Date: 20130531

File: 560-02-69

Citation: 2013 PSLRB 63

Canada Labour Code

Before a panel of the Public Service Labour Relations Board

BETWEEN

DOUGLAS DWAIN WHITE

Complainant

and

TREASURY BOARD (CORRECTIONAL SERVICE OF CANADA)

Respondent

Indexed as
White 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: John G. Jaworski, a panel of the Public Service Labour Relations Board

For the Complainant: Jack Haller, Union of Canadian Correctional Officers – Syndicat des Agents Correctionnels du Canada – Confédération des Syndicats Nationaux

For the Respondent: Allison Sephton, counsel

Heard at Moncton, New Brunswick, and Ottawa, Ontario,
December 18 to 20, 2012, and January 28, 2013.

I. Complaint before the Board

[1] On March 17, 2010, Douglas Dwain White ("the complainant") filed a complaint with the Public Service Labour Relations Board ("the Board") against the Correctional Service of Canada ("the respondent") under section 133 of the *Canada Labour Code (*"the *Code*"*).* The complainant alleged that the respondent took action against him because he submitted a work refusal on February 10, 2010.

[2] Specifically, the complainant stated that, despite that he had submitted a work refusal on February 10, 2010 pursuant to section 128 of the *Code*, the respondent refused to accept his work refusal and required him to obtain medical clearance from his physician on the issues he raised in his work refusal. The complainant stated that, on the same day that he refused to work, he also went home sick, which had nothing to do with the work refusal. The complainant stated that he was required to use paid sick leave credits and requested that that leave be reinstated to him. The complainant also asked that the letter that was placed in his personnel file be removed and that action be taken against the managers who did not follow the *Code*.

[3] At the outset of the hearing, the respondent raised a preliminary objection to my jurisdiction. I heard the arguments with respect to the objection and determined that I would have to hear evidence before being able to rule on it. It was also clear that the evidence on the jurisdictional issue was interconnected with the evidence on the merits of the matter, and as such, I reserved my decision on my jurisdiction until I had heard all the evidence.

II. Summary of the evidence

A. Background

[4] The complainant began his employment with the respondent in 1986 as a correctional officer ("CX") 1. He has been a CX-2 for the past 14 years. Currently, his substantive position is a CX-2 as the coordinator of Visits and Correspondence ("V & C") at Atlantic Institution ("the Institution"), a maximum-security federal penitentiary operated by the respondent in its Atlantic Region, in Renous, New Brunswick. The complainant's previous position at the Institution was as the escort coordinator.

[5] The complainant has also held several positions within the Union of Canadian Correctional Officers – Syndicat des Agents Correctionnels du Canada – Confédération

des Syndicats Nationaux ("the bargaining agent"), including locally at the Institution as a shop steward, a local vice-president and the president. In February 2010, the complainant was the bargaining agent's Atlantic Region vice-president. Since May 2010, the complainant has held the position of the bargaining agent's Atlantic Region president and as such is on leave from his substantive position at the Institution.

[6] As the V & C coordinator, the complainant reported to Correctional Manager ("CM") Yves Lemieux. Mr. Lemieux is currently the CM responsible for scheduling and deployments at the Institution; he has been in that position either permanently or on an acting basis since July 2010. Before that, from about the beginning of 2008, he was the acting CM for Living Unit Two and V & C. Before that, from 2001, he was the V & C coordinator at the Institution. At all material times, his substantive position was as a CX-2, and he was in an acting CM position.

[7] Robert Taylor is currently the CM responsible for the Segregation Unit at the Institution. He has been with the respondent for 23 years, serving most of his time as either a CM or an Institutional Security Officer ("ISO"). From 2008 until August 2012, he was the CM of Operations. When the complainant was the escort coordinator, he reported to Mr. Taylor.

[8] Kevin Hare is currently Assistant Warden, Operations ("AWO"), at the Institution. He has been in this position, either on an acting or an indeterminate basis, since April 2009. The AWO is responsible for all correctional operations. Fourteen CMs report directly to him, through whom 200 CXs report indirectly. He is responsible for the day-to-day correctional operations of the Institution. He has roughly 31 years of experience, starting as a CX-1 and moving through the ranks as a CX-2, a CM and an ISO. Except for two brief sojourns, he has spent his entire career at the Institution. As the AWO, he reports to the Deputy Warden ("DW").

[9] Paul Bourque is currently Warden of the Institution. He has been in this position since October 2008. The Warden is responsible for all the Institution's operations. Mr. Bourque started his career with the respondent in 1986 as a CX-1 and moved through the ranks as a CX-2, a CM and a DW before becoming the Warden.

[10] Joel Banks is currently a CX-2 at the Institution and has been for the past 12 years. He has been at the Institution since May 1997, starting as a CX-1. Mr. Banks has held a variety of positions with the bargaining agent at both the local and regional

levels, including the position of Atlantic Region president. He is currently a shop steward.

[11] Rene Morais is currently Occupational Health and Safety ("OHS") Advisor for the Atlantic Region of the respondent. He has been in this position for the past seven years. Before that, he held the position of OHS Advisor at Dorchester Institution, a medium-security institution also in the Atlantic Region.

[12] V & C is that part of the Institution where inmates have visits with persons from outside. It is a large room with tables and chairs on which the inmates sit with their visitors. The room and access to it are monitored and controlled by a control post in which several CXs work. The control post is separated from the V & C room by walls, doors and bulletproof glass. Access to the control post is via a steel door.

[13] The complainant, as the V & C coordinator, works primarily in an office that is part of the V & C control post and that can be accessed only through a single doorway into the V & C control post. The office was described by several witnesses as small, windowless and approximately six feet by six feet, with a desk, chair and computer. Its ventilation is via a duct in the ceiling.

[14] The complainant described his job duties as primarily administrative in nature, requiring that the majority of his time be spent at his desk, working mostly on his computer. A copy of his job description was not filed. Immediately before being the V & C coordinator, the complainant was the escort coordinator and reported to CM Taylor. A copy of the job description for that position was not filed; nor were those duties described for me.

[15] Before 2007, CXs at Canada's federal penitentiaries did not wear the stab-proof vest ("vest") as part of their required work attire. Discussions between the bargaining agent and the respondent resulted in the respondent acquiring vests for all CX-1s and CX-2s.

[16] The respondent's policy is that all CX-1s and CX-2s wear the vest while on duty at certain facilities. Exhibit C-1 has attached the respondent's "Stab-Resistant Vest Protocol." Part 2 of the protocol refers as follows to Individually Assigned Vests:

> ***Part 2-Individually Assigned Vests***
>
> ***Availability and Assignment of Vests***
>
> *6. In all maximum security institutions, treatment centres and Special Handling Units (SHU), vests will be individually assigned to all Correctional Officer I and Correctional Officer II staff working in the institutions.*
>
> *. . .*
>
> *9. Staff issued individual vests are responsible for:*
>
> > *a) wearing their vest at all times they are on duty except when required to wear a ballistic vest. Staff not wearing the vest during this period of time will be subject to disciplinary action;*
>
> *. . .*

[17] The complainant is a CX-2 and works in a maximum-security institution; as part of his security equipment, he is required to wear a vest and has been provided with an individually assigned vest.

[18] Mr. Taylor described the process involved in fitting an individually assigned vest. A fitter measures an officer, and the information is sent to the supplier. After the vest is manufactured, it is sent back to the Institution, where the officer tries it on to ensure that it fits properly and provides the protection required. Initially, two types of vest were offered, a bell cut and a straight cut. The bell cut was described as less comfortable, as the front armour was rigid and would hang down onto the officer’s lap when seated. In 2011, the bell-cut style was done away with. The vests are adjustable; there are Velcro straps on both sides and on the top that hold the front and back panels together. It can be loosened or tightened by adjusting the tabs. A looser vest permits more airflow around the torso.

[19] There was no evidence as to what style of vest the complainant was issued.

[20] There was no evidence as to when the complainant was issued the vest that is the focus of the complaint before me.

[21] AWO Hare testified that the vest is part of the personal protective security equipment issued to all CX-1s and CX-2s. Its purpose is to protect against serious injury and is part of their uniforms. All CXs are required to wear the vest while on

duty. Wearing the vest is not dependent on what post or area of the Institution an officer is located in.

[22] Messrs. Hare, Taylor and Lemieux testified that the policy required all CXs to wear their vests and that it was important for all the CXs to wear their vests for due diligence purposes. Management could not be seen allowing certain CXs to not wear their vests while others were required to wear theirs. Mr. Hare also testified that it was important for the complainant to wear his vest as he was seen as a leader by others at the Institution.

[23] Mr. Banks testified that he understood that it was the respondent's policy that all CXs wear their vests at all times, everywhere in the Institution, regardless of location, which included in the V & C, even if the CX was doing paperwork.

[24] Mr. Hare testified that, when CXs were not wearing their vests, they were instructed to put them on, or their CMs were instructed to instruct them to wear their vests.

[25] Exhibit R-6 is the Post Order for the complainant's V & C coordinator post. Paragraph 5 of it provides as follows:

> ***DUTIES***
>
> ***5.*** *The Sector Coordinator shall carry on his person the required CSC approved safety and security equipment (i.e. CPR mask, handcuffs, PPA, search gloves, vest, etc.). He will test their PPA with the MCCP officer at the commencement of the shift.*

[26] Before the events of February 10, 2010, the complainant had been involved in at least two other section 128 work refusals under the *Code* ("section 128 work refusal") about the vest and at least one other section 127 complaint about the vest.

[27] Mr. Taylor testified that, on June 19, 2009, he saw the complainant at the Institution's central control post without his vest on. He stated that at that time he was not the complainant's direct supervisor, as the complainant was already working as the V & C coordinator. He stated that, when he asked the complainant why he was not wearing his vest, the response he received was that it was too hot in the V & C coordinator's office. Mr. Taylor stated that they went back to that office, where he confirmed that the area was quite hot and that the air conditioning for the area was

not working. The complainant gave him a document in which he stated that he was invoking his section 128 right to refuse to work under the *Code*.

[28] The air conditioning problem was brought to the attention of the DW, who arranged to have it checked and fixed. Once it was fixed, the complainant determined that he did not wish to continue to pursue a section 128 work refusal but to refer the matter as a complaint under section 127 of the *Code* ("section 127 complaint"). According to Mr. Taylor, the complainant put his vest back on and continued to wear it at his post.

[29] The complainant's typewritten June 19, 2009 section 128 work refusal and subsequent handwritten amendment to a section 127 complaint reads as follows:

> *On June 19th at approx. 0930hrs, I invoked section 128 of the Labour Code for 2 reasons.*
>
> 1. *Approx. 1 year ago there was a job hazard analyst done on the stab resistant vest that are supplied to only Cx 1's and Cx 2's of the Correctional Service of Canada. We were promised a copy of the report and seeing that it's a year later and with the heat returning I feel that it's a danger to me to wear the vest in Atlantic Institution. There has always been an air problem and the building is extremely hot.*
>
> 2. *The second point is that the vests are safety equipment and should be supplied to all employees that enter the building.*
>
> *"Doug White"*
>
> *I wish to defer these complaints to a 127. "Doug White" June 19, 2009.*
>
> [*Sic* throughout]

[30] There is no evidence to indicate what became of the June 19, 2009 section 128 work refusal / section 127 complaint.

[31] Exhibit R-10 is entitled *Management Response to 127 Complaint (May & October 2009 and January 2010) Correctional Officer 2 Doug White and Correctional Officer 1 Josh Good of Atlantic Institution* and is undated. I was not provided with the original section 127 complaint(s) of the complainant or of Mr. Good, of which Exhibit R-10 is in response. It was entered through Mr. Bourque, who testified that the

response was issued under his name and authority. He did not know when it was issued.

[32] Exhibit R-10 refers to a number of complaints raised under section 127 of the *Code*, of which two relate to wearing the vest and were summarized on the first page as follows:

> 1. *The requirement to wear the vest would alter the shooting capabilities of an officer required to provide armed intervention from a secure post;*
>
> 2. *Management needs to provide every person granted access to the work place by the employer with prescribed safety materials, equipment, devices and clothing;*
>
> . . .

[33] There was no evidence that the complainant was provided a copy of Exhibit R-10 before the hearing.

[34] Exhibit R-12 is an investigation dated February 18, 2010 and launched under section 127 of the *Code* undertaken by Mr. Taylor and Mr. Doug Best, after being appointed for that purpose by Warden Bourque, about a section 128 work refusal filed by the complainant on January 4, 2010. Like the June 19, 2009 section 128 work refusal, this one started out as a section 128 work refusal and was later referred as a section 127 complaint.

[35] I was not provided with a copy of the January 4, 2010 section 128 work refusal.

[36] Mr. Taylor, in addition to testifying about his involvement in the complainant's June 19, 2009 and January 4, 2010 refusals / complaints, testified that, during the period that the complainant reported to him, he had a number of discussions with him about wearing his vest.

[37] Mr. Taylor testified that the complainant made it clear to him that he did not care for the vest. Mr. Taylor stated that, when he saw that the complainant was not wearing his vest, it was usually in the escort coordinator's office. He stated that, when he saw the complainant not wearing his vest, it was generally when the complainant was at his desk; the discussions usually involved the complainant stating that he felt that he did not have to wear the vest while working at his desk. Mr. Taylor stated that

he made it clear to the complainant that he was required to wear his vest at all times while at work.

[38] Mr. Taylor stated that, while he was the complainant's supervisor, he was required to instruct him to put on the vest approximately once per month. Mr. Taylor testified that he was not the only one who noticed that the complainant was often not wearing his vest, but his superiors would bring it to his attention and instruct him to instruct the complainant to wear it.

[39] Mr. Taylor testified that, although the complainant was not the only CX whom he was required to instruct to wear the vest while at work, he had to speak to the complainant the most.

[40] Mr. Hare testified that he was aware that the complainant had issues with wearing his vest, which started when the complainant was the escort coordinator. Mr. Hare stated that the complainant had made it clear to him that he did not like wearing the vest. He stated that, when he saw complainant not wearing his vest, he would speak to him about it and make it clear to him that he was required to wear it. Mr. Hare stated that, in the past, when he instructed the complainant to put on his vest, the complainant complied.

[41] Mr. Lemieux testified that, when the complainant first came within his area of responsibility, he was aware that the complainant had issues with wearing the vest.

[42] Mr. Lemieux testified that part of his morning routine, after attending the morning management meeting, was to visit both Living Unit Two and V & C. The purpose of his visits was to report any information that came out of the meeting and to see if anything was happening within the areas that were under his responsibility. He stated it was his practice during his visit to ensure that all CXs were wearing their uniforms and safety equipment, including their vests. He stated that, when he saw that the complainant was not wearing his vest, it was in the V & C coordinator's office. He would then instruct the complainant to put his vest on. It was Mr. Lemieux's recollection that he was required to speak to the complainant on two or three occasions. He stated that he typically used a friendly approach and in turn received a friendly response, being that the complainant would either comply or, if the vest was at his home, state that he would bring it in.

[43] Mr. Lemieux also testified that he was very familiar with the V & C coordinator's office as he had at one time worked there. He was asked in cross-examination if he agreed that the air in the office was not great. His response was that he never suffered any discomfort but that at times it could be hot.

[44] The complainant admitted that he had issues with the vest. He stated that he understood that the rules required him to wear it while he was working at the Institution. He stated that, whenever he was in the units or walking in the Institution, he would wear his vest. However, he stated that he would sometimes take it off when working in the V & C coordinator's office.

[45] The complainant stated that his view was that anyone who comes into contact with inmates should be required to wear a vest, including nurses, kitchen staff and CMs.

B. <u>February 2010</u>

[46] On February 9, 2010, Mr. Lemieux stated that he received a report that the complainant was observed not wearing his vest. He stated that he discussed it with his supervisor, Mr. Hare.

[47] Mr. Hare recalled a discussion with Mr. Lemieux and speaking with Warden Bourque, both on February 9, 2010. Both conversations were about the complainant not wearing his vest. Mr. Hare stated that he and Mr. Bourque agreed to an approach in which Mr. Lemieux would speak to the complainant and instruct him to wear his vest. The next day, Mr. Lemieux would check to ensure that the complainant was wearing his vest. If he was not wearing it again, Mr. Lemieux would instruct him again to wear it. If the complainant still continued to not wear his vest, he would be given a direct order. Mr. Hare stated that, if it came to having to issue a direct order and a refusal to obey it occured, the complainant would be sent home until he returned to the Institution with his vest on.

[48] Mr. Bourque also recalled the discussion on February 9, 2010 with Mr. Hare about the complainant not wearing his vest. Mr. Bourque was aware that the complainant not wearing the vest had become an ongoing issue. Mr. Bourque's testimony confirmed Mr. Hare's account of their discussion of February 9, 2010 about the plan of action.

[49] Mr. Lemieux testified that he spoke to the complainant on February 9, 2010, that he made him aware that he was required to wear his vest, and that he told him that, if he was not wearing it the next day, administrative action would be taken. Mr. Lemieux testified that Mr. Hare had instructed him to tell that to the complainant.

[50] Mr. Lemieux testified that, on February 10, 2010, after the morning meeting, as per his routine, he proceeded down to V & C and entered the V & C coordinator's office. The complainant was not wearing his vest. Mr. Lemieux stated that he asked the complainant where his vest was and that he was told that it was at the complainant's home. Mr. Lemieux stated that he reminded the complainant of their conversation of the previous morning about wearing the vest and, as stated, he was going to see Mr. Hare. Mr. Lemieux's evidence was that he did not tell the complainant to wear his vest or go home; nor did he in any way discipline him. He stated that at no time during their meeting did the complainant advise him that he was exercising any rights under the *Code* or that he was refusing to work or identify any danger to himself.

[51] Mr. Lemieux stated that he left the complainant's office and went to see Mr. Hare, at which point it was decided that a meeting would take place involving the complainant, Mr. Lemieux and Mr. Hare. Mr. Lemieux stated that he returned to the V & C coordinator's office and instructed the complainant that a meeting was to be held immediately in Mr. Hare's office.

[52] The complainant testified that Mr. Lemieux came into his office on February 10, 2010. He stated that there are no carpets in V & C; therefore, one can hear someone coming, walking on the floor. As such, he stated that he could hear Mr. Lemieux running across the floor of V & C, and he knew that Mr. Lemieux was coming to see if he was wearing his vest. The complainant stated that he was not wearing his vest that morning. He stated that he was down in V & C and was having trouble breathing, and that the "vents" were awful, that what was coming out of the vents was black and was dust. He testified that Mr. Lemieux told him to wear his vest or go home. He believed he was being suspended without pay. He stated that he thought that he was in danger so he wrote up a section 128 work refusal. His evidence was that he also told Mr. Lemieux that he was exercising his right to refuse to work under section 128 of the *Code*.

[53] A meeting took place in Mr. Hare's office involving the complainant, Mr. Banks, Mr. Lemieux and Mr. Hare. It was digitally recorded by the complainant, introduced by

the respondent and identified by the complainant on cross-examination. While everyone at the meeting testified as to what occurred, the recording provides an accurate account of what occurred and in what order.

[54] Before the complainant went to Mr. Hare's office, he contacted Mr. Banks. Mr. Banks testified that, before the meeting, the complainant made him aware that the complainant would be given a direct order to wear his vest, failing which he believed that he would be sent home.

[55] The complainant initiated the digital recording in the V & C coordinator's office, when Mr. Lemieux told him that Mr. Hare would see him upstairs. Approximately one minute passes on the recording, during which walking can be heard, along with doors and gates opening and closing. The complainant then starts talking and asks everyone to identify themselves; he introduces himself and Mr. Banks, who has accompanied him. Mr. Lemieux and Mr. Hare introduce themselves.

[56] As soon as the introductions are complete, Mr. Hare advises the complainant that he has been instructed by the Warden to give the complainant a direct order to put his vest on, and if he does not, he will be sent home. In response, the complainant asks if the instruction is coming from the Warden. When that is confirmed, he then tells everyone that he is going home sick, and in the next breath produces the written section 128 work refusal and then advises that he will be pressing harassment charges against the Warden and CM Lemieux. Mr. Hare and the complainant debate over whether the complainant is being sent home or whether he is going home sick. By the end of the meeting, which lasts just over four minutes, the complainant is leaving the Institution, stating that he is sick, caused by stress, and Mr. Hare has received from the complainant his written section 128 work refusal.

[57] The complainant left the Institution on February 10, 2010 and did not return to work until March 5, 2010.

[58] The section 128 written work refusal reads as follows:

> *On behalf of myself and every employee and visitor that enters the Institution, I am invoking section 128 of the labour code for the following reasons:*
>
> *1. There was no ergonomic assessment done on the vests.*

> *2. The air in my office hampers my ability to breath [sic] when I have the vest on.*
>
> *3. According to section 12.1(b) the use of protection equipment may prevent or reduce injury from that hazard,* ***every person granted access to the work place who is exposed to that hazard shall use the protection equipment <u>prescribed</u> by this Part.***
>
> *On February 9, 2010 I was threatened with disciplinary action by Correctional Manager Yves Lemieux, this is contrary to section 147 of the code (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.)*
>
> *There was an agreement in place with CM Bob Taylor who was handling the original complaint, so I must consider this harassment as my livelihood has been threatened. Warden Paul Bourque was aware of the agreement but gave the direction to Yves to discipline me.*
>
> [Emphasis in the original]

[59] There was no evidence of a harassment complaint filed by the complainant regarding Mr. Bourque or Mr. Lemieux.

[60] During the course of the meeting, the complainant alleged that he had an agreement with CM Taylor with respect to the vest; however, no specifics of that agreement were discussed during the meeting.

[61] The complainant testified that the agreement he believed he had with CM Taylor was that an ergonomic assessment would be carried out with respect to wearing the vest while seated working at a desk.

[62] CM Taylor testified that the only agreement he could recall with the complainant about the vest was with respect to the section 128 work refusal of June 19, 2009. He stated that, at that time, he agreed that the complainant could work in the V & C coordinator's office without his vest on that day, pending the repair of the air conditioning for that area.

[63] On February 11, 2010, the complainant sent Mr. Hare an email requesting, as he phrased it, the status of his different "labour codes." Mr. Hare replied to the complainant via email on February 16, 2010 and attached the following three documents:

1. An email from Mr. Morais, dated February 15, 2010.

2. A document entitled, *Response to Canada Labour Code Section 128 Refusal to Work from Officer Doug White dated Feb 10th, 2010 (undated).*

3. A letter from Warden Bourque to the complainant, dated February 16, 2010.

[64] Mr. Bourque confirmed that both the Warden's letter of February 16, 2010 and the *Response to Canada Labour Code Section 128 Refusal to Work from Officer Doug White dated Feb 10th, 2010*, attached to Mr. Hare's February 16, 2010 email, were sent under his authority, although they were signed on his behalf by the DW. The complainant confirmed that he received the email and all three documents.

[65] Mr. Bourque confirmed in his evidence that the document entitled *Response to Canada Labour Code Section 128 Refusal to Work from Officer Doug White dated Feb 10th, 2010,* was his response to the complainant's February 10, 2010 section 128 work refusal. It states that he received and reviewed the work refusal and that he will not address the concerns as a work refusal. In his evidence before me, Mr. Bourque stated that he did not agree that the complainant's actions on February 10, 2010 were a legitimate refusal to work due to a danger as defined by the *Code*. He did not agree that there was a danger.

[66] The Warden's letter dated February 16, 2010 states as follows at its fourth paragraph:

> *As you have indicated you had difficulty breathing while wearing the anti-stab vest when you are in your office, and as you know, the vest must be worn for the safety of our*

> *correctional officers, we require clarification from your treating practitioner regarding the following:*
>
> > *-What is your current level of fitness to return to work; totally disabled, partially disabled with limitations or fit to return to substantive position without limitations?*
> >
> > *-If you are fit to return to your substantive position, please provide medical certification confirming this.*
> >
> > *-If you are currently totally disabled, when is your date of next reassessment and potential return to work date?*
> >
> > *-If you are partially disabled, what are your functional limitations? Are they temporary or permanent in nature? If they are temporary, what is the date of next reassessment?*

[67] That paragraph forms the basis of the complainant's allegation of reprisal.

[68] The complainant responded to Mr. Hare's February 16, 2010 email that same day, stating that his 128 work refusal was ". . . on the air quality, ergonomic assessment and lack of safety equipment for all staff in the Institution." He further stated as follows:

> *At no time did I indicate to you that I was leaving because of these reasons. I will deal with Mr. Bourque refusing to accept my 128 when I return to work through the Labour Code . . . One more question on the medical letter, are you denying me entering the Institution without a medical certificate?*

[69] Mr. Hare responded to the complainant via email February 17, 2010, stating the following:

> *I agree Doug, that you, when asked to put your vest on, gave me a 128 that stated that you had problems breathing in your office with the vest on among other issues and verbally stated that your* [sic] *were going off sick because of stress. You followed up with a WCB form. However due to your concerns about your health while wearing your vest the warden asked for a medical assessment in the letter that was sent to you via email.*
>
> *Since you were the one that raised the issue regarding breathing difficulty, management wanted to ensure that you are fit to perform all of the duties of your position. If you now say that you can wear the vest at work to perform your duties, there is no need for medical certification. In other words, you can return to work without a medical certificate as long as you are willing to wear the vest.*

[70] Both Mr. Hare and Mr. Bourque testified that the reason for the February 16, 2010 letter were the concerns about the complainant's health while wearing his vest. The complainant had raised the issue of breathing difficulty while wearing the vest, and management wanted to ensure that he was fit to perform his duties. Mr. Hare advised the complainant in his email of February 17, 2010 that, if in fact he could wear his vest at work without any health issues, there was no need for a medical certificate.

[71] There is no evidence of any communication after Mr. Hare's email of February 17, 2010, until Mr. Hare emailed the complainant on February 26, 2010. In that email, Mr. Hare reiterated to the complainant that nothing had changed and that he could return to work without a medical certificate, as per clause 31.03 of the relevant collective agreement, as long as he wore his vest. He ended the email by advising the complainant that, if he had any questions, he could contact him.

[72] The complainant replied to Mr. Hare's email that same day, stating that he would return to work without a medical certificate only if he were so informed in writing by the Warden, since the Warden sent him the letter requiring him to obtain one. The complainant also stated that he was using his sick leave because of the memo requiring him to obtain a medical certificate and stated that that was not the reason he was off work. Mr. Hare emailed the complainant back that same day and again confirmed that he could return to work without a medical certificate if he wore his vest, and Mr. Hare confirmed that that was the Warden's position.

[73] The complainant returned to work on March 5, 2010. There was no evidence that he either obtained or provided a medical certificate or that the Warden provided the complainant with anything in writing confirming what Mr. Hare had already stated in his emails of February 17 and 26, 2010.

[74] The time the complainant was off work was recorded into the pay system as sick leave, as vacation leave and as leave for union business. No leave forms were submitted into evidence, and it is not clear whether the complainant requested the leave in the form it was recorded or if it was recorded by managers based on their interpretations of events. Of the leave recorded during the period the complainant was away from work between February 10 and March 5, 2010, 46 hours were recorded as paid sick leave. Of the 46 hours of paid sick leave, only 16 hours were recorded after the complainant received the February 16, 2010 letter.

[75] The complainant testified that he has not seen a physician with respect to the breathing trouble when wearing his vest. He did not provide any evidence that he suffers from any form of respiratory ailment or from allergies. No medical evidence of any type was submitted into evidence.

[76] The only evidence with respect to the air quality in the V & C coordinator's office is contained in an undated "Air Quality Report" authored by Mr. Morais, based on tests he carried out between May 3 and 6, 2010. Mr. Morais testified about his testing and report. The report showed that the temperature, relative humidity, carbon monoxide and carbon dioxide levels were all tested and were found to be within normal acceptable indoor ranges. The report also reported on a visual inspection of the office, which did not disclose any dampness, odours or excessive visible dust.

[77] The complainant testified that mould was a rampant problem within the Institution and stated that the firing range had to be closed for a period as a result. There was no evidence as to the extent of that problem, when it occurred or when it was resolved.

[78] There was no evidence that mould was ever an issue in V & C, the V & C control post or the V & C coordinator's office. There was no evidence that the complainant ever suffered from any allergy or respiratory problem due to mould.

III. <u>Summary of the arguments</u>

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

[79] The question that has to be answered is whether the respondent imposed discipline on the complainant in whole or in part because he exercised his work refusal rights under section 128 of the *Code*.

[80] The complainant argued that the *Code* is the most important legislation an employee can rely on; it establishes employees' most important protections. The *Code* protects federal employees from working in dangerous situations, such as a beam that could fall on them, greasy steps that they could slip on or a bullet that could be found in the Institution. Equipment that an employee has to wear could also be dangerous.

[81] The complainant argued that it is not a heavy onus to invoke a work refusal under section 128 of the *Code*. His position is that the respondent does not have the

right to ignore or to not accept a work refusal. The series of emails between the complainant and Mr. Hare do not suggest that the complainant gave up his work refusal. Once the complainant invokes a work refusal, and once retaliation occurs, there is a reverse onus on the respondent to prove that the action taken did not violate the *Code*.

[82] The complainant stated that there was not only a breach of section 128 of the *Code* but also of section 147 by virtue of the discipline imposed on him. As such, he has a valid complaint under section 133.

[83] The breach was clear; there was no meeting or assessment of the Institutional Occupational Health and Safety Committee; no call for a Health and Safety Officer ("HSO") to attend and investigate; and the respondent was retaliated against the complainant because he invoked his rights under the *Code*.

[84] According to the complainant, for some time, the air quality at the Institution was poor. He felt on February 10, 2010 that enough was enough. It was not a normal workday; he had to wear his vest while working at his computer, and he had difficulty breathing. He stated that, not only did he write up a section 128 work refusal before meeting with the managers, he also discussed his breathing difficulties with CM Taylor. He believed that he had an arrangement with management about wearing his vest while sitting in his office working at his desk.

[85] The complainant stated that he merely wanted a little latitude in his office when not dealing with inmates. Only 10 percent of his duties involved dealing with inmates, and he stated that, when he dealt with inmates, he wore his vest. His issue was wearing the vest while seated at his desk.

[86] The complainant stated that there were chronic problems with air quality, which he was particularly concerned about due to a son who suffered from visual problems that he attributed to air quality issues.

[87] The complainant argued that he never disobeyed a direct order and that, whenever he was instructed to put on his vest, he complied.

[88] The complainant stated that, once he was at home, no one asked him if he wanted to continue his work refusal and that there is no evidence that he did not want

to continue his work refusal. He was intimidated into wearing his vest. He had a reasonable belief that his life was in imminent danger.

[89] The complainant stated that, had he possessed in January 2010 Exhibit C-3, the draft “Job Hazard Analysis Worksheet” dated July 2008, perhaps he would not have filed his work refusal.

[90] The complainant stated that no ergonomic assessment was carried out on the vests.

[91] The complainant relied on *Canada Post v. Jolly* (1992), 87 di 218 (CLRB), which stands for the proposition that the only onus on an employee refusing to work is to show that he or she is motivated by a genuine safety concern. The complainant’s position is that he had a legitimate safety concern.

[92] The complainant relied on *Atkinson v. VIA Rail* (1992), 89 di 76 (CLRB), and *Chaney v. Auto Haulaway Inc.,* 2000 CIRB 47, which state that any person who exercises a work refusal in good faith, whether correct or not, is protected by both sections 133 and 147 of the *Code* against reprisals. According to the complainant, to find for the respondent, the Board must be satisfied that the action taken against the complainant was not tainted with retaliation.

[93] The complainant relied on *Di Palma v. Air Canada* (1996), 100 di 89 (CLRB), for the proposition that, if a complainant alleges that covert threats were made, which would be a contravention of paragraph 147(*a*) of the *Code*, the onus is on the employer to prove that it never threatened the complainant.

[94] The complainant’s position is that an email was sent on March 5, 2010, by Mr. Hare to Mr. Niles, the respondent’s second in command in its Atlantic Region, because the respondent wanted to discipline the complainant. Therefore, it was a covert threat.

[95] The complainant relied on *Chaves v. Correctional Service Canada,* 2005 PSLRB 45, for the proposition that the application of section 147 of the *Code* is not limited to financial reprisals; there are other ways to retaliate against an employee, such as requiring a medical note.

[96] The complainant stated that section 148 of the *Code* is there as a deterrence and can be used to send a message to the respondent that it cannot discipline an employee for invoking a work refusal. Sick leave credits have value, and by requiring the complainant to obtain a medical certificate before returning to work and to use sick leave credits pending his return, the respondent was retaliatory.

[97] The complainant also referred me to *Ouimet v. VIA Rail Canada Inc.*, 2002 CIRB 171; *Walker v. Northwinds Northern Inc.,* (1988), 78 di 123 (CLRB); *Robitaille v. Treasury Board (Correctional Service of Canada),* [1990] C.P.S.S.R.B. No. 131; *Lequesne v. Canadian National Railway Company,* 2004 CIRB 276; *Kucher v. Canadian National Railway Company* (1996), 102 di 121 (CLRB); *Boivin v. Canada Customs and Revenue Agency,* 2003 PSSRB 94; *Blakely v. Algoma Central Corporation,* 2003 CIRB 240; and *Baker v. Polymer Distribution Inc.,* 2000 CIRB 75.

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

[98] The respondent stated that the Board has to address the following three issues:

1. Did the complainant have a reasonable basis to exercise his right to refuse to work?

2. Were sanctions taken against the complainant by the respondent, and if so, did those sanctions constitute discipline?

3. If the action taken by the respondent was disciplinary, has the respondent proven that it was related to something other than the complainant's refusal to work?

[99] The respondent's position is that the complainant did not have a valid section 128 work refusal, that no sanctions were taken against the complainant, and that, if there was any action by the respondent, it had nothing to do with the complainant's section 128 work refusal. Since there was no valid refusal to work, there can have been no reprisal, and therefore, the Board is without jurisdiction.

[100] The respondent stated that the complainant's work refusal on February 10, 2010 was not a valid work refusal due to a danger but a pre meditated attempt by him to avoid being sent home for not wearing the vest. The respondent

stated that there was no danger or any reasonable belief of danger, and the evidence supports a conclusion that the complainant's work refusal was not about danger.

[101] The complainant used section 128 of the *Code* to bring forward his ongoing dispute with the respondent about wearing the vest and air quality. Neither reason is a legitimate purpose under section 128. The evidence shows that the complainant did not like wearing his vest, which had been an ongoing issue for several months not just in the V & C coordinator's office but throughout the Institution. The evidence was clear that he was constantly being told to put his vest on. The respondent stated that the complainant constantly had different reasons for not wearing his vest.

[102] While the complainant stated that he is not a first responder, as defined by the respondent's policies, and therefore need not wear a vest at all times, he is a CX, and the policy is clear that all CXs, regardless of their duties, are required to wear the vest while at work at the Institution.

[103] As of February 9, 2010, the respondent determined that the complainant's ongoing refusal to wear his vest while at work had to be addressed. A course of action was set, and it was determined that the complainant would be asked and then ordered to wear his vest, failing which he would be sent home. The complainant admitted that one of the reasons he wrote up his section 128 work refusal was to avoid being sent home. The first line states that, on February 9, 2010, he was "threatened" with being sent home. That is clear evidence that the complainant's action on February 10, 2010 was premeditated.

[104] The complainant had been warned on February 9, 2010 that he was to wear his vest, failing which action would be taken if he showed up at work without it. He came into work on February 10, 2010 without his vest, typed up the section 128 work refusal, and went to the meeting with the AWO, his CM and his union representative, and when given the direct order, handed them the work refusal and told them that they could not send him home without pay as he had made a valid work refusal under section 128.

[105] The complainant also stated that he went home sick due to the stress of suffering harassment at the hands of his CM and the Warden for being told to wear his vest. It is clear that the motivation for filing the section 128 work refusal was to avoid being sent home without pay.

[106] The respondent argued that the complainant's version of events is just not believable. The digital recording indicates that the work refusal is not raised until after the complainant is told that he will be given a direct order to put on his vest and, if he does not comply, he will be sent home. Only once the complainant confirms the course of action that will be taken and the source of the instruction does he raise the section 128 work refusal.

[107] The respondent stated that the complainant was using section 128 of the *Code* to bring forward his vest issues, which had been ongoing and that he identified as longstanding. The complainant stated in his testimony that "enough was enough" about his complaints about the air quality in his office and his request for an ergonomic assessment of the vest. The complainant confirmed that he had an outstanding section 127 complaint under the *Code* about his views on the ergonomic assessment for the vest.

[108] With respect to the ongoing air issues, the complainant admitted in cross-examination that the air quality was a chronic problem in the Institution and that it had always been bad and that the air on February 10, 2010 was no different from any other day. The complainant linked the difficulty breathing with the air quality in his office; however, he also stated that he did not have any difficulty breathing when his vest was off. He also testified that he did not go to his doctor or obtain a medical certificate because he never had any trouble breathing and was fully capable of fulfilling his duties. The complainant also stated that he has no health issues.

[109] The respondent stated that there were many inconsistencies with the complainant's testimony. The written section 128 work refusal refers to issues that have nothing to do with a danger to the complainant, such as ergonomic assessments and whether visitors to the Institution have to wear the vests. The respondent stated that it is an interesting and inconsistent argument that the complainant made that, on one hand, everyone who comes into contact with inmates should be required to wear a vest, yet, on the other hand, he stated that he was endangered by wearing his vest.

[110] It is clear from the Warden's correspondence sent via email of February 16, 2010 that the respondent did not accept the complainant's section 128 work refusal, as it did not view the situation as one of danger. The email exchange between the complainant and the AWO between February 16 and 26, 2010, does not refer to the complainant maintaining his work refusal.

[111] The respondent's position is that an employee's discomfort does not equate to a danger or a hazard. Heat stress analyses were carried out with respect to the vest, and no danger was identified. An air quality assessment was done on the V & C coordinator's office, and no problems were found.

[112] Mr. Lemieux's evidence was that the complainant not only was not wearing his vest but also that he did not have it with him. Thus, it was impossible for him to have been in any danger from wearing the vest in his office.

[113] The complainant's arguments on the assessment by a physician as opposed to an HSO are contradictory. If he had a breathing problem, why did he not seek medical assistance or an assessment? If a physician could not assess him off-site, how would an HSO assess him off-site, particularly when the problem was medical?

[114] The complainant's evidence about being forced to use his sick leave credits was not credible. The evidence showed that the time he was away from work was charged against three different types of paid leave, uncertified sick leave, vacation leave and union business. The complainant claimed that he was forced to use his sick leave. The only evidence is the leave shown as approved. The argument that he was forced to use his sick leave makes no sense when the leave shown as taken was of three different types, and he voluntarily took sick leave.

[115] The respondent referred me to *Verville v. Canada (Correctional Services),* 2004 FC 767, and *Chapman v. Canada (Customs and Revenue Agency),* [2003] C.L.C.A.O.D. No. 17 (QL), with respect to the definition and interpretation of danger and what must exist for a finding of danger to be made. The respondent's position is that the complainant never satisfied the onus of showing that a danger existed. The employer has the right under the *Code* to disagree that there is a danger. Once it does, it is incumbent on the employee to keep the refusal process moving forward. The complainant did not do so once advised that the respondent did not agree that there was a danger.

[116] The respondent relied on *Canada (Attorney General) v. Fletcher,* 2002 FCA 424, and *Welbourne v. Canadian Pacific Railway Co.,* [2001] C.L.C.A.O.D. No. 9 (QL), in support of its position that a work danger cannot be hypothetical or speculative. While the *Code* states that it can be about the future, reasonableness and certainty are required.

[117] The respondent stated that *Employees and Amalgamated Transit Union v. Laidlaw Transit Ltd. – Para Transpo Division,* [2001] C.L.C.A.O.D. No. 19 (QL), holds that the danger has to be identified; a suspicion is not sufficient. There must be a reasonable degree of certainty between the thing being complained of and the danger. There must be evidence. The respondent relied on *Budgen v. Treasury Board (Solicitor General Canada),* [1988] C.P.S.S.R.B. No. 236 (QL), as support for its position that the employer is not required to undertake a fishing expedition. There has to be an obvious and reasonable nexus between the person and the danger. At one point during his testimony, the complainant stated that he filed his section 128 work refusal because he wanted to see if there was an air quality problem. He stated that air quality was an ongoing issue. According to the respondent, although air quality may have been an ongoing issue, it was not necessarily a danger.

[118] Section 128 of the *Code* is not to be used to bring labour relations or other workplace issues to a head to be dealt with. *Koski v. Canadian Pacific Limited* (1993), 92 di 195 (CLRB), states that section 128 is not meant to deal with systemic or chronic situations but with acute and immediate hazards. Systemic or chronic situations are to be dealt with through other parts of the *Code*. Air quality was an ongoing issue and was not a new issue, and it should have been dealt with under other sections of the *Code*.

[119] The second and third issues identified by the respondent are whether the complainant suffered a reprisal that was disciplinary in nature, and if he did, whether there was a direct link between the respondent's action and the exercise of the section 128 work refusal. The respondent stated that there was no reprisal as defined by the *Code*.

[120] The respondent stated that, if a threat of discipline was made, it was made before any section 128 work refusal. The complainant was advised on February 9, 2010 that he was required to wear his vest, failing which action would be taken. It cannot be considered a reprisal. The action that was to be taken was that the complainant would be sent home should he refuse to wear his vest. While he did go home, he did so of his own volition, stating that he was sick, which the AWO accepted.

[121] The complainant stated that the requirement for him to undergo a fitness-to-work evaluation ("FTW") was a retaliation. The evidence was that the Warden the and AWO were of the view that an FTW was required based on what the

complainant wrote in his section 128 work refusal and the health issues raised that he was having trouble breathing while wearing his vest. They felt that, since he was having trouble breathing, the most appropriate person to assess him would be a physician. Given that the complainant was required to wear a vest to do his job, the fact that he could not breathe while wearing it could have made returning to work a challenge.

[122] No disciplinary action was taken against the complainant. No financial penalty was imposed. The speculation that the email from the AWO to Mr. Niles was some form of retaliation does not qualify as a reprisal under section 147 of the *Code*.

[123] The respondent relied on *Stead and Weda v. Deputy Head (Correctional Service of Canada),* 2012 PSLRB 87, for the proposition that, for discipline to occur, there has to be an intent to discipline. There was no intent to discipline the complainant. The intent was administrative; he was not wearing his vest and was required to wear it while at work. It was a requirement of the job. No discipline was imposed; nor was there an intention to discipline, and in any event, no action was taken, as the complainant went home sick.

[124] *Boivin* stands for the proposition that an employer can reasonably request an FTW evaluation even under a section 128 work refusal about the same fact situation, and the FTW evaluation will not be seen as retaliatory or as a reprisal as defined by section 147 of the *Code*.

[125] The respondent also relied on *Welbourne*; *Brailsford v. Worldways Canada Ltd.* (1992), 87 di 98 (CLRB); *Leary v. Treasury Board (Department of National Defence et al.),* 2005 PSLRB 35; *Creamer v. Treasury Board (Health Canada),* PSSRB File No. 165-02-94 (19961107); *Boucher v. Canada (Correctional Service),* [2002] C.L.C.A.O.D. No. 20 (QL); *Webber v. Treasury Board (Health and Welfare Canada),* PSSRB File No. 165-02-92 (19930510); and *Fletcher.*

C. Complainant's reply

[126] The complainant stated that all the cases cited by the respondent are irrelevant as they involve situations in which the *Code* was respected and followed. In this case, the respondent did not respect the *Code*. The complainant said that he could not breathe; rather than accept that fact, the respondent took the position that there was no danger and ignored the *Code*.

[127] The definition of "danger" is very broad. The complainant provided enough information for the respondent to investigate. Under subsection 128(10) of the *Code*, if no investigation is launched, it is incumbent on the respondent to call the HSO.

[128] The complainant stated that the respondent breached the *Code* by not involving the Joint Occupational Health and Safety Committee and by not calling in the HSO. The respondent should have done both. The complainant even told the AWO when he was leaving the Institution that the HSO could reach him at home. He certainly was not dropping his request to have the danger investigated.

[129] The complainant stated that this was the first time that an employee was ever required to undergo an FTW evaluation due to making a work refusal under section 128 of the *Code*. The evidence shows that, because the complainant invoked his right to refuse to work under section 128, he was required to obtain a medical certificate.

[130] The complainant stated that there is a conflict in the evidence in that Mr. Lemieux stated that the complainant did not inform him that he was making a work refusal under section 128 of the *Code*. The complainant stated in re-examination that he told his manager that he was going to invoke section 128 and that it was because he could not breathe.

[131] The complainant stated that the danger was not hypothetical, that he could not breathe and that something in the office was causing him breathing problems. A physician could not have put anything in a note. The Institution's firing range had to be closed down because of mould. An ergonomic assessment could have assisted.

[132] The complainant stated that he did not need accommodation and that the respondent's accommodation suggestion was meaningless. In accommodation cases, employees ask for accommodation; in this case, the complainant never asked for it.

IV. <u>Reasons</u>

[133] The Board's jurisdiction to hear complaints under the *Code* flows from section 240 of the *Public Service Labour Relations Act* ("the *Act*"), which states as follows:

> ***240.*** *Part II of the* Canada Labour Code *applies to and in respect of the public service and persons employed in it as if the public service were a federal work, undertaking or*

business referred to in that Part except that, for the purpose of that application,

*(*a*) any reference in that Part to*

(i) "arbitration" is to be read as a reference to adjudication under Part 2,

(ii) the "Board" is to be read as a reference to the Public Service Labour Relations Board,

(iii) a "collective agreement" is to be read as a reference to a collective agreement within the meaning of subsection 2(1),

(iv) "employee" is to be read as a reference to a person employed in the public service, and

(v) a "trade union" is to be read as a reference to an employee organization within the meaning of subsection 2(1);

*(*b*) section 156 of that Act does not apply in respect of the Public Service Labour Relations Board; and*

*(*c*) the provisions of this Act apply, with any modifications that the circumstances require, in respect of matters brought before the Public Service Labour Relations Board.*

[134] Section 133 of the *Code* sets out the process for filing complaints under the *Code.* The subsections relevant to this case are as follows:

Complaint to Board

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 out 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.

[135] Section 147 of the *Code* prohibits an employer from taking reprisal actions against an employee and states as follows:

General prohibition re employer

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.*

[136] Section 128 is the section of the *Code* that permits an employee to refuse to work in certain situations of danger. The subsections relevant for this case are 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.

. . .

(13) If an employer disputes a matter reported under subsection (9) or takes steps to protect employees from the danger, and the employee has reasonable cause to believe that the danger continues to exist, the employee may

> *continue to refuse to use or operate the machine or thing, work in that place or perform that activity. On being informed of the continued refusal, the employer shall notify a health and safety officer.*

[137] Section 240 of the *Act* states that Part II of the *Code* applies to and in respect of the public service. All of sections 128, 133 and 147 of the *Code* fall within Part II, and as a complaint has been filed under section 133 of the *Code* alleging a reprisal under section 147, I have jurisdiction to hear and determine the matter.

[138] Pursuant to subsection 133(6) of the *Code*, once filed, the complaint is 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. The initial burden of proof lies with the complainant, who must prove only that he or she has filed a complaint under subsection 133(1) of the *Code* and that the complaint arose in respect of a right being exercised under either section 128 or section 129 of the *Code.*

[139] The complaint was filed with the Board on March 17, 2010, and sets out, at paragraph 3, the following concise statement of the matter complained of:

> *On February 10, 2010 I submitted a work refusal to Kevin Hare. I left work because I was sick, which had nothing to do with the 128. On February 16th I received written notice that Warden Paul Bourque would not entertain the 128, and that before I returned to work I must get medical clearance from my Doctor on my 128 points. There was no work place investigation but only 3 senior managers decided this on there* [sic] *own (Paul Bourque, Daryl Blacquiere and Kevin Hare). There was also a letter that was put on my file because of the 128.*

[140] A copy of the section 128 written work refusal dated February 10, 2010 was submitted into evidence.

[141] I find that the initial burden upon the complainant was met, as a complaint was filed within the time limits set out by subsection 133(2) of the *Code* that arose out of the filing of a work refusal under subsection 128(1). Since that initial burden was met, it was incumbent on the respondent under subsection 133(6) to prove that a contravention of section 147 did not occur.

[142] The burden established by subsection 133(6) of the *Code*, which is proving that a contravention of section 147 did not occur, will be satisfied by the respondent if it can establish any one of the following:

1. The complainant did not act in accordance with section 128.

2. The respondent neither disciplined nor financially penalized the complainant.

3. If the respondent either disciplined or financially penalized the complainant, it was not in any way related to the complainant exercising his rights under section 128 of the *Code*.

[143] The test to determine whether the complainant acted in accordance with section 128 of the *Code* has been settled by the jurisprudence. In *Chaney*, the Canada Industrial Relations Board ("CIRB") held that, in section 133 complaint cases, ". . . a major consideration is whether the employee who has exercised the right to refuse did have reasonable cause to believe that danger existed." The CIRB went on to state the following:

. . .

> *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. . . .*

. . .

[144] The Board in *Boivin* held that employees who have a reasonable belief that a condition exists in any workplace that constitutes a danger have the right to refuse work. Employers who impose penalties on such employees because they exercised that right are in violation of section 147 of the *Code.*

[145] The Board also held as follows in *Boivin* that, in determining whether to uphold a complaint under section 133 of the *Code:*

. . .

> *[127] . . . the Board must review whether the employee had a reasonable cause to believe that a dangerous condition existed before he withdrew his services. If this condition cannot be met, then the employer's action, whether disciplinary or not, is not a violation of the* Code*.*

. . .

[146] "Danger" is defined in subsection 122(1) of the *Code* as follows:

> *"danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.*

[147] Many of the cases cited by the parties address what may or may not constitute a danger. However, the complainant does not have to establish that he was actually in danger to be protected from a reprisal. As stated in *Chaney* and *Boivin,* a complainant has only to establish that he or she had reasonable cause to believe that a dangerous condition existed.

[148] The complainant suggested that the cases cited by the respondent were irrelevant as they all dealt with fact scenarios in which the employer respected the *Code*. Both parties led evidence, and argued about the errors in process under section 128 of the *Code*. In essence, both parties pointed their fingers at the other as not having followed the process set out in section 128. The complainant's argument was that the respondent could not deny the work refusal, and as such, the work refusal remained in effect, and he never conceded that it was withdrawn or abandoned. Hence, the complainant acted in accordance with section 128. The respondent argued that it had the right to deny the work refusal and that it was incumbent on the complainant, when so advised, to take steps to confirm his continuing refusal to work, such that the process in section 128 moved forward. If the complainant does not take that step, the work refusal process comes to an end. Therefore, the complainant has not acted in accordance with the *Code*.

[149] I agree with the respondent's argument with respect to the process under section 128 of the *Code*. The process was put in place for a reason. Section 128 is an extraordinary section that allows employees to refuse to work when they believe there is a danger. It is there to protect them. If the danger continues to exist or there is a dispute as to its existence, it is paramount that the employee continue to be protected and that the situation be dealt with.

[150] The fact that a refusing employee does not follow the process set out in section 128 of the *Code* and indicates a continued work refusal ends the section 128 process. That said, the fact that the employee has not followed the process or that a work refusal has ended does not exonerate an employer under sections 133 and 147.

[151] The respondent clearly notified the complainant on February 16, 2010 that it did not accept his February 10, 2010 written section 128 work refusal; the complainant confirmed by email on February 17, 2010 that he understood. It was incumbent on him under subsection 128(9) to notify the respondent as well as the workplace committee or the health and safety representative of his continued refusal. He did not. While I find that the complainant did not comply with subsection 128(9), this does not determine the matter of whether he had reasonable cause to believe that he was in danger when he engaged section 128 on February 10, 2010.

[152] The definition of "danger," as set out in the *Code*, and as further refined in the jurisprudence, refers to hazards, conditions or activities. The workplace, the situation and even the individual could potentially define what danger is in any given set of circumstances. In *Welbourne,* the appeals officer stated the following:

. . .

> *[19] The existing or potential hazard or condition or the current or future activity referred to in the definition must be one that can reasonably be expected to cause injury or illness to the person exposed to it before the hazard or condition can be corrected or the activity altered. Therefore, the concept of reasonable expectation excludes hypothetical or speculative situations.*
>
> *[20] The expression* "before the hazard or condition can be corrected" *has been interpreted to mean that injury or illness is likely to occur right there and then i.e. immediately. However, in the current definition of danger, a reference to hazard, condition or activity must be read in conjunction to the existing or potential hazard or condition or the current or*

> *future activity, thus appearing to remove from the previous concept of danger the requisite that the injury or illness will likely occur right there and then. In reality however, injury or illness can only occur upon actual exposure to the hazard, condition or activity. Therefore, given the gravity of the situation, there must be a reasonable degree of certainty that an injury or illness is likely to occur right there and then upon exposure to the hazard, condition or activity unless the hazard or condition is corrected or the activity is altered. . . .*

. . .

[153] The activity, hazard or condition that is the source of the danger as expressed by the complainant in his evidence was his individually assigned stab-proof vest. His allegation was that he could not breathe with his vest on in the V & C coordinator's office the morning of February 10, 2010. As stated in *Welbourne*, injury or illness can occur only upon actual exposure to the hazard, condition or activity. In the complainant's case, the vest must at the very least be present; if it is not, there is no possible way that the complainant had reasonable cause to believe that he could not breathe with his vest on in the V & C coordinator's office that morning.

[154] With respect to what occurred on February 10, 2010, two things are clear and not in dispute. The complainant was not wearing his vest on that day, and only the complainant and Mr. Lemieux were present in the V & C coordinator's office when they discussed the complainant not wearing the vest on that day. The complainant's evidence as to what occurred differs from that of Mr. Lemieux with respect to the most important fact, which was whether the complainant actually had his vest with him. I am faced with two opposing sets of facts and must determine what occurred. To do it, I must assess the credibility of the testimonies of the two witnesses.

[155] The well-known test for credibility is set out in the oft cited *Faryna v. Chorny,* [1952] 2 D.L.R. 354 (BCCA), in which the Court stated the following:

. . .

> *If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. . . .*

> *The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. . . .*

. . .

[156] When I reviewed the evidence in its entirety, the oral testimonies of all the witnesses, together with the documents filed and the digital recording, the testimony of Mr. Lemieux withstood the test as enunciated in *Faryna*. The complainant's evidence is not only inconsistent with the other evidence, but also, at times, he contradicted himself. The fact scenario as set out by Messrs. Lemieux, Hare and Bourque about what occurred on February 9 and 10, 2010 is corroborated by what is on the recording.

[157] The complainant did not recall having had a discussion with Mr. Lemieux on February 9, 2010, about the vest. However, the complainant's written section 128 work refusal, typed on the morning of February 10, 2010, states as follows at the second paragraph, "On February 9, 2010 I was threatened with disciplinary action by Correctional Manager Yves Lemieux, this is contrary to section 147 of the code . . . ."

[158] In his evidence-in-chief, when referred to that sentence and asked about the date, the complainant suggested that it was the wrong date and that it was a typo because the right date was February 10, 2010. The complainant had no recollection of anything occurring on February 9, 2010. Yet, he specifically wrote that "[o]n February 9, 2010 I was threatened . . . ."

[159] In the same breath, the complainant stated that he believed that he had been targeted. Of that, I have no doubt, as the evidence of Messrs. Hare, Bourque and Lemieux verified it. However, the complainant's testimony, about how he came to know of it did not coincide with the evidence. In fact, it was nothing but speculation. He stated that he knew he had been targeted because he believed that he and the vest were discussed at the morning briefing meeting. How he came to know that he could not explain, as no evidence was adduced that he was discussed at the morning management meeting or at the morning briefing. No one testified to that effect. No

document was produced that suggested that it occurred. This point was not put to any of the respondent's witnesses, including Mr. Lemieux, who testified that he attended the daily management meeting.

[160] On the other hand, Mr. Lemieux testified that, on February 9, 2010, when the complainant was not wearing his vest, he discussed it with his supervisor, Mr. Hare. He described for me the discussion he had with Mr. Hare and the instructions that Mr. Hare gave him. He also testified as to how he carried out those instructions by telling the complainant on February 9, 2010 and again on February 10, 2010 to wear his vest, and that, if he did not comply, he would be given a direct order to put it on, failing which administrative action may be taken. One certainly could interpret that as a warning or even a threat.

[161] Mr. Hare and Mr. Bourque each testified that they recalled having discussions on February 9, 2010 about the complainant not wearing the vest and about deciding on a plan of action. The plan included instructing the complainant on February 9, 2010 and again on February 10, 2010 to wear his vest, and if he did not comply, he would be given a direct order to put it on. Mr. Hare described separate discussions with Mr. Lemieux and Mr. Bourque. Mr. Bourque described only one discussion with Mr. Hare. The plan was corroborated not only by Mr. Lemieux's evidence of what he did but also ultimately by the complainant's digital recording.

[162] Either the complainant is speculating as to what he thinks might have occurred, to make him believe that he was targeted, or he knew that he was being targeted because his supervisor told him so. When I assessed all the evidence, I came to believe that, on February 9, 2010, the complainant was not wearing his vest. His superiors addressed it, and they created a plan to deal with the complainant's behaviour. He was warned.

[163] This brings us to February 10, 2010. Mr. Lemieux testified that, on that morning, he went into the V & C coordinator's office. When he saw that the complainant was not wearing his vest and did not have it with him, he asked the complainant where his vest was. The complainant said that it was at his home. Mr. Lemieux said that, after the exchange, he reminded the complainant of their discussion of the previous morning and that he was going to see Mr. Hare. He stated that the complainant did not tell him that he was refusing to work due to a danger; nor was Mr. Lemieux provided with a

written section 128 work refusal. He stated that he did not discipline the complainant or tell him to go home.

[164] The complainant confirmed that he made the digital recording and that he began recording while he was still in the V & C coordinator's office. It starts with a door opening and a voice (identified as Mr. Lemieux) telling the complainant that Mr. Hare will see him. The recording device is not shut off. One can hear what is obviously walking, stairs being climbed and doors and gates opening and closing. The recording never stops. After roughly a minute, the speaking continues with the start of the meeting, which is the key part of the recording. It is transcribed as follows:

> ***White**: Okay, just for a, I'll start off, I guess, just for my own records, I'd like everybody to identify themselves on the tape, my name is Dougie White and I have Joel Banks with me, for a union rep.*
>
> ***Lemieux**: Yves Lemieux, Correctional Manager, Unit Two.*
>
> ***Hare**: Kevin Hare, I'm actually the, currently the acting Deputy Warden. Basically, what we, it is very simple Doug, the Warden has asked us to give you a direct order to put your vest on, um, and if you refuse that direct order, you are to go home.*
>
> ***White**: So this is coming from the Warden?*
>
> ***Hare**: Yes.*
>
> ***White**: Kay, uh, I'm going home, I'm going home sick. I'm evoking* [invoking] *128 right now and I'm also pressing harassment charges against uh Paul Bourque and Mr. Lemieux. This has been ongoing every time I do something to the Warden, send him an email or anything, he comes back with this here, okay*
>
> ***Hare**: no this*
>
> ***White**: he's called me a rat in the institution, he's called me everything in here and I am tired of it; this is harassment, uh, I have a 127*
>
> ***Hare**: I wanna, I want to be clear Doug, you are not going home sick.*
>
> ***White**: I'm going home sick.*
>
> ***Hare**: We're sending you home.*

> ***White**: No I just evoked* [invoked] *the Labour Code, okay, 128 work refusal, okay.*
>
> ***Hare**: Okay.*
>
> ***White**: It's in writing right there, okay, also I'm being harassed, and you can't tell me if I'm not going home sick or not, I am tired of being under the gun all the time here, okay, I sent an email off to the Warden here a couple of days ago and I know for a fact that what this is all about, so I am going home sick . . .*

[165] Sometime between Mr. Lemieux checking on the complainant and then returning and advising him of the meeting, the complainant arranged for Mr. Banks to join him in the meeting in Mr. Hare's office. Mr. Banks testified that, when Mr. Lemieux came to get the complainant for the meeting, he was with the complainant in the V & C coordinator's office. He further stated in his evidence that the complainant knew that the purpose of the meeting was to give the complainant a direct order to wear his vest. Mr. Banks did not provide any evidence as to whether the complainant was in possession of his vest that day.

[166] The recording discloses that Mr. Hare believed that they were meeting with the complainant to give him a direct order to wear his vest, failing which he would be sent home. Had the complainant refused to work, and had he invoked his rights under section 128 of the *Code* and conveyed as much to Mr. Lemieux in their first meeting on the morning of February 10, 2010, I expect that the meeting with Mr. Hare would have started out quite differently. I would have expected that, at the very least, either Mr. Lemieux would have brought the refusal to the attention of Mr. Hare, or the complainant would have, and the issue they would have discussed from the outset would have been the work refusal, not the issuing of a direct order.

[167] What the complainant states on the recording is very telling. After he has been told the purpose of the meeting and after he has confirmed the Warden's involvement, he states that "I'm evoking [invoking] 128 right now." If he had already invoked section 128 of the *Code* and had refused to work, I would have expected him to have said that he had already refused to work or had invoked section 128, rather than using the phrase "right now." After he makes that statement, some back and forth ensues between him and Mr. Hare, and he then states, "I just evoked [invoked] the Labour Code, okay, 128 work refusal." After hearing the recording, the back and forth of the discussion, the intonation of the voices, and the complainant's use of the modifiers

"right now" and "just" to describe what he is doing, it became clear to me that the section 128 work refusal was first raised in the meeting with Mr. Hare.

[168] I have difficulty accepting the complainant's version of what occurred in the V & C coordinator's office on the morning of February 10, 2010, as his version of events does not accord with the evidence of the other witnesses, or more importantly, with his recording and testimony. The complainant testified that, on February 10, 2010, Mr. Lemieux told him in their meeting in the V & C coordinator's office that not only was he being disciplined but he was also being sent home, suspended without pay. If that were in fact true, then why was a second meeting held with Mr. Hare? Later in his testimony, his story changed, and he stated that he believed he was going to be sent home, which was why he typed the section 128 work refusal. He also stated that he told Mr. Lemieux that he was invoking section 128 of the *Code*.

[169] Mr. Lemieux testified that, when he saw that the complainant was not wearing his vest on February 9, 2010, he went to his superiors to seek instruction and advice. Their evidence was that they determined a course of action, and Mr. Lemieux was involved in executing that plan. If Mr. Lemieux had the authority to discipline the complainant on February 10, 2010, why did he leave and arrange a meeting with AWO Hare? It is clear from the recording and from what Mr. Hare said that his purpose in meeting was to give the complainant a direct order to put on his vest, failing which he would be sent home; that was stated at the outset of the meeting. Even after Mr. Hare states the purpose of the meeting and the instruction, the complainant asks him to verify that the instruction is coming from the Warden. Even after Mr. Hare confirms that the instruction is coming from the Warden, the complainant states that he will go home, but not because he is disobeying a direct order but because he is sick. Only after that exchange is over does he state that he is invoking section 128 of the *Code*.

[170] Had Mr. Lemieux ordered the complainant to go home, why would Mr. Lemieux then see Mr. Hare to arrange a meeting so that they could give the complainant a direct order to put on his vest, failing which they would send him home? If the complainant already refused to work, citing section 128 of the *Code,* why was it not the order of business at the outset of the discussion? Indeed, it was also the evidence of Mr. Banks, the complainant's representative, who stated that the complainant believed that the

purpose of the meeting with Mr. Hare was to give a direct order. The complainant's version of events does not withstand the test of credibility.

[171] I also find that the complainant's version of events does not coincide with the reality of the workplace. Mr. Lemieux was not a substantive CM at that time; he was a CX-2. His evidence was that he was new to his acting position and that it was the first time he had ever acted as a CM. He stated that he had no experience in either disciplining or taking administrative action against employees. It makes sense that he sought the advice of his superiors for that reason alone. However, in addition, Mr. Lemieux's substantive position as a CX-2 was at the same group and level as the complainant; a position that was included in the bargaining unit, represented by the bargaining agent, of which the complainant was the Atlantic Region vice president. It is highly likely that Mr. Lemieux would have deferred a decision such as an administrative suspension or the outright disciplining of a colleague and executive of the bargaining agent to someone further up the institutional chain of command.

[172] The complainant testified that the air quality in the Institution was a chronic problem and specifically mentioned the finding of mould at the firing range. That does not assist me in determining whether he had reasonable cause to believe that he was in danger when he submitted his work refusal on February 10, 2010. The only location at that time in which the air quality mattered was in the V & C coordinator's office, and again, the complainant's testimony was inconsistent and at times contradictory. He initially testified that there was black dust coming from the vent and that he could not breathe with his vest on. He wrote the following in his work refusal under section 128, "The air in my office hampers my ability to breath [*sic*] when I have the vest on." Later in his testimony, he stated that the air in his office was the same on February 10, 2010 as it had always been, and that he had no difficulty breathing once his vest was off.

[173] Despite all the allegations of problems with either the vest or the air quality, or both, the complainant never saw a physician to see if he had any form of respiratory problem or allergies or if the vest constricted his ability to breathe. In his re-examination, the complainant stated that he never saw a doctor about it because he never had a problem breathing. Given the nature of the alleged danger, which was specific to him due to the vest he wore over his upper body, the most logical way of assessing if there was a risk was by a physician, who could have examined the complainant with the vest on. When asked about it in cross-examination, the

complainant stated that there is and was nothing wrong with his health, so he had no reason to see a physician.

[174] On the other hand, the respondent tested the air in the V & C coordinator's office in early May 2010, the results of which reported that the temperature, relative humidity, carbon monoxide and carbon dioxide levels were all found within normal acceptable indoor ranges. The visual inspection of the office did not disclose any dampness, odours or excessive visible dust.

[175] As the complainant's evidence about the air was inconsistent and often contradictory, and tests of the air quality showed no problems, I cannot find that there was any evidence of a problem with the air in the V & C coordinator's office.

[176] The complainant testified in examination in chief that he always wore his vest outside the coordinator's V & C office. In cross-examination, he admitted to not wearing his vest outside the V & C coordinator's office. On June 19, 2009, CM Taylor caught him at the Institution's central control post without his vest on. Mr. Hare likewise testified that he would see the complainant without his vest in the vicinity of the AWO's office, which was on a different floor from the V & C coordinator's office. Again, the complainant's evidence on the vest was inconsistent and contradictory and goes directly to the credibility of his evidence with respect to the vest.

[177] As the complainant's evidence was inconsistent and contradictory and does not withstand the test as articulated in *Faryna,* and as Mr. Lemieux's evidence was in harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions, I accept Mr. Lemieux's version of events about the morning of February 10, 2010. I accept as a fact that the complainant did not have his vest with him at work that day. If he did not have his vest with him at work, he could not have had reasonable cause to believe that there was a danger. Therefore, he did not meet the standard articulated in both *Chaney* and *Boivin.*

[178] The respondent has met the burden imposed on it by subsection 133(6) of the *Code*.

[179] As I have found that there was no reasonable cause for the complainant to refuse to work pursuant to section 128 of the *Code*, I need not address whether the

respondent's actions in requesting that the complainant obtain a medical certificate before returning to work constituted discipline or a penalty as described in section 147 of the *Code*.

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

(The Order appears on the next page)

V. Order

[181] I have jurisdiction to hear the complaint.

[182] The complaint is dismissed.

May 31, 2013.

John G. Jaworski,
a panel of the Public Service
Labour Relations Board