Date: 20100401

File: 560-02-44

Citation: 2010 PSLRB 49

Canada Labour Code

Before the Public Service Labour Relations Board

BETWEEN

DENIS LECLAIR

Complainant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

Indexed as
LeClair v. Treasury Board (Correctional Service of Canada)

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

REASONS FOR DECISION

Before: Dan Butler, Board Member

For the Complainant: John Mancini, Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN

For the Respondent: Isabel Blanchard, counsel

Heard at Moncton, New Brunswick
January 26 to 28, 2010.

I. Complaint before the Board

[1] Denis LeClair ("the complainant") is a correctional officer at the Springhill Institution of the Correctional Service of Canada ("Springhill"). On July 29, 2008, he made a complaint against the Treasury Board (Correctional Service of Canada) ("the respondent") under section 133 of the *Canada Labour Code*, R.S., 1985, c. L-2 ("the *Code*"). The complaint reads in part as follows:

. . .

> *On or about July 11, 2008, Mr. Denis LeClair . . . was ordered by correctional manager Justin Simmons* [*sic* throughout], *acting under the direction of Warden Ed Muise, to search through human excrement. Mr. LeClair refused to conduct this search because it was not safe. Mr. Simmons threatened Mr. LeClair that he would be sent home without pay and fined if he did not obey his order. Mr. LeClair made it clear to Mr. Simmons that he maintained his refusal explicitly citing section 128 of the Canada Labour Code. It should be noted that the employer was acting in violation of a previous section 128 resolution on the same subject matter.*
>
> *In flagrant violation of the Canada Labour Code, Mr. Simmons, purportedly acting in complicity with institutional management under the direction of Warden Ed Muise, refused to recognize the section 128 work refusal.*
>
> *In violation of section 147, Mr. Simmons repeatedly threatened Mr. LeClair to search the human excrement or leave his post and Mr. Simmons successively imposed four financial penalties of $ 160, $ 320, $ 480 and $640 on Mr. LeClair for his refusal. It should be noted that Mr. LeClair could not simply leave his post without being properly relieved under company policy, even if this relief were not in violation of the Canada Labour Code.*
>
> *In yet another violation of section 147, Mr. Simmons had Mr. LeClair escorted off the premises and made it clear that he would be denied remuneration for the rest of his shift.*
>
> *Mr. Simmons purportedly acting in complicity with warden Ed Muise, continued to violate the Canada Labour Code by ordering two other correctional officers to relieve Mr. LeClair and concealing from them Mr. LeClair's section 128 work refusal.*
>
> *On or about July 16, 2008, warden Ed Muise purportedly acting in complicity with Correctional Service of Canada Atlantic Regional Headquarters under the direction of Deputy Commissioner John Turner, further violated section*

> *147 of the Code by issuing an order convening a disciplinary investigation on Mr. Denis LeClair for refusing a direct order to search human excrement and refusing to leave the premises as directed by Mr. Simmons.*
>
> *On or about July 24, 2008, Mr. Rhéal Leblanc, project officer acting on the above-cited order, attempted to conduct the said disciplinary investigation of Mr. Denis LeClair in violation of section 147 of the Canada Labour Code. Mr. Rhéal Leblanc was informed that his investigation was in violation of section 147. Mr. Leblanc made it clear that he was not the least concerned by the prohibition of discipline under section 147 and attempted to force Mr. Denis LeClair to respond to his questions, and adamantly refused to accept case law on double jeopardy.*
>
> . . .

[2] The complainant sought the following corrective action:

> 1. *Determine that the Correctional Service of Canada has contravened section 147 (on all counts)*
>
> 2. *Order that the Correctional Service of Canada cease contravening section 147 (on all counts)*
>
> 3. *Order Correctional Service of Canada to pay Denis LeClair for the hours that would but for the contravention have been paid.*
>
> 4. *Rescind all disciplinary action taken in contravention of section 147:*
>
> - *the orders to leave the premises*
> - *the four financial penalties*
> - *the order to remove Denis LeClair from the premises*
> - *the disciplinary investigation and any resumption thereof*
> - *the removal of any mention of the above orders penalties and disciplinary investigation from Mr. Denis LeClair's file*

[3] On September 12, 2008, the respondent wrote to the Public Service Labour Relations Board ("the Board") and stated that it did not impose discipline on the complainant. It asked the Board to dismiss the complaint as being moot.

[4] At the hearing, the respondent advanced an additional objection. It argued that the Board lacks jurisdiction to consider the complaint because the complainant did not properly refuse to work within the meaning of section 128 of the *Code*. Because he did not meet the procedural requirement set out in section 128, the respondent submitted that the complainant is not entitled to the protections provided under section 147.

[5] After their opening statements at the hearing, the parties stipulated that the respondent did not implement financial penalties against the complainant.

II. Summary of the evidence

[6] As a practical matter, I asked the respondent to lead its evidence first.

[7] The respondent adduced evidence through two witnesses. Justin Simons was the complainant's supervising correctional manager on July 11, 2008. Michael MacLeod was the deputy warden of Springhill. Springhill is a medium-security institution that holds between 420 and 480 inmates and that engages approximately 180 correctional officers.

[8] Mr. Simons explained the operation of the "dry cell." When a staff member suspects that an inmate is secreting contraband in his anal cavity, they strip search him and confine him in the dry cell. The dry cell contains a "drug loo" — a toilet that is specially designed so that feces are diverted to a strainer in a holding container. Once an inmate has defecated, he is instructed to flush the toilet several times to ensure that the feces has entered the holding container. Water is then hosed through the strainer inside the container for five to seven minutes, removing the fecal material and leaving behind any contraband. On occasion, some fecal material may remain if the feces is compacted. After the hosing, the lid of the holding container is opened to permit visual examination of the contraband, if any. If contraband is found, it is removed and sent to a security intelligence officer for further inspection.

[9] The role of the correctional officer assigned to the dry cell is to observe the inmate continuously through the mail slot of the dry cell. When the inmate has defecated and flushed the toilet as instructed, he is removed from the cell, placed in a holding area and searched again. The correctional officer assigned to the dry cell activates the hose mechanism for the drug loo, waits the required time and then opens the holding container lid. If there is contraband, the correctional officer removes it, bags it and sends it to the security intelligence officer.

[10] At the dry cell post, the correctional officer has access to documents and instructions on the operation of the dry cell and on the use of the personal protective equipment (PPE) stored there. The documents include Standing Order 569, *Special Surveillance – Inmate who is carrying contraband in a body cavity – "INTERIM,"* and *Annex A: Dry Cell Routine* (Exhibit R-1, tabs 5 and 6).

[11] Mr. Simons testified that some correctional officers may only be assigned to the dry cell infrequently but that any officer may be required to perform dry cell duty. The job description for a Correctional Officer I contains the following paragraph that relates directly to the dry cell (Exhibit R-1, tab 2):

. . .

> *When searching or restraining inmates, there is potential for exposure to bodily fluids and bio-hazardous material that may harbour communicable diseases (e.g. feces, urine, spittle, saliva or blood). Protective clothing is worn when contact with inmates is imminent in order to minimize risk. Some instances (e.g. when the incumbent is required to forcibly restrain inmates) may not afford this opportunity.*

. . .

[12] Commissioner's Directive 566-7, *Searching of Inmates*, is the authority that permits correctional officers to conduct physical searches (Exhibit R-1, tab 4). It also refers to the use of the dry cell.

[13] Mr. Simons indicated that a 2006 Occupational Safety and Health (OSH) investigation of an earlier refusal to work under section 128 of the *Code* resulted in a requirement to provide the proper PPE at the dry cell. Point form instructions are posted there on how to don and doff the PPE (Exhibit R-1, tab 7). The name and telephone extension of the custodian responsible for hazardous substances at Springhill are printed at the bottom of the instructions.

[14] Before the earlier refusal to work under section 128 of the *Code*, correctional officers who did not want to operate the dry loo could call in a correctional manager to perform that duty. Since 2006, the respondent has assigned correctional officers to the task. Mr. Simons referred to an excerpt from the dry cell log for July 10, 2008 that indicated that a correctional officer had operated the drug loo that day on two occasions (Exhibit R-1, tab 8).

[15] Mr. Simons described the events of July 11, 2008. He testified that the complainant was not scheduled to work that day. Because no additional staff members were available on site, Mr. Simons contacted the complainant and called him in to work overtime at the dry cell post beginning at 8:00 a.m. At 12:30 p.m., the complainant called Mr. Simons ("the first conversation") to report that he had been required to use force on Inmate G after Inmate G defecated in the dry cell. Mr. Simons directed the complainant to examine the feces using the dry loo. According to Mr. Simons, the complainant replied, "I do not search the poop. Tim Spence [a correctional manager] searches the poop." The call ended. Mr. Simons stated that he felt that the call was not a refusal to work under section 128 of the *Code* but that, rather, it comprised a refusal to perform assigned work.

[16] Mr. Simons discussed the situation with the "management team," consisting of an assistant warden, Warden Ed Muise and Mr. MacLeod. The team decided that Mr. Simons should terminate the complainant's overtime and send him home once the complainant completed his use-of-force report if he was unwilling to examine the feces. If the complainant refused the order to leave, the warden instructed Mr. Simons to revert to discipline in accordance with the respondent's "global agreement" with the Union of Canadian Correctional Officers - Syndicat canadien des agents correctionnels - CSN (UCCO-SACC-CSN) (Exhibit C-3).

[17] After consulting the management team, Mr. Simons telephoned the complainant ("the second conversation"), ordered him to complete his use-of-force report and then go home, and gave him 10 to 20 minutes to write the report. Mr. Simons testified that the complainant replied in the negative. While he could not recall exactly what was said next, Mr. Simons indicated that the conversation was very brief. He stated that the complainant did not mention section 128 of the *Code* and did not say why he would not search the feces.

[18] Correctional Manager Greg McLeod arrived shortly after at the dry cell post to relieve the complainant. Mr. McLeod examined the contents of the holding container and called Mr. Simons to tell him that there was no contraband in the drug loo.

[19] Mr. Simons called the complainant again ("the third conversation") 30 or 40 minutes after the second conversation. He gave him 10 minutes to leave the institution and told him that failing to do so would result in the first level of discipline

under the global agreement. The complainant refused to leave and refused to be relieved by a correctional manager.

[20] The "fourth conversation" occurred 10 minutes later. Mr. Simons again instructed the complainant to leave and referred to the second level of discipline under the global agreement. The complainant refused and, according to Mr. Simons, mentioned for the first time that he was invoking section 128 of the *Code*, without explaining why. Mr. Simons told the complainant that he was supposed to have left the post by that time. He also told the complainant that he would not entertain the section 128 work refusal.

[21] Mr. Simons explained at the hearing that he did not believe that a section 128 refusal to work was in order because a correctional manager had already resolved the situation and had relieved the complainant from his duties.

[22] During the "fifth conversation," Mr. Simons once more directed the complainant to leave at the threat of the third level of discipline under the global agreement. The complainant, who was the local bargaining agent president at that time, requested bargaining agent representation. Mr. Simons declined. At the hearing, Mr. Simons testified that he did not agree to union representation because he was in the midst of trying to remove the complainant from the workplace. He said that union representation would have been provided at the time of the disciplinary investigation.

[23] During the "sixth conversation," Mr. Simons advised the complainant that he was at the fourth level of discipline under the global agreement. Shortly after the conversation, the complainant left the dry cell post and went to Mr. Simons' office to sign his overtime sheet. Mr. Simons testified that the respondent paid the complainant for his overtime until 1:30 p.m. He noted that the complainant was unhappy and wanted to be paid until 2:45 p.m., the time that he appeared at Mr. Simons' office. The complainant then left the institution willingly, escorted by Correctional Manager Alistair McLelland. Mr. Simons stated that he did not receive a use of force report from the complainant.

[24] Mr. Simons insisted that he invoked discipline because the complainant did not follow directions to be relieved by the correctional manager, to submit his report and then to leave the institution. He maintained that he was not aware of any refusal to work under section 128 of the *Code* until after he ordered the complainant to leave.

[25] On July 12, 2008, Mr. Simons submitted a report to the warden about the incident (Exhibit R-1, tab 9).

[26] In cross-examination, Mr. Simons agreed that the respondent ultimately chose not to discipline the complainant for the events of July 11, 2008. In his view, the fact that the respondent later chose not to proceed with discipline was not relevant to understanding his role at the operations desk on July 11, 2008. He indicated that he would not have been involved in any disciplinary proceedings or decisions concerning the incident.

[27] Asked whether the complainant had been previously exposed to section 128 situations, Mr. Simons stated that the local union executive of which the complainant was a member had invoked section 128 many times. He also agreed that the complainant had experience with different disciplinary situations.

[28] Mr. Simons reconfirmed that the complainant provided no motive for his refusal to examine the feces in the first conversation. He also did not ask that someone come to the dry cell to perform the duty. Mr. Simons denied that the complainant mentioned that he was not trained to perform the work.

[29] The complainant referred Mr. Simons to an item about the dry cell in the minutes of a union-management meeting of February 19, 2008 (Exhibit C-1). Mr. Simons stated that he had not seen the minutes before. He said that it was his impression that the dispute between the union and the respondent about the dry cell reflected in those minutes was subsequently resolved.

[30] Returning to the first conversation, Mr. Simons testified that he could not say exactly whether he had asked the complainant the following: “What do you want me to do, send another union member to do the job?” He did recall the complainant replying as follows: “You can do it if you want, but I’ll recommend that they not do it.” Mr. Simons denied that the complainant communicated any sense of danger or mentioned the issue of the lack of training. He also denied telling the complainant in the first conversation that he would send him home if he did not examine the feces.

[31] Mr. Simons testified that a correctional officer can decide to perform a duty that he or she believes is dangerous or invoke section 128. When a correctional officer

informs the respondent that he or she is invoking section 128 of the *Code* and states the grounds for doing so, the respondent tells the officer not to perform the task.

[32] The complainant referred Mr. Simons to a "second version" of his report sent to the warden about the incident of July 11, 2008 (Exhibit C-2). Mr. Simons stated that he sent the second version because someone had required more information. However, he could not recall who had communicated that requirement. Asked why a section about "a fact-finding investigation" was deleted from the second version, Mr. Simons answered several times that he did not know.

[33] Mr. Simons reiterated his recollection that the complainant did not invoke section 128 of the *Code* until the fourth conversation and that he did not at that time explain the perceived danger or mention training.

[34] Questioned whether the complainant had received training about the operation of the dry cell, Mr. Simons stated that there was a standing order at the post that outlined the requirements. Pressed further, he testified that the complainant received training about handling contraband. If he had any questions about operating the drug loo, the complainant could have asked and would have received answers. Mr. Simons insisted that every correctional officer is trained to perform the duty as part of their core training. No other training is required.

[35] Mr. Simons confirmed that diseases such as hepatitis B and C and AIDS are prevalent at Springhill. In re-examination, he indicated that the complainant never raised any issue concerning diseases or contamination and that he did not invoke any other type of danger.

[36] Mr. MacLeod recalled the management team discussion with Mr. Simons on July 11, 2008. He testified that there was no mention of a section 128 refusal to work. The team understood that the complainant was working overtime at the dry cell and that he refused to search the contents of the drug loo. Because that duty was the reason for the overtime requirement, Mr. Muise directed Mr. Simons to send the complainant home. The team discussed the use of the disciplinary sanctions provided under the global agreement. Mr. Muise told Mr. Simons to follow the global agreement if the complainant refused to leave the premises.

[37] Mr. MacLeod stated that the respondent later determined that it would not impose discipline after discussions with labour relations advisers and with regional and national headquarters. He indicated that he was not involved in those discussions. He believed that the warden made the decision not to pursue discipline.

[38] Mr. MacLeod explained that the usual course of action in a section 128 situation is to cease "everything" until either the parties resolve the situation or there is a ruling from a Human Resources and Skills Development Canada (HRSDC) officer on the course to follow.

[39] Sometime after the July 11, 2008 incident, Mr. MacLeod testified that he left on a one-month vacation.

[40] In cross-examination, Mr. MacLeod testified that management often steps in to complete the task in a section 128 situation, as happened in this case. A refusal to work under section 128 of the *Code* stops management from assigning another staff member to perform the duty. Asked whether there was a section 128 investigation into the events of July 11, 2008, Mr. MacLeod stated that the section 128 situation no longer existed once management assumed responsibility for the operation of the drug loo. The danger had ceased. He indicated that he never heard that Mr. Simons told the complainant that he would not entertain a section 128 refusal "right off the bat."

[41] Shown the minutes of the union-management meeting of February 19, 2008 (Exhibit C-1), Mr. MacLeod agreed that operation of the dry cell was an ongoing issue at that time. However, in the respondent's view, the issue had been resolved before July 2008. He disagreed that the question of training remained outstanding and stated that the respondent had posted a sheet instructing correctional officers on the operation of the drug loo (Exhibit R-1, tab 7). He agreed that no formal training was provided, as sought by the union. Mr. MacLeod testified that he never heard on July 11, 2008 that the complainant refused to operate the drug loo because he had not received training.

[42] Mr. MacLeod accepted that the respondent convened the OSH committee to examine the dry cell situation after July 11, 2008 but was not sure whether the respondent conducted a section 128 investigation. However, he did identify an email sent by Mr. Muise to the complainant dated July 26, 2008 (Exhibit C-4), in which the warden advised him that ". . . CX do not have to search the poop until the 128 is

resolved." Because Mr. MacLeod was on a one-month vacation at that time, he testified that he was not sure who was involved in the OSH committee investigation, what its work entailed or whether that work related to the events of July 11, 2008.

[43] The complainant led evidence through four witnesses, including himself.

[44] Jason McDonald, a CX-1 correctional officer at Springhill, testified that Mr. Simons asked him to relieve the complainant at the dry cell at approximately 2:15 or 2:30 p.m. on July 11, 2008. Mr. Simons did not mention a section 128 work refusal. Mr. McDonald went to the dry cell, relieved the complainant and learned from another officer — exactly whom, he could not recall — that the complainant had refused to search the drug loo and that he had "called a 128."

[45] Dave Harrison, also a CX-1 at Springhill, outlined that he was a union representative on the OSH committee in 2006 and that he was involved with the section 128 work refusal at that time concerning the operation of the drug loo. He said that an HRSDC safety officer was called in to mediate and that the respondent subsequently agreed to provide the PPE and training. Nevertheless, concerns remained between the parties about the use of the drug loo, both regionally and nationally. Because of those concerns, Mr. Harrison understood that the respondent decided that it would not call in correctional officers to perform the duty. Instead, managers would be asked to operate the drug loo and to examine the contents of the container. Mr. Harrison testified that he recalled one occasion when a correctional manager came in on overtime for that purpose. However, he could not say with certainty that the practice occurred every time through to July 2008.

[46] Mr. Harrison acknowledged that the respondent made available gloves, masks and body suits for the operation of the drug loo and that it posted instructions on donning and doffing the PPE. However, there was no formal training. That lack of training was an ongoing issue. The union's OSH representatives decided that they would have to call in the HRSDC safety officer once again but did not follow up on the decision because the respondent was not asking correctional officers to search the drug loo.

[47] In cross-examination, the respondent asked Mr. Harrison whether correctional officers searched the drug loo on some occasions. He replied that it was possible but that he had not seen it happen.

[48] For Stephen Robertson, a CX-2 correctional officer, July 11, 2008 was his last workday at Springhill before transferring to another institution. On that day, he received a call from Mr. Simons to report to his office. A few minutes earlier, he had heard that the complainant had refused to work under section 128 of the *Code*. Mr. Robertson asked Mr. Simons whether the requirement to report to his office was to direct him to replace the complainant. Mr. Simons did not answer. After some "back and forth," Mr. Simons told Mr. Robertson that he had 10 minutes to consider whether he was going to report to Mr. Simons' office. After 10 minutes, Mr. Simons phoned again and repeated his request that Mr. Robertson report to his office. Once more, Mr. Robertson asked whether it involved replacing the complainant and again did not receive an answer. Mr. Simons then ordered Mr. Robertson to his office. Mr. Robertson answered that he was going home because he was sick. Mr. Robertson insisted that Mr. Simons replied as follows: "Sick is not an option."

[49] Asked whether he was in fact sick on July 11, 2008, Mr. Robertson answered that it was his last day of work at Springhill and that he had had a nervous stomach all day. He mentioned not feeling well in his first conversation with Mr. Simons. Later, he submitted a medical certificate for his absence to the respondent.

[50] The complainant outlined his version of what happened on July 11, 2008. On reporting to the dry cell post, he reviewed the post order, sat and watched Inmate G, fed him lunch, and then observed him having a bowel movement. He asked the inmate to flush the toilet three times, removed him from the cell and placed him in the shower area. While in the shower area, he had to use pepper spray on the inmate. He then returned to the dry cell and operated the drug loo container mechanism.

[51] The complainant stated that he was not going to open the container. Asked why, he answered "[b]ecause I do not do that." He testified that he was not properly trained to use the PPE.

[52] The complainant called Mr. Simons and told him that he needed someone to come down and search the feces. (At the hearing, he said that he knew that the practice was to have managers perform the job and that it was not possible that Mr. Simons was unaware of that fact.) According to the complainant, Mr. Simons told him that it was the complainant's job and that he had to do it. The complainant told Mr. Simons that the reason he would not perform the task was that he wanted training on how to wear the PPE. He referred to the "old 127/128" and to the problem of correctional

officers not receiving the promised training. The complainant testified that Mr. Simons was aware of what he was speaking about. Mr. Simons responded by asking the complainant whether he wanted some other union members to do the job. The complainant replied that Mr. Simons could do that if he wanted to but that he would recommend to other correctional officers that they not do it.

[53] The complainant testified that he had ". . . done a lot of section 128s" and that he knew the process well. He stated that it was normally the respondent's duty to inform other members of staff that an employee has invoked section 128 of the *Code* but that management at Springhill did not respect that duty. He confirmed that he had personally experienced situations where management failed to do so, including incidents involving Mr. Simons.

[54] Recalling the first conversation with Mr. Simons once more, the complainant maintained that he told him that he was not "okay" with the respondent's decision to post the donning and doffing instructions at the dry cell. Mr. Simons told him that he would send him home if he refused to do his job. The complainant replied that he was willing to go home but that he had to write his use-of-force report. Mr. Simons gave him 20 minutes to write the report and told him that he was going to send someone to relieve him. The complainant was then to go home.

[55] When two correctional managers arrived, the complainant asked a correctional officer in the unit to relieve him so that he could use the telephone. He called Mr. Simons and asked whether he was trying to intimidate him by sending two managers to replace him. Mr. Simons replied in the negative and told the complainant that he could come and see him in his office. The complainant replied that he could not because he had not been properly relieved by a CX-01 or CX-02 officer. The complainant stated that a CX-04 correctional manager was not a proper relief. (Later, he testified that he could not guarantee that that was the rule but that it was certainly the practice.) Mr. Simons answered that the complainant had been properly relieved, told him to go home and gave him his first disciplinary fine. The complainant stated that he felt that he "was being set up" (that is, that he could lose his job if he left his post without being properly relieved), and he refused to go home. He then told Mr. Simons that he was invoking section 128 of the *Code*.

[56] The complainant stated that the first and second conversations with Mr. Simons were separated by 20 or 30 minutes. Their third conversation came 10 minutes later.

Mr. Simons asked whether the complainant was leaving. He replied that he was not going home until he was properly relieved. Mr. Simons imposed the second-level fine on him and indicated that he would call again after another 10 minutes. During the conversation, or perhaps later, the complainant said that he asked for union representation but was refused.

[57] The same exchange occurred in the fourth conversation. Mr. Simons ordered the complainant to go home. The complainant refused and said that he had not been properly relieved. Mr. Simons administered a third fine and gave the complainant another 10 minutes to think it over. The complainant told Mr. Simons that he waived the additional 10 minutes, but Mr. Simons hung up.

[58] During the last telephone call 10 minutes later, Mr. Simons levied the fourth-level fine. The complainant explained to him that he would rather pay the fine than risk losing his job for leaving his post without being properly relieved.

[59] After another 30 to 45 minutes, Mr. McDonald arrived at the dry cell and relieved the complainant. When the complainant left the post, Mr. McLelland followed him. The complainant went to Mr. Simons' office to sign the overtime sheet and noticed that the hours of work listed on the sheet (ending at 1:30 p.m.) were not the same as the actual hours that he had worked (until 2:45 p.m.). He signed the sheet — if he had not, he would not have been paid — and then left the institution, escorted by Mr. McLelland.

[60] The complainant identified the following four documents: 1) a letter dated July 16, 2008 from Mr. Muise to him convening a disciplinary investigation for the complainant's refusal to search the feces (Exhibit C-6); 2) a letter on the same day from Mr. Muise to him convening a fact-finding investigation into his use of force on Inmate G in the shower area (Exhibit C-7); 3) a third letter from the warden on the same day directing Mr. MacLeod to conduct the fact-finding investigation (Exhibit C-8); and 4) a subsequent letter from Mr. MacLeod to the complainant requiring his presence at a meeting as part of the fact-finding investigation (Exhibit C-9).

[61] The complainant reported that he later had one meeting with the discipline investigator, at which time he declined to answer questions on the advice of his UCCO-SACC-CSN representative, John Mancini. After the meeting with the investigator,

Paulette Arsenault (from the respondent's Atlantic region) sent an email to Mr. Mancini on July 28, 2008 (Exhibit C-10) that read in part as follows:

. . .

> *. . . upon further review, we have decided to proceed with the Refusal to Work Investigation and Process (Sect 128 of CLC Pt 2) with regards to the Searching of Human Fecal Matter, which occurred on July 10, 2008* [*sic*] *at Springhill Institution, involving Correctional Officer Denis LeClair.*

. . .

(Both parties agreed that the date in the email was incorrect and that it should have been July 11, 2008.) The complainant heard nothing more of the disciplinary investigation and learned only at this hearing that management had decided not to proceed with discipline.

[62] Asked if he was ever contacted as part of a section 128 investigation, the complainant testified that a person approached him one day at work about the situation. He told that person that his section 128 refusal to work had been denied on July 11, 2008 and that it was now "kind of late" to investigate.

[63] In cross-examination, the complainant reconfirmed that he referred to the previous section 128 situation in his first conversation with Mr. Simons and that he also mentioned that correctional officers were to receive training.

[64] According to the complainant, his concern in operating the drug loo was the danger involved in removing the contraband and placing it in a bag and also the possibility that "something might fly out" on opening the container lid if pressure had built up in the plumbing. Without training, he might face the risk of contamination if he did not don or doff the PPE properly.

[65] The complainant stated that the "Instructions on putting on or removal of the Bio suits" (Exhibit R-1, tab 7) were not sufficient because they did not detail the consequences of contamination. If he had been given proper training, he would have been able to ask questions about those consequences.

[66] The complainant accepted that there are situations, such as an inmate spitting at a correctional officer, that carry a risk of disease contamination and that that risk was part of his job. When those situations occur, the existing protocol directs the

correctional officer to go to the hospital, where he or she may choose "to take a cocktail." The complainant stated that it is not possible to prepare for some risks. However, in the case of the drug loo, there would be time to prepare if properly trained. The complainant maintained that his own safety came first in his job and asked the following: "Why should I make the risk greater?"

[67] The respondent asked the complainant whether he could ask for help if he had questions about the donning and doffing procedures. The complainant replied that he had asked for training since 2006 and that it had never been provided. However, he acknowledged that he could call the name listed on the "Instructions on putting on or removal of the Bio suits," that "there was no rush" and that he could take as long as he needed to don the protective suit.

[68] Asked whether the respondent had failed more than once in the past to inform other staff members that an employee had refused to work under section 128 of the *Code*, the complainant cited several examples. He insisted as follows that, ". . . when you do a 128, they still have to go through the process."

[69] The complainant referred to a "job safety analysis" that was conducted in 2006. He recalled that the analysis said that correctional officers would receive training on the donning and doffing of protective suits and other PPE. For new recruits, the training would form part of the initial Correctional Training Program (CTP). For existing staff, it would be offered as part of the annual course on using self-contained breathing apparatus (SCBA). Pressed on that point, the complainant agreed that the analysis "suggested" that the training be added to the CTP and to the SCBA course.

[70] The complainant confirmed that he received each of the four levels of discipline under the global agreement because he refused a direct order to go home.

[71] Returning to the conversations with Mr. Simons, the respondent asked the complainant if he explained the risk of contamination to Mr. Simons. The complainant stated his belief that Mr. Simons understood ". . . the whole situation of the previous section 128 and the dry cell." He said that a copy of the job safety analysis that resulted from the 2006 situation was in the logbook at the post. He again insisted that he explained his concern about donning and doffing the protective suit to Mr. Simons and that his lack of proper training created a danger.

III. Summary of the arguments

A. For the respondent

[72] The respondent submitted that the Board must answer the following three questions: 1) Did the complainant refuse to work under section 128 of the *Code*? 2) Are the respondent's actions of the type listed under section 147? 3) Did the respondent's actions contravene section 147?

[73] If the answer to the first question is in the negative, then the Board lacks jurisdiction and the analysis must stop. If the answer is in the affirmative, the Board must dismiss the complaint if it answers either the second or the third question in the negative.

1. Did the complainant refuse to work under section 128 of the *Code*?

[74] According to the respondent, the case law has established three essential elements for a refusal to work under section 128 of the *Code*, as follows: 1) the employee must make it clear that he or she is refusing on the basis of a perceived danger; 2) there must be a reasonable basis for exercising that right; and 3) there must be a nexus between the refusal and the time that it is communicated. See *Gaskin v. Canada Revenue Agency*, 2008 PSLRB 96, at paragraph 84, *Boivin v. Canada Customs and Revenue Agency*, 2003 PSSRB 94, at paragraph 127, and subsection 128(6) of the *Code* that requires an employee to ". . . report the circumstances of the matter to the employer without delay."

[75] The respondent summarized the two contradicting versions of what occurred on July 11, 2008 that emerged from the evidence. It submitted that the Board must resolve the differences following the direction about assessing credibility in *Faryna v. Chorny*, [1952] 2 D.L.R. 354. As outlined in *F.H. v. McDougall*, 2008 SCC 53, evidence about credibility should be considered in its entire context on a balance of probabilities.

[76] In 2006, the respondent faced the issue of a work refusal under section 128 of the *Code* for the same reason. According to Mr. Harrison's testimony, the following three outcomes flowed from that situation: 1) correctional officers searched the drug loo from time to time; 2) the respondent made the required PPE available; and 3) the respondent acted on the training requirement by posting the "Instructions on putting

on or removal of the Bio suits" (Exhibit R-1, tab 7). From the respondent's perspective, the issue was resolved. Mr. Muise stated at the February 19, 2008 union-management meeting that he was satisfied with the resolution (Exhibit C-1). Both Mr. Simons and Mr. MacLeod testified that they viewed the issue as having been resolved. However, the union continued to push the matter.

[77] When Mr. Simons encountered the situation on July 11, 2008, he examined the circumstances as they existed on that day and asked himself whether there was a valid section 128 work refusal. He answered in the negative. He testified that it never occurred to him that the complainant's refusal to search the drug loo was related to the 2006 situation.

[78] The respondent submitted that the Board will have to decide whether the complainant made it sufficiently clear to Mr. Simons that he was exercising his right to refuse work under section 128 of the *Code*. It argued that it must be able to distinguish a section 128 work refusal from a plain refusal to perform work. For the respondent to agree that a danger exists, it is not sufficient that an employee say only that "there's a 128." The complainant assumed that Mr. Simons knew what the complainant was talking about but did not on that day articulate a work refusal to Mr. Simons in a manner sufficient to allow Mr. Simons to understand that he was invoking section 128, and the reason. It was not sufficient for the complainant to state that he was raising "a 128." He was obligated to explain why he perceived that a danger existed.

[79] The respondent also maintained that the required nexus between communicating a refusal and the situation that gave rise to it was absent in this case. Mr. Simons testified that the complainant raised section 128 only in the fourth conversation. By that time, the complainant's action in Mr. Simons' mind was purely a refusal to work. Management had already searched the drug loo for contraband and had removed the complainant from dry cell duty. When the complainant invoked section 128, there was no function for him to perform.

[80] The respondent posed the following question: "Was there a reasonable cause for the complainant to refuse to work?" It noted that the complainant agreed that the "Instructions on putting on or removal of the Bio suits" posted at the dry cell explained how to don and doff the protective suit. He agreed that those instructions provided him with a person to contact if there was an issue. He also agreed that there was no rush to search the drug loo and that he could take as long as he required to

don the suit. He confirmed that, if there was contamination, procedures were in place to deal with that eventuality (that is, going to the hospital to "take a cocktail"). Finally, he agreed that the risk of exposure to disease was part of his job.

[81] According to the respondent, there was something in place to respond to all the complainant's concerns. The respondent questioned whether there really was a safety issue in the complainant's mind that day. Did the complainant instead raise section 128 of the *Code* because of the 2006 situation and because of the union's position that the respondent had agreed but failed to provide training?

[82] The respondent referred the Board to *Verville v. Canada (Correctional Services)*, 2004 FC 767, for its definition of a normal condition of employment under paragraph 128(2)(*b*) of the *Code*. The respondent maintained that, taken together, Standing Order 569, *Special Surveillance - Inmate who is carrying contraband in a body cavity - "INTERIM", Annex A: Dry Cell Routine* (Exhibit R-1, tabs 5 and 6), the provision of training to correctional officers on handling contraband, and the "Instructions on putting on or removal of the Bio Suits" (Exhibit R-1, tab 7), all demonstrate that the respondent had brought the risk associated with the operation of the drug loo to a level that made that task acceptable as a regular working condition; see *Pépin v. Bell Canada*, [2003] C.L.C.A.O.D. No. 10 (QL).

[83] In summary, the respondent argued that the complainant did not inform it in a sufficiently clear manner that he was invoking his right to refuse work under section 128 of the *Code*. As a result, the Board must find that there was no valid work refusal.

2. <u>Are the respondent's actions of the types listed under section 147?</u>

[84] The respondent maintained that it did not dismiss, suspend, lay off or demote the complainant. It noted that the parties stipulated that the respondent did not implement any financial penalties. While Mr. Simons referred on four occasions to discipline under the global agreement in his conversations with the complainant, those penalties never materialized.

[85] According to the respondent, it informs employees that they will be subject to discipline so that there are no surprises. When Mr. Simons informed the complainant about the penalties under the global agreement, he did not "threaten discipline" within the meaning of section 147 of the *Code* nor did he seek to intimidate the complainant to refrain from submitting a section 128 work refusal. Mr. Simons viewed the

complainant's failure to leave the premises as a refusal to follow orders. He referred to the global agreement "in all good faith" in that context.

3. Did the respondent's actions contravene section 147?

[86] If the Board finds that the respondent threatened discipline, the respondent submitted in the further alternative that the threat of discipline was not linked to the reasons listed in section 147 of the *Code*.

[87] Neither paragraph 147(*a*) or (*b*) of the *Code* applies in the circumstances of this case.

[88] The evidence shows that paragraph 147(*c*) of the *Code* also does not apply. Mr. Simons testified that he referred to discipline under the global agreement because the complainant refused his order to leave the premises. The issue of the complainant's failure to obey that order is completely distinct from his alleged refusal to work under section 128. In his own testimony, the complainant agreed that Mr. Simons referred to the global agreement because the complainant would not go home as ordered.

[89] Even if the complainant properly invoked section 128 of the *Code*, he cannot use his refusal to work to cover all other misconduct or actions that could potentially lead to discipline. He also cannot use the right of refusal as a means to raise other ongoing workplace issues; see *Alexander v. Treasury Board (Department of Health)*, 2007 PSLRB 110.

4. Summary

[90] In summary, the respondent submitted that the complainant never invoked a work refusal that met the requirements of section 128 of the *Code*. Documents from after the incident such as Ms. Arsenault's email to Mr. Mancini (Exhibit C-10) are not sufficient to show that there was a valid section 128 refusal on July 11, 2008.

[91] In the alternative, none of the actions taken by the respondent was of the types listed under section 147 of the *Code*.

[92] In the further alternative, any action taken by the respondent did not relate to a work refusal under section 128 of the *Code* but, instead, to a different situation that arose on the same day.

[93] As a result, the Board should dismiss the complaint. If the Board allows the complaint, the corrective action should be limited to declaratory relief.

B. <u>For the complainant</u>

[94] The complainant stated that the respondent's theory of the case rests on the following two propositions: 1) there could not be a valid work refusal under section 128 of the *Code* because the complainant was off duty when he tried to invoke that section; and 2) since management conducted the search of the drug loo container, there was no longer a dangerous situation. The complainant maintained that the respondent is fundamentally wrong in both propositions and that it was in complete violation of the *Code* on July 11, 2008.

[95] The complainant pointed out what he described as the respondent's "very curious" position on the issue of discipline. The respondent imposed discipline on July 11, 2008 but then informed the complainant at the hearing that it had abandoned the discipline. Nevertheless, throughout the hearing, the respondent effectively took the position that the disciplinary actions taken by Mr. Simons were well founded because the complainant had been insubordinate.

[96] According to the complainant, it is dangerous and arrogant for the respondent to argue that an employer can immediately put an employee off duty when faced with a work refusal under section 128 of the *Code* and then claim as a result that there was no proper section 128 refusal. If the Board accepts that position, the effect would be to annihilate a crucial right given to employees by the *Code*. Employers could neutralize the right to refuse work under section 128 by sending employees home for failing to obey an order, transforming in one stroke a work refusal into a case of insubordination. Equally, an employer could decide to send a manager to replace an employee who invokes section 128, have the manager perform the work and then argue that there was no section 128 work refusal because the danger ceased. Those scenarios leave employees totally at the mercy of their employers.

[97] The complainant strongly disagreed with the argument that he never clearly expressed a section 128 work refusal. Guided by his understanding of normal practice based on the 2006 section 128 situation, the complainant contacted Mr. Simons and asked him to send a manager to open the drug loo container and examine its contents. The complainant had not been properly trained to perform that function because the

warden had adamantly refused to provide training, as the minutes of the union-management meeting of February 19, 2008 prove. At one point, the complainant clearly expressed that he was invoking section 128. The complainant submitted that there could have been no doubt in Mr. Simons' mind from their very first conversation that the complainant's work refusal was related to the lack of training. Mr. Simons immediately spoke with the management team. It is impossible to believe that, after those discussions, Mr. Simons did not fully understand that the real nature of the problem was the complainant's lack of training to use the PPE to protect himself from biohazards.

[98] Notably, Mr. Simons did not ask the complainant any questions in the first conversation. When an employee tells a manager that there is a task that he will not perform, the normal expectation is that the manager will ask why and that he or she will try to determine the nature of the problem. Mr. Simons did not. He reacted immediately by stating that "I'm the boss. You're going to do it and that's the end of it." That reaction is not what is expected under the *Code*.

[99] Even if there was doubt that the complainant was refusing to work under section 128 of the *Code* after the first conversation, Mr. Simons knew within a very short period that that was exactly what the complainant was doing when he explicitly mentioned section 128 in a subsequent conversation. According to the complainant's evidence, he referred specifically to section 128 within 20 or 30 minutes.

[100] The complainant submitted that the case law clearly indicates that there is no requirement to be very formal when invoking section 128 of the *Code*; see Snyder, *The 2009 Annotated Canada Labour Code*, Thomson Canada Limited, 2008, page 706. Once the complainant invoked section 128, the respondent bore the onus in good faith to understand what was behind the work refusal.

[101] According to the complainant, the evidence is inescapable that the respondent imposed four disciplinary penalties on him, contrary to what the respondent argued. When an employee exercises the right to refuse dangerous work under section 128 of the *Code*, he or she cannot be faced with the immediate imposition of discipline. The purpose of section 147 is precisely to prohibit an employer from pressuring employees through the threat of discipline from invoking their rights. The purpose of the *Code* was to protect the complainant on July 11, 2008. Instead, the respondent tried to

intimidate him and then went one step further by parading the complainant under escort out of the institution to set an example for other correctional officers.

[102] The complainant referred the Board to *Lequesne and United Transportation Union, Local 1271 v. Canadian National Railway Company*, [2004] CIRB No. 276, *Chaney v. Auto Haulaway Inc.*, [2000] CIRB No. 47, and *Baker v. Polymer Distribution Inc.*, [2000] CIRB No. 75.

[103] On the issue of the application of paragraph 128(2)(*b*) of the *Code*, the complainant argued that it is accepted that the work performed by an employee can entail a certain degree of risk if the employer has taken all measures to protect the employee from that risk. The respondent did not do that in this case. The complainant submitted that it is not a normal condition of employment to require an employee to operate the drug loo if the employee has not received the proper training for using the PPE. Drawing an analogy to the training that the respondent provides to correctional officers on the use of firearms, the complainant stated as follows that "[y]ou don't just give them a gun, you show them how to shoot it safely."

[104] In conclusion, the complainant submitted that the most important corrective action for the Board to take is to make an order requiring the respondent to cease and desist in contravening section 147 of the *Code*. The complainant also asked that the respondent be required to compensate him for the unpaid overtime that elapsed before he left the institution at 2:45 p.m. on July 11, 2008.

IV. Reasons

[105] The complaint was made under section 133 of the *Code*, which reads in part as follows:

> ***133.*** *(1) An employee, or a person designated by the employee 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.*
>
> *. . .*
>
> *(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.*

[106] The complaint alleged that the respondent violated section 147 of the *Code*, which reads as follows:

> ***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.*

[107] The complaint addresses the respondent's actions when the complainant allegedly refused to work under section 128 of the *Code*. That section reads in part as follows:

> ***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.

(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if

(a) the refusal puts the life, health or safety of another person directly in danger; or

(b) the danger referred to in subsection (1) is a normal condition of employment.

. . .

(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.

. . .

(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

(10) An employer shall, immediately after being informed of the continued refusal under subsection (9), investigate the matter in the presence of the employee who reported it and of

(a) at least one member of the work place committee who does not exercise managerial functions;

(b) the health and safety representative; or

(c) if no person is available under paragraph (a) or (b), at least one person from the work place who is selected by the employee.

. . .

[108] Section 129 of the *Code* outlines the role of a health and safety officer where the parties continue to disagree about a work refusal. It reads, in part, as follows:

> ***129.*** *(1) On being notified that an employee continues to refuse to use or operate a machine or thing, work in a place or perform an activity under subsection 128(13), the health and safety officer shall without delay investigate or cause another officer to investigate the matter in the presence of the employer, the employee and one other person who is*
>
> *(a) an employee member of the work place committee;*
>
> *(b) the health and safety representative; or*
>
> *(c) if a person mentioned in paragraph (a) or (b) is not available, another employee from the work place who is designated by the employee.*
>
> . . .
>
> *(4) A health and safety officer shall, on completion of an investigation made under subsection (1), decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee.*
>
> . . .

[109] I have organized these reasons around the following three questions:

1) Does the Board have jurisdiction to consider the complainant's refusal to perform a duty as a refusal to work within the meaning of section 128 of the *Code*?

2) If the answer to question 1 is in the affirmative, did the respondent prove on a balance of probabilities that it did not violate section 147 of the *Code*?

3) If the respondent has failed to prove that it did not violate section 147 of the *Code*, what is the appropriate corrective action?

A. Does the Board have jurisdiction to consider the complainant's refusal to perform a duty as a refusal to work within the meaning of section 128 of the *Code*?

[110] The respondent submitted that the Board has no jurisdiction to hear the complaint because there was no valid refusal to work under section 128 of the *Code*. The respondent argued several positions to support its objection. It submitted 1) that

the complainant did not communicate a refusal to work that sufficiently identified the nature of the danger that he perceived, 2) that the complainant did not have a reasonable basis to perceive that a danger existed, 3) that there was not the required nexus between the refusal to work and the time that the complainant communicated it to the respondent, and 4) that, in any event, the duty that the complainant was directed to perform involved a danger that was a normal condition of employment within the meaning of paragraph 128(2)(*b*).

[111] In my respectful view, the respondent's position at the hearing that there was no valid work refusal under section 128 of the *Code* did not comport with the actions of its representatives in the days following July 11, 2008. Two documents in evidence provide a direct indication of the respondent's state of mind at that time. On July 26, 2008, Mr. Muise, the respondent's senior authority at Springhill, wrote to the complainant and told him ". . . that CX do not have to search the poop until the 128 is resolved" (Exhibit C-4). In the context, there is no question that the outstanding "128" to which the warden referred was the incident on July 11, 2008 at the dry cell. Two days after Mr. Muise's letter, Ms. Arsenault, writing on behalf of the respondent, informed the complainant's UCCO-SACC-CSN counsel, Mr. Mancini, as follows (Exhibit C-10):

. . .

> *. . . we have decided to proceed with the Refusal to Work Investigation and Process (Sect 128 of CLC Pt 2) with regards to the Searching of Human Fecal Matter, which occurred on July 10, 2008* [*sic*] *at Springhill Institution, involving Correctional Officer Denis LeClair.*

. . .

[112] Neither Mr. Muise or Ms. Arsenault testified. The witnesses who did testify on the respondent's behalf provided very little evidence about the respondent's actions after the dry cell incident. Mr. Simons does not appear to have been involved beyond the actual day of the event other than submitting a report the next day. Mr. MacLeod testified that he left on vacation. While he recalled that the respondent subsequently convened the OSH committee to examine the dry cell situation, he was unsure whether it conducted a section 128 investigation. Therefore, I can only rely on what Mr. Muise and Ms. Arsenault wrote in Exhibits C-4 and C-10 to understand how the respondent actually treated the complainant's alleged work refusal once Mr. Simons' participation in the matter ended. By that evidence, the respondent received the section 128 work

refusal and undertook to follow up. There is no evidence that it raised a concern following July 11, 2008 that the refusal to work was improper or that the respondent could not entertain it. The only indication that any representative of the respondent ever challenged the *bona fides* of the grievor's section 128 refusal was Mr. Simon's testimony about what he told the grievor on July 11, 2008. In their subsequent communications, Mr. Muise and Ms. Arsenault effectively abandoned Mr. Simons' position.

[113] I note as well that the respondent did not challenge the status of the complainant's refusal to work under section 128 of the *Code* when it officially stated its position on the complaint to the Board on September 12, 2008. The only defence that it offered at that time was that the complaint was moot because the respondent did not impose discipline on the complainant.

[114] The investigation process that section 128 of the *Code* engages is triggered by an action taken by an employee. Nothing happens until an employee has communicated his or her refusal to work under section 128 to the employer. In the circumstances of this case, the fact that representatives of the respondent confirmed to the complainant and his representative that there was an outstanding section 128 work refusal stemming from the events of July 11, 2008 and that the respondent intended to resolve it must be considered powerful proof that — in the respondent's mind — the complainant did invoke section 128 and that he sufficiently communicated his reason for doing so to allow the respondent to understand it and to undertake to follow up. On the latter point, both Exhibits C-4 and C-10 leave no doubt that the respondent knew in July 2008 what the work refusal was about. Mr. Muise specifically referred to "search[ing] the poop" and Ms. Arsenault referred to ". . . Searching of Fecal matter . . . involving Correctional Officer Denis LeClair."

[115] On the basis of the evidence, I must consider as proven that the respondent decided, in July 2008, to receive and address the complainant's section 128 work refusal, that it sufficiently understood the reason for it and that it did not challenge that the complainant invoked his right under the *Code* — regardless of what Mr. Simons said or did on July 11, 2008.

[116] Despite the clear evidence provided by Exhibits C-4 and C-10, the respondent argued at the hearing that I should ignore, in effect, what the respondent's representatives did or said after July 11, 2008. It submitted that I should base my

findings only on what actually occurred on July 11, 2008 and that, in that analysis, I should prefer the testimony of Mr. Simons and Mr. MacLeod as more credible than the complainant's version of the events of that day. On that basis, it contended that the complainant did not properly refuse to work under section 128 of the *Code*.

[117] If, as the respondent urges, I examine the evidence of what occurred on July 11, 2008 using the *Faryna v. Chorny* test, I do not believe that it shows that the complainant failed to properly invoke section 128 of the *Code*. The case law is clear that an employee must communicate to the employer his or her belief that a danger exists with sufficient clarity to allow the employer to know that section 128 is in play. In doing so, there are no magic words to pronounce. Certainly, there is no requirement that the employee actually cite section 128. According to the wording of subsection 128(1), the employee must have ". . . reasonable cause to believe . . ." that a danger exists. As interpreted in the case law, an employee needs to prove that he or she reasonably believed in the existence of a danger. Once the employee proves his or her reasonable belief, and the evidence shows that he or she acted to communicate that reasonable belief to the employer, section 128 is properly engaged.

[118] The respondent submitted that there must be a "reasonable basis" for exercising the right to refuse work. In my view, that formulation goes beyond the requirement that an employee prove that he or she reasonably believed in the existence of a danger. Instead of assessing the reasonableness of the employee's belief in the existence of a danger, the respondent's formulation appears to ask for direct proof that a danger reasonably existed. My reading of the case law suggests that the respondent's formulation demands more than what section 128 of the *Code* requires. To be sure, I read the case law as accepting that an employee can be wrong in believing that a danger exists provided that his or her belief in the existence of a danger was itself reasonable.

[119] In that vein, the case law cautions against placing too heavy a burden on an employee to prove the basis for his or her belief. For example, in *Chaney v. Auto Haulaway, Inc.*, [2000] CIRB No. 47, the Canadian Industrial Relations Board wrote as follows:

. . .

> ***26.*** *In cases of this type, a major consideration is whether the employee who has exercised the right to refuse did have*

> *reasonable cause to believe that danger existed. In this regard, the Board has always given the broadest interpretation possible to the concept of reasonable cause.*
>
> ***27.*** *The purpose of the legislation is to prevent accidents and injury to health in the workplace. To achieve this goal, employees ought not to be discouraged from identifying potentially hazardous conditions by placing a heavy onus on them to establish that their fears were well founded. When employees complain that reprisals have been taken against them because they have exercised their right to refuse under the Code, the main focus should be on the reasons behind the employer's decision to take disciplinary action rather than on the reasonableness of the employee's refusal. . . .*
>
> . . .

The case law tends to emphasize that the employee need only establish that his or her refusal to work was motivated by a genuine safety concern: see, for example, *Sabourin v. Canada Post Corporation*, [1987] CIRB No. 618. Some decisions have found further that an employee should be given the benefit of the doubt in weighing the sincerity of that concern: see *Canada Post Corporation v. Jolly*, [1992] CIRB No. 941.

[120] The complainant in this case testified that he believed that his safety was at risk because he had not received training on using the PPE. He described the posted "Instructions on putting on or removal of the Bio suits" (Exhibit R-1, tab 7) as insufficient because they did not provide information about the consequences of contamination. He testified that he was concerned, as a result, that opening the drug loo container and examining its contents risked exposure to bio-hazards. He was also concerned that he might become contaminated if he doffed the Bio suit improperly. In cross-examination, Mr. Simons confirmed that diseases such as hepatitis B and C and AIDS are prevalent at Springhill.

[121] While the complainant's testimony also indicated that there were options available to him to counter or reduce the perceived risk — for example, contacting the custodian for assistance in donning and doffing the PPE or proceeding to the hospital if he felt that he had been exposed to contaminants — I nonetheless believe that he has established his belief in the existence of a danger on July 11, 2008, on a balance of probabilities. I certainly have no authoritative evidence before me that disputes the possibility that he may have faced a danger on July 11, 2008. (On that point, I note that the CIRB ruled in *Lequesne v. Canadian National Railway Company*, [2004] CIRB No. 276, that a complainant must be presumed to have had reasonable cause to believe

that a danger existed in the absence of a contradicting opinion from a health and safety officer.) The respondent counter-argued that the complainant may have instead invoked section 128 ". . . because of the union's position that the respondent had agreed but failed to provide training." While that possibility exists, it does not in turn prove that the union's concern — and the complainant's concern —about training was not linked to a reasonable belief that a danger could exist if an employee was required to operate the drug loo without appropriate training.

[122] Concerning the issue of what the complainant communicated to the respondent, and when, the evidence given by Mr. Simons indicated that the complainant specifically linked his refusal to search the drug loo container to the exercise of his right to refuse work under section 128 of the *Code* no later than their fourth conversation. While the precise timeline remains unclear, that conversation must have occurred within the hour after the complainant's initial call to Mr. Simons, or very shortly after. The delay was minimal, at best.

[123] Even if the complainant did not specifically invoke section 128 in the first, second or third conversations, as Mr. Simons maintained, it is uncontested that he refused to work in the very first conversation and that he reported the essential circumstances of his refusal at that time; that is, that he refused to work faced with the requirement to open the drug loo container and examine its contents. Recall, once more, that the case law does not require that a complainant actually cite section 128, or even the *Code*, as a precondition to invoking its protection.

[124] According to the complainant's evidence, he provided sufficient information in the first conversation to allow the respondent to understand the situation as a section 128 work refusal, including the reason for his work refusal. He testified that he linked his refusal from the outset to the 2006 section 128 incident — an incident that explicitly concerned the danger of exposure to biohazards that correctional officers allegedly face in operating the drug loo. Even were I to substantially discount the accuracy of the complainant's recollection of what he told Mr. Simons in the first conversation, or what he said that he repeated in the conversations that followed, I do not find it credible that Mr. Simons would not have quickly come to understand the nature of the situation, particularly once he had discussed the matter with the members of the management team. The minutes of the February 19, 2008 union-management meeting (Exhibit C-1) show that Mr. Muise and Mr. MacLeod, both

of whom attended, must have understood that a refusal by a correctional officer — and specifically a refusal by this complainant — to perform a duty in the dry cell had something to do with concerns about danger in operating the drug loo and about training. They might not have accepted the legitimacy of those concerns, but for the management team to have been unaware that those concerns were outstanding, particularly in the complainant's mind, seems to me to be an unreasonable interpretation of the evidence. In my view, the management team would have recognized the situation on July 11, 2008 as a real or potential section 128 work refusal virtually from the outset, knew that the issue of training was in the mix and would have instructed Mr. Simons on that basis. In that sense, the nexus between the complainant's initial work refusal and section 128 should have been very clear to the respondent from the beginning.

[125] Mr. Simons' testimony revealed that he understood the respondent's position about training and the drug loo quite well. He stated that he believed that there was no longer an issue. He testified that ". . . every correctional officer is trained to perform the duty as part of their core training. No other training is required." That testimony accords closely with what Mr. Muise had already stated on the record. According to the minutes of the February 19, 2008 consultation meeting (Exhibit C-1), Mr. Muise said that he was "very comfortable" with the instructions for using the PPE that the respondent had posted and that he was ". . . not ready to spend one day, one half day, or one hour training people how to get dressed."

[126] Considering the evidence, I believe that Mr. Simons would have been quite able on July 11, 2008 to express the respondent's disagreement that a danger existed, and why, as was the respondent's right under subsection 128(8) of the *Code*. He could have laid the basis for rejecting the complainant's work refusal for reasons founded in section 128, but that did not happen. The respondent seems to have had a different strategy in mind. When the complainant confirmed in the fourth conversation that he was invoking section 128, Mr. Simons testified that he immediately responded by stating that he would not entertain a work refusal under the *Code*. He apparently asked no questions about the situation. He did not discuss the purported danger, or lack thereof. While he may have signalled that any danger that the complainant encountered was ". . . a normal condition of employment . . ." by telling the complainant that ". . . it's your job and you have to do it . . . ," that is not why he refused to entertain the complainant's section 128. On that point, his testimony was

precise. He told the complainant that he would not entertain his section 128 because he had relieved the complainant of duty and had ordered him to leave the institution.

[127] Mr. Simons may have been operating within his authority when he decided to place the complainant off duty, but using that decision as the basis for not considering a section 128 work refusal seems to me to offend the spirit and intent of the *Code*. The case law clearly offers examples of situations where an employer has appropriately rejected a refusal to work under section 128 and subsequently had that decision upheld, for procedural or substantive reasons, as section 128 contemplates. However, the case law also suggests that an employer must actively and reasonably turn its mind in some fashion to evaluating the circumstances of a purported work refusal before rejecting it. Mr. Simons' reaction met no such standard. The complainant was on duty when he reported his refusal to work to him. Counselled by the management team, Mr. Simons immediately ordered the complainant in the second conversation to complete his use-of-force report and then go home if he continued to refuse. Mr. Simons' course was set, and nothing that the complainant subsequently said, including mentioning section 128, dissuaded him from that course. The evidence thus persuades me that Mr. Simons — acting on instructions or on his own — was never really open to the possibility that he should entertain a section 128 work refusal. Placing the complainant off duty may have had the effect of removing the complainant's exposure to the possible danger for the time being, but it did not change the reality that the complainant had refused to work and that the respondent knew, or reasonably ought to have known, that the refusal raised a section 128 situation. When the complainant confirmed the link to section 128, the situation did not somehow cease to exist because Mr. Simons had ordered the complainant to go home in the interim. It also did not cease to exist because Mr. Simons found someone else to perform the duty.

[128] I do not believe that the respondent may credibly advance its objection to the Board's jurisdiction by arguing an interpretation of the facts contradicted by the actions and statements of its own representatives. As my review of the evidence reveals, the respondent did not communicate on July 11, 2008, or in the weeks immediately after the event, the concerns that led it at the hearing, for the first time, to argue 1) that the complainant did not communicate a refusal to work that sufficiently identified the nature of the danger perceived by him, 2) that the complainant did not have a reasonable basis to perceive that a danger existed, and

3) that there was not the required nexus between the refusal to work and the time that the complainant communicated it to the respondent.

[129] To the contrary — and apparently in contradiction to the position that Mr. Simons took on July 11, 2008 — the limited post-incident evidence that is available proves that the respondent decided to accept that the complainant properly filed a refusal to work under section 128 and that it had sufficient understanding of the nature of the triggering event to allow it to commit to undertake an investigation.

[130] I believe that the respondent's onus must be to defend itself against the complaint on that basis. While I recognize that it is generally open to a party to raise a jurisdictional objection as late as the hearing itself, the credibility of an objection will be suspect if the statements and actions of the party's representatives do not accord with the theory that the party later seeks to advance. The evidence in this case is that the respondent accepted that the complainant invoked a section 128 work refusal, regardless of what Mr. Simons said, and that it undertook to address it on that understanding. Having done so, it was open to the respondent to conclude that no danger existed, as was its right under subsection 128(6) of the *Code*. It was open to the respondent to maintain that it had resolved any safety issues through the steps that it took following the 2006 section 128 situation. However, there is no evidence that it ever communicated any such position to the complainant or to his representative — until the hearing. When an employer disagrees about the existence of a danger, section 128 provides further steps for resolving the situation. It appears that the respondent followed none of those steps. The comportment of its representatives in this case gave the complainant no opportunity to consider whether to exercise the further options available to him under section 128. Mr. Simons first pre-empted the process envisaged by section 128 by immediately denying that the complainant — relieved of duty — had standing to invoke section 128. Then, for reasons that remain unexplained, Mr. Muise and Ms. Arsenault abandoned Mr. Simons' position and communicated their acceptance that the complainant refused to work under section 128. What then happened is largely unknown. The respondent offered virtually no evidence about how it followed up in accordance with section 128. On balance, it seems probable that it did not.

[131] I am thus satisfied that the statements and actions of the respondent's representatives in this case undermine the credibility of its jurisdictional objection. I

find that the respondent ultimately decided to entertain the complainant's work refusal, and that it should now be held to defend against the complaint on that basis. The respondent knew, or ought reasonably to have known, that what the complainant communicated as early as his first conversation with Mr. Simons involved a real or potential section 128 situation. The respondent should have turned its mind to its responsibilities under section 128 and then acted consistently in accordance with the process that section 128 requires — even if only to state its basis for rejecting the work refusal.

[132] There remains the respondent's argument — based on Standing Order 569, *Special Surveillance - Inmate who is carrying contraband in a body cavity - "INTERIM", Annex A: Dry Cell Routine* (Exhibit R-1, tabs 5 and 6), the provision of training to correctional officers on handling contraband, and the "Instructions on putting on or removal of the Bio Suits" (Exhibit R-1, tab 7) — that it had brought the risk associated with the operation of the drug loo to a level that made that task acceptable as a regular working condition. In the respondent's submission, the danger associated with searching the drug loo was a "normal condition of employment" within the meaning of paragraph 128(2)(*b*) of the *Code*. Therefore, an exception existed that limited or precluded the complainant's right to refuse work on July 11, 2008.

[133] The complainant counter-argued that the work performed by an employee can entail a certain degree of risk if the employer has taken all measures to protect the employee from that risk — something that the respondent did not do in this case. The complainant submitted that it is not a normal condition of employment to require an employee to operate the drug loo if the employee has not received the proper training for using the PPE.

[134] I am not convinced that the essential character of this case requires that I rule whether searching the drug loo was a "normal condition of employment" within the meaning of subparagraph 128(2)(*b*) of the *Code* — or even that I have the authority to make such a ruling in the circumstances. The primary allegation in this case is that the respondent took disciplinary action against the complainant for refusing to work under section 128. As a complaint filed under section 133, the case requires the Board to exercise its authority for the sole purpose of determining whether that disciplinary action was a reprisal prohibited by section 147. Subsection 133(1), which reads as follows, clearly states that purpose:

> ***133.*** *(1) An employee, or a person designated by the employee 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.*

Chaney, among other decisions, confirms that the main focus in such a case is ". . . on the reasons behind the employer's decision to take disciplinary action . . . ." (paragraph 27).

[135] Where a section 133 complaint involves the exercise of a right under section 128 of the *Code*, subsection 133(3), which reads as follows, states one precondition:

> ***133.*** *(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.*

Subsection 128(6) reads as follows:

> ***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.*

In effect, I have already ruled that the complainant in this case ". . . report[ed] the circumstances of the matter to the employer without delay."

[136] In my view, the wording of section 133 of the *Code* does not require the Board to determine first whether a danger existed within the meaning of section 128 or that any such danger comprised a "normal condition of employment" before proceeding to assess the alleged reprisal action on the part of an employer. Under sections 128 and 129, the *Code* assigns the substantive responsibility to assess the existence of a danger to other entities — first to the employer and then, as necessary, to the workplace committee or health and safety representative and, finally, to a health and safety officer under section 129. Under an earlier version of the *Code*, the Board could have been asked to review a health and safety officer's decision about the existence of a danger or whether that danger was a normal condition of employment: see, for example, the Canada Labour Relations Board rulings in *Lalonde v. Canada Post*

Corporation, 77 di 9 (CLRB No. 731); *Almeida v. Via Rail Canada Inc.*, 82 di 10 (CLRB No. 818); and *Spadafora v. Canadian Airlines International Ltd.*, 90 di 157 (CLRB No. 981). The *Code* has since changed and that situation does not apply here.

[137] I have found, on a balance of probabilities, that the complainant had a reasonable belief that a danger existed, that there was a nexus between that belief and his refusal to work (communicated "without delay") and that the respondent accepted that he refused to work under section 128. Those findings, in my view, are sufficient to allow me to proceed under section 133 to consider whether the respondent took disciplinary action in violation of section 147. By maintaining that searching the drug loo was a "normal condition of employment" within the meaning of paragraph 128(2)(*b*), the respondent is advancing as a jurisdictional matter a substantive argument that belongs to a different scenario. In that type of scenario, the respondent would have answered the work refusal by formally stating its position that the "normal condition of employment" exception expressed in paragraph 128(2)(*b*) applied. Faced with that position, the complainant would then have had to decide whether to continue his work refusal, as was his option under subsection 128(9). If he exercised that option, the further processes for considering the existence of a danger outlined in section 128 could have ensued, including the possible intervention of a health and safety officer under section 129. At some early stage, that scenario would have produced an existence of danger analysis and a review of the application of the "normal condition of employment" exception. If the respondent disagreed with the results and insisted that the "normal condition of employment" exception applied, it could have pursued its case on that basis to the extent permitted by the *Code*.

[138] None of that happened in this case. I do not believe that the respondent can now ask the Board, in the context of a jurisdictional objection to a complaint filed under section 133 of the *Code*, to conduct a substantive analysis that should have first been performed by others if the processes outlined by sections 128 and 129 had been followed. In this case, the normal processes under sections 128 and 129 were short-circuited by the respondent's actions — or, if they were not, I have no evidence of how the employer complied beyond its promise to investigate in Exhibits C-4 and C-10. Usually, a section 133 complaint occurs in a context where those processes have taken place and the issues of substance that can be raised under section 128 have been raised, including the position that a danger comprises a "normal condition of employment." The apparent short-circuiting of the process by the respondent in this

case makes the case atypical and difficult but it does not change the reality that it is a section 133 complaint about reprisal action, not a review of an existence of danger determination made under section 128 or 129.

[139] In summary, I do not believe that the respondent's argument that searching the drug loo was a "normal condition of employment" properly forms part of an objection to my jurisdiction to consider the merits of this section 133 complaint.

[140] For the reasons stated, I dismiss the respondent's objection to the Board's jurisdiction to consider the complaint. For the purpose of determining his complaint under section 133 of the *Code*, I find that the complainant properly invoked section 128 and that the respondent entertained his action as a section 128 work refusal.

B. Did the respondent prove on a balance of probabilities that it did not violate section 147 of the *Code?*

[141] Having found that the complaint was made about the exercise of a right under section 128 of the *Code*, it is the respondent's burden under subsection 133(6) to prove that it did not contravene section 147.

[142] The respondent submitted that none of the actions taken by the respondent was of the types listed under section 147 of the *Code.* I disagree.

[143] The evidence is straightforward. Mr. Simons testified that he referred in his conversations with the complainant to each of the four levels of discipline provided under the global agreement. The complainant testified to the same effect. Mr. Simons' references were not academic. The complainant correctly understood them as conveying Mr. Simons' determination to impose discipline. The evidence further showed that Mr. Simons acted on instructions from Mr. Muise to impose disciplinary penalties under the global agreement if the complainant refused to go home.

[144] On July 16, 2008, Mr. Muise notified the complainant that he was convening a disciplinary investigation (Exhibit C-6). The evidence also indicated that a discipline investigator subsequently called the complainant to a meeting.

[145] At the very least, the respondent's actions must be construed as a threat to impose disciplinary action within the meaning of section 147 of the *Code*. The respondent's original position that there was no discipline, thus rendering the

complaint moot, is itself moot. It is not necessary under section 147 that the respondent actually execute discipline. Threatening discipline is sufficient.

[146] I dismiss the respondent's objection that the complaint is moot and find that the action taken by the respondent in this case is an action described in section 147 of the *Code*.

[147] The real issue is whether the respondent threatened to discipline the complainant because he ". . . acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part" within the meaning of paragraph 147(*b*) of the *Code*. The respondent argued (in the alternative) that any discipline imposed or threatened did not relate to a work refusal under section 128 but, instead, to a different situation that arose on the same day — the complainant's refusal to obey the order to be relieved, complete his use-of-force report and go home.

[148] On the face of the evidence, there is some support for the respondent's position. Mr. Simons consistently testified that he referred to the disciplinary penalties under the global agreement because the complainant would not obey his order to leave the dry cell post and go home. In cross-examination, the complainant agreed that he received each of the four levels of discipline under the global agreement because he refused a direct order to go home.

[149] Is there any reason to probe further? In my view, there is, and it can be found principally in Mr. Muise's order convening a disciplinary investigation, sent to the complainant on July 16, 2008 (Exhibit C-6). Mr. Muise wrote as follows:

. . .

> *I have received information that leads me to believe you may have been involved in inappropriate activities related to a direct order to search the bodily waste expelled by [Inmate G]. You refused to do so. This is in contravention of S.O. 569, entitled "Dry Cell". As a result, you were relieved of your duties and advised that your shift was terminated. You refused to leave the premises as directed by the Duty Correctional Manager.*
>
> *Such action, if founded, constitutes a serious breach of CSC's Standards of Professional Conduct and/or CSC's Code of Discipline. . . .*

. . .

> *Should the disciplinary investigation conclude that these allegations are founded, disciplinary action will be taken.*

. . .

[150] The wording of the letter creates some ambiguity. The words "[s]uch action" (that could constitute a serious breach of the code of discipline) in the second paragraph could be viewed as referring to the complainant's refusal to "search the bodily waste" or to the reference that the complainant ". . . refused to leave the premises as directed. . . ." For two reasons, my view is that Mr. Muise intended to identify the complainant's refusal to search the bodily waste as a possible disciplinary offence. The first reason is that he identified that refusal directly as a contravention of Standing Order 569, a possible ground in and of itself for imposing discipline. The second reason lies in the wording of the final sentence. There, Mr. Muise refers to "these allegations" in the plural and states that disciplinary action will be taken if "these allegations are founded." There are only two allegations in the letter. One of them unquestionably concerned the issue of searching the drug loo container.

[151] Once again, the respondent did not call Mr. Muise to testify at the hearing. I thus have no direct evidence to contradict or to place in a different perspective what his letter states on its face.

[152] As of July 16, 2008, the complainant could only have interpreted Mr. Muise's letter as indicating that the threat of discipline that he faced related at least in part to his refusal to search the drug loo container on July 11, 2008 — the subject matter of his section 128 refusal to work. The respondent apparently left the complainant under the formal threat of that discipline for well over a year until this hearing was convened while at the same time arguing to the Board in September 2008 that there was no discipline.

[153] The respondent must be held to Mr. Muise's letter of July 16, 2008. It determines the matter. I find that the respondent threatened to discipline the complainant at least in part because he refused under section 128 of the *Code* to search the drug loo container on July 11, 2008.

C. <u>What is the appropriate corrective action?</u>

[154] The complainant asked that I declare that the respondent violated section 147 of the *Code*. However, he stressed that the most important corrective action would be an order from the Board requiring the respondent to cease and desist in violating section 147.

[155] A cease and desist order is a practical and appropriate corrective measure where a decision-maker has reasonable cause to believe that a respondent will continue to violate the *Code*. Although there was some testimony from the complainant to the effect that the respondent breached section 147 of the *Code* in its approach to section 128 work refusals on a number of previous occasions, I have no sound basis to presume that similar violations will reoccur without a cease and desist order. In my view, it is appropriate for the Board to expect that the respondent will take the findings of this decision seriously and guide its future actions accordingly. To that extent, I believe that a declaration that the respondent violated section 147 of the *Code* in this case is sufficient.

[156] The complainant also claims lost overtime compensation on July 11, 2008 for the actual hours he worked beyond the hours of work listed on the overtime sheet in Mr. Simons' office; that is, for the period from 1:30 p.m. until 2:45 p.m. In view of my ruling that the complainant properly invoked section 128 of the *Code*, it is reasonable to argue he should not be penalized for the brief extra time that he remained at the workplace waiting, in his opinion, to be properly relieved of duty. While I make no finding that the complainant was correct in his belief about the proper relief procedure, I do consider that the order to leave the workplace immediately was part of the respondent's failure to follow the process provided by section 128. In the circumstances, I find that it is appropriate that the respondent should pay the complainant in accordance with the applicable provisions of the relevant collective agreement until the time that he left the institution.

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

(The Order appears on the next page)

V. Order

[158] The respondent's objection to the Board's jurisdiction to consider the complaint is dismissed.

[159] The respondent's argument that the complaint is moot is dismissed.

[160] I declare that the respondent violated section 147 of the *Code*.

[161] The respondent will compensate the complainant in accordance with the overtime provisions of the relevant collective agreement for the time between 1:30 p.m. and 2:45 p.m. on July 11, 2008.

April 1, 2010.

Dan Butler,
Board Member