Human Resources Development Canada
Développement des ressources humaines Canada

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

CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

Marc Bouchard
Mario Guillemette
applicants

and

Correctional Service of Canada
employer

and

Mario Thibault
health and safety officer

Decision No. 01-027
December 12, 2001

This case was heard by appeals officer Michèle Beauchamp in Cowansville, Quebec, on September 7, 2001.

Appearances

For the applicants:

Marc Bouchard, correctional officer
Robert Guimond, union advisor, *Confédération des syndicats nationaux* (CSN)
Jean-Yves Cyr, executive president, union local

For the employer:

Régis Charrron, Assistant Director, Management Services, Correctional Service of Canada (CSC)
Suzanne Legault, Unit Manager

[1] This case concerns an appeal made by Marc Bouchard and Mario Guillemette, correctional officers at Cowansville Institution in Quebec, under subsection 129(7) of Part II of the *Canada Labour Code* ("the Code") against a decision of no danger given by health and safety officer Mario Thibault of Human Resources Development Canada's Labour Program on February 27, 2001.

[2] On February 26, 2001, Marc Bouchard and Mario Guillemette refused to work on the basis of subsection 128(1) of Part II of the Code in a situation that was described in the letter below as follows:

> Cowansville, 01/02/26
>
> Dear Sir or Madam,
>
> I, Correctional Officer Marc Bouchard, hereby wish to exercise my right under Part II of the *Canada Labour Code* to refuse to work in the case of inmate XXXXX for the following reasons:
>
> 1. The inmate in question is an impulsive individual who has difficulty in controlling himself.
> 2. He has a low frustration threshold in emotionally-charged situations.
> 3. Positive urine test (29/01/01).
> 4. Involved in a fight (28/01/01).
> 5. Aggravated assault, assault, homicide.
> 6. HIGH-risk and HIGH level of criminal needs.
> 7. Has not undergone any remedial program so far.
> 8. Has manifested violent behaviour since 1989.
>
> These eight points are reflected in the psychologist's report that was completed on 2000/11/10.
>
> Also, in view of the recent misconduct involving this inmate (fighting and positive urine test) combined with his criminally violent nature and the places that would be visited during his escorted temporary absence (ETA), I feel that the ETA should be conducted according to generally accepted practice — namely, ARMED.
>
> The 23/02/01 assessment for decision states that PSO XXXXX should certify that the inmate has not been drinking or smoking before the temporary absence. A complete (unarmed) security escort was recommended, but can we seriously consider an UNARMED escort to be COMPLETE?
>
> When inmates know that one of the escorting officers is armed, it has a psychological effect on them that it is generally beneficial for the officers.
>
> For all these reasons, I think that it is too dangerous to escort such an individual on a temporary absence without being armed and I do not feel comfortable in this situation.

[3] Correctional officer Mario Guillemette, who was also assigned to accompany the inmate in question, was absent at the time of health and safety officer Thibault's investigation, but correctional officer Yves Dufour, who is also vice-president of the union local, explained officer Guillemette's refusal to work as follows:

> Officer Guillemette wishes to point out the significant deterrent effect of being armed on high-risk offenders. Officer Bouchard had recently received what he felt was a credible anonymous tip that two inmates were recently attacked on the orders of

> inmate XXXXX; so, Officer Guillemette wanted the health and safety officer to check out this information with Cowansville Institution management. However, as it turned out, rather than this factor, it was the assessment for decision because of the inmate's psychological profile (as determined by psychologist XXXXX in November 2000) that was the main reason for the officer's refusal to work. Since this psychological evaluation clearly described the inmate's fragile emotional state, Officer Dufour asked the health and safety officer to read it before coming to a decision.

[4] Both correctional officers were supposed to perform the ETA to a Montreal hospital where the inmate was to see his gravely ill mother. In his investigation report that was sent to the parties concerned, health and safety officer Thibault states that he was notified of the refusal to work the same day and it was agreed that he would conduct his investigation at Cowansville Institution the following day.

[5] In his investigation, health and safety officer Thibault ascertained that the team responsible for assessing the circumstances of the inmate's temporary absence had made a thorough assessment before coming to a decision. The members of this team included a correctional officer II who was very familiar with this inmate. The assessment team applied a number of specific criteria to determine whether the escorting officers should be armed or not — criteria such as the inmate's psychological assessment, his difficulty in controlling his emotions, no previous escape attempts, no links with organized crime, and no previous threats against prison staff.

[6] The assessment team recommended that the escort for the temporary absence be unarmed, that the inmate be restrained with handcuffs and leg irons, and that the escorting officers be equipped with pepper spray. The team also recommended that the correctional officers check the inmate's condition before the temporary absence and that it be cancelled if they noticed that he was under the effect of drugs or alcohol.

[7] Health and safety officer Thibault explained that the armed correctional officer in an armed escort should never come close to the inmate being escorted so as to avoid any risk that the inmate seize the weapon. On the other hand, if the escorting officers are unarmed, they could combine their forces to restrain the inmate by the arms and this would reduce the inmate's inclination to be violent. The health and safety officer also had the inmate's file checked for an anonymous tip that he had either arranged for someone to attack two other inmates or had attacked the inmates himself, but there was nothing in the file to corroborate this information.

[8] Health and safety officer Thibault took all these factors into consideration, as well as the measures used to control the inmate and the fact that both correctional officers were qualified and experienced enough to decide that there was no danger for correctional officers Bouchard and Guillemette in escorting the inmate without being armed.

[9] Correctional officer Bouchard explained to the hearing that he had been a correctional officer II since 1989 and that he was responsible for eight inmates. The inmate involved in the refusal-to-work situation had received an initial assessment and should have followed a program to control his emotions. Officer Bouchard stated that the temporary absence in question was for humanitarian reasons, which usually implies only one escorting officer, dressed in civilian clothes and driving an ordinary car. In this particular situation, the assessment team had, according to the report, recommended "full security," which implies two uniformed officers, the use of a clearly identified CSC van, a handcuffed and shackled inmate, an officer in charge equipped with pepper spray, and an armed driver.

[10] Since the inmate in question was housed in a block that Correctional Officer Bouchard worked in, the officer had some knowledge of him. Officer Bouchard said that he was afraid that the inmate would react violently when he saw the critical state his mother was in, that the hospital was located in a neighbourhood where the inmate had grown up and where he might have friends prepared to help him escape, that there were many criminals in Montreal and that, according to the inmate's initial assessment, he represented a high level of risk for the general public. On the other hand, the correctional officer admitted that the escort went off without any problems and the inmate behaved well.

[11] Union advisor Robert Guimond stated that the risk factors the escorting officers were facing derived from the inmate, the area and the inherent institutional nature of the Correctional Service. It was therefore appropriate to consider the best means of providing as much security as possible to the escorting officers that would take into account the stress they were under and the effect this would have on their health. Mr. Guimond felt that such risks should be eliminated in the spirit of section 122.2 of Part II of the Code dealing with preventive measures. In his view, arming the officers would be the best way of both eliminating the dangers for the officers and protecting the inmate. He recommended that, if the appeals officer decided to issue a direction, this would include the obligation to provide training in self-defence to the correctional officers.

[12] In his testimony, Régis Charron, Assistant Director, CSC Management Services, reminded the hearing that the Correctional Service is governed by the *Corrections and Correctional Release Act*, which attempts to ensure that inmates eventually become good citizens. This act stipulates that when assessing inmates for temporary absence purposes, the CSC should take the least restrictive measures, bearing in mind the security profile of the inmate in question. The risk assessment made by the professional team in this case took into account the inmate's security profile as well as the legally required criteria in their process of deciding whether the escort should be armed or not and whether the inmate should be handcuffed and shackled.

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[13] Subsections 146(1) and 146(2) of Part II of the *Canada Labour Code* define the appeal officer's role when an appeal is brought against a "non-existent danger" decision issued under subsection 129(7). Here are relevant excerpts from these subsections:

> 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; and
> (b) issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).
>
> (2) The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned, and the employer shall, without delay, give a copy of it to the work place committee or health and safety representative.

[14] In my view, two questions need to be asked in this case: first, were Correctional Officers Bouchard and Guillemette facing danger within the meaning of the Code when they refused to work on February 26, 2001, and was this a normal condition of their employment?

[15] Here are the relevant sections of Part II of the Code:

> 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 constitutes a danger to the employee or to another employee;
> (b) a condition exists in the place that constitutes a danger to the employee;
> (c) the performance of the activity constitutes a danger to the employee or another employee.
>
> (2) An employee may not, under this section, refuse to operate a machine or thing, to work in a place or to perform an activity if
> (a) the refusal puts the life, health or safety of another person directly in danger; or
> (b) the danger referred to in subsection (1) is a normal condition of employment.

[16] 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*
>
> *"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*

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.	*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.*

[17] I stated in *François Jeanson and the Correctional Service of Canada*[1] that this definition of danger takes into account possible exposure to a hazard, condition or activity that could cause injury or illness to the employee, if the action required was not taken to correct the hazard or condition or alter the activity before the danger materializes. In the same decision, I also made use of what Appeals Officer Serge Cadieux stated in *Darren Welbourne and Canadian Pacific Railway Company*[2] — namely, the argument that the concept of "could reasonably be expected to" excludes all hypothetical situations.

[18] I think it would also be useful to remember that the federal Public Service Staff Relations Board has made a considerable number of decisions that have established jurisprudence concerning refusal to work by Correctional Service officers and that most of these precedent-setting decisions have indicated that the possibility that correctional officers might be subject to violence from one or more inmates is a "normal condition" of their employment.

[19] In this regard, I would simply like to cite *William Kirkwood Brown and the Correctional Service of Canada*,[3] in which PSSRB member Turner stated with reference to one of the board's previous cases:

> As in Evans (supra), in the case of a correctional officer, the type of danger alleged to exist, i.e. the possibility of violence, is inherent in the job. I refer to McKenzie (Board file 165-2-78), wherein Board member Young wrote at page 17:
>
> > *I find myself in agreement with [counsel for the employer], when he argues that both the threat of escape or assault upon a penitentiary as well as the actual carrying out of such an act are inherent risks of the prison guard's job.*

[20] As a result, I have come to the conclusion that, because of the constant interaction between inmates and correctional officers, potentially violent reactions from inmates do represent a normal condition of employment for Canadian correctional officers. I have also concluded that the CSC needs to take such risks into account if it wants to be faithful to its obligations, as prescribed by section 124 of the Code, to "ensure that the

[1] Decision 01-023, rendered on October 11, 2001
[2] Decision 01-008, rendered on March 22, 2001
[3] Decision 165-2-110 of the PSSRB, rendered on September 25, 1995

health and safety at work of every person … is protected." The CSC must therefore do its best to reduce this "inherent risk" so that this "normal condition of employment" never exceeds the normal range of risk and becomes a danger within the meaning of subsection 128(1) of the Code.

[21] In this particular case, the Correctional Service was well aware of the degree of risk the inmate in question represented. It therefore applied its usual policy concerning inmate absences (in this instance, for humanitarian reasons), by accepting the recommendation the professional risk assessment team had made on the basis of a number of specific criteria. This recommendation covered the following points: unarmed escort whereby the inmate would handcuffed and shackled and the officers equipped with pepper spray.

[22] Were Correctional Officers Bouchard and Guillemette facing a danger within the meaning of the Code (when they refused to work)? I do not believe that in this case, the risk they were facing fell outside the normal conditions of their employment to the extent that it represented a danger within the meaning of the Code. Correctional officers work in an environment that involves an inherent possibility of violence. I consider that, as the officers' employer, the CSC did its best to reduce the risks associated with this ETA by taking various steps including risk assessment by a team of professionals who were very familiar with the circumstances involved.

[23] For all the above reasons, I confirm the decision of no danger given by Health and Safety Officer Thibault.

Michèle Beauchamp

Appeals Officer

SUMMARY OF APPEALS OFFICER DECISION

Decision No. 01-027

Applicants: Marc Bouchard and Mario Guillemette

Employer: Correctional Service of Canada

Key Words: Refusal to work, danger, armed or unarmed escort

Code: 122, 128(1)
COHSR: n/a

Summary: Two correctional officers at the Correctional Service of Canada's Cowansville Institution refused to work on the grounds of subsection 128(1) of the Code, alleging that it would be dangerous for them to escort an inmate to visit his gravely ill mother in a Montreal hospital. After his investigation, the health and safety officer decided that escorting the inmate without being armed did not represent any danger for the employees concerned.

The appeals officer confirmed the health and safety officer's decision of no danger, because there is an inherent potential for violence in the penitentiary system and the danger the officers were exposed to did not exceed the normal circumstances of their employment so as to become a danger within the meaning of the *Canada Labour Code.*