

**Date:** 20050520

**File:** 160-2-99

**Citation:** 2005 PSLRB 45

*Canada Labour Code*



Before the Public Service  
Labour Relations Board

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BETWEEN

**PAUL CHAVES**

Complainant

and

**TREASURY BOARD  
(Correctional Service Canada)**

Respondent

Indexed as *Chaves v. Treasury Board (Correctional Service Canada)*

In the matter of a complaint made under section 147 of Part II of the *Canada Labour Code*.

**REASONS FOR DECISION**

***Before:*** D.R. Quigley, Board Member

***For the Complainant:*** Philippe G. Trottier, Public Service Alliance of Canada

***For the Respondent:*** Stéphane Hould, Counsel

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Heard at Kingston, Ontario,  
March 22 to 24, 2005.

## REASONS FOR DECISION

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### Complaint before the Board

[1] In his complaint, Paul Chaves alleges that his former supervisor, Frank Ignazzitto, violated section 147 of Part II of the *Canada Labour Code (CLC)*. Following a competition that Mr. Chaves applied for, Mr. Ignazzitto provided information to a Correctional Service Canada (CSC) selection board regarding health and safety matters previously raised by Mr. Chaves, thereby giving him a negative reference and affecting his opportunity for career advancement.

[2] The relief sought is that the respondent issue an apology and that CSC managers be trained in order to avoid future violations of the *CLC*.

[3] Mr. Chaves testified on his own behalf and 10 exhibits were introduced. Counsel for the respondent called one witness and filed one exhibit. The parties filed one exhibit on consent (Exhibit G-10).

[4] At the outset of the hearing, counsel for the respondent objected to my hearing this complaint, stating that no disciplinary action was taken against Mr. Chaves; therefore, there was no contravention of section 147 of the *CLC*. The fact that Mr. Ignazzitto referred to health and safety complaints that Mr. Chaves had filed does not constitute disciplinary action.

[5] In reply, Mr. Chaves' representative stated that there was a violation of section 147 of the *CLC*, as Mr. Ignazzitto's comments to the selection board affected Mr. Chaves' career advancement opportunities.

[6] I decided to proceed to hear the merits of the case and will deal with counsel's objection in my reasons.

[7] The parties introduced an Agreed Statement of Facts (Exhibit A-1), which reads as follows:

### ***Statement of Facts***

1. *Mr. Paul Chaves an employee of CSC (WP-3) has exercised his rights under Part II of the Canada Labour Code in 2001 on more than one occasion.*
2. *The Correctional Service of Canada held a competitive process in 2002 under the Public Service Employment Act for a WP-3 Social Program Officer.*

3. *Mr. Chaves was an unsuccessful candidate in said competition.*
4. *On June 5, 2003 an Appeal Board struck under the PSEA allowed Mr. Chave's appeal citing 3 flaws including a lack of information from his supervisor – Mr. Frank Ignazzitto.*
5. *On July 29, 2003 as part of the corrective action of the said selection process, the selection board interviewed Supervisor Frank Ignazzitto during which time he provided information to the selection board regarding health and safety matters filed by Mr. Chaves.*
6. *The comments made by Mr. Ignazzitto were noted in written form by members of the selection board.*
7. *On June 15, 2003 an Appeal Board rendered a decision in a second subsequent appeal by Mr. Chaves on the said competition after it had considered all of the relevant information put to it, including the reference check information the selection board had obtained from Mr. Ignazzitto.*
8. *The Appeal Board dismissed Mr. Chaves' second appeal.*
9. *On March 18, 2004 Mr. Chaves filed the instant complaint under Part II of the Canada Labour Code alleging a violation of s. 147.*

[8] 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 Board continues to be seized with this complaint, which must be disposed of in accordance with the new Act.

#### Summary of evidence

[9] Paul Chaves began his career at Millhaven Institution, a maximum-security facility, in 1991. In 1998, he acquired indeterminate status as a Social Program Officer at the WP-02 group and level. Shortly thereafter, he applied for transfers to lower security institutions to relieve his stress level.

[10] In 2002, following the collective bargaining process, employees classified at the WP-02 level were assigned extra duties and as a result, they were reclassified to the WP-03 level. That same year, the CSC posted a competition to fill positions at the

WP-03 level in the Kingston area, including at lower security institutions such as Grand Valley Institution for Women, Beaver Creek/Fenbrook and Warkworth.

[11] Mr. Chaves applied for one of the positions and successfully achieved the required pass-mark on the written exam assessing knowledge. He was also successful during the oral interview that assessed his abilities and skills. Personal suitability was assessed on the basis of a candidate's responses during the oral interview, as well as information obtained following a candidate reference check. "Respect" was one of the five personal suitability elements assessed and it was considered non-compensatory; that is, candidates were required to meet a minimum standard in order to be considered qualified for the available positions.

[12] Mr. Chaves received a score of 10 points out of a possible 25 under the non-compensatory element of "respect". As the minimum standard required 15 points, the selection board decided that he did not qualify and he was screened out. Mr. Chaves filed an appeal with the Appeal Directorate of the Public Service Commission (PSC). Carolyn Brown, the Appeal Board Chairperson, rendered a decision on June 5, 2003, allowing the appeal (Exhibit G-1):

[...]

*Decision and Reasons:*

*After careful review of the evidence and argument presented as well as the testimony provided, I am of the opinion that my intervention is warranted with respect to the appeal of Paul Chaves...*

[...]

*Turning to the allegations of Paul Chaves, I have some concerns with how the Selection Board arrived at a decision regarding the assessment of the appellant under the element of respect. It appears to me that information from his substantive supervisor concerning his performance, information which Mr. Ignazzitto would possess given the length of time during which the appellant reported to him is critical to the determination of Mr. Chaves' qualification. It seems to me that Mr. Ignazzitto is one individual who was quite knowledgeable about the appellant's performance as the most recent performance evaluation covering the period June 2001 until November 2002 would suggest. That Mr. Ignazzitto might have some concerns with the appellant's performance is an area which the Selection Board would have to consider, and presumably it should seek*

*clarification and examples to support the observations made. In my view, the absence of substantive examples to support the comments made by the referee contacted by the Board, is also a flaw in the assessment of Mr. Chaves' qualifications and one which should be addressed in any corrective action taken subsequent to this upheld appeal. Finally, in my opinion, the Selection Board had an obligation to substantiate the final decision it reached concerning the critical element of the respect, and there is nothing in the documentation provided by the department nor in the testimony provided by the Selection Board Chairperson to demonstrate the basis upon which the mark was awarded.*

[...]

[13] In order to comply with the decision of the Appeal Board, the selection board (which had consisted of June Blackburn, the Assistant Warden at Collins Bay Institution, as Chairperson, and Greg MacDonald and Angela Reid, as Board Members) reassessed the “respect” portion of the personal suitability assessment. Mr. Chaves' previous supervisors, Carol Hughes and Mr. Ignazzitto, were interviewed and asked to provide specific examples for the “respect” element. As well, the questions were designed to address the following elements: “desire to learn and change”; “integrity”; “results orientation”; and “teamwork”.

[14] The notes taken by each member of the selection board were filed as Exhibits G-4 to G-6.

[15] As previously stated, the complaint revolves around Mr. Ignazzitto's comments to a CSC selection board about complaints that Mr. Chaves had previously filed under subsections 127.1 and 128(1) of the *CLC*. These subsections read as follows:

*127.1(1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.*

[...]

*128.(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that*

- (a) *the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*
- (b) *a condition exists in the place that constitutes a danger to the employee; or*
- (c) *the performance of the activity constitutes a danger to the employee or to another employee.*

[16] Mr. Chaves contends that Mr. Ignazzitto's reference to the complaints he filed was negative in intent and disciplinary in nature, thereby violating his rights under section 147 of the *CLC*.

[17] Section 147 of the *CLC* 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 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) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*

*(b) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or*

*(c) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*

[18] Mr. Chaves agreed that management at Millhaven Institution never took direct disciplinary action against him for having filed a complaint pursuant to the *CLC*. However, it is his belief that Mr. Ignazzitto's comments to the selection board were disciplinary in nature.

[19] Mr. Chaves proceeded to describe two incidents whereby he believed that his filing of this complaint was justified.

[20] The first incident occurred early in November 2001, following a stabbing between two inmates in the recreational area at Millhaven Institution. The Institution locked down the inmates and a search was conducted. As a result of this search,

several weapons were found and seized by correctional officers. After several weeks had passed without further incident, management lifted the lockdown and inmates were again allowed to move throughout the institution. However, another stabbing occurred and more weapons were found. Mr. Chaves believed there was a risk to his health and safety and therefore filed a complaint under the *CLC*.

[21] Birgit Barca, a Health and Safety Officer at Human Resources Development Canada (HRDC), investigated the matter and decided that no danger existed and therefore Mr. Chaves could not continue to refuse to work supervising the inmates in the recreational area (Exhibit G-9). Mr. Chaves returned to work and although the employer took no steps to make the recreational area any safer, neither did it take any direct disciplinary action against him.

[22] The second incident, which again occurred at Millhaven Institution, concerned Mr. Chaves' canteen duty (the delivery of chocolate bars, chips, cigarettes, etc., to inmates in the Segregation Unit). Mr. Chaves made a canteen round approximately every two weeks. He stated that he had trouble breathing while in the Segregation Unit, as inmates were allowed to smoke; therefore, he filed a complaint. In response, the employer installed a box fan and he agreed to work under that condition, but reserved his right to initiate further action if necessary. Mr. Chaves stated that as more and more conclusive evidence of the dangers of second-hand smoke was being documented by medical authorities, he decided to file another complaint. In response, the employer provided him with a "Self-Contained Breathing Apparatus" (SCBA), which is what firefighters use in the performance of their duties. The SCBA had an oxygen tank and a full-face breathing mask. He agreed to use the SCBA and was trained in its safe operation. He used it for approximately one year and during that time endured verbal abuse from the inmates, who called him Darth Vader and Jacques Cousteau. When the Institution ran low on tanks, management decided that he would no longer perform the canteen duty. During this period of time, Mr. Ignazzitto was his supervisor.

[23] Mr. Chaves concluded his testimony by stating that he believes Mr. Ignazzitto referred to his *CLC* complaints in the hope that he would be disqualified from the competition. He noted as well that, as the Chairperson of the selection board, Ms. Blackburn should not have allowed Mr. Ignazzitto to make reference to health and safety issues that Mr. Chaves had previously raised. It is his belief that the

selection board members were insufficiently trained with respect to the provisions of the *CLC*. Ms. Blackburn should have instructed Mr. Ignazzitto not to refer to health and safety complaints filed by Mr. Chaves.

[24] In cross-examination, Mr. Chaves agreed that Mr. Ignazzitto had no delegated authority with regard to disciplinary matters. As well, he conceded that Mr. Ignazzitto had never given him either a written or an oral reprimand.

[25] In redirect, Mr. Chaves stated that although he was never directly disciplined by senior management for having filed a complaint under the *CLC*, it is his belief that Mr. Ignazzitto's comments to the selection board resulted in a negative reference check, thereby violating section 147 of the *CLC*.

[26] June Blackburn has been the Assistant Warden of Corrections Programs at Collins Bay Institution for approximately six and one-half years. She was delegated the role of Chairperson of the selection board for the competition to fill positions at the WP-03 level in the Kingston area. The witness selected Greg MacDonald, an Acting Pay Manager from Kingston, and Angela Reid, a teacher from Collins Bay, as board members.

[27] Ms. Blackburn testified that Mr. Chaves had been successful in the competition up until the candidate reference check, and particularly when assessed with regard to the "respect" element. When he was screened out, Mr. Chaves filed an appeal with the PSC. As the Chairperson of the selection board, Ms. Blackburn was directed by the Appeal Board of the PSC to substantiate the marks that he had been awarded.

[28] The selection board interviewed Ms. Hughes and Mr. Ignazzitto in person. As a result of their interviews, together with Mr. Chaves' evaluation reports and the answers he provided to questions they posed, their decision that he had failed to meet the requirements under the personal suitability element remained unchanged (Exhibit E-1). A second appeal hearing upheld their determination.

[29] The witness stated that Mr. Chaves was not screened out because he had filed complaints under the *CLC*, but because of a chronic problem of not trying to resolve health and safety issues in consultation with his immediate supervisor. He bypassed his supervisor and manoeuvred to higher authorities without giving his supervisor an opportunity to resolve the problem.



[30] The witness noted that the only reference made to Mr. Chaves' *CLC* complaints was during the personal suitability assessment. The lack of interaction with his supervisor was one of the reasons he was given low marks and subsequently screened out.

[31] In her notes taken during the interview with Mr. Ignazzitto (Exhibit G-4, page 1), Ms. Blackburn wrote: "If he doesn't like a rule, bypasses supervisor & goes elsewhere. Super is last to know - example - # of i/ms [inmates] issue - did not go to Super... Frank found out about it from others - chronic problem." She referred to Mr. Chaves' habit of bypassing his supervisor and examples were noted (Exhibit G-4, pages 5 and 6). These notes reflected Mr. Ignazzitto's assessment of Mr. Chaves' lack of respect and chronic behaviour toward his supervisor.

[32] The witness stated that candidates had to meet the critical element of "respect" under the personal suitability assessment in order to continue to be considered in the selection process. In the selection board's opinion, Mr. Chaves failed to meet this requirement.

[33] In referring to Exhibit E-1, the selection board's notes of Mr. Chaves' personal suitability assessment, the witness stated that Mr. Chaves bypassed his supervisor not only with regard to health and safety matters, but also with respect to other matters, such as the filing of grievances. She agreed that although he has the right to use the necessary redress mechanisms in place to resolve a problem, bypassing his supervisor was unacceptable.

[34] In conclusion, the witness noted that as a result of a workforce adjustment directive, no appointments were made to fill positions in Kingston following the competition.

[35] In cross-examination, Ms. Blackburn was not able to recall if there were any appointments made to fill positions at Warkworth, Grand Valley and/or Fenbrook/Beaver Creek Institutions following the competition process. She reiterated, however, that no appointments were made to fill positions in Kingston.

[36] Ms. Blackburn stated that Mr. Ignazzitto was interviewed by the selection board, as directed by the Chairperson of the PSC Appeal Board, for approximately one hour. As a result of the appeal filed by Mr. Chaves, the selection board reassessed the

“respect” element, as well as the “desire to learn and change”, “integrity” and “teamwork” elements.

[37] When referred to her notes of the “Candidate Reference Check” with respect to the “desire to learn and change” element (Exhibit G-4, page 6), Ms. Blackburn reiterated that Mr. Chaves should have discussed the incident mentioned therein with his supervisor before initiating a complaint under the *CLC*. When asked if Mr. Ignazzitto had provided Mr. Chaves with any proper instructions or the procedure to follow with regard to filing a *CLC* complaint, Ms. Blackburn replied that she did not know.

[38] The witness noted that she found Mr. Ignazzitto to be an objective and credible reference. She stated that Mr. Ignazzitto’s concern was that Mr. Chaves would not consult with him when a problem arose and before filing a complaint under the *CLC*. The issue was not that Mr. Chaves invoked his rights under the *CLC*, but rather that he never gave Mr. Ignazzitto an opportunity to try to resolve the problem.

[39] Exhibit G-10 was introduced on consent. It is an e-mail dated November 5, 2001, from Mr. Chaves to Mr. Ignazzitto raising concerns about his safety because offenders are being allowed to work in the recreational area further to stabbing incidents and the recovery of weapons.

### Summary of the arguments

#### For the Complainant

[40] Mr. Chaves alleges that by exercising his rights under the *CLC*, he suffered a penalty, albeit not a financial one but a penalty nevertheless, which had a negative effect on his career advancement opportunities.

[41] Mr. Trottier argued that evidence was adduced to prove that Mr. Chaves did not bypass Mr. Ignazzitto before filing a complaint under the *CLC* (Exhibit G-10). Mr. Ignazzitto’s negative comments to the selection board were never substantiated. In other words, the selection board did not take any measures to be objective when considering Mr. Ignazzitto’s comments. Mr. Trottier stated that Mr. Ignazzitto’s tainted comments, which were considered and accepted without verification by the CSC selection board, violated section 147 of the *CLC*, with the result that Mr. Chaves was deemed unsuitable and disqualified from the competition.

[42] In conclusion, he stated that although the penalty was not a financial one, the *CLC* also refers to “other penalty”. There is, therefore, a direct link to the fact that Mr. Chaves was found unqualified by the selection board.

For the Respondent

[43] Counsel reiterated his objection to my jurisdiction to hear this complaint, stating that Part II of the *CLC* deals with health and safety issues; it does not pertain to a selection process covered by the *Public Service Employment Act (PSEA)*.

[44] Counsel agreed that section 147 of the *CLC* states that the employer cannot impose a financial penalty, or other penalty, or refuse to pay an employee. In this case, no evidence was adduced to show that the employer had disciplined Mr. Chaves.

[45] Counsel noted that it is the *PSC* that has jurisdiction to deal with appeals in respect of a selection/competitive process; under the *PSEA*, appointments are the sole jurisdiction of the *PSC*.

[46] Following Mr. Chaves’ first appeal, the *PSC* determined that there was a flaw in the process and the selection board was directed to reassess the marks that Mr. Chaves had been awarded. The selection board interviewed Mr. Ignazzitto and a second appeal by Mr. Chaves was dismissed. As Mr. Ignazzitto was Mr. Chaves’ supervisor, he was an appropriate reference check. Counsel noted that Mr. Ignazzitto had no disciplinary authority over Mr. Chaves and he never gave him either an oral or a written reprimand.

[47] There is no evidence that Mr. Chaves failed to meet the “respect” element under the personal suitability assessment because he had invoked his rights by filing complaints under the *CLC*. Rather, it was as a result of his failure to follow the appropriate process and his bypassing his supervisor.

[48] In support of his arguments, counsel cited the following cases: *Canada Post Corp. v. Qureshi*, [1994] C.L.C.R.S.O.D. No. 3 (QL); *Union of Canadian Correctional Officers v. Costello*, 2003 PSSRB 54; *Blakely (Re)*, [2003] C.I.R.B. No. 240 (QL); *Fedoryk v. Treasury Board (Canadian Transport Commission)*, PSSRB File No. 166-2-15695 (1986) (QL); *Foreman v. Treasury Board (Indian and Northern Affairs Canada)*, 2003 PSSRB 73; and *Mark v. Treasury Board (Transport Canada)*, PSSRB File Nos. 166-2-21451 to 21455 (1992) (QL).

Reply

[49] The complainant's representative stated that by exercising his rights, Mr. Chaves was penalized and denied an opportunity for career advancement. As such, this was disciplinary in nature and he has met the test under section 147 of the *CLC* that refers to "any disciplinary action".

[50] As for corrective action, Mr. Chaves does not want to turn back the clock and cancel any appointments that might have been made, if positions were, in fact, filled at Warkworth, Grand Valley or Fenbrook/Beaver Creek Institutions. Rather, the respondent should be ordered to issue an apology and ensure that in future, no reference be made to a selection board if an employee has filed a complaint under the *CLC*. Mr. Trottier stated that, either through willingness or neglect, the selection board violated section 147 of the *CLC* by allowing Mr. Ignazzitto to refer to the *CLC* complaints that Mr. Chaves had previously filed. Therefore, the respondent must be held accountable.

Reasons

[51] In regard to Mr. Ignazzitto's reference to Mr. Chaves' actions, I conclude the following.

[52] After being screened out of the competition, Mr. Chaves filed an appeal with the PSC. The Appeal Board decision stated (Exhibit G-1, p. 22):

[...]

*Finally, in my opinion, the Selection Board had an obligation to substantiate the final decision it reached concerning the critical element of the respect, and there is nothing in the documentation provided by the department nor in the testimony provided by the Selection Board Chairperson to demonstrate the basis upon which the mark was awarded.*

[...]

[53] As a result, the selection board personally interviewed Mr. Ignazzitto. Their notes of the interview (Exhibits G-4 to G-6) reflect comments provided by Mr. Ignazzitto regarding the "respect" element. The selection board's final decision was that Mr. Chaves failed to meet the minimum standard required for the non-compensatory element of "respect"; thereby, he was disqualified from the competition.

Mr. Chaves then filed a second appeal. The appeal was heard by J.R. Ojalammi on June 5, 2003. On page 23 of the decision (Exhibit G-3), he stated:

*Analysis*

[...]

*Mr. Chaves suggested that although the selection board had said it was only concerned with the grievances which he had filed and his objection to unsafe working conditions pursuant to the Canada Labour Code from the perspective that he had not followed appropriate procedures, in reality using these events in his assessment was a covert means of applying pressure to him so that he would not file grievances or objections to unsafe working conditions in the future. This argument was based on speculation. On the other hand, the department's representative presented a cogent and rational explanation of why the selection board was justified in considering these events in the context of whether the appellant followed the appropriate procedures.*

*I cannot find fault with what the selection board did based simply on speculation. However, the evidence presented at the hearing did not, in my estimation, even allow for a reasonable inference to be drawn that the board had actually considered these events as a means to pressure the appellant into not repeating them. It appears that the selection board only considered this information would evaluating whether the appellant followed appropriate procedures (sic). Consequently this aspect of the appellant's arguments cannot succeed being based, as it is, on speculation*

[...]

[Emphasis added]

[54] Mr. Chaves then filed a complaint with this Board pursuant to section 147 of the *CLC*.

[55] With regard to the employer's objection to the Board's jurisdiction to hear this complaint, in respect of the selection board process I agree that it is within the jurisdiction of the PSC, pursuant to the *PSEA*, to appoint or hear appeals of persons appointed to positions or choose a selection process. I will not comment, nor would it be appropriate to do so, with regard to their findings. However, I have decided that the Board does hold jurisdiction to hear this complaint for the following reasons.

[56] In order to make a reasonable decision in this case, an analysis and interpretation of section 133 of the *CLC* may be useful.

### Analysis and Decision

#### The Board's Jurisdiction

[57] Before the amendments to Part II of the *CLC* (Bill C-12) were made, and which took effect on September 30, 2000, section 133 of the *CLC* read as follows:

*133.(1) Where an employee alleges that an employer has taken action against the employee in contravention of paragraph 147(a) because the employee has acted in accordance with section 128 or 129, the employee may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*

*(2) A complaint made pursuant to subsection (1) shall be made to the Board not later than ninety days from the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or the circumstances giving rise to the complaint.*

*(3) An employee may not make a complaint under this section if the employee has failed to comply with subsection 128(6) or 129(1) in relation to the matter that is the subject-matter of the complaint.*

*(4) Notwithstanding any law or agreement to the contrary, a complaint referred to in subsection (1) may not be referred by an employee to arbitration.*

*(5) On receipt of a complaint made under subsection (1), the Board may assist the parties to the complaint to settle the complaint and shall, where it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*

*(6) A complaint made pursuant to subsection (1) in respect of an alleged contravention of paragraph 147(a) by an employer is itself evidence that that contravention actually occurred and, if any party to the complaint proceedings alleges that the contravention did not occur, the burden of proof thereof is on that party.*

[58] Since the amendments, the section reads as follows:

133. (1) *An employee, or a person designated by the employer for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.*
- (2) *The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*
- (3) *A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6), or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.*
- (4) *Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.*
- (5) *On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.*
- (6) *A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.*

[Emphasis added]

[59] In the instant case, Mr. Chaves alleges that Mr. Ignazzitto's comments to the CSC selection board re sections 127 and 128 of the *CLC* constituted disciplinary action that violated his rights and adversely affected his career aspirations. As well, he alleges that the selection board members were not sufficiently trained in *CLC* matters; if they had been, they would not have accepted Mr. Ignazzitto's references to his complaints. In order to meet the provisions of section 133, an employee must first

meet several hurdles: filing a complaint in writing; timeliness; complying with subsection 128(6).

- 133(1): The complainant made an allegation under section 147 in writing. The complainant mistakenly filed the complaint to Human Resources Development Canada (HRDC) on February 18, 2004, and subsequently to the PSSRB on March 18, 2004, as stated in the Statement of Facts (Exhibit A-1).
- 133(2): I conclude that timeliness in this case is not at issue, as the employer did not adduce evidence that the 90-day threshold was not met by the complainant.

#### Prior to the Invocation of the Reverse Onus

[60] While this case is indeed one where the reverse onus provided for in subsection 133(6) applies, there is a first hurdle which needs to be cleared by the complainant prior to the reverse onus provision applying in this case. Prior to getting into an evaluation of the employer's evidence, the complainant must first prove that the requirements of section 133 were met in order to determine whether or not the complainant even had the right to file a complaint under section 133. Specifically, in accordance with subsection 133(3), the complainant must show that he has complied with subsection 128(6), which is the employee's obligation to report the refusal to the employer. While Mr. Ignazzitto complains that Mr. Chaves did not first report his safety concerns to him, there is no indication that Mr. Chaves did not report them to "the employer", broadly speaking.

#### *Section 128*

*(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.*

[Emphasis added]

[61] The complainant testified to two incidents which were the basis for Mr. Ignazzitto's comments on the "respect" element. The first incident occurred in November of 2001, following a stabbing incident between two inmates and resulted in a work refusal by Mr. Chaves. Exhibit G-10 clearly indicates that the complainant, prior



to exercising his rights under section 128 on November 5, 2001, conversed with Mr. Ignazzitto regarding this issue.

[62] The second incident was related to Mr. Chaves' concerns regarding second-hand smoke while delivering canteen items to inmates in the Segregation Unit.

[63] Following a review of the evidence in detail, it is clear that Mr. Chaves filed a section 127 complaint; however, I note at page 7 of Exhibit G-4: "Paul submitted a 127 on smoking .... Should not have to go to units because of smoke environment...turned in to a Section 128."

[64] I have concluded that both incidents referred to by Mr. Ignazzitto were the subject of work refusals by Mr. Chaves; the reverse onus provisions of subsection 133(6) would therefore apply, and the onus is on the employer to prove, beyond the balance of probabilities, that it did not violate section 147 of the *CLC* in referring to these incidents as part of Mr. Chaves' reference check.

[65] Unfortunately, Mr. Ignazzitto was not called to testify by the employer. Instead, the employer chose to call Ms. Blackburn, who was a member of the selection board. While she was the one to assess the candidates based on all of the factors, she was not the person who made the remarks at issue. While Mr. Chaves works at Millhaven Institution, Ms. Blackburn works at Collin's Bay. I see no allegation by the complainant that Ms. Blackburn was guilty of retaliatory action in violation of section 147 nor does she have any reason to wish to retaliate against Mr. Chaves, given that she probably does not even know him. Rather, the complaint names only Mr. Ignazzitto.

[66] Mr. Chaves does allege that Ms. Blackburn was in error in allowing Mr. Ignazzitto to refer to the incidents outlined above, but the complainant did not refer in his testimony to any *CLC* provisions which prohibit such action. I therefore conclude that the reproach appears to be more in the nature of a general comment than one intimately tied to a *CLC* provision.

#### What Constitutes an "Other Penalty" under the *CLC*?

[67] Complaints such as the one filed by Mr. Chaves are actually filed under section 133 of the *CLC*, alleging a violation of section 147. I would note that the wording of subsection 133(1) is as follows:

*An employee...who alleges that an employer has taken action against the employee in contravention of section 147 may....*

[Emphasis added]

[68] The word “financial” is notably absent from the wording of this section and indeed the wording in section 133 is much broader than the wording of section 147, which appears to be limited to action of a “disciplinary” nature.

[69] While section 147 does list words with a definitely “financial” slant, I do not believe that the application of section 147 is limited to cases where the reprisal action is financial in nature only. The wording of section 147, in the phrases “financial or other penalty” and “disciplinary action” can also be interpreted to include action taken against the employee which is not necessarily financial in nature.

[70] In a decision of the Canada Labour Relations Board (CLRB), *Lawrence Warris* (1997), 104 di 62, the complainant claimed that he had been reassigned to a different position because of the fact that he had exercised his right to refuse unsafe work. As the Board noted, his rate of pay, work location and hours of work remained unchanged. The Board, in Part V of the decision, states the following:

*The optimal consideration in matters such as the present is the determination of whether or not the action taken by an employer, which is alleged to be in breach of section 133, was taken, in the words of section 147...*

In Part VI of the decision, the CLRB stated:

*Other than Warris' personal interpretation of the effects of his reassignment, it cannot be said that the effects of the same were punitive, or even that the employer intended the same... Nor, for that matter, does the evidence disclose any indication that the employer implemented the expansion of the provisioner positions, or in fact reassigned Warris to one of those positions, in retribution for or as a consequence of Warris' refusal to work...*

[71] This decision speaks of action taken by the employer, of retribution and punitive effects, but does not require that there be an actual or potential financial consequence to the actions taken by the employer. While the Board does refer to the complainant's loss of parking privileges, it does not do so in the context of proving that the employer's actions fit within the ambit of section 147. Rather, they are viewed within the whole context of the decision as evidence or indicia of disciplinary action or

reprisal. Finally, the CLRB did make a statement in Part VI of the decision regarding the intent of sections 133 and 147:

*The protection which sections 133 and 147 afford are designed to ensure that adverse action is not taken against an employee, by an employer, because of the exercise of that employee's rights under section 128....*

[72] I see no limitation in the *CLC* provisions to actions which result in a financial detriment and, given the broad and purposive intent of the *CLC* generally, and of the reprisal provisions specifically, I think that it would be contrary to legislative intent to allow an employer to do indirectly what Parliament had barred directly. The intent and goal of the *CLC* are to ensure a safe workplace for employees and the “whistle blowing” provisions of the *CLC* would be rendered meaningless if the employer were allowed to take action against an employee, as long as that action did not result in a financial penalty for the employee.

[73] Subsection 127.1(1) reads:

*Internal Complaint Resolution Process*

*127.1 (1) An employee who believes on reasonable grounds that there has been a contravention of this Part or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment shall, before exercising any other recourse available under this Part, except the rights conferred by sections 128, 129 and 132, make a complaint to the employee's supervisor.*

[74] I conclude that as parliamentarians turned their minds to this subsection, they were cognizant that an employee, in the exercising of his rights available under this part, would be exempt in notifying an employee's supervisor when invoking a refusal to work as defined in section 128.

[75] One might assume that an employee who believes that there is a likelihood of an accident or injury to health may have been assigned duties by his/her supervisor that may be of consequence to the employee.

[76] Although it is preferable that an employee make a complaint to his supervisor, it is not mandatory when exercising one's right under section 127. It is, however, mandatory to make a complaint to the employer when exercising one's rights under section 128.

[77] In conclusion, I find the employer guilty of a violation of section 147 of the *CLC*, albeit perhaps only by virtue of the fact that the parties erred with regard to establishing the onus of the burden of proof. It was the employer's obligation to adduce evidence that Mr. Ignazzitto's comments were not punitive to Mr. Chaves. It did not.

[78] As for the requested remedy, I see no reason to order an apology by the employer to Mr. Chaves. As well, no evidence was put forward by Mr. Chaves to lead me to conclude that the selection board violated provisions of the *CLC*.

[79] For all of the above reasons, the Board makes the following order:

*(The Order appears on the next page.)*

Order

[80] The complaint is allowed to the extent mentioned above.

May 20, 2005

**D.R. Quigley,  
Board Member**