Date: 20050415

File: 160-2-103

Citation: 2005 PSLRB 35

Canada Labour Code

Before the Public Service
Labour Relations Board

BETWEEN

NORMAN LEARY

Complainant

and

TREASURY BOARD
(Department of National Defence)
and
LCdr DAVE RUTHERFORD, CAPTAIN A. SMITH

Respondents

Indexed as
Leary v. Treasury Board et al.

In the matter of a complaint made under section 133 of the *Canada Labour Code*

REASONS FOR DECISION

Before: Joseph W. Potter, Vice-Chairperson

For the Complainant: David A. Mombourquette, Counsel, Federal Government Dockyard Trades and Labour Council East

For the Respondents: Harvey Newman, Counsel

Heard at Halifax, N.S., February 8-9, 2005.
Written submissions received February 10 and 24, 2005.

Complaint Before the Board

[1] On May 3, 2004, Norman Leary, an employee of the Department of National Defence, filed a complaint under section 133 of the *Canada Labour Code (*the *Code)* alleging that his employer penalized him in contravention of section 147 of the *Code*. Mr. Leary sent his complaint to the Canada Industrial Relations Board (CIRB) and it inadvertently began to process the complaint before realizing that this type of complaint fell under the jurisdiction of the Public Service Staff Relations Board (PSSRB). Upon realizing its error, the CIRB forwarded the complaint to the PSSRB on July 9, 2004. This decision relates thereto.

[2] On April 1, 2005, the *Public Service Labour Relations Act* (the "new *Act*"), enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 39 of the *Public Service Modernization Act*, the Public Service Labour Relations Board continues to be seized with this complaint, which must be disposed of in accordance with the new Act.

[3] The complainant alleges that the employer penalized him by removing him from a work area known as the "Mechanical Test Facility". This action was taken by way of a letter dated March 24, 2004, because, Mr. Leary alleges, he withdrew his services from work in October 2003. Mr. Leary states that such action by the employer contravenes section 147 of the *Code*.

[4] Cases of this nature carry a reverse onus as per subsection 133(6) of the *Code*. However, the employer stated that the provision only applies if the employee can show that he had a reasonable basis to seek the protection of the *Code* in the first place, and the employer was not conceding that such a reasonable basis existed as per the *Code*. I indicated that the issue could only be decided following my hearing of all the evidence, and the parties agreed to proceed on that basis, with the complainant proceeding first.

[5] The parties consensually agreed to introduce a book of documents (Exhibit G-1) with some 32 tabs. In this decision, I will refer to them as T-1, T-2, etc., for ease of reference.

[6] Mr. Leary began his employment with the Department of National Defence in 1986 and became a certified tradesperson in 1989. In October 1994, Mr. Leary

volunteered to work in an area called the "Mechanical Test Facility" (MTF). Following an initial on-the-job training program, Mr. Leary worked alone in the MTF. In 1997 or so, Mr. Leary trained another employee, Jeff Comeau, to work in the MTF but Mr. Comeau would only work there when the work load required more than one employee, which was on an intermittent basis.

[7] In February 2001, Mr. Leary became a member of the Joint Occupational Safety, Health and Environmental Committee (JOSHE) and he participated in this Committee as his work load permitted.

[8] In May 2003, Mr. Leary filed what was termed a non-conformance report stating "toilet rooms need to be serviced more often in accordance with Spec. They are not sanitary …" (Exhibit T-2). This was an internal report and addressed a longstanding problem of what can fairly be described as an extremely dirty washroom located in the building in which Mr. Leary worked. The building housed some 200 civilian tradespersons, who worked at various trades in support of Canada's maritime fleet.

[9] The problem was looked into by a joint union/management team and a report was written (Exhibit T-1). The report found, in part:

. . .

> *"…that these complaints are justified due to the fact that cleaning contracts for … (the building) … are routinely being breached …"*

. . .

The report was dated May 23, 2003.

[10] In September 2003, LCdr David Rutherford was appointed as Technical Services Manager (TSM) for the mechanical division, where Mr. Leary was working. Although not Mr. Leary's direct supervisor, LCdr Rutherford had overall managerial authority for Mr. Leary, as well as the 200 or so other civilian employees at that work location.

[11] Shortly after commencing his TSM duties, LCdr Rutherford heard about Mr. Leary's unhappiness with respect to the regular cleanliness of the washroom, and of a potential withdrawal of service by Mr. Leary. LCdr Rutherford testified that he felt there was credence to Mr. Leary's complaint after the two viewed the washroom area during a walk around.

[12] Matters came to a head, so to speak, for Mr. Leary on October 8, 2003, when he withdrew his services because he felt there was no resolution to the issue of addressing the regular cleaning of the washroom. He felt the situation presented a danger, as he understood that term to be defined in the *Canada Labour Code* at section 122.

[13] LCdr Rutherford asked Mr. Leary to put his concerns and reasons for withdrawal of service in writing. Mr. Leary complied (see Exhibit T-3). His memo states [sic throughout]:

> *I am refusing to work due to a fundamental failure of the internal complaint resolution process as outlined in the Canada Labour Code Part II, Section 127. I have been waiting for a response to as to what my employer intends to do about the personal service areas sanitation problems and when they are going to be resolved. This complaint was originally investigated and found to be justified in May 2003.*
>
> *I believe this failure constitutes a danger to all employees for the following reason. If matters of health and safety are not dealt with timely (or if deadlines are not set), issues will undoubtedly pile up. When this happens, a degree of complacency sets in that leads to people saying "That's the way this place operates". Employees not only stop complaining (because they feel nothing will be done anyway), they also eventually accept the hazards as a part of life. This, without a doubt, will lead to more accidents, injuries and illnesses.*
>
> *I hope we can resolve this situation with a minimum of personal attacks.*

[14] Unaware of the requirement for HRDC to be contacted in the event of a withdrawal of service by an employee, LCdr Rutherford wrote the following letter to Mr. Leary on October 10, 2003 (Exhibit T-6):

> *Having reviewed your letter at Ref A, I do not find sufficient grounds to justify a withdrawal of your services from FMF Cape Scott. Your perception as to the present state of an internal complaint resolution process does not constitute an immediate danger to yourself or your fellow employees. Your concerns with respect to the sanitary condition and maintenance of wash places have been addressed at Ref B, including a plan to pursue the correction of outstanding deficiencies that remain beyond the unit's control. As such you are ordered to return to work effective immediately.*

[15] After receiving this letter, Mr. Leary filed a complaint with the CIRB (believing that was the proper route), alleging that the employer threatened him with disciplinary action.

[16] Shortly after that, the employer realized that the matter had to be investigated by HRDC; a health and safety officer was contacted and an investigation ensued. The Health and Safety Officer, Glenn Grandy, visited the work location. He then wrote, in part (Exhibit T-9):

> . . .
>
> *"…the undersigned health and safety officer considers that a danger does not exist."*
>
> . . .

[17] Mr. Grandy also issued a document titled "Assurance of Voluntary Compliance" (Exhibit T-10), stating "Internal Complaint Resolution Process Section 127(1) of the Canada Labour Code must followed [sic] step by step", which Mr. Leary claims supports his allegations that the internal complaint resolution process, as outlined in the *Code*, was not being followed.

[18] Letters respecting each party's position were exchanged with the CIRB, and on December 17, 2003, Captain Smith, the Commanding Officer of the Base, wrote to Mr. Leary, saying, in part (Exhibit T-14):

> . . .
>
> *"…it has been determined that there was no evidence of misconduct. As such, the investigation is now closed and no further action is contemplated."*
>
> . . .

[19] Mr. Leary then withdrew the complaint which he had filed with the CIRB, and he hoped the matter was over.

[20] The withdrawal of service by Mr. Leary had demonstrated to LCdr Rutherford that the MTF, where Mr. Leary worked alone, was vulnerable if insufficient personnel were available to fill in, in the event of a lengthy absence on Mr. Leary's part. LCdr Rutherford testified that he recognized Mr. Leary was an excellent employee, and there was no issue with respect to the quality of his work. However, LCdr Rutherford

felt that the MTF was not a very busy facility and that Mr. Leary's skills could best be used elsewhere, and also that other employees should be trained to work in the MTF.

[21] With this thought in mind, Lt. Cdr Rutherford sent Mr. Leary a memo dated March 24, 2004, telling Mr. Leary that he "…shall assume general trade-related duties as assigned by the (supervisor)". This same memo was also sent to Mr. Comeau and stated that "Mr. J. Comeau shall assume the duties of Mechanical Test Facility Operator." (Exhibit T-22).

[22] LCdr Rutherford stated that he felt that Mr. Comeau had to be given the opportunity to work in the MTF on his own to demonstrate his competence in that area. Such action would mean that two employees would be fully competent to work in the MTF, but LCdr Rutherford felt that the area should have three employees who could do the work. Accordingly, his March 24, 2004 memo (Tab 22) also stated, in part:

. . .

> *"In order to ensure maximum availability, a minimum of three personnel shall be trained in the operation of the Test Facility…Management of the training program, and operator rotation is assigned to the Test Facility Supervisor".*

. . .

[23] This was not an act of retaliation, stated LCdr Rutherford. He had the requisite authority to move personnel around, and the individuals being moved had generic job descriptions, not ones that were affiliated with a specific position. The intent was to ensure that there were sufficiently trained personnel to perform the functions needed in the MTF. In cross-examination, LCdr Rutherford admitted that he did not know if other work areas in the same building had additionally trained personnel, or not.

[24] Receiving the memo "broke my heart", stated Mr. Leary. In fact, on April 21, 2004, Mr. Leary penned a three-page document titled "What have I done to be removed from the MTF" (Exhibit T-26). In this document, he highlighted his accomplishments in his work area over the time he was working there. In spite of various attempts to reverse this decision, LCdr Rutherford felt that he needed this

operational flexibility and the decision stood. Mr. Leary was assigned duties in another work area and was moved out of the MTF.

[25] On May 3, 2004, Mr. Leary filed another complaint with the CIRB under section 133 of the *Code*, alleging "…that my employer has penalized me in contravention of section 147 of the same code." (Exhibit T-29).

[26] Mistakenly, the CIRB commenced to process this complaint as well, and the employer submitted its response to the complaint on May 10, 2004 (Exhibit T-30). The reply reads, in part:

> . . .
>
> *2. The complaint was submitted as a result of a management decision to institute a training regime for the operation of the Mechanical Test Facility within FMF Cape Scott. This decision was made following the realization that the unit had only one operator dedicated to the full time operation of the test facility. It is unfortunate and inaccurate for Mr. Leary to construe this course of action as a personal attack. This training plan would see a minimum of three personnel trained in the operation of the test facility. Trained personnel would then be rotated through the test facility on a periodic basis in order to maintain currency, and by extension provide the unit with built in capability redundancy.*

[27] Mr. Leary testified that he believed his removal from the MTF constituted a penalty, as that term is understood in the *Code*. Furthermore, he felt that such action was disciplinary in nature, which is not allowed under the *Code*. He also testified that he has not been rotated back into the MTF. LCdr Rutherford stated that it was always his intent to rotate Mr. Leary through the MTF, but that it was only in the fall of 2004 that the third person commenced training in the MTF. Also, LCdr Rutherford has been given another assignment and is no longer the individual in charge of that area.

[28] On July 9, 2004, the CIRB, realizing that the matter fell under the jurisdiction of the PSSRB, forwarded the entire file to the PSSRB for proper processing. This decision pertains thereto.

Summary of the Evidence

[29] The complainant alleges a violation of section 147(c) of the *Code* and is of the view that the decision to remove him from his duties in the MTF was connected to his withdrawal of service.

[30] The decision to assign Mr. Leary other duties was made by LCdr Rutherford because, according to him, the work refusal highlighted the fact that there was a lack of sufficiently trained personnel to act as back-up in the test facility.

[31] When the decision was made to move Mr. Leary in March 2004, Mr. Comeau was already sufficiently trained to do the job. Training another operator was not an imminent issue because this did not commence until late in the fall of 2004, so what really happened was that one trained employee took the place of another.

[32] Was this a case of a diligent manager taking steps to correct a deficiency? The complainant says no, it was not, for a number of reasons.

[33] Mr. Leary's memo (Exhibit T-26), as well as the one written by Mr. Comeau (Exhibit T-27), shows the detail that LCdr Rutherford could have discovered about the quality of Mr. Leary's work, if he had taken the time to do so before he made the decision. These also show that there are clear business reasons against making the decision to remove Mr. Leary from the test facility.

[34] There was no advance consultation with the union, which there should have been.

[35] No direction was given to ensure that Mr. Leary was rotated through the job, in spite of what the employer stated it would do (as per paragraph 3 of Exhibit T-22).

[36] LCdr Rutherford took it upon himself to act on the situation in the MTF, yet no efforts were made to determine if such staffing deficiencies existed in other work units.

[37] The evidence clearly showed that the motivation to move Mr. Leary was linked to his work refusal. There was no operational need to make this move in March 2004. The only reason it was made was that management wanted to remove Mr. Leary from the test facility, in spite of his excellent service.

[38] The case is best summed up in a letter written from one of the supervisors, Mr. Mirabelli, to Ray Cormier, the individual in charge of all civilian personnel on the dockyard where Mr. Leary worked. In the letter, Mr. Mirabelli writes, in part (Exhibit T-28):

. . .

> *"…it is such a shame to, as I see punish a man for doing and caring in a manner above any expectations. What a waste. Ray, we need help. If this proceeds in the direction that I feel we are being asked, I mean told than* [sic] *I feel this is the beginning of our demise…"*

. . .

[39] In terms of remedy, section 134 of the *Code* would permit the issuance of an order requiring the employer to return Mr. Leary to the duties he had before his removal. The complainant asks that this order be issued.

[40] Counsel for the complainant referred to the following cases: *Lawrence Warris*, (1997) 104 di 62; *Kinhnicki v. Canada Customs and Revenue Agency*, 2003 PSSRB 52 and *Boivin v. Canada Customs and Revenue Agency*, 2003 PSSRB 94.

Argument for the Respondent

[41] Two issues must be decided in this case. First, the threshold issue must be dealt with; namely, was there a genuine basis to refuse to work, thereby invoking the provisions of the *Code*? Secondly, if the threshold has been met, has the employer discharged its onus to show that its actions are not retaliatory?

[42] The problem of finding a long-term solution to the unsanitary washroom had existed for some time. Mr. Leary was getting frustrated at its lack of resolution.

[43] The employer was aware of the problem and was trying to resolve it, but Mr. Leary withdrew his service because of a lack of action. There was no immediate danger to Mr. Leary and, in fact, the situation in October, when the withdrawal of service took place, was no different from that of the previous May when Mr. Leary filed his non-conformance report. He was not responding to any reasonable semblance of danger as per the *Code*.

[44] To invoke danger under the *Code*, there has to be something that is likely to cause harm to your safety and/or health with some certainty. Such was not the case here. There is no danger because of a "fundamental failure of the internal complaint resolution process", as Mr. Leary put it.

[45] Management determined that there was no misconduct on Mr. Leary's part and told him that no further action was being contemplated.

[46] What happened at that time, however, was that LCdr Rutherford began thinking about the vulnerability of the test facility, should Mr. Leary be away for a lengthy period of time.

[47] LCdr Rutherford was aware that Mr. Leary was subject to a generic job description. There was no dedicated job at the test facility and LCdr Rutherford decided to effect an organizational change. He had every right to do so, and there wasn't a requirement to consult with anyone in advance of making this change.

[48] Mr. Leary had no incumbent rights to the work in the test facility. He was subject to different assignments in his trades job.

[49] This was a genuine management decision taken for operational reasons, good, bad or indifferent. The manager is paid to make decisions, and he made one.

[50] The reason that the decision was made was not one of retaliation. The work refusal spotlighted a deficiency, and an operational decision was made in response to the need.

[51] No disciplinary action has been taken against Mr. Leary. He has never been excluded from performing his duties in the MTF, but no longer performs them on a full-time basis. Mr. Leary has not lost any salary, and no penalty has occurred. The employer has the right to reorganize and that is what it did.

[52] Counsel for the employer referred to the following cases: *Boivin* (supra) and *Massip v. Canada (Treasury Board)* (1985), 61 N.R. 114 (FCA).

Reply of the Complainant

[53] The employer states that because the danger existed and was tolerated for so long, in effect the employee waived his right to withdraw his service. This is simply

not so. Employees have a right to trigger the provisions of the *Code* when they believe it is being violated.

Reasons

[54] Pursuant to paragraph 128(1)(b) of the *Code*, an employee may refuse to work in a place if the employee has reasonable cause to believe that a condition exists in the place that constitutes a danger to the employee.

[55] The complainant states that the employer has violated section 147(c) of the *Code*. This states:

> ***147.*** *No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period of time that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee*
>
> *(a) …*
>
> *(b) …*
>
> *(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

[56] Mr. Leary has filed his complaint pursuant to section 133 of the *Code* alleging this violation.

[57] The employer stated that the threshold issue must be examined initially, namely, was there a genuine basis to refuse to work? If so, section 147 of the *Code* can be invoked. If not, this provision of the *Code* is not available to the complainant.

[58] I dealt with this issue in an earlier decision, *Boivin (supra*), at paragraphs 123 and 124. I stated:

> *¶123 As stated at the outset, this is a reverse onus situation by virtue of subsection 133(6) of the Code. In other words, Mr. Boivin's allegation that the employer has violated the Code is itself evidence that the contravention actually occurred. In* Kucher *(supra), the Canada Labour Relations Board (CLRB) (as it then was), at paragraph 11 wrote:*

> *11….In order to meet this onus, the employer must establish that the disciplinary action had nothing to do with the fact that the employee exercised his right to refuse work under the Code, once the employee had satisfied the Board that he had a reasonable cause to believe that a dangerous condition existed.*

> *¶124 As I understand this decision, it stands for the proposition that the Board must review whether the employee had a reasonable cause to believe that a dangerous condition existed before he withdrew his services. If this condition cannot be met, then the employer's action, whether disciplinary or not, is not a violation of the Code.*

[59] The employer advances that there was no genuine basis to believe that a danger existed when Mr. Leary withdrew his services, and that the withdrawal was based on the frustration he was experiencing in not getting a long-standing problem resolved. The complainant states that the withdrawal was directly related to the extremely unsanitary washroom conditions, a situation recognized by a joint union/management team.

[60] When LCdr Rutherford heard of the withdrawal, he asked Mr. Leary to state, in writing, his reason for the withdrawal of service. Mr. Leary wrote, on October 8, 2003 (at Exhibit T-3):

> *"I am refusing to work due to a fundamental failure of the internal complaint resolution process as outlined in the* Canada Labour Code Part II*, Section 127.1. I have been waiting for a response to as to* [sic] *what my employer intends to do about the personal service areas sanitation problems and when they are going to be resolved…"*

[61] Section 128 (1) permits an employee to "…refuse…to work in a place…if the employee while at work has reasonable cause to believe that…a condition exists in the place that constitutes a danger to the employee…"

[62] Did Mr. Leary have reasonable cause to believe that a danger, as that term is understood in the *Code,* existed, such that he could avail himself of the withdrawal of services provision? The *Code* defines "danger" as:

> *[**"danger"** «danger»] "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;*

[63] In my view a refusal to work "…due to a fundamental failure of the internal complaint resolution process" does not constitute a "reasonable cause to believe that a condition exists in the place that constitutes a danger to the employee" such that he can withdraw his services.

[64] In *Boivin (supra)*, I wrote, at paragraphs 127 and 128:

> *¶127 The employer submitted that if the employee did not have a reasonable basis for exercising his right to refuse work, he was not entitled to the protection of section 147 of the Code in the first place. I agree.*
>
> *¶128 At paragraph 14 of* Kucher *(supra), the CLRB wrote:*
>
> > *14. To have the protection of the Code, the refusal must be made in circumstances where there is "reasonable cause" for such a belief (see Bermiline Jolly (1992), 87 di 202; and 16 CLRBR (2d) 300 (CLRB no. 929)). The notion of reasonable cause entails both an objective and a subjective element (Francine Tremblay) et al. (1985), 59 di 163 (CLRB no. 497)), as the Code does not confer a right of refusal based merely on "genuine belief." The danger must be acute and immediate and not merely stem from anticipation of stress because of interaction with fellow employees (see Antonio Almeida (1990), 82 di 10 (CLRB no. 819)).*

[65] I do not believe that one can find that the "…fundamental failure of the internal complaint resolution process" as Mr. Leary wrote on October 8, 2003, constitutes reasonable cause to believe that a danger exists, at least objectively speaking. It may well lead to frustration on the employee's part, as there may not be a satisfactory long-term solution, but it is not, in my view, reasonable cause within the meaning of the C*ode*.

[66] Even if I were to disregard the complainant's own words and find that he withdrew his services solely because of an unsanitary washroom, that, in and of itself, may not be sufficient reason to say a that there was a "reasonable cause to believe that a condition exists in the place that constitutes a danger to the employee". I did not hear any evidence to say that this was the only washroom that the complainant could use, nor did I hear any evidence about the condition of other washrooms (if any others existed). Perhaps the complainant could have used another washroom that was sanitary. Also, I did not hear evidence concerning the condition of the washroom as it existed on October 8, 2003, the day Mr. Leary withdrew his service. Certainly the evidence showed that, at times, the washroom was unsanitary. However, was it unsanitary on October 8th? I simply do not know. Here, the complainant must meet the initial onus of showing that he had a reasonable basis for exercising his right to refuse work. In my view, that onus has not been met.

[67] Having found that there was no reasonable basis to withdraw his services at the outset, I find that the complainant is not entitled to the protection of section 147 of the *Code*. However, if I am wrong in that regard, the complainant would have a second hurdle to meet, namely to show that the employer imposed "a financial or other penalty" or took "disciplinary action against the employee".

[68] There was no dispute that LCdr Rutherford had the authority to effect an organizational change. Similarly, there was no dispute that Mr. Leary had a generic job description and did not own a position in the MTF.

[69] Mr. Leary did not suffer any financial loss that I was made aware of, in his movement out of the test facility. He kept his same classification and pay. Counsel for the complainant agreed that there was no financial penalty incurred by the complainant. The "penalty", if it can be termed that, was to be taken out of the test facility and placed elsewhere. The receiving unit was not at issue, as the focus of the complainant was that he had been penalized by being moved out of the test facility.

[70] I do not find that the employer's action was disciplinary in nature, nor was it a penalty as that term is used in section 147 of the *Code.* Section 147 says, in part:

. . .

> *147. [General prohibition re employer] No employer shall dismiss, suspend, lay off or demote an employee, impose a*

> *financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee …*

. . .

[71] Excluding the words "or other penalty", all of these prohibitions would, if carried out, result in some financial detriment to the employee. The *Code* is set up, I believe, largely to prevent the employer from imposing a financial penalty on the employee, where the employee had a right to withdraw his or her service. It may be possible to consider some action of the employer, non-financial in nature, as an "other penalty" as, for example, the imposition of demerit points which, once a threshold is reached, results in some financial detriment. The demerit points could then be considered in terms of "other penalty". However, given the circumstances of this case, I do not find that moving Mr. Leary is a penalty, as that term is used in the *Code*.

[72] Mr. Leary may see management's decision as a penalty, but to paraphrase the words in the *Kucher* decision *(supra)*, the *Code* does not prohibit the employer from penalizing the employee merely because the employee has a "genuine belief" that such action is a penalty. The employer's action must have some relationship to the totality of the language in section 147 to be considered a penalty. In my view, such a relationship does not exist in these circumstances.

[73] I do not believe that an action can be deemed to be a "penalty", as I understand that term to be construed in section 147 of the *Code*, simply because the complainant views the action as a "penalty". If Mr. Leary liked the job that he was moved into, then I would venture to say that the action of removing him from the MTF would not be seen by him as a "penalty". The scheme of section 147, as I see it, is not to be dependent on the personal views of the complainant, but rather it is designed to prevent the employer from taking certain action which, if looked at objectively, would violate the *Code*. Such an element is, I believe, absent here.

[74] LCdr Rutherford did not say that Mr. Leary would be permanently removed from the test facility. In fact, the March 24, 2004 memo which was given to Mr. Leary says in part (Exhibit T-22):

. . .

> *"Management of the training program, and operator rotation is assigned to the Test Facility Supervisor".*

. . .

LCdr Rutherford testified that it was always his intent to have trained personnel rotate through the test facility. I believe that this type of practice makes sense in this situation. It ensures that a number of individuals will have the skills to do the job and, therefore, usually someone would be available to do the work.

[75] I do, however, believe that it would be wise for the employer to meet with Mr. Leary and his union representative, if he so desires, to discuss how best to execute LCdr Rutherford's wishes on rotating people through the position. The evidence indicated that skill sets can be lost over time if they are not used. Mr. Leary has excellent skill sets, and his work in the test facility was, according to all accounts, exemplary. The employer stated that it did not want to lose this skill set, which is all the more reason to meet with Mr. Leary and discuss the issue of his rotating through the test facility in order that he remains current, and the excellent work he did continues.

[76] Although Captain A. Smith was named as a Respondent in this complaint, no evidence regarding his involvement in the events in issue was tendered.

Order

[77] Therefore, for all of the above reasons, this complaint against all of the Respondents must fail.

April 15, 2005.

Joseph W. Potter,
Vice-Chairperson.