

Federal Court



Cour fédérale

Date: 20150218

Docket: T-2094-13

Citation: 2015 FC 208

Ottawa, Ontario, February 18, 2015

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

BRIAN ZIMMERMAN

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the November 26, 2013 decision of the Appeals Officer of the Occupational Health and Safety Tribunal Canada. The decision rescinded the prior decision dated November 16, 2009 of the Health and Safety Officer that no danger existed for the Respondent, Corrections Officer Brian Zimmerman, after he exercised a refusal to work under section 128 of the *Canada Labour Code*, RSC, 1985, c L-2 (“the Code”). The

Appeals Officer found that a danger existed and directed the employer to correct the hazards within 90 days.

[2] This application should be dismissed for the following reasons.

I. Facts

[3] The Respondent refused to work citing eight safety issues in a new satellite living unit called "Unit 4" at Kent Institution located in Agassiz, B.C. The Unit at issue is referred to as Unit 4 and/or as Pod 1 throughout the evidence.

[4] Kent Institution is the only maximum security institution for men (336 beds) in the Pacific Region. The unique new 96 bed Unit 4 was opened a few months before the Respondent initially refused to work on November 3, 2009. The Unit is unique to Kent Institution as it is self contained and has its own living units, yards, program corridors, common room, laundry rooms and gym. Unit 4 is connected to the rest of Kent Institution by a corridor with barriers.

[5] Unit 4 has an upper gallery (gun walk) that overlooks the ranges and common areas and permits a Corrections Officer to observe inmates below. One of Unit 4's differences from other units at the Kent Institution is that the other units have a feed from Closed Circuit Television ("CCTV") directly fed to the Main Communications Control Post ("MCCP"). Unit 4's camera feed does not go to the MCCP. MCCP is where all communications are received and conveyed pertaining to alarms and other emergency situations at Kent Institution. Instead, the camera feed

for Unit 4 goes to Unit 4's Control Post ("CP"), the Security Intelligence Office ("SO"), the Emergency Command Post ("ECP") and the Correctional Manager ("CM")'s office.

[6] The issues the Respondent raised for his first work refusal on November 3, 2009 were:

1. Intermittent loss of control of Unit Lighting;
2. Intermittent loss of control of the Intercom system;
3. Intermittent loss of control of the tier and common area camera system;
4. Loss of door camera coverage during range walks;
5. No CCTV monitoring feed in the MCCP;
6. Cell doors opening outside of operator control;
7. Weapons retention in the gun-single point harness;
8. Cell night lights turning on at the same time.

[7] When the Respondent first refused to work, the Assistant Warden investigated the eight safety issues identified by the Respondent. The Assistant Warden agreed with the Respondent that a danger existed and staff were removed until the danger was fixed.

[8] Warden Massey investigated the identified issues, responded to some and then determined the danger was resolved with regard to items 1, 2, 3, 4 and 6, and that only items 5, 7, and 8 remained. The Warden stated that the lack of a CCTV feed from Unit 4 to the MCCP was not a danger as the feed was sent to the Unit 4 CP, the CM office and SO's office for investigative/evidentiary purposes. Warden Massey said that more research could be conducted to see if a feed to MCCP was possible.

[9] The Warden agreed that the security bars on the gun walk were a danger and that Correctional Services Canada (“CSC”) needed to purchase single point gun harnesses. The request for the gun harnesses was sent to Regional Headquarters for approval with an answer expected the next week. The Warden responded to concern #8 by stating that there was a request regarding the cell night lights.

[10] With these findings, the Warden expected a full return to work by November 13, 2009. However, on November 12, 2009, the Respondent again refused to work pursuant to subsection 128(13) of the Code.

[11] Health and Safety Officer (“HSO”) O’Byrne investigated the Respondent’s continued refusal to work and found on November 16, 2009 that a danger did not exist as he “...had an assurance of voluntary compliance from the employer to address and resolve the matter.” HSO O’Byrne confirmed that no feed into MCCP from Unit 4 removes a layer of protection for the Correctional Officers (“COs”) but that it did not constitute a danger and that “continued safety concerns are more speculative in nature and unlikely to create a future danger.”

[12] The decision of HSO O’Byrne was appealed on November 16, 2009. A hearing was held on October 16, 2012. A transcript of that hearing was filed as part of the Record. The Appeals Officer, Douglas Malanka, rendered a decision on November 26, 2013, and that decision is the subject of this Judicial Review.

II. The Appeal Officer's Decision

[13] The material issue in the Appeals Officer's decision was that Unit 4 is unique in that there is no CCTV feed from the Unit to the MCCP as there is in every other unit of the prison. The CCTV communication post is manned and monitored and in all other unit is the "eyes" on developing situations and when incidents occur. Unit 4 is designed differently from other units as it can be monitored from above and the camera feeds from Unit 4 go the CP, CM's office and SO's office rather than to the main CCTV at the MCCP.

[14] The second issue before the decision maker was that the gun posts in the upper level of the unit are constructed so that guns could fall through to the prisoners. This was earlier remedied somewhat by installing security bars but the Respondent still felt exposed to danger.

[15] The Appeals Officer found that the lack of MCCP monitoring in CCTV of Unit 4 increased the risk of injury that was not otherwise mitigated for the COs working there. The Appeals Officer found that un-monitored CCTV in Unit 4 removed a layer of protection for the workers that was available in other parts of Kent Institution.

[16] Secondly, the Appeals Officer found that the space between the security bars in the shooting portals on the gun gallery were large enough for a CO's rifle to accidentally fall through to the inmate area. The employer added horizontal bars to prevent a rifle from falling through but the Respondent identified the horizontal bars as also being a hazard. The Appeals Officer found that this issue was addressed but according to Mr. Zimmerman, not appropriately. The Appeals

Officer found the horizontal bars a danger because an officer in the gun gallery may not give a warning shot as easily.

III. Arguments and Analysis

[17] The Applicant submits that the Appeals Officer's decision is unreasonable because:

- the officer failed to review and comment on central evidence that explained how the unique design of Unit 4 eliminated any situation that constituted a danger as defined in the Code. That Unit 4 has a unique self-contained design that reduces the movement of inmates, in turn reducing the opportunity for security incidents;
- the Appeals Officer used the improper test for danger, relying on hypotheses and conjecture;
- the Appeals Officer was unreasonable in accepting some evidence as "unchallenged" when the employer submitted evidence that Unit 4 was designed to eliminate any threat of danger to COs;

[18] The Respondent disagrees and submits that this matter should be dismissed because:

- section 146.3 of the Code, states that the Appeals Officer's decision is final, provides a privative clause and that the expertise of the Appeals Officer attracts deference in matters of health and safety;
- that the unique design of Unit 4 was not a central argument of the employer and that the Appeals Officer nonetheless mentioned the unique nature of the living unit;

- that the reasons reflect an understanding of the issues and evidence and that the Appeals Officer is not required to explain each piece of evidence and is reasonable based on the evidence before the Appeals Officer.

[19] I agree with the Respondent that the decision was reasonable.

[20] Both parties agree that the standard of review of the decision is reasonableness (*Martin-Ivie v Canada (Attorney General)*, 2013 FC 772 at para 18).

[21] The Appeals Officer conducted a *de novo* hearing before rendering his decision. The Tribunal heard evidence from seven witnesses for the Union Advisor. The testimony of Deputy Warden Mattson and Mr. Hunken for the Applicant was referred to in the decision. As well there was full argument from the parties' counsel.

[22] The Appeals Officer rescinded the previous decision that a danger did not exist and a direction was issued directing the employer "to take measures within 90 days to correct the hazards that constitute the danger and to report those measures to a Health and Safety Officer of the Vancouver district Office by February 24, 2014."

[23] The Appeals Officer concluded from the evidence:

... that the absence of CCTV feed from Pod 1 to the MCCP increases risk of injury for COs working in Pod 1 or responding to an emergency there as it removes a layer of protection available to COs in other parts of Kent Institution which is not otherwise mitigated. Such CCTV feed enables the MCCP officer to provide and/or confirm necessary and timely intelligence for COs and

responding to an assault or other emergency such as the exact location of the alarm or emergency, the number of inmates potentially involved, the nature of the emergency, whether ancillary fire safety equipment is required, the presence of weapons and whether anyone is injured and needing medical, enhance the ability of COs to reorganize their response to emergencies and/or incidents and to call for or receive timely police, medical or other emergency assistance and other information that was identified by COs.

I further conclude that addition of horizontal bars installed in viewing windows on the gun gallery to prevent rifles from falling or being pulled by inmates through the grates constitutes a danger for COs working in Pod 1 and for COs responding from other parts of Kent Institution to an emergency. The evidence confirms that the gun gallery officer has an important safety role for deterring and/or curtailing an emergency situation before it escalates in magnitude or risk and for directing a deliberate shot to save someone's life. With the addition of the bars, the CO is required to withdraw and reinsert the firearm through the bars each time the inmate in question moves. As a result of the horizontal bars affixed to the gun portals, the gallery gun walk officer is not capable in every circumstance of delivering a necessary warning or deliberate shot during an incident to quell or arrest an incident or to save the life of a CO.

[24] The decision dealt with three issues:

- A. The absence of camera feeds (CCTV) from Unit 4 (Pod 1) being fed to the MCCP;
- B. The alleged deficiencies related to the Intercom system in Unit 4 (Pod 1);
- C. The alleged deficiencies related to work on the Unit 4 (Pod 1) Gun Walk post.

[25] The Appeals Officer asked himself if there was a reasonable possibility of an injury occurring because of the three issues stated above.

[26] Danger is defined in subsection 122(1) of the Code as including any current or future activity that could reasonably be expected to cause injury to a person exposed thereto before the

hazard can be corrected or the activity altered. The Appeals Officer relied on Justice J. Gauthier (as she then was) in *Verville v Canada (Correctional Services)*, 2004 FC 767 and the Federal Court of Appeal in *Canada Post Corporation v Pollard*, 2008 FCA 305, that the precise time the potential hazard would occur did not need to be established, but what must be established is in what circumstances could it be expected for an injury to occur in the future with a reasonable possibility, but not a mere possibility.

[27] At the hearing, the Applicant gave evidence that the camera feed to MCCP is not necessary in this unit because: the unique design of Unit 4 enabled actual eyes from above; because a camera feed goes within the unit; and because of “dynamic security”.

[28] The Applicant says the dynamic security that is utilized on Unit 4 ensures there is no danger working on the unit. The unique design creates more controlled inmate movement. The direct observation on this unit makes the MCCP feed not necessary unlike on other units where it is necessary. The Applicant says there is no gap because direct observation is better. The Applicant further argued that the self contained nature of the unit with less inmate movement, more staff and a dedicated gun gallery officer makes it unnecessary to have a CCTV feed to MCCP.

[29] The Respondent submitted that based on the evidence at the hearing, the CCTV feed to MCCP is essential for his personal safety and without that feed to MCCP, it is dangerous to work on that Unit. The Respondent's evidence of a danger included:

- when radios are silenced, the communication hub of the prison should have a camera feed and CCTV monitored link for MCCP to see what is going on;
- that the inmate's art of diverting attention of the COs in one area when something occurs in another area would make the single set of eyes on the CP of Unit 4 and the eyes from above insufficient. With multiple eyes monitoring the CCTV feeds at the MCCP, the COs attention would not be as easily diverted or if one set of eyes was diverted, that not all the MCCP people would be distracted and this would increase the safety;
- There are six sets of specifically trained eyes at the MCCP that can spot issues developing and communicate to the proper emergency personal when radio silence is essential on the unit;
- During any radio silence, the MCCP is the eyes of the institution and determines when to bring in the primary response team;
- The higher incidence of weapons being used, so the chance of an emergency is even higher. The Respondent says that the live feed MCCP provides immediate assistance to both inmates and correctional officers;
- The lack of a CCTV feed to MCCP could diminish the ability of first responders receiving timely information on any situation that is occurring on the unit and to respond to emergencies including calling in police or medical emergency assistance;

- The response time to Unit 4 is between 15 to 30 seconds which is longer due to the number of barriers that need to be opened because the unit is self contained;
- Evidence was that having the CCTV feed to the CP only in Unit 4 does not mitigate the danger as in an emergency the two COs in the control post are not monitoring the cameras; they are opening doors into Unit 4 to allow emergency and other responders in and to get the COs off the living units;
- The personal alarms are assigned to units and do not indicate who sounded the alarm or where exactly it was sounded;
- The evidence was that in seven seconds, 33 stab wounds or 50 head blows could be given and if there was a MCCP feed the first responders could be directed exactly where to go;
- Evidence that a firearm had been deployed twice in the unit since its opening and that a firearm can only be deployed to prevent death, grievous bodily harm to a correctional officer or inmate or escape when all lesser means are unavailable or have proven unsuccessful (See Post Order F-11 Gallery Post: Pod Living Unit Gun Walk at Appendix A).

[30] I disagree that the decision maker did not understand and address the uniqueness of Unit 4 or fully understand and appreciate the extensive evidence of the Applicant on this point.

[31] The Appeals Officer at paragraphs 57 and 99 wrote:

57 Mr. Girard stated that the testimony of Deputy Warden Mattson was that dynamic security is a fundamental tool and operating strategy for CSC. According to Deputy Warden Mattson, dynamic security encompasses full interaction between COs and

inmates and makes Kent more secure because staff know more about individual inmates and that information can be assessed and responded to by staff and management.

99 ... the respondent held that any danger that might exist is mitigated by: the unique self contained design of Pod 1 which reduces inmate movement and enhances dynamic security; CSC's policies and in the form of Commissioner Directives, Standing Order, Post Orders, Job Descriptions; the training provided to COs; and the protective equipment issued to COs.

[32] The Appeals Officer found at paragraph 100:

In this regard, I find the respondent did not demonstrate how the numerous policies, procedures, standing orders addressing dynamic security, control of inmate movement, CO training and CO personal protection equipment mitigate the absence of live feed from CCTV cameras in Pod 1 to the MCCP especially after an assault or incident has occurred despite all of the security measures in place. Moreover, CM Verville testified that information provided by the MCCP assists dynamic security and emergency response in the living units.

[33] The Appeals Officer referred to the testimony of the Deputy Warden of what is done on Unit 4 to protect the COs rather than the CCTV being monitored by the MCCP. The Appeals Officer then listed in great detail the evidence given on behalf of the Applicant. That evidence included what was in place for Unit 4 which was different than what is in place in the other units given there was no CCTV feed to MCCP. His finding that the fact guns had been used twice in Unit 4 according to the Post Order F-11 Gallery Post: "Unit 4 Gun Walk means that the CO is "exposed thereto not as a mere possibility but as a reasonable one."

[34] The Appeals Officer heard all the evidence and weighed it. He made a finding that he would give “considerable weight” to the front line officers’ evidence. I will not reweigh the evidence.

[35] The Appeals Officer was alert to the issue of the unique design. There would not have been a need for the hearing if the unit had not been unique in design as the CCTV feed would have been to MCCP. The reasons do refer to the unique style and dynamic security but also says that during an assault none of those things assist. A review of the hearing transcript confirms that there was evidence to support the findings made by the Appeals Officer.

[36] This was a detailed and lengthy decision and though not every piece of evidence was mentioned in the decision, it is not necessary. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, tells us that the decision does not have to be perfect and when read as a whole is within an acceptable range and the decision is reasonable. I find that the Appeals Officer fully addressed and understood that Unit 4 was unique and then gave more weight to the evidence of the CO and found a danger existed.

[37] Further, the Appeals Officer found that the horizontal bars hinder the gallery gun walk officer’s ability to deliver a timely, accurate shot. He found the risk of an emergency situation and the necessity of firing the gun was not hypothetical and had occurred. The Appeals Officer also found that the role of the officer on the gun walk is an important safety role to save lives or to curtail an emergency situation. Consequently, the Appeals Officer used the appropriate test for danger and assessed it accordingly.

[38] The second argument of the Applicant is that it was unreasonable to say twice in the decision that the Respondent's evidence was "unchallenged". At paragraph 102, the Appeals Officer indicated that the CO's evidence was unchallenged regarding the feed:

The unchallenged testimony of COs Zimmerman, Aulakh, Conteh and Sterkenburg and CM Verville was that CCTV feed from Pod 1 cameras to the MCCP provides a level of protection to CO that may reduce the risk of injury and severity in an emergency. According to the COs, the MCCP can provide immediate and essential information to COs responding to an alarm or other emergency situation regarding the location of incident, the number of inmates potentially involved, the nature of the emergency, whether ancillary fire safety equipment is required, the presence of weapons and whether anyone is injured and needing medical assistance. Additionally, the MCCP officer can enhance the ability of COs to reorganize their response to emergencies and/or incidents and to call for or receive timely police, medical or other emergency assistance. An example of an early call for medical assistance by the MCCP officer was put into evidence.

[39] Again, at paragraph 111:

The unchallenged evidence of CO Strekenburg was that the use of weapons has increased at Kent and he has personally observed stabbings and the unchallenged evidence of COs Aulakh and Strekenburg was that it takes longer to respond to an incident in Pod 1 and that 33 stab wounds or 50 head blows could be delivered by someone in as little as seven seconds.

[40] The Applicant submits this was an error by the Appeals Officer because the employer submitted evidence that Unit 4 was designed to eliminate any threat of danger to COs. The Applicant says they challenged all of the evidence so it is a reviewable error.

[41] Specifically, the evidence at paragraph 102 was what the MCCC can do. The evidence of what the MCCC can do was not challenged. What the Applicant challenged was whether the unique design of the Unit and the protocol in place placed the Respondent in danger.

[42] At paragraph 111, the unchallenged evidence was concerning the use of weapons increasing at Kent Institution and that the CO had personally observed stabbings and the response time to incidents in Unit 4. When I review the transcript, that evidence was not challenged.

[43] In the lengthy and detailed decision, the Appeals Officer said he was giving “considerable weight to the testimonies of the Correctional Officers as ordinary witnesses based on their extensive knowledge, experience and training regarding the issues.”

[44] There was evidence that supported that there was no danger in not having the CCTV feed in Unit 4 going to MCCC and there was evidence to support the findings made by the Appeals Officer that there was a danger. The Appeals Officer did not ignore evidence but choose to give the evidence of the front line officers more weight. The use of the word “unchallenged” references very specific findings and not the evidence presented as a whole. Microscopic review of the use of the word “unchallenged” does not hold up against a reading of the decision as a whole.

[45] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and also the decision must be within the range

of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12). I find that this decision was reasonable and meets this standard.

[46] I will dismiss the application and order costs in the amount of \$250.00 to be paid forthwith by the Applicant to the Respondent.

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;
2. Costs are payable forthwith to the Respondent by the Applicant in the amount of \$250.00.

"Glennys L. McVeigh"

Judge

APPENDIX A

Post Order F-11 Gallery Post: Pod Living Unit Gun Walk

A warning shot may be used to prevent death, grievous bodily harm or escapes when all lesser means are not available, have proven unsuccessful or not the safest and most reasonable intervention giving situational factors.

A deliberately aimed shot at an individual to prevent death, grievous bodily harm or escapes shall only be used when all lesser means are not available, have proven unsuccessful or not the safest and most reasonable intervention giving situation factors.

A deliberately aimed shot at an individual to prevent destruction of property if there is a reasonable possibility that a life-threatening incident will develop and if lesser means are not available, have proven unsuccessful or not the safest and most reasonable intervention giving situational factors.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2094-13

STYLE OF CAUSE: ATTORNEY GENERAL OF CANADA V
ZIMMERMAN

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: AUGUST 27, 2014

**JUDGMENT AND REASONS
BY:** JUSTICE MCVEIGH

DATED: FEBRUARY 18, 2015

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