loaded with it. This training aspect of this case is given much weight because, for all practical purposes, a live round should be intercepted before any mishap occurs. I understand that other penitentiaries have indicated an interest in keeping the same training system in place respecting similar appearance for rounds.
- [21] Mr. Page acknowledged that the safety procedures for handling weapons during training prohibit anyone from directing his weapon towards any student at any time and particularly once the weapon is loaded. In fact, this is a universal rule understood and accepted by everyone, including Mr. Page. Failure to comply with this rule should result in immediate reprimand.
- [22] The weapon, if unintentionally loaded with an undetected live round, would have to be fired in the direction of a student to cause injury, an action which is also prohibited since weapons are only to be fired in a controlled environment such as at a target at the range.
- [23] Finally, Mr. Page acknowledged that he was not in an immediate danger when he refused to work but that a potential danger existed to him. One of his concern was that if an undetected live round were to be fired in the classroom, the risk of ricochet and injury would be very high. Like the safety officer before me, I find this situation to be most unlikely and highly hypothetical. Hypothetical situations do not meet the definition of danger under the Code.

[24] While I generally agree with the concerns expressed by Mr. Page respecting the procedures that were in place at the time of his refusal to work, I agree with the safety officer that Mr. Page was not in a situation of danger as defined in the Code. The possibility that a live round would be mixed with dummy rounds, that it would not be detected by an expert trainer, that it would escape identification during a session on ammunition identification, that it would be loaded undetected in one of the student's firearm, that that student would inadvertently aim his/her weapon at another person and unintentionally fire his weapon at that person or that the shot would ricochet and injure someone in the classroom, is so remote that I find it to be highly unlikely to occur.

[25] None of the facts outlined above would support the contention that Mr. Page, or any other student, was in a situation that could reasonably be expected to cause injury to him either immediately or some time in the future. Thus there is no reasonable expectation that injury would occur to Mr. Page. For these reasons, I confirm the safety officer's decision of absence of danger.

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Serge Cadieux  
Appeals Officer

SUMMARY OF APPEALS OFFICER DECISION

Applicant: Howard Page

Respondent: Correctional Services Canada, Collins Bay Institution

**KEY WORDS**

Ammunition, live rounds, dummy rounds, danger, reasonable expectation of injury, procedure, training, detection of live rounds

**PROVISIONS**

C.L.C.129(7)

**SUMMARY**

A correctional officer refused to participate in weapons training given by the Collins Bay Institution. The employee had become aware that a live round of ammunition had been found on a previous date mixed with dummy rounds. The employee was concerned that the procedures in place were insufficient to protect him. It was impossible to distinguish the live round from dummy rounds on the basis of colour, shape or storage method. Mr. Page feared that should a live round be fired in a classroom, it could ricochet and injure a student. The health and safety officer who investigated Mr. Page's refusal to work found this situation to be hypothetical and ruled on the absence of danger as defined under the Code.

On appeal, the appeals officer agreed with the safety officer. The definition of danger under the Code required that there be a reasonable expectation that injury occurs. There were no reasonable expectation that injury would occur in the instant case. The appeals officer found that identifying live rounds from dummy rounds was an integral part of training. The appeals officer noted that the live round had been immediately detected by an experienced trainer. Other trainers, who have ultimate responsibility for the handling of ammunition during training, had said that they would also identify the live round immediately if it was mixed with dummy rounds. The appeals officer found that the situation feared by Mr. Page was hypothetical and confirmed the health and safety officer's decision of absence of danger.