CANADA LABOUR CODE
PART II
OCCUPATIONAL HEALTH AND SAFETY

C. Byfield
applicant

and

Correctional Service of Canada
e*mployer*

Decision No: 03-007
March 10, 2003

Appeals officer Douglas Malanka inquired into the decision of health and safety officer Darlene Tunney who, on October 26, 2001, decided pursuant to subsection 129.(4) of the Canada Labour Code (hereto referred to as Part II or the Code) that a danger did not exist for C. Byfield, a Primary Worker[1] (PW) at Grand Valley Institute for Women (GVI). A hearing was held on January 21, 2003 in Kitchener, Ontario.

Appearances

Mr. Michel Bouchard, Advisor, Conféderation des syndicats nationaux (CSN).
Mr. Earl. Bird, PW, GVI; Co-Chair, GVI Work Place Health and Safety Committee (WPHSC), and Representative, Union of Canadian Correctional Officers (UCCO).
Mr. Henry Heikoop, PW, GVI; and Representative, GVI WPHSC.
Ms. Charlene Byfield, PW, GVI.

Mr. Richard Fader, Council, Department of Justice, for Correctional Service of Canada;
Mr. Barry McGinnis, Assistant Warden Management Services, GVI.
Ms. Lonnie Gratton, PW and Officer in Charge October 25, 2001, GVI.
Ms. Crystal Thompson, Team Leader, Structured Living Environment, GVI.
Ms. Fran. Pieper, GVI.

Ms. Darlene Tunney, Health and Safety Officer, Human Resources Development Canada.

[1] Primary Worker Byfield was classified as a Correctional Officer at the Level of CX 02.

[1] On October 25, 2001, PW Byfield arrived at the GVI PW Office for her day shift. Officer in Charge (OIC) L. Gratton informed her that she was posted to the Structured Living Environment (SLE) and, in accordance with the Post Orders for the SLE, that she would be the only PW assigned to the post during the shift. PW Byfield immediately refused to work stating that it was unsafe for a single PW to staff the SLE. She held that the SLE was an unsecured post, that inmates in the SLE had mental health issues and unlimited movement in the unit, and that radio communications in the SLE were inadequate. This was the second time that PW Byfield had refused to work as the sole PW in the SLE. She previously refused to work on October 22, 2001 when she was similarly assigned to work as the sole PW on the SLE during the day shift.

[2] Health and safety officer Tunney arrived at GVI and investigated into PW Byfield's refusal to work on October 25, 2001. I retain the following from her report and testimony.

[3] PW Byfield told officer Tunney that the SLE was located approximately 200 metres from the main building and that the specialised unit could house up to 8 minimum or medium security inmates who had mental health issues. She stated that the SLE was an unsecured post and that inmates had unlimited movement within the unit and the institution itself. She maintained that GVI had a relatively low staff to inmate ratio and usually ran on minimum staffing. She held that there was no backup in the SLE itself, and given the physical distance between the SLE and the main building, the Patrol might not be able to respond to the SLE in a timely manner. PW Byfield further complained that Behaviour Counsellors (BCs) with whom PWs had to work had not received the 12 week correctional officer instruction and training. Consequently, the health and safety of both the BC and PW could be at risk if trouble arose. She also complained that there had been problems on the SLE with two-way radio communications.

[4] Health and safety officer Tunney's investigation established that the SLE provided a specialized treatment option for minimum and medium security inmates at GVI with significant cognitive limitations or mental health concerns. Candidates to the SLE were assessed prior to placement according to Correctional Service of Canada (CSC) protocol. The Operational Plan for the SLE specified how the unit was to function, including hiring and training requirements for the multidisciplinary team required to provide intensive support and specialized correctional rehabilitation and mental health programs on a 24 hour basis. GVI was operated on an open concept basis which permitted inmates to experience a residential-like setting and to move freely within GVI and the SLE. The SLE was always intended to be staffed with only one fully trained PW worker during the day and evening shifts and, while Behavioural Counsellors (BCs) were not trained as PWs, they were trained in non-violent crisis intervention and were responsible to participate in maintaining security in the institute.

[5] Health and safety officer Tunney learned that GVI was housing a total of 92 inmates at the time of PW Byfield's refusal to work, and that the following staffing levels applied for the three round-the-clock shifts:

- 7:00 a.m. to 3:00 p.m. - (Day Shift) - 10 primary workers;
- 3:00 p.m. to 11:00 p.m. - (Evening Shift) - 6 primary workers;
- 11:00 p.m. to 7:00 a.m. - (Night Shift) - 6 primary workers.

[6] She further noted that the following staffing levels were in effect in respect of the SLE, and that, at the time of PW Byfield's refusal to work, the SLE was housing only 5 of 8 possible inmates:

- Day Shift
  - 1 primary worker;
  - 1 Behavioural Counsellor;
  - 1 Nurse;
  - 1 Team Leader (not always present within the unit)

- Evening Shift
  - 1 primary worker;
  - 1 Behavioural Counsellor;
  - 1 Nurse (until 7:30 p.m.);
  - 1 Team Leader (until 4:00 p.m.)

- Night Shift
  - 2 primary workers.

[7] Mr. McGinnis informed Officer Tunney that a Threat-Risk Assessment for the SLE had been developed according to CSC guidelines and in consultation with GVI WPHSC members. He pointed out that the Threat-Risk Assessment also required only one PW on the SLE during the day and evening shift. Mr. McGinnis held that PW Byfield was properly trained and qualified to do the work, and that operational contingency plans were in place should an incident have occurred.

[8] Health and safety officer Tunney also learned that the risk level assigned to the SLE at the time of PW Byfield's refusal to work was low to moderate, and that the ratio of PW to inmate on the SLE was 1:5 vs. 1:9 for the overall institution. In her decision on October 26, 2001 that a danger did not exist for PW Byfield, Officer Tunney noted that there had been few incidents of assaults at GVI since 1997, and that there was no evidence of agitation or stress among the inmates at the time of PW Byfield's refusal to work.

[9] PW Byfield testified that, following her first refusal to work, an inmate had threatened to injure someone and had been put into the GVI segregation unit. She held that inmate attitudes in the SLE could change at the "drop of a dime" because some inmates suffer from schizophrenia, bi-polar disorder or low social function. She reiterated that a BC was not trained to back up a PW should violence occur and that the response time for the Patrol was unknown at the time. She opined that a medium security inmate could inflict injury if the response time for the Patrol

exceeded 1 minute. While she conceded that the locked secured office could have provided some sanctuary for her until help arrived, she felt that it could only afford short term security because the glass window appeared to be constructed of normal glass.

[10] Mr. Henry Heikoop, employee co-chair on the GVI WPHSC, testified that he had never been consulted on the Threat-Risk Assessment for the SLE and that the Assessment did not reflect PW concerns. With regard to the test ordered by health and safety Tunney to measure Patrol response time to the SLE, he held that the Patrol had been sent to a favourable location just prior to the test. He opined that the true response time for the SLE could vary between 30 seconds and 2 minutes, and that any response time greater than 1 minute could be a problem. He conceded, however, that the Patrol usually advises the Security Control Post (SCP) of its location and that any PW in the institute not tied to a post would respond to a call for help in the institution.

[11] Mr. Earl Bird testified that he had asked to participate in the SLE Threat-Risk Assessment as co-chair of the GVI WPHSC, but was not consulted. Instead, Mr. McGinnis consulted Ms. Germain who was not a correctional officer and who did not represent Correctional Officers, and Ms. Zuberbuhler who preferred not to participate because she did not regard herself as competent for consulting on security at SLE. He conceded that he had been consulted after the fact, but declined to provide input since he was not included at the outset.

[12] Mr. McGinnis testified regarding the chronology of events connected with PW Byfield's refusal to work on October 25, 2001.

[13] He said that he met with Steve Robertson, PW representative, Jacqueline Ferreira, PW, ATL Sheila O'Neil and Chief Physiologist Allison Edgar-Bertoia on October 19, 2001 to discuss the rumour of a possible refusal to work in the SLE. At the meeting, described as an Informal Dispute Resolution Meeting, Ms. Ferreira told Mr. McGinnis that staffing one PW in the SLE was wrong and that two PWs were needed to alleviate employee concerns. According to Ms. Ferreira and Mr. Robertson, it was unsafe to staff the SLE with one PW on day and evening shifts because: the SLE Post Orders were draft and too general to provide substitute PWs with clear direction as to their duties and responsibilities; some inmates participating in the SLE program were unsuitable for the program; PW training was inadequate and BCs were not trained to provide PWs with backup; PWs and BCs were physically separated whenever it was necessary to separate incompatible inmates in the unit; communication equipment on the SLE did not always function properly; there was no performance standards for the Patrol to respond to a call for help in the SLE; and, PWs had to escort inmates to their smoking breaks while the BC remains alone in the SLE.

[14] On October 22, 2001, PW Byfield refused for the first time to work as the sole PW on the SLE. She provided Mr. McGinnis with a list of her health and safety concerns related to the SLE that appeared to reiterate the concerns that Ms. Ferreira and Mr. Robertson had provided to Mr. McGinnis on October 19, 2001, and to add new ones. McGinnis brought PW Byfield's document of concerns to a management team meeting on October 22. 2001, and following their meeting, Deputy Warden Blackler forwarded a written response to PW Byfield.

[15] PW Byfield refused to work as the sole PW on the SLE for the second time on October 25, 2001. Mr. McGinnis investigated into her second refusal to work with the participation of the GVI WPHSC. Participants included: Mr. McGinnis Management Co-chair WPHSC; Earl Bird, employee Co-chair WPHSC and UCCO Labour Representative; PW Byfield, Member WPHSC and PW; Crystal Thompson, Acting Team Leader (A/TL), SLE; and Fran Pieper, recorder. Later, Henry Heikoop, A/TL for the SLE joined the meeting.

[16] PW Byfield told the participants that she refused to work for the same reasons as her previous refusal to work on October 22, 2001, and because an SLE inmate had to be transferred to the segregation unit since her previous refusal to work.

[17] With regard to the Post Orders, Operational Plan and Threat-Risk Assessment Document for the SLE, Mr. McGinnis reminded participants that the Post Orders for the SLE had been approved in mid September, 2001, as part of the Pre-Operational Audit of the SLE, and that the SLE Post Orders approved one PW for the day and evening shift. Ms. Crystal Thompson stated that she had electronically distributed the SLE Operational Plan and all other essential documents to SLE staff two weeks in advance of the opening of the unit. Mr. McGinnis stated that he reviewed the Threat-Risk Assessment Document with Ms. Marion Evan, TL, Catherine Zuberbuhler, UCCO Representative, Dee Germain, Co-chair WPHSC and USGC labour representative, Alison Edgar-Bertoia, Chief Physiologist, and A/TLs Sheila O'Neil, and Mark Christie to complete the SLE Threat-Risk Assessment Document. The participants agreed to use the Threat-Risk Assessment from the secure unit as a template and completed the SLE Threat-Risk Assessment. The SLE Threat-Risk Assessment document was then forwarded to SLE staff, the Management Team, the WPHSC Committee and to Kris Stapleton, GVI USGE President.

[18] Following his joint investigation of PW Byfield's refusal to work, Mr. McGinnis disagreed that a danger existed for PW Byfield and concluded that staffing one PW in the SLE during day and evening shifts does not constitute a danger or a potential danger. He advised Deputy Warden Blackler of the impasse and she subsequently advised health and safety officer Tunney of PW Byfield's continued refusal to work.

[19] Mr. McGinnis testified that a personal protection alarm (PPA) test was conducted on October 26, 2001 in the middle office of the SLE in accordance with health and safety officer Tunney's direction. He confirmed that the SCP acknowledged the PPA and radioed the Patrol to respond within the 10 seconds of alarm. Two Patrol officers and one additional PW subsequently responded to the alarm within 50 seconds, and two other PWs responded 10 seconds later. Mr. McGinnis confirmed that PWs not tied to a specific post would respond to an alarm in addition to the Patrol. Mr. McGinnis added that, on December 3, 2001, two inmates were involved in a physical altercation in the SLE and this resulted in a PPA being alarmed. In that instance, three PWs in the PW Office responded and they reached the SLE within 1-2 minutes.

[20] Ms. Gratton testified that she was the OIC on the SLE the night shift prior to PW Byfield's refusal to work. She stated that there had not been any incidents during the shift and that the SLE appeared quiet at the time of PW Byfield's refusal to work. She opined that she did not have any difficulty working on the SLE when there was only one PW posted to the unit.

[21] Ms. Crystal Thompson testified that she was the A/TL in charge of the SLE at the time of PW Byfield's refusal to work. She testified that she was absent from GVI between October 5 to 24, 2001, and so was not directly involved in the actual opening of the SLE. However, she understood that 2 inmates were assigned to the SLE on October 2, 2001, another 2 on October 11, and another 2 on October 19. Although the SLE was a new initiative, she felt that the risk associated with the unit was manageable.

[22] In his summary, Mr. Bouchard argued that the matter was one of safety and not one of labour relations. He conceded that the issue related to staffing levels, but held that staffing levels and safety are intertwined in a medium security environment. According to Mr. Bouchard, the evidence in the case established that there was no backup for the PW assigned to the SLE on the day and evening shift and that the PW must rely on the Patrol for assistance. He held that the Patrol can take anywhere from 30 seconds to 3 minutes to respond and that this was insufficient. He accepted other PWs may also be available to respond from time to time, but one could not rely on this. He argued that a danger existed for PW Byfield on October 25, 2001, because the SLE Post Orders were unclear, there had been problems with the communication equipment in the SLE and because the retreat office in the SLE was not secure. He asked that I reverse the decision of health and safety officer Tunney that a danger did not exist for PW Byfield.

[23] Mr. Fader referred to the definition of danger in section 122 of the Code and held that, while the definition of danger now includes potential hazards or conditions, or future activities, the definition still requires that there must be a reasonable expectation that the hazard or condition could cause injury or illness to a person exposed thereto and before the hazard or condition can be corrected for a danger to exist.

[24] For interpreting and applying the definition of danger and the right to refuse work provisions in sections 128 and 129 of the Code, he referred me to the decision of the Federal Court of Appeal in the case of Fletcher v. Canada (Treasury Board) made on November 15, 2002 wherein the Honourable Mr. Justice J.A. Décarie wrote the following in paragraph 18 regarding the right to refuse provisions in the Code:

> 18 The mechanism is an ad hoc opportunity given 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 will-being of an employee which is at stake, not a hypothetical or speculative one.

[25] He noted that Honourable Messrs Justices Noel and Desjardins concurred with the Honourable Mr. Justice Décarie in that decision and the Honourable Mr. Justice Desjardins added the following in paragraphs 34 and 38 of the decision:

> 34. The safety officer, on the other hand, is told by our Court in Bidulka, supra, at 641, that a determination as to whether a condition exists that constitutes a danger to the employee, so as to justify a continuation of his refusal to work, is to be made at the time of the investigation. An employee can continue to refuse to work only if such a danger exists. If no danger exists, an employee has no justification to continue to work.
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> 38. Moreover, neither the safety officer nor the Board, could consider the "minimum staffing policy". The mechanism provided by the Code calls for a specific fact finding investigation to deal with a specific situation. It is not meant to provide a forum for an analysis of an employer's policy.

[26] Mr. Fader further referred me to paragraph 41 and 42 in my decision in the case of Canada (Correctional Service) and Schellenberg, Decision No. 02-005, issued May 9, 2002, in which I wrote:

> [41] For deciding if a danger exists, the health and safety officer must consider all aspects of the definition of danger and, on completion of his or her investigation, decide if the facts in the case support a finding of danger under the Code. This determination must be done on a factual basis and the facts must be persuasive since the right to refuse and danger provisions under the Code are considered to be exceptional measures. For a health and safety officer to find that a danger under the Code exists at the time of his or her investigation in respect of a potential hazard or condition, as in this case, the facts in the case must be persuasive that:
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> - a hazard or condition will come into being;
> - an employee will be exposed to the hazard or condition when it comes into being;
> - there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and
> - the injury or illness will occur immediately upon exposure to the hazard or condition[2].

[2] Since my decision in the case of Canada (Correctional Service of Canada) and Schellenberg, Decision No. 02-005, issued May 9, 2002, I have decided that it would be more appropriate to combine the 3rd and 4th bullet in paragraph [41] and the 2nd and 3rd bullet in

[42] It follows that, where a hazard or condition actually exists at the time of the health and safety officer's investigation, the facts in the case must only be persuasive that:

- an employee will be exposed to the hazard or condition;
- there is a reasonable expectation that the hazard or condition will cause injury or illness to the employee exposed thereto; and
- the injury or illness will occur immediately upon exposure to the hazard or condition.[3]

[27] He then referred me to paragraphs 9 and 10 in the decision of Verville and Canada (Correctional Service), Decision No. 02-013, issued June 28, 2002, and to paragraph 51 in the case of Stone and Canada (Correction Service), Decision No. 02-019, issued on December 6, 2002, wherein appeals officer Cadieux wrote respectively:

Verville and Canada (Correctional Service),

> 9. There is no indication in the instant case that the employees would be exposed to an activity that would cause injury to them. It is true that they were required to work amongst prisoners incarcerated in a maximum security facility, but there was no specific threat or occurrence that night that might reasonably be thought to cause injury. There was also no information that anything out of the ordinary was going to occur in the foreseeable future. The concern of the refusing correction officers was that an assault can happen at any time without warning. That concern is based primarily on the unpredictability of the inmate's behaviour. The testimonies of correctional officers were eloquent on this point.
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> 10 In a maximum security environment such as the Kent Institution, the risk of being assaulted is always present, and is inherent to a correctional officer's job (see the Federal court decision of Canada v. Lavoie [See note 3 below]). Thus, there is an inherent risk of being assaulted without warning in such an environment. In order to find that a danger existed, it would have to be demonstrated, based on the facts gathered during the health and safety officer's investigation, that there was a reasonable expectation that an injury was likely to occur to those correction officers' carrying out their current or future duties. This reasonable expectation should not be based on hypothesis or conjecture. Furthermore, the employees argue that the injury would occur because the correctional officers are not permitted to carry handcuffs at their discretion. This has not being demonstrated.

Stone and Canada (Correction Service),

> 51 As it stands today, the right to refuse provision in the Code are not meant to address long standing problems such as the problem identified by Mr. Stone in the instant case. The right to refuse in the Code remains an emergency measure to deal with situations where one can reasonable expect the employee to be injured when exposed to the hazard, condition or activity. However, it cannot be a danger that is inherent to the employee's work or is a normal condition [See note 6 below] of employment. This statement alone is fraught with consequences for correctional

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paragraph [42]. In accordance with the definition of danger in the Code, the "reasonable expectation" referred to in paragraphs [41] and [42] would apply to both criteria.

[3] See footnote 1.

> officers. Given that the likelihood of encountering violence is a normal condition of employment of the job of correctional officers, who are specifically trained to deal with these situations, it is very difficult to envisage a situation, in that environment, where a refusal to work for violence could be justified other than in a specific and exceptional circumstance.

[28] Mr. Fader held that the facts in this case do not support a finding of danger for PW Byfield. He emphasized that all was quiet in the SLE when PW Byfield refused to work and there was no indication that something was about to occur. He pointed out that PW Byfield had not reported to the post to see if anything was occurring; had not checked officer logs for the previous shift to see if any incidents had occurred; and had not checked her radio equipment to determine if it had been faulty prior to refusing to work.. He reiterated that PW Byfield was properly trained and equipped to perform the work and asked that health and safety officer Tunney's decision that a danger did not exist for PW Byfield be confirmed.

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[29] The issue in the case is whether or not a danger existed for PW Byfield at the time of health and safety officer Tunney's investigation of her continued refusal to work on October 25, 2001. For determining this, it is necessary to consider the facts in the case in relation to the definition of danger and the right to refuse provisions in the Code

[30] According to the section 122.(1) of the Code, danger is defined 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.

[31] Mr. Fader cited several citations in his summary for interpreting and applying the definition of danger and the right to refuse provisions in the Code. I agree that the citations are relevant to the case at hand and are to be applied here.

[32] According to the facts in the case, PW Byfield refused to work for the first time on October 22, 2001 after being assigned as the sole PW on the SLE. She held that it was dangerous to staff the SLE on day and evening shifts with only one PW. In connection with her refusal to work, she submitted a document to management listing her occupational health and safety concerns related to work on the SLE. Her health and safety concerns related generally to the Post Orders and Operational Plan for the SLE, the physical setup and equipment in the SLE and with the absence of a performance standard relative to the Patrol providing back up to a PW on the SLE. PW Byfield concerns were not alleviated by Deputy Warden

Blackler's response to her health and safety concerns and on October 25, 2001 refused again to work as the sole PW on the SLE during the day shift.

[33] Thus her refusal to work of October 25, 2001, was not based on anything specifically occurring or expected to occur on or in connection with the SLE. Rather it was based on PW staffing levels in the SLE and her conviction that her numerous health and safety concerns confirmed the danger. However reasonably this may have seemed to PW Byfield, such a view is not consistent with the definition of danger in the Code or with the case law cited. To the contrary, the definition establishes that a hazard, condition or activity only constitutes a danger if the hazard, condition or activity is one that could reasonably be expected to cause injury to any person exposed thereto before the hazard or condition can be corrected or activity altered. That is, the mere existence of one or more hazards, conditions or activities does not automatically confirm the existence of a danger. Instead, a danger is confirmed where the relevant facts confirm the reasonableness of the expectation that the hazard, condition or activity in question exists, or is capable of coming into existence; that the hazard, condition or activity will cause injury or illness to a person exposed thereto and that the injury or illness will occur immediately, even if the injury or illness is latent; that the illness or injury is serious, as opposed to an irritation; and that the hazard, condition or activity is one that arises out of, linked with, or occurring in the course of employment to which Part II applies. None of this was established in connection with PW Byfield's refusal to work.

[34] With regard to case law and staffing levels, I refer parties back to paragraph 25 (and to paragraph 38 therein) wherein the Honourable Mr. Justice Desjardins wrote:

> 38. Moreover, neither the safety officer nor the Board, could consider the "minimum staffing policy". The mechanism provided by the Code calls for a specific fact finding investigation to deal with a specific situation. It is not meant to provide a forum for an analysis of an employer's policy. [My underline for emphasis.]

[35] PW Byfield refused to work on October 25, 2001 because she postulated that something might occur on the SLE. Health and safety officer Tunney found that the facts did not substantiate her complaint that a danger existed at the time of her investigation. For the reason specified in the above, I agree with health and safety officer Tunney that a danger did not exist for PW Byfield and confirm her decision.

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Douglas Malanka
Appeals Officer

Decision No.: **03-007**

Applicant: C. Byfield

Respondent: Correctional Service of Canada

Key Words: danger, structured living environment (SLE), prison for women, staffing levels, unsecured post, post orders, operational plan, Threat-Risk Assessment, radios, personal protection alarms, patrol, response time

Provisions: C.L.C:122, 128, and 129.

Summary: On October 25, 2001, a Primary Worker (PW) at Grand Valley Institute for Women arrived for her day shift. The Officer in Charge informed her that she was posted to the Structured Living Environment and that she would be the only PW assigned to the post during that shift. The PW refused to work stating that it was unsafe for a single PW to staff the SLE. She held that the Structured Living Environment is an unsecured post, that inmates in the unit have unlimited movement in the unit, that inmates there have mental issues, and that radio transmission/communication in the unit is inadequate

The health and safety officer who investigated into the refusal to work found no evidence of an existing or potential hazard, condition or current or future activity that could reasonably be expected to cause injury of illness to the employee before the hazard or condition could be corrected or activity altered. She decided that a danger did not exist for the PW and informed parties of her decision.

Following his inquiry into the circumstances of the decision, the appeals officer confirmed the decision of the health and safety officer that a danger did not exist for the PW.