Occupational Health and Safety Tribunal Canada
Tribunal de santé et sécurité au travail Canada

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Case No.: 2006-60
Decision No.: CAO-06-052(S)

Canada Labour Code
Part II
Occupational Health and Safety

Mahaligam Singaravelu
Appellant

And

Correctional Services Canada
respondent

Decision No.: CAO-06-052(S)
January 17th, 2007

This is a preliminary decision decided by Appeals Officer Michael McDermott on the basis of oral submissions made during a telephone conference hearing held January 10, 2007.

For the Appellant
Mr. Y Hameed, Hameed Farrokhzad LLP

For the Respondent
Mr. Mel Sater, Legal Services, CSC.

[1] This is a preliminary decision in a case concerning an appeal pursuant to section 129(7) of the *Canada Labour Code*, Part II, (the *Code*) made by Mr. Mahalingam Singaravelu (Appellant) against a decision of no danger, issued on November 17, 2006, by Health and Safety Officer (HSO) BobTomlin, pursuant to section 129(4) of the *Code*.

[2] Mr. Singaravelu, an employee of Correctional Services Canada (Respondent) invoked his right to refuse, pursuant to section 128 of the *Code*, on October 27, 2006. Specifically, he refused to perform the functions of the Institutional Fire Chief, part of his duties at CSC's Joyceville Institution, expressing the feeling that to do so would constitute a danger to the life, health or safety of himself, other CSC staff and inmates at the Institution. He claimed never to have been given adequate training by qualified instructors in order to perform the functions to the standard set out in the Commissioners' Directive.

[3] In his notice of appeal of the no danger decision, Mr. Singaravelu requested a "stay of the direction" issued by the HSO pending the outcome of the appeal. This request was considered during a telephone conference hearing held on January 10, 2007, and is the subject of this preliminary decision. These written reasons confirm the oral decision I gave after hearing the parties.

[4] The first and fundamental issue to be determined with respect to a request for a stay is whether the *Code* grants jurisdiction to make such a determination. For the Appellant, Mr. Hameed cited the definition of "danger" in section 122 of the *Code* and referred to the duties of employees in section 126, with emphasis on the duty to report to the employer the existence of hazardous circumstances in the work place. He drew from these references that, when there is apprehension of a continuing danger and an employee so alerts the employer, the objectives and the purpose of the *Code* enable the Appeals Officer to deal with the related questions of occupational health and safety on an expedited basis. In this case, he argued, these considerations would provide the Appeals Officer with jurisdiction to grant a stay.

[5] At a more specific level, Mr. Hameed cited the right to appeal provided by section 146 of the *Code*. He submitted that an Appeals Officer clearly has jurisdiction to hear an appeal of an HSO's decision on its merits but that, if the right to appeal is to have significance, there must be a means to preserve the appellant from any harm that may continue to exist during the interval between lodging the appeal and its disposition. Hence, he argued, the Appeals Officer in this case must have jurisdiction to grant a stay.

[6] In response to my request for clarification of the precise aspect of the HSO's decision for which a stay is being sought, Mr. Hameed confirmed that it is the effect of the decision, pursuant to section 129(7) which disentitles Mr. Singaravelu to continue his refusal to undertake the work in question.

[7] For the Respondent, Mr. Sater submitted that when a stay of a direction is requested it implies that a direction has been issued. CSC has no knowledge of a direction having been issued in this case and the merit of the no danger decision is, he added, the substance of the appeal. CSC submits that the Appeals Officer has no jurisdiction to grant a stay and he advised that the statutory basis for its position is found in section 146(2) of the *Code*. The section specifically addresses the ordering of stays when a direction has been appealed but does not include reference to a decision respecting the absence of danger pursuant to section 129(4) of the *Code*. It reads as follows:

> 146(2) Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction.

[8] In rebuttal, Mr. Hameed submitted that section 146(2) does not deprive an Appeals Officer of jurisdiction to grant a stay and maintained that the general application of section 146 with respect to appeal rights is consistent with an Appeals Officer deciding any matter raised by an appellant, substantive or procedural, respecting health and safety.

[9] I am unable to accept the argument made on behalf of the Appellant that the definition of danger (section 122 of the *Code*) and an employee's duty to report possible hazardous circumstances to an employer (presumably section 126(1)(g) of the *Code*) confer jurisdiction to grant a stay of a decision, pursuant to section 129(4) of the *Code*, regarding the absence of danger. Clearly, both provisions are relevant to the refusal process commenced by Mr. Singaravelu and are consistent with the objectives and purpose of the *Code*. However, I find no obvious connection with the ability of an Appeals Officer to grant a stay, particularly when such an ability is more directly addressed elsewhere in the statute.

[10] Neither can I accept the argument on behalf of the Appellant that, because section 146(1) of the *Code* establishes a right to appeal a direction and section 129(7) establishes a right to appeal a decision of no danger, there exists an implicit right to be heard on a request for a stay. Of course, in the case of section 146 the issue is explicitly addressed in sub-section (2) with discretion to grant a stay of a direction vested with the Appeals Officer. I agree that there is the prospect, in the event that a no danger decision is rescinded and effectively reversed, that there may have been some continuing hazard during the time it took for the appeal to be decided. I do not accept, however, that the legislators ignored such a prospect when framing the *Code*. It is commonly acknowledged that the right to refuse sections of the *Code* are designed to provide an expeditious means of addressing specific health and safety hazards identified or suspected to exist in the work place. Employees are assured of having their concerns in this regard fully considered and, if necessary, investigated and determined by a qualified Health and Safety Officer. Confining the scope of the stay provision to directions offers a measure of balance to employers such that their operations would not be unduly suspended pending an appeal of a no danger decision.

[11] I do accept the argument made by Corrections Canada that, in the absence of a direction having been issued by the HSO, the Appeals Officer has no jurisdiction to grant a stay in this case. Section 146(2) gives an Appeals Officer discretion to grant a stay when an appeal has been made of a direction issued pursuant to the *Code* but does not accord such discretion with respect to a decision of no danger issued pursuant to section 129(7).

[12] Section 129(7) of the *Code* reads as follows:

> 129(7) If a health and safety officer decides that the danger does not exist, the employee is not entitled under section 128 or this section to continue to refuse to use or operate the machine or thing, work in that place or perform that activity, but the employee, or a person designated by the employee for the purpose, may appeal the decision, in writing, to an appeals officer within ten days after receiving notice of the decision.

Its wording is clear and significant for this case. Following a decision of no danger, the employee is no longer entitled to refuse to perform the work in question. There is no discretion included for an Appeals Officer to grant a stay as there is in the case of section 146(2). I can find no authority in the *Code* that would permit me as the Appeals Officer to ignore the plain statutory language of section 129(7) and to grant a stay. To do so

would, in my view, negate the legislators' intent. For this and the above reasons, I confirm my oral decision given after considering the submissions and arguments of both parties made in the telephone conference hearing of January 10, 2007. I do not have jurisdiction to grant a stay. I retain jurisdiction to hear the appeal on its merits and I seek the cooperation of both parties to schedule a hearing without undue delay.

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Michael McDermott
Appeals Officer.

Summary of Appeal Officer Decision

Decision No.: CAO-06-052 (A)

Appellant: Mr. Mahaligam Singaravelu

Respondent: Correctional Service Canada

Provisions: *Canada Labour Code*, Part II: 129(7), 129(4), 128, 122, 126, 146, 146(2)

Keywords: Preliminary decision, jurisdiction, stay, no authority

Summary:

The Appeals Officer held a teleconference to discuss the preliminary issue of a stay request submitted by the appellant. Given that no direction was issued, the Appeals Officer determined that he had no jurisdiction to grant a stay.