Date: 20240402

File: 560-02-44468

Citation: 2024 FPSLREB 48

Federal Public Sector Labour Relations and Employment Board Act and *Canada Labour Code*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

JAMES STEWART

Complainant

and

TREASURY BOARD
(Correctional Service of Canada)

Respondent

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

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

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

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

For the Respondent: Mathieu Cloutier, counsel

Heard at Abbotsford, British Columbia,
January 10 to 13, 2023.

REASONS FOR DECISION

I. Complaint before the Board

[1] On April 1, 2022, James Stewart ("the complainant") made a complaint with the Federal Public Sector Labour Relations and Employment Board ("the Board"), naming as respondents Leanne Anderson, a correctional manager (CM; she was an acting CM at the time at issue), and the Correctional Service of Canada (CSC), under s. 133 of the *Canada Labour Code* (R.S.C., 1985, c. L-2; "the *Code*"). The concise statement of each act, omission, or other matter giving rise to the complaint was stated as follows:

> …
>
> *On January 12, 2022, upon his entry in Mountain Institution for his day shift, the complainant was told that he will have to wear a faceshield, the complainant refused to do so. Acting correctional manager Leanne Anderson said that if he fails to do so, she won't let him work and he will be sent home. The complainant asked Ms. Anderson if she wanted to hear his reasons to refuse to work. The complainant proceeded to explain that he was assaulted in the past and that he needs to see what is coming off. The faceshield, because of significant fogging issue, impedes considerably Correctional Officers' vision. The manager did not follow the procedure set in Canada Labour Code with respect to work refusal and sent the complainant home. The complainant later learn that the employer just took his sick leave hours to cover his absence, without the complainant making such request or having knowledge of it.*
>
> …
>
> [*Sic* throughout]

[2] The corrective action sought in the complaint was any order that the Board finds appropriate in the circumstances as well as an order to reinstate the complainant's sick leave hours that were unilaterally applied by the employer or an order to pay the complainant compensation equivalent to the sick leave hours that were applied unilaterally.

[3] On January 21, 2022, before he made this complaint, the complainant filed a grievance that arose out of an encounter with CM Anderson on the morning of January 12, 2022, which is the subject matter of this complaint, albeit the grievance mistakenly identified the occurrence as having taken place on the morning of January 14, 2022. The grievance states as follows:

…

DETAILS OF GRIEVANCE / DESCRIPTION DU GRIEF

2022-01-14 APPROXIMATELY 0620 I REPORTED FOR WORK AND WAS DIRECTED TO WEAR A FACE SHIELD. I STATED I WOULD NOT. A/CM LEANNE ANDERSON TOLD ME 'WE WON'T LET YOU IN UNLESS YOU WEAR ONE'. I INFORMED HER I WASN'T WEARING ONE DUE TO HEALTH & SAFETY CONCERNS SPECIFYING THAT AS I HAVE BEEN PREVIOUSLY ASSAULTED I WANTED THE ABILITY TO SEE IT COMING AND THAT THE FACE SHIELDS IMPEDE MY VISION. SHE RESPONDED WITH SAYING I CAN TAKE IT OFF WHEN RESPONDING TO AN INCIDENT. I TOLD HER I DIDN'T KNOW WHEN I WOULD BE ASSAULTED. SHE HAD NO RESPONSE. I WAS DENIED THE RIGHT TO REFUSE WORK DUE TO HEALTH & SAFETY CONCERNS. THE NEXT DAY I LEARNED I WAS BOOKED OFF SICK.

CORRECTION [*sic*] *ACTION REQUIRED / MESURES CORRECTIVES DEMANDÉES*

SICK TIME RECREDITED FOR THE DAY, AN APOLOGY FOR HAVING MY RIGHTS VIOLATED, $50,000 (FIFTY THOUSAND DOLLARS)

TO BE MADE WHOLE

…

[4] No first-level grievance hearing was held, but a first-level response denying the grievance was provided. A second-level grievance hearing was held, and a second-level response was issued in which the grievance was allowed in part granting the return to the complainant of the one day of sick leave with pay (SLWP) credit used on January 12, 2022, and substituting in its stead with a day of leave without pay (LWOP). At the time of the hearing, the complainant's sick leave bank had been credited the time at issue, and in its stead was the equivalent time as LWOP.

[5] Entered into evidence was a copy of the complainant's transmittal of his grievance to the final level of the grievance process. There is no record of any grievance hearing at the final level or of any response to it; nor is there any record of the grievance being referred to the Board for adjudication under s. 209 of the *Federal Public Sector Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*").

[6] Before and again at the outset of the hearing, the respondent raised preliminary objections to the Board's jurisdiction. It was clear before starting the hearing that I would have to hear evidence to be in a position to rule on the objections, and as such, I

heard all the evidence of the parties and heard arguments on the objections as well as on the merits of the complaint.

II. Summary of the evidence

A. Background

[7] The acronym "PPE" is used in both the oral and documentary evidence and stands for "personal protective equipment". Inmates are sometimes referred to in both the oral and documentary evidence as offenders.

[8] Sections 128(1) and (2) of the *Code* state 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*	***128 (1)*** *Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :*
(a) *the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*	***a)*** *l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;*
(b) *a condition exists in the place that constitutes a danger to the employee; or*	***b)*** *il est dangereux pour lui de travailler dans le lieu;*
(c) *the performance of the activity constitutes a danger to the employee or to another employee.*	***c)*** *l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.*
(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*	***(2)*** *L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :*
(a) *the refusal puts the life, health or safety of another person directly in danger; or*	***a)*** *son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne;*

(b) *the danger referred to in subsection (1) is a normal condition of employment.*	***b)*** *le danger visé au paragraphe (1) constitue une condition normale de son emploi.*

[9] Many of the documents and several of the witnesses used the term "call a 128" or referred to "a 128". This is a reference used when an employee exercises their right to refuse work due to their belief that it is a danger and their action is within their right under s. 128(1) of the *Code*.

[10] The complainant began his employment with the CSC in 2001 as a correctional officer (CX) classified CX-01. He testified that he became a CX-02 but later returned to being a CX-01. His entire career has been spent in the CSC's Pacific Region. At the time of the facts giving rise to the complaint, and for approximately eight years, he was a CX-01 at Mountain Institution ("Mountain" or "the institution"). It is a medium-security federal penitentiary for men operated by the CSC in the Pacific Region in Agassiz, British Columbia.

[11] In addition to being a CX, the complainant was, for a period in or about 2008 to 2009, a shop steward for his union, the Union of Canadian Correctional Officers - Syndicat des agents correctionnels du Canada - CSN (UCCO-SAC-CSN; "the union"), as well as a designated occupational health and safety (OHS) officer for the union, when he was working at Kent Institution, which is a maximum-security federal penitentiary for men operated by the CSC on the same federal property as Mountain. He confirmed that he received training as a shop steward by the union but did not receive any training with respect to being a union OHS officer. When asked if he was involved in any s. 128 work refusals as a union steward he answered "No", but clarified that by stating that he was not certain.

[12] At the time of the hearing, Nathan Stone was a CX-01 at Mountain. He was a member of the union's local executive at Mountain and had been for about a year.

[13] At the time of the hearing, Roger Sehra was the acting assistant warden of interventions at Mountain. His substantive position was the assistant warden of operations at Mountain, which he had been in since May of 2021 and was in at the time of the facts giving rise to the complaint. He has been with the CSC for 23 years.

[14] At the time of the hearing and at the time of the facts giving rise to the complaint, Morgan Andreassen was the warden of Mountain.

[15] At the time of the hearing, Leanne Anderson was a CM at Mountain. At the time of the facts giving rise to the complaint, she was an acting CM (A/CM) and the COVID manager for Mountain.

[16] The interaction on January 12, 2022, which resulted in the complaint and the grievance ("the January 12 incident"), took place in a self-contained and separate building located at the northeast end of the institution, which is mostly outside the perimeter fence that surrounds the institution and that is the principle entrance to it ("the PE building"). It bisects the perimeter fence near the rear of the building. A diagram of the PE building was entered into evidence. A little south and east of the building and adjacent to it is the institution parking lot, accessible by a local road. People who work at or visit Mountain can park their cars in this lot.

[17] The entrance to the PE building is on its east side, adjacent to the institution parking lot. It consists of an outer and inner door, with a small vestibule area between the doors marked on the diagram as "E101". The outer door leads to and from the parking lot area. The inner door leads from E101 to the main lobby of the PE building, identified on the diagram as "E100". Anyone exiting E101 and entering E100 faces security equipment not unlike the security screening equipment at an airport for passengers to pass through to move from the unsecured area of the airport to the secured area where the boarding gates are located.

[18] The security equipment in the PE building includes an X-ray machine for bags, a metal detector, and a desk (or table) behind which the CX manning the equipment is located. This is the principle entrance control post (PECP). Any person who wishes to legally gain access to the institution must enter through the outer doors of the PE building into E101, then proceed out of E101 and through the inner doors into E100. They must then proceed to the PECP and go through the security screening equipment and be admitted to go past it and behind it. As they go past, they swipe their employee ID card on a magnetic strip at a door marked "E106" ("door E106").

[19] Once a person has been admitted past the PECP, there is a small open area behind it identified as "E106". Adjacent to E106 is a room, E105, which can be accessed only by going through E106. The CXs reporting for work who have passed through the

PECP would don their PPE, such as stab-proof vests as well as their tool belts, in this area of E105 and E106. After doing so, they would be able to then exit the PE building from a door on its west side, door E106A. Once someone has exited door E106A, they are no longer outside the perimeter fence of the institution but inside it. The evidence disclosed that on most days, the PECP is manned by one CX and that normally, no CMs are at this location.

[20] The evidence disclosed that the several different shifts for the CXs (not including CMs) can be broken down into either a morning shift of varying lengths that starts either in the evening of one day and ends in the morning of the next, or a day shift of varying lengths that starts at 06:30 and ends at different times. Upon arriving at the institution for a shift, a CX enters through the PE building in the manner I just described, and once they don their PPE and proceed out of the PE building through door E106A, they first go to the CMs office, to be given their post assignment for their shift, and then proceed to the institution's briefing room. The CXs starting the shift at 06:30 are to be in the briefing room at 06:30. After the briefing, the CXs proceed to their assigned posts.

[21] The evidence disclosed that at 06:30, the inmates would still be locked in the living units. Mr. Sehra stated that the closest living unit to the PE building was about 200 metres away. He said that there would be six secure doors between the PE building and an inmate cell in a living unit.

[22] Entered into evidence was a copy of the work description of a CX-01. The parts of the work description that are relevant to this decision are as follows:

> ***Working Conditions – Conditions de travail***
>
> ***(1) Work Environment***
>
> …
>
> *PHYSICAL WORK ENVIRONMENT*
>
> *The work is carried out in a controlled-access institution with multiple barriers and security controls, and involves the provision of security in inmate living quarters. There is exposure to unpleasant sights, sounds and odours on a daily basis.*
>
> *When searching or restraining inmates, there is potential for exposure to bodily fluids and bio-hazardous material that may harbour communicable diseases (e.g. feces, urine, spittle, saliva or blood). Protective clothing is worn when contact with inmates is imminent in order to minimize risk….*

…

(2) Risk to Health

There is a risk of verbal or physical assault and/or psychological trauma due to the daily performance of security duties in direct contact with potentially volatile inmates who may have low-level cognitive skills and alternate social values/attitudes. The incumbent is required to closely monitor inmates throughout the shift and may be asked to disseminate unfavourable information.

…

[23] In cross-examination the complainant admitted this:

- there was a risk of attacks from inmates, which was an inherent risk in the job;
- he understood his obligations under s. 126 of the *Code*;
- he understood his obligations under s. 126 of the *Code* on January 12, 2022;
- he understood that he is required to wear PPE; and
- he understood that on January 12, 2022, he was required to wear PPE.

[24] Section 126(1) of the *Code* states as follows:

126 (1) *While at work, every employee shall*	***126 (1)*** *L'employé au travail est tenu :*
(a) *use any safety materials, equipment, devices and clothing that are intended for the employee's protection and furnished to the employee by the employer or that are prescribed;*	***a)*** *d'utiliser le matériel, l'équipement, les dispositifs et les vêtements de sécurité que lui fournit son employeur ou que prévoient les règlements pour assurer sa protection;*
(b) *follow prescribed procedures with respect to the health and safety of employees;*	***b)*** *de se plier aux consignes réglementaires en matière de santé et de sécurité au travail;*
(c) *take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions;*	***c)*** *de prendre les mesures nécessaires pour assurer sa propre santé et sa propre sécurité, ainsi que celles de ses compagnons de travail et de quiconque risque de subir les conséquences de ses actes ou omissions;*
(d) *comply with all instructions from the employer concerning the health and safety of employees;*	***d)*** *de se conformer aux consignes de l'employeur en matière de santé et de sécurité au travail;*
(e) *cooperate with any person carrying out a duty imposed under this Part;*	***e)*** *de collaborer avec quiconque s'acquitte d'une obligation qui lui*

	incombe sous le régime de la présente partie;
***(f)** cooperate with the policy and work place committees or the health and safety representative;*	***f)** de collaborer avec le comité d'orientation et le comité local ou le représentant;*
***(g)** report to the employer any thing or circumstance in a work place that is likely to be hazardous to the health or safety of the employee, or that of the other employees or other persons granted access to the work place by the employer;*	***g)** de signaler à son employeur tout objet ou toute circonstance qui, dans un lieu de travail, présente un risque pour sa santé ou sa sécurité ou pour celles de ses compagnons de travail ou des autres personnes à qui l'employeur en permet l'accès;*
***(h)** report in the prescribed manner every accident or other occurrence arising in the course of or in connection with the employee's work that has caused injury to the employee or to any other person;*	***h)** de signaler, selon les modalités réglementaires, tout accident ou autre incident ayant causé, dans le cadre de son travail, une blessure à lui-même ou à une autre personne;*
***(i)** comply with every oral or written direction of the Head or the Board concerning the health and safety of employees; and*	***i)** de se conformer aux instructions verbales ou écrites du chef ou du Conseil en matière de santé et de sécurité des employés;*
***(j)** report to the employer any situation that the employee believes to be a contravention of this Part by the employer, another employee or any other person.*	***j)** de signaler à son employeur toute situation qu'il croit de nature à constituer, de la part de tout compagnon de travail ou de toute autre personne — y compris l'employeur —, une contravention à la présente partie.*

B. The COVID-19 Pandemic

[25] In late 2019, the world became increasingly aware of a growing health risk in the form of a virus identified as COVID-19. In or about the middle of March 2020, COVID-19 was identified as a worldwide pandemic. At this time, Canada went into a national lockdown. Any persons who could work from home did so. Businesses, except those that were deemed essential, were closed. It would not be an exaggeration to state that the world economy in many respects came close to coming to a grinding halt. National, provincial, and local states of emergency were declared by the appropriate governing authorities.

[26] There was not a vaccine available to the public until early 2021. Some of the vaccines offered required two shots administered several months apart. While vaccine research and production ramped up, the virus mutated, and as such, the world started to see waves in which the illness would subside for a time and then go on the upswing. The vaccines were not 100% effective, and there was a question of their efficacy when the virus mutated. As it mutated, the vaccines were adapted, and booster shots became available.

[27] During the course of the pandemic, different actions were taken and restrictions imposed by local, regional, provincial, and national authorities to safeguard people from the effects of the virus. Two of the universal steps that were required when away from home were wearing a mask and washing or sanitizing hands. The requirement to wear a mask over one's mouth and nose was imposed because (it appeared to be determined and was commonly accepted by worldwide health authorities) the virus was transmitted through the air and by breathing.

[28] In December of 2021 and January of 2022, the pandemic was in what was identified by public health authorities as its fourth wave. Mask wearing across the country was largely still required when one was indoors and not in one's own home. The exact rules and regulations with respect to the number of persons allowed into indoor spaces could be and were limited depending on the local, regional, and provincial health authorities. At this point in time, the first vaccine booster shot had become available; however, the second had not.

[29] During the course of the pandemic, certain local, regional, provincial, and federal institutions and job functions were critical for the continued operation of our country and the communities within it. Examples of these would include the production and provision of the necessities of life, such as food and health-care products and services. Included in these would be the operation of the federal penitentiaries, which fall under the CSC. CSC houses, in federal institutions across the country, men and women who have been sentenced to prison time of two or more years.

[30] Mr. Sehra stated that COVID-19 was a significant health risk in an institution like Mountain because the inmates live in close quarters and cannot leave. He stated that Mountain has a high number of older inmates and inmates with health issues, who

would be susceptible to higher risk due to COVID-19. As the institution is a closed society, the virus would not just appear within the population; it would have to be brought in by someone from the outside who has come into the institution either to work or to visit.

[31] Mr. Sehra testified that the CSC had established certain health protection and safety protocols specific to the COVID-19 pandemic, which were identified to the Board as the "Integrated Risk Management Framework" or "IRMF". It set out five colour-coded threat (or risk) levels. The lowest level was green, followed in ascending order as follows: grey, yellow, orange, and red.

[32] Yellow was designated as moderate risk and was described as COVID-19 being present in the community (within which the institution is situated), and likely spreading, and the incidence rates are increasing. The orange designation was considered moderate to high and was described to be the situation in the institution at large if an inmate had COVID-19. The area specific to the inmate would be considered in the red, while the balance of the institution would be considered as being in the orange.

[33] Entered into evidence were the minutes of the Pacific Region's Management Early Response Committee or "MERC" (PR MERC). Mr. Sehra testified that a MERC is specific to an area; it could be specific to an institution or a region or national, depending on what it is set up to address. In this case, the PR MERC was set up with respect to the COVID-19 pandemic. Mr. Sehra stated that involved were CSC national and regional management personnel as well as other federal health-care personnel from outside the CSC and regional health-care advisors from the Fraser Valley Community of B.C. Their responsibility was to assess the risks with respect to the pandemic and advise whether the CSC and its institutions should escalate or lower their IRMF threat levels.

C. Early 2022: the pre-incident

[34] Mr. Sehra testified that as of January of 2022, the Omicron variant of COVID-19 was the predominant strain affecting public health.

[35] The evidence disclosed that two types of face shields were in use in CSC facilities: the first was a full, plastic, clear face shield that covered the face from above

the eyes down past the mouth and was attached by a foam band that went behind the wearer's head, and the second was a set of clear eyeglasses that attached like glasses and had a clear shield that extended down from them to below the mouth. Face shields are considered PPE.

[36] On January 4, 2022, Warden Andreassen sent an email to all management staff at Mountain ("the Jan. 4 instruction"), which stated as follows:

> …
>
> *Please reinforce the use of PPE with your staff. We are currently YELLOW, and must don medical grade masks and face shields when not alone in an office. Allowances are made where the shield poses a potential hazard, such as when driving, when in the community with a sidearm, or when working on steam line in the kitchen. Any other concerns should be brought to the appropriate Division Head for review and decision.*
>
> *I know this sucks, but it is what we need to do to avoid potential exposures to the Omicron variant while at work.*
>
> …

[37] Mr. Andreassen testified that he had issued the Jan. 4 instruction as the issue of wearing face shields was a hot topic. He stated that there had been a concern raised over wearing them and that he held off implementing an instruction requiring wearing them until a s. 128 work refusal at another institution in the CSC's Pacific Region had been resolved.

[38] The evidence disclosed that on December 29, 2021, at 11:42 a.m. local time, a work refusal was made by John Randle, a CX at Pacific Institution in Abbotsford, B.C. ("the Randle refusal"). Pacific Institution is also in the CSC's Pacific Region and is about 61 kilometres from Mountain.

[39] The facts of this work refusal are set out in a report issued on January 19, 2022, by Gurmeet Lidder, the health and safety officer (HSO) from Employment and Social Development Canada (ESDC) who investigated the work refusal and who on December 31, 2021, issued a decision on the Randle refusal that stated that "a danger does not exist".

[40] Mr. Randle's statement of the refusal to work on December 29, 2021, was that he believed that working in the close proximity of inmates while wearing the face shield constituted a potential danger to him in certain circumstances, a fogged-up face

shield could create a sudden assault situation, the face shield could break from a sudden impact and injure him, and a broken face shield could be used as a weapon against him.

[41] On January 11, 2022, at 17:42, Mr. Sehra sent an email to all Mountain staff, which stated as follows:

> …
>
> *A number of instances of PPE non-compliance (medical masks and face shields) have been recently reported. As a result of the concerns raised, an emergency meeting of OSH members was held this morning to address the concerns as they are directly related to the health and safety of the staff who work at Mountain. Union representatives and mangers whom do not normally attend OSH meetings were invited to the meeting to discuss this important issue. Everyone in attendance at the meeting was given opportunity to speak to the group to voice their concerns. The following direction and actions are as a result of this meeting.*
>
> ***Staff must comply to the PPE direction as identified in the IRMF in the current YELLOW phase. This includes the use of the medical face mask and face shield. The management team will be more present and directive in promoting this compliance throughout the institution. Face shields must be worn at all times unless you are alone. When eating or drinking a beverage you must find a space away from others before removing the face shield and mask.***
>
> *As noted in the email below there are exceptions for when not wearing a face shield. These exceptions are not generalized and only specific to tasks (for example driving, while outdoors and physically distanced, working around steam/knives in the kitchen/responding to a security situation…). Other reasonable exceptions can be considered however a generalized statement of fogging face shields is not considered an exception.*
>
> *A supply of a different type of face shield (style with the half glasses attached to a face shield) as been procured. This new style of face shield is being issued to staff through their manager. The number of this type of face shield is limited in quantity and will be distributed to you through your manager. The face shields are reusable item so please ensure you reuse this item. The face shield will be replaced if damaged, worn out, or lost with currect existing stock.*
>
> *Please consider the COVID19 mitigation strategies during your daily routines. COVID19 Omicron is highly transmissible and these efforts will allow for us to maintain reasonable routines through the peak of this next wave of the pandemic.*
>
> …

[*Sic* throughout]
[Emphasis in the original]

D. The January 12 incident

[42] Mr. Sehra testified that he made a decision for the morning of January 12, 2022, which stated that all staff be required to wear medical-grade masks and face shields. He said that he had asked that CM Anderson be present at the PECP for when staff arrived for the start of the day shifts as she was the institution's COVID manager. He stated that he did this because usually, it is a CX-01 working the PECP, and it would be difficult for someone at that level to give instructions directing peers or more senior officers to don the face shield and medical mask.

[43] The only two persons who testified about what occurred on this day and who were actually present at the time of the events that took place were the complainant and CM Anderson.

[44] CM Anderson testified that on January 11, 2022, she had been instructed by Mr. Sehra to come to the institution early the next morning to enforce the wearing of face shields. She said that she was in the PE building, at the PECP, and was positioned in the area marked E106 behind the desk or table and X-ray machine that created a barrier between E106 and E100.

[45] She stated that on that morning, some people were confused, as usually, there were no CMs at the PECP. She said that staff members saw her, as well as the face shields, and that some appeared disgruntled. She said that the noise level was louder than usual. She said that she informed the incoming staff members that wearing face shields was mandatory and instructed them on how to remove the protective film from the shield.

[46] CM Anderson said that the complainant arrived at the PE building at around 06:15 or 06:20, while the complainant said that he arrived at about 06:20. CM Anderson said that while inside the E100 area, he was wearing a medical mask but not a face shield before he approached the PECP, where she was located. She said that he came up to the X-ray machine to put his bag to go through it and said, "Good morning." She said that she told him that a face shield was mandatory to come into the institution. She said that he asked what would happen if he did not put on a face

shield, to which she said that she told him that he would not be allowed in. She said that once she said this, he picked his bag up from where he had placed it and proceeded to walk away from the PECP back to the entrance of the building, E101. She said that as he did this, he turned toward her and said, "Don't you want to know why", and proceeded to tell her that he had been assaulted in the past and had heard that other CXs had been assaulted while wearing a face shield. CM Anderson said that her response to him was that he could take off the face shield if he was responding to an alarm or felt that he was going to be attacked. She said that his response was that he could not predict when he would be attacked.

[47] CM Anderson said that at this juncture in their conversation, the area in front of the PECP, in E100, had become quite busy, so she told him again that he could not come into the institution without a face shield. She said that he turned around, put his hands in the air, shrugged his shoulders, said to book him off sick, and proceeded to walk out of the PE building.

[48] In his examination-in-chief, the complainant stated that when he was in the PE building, he was told by the CX working at the PECP that he was required to wear a face shield. He said that CM Anderson also gave him that direction. He said that the words used by CM Anderson were these: "You need to wear a face shield; I can't permit you entry into the institution if you don't wear one." He was asked by his representative as to what happened next, to which he said that he asked CM Anderson if she wanted to know why; he said that she responded "Okay." He said that he told her that he identified it as a health-and-safety concern, specifically that it impairs his vision. He said that as someone who had been assaulted previously, it would be a hazard if he had to wear one.

[49] When asked by his representative what CM Anderson's reply was, he said that she said that he could take the face shield off when he responded, to which he said that he told her that it could be too late as he would not know when he would be attacked. He then said that she told him that if he did not wear a face shield, he would not be allowed into the institution. He said that his response to that was this: "So I can't go to work", and then left. When his representative said to him that the employer's position was that he told CM Anderson to book him off sick, he said that he never requested to be booked off sick. He said that he did not book off sick but that he

was refused entry into the institution. When asked what he believed his leave status would be, he said that he believed that it would be LWOP.

[50] The complainant said that he left the institution. He said that he tried to contact the union but was unable to. He said that he worked the next day and did wear a face shield. He also said that on that next day, he found out that the employer had docked his sick leave bank.

[51] In cross-examination, the complainant confirmed that he was told that he would be denied entry into the institution if he did not wear a face shield and that this was before he raised any issue with respect to health and safety. He was also asked when before January 12, 2022, had he had last donned a face shield, to which he said that he could not recall. A copy of his training record was entered into evidence, and counsel for the employer brought him to an entry showing that he underwent training on December 7, 2020, for "Infection Control Principles" training ("ICP training"). He was asked if this refreshed his memory, to which he said that he recalled taking the training. However, when he was asked if he recalled being trained during the ICP training on wearing a face shield, he said that he could not recall.

[52] In cross-examination, the complainant was asked if he felt that he was in danger of being attacked in the entrance area (the PE building) to the institution, to which he said that he did not. He confirmed that at the time he was instructed to don the face shield in the vicinity of the PECP, he was not in any danger. He further confirmed that once he had cleared through the PECP, he would have attended the morning briefing, and before doing that, there would not have been any contact with inmates. To be more specific, he confirmed that once he had passed through the PECP and was inside the institution, between the PECP and the briefing room, he would not have had contact with inmates. He stated that he could have worn the face shield until he had contact with inmates and then called a 128.

[53] In cross-examination, the complainant confirmed that CM Anderson did not instruct him to go home.

[54] On April 27, 2022, the complainant and Mr. Stone attended a grievance hearing with Warden Andreassen about the grievance that was filed in this matter. The Warden recalled that the hearing was in person, while both the grievor and Mr. Stone recalled that it was done by videoconference. Whether the meeting was in person or not, both

Mr. Andreassen and the complainant recalled that the complainant told the Warden that he believed that face shields were a complete farce, and both recalled discussing the January 12 incident. Mr. Andreassen said that he asked the complainant why he did not call a 128 and that the complainant replied that he did not want to do that.

[55] In cross-examination, the grievor was asked if he recalled saying to the Warden that he did not want to call a 128, to which he said that he did not want to call a 128. He was then asked if he recalled saying, "I could have called a 128", to which he said this: "Yes, I said that."

[56] Warden Andreassen, in issuing the second-level response to the grievance dated April 28, 2022, stated the following:

> …
>
> *A second level grievance hearing was held on April 27, 2022. You advised me that when you arrived at the Institution, you were told to wear a face shield by Acting Correctional Manager (A/CM) Anderson, or you would not be able to enter the Institution. You advised me that you did not feel there was enough dialogue with A/CM Anderson around your concerns that the face shield would impede your vision should there be any kind of incidents with Offenders. You stated that you did not initiate a CLC 128 work refusal as you "wanted to resolve the issue at the lowest level". You expressed that that* [*sic*] *you felt wearing a face shield was a "complete farce", and was unreasonable. As such, you feel your rights were violated.*
>
> *As discussed during the hearing, you did not invoke your right to submit a CLC 128 work refusal, which would have initiated further process and dialogue on your concerns. I appreciate you were trying to resolve your concerns at the lowest level, but the Employer mandated the wearing of a face shield due to COVID mitigation strategies.…*
>
> …

[57] In cross-examination, the complainant was asked about the making of the complaint, which he did not sign. He stated that he did not see it before it was made. He did state that he exchanged emails with union personnel before it was made.

[58] Entered into evidence was a copy of an email dated January 28, 2022, and sent by CM Anderson to Mr. Sehra. The subject line was "Grievance", and the relevant portions state as follows:

…

> *The date of my interaction with CX1 Stewart was Jan. 12th.*
>
> *The time was approximately 0615-0620 hrs*
>
> …
>
> *Officer Stewart came through the doors of Visitor Security wearing a medical grade mask only.*
>
> *I advised Officer Stewart that he was required to wear a face shield now.*
>
> *He asked what would happen iif* [*sic*] *he didn't wear one and I said that I could not give him access to the site.*
>
> *He then stated to me that he would not wear the face shield because of the risk of assault and informed me that other sites had assaults on officers because of shields. He explained that he felt himself in danger if wearing one. I attempted to explain that the face shield could be taken off during an incident or responding to a PPA/incident.*
>
> *He did make a statement, I cannot be sure of the exact wording, that he would not be able to predict an assault.*
>
> *I told Officer Stewart that again there was a requirement to wear a face shield.*
>
> *He verbalized to book him* [off] *sick.*
>
> *A further attempt that morning was not given to Officer Stewart as this was not the time nor place with the amount of Correctional Officers and Health Services Workers reporting to work.*
>
> *Tensions were high and many staff were making comments and asking questions about the shields, not just Officer Stewart. Furthermore, the addition of face shields was not a surprise, it has been mandatory since entering the yellow zone.*
>
> *His concerns were not addressed at the time due to this.*
>
> *Once the flow of traffic eased I was able to report to M6 that one officer wanted to cancel his overtime and another officer went home because he refused to wear a face shield.*
>
> *I cannot recall if I told M6 to book him* [off] *sick or if LWOP was discussed.*
>
> …

[59] In cross-examination, it was put to CM Anderson that the complainant conveyed his concerns, to which she agreed. She also stated that instead of engaging, he said to book him off sick, and he left the institution. His representative then put it to CM Anderson, that the complainant could have gone under the *Code*, to which she answered, "if he didn't leave the institution".

[60] Entered into evidence were the following:

- the "Notification of Refusal to Work" under s. 128 of the *Code* made by Dylan Medway, Acting CX-02, at Mountain on January 14, 2022, at 09:45 ("the Medway s. 128 refusal");
- the "Employer's Response" to the Medway s. 128 refusal, dated January 14, 2022, and authored by Alan Cramm, a CM at Mountain;
- the "Employer's Decision" on the Medway s. 128 refusal, dated January 19, 2022, and authored by Mark Bussey, Acting Warden at Mountain;
- the "Mountain Occupational Health and Safety Representatives Investigation Report" on the Medway s. 128 refusal, dated February 2, 2022, authored by both an employer and an employee representative;
- the letter of decision of HSO Arshdeep Rattan, dated February 16, 2022, advising that a finding of "no danger" had been made with respect to the Medway s. 128 refusal; and
- the ESDC "Investigation Report" and decision of HSO Rattan, dated February 16, 2022, with respect to the Medway s. 128 refusal.

[61] The reason for the work refusal set out in the Medway s. 128 refusal, as set out by CM Cramm and attested to by CX Medway, was stated as follows:

> *One 2022-01-14 at approximately 09:45 A/CX02 Medway approached me and identified concerns with having to wear face shields on the ranges of the living unit while conducting security patrols. When asked why, Officer Medway stated the following reasons:*
>
> *• Range Walks — Cannot see properly into cell because of glare, therefore cannot see potential threats clearly.*
>
> *• Hearing is distorted, hard to perceive sound at normal audible volume or where it is coming from*
>
> *• Masks dent easily, we are supposed to re-wear so wear/tear leads to further visibility challenges*
>
> *• If Officer is wearing prescription glasses, now have double glare. Eyes are also corrected as per doctor, face shield impacts eye correction leading to potential issues. They impede someone's medical device. (This is potentially an issue for Officers at times other than security patrols [expressed verbally])*
>
> *• Could be mitigated with goggles potentially, or no wearing of face shields on range walks. (wearing face shield up is not a compromise as it renders the faceshields useless and defeats the purpose.)*
>
> *• Potential for spontaneous use of force*
>
> *• Face shield has potential to fog up (expressed verbally)*
>
> ***Employee suggestions to resolve the matter (if applicable):*** *Face shields should not be work during security patrols in the living unit.*
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[62] Entered into evidence was a series of emails on January 14, 2022, between the complainant and Ms. Blanchette of the union, as follows:

> [The complainant to Ms. Blanchette, at 15:00:]
>
> …
>
> *I am the officer Julia from Mountain contacted you in regard to the human rights complaint.*
>
> *My complaint is not regarding PPE. Its regarding when I raised a health and safety concern I was denied entry to the institution, sent home and booked sick.*
>
> *I clearly articulated why I was not going to wear a face shield citing health and safety concerns, specifically that I have previously been assaulted by an inmate and the mask impedes my visual field and I want to be able to have full vision to identify threats, and this is why I am refusing to wear one … The manager didn't have anything else to say and offered me no other options other than saying I won't be permitted entry if I wasn't wearing one. I went home advising my union what had happened.*
>
> *The next day I reported to work and learned that I had been booked off sick.*
>
> *I never booked off sick. I refused to work citing health and safety concerns. These concerns were ignored and I was sent home. My rights were violated. This is the nature of my human rights complaint. Grievance is in the process of being submitted.*
>
> …
>
> [The complainant to Ms. Blanchette, at 15:48:]
>
> …
>
> *2022-01-12 approximately 0620 at the PE I was informed by the CX working the front desk that there were face shields to be worn. I informed him I wasn't wearing on. A/CM Anderson was present at the PE and stated something to the effect of, 'if you don't wear one we won't let you in.' I inquired that, 'I'll be sent home?' She confirmed. I then stated, 'don't you want to know why I'm not going to wear one,' then told her that as 'I have previously been assaulted, I want to see it coming. Wearing the face shield impedes me from seeing it coming.' She then countered with 'you can take it off responding to incidents.' I informed her that 'I don't know when an inmate is going to assault me.' She said nothing else.*
>
> *I went home and contacted my union local VP right away via email that my right to refuse work had been violated.…*
>
> *The next day I reported to work and saw on my email I had been booked off sick.*
>
> *I was refused entry after I had cited a safety concern. I did not book off sick.*

> [The complainant to Ms. Blanchette, at 16:36:]
>
> *We currently have a 128 in on the face shields during range walks. Not pulled by me.*
>
> *My rationale for returning to work and wearing the shield was I need to get paid and would explore the violations of my rights while managing the risk.*
>
> [*Sic* throughout]

[63] Entered into evidence was an email exchange on March 30, 2022, between the complainant and Melissa Saunders of the union; Ms. Saunders' position at the union was not disclosed to me. The exchange was as follows:

> [The complainant to Ms. Saunders, at 16:58:]
>
> …
>
> *When I arrived at the institution and was walking through the PE CX1 Bazleyvich instructed me to wear a face shield, and told me they were 'over there' motioning to a table inside the PE.*
>
> *I informed him I wasn't going to wear one.*
>
> *A/CM Anderson who was standing behind Baz then stated something to the effect of, 'if you don't wear one, we can't let you in."*
>
> *I then offered why I was not going to wear one clearly articulating health and safety concerns, specifically that I have previously been assaulted by an inmate and the mask impedes my visual field and I want to be able to have full vision to identify threats, and this is why I am refusing to wear one. I was then informed that I can remove the mask when I respond to an incident. I rebutted with that I didn't know when I would be assaulted. The manager didn't have anything else to say and offered me no other options other than saying I won't* [*sic*] *be permitted entry if I wasn't wearing one.*
>
> *I perceived this as instruction to leave the institution. I left shortly thereafter emailing VP Min a synopsis of the situation. For the remainder of the day I heard nothing back from the local union.*
>
> *I contacted CM Jason Denham later during the morning, who was not on site I don't believe, and informed him of what was going on. Believing I was on LWOP, and not being able to afford continuously not being paid, I stated to CM Denham that I would manage my anxiety around wearing a mask and return the next day since no one was reaching out with other possible options.*
>
> …
>
> [Ms. Saunders to the complainant, at 17:36:]
>
> …
>
> *Does the employer agree that they sent you home that day or do they dispute that?*

…

[The complainant to Ms. Saunders, at 17:44:]

…

I don't know if they dispute it or not.

During the informal resolution attempt A/CM Anderson acknowledged and apologized for not following up with me because there was 'lots going on'. So I would say that they didn't directly dispute at that meeting that they refused to send me home.

I articulated that I believed I was sent home. I don't believe that was refuted.

I stated in the informal resolution meeting that I felt I basically called a 128 and was sent home for it. She never refuted that. She then offered a sort of apology for not following up with my refusal to wear a face shield.

Nathan confirms this is what he perceives was communicated in the meeting.

III. Summary of the arguments

A. For the complainant

[64] The complainant referred me to *White v. Treasury Board (Correctional Service of Canada)*, 2022 FPSLREB 52 ("*White 2022*"), *Martin-Ivie v. Treasury Board (Canada Border Services Agency)*, 2013 PSLRB 40, *Chaves v. Treasury Board (Correctional Service Canada)*, 2005 PSLRB 45, *LeClair v. Treasury Board (Correctional Service of Canada)*, 2010 PSLRB 49, *Noel v. VIA Rail Canada Inc.*, 1986 CarswellNat 896, *Atkinson v. VIA Rail Canada Inc.*, 1992 CarswellNat 915, *Lequesne v. Canadian National Railway Company*, 2004 CIRB 276, *Chaney v. Auto Haulaway, Inc.*, 2000 CIRB no. 47, *B.M.W.E. v. Canadian National Railway*, 1986 CarswellNat 998, *Conteh v. Treasury Board (Correctional Service of Canada)*, 2014 PSLRB 36, *Kinhnicki v. Canada Customs and Revenue Agency*, 2003 PSSRB 52, *Attorney General of Canada v. Laycock*, 2018 FC 750, *Correctional Service of Canada v. Laycock*, 2017 OHSTC 21, *Verville v. Canada (Service correctionnel)*, 2004 FC 767, *Armstrong v. Canada (Correctional Service)*, 2010 OHSTC 6, *MacNeal v. Correctional Service Canada*, 2020 OHSTC 7, *Correctional Service of Canada v. Courtepatte*, 2018 OHSTC 9, *Zimmerman v. Canada (Correctional Service)*, 2013 OHSTC 34, *Marois v. Transport Norcité Inc.*, 2020 CIRB 951, and *Burchill v. Attorney General of Canada*, [1981] 1 F.C. 109 (C.A.).

[65] The complainant submitted that the Board's role is limited. It is not to determine if a danger existed; it is to determine if the employer imposed a penalty due to rights under Part II of the *Code* being exercised.

[66] The complainant submitted that there is no dispute that the time frame within which the complaint was made was met. He further submitted that to exercise his right under s. 133, he must comply with s. 128(6) of the *Code*. He submitted that this was complied with as he advised CM Anderson of his concern. Once a complainant has done these things, the burden shifts to the employer.

[67] A face shield is a thing and therefore is covered by the rights articulated in s. 128(1) of the *Code*. The complainant stated that it is unclear why CM Anderson did not consider his actions of January 12, 2022, a work refusal given the written account of it entered into evidence.

[68] *White 2022* stands for the proposition that there are no magical words needed to invoke a work refusal under s. 128 of the *Code*. In *White 2022*, Mr. White was asked to bring an inmate somewhere, but he felt unsafe. Technically, he did not make a work refusal. This is important because the complainant said that he did not call a 128. Employees are not experienced labour relations representatives or lawyers; they are ordinary people.

[69] The complainant submitted that there is no requirement to put the refusal in writing. There is no requirement for there to be a danger; there has to be a genuine safety issue that is believed. He said that he was attacked and assaulted and that unimpeded vision is a legitimate concern.

[70] The complainant referred to paragraphs 13 through 15 of *Noel*, where the Canada Labour Relations Board stated as follows:

> *13 It is clear that Mr. Noel had reasonable cause to believe a condition existed at the car repair facility that would constitute an imminent danger to his safety. He reported that belief to his employer when he spoke to his supervisor and the general foreman. It may not have been couched in the legal language of section 82.1 of the Code but his message was unambiguous:*
>
> *— that VIA Rail's own safety rules in respect of train movements were being violated;*

> *— trains were apt to be shifted without warning — and this created a situation of imminent danger for him and therefore he was not going to work until the problem was cleared up.*
>
> *It was no solution to send him to work on other coaches parked on another track because the problem giving rise to the imminent danger was general and affected the whole facility and could easily reappear in connection with that other set of coaches and that other track.*
>
> *14 It is unlikely that Mr. Noel used the word "imminent" when he spoke to both the supervisor and the general foreman but he did seek to convey the idea that he believed he was in danger because of the ongoing disregard for the train movement rules in the facility. This Board has already said in effect that the word "imminent" does not constitute some kind of magic incantation, the use of which is a sine qua non for the successful invocation of section 82.1. In any case, his supervisor heard him refer to Part IV of the Code during their conversation, although he claimed in a statement filed with the Board that he did not realize at the time Mr. Noel was claiming imminent danger.*
>
> *15 As has been indicated, the Board finds that Mr. Noel did register a refusal to work with his employer in accordance with section 82.1. The possibility that it was misunderstood by the supervisor and the general foreman does not invalidate it nor does that give the employer any licence* [*sic*] *to fail to discharge his responsibilities under the law.*

[71] The complainant argued that CM Anderson did not misunderstand and that she, as well as Messrs. Sehra and Andreassen, were told about the reason for refusing to wear the face shield. There was no suggestion by the CSC at the time that it doubted the genuineness of the complainant's concern. If it did, it had an obligation to investigate the refusal. Further, the *Code* provides for an investigation by ESDC. ESDC investigated both the Randle refusal and the Medway s. 128 refusal. It can refuse to investigate if a refusal is made in bad faith. The Randle refusal situation was the same as the complainant's. Both involved face shields, and there is no suggestion that the refusals were frivolous, vexatious, or in bad faith. Subjectivity is important, and an employee who exercises a right is allowed to be wrong.

[72] There should have been an investigation by the CSC in the presence of the employee. This did not happen. It dismissed his refusal in a cursory manner. Had there been an investigation done, and had a decision been made that there had been no danger, there would have been a report. The refusal could have continued, and ESDC would have been brought in. By not following the process, the CSC took away the complainant's ability to fight and maintain his position.

[73] Whether the CSC applied SLWP or simply LWOP, it was a penalty and was covered by s. 147 of the *Code*. The objective of the *Code* is to protect employees, and they should not be penalized. The complainant stated that he never requested to be placed on SLWP. His account should be believed. His account was written immediately after the January 12 incident, while CM Anderson's was written 16 days later.

[74] The position of the CSC makes no sense. Why would the complainant have asked to be booked off on SLWP when he submitted a refusal under the *Code*? Why would he say that he would rather have been put on LWOP? He is not suggesting that CM Anderson lied; perhaps, she might have misunderstood. Neither of the grievance replies at the first or second level refer to the SLWP as having been at his request.

[75] CM Anderson could have asked the complainant to wait in his car and come back after the rush at the PECP; then, they could have discussed it. Even if the complainant did not wait, the CSC could have initiated an investigation. Section 128(12) of the *Code* provides that an investigation can proceed without the employee.

[76] The fact that the complainant returned to work the next day and wore a face shield is no excuse to dismiss his concern.

[77] The CSC admitted that the complainant refused to use a face shield and therefore was suspended from entering the institution. He was not allowed in; he might not have been sent home, but at the same time, he was refused entry. There was nothing he could do. He had to remain outside the institution.

[78] The link has been established between the work refusal and the reprisal, and as such, the complaint should be allowed.

[79] The corrective action sought is the payment of the day of salary lost, which would have been an 8.75-hour day.

B. For the respondents

[80] The respondents referred me to the *Code*, as well as to *Vallée v. Treasury Board (Royal Canadian Mounted Police)*, 2007 PSLRB 52, *White v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 63 ("*White 2013*"), *Nash v. Deputy Head (Correctional Service of Canada)*, 2017 PSLREB 4, *Vanegas v. Treasury Board (Correctional Service of Canada)*, 2018 FPSLREB 60, *Walker v. Deputy Head (Department of the Environment*

and Climate Change), 2018 FPSLREB 78, *Burlacu v. Treasury Board (Canada Border Services Agency)*, 2022 FPSLREB 51, *Saumier v. Canada (Attorney General)*, 2009 FCA 51, *Green v. Deputy Head (Department of Indian Affairs and Northern Development)*, 2017 PSLREB 17, and *Gill v. Deputy Head (Correctional Service of Canada)*, 2018 FPSLREB 55.

[81] The Board is seized with a complaint, under ss. 133 and 147 of the *Code*, which claims that booking the complainant off on SLWP was a reprisal for raising a health-and-safety concern. The test to determine this is set out in *Vallée*, which states at para. 64 as follows:

> *[64] Thus, the complainant would have to demonstrate that:*
>
> *a) he exercised his rights under Part II of the* CLC *(section 147);*
>
> *b) he suffered reprisals (sections 133 and 147 of the* CLC*);*
>
> *c) these reprisals are of a disciplinary nature, as defined in the* CLC *(section 147); and*
>
> *d) there is a direct link between his exercising of his rights and the actions taken against him.*

[82] The Board's jurisdiction is not to determine if a danger existed. However, the Board does have to analyze the context of what occurred on the morning of January 12, 2022, meaning the what, where, when, and why to determine if there is a nexus between booking the complainant on SLWP and a work refusal under s. 128(1) of the *Code*.

[83] For the complainant to satisfy the first part of the test set out in *Vallée*, he must establish that he exercised a right under the *Code*. In this case, he must show that he exercised his right to refuse to work under s. 128 of the *Code*. To do this, he must have been "at work". The jurisprudence setting out what "at work" means is set out in *Saumier*, *White 2013*, and *Green*.

[84] The facts demonstrate that on the morning of January 12, 2022, the complainant was denied entry into the institution before his shift had begun and that he never got past the PECP. He confirmed in his testimony that before he left the PE building, CM Anderson twice gave him direction with respect to having to put on a face shield before being permitted entry. He then confirmed that he said something to the effect of this: "So I can't go to work." And then, he left the building of his own accord.

[85] Therefore, the complainant was not "at work" within the meaning of s. 128 of the *Code*. If he was not "at work", he cannot satisfy this very first part of the test in *Vallée*; he did not exercise a right to refuse to work under s. 128(1) of the *Code*, and as such, no complaint process can move forward. On this basis alone, the complaint should be dismissed.

[86] Also as a condition precedent for the complaint process under ss. 133 and 147 of the *Code* to be invoked, in addition for the complainant to be "at work", they must establish that they have also satisfied ss. 128(2)(a) and (b) in that the work refusal does not put the life, health, or safety of another person directly in danger and that the danger that is the subject of the work refusal is not a normal condition of their work.

[87] The respondents' submits that the complainant made no mention in his submissions about COVID-19, the worldwide epidemic that differentiates this from any other case. He asks the Board to ignore that COVID-19 was front and centre and was the danger. He is ignoring that his refusal to wear a face shield put the life, health, and safety of other persons at risk due to COVID-19. Mr. Sehra elaborated on why the face shield requirement was put into place, which was to prevent the spread of the COVID-19 virus in a secluded population. He alluded to the fact that the institution was like a ship and that the inmates were trapped on it. The CSC has an obligation with respect to the inmates as well as the persons who work at or visit its institutions.

[88] The benefits of preventing the spread of COVID-19 outweighed the risk of a non-existent potential attack by an inmate. Thus, the complainant did not satisfy the exceptions set out in s. 128(2)(a) because the failure to put on a face shield put the life, health, and safety of anyone else who was in the institution directly in danger due to the risk from COVID-19.

[89] The work description provides that the risk of being attacked by an inmate is a normal condition of employment. As such, the complainant did not satisfy the exceptions set out in s. 128(2)(b) of the *Code*.

[90] CM Anderson stated that she understood that the complainant wanted to be booked off sick, so she did it. Her evidence did not disclose that she understood that he was exercising a work refusal under s. 128 of the *Code*.

[91] There was nothing going on at the time the complainant spoke of his health-and-safety concerns on January 12, 2022, which suggested that he could not put on a face shield and then, at some point once he was in the institution, have a discussion about his concerns.

[92] It is also not the Board's role to determine if the process under the *Code* was followed. Again, reviewing whether the process under the *Code* was followed is done only to provide context for the question of the alleged reprisal. If the process was not followed, it is for another jurisdiction to address.

[93] It is the respondents' position that the complaint is moot because the complainant's sick leave bank was recredited the lost one day of SLWP, attributed for January 12, 2022, as part of the grievance process. The complainant filed a grievance and pursued it through the first two levels of the grievance process, where, at one of the levels, the decision was made to recredit his sick leave bank with the one day of SLWP. While he testified that he believed that he should have been placed on LWOP when he did not work on January 12, 2022, this, like any pay issue, should have been addressed through the grievance process. In fact, the result of the grievance process was to characterize the leave from work on January 12, 2022, as LWOP, which is what the complainant expected to happen. In addition, he did not pursue the grievance process any further. The fact that it could have been and that it was not makes the relitigating of it by way of the complaint for the same matter an abuse of process.

[94] There is no nexus that would allow a work refusal under s. 128(1) of the *Code* in this case. There was no danger when the complainant stated that he raised his health-and-safety concern about the face shield. There is no evidence that there was an intent by CM Anderson to discipline him. He was not sent home. He admitted this. Most importantly, when he raised his health-and-safety concern, he had already been denied entry into the institution. His absence from work had to be accounted for. It had to be some form of leave.

[95] The wording of the complaint states that the complainant was "denied the right to refuse work". He was denied entry into the institution and then left the PE building of his own accord. Therefore, he was not "at work" within the meaning of the *Code*.

[96] The complainant's actions on the morning of January 12, 2022, amounted to insubordination. There was a clear order; he understood it, CM Anderson had the authority to make it, and he did not obey it, which he confirmed in his testimony.

[97] The health-and-safety issue that the complainant was concerned about was the alleged fogging of the face shield. There is no evidence that the face shields fog up. In cross-examination, he stated that he might or might not have used a face shield during his ICP training in December of 2020 and that he could not recall if he tried to use a face shield between that time and January 12, 2022. He did not mention whether fogging was an issue. CM Anderson did not experience any issues with the face shield, and no one reported problems with fogging face shields. The evidence of Mr. Sehra disclosed that there were two types of face shields that the CSC used. The complainant did not state in his testimony that the face shields available on January 12, 2022, were the type that fogged up or impeded his vision. His concerns were purely hypothetical.

[98] The respondents submit that the Board is without jurisdiction and that the complaint should be dismissed.

C. The complainant's reply

[99] The complainant submitted that the respondents cannot rely on the argument that he was not at work as it was never mentioned before the hearing; as such, it is a breach of the rule in *Burchill*. He was taken by surprise. He referred me to *Gill*, at paras. 187 and 188.

[100] The complainant could not have been insubordinate if he was not at work.

[101] The decision in *Saumier* can be distinguished because the complainant in that matter was on sick leave. In this case, the complainant had been at work the day before and the day after. The decision in *Green* can also be distinguished as the complainant in that case was not at work. In addition, the complainant referred me to *Marois*, at para. 54.

[102] With respect to the complainant not pointing out what face shield was problematic, he referred me to the decision in the Medway s. 128 refusal that was referenced in the material. The Board should give a broad and liberal meaning to the *Code*.

[103] There is a requirement for the CSC to investigate a work refusal; it did not. It also requires a written report; there is none. The respondent should have continued the process.

[104] The fact that the complainant lost a day's pay can amount to a penalty. This can be punishment without intent.

[105] The burden is with the CSC once the complainant has satisfied the condition in s. 133. It is the complainant's position that he did satisfy this burden, which moves the onus to the CSC to disprove the complaint.

[106] With respect to the issue of mootness, there is no such reference in the *Code*.

[107] The respondents' submission that being assaulted is a part of the job is not accurate and has been addressed in *Verville*, *Laycock*, and *MacNeal*.

D. The respondents' sur-reply

[108] *Burchill* addresses the tact of bringing forward new and different issues at adjudication. It was decided in the context of a grievance and stands for the proposition that a grievor cannot add new allegations to a grievance. The complainant cannot use *Burchill* to suggest that he was taken by surprise with respect to the initial satisfying of his burden. It is a question of law. He should have anticipated that he would have to establish that he invoked a work refusal under s. 128 of the *Code*. No new or different facts were led or alleged. There is no new issue. In *Gill*, *Burchill* was applied because the employer sought to change the reason for the termination, which was the very basis of the grievance. In this case, none of the facts have changed; nor has the complaint, which alleged a reprisal for the refusal to work.

IV. Reasons

[109] Before I address the respondents' objection to my jurisdiction, I will address the complainant's objection, based on *Burchill*, to the respondents' argument that the complainant was not at work and therefore could not have engaged s. 128 of the *Code*, and as such could not have made this complaint ("the complainant's *Burchill* objection").

A. The complainant's *Burchill* objection

[110] For the reasons that follow, the complainant's *Burchill* objection is dismissed.

[111] In *Gill*, I said this about *Burchill*:

> ***187*** *This concept of law is not new. In* Burchill*, the Federal Court of Appeal dealt with the issue of changing the basis of a grievance during the grievance process. In that case, the question dealt with during the grievance process was whether Mr. Burchill had indeterminate status or tenure despite accepting a term position. The Court pointed out that that question was determinable in the grievance process but that it could not be referred to adjudication. When he lost his grievance at the final level, Mr. Burchill attempted to refer it to adjudication on the basis that he had been discharged from his employment for disciplinary reasons, which the Court held he could not do.*
>
> ***188*** *The concept in* Burchill *applies equally to the employer. It is certainly both unfair and prejudicial to the grievor when, more than six-and-a-half years after it terminated his employment, he has to try to defend against allegations of which he was not fully made aware, and he was not required to address when moving his grievance forward through the grievance and adjudication processes.*

[112] In *Gill*, the grievor had been terminated under s. 62(1) of the *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13; "the *PSEA*"), ostensibly during his period of probation as set by the Treasury Board's *Regulations* ("the probationary *Regulations*"), established under s. 61 of the *PSEA*. The grievor grieved his termination, and the employer objected to the Board's jurisdiction to hear the matter on the basis of s. 211(a) of the *Act*, which provides that nothing in s. 209 of the *Act*, the section that permits grievances to be referred to the Board for adjudication, is to be construed or applied as permitting the referral to adjudication of an individual grievance with respect to terminations of employment under the *PSEA*.

[113] During the course of the evidence in hearing that matter, it became clear to me that the grievor likely had been terminated outside the probationary period set by the probationary *Regulations*. As such, I invited submissions on that issue.

[114] In the course of those submissions, the employer argued in the alternative (to the termination being timely and within the appropriate probationary period) that it "could have" terminated the grievor's employment for unsatisfactory performance. I dismissed that argument on the basis of the decisions of the Federal Court of Appeal in *Canada (Attorney General) v. Heyser*, 2017 FCA 113, and *Bergey v. Canada (Attorney General)*, 2017 FCA 30, both of which were judicial reviews of Board decisions, and *Burchill*.

[115] While the decisions in all of *Burchill*, *Heyser*, *Bergey*, and *Gill* were originally grievances and were dealt with by the Board or one of its predecessors (before three of them went to the Federal Court of Appeal), the reasoning applied in them is not exclusive to grievances and can be used in other forms of proceedings.

[116] In simple terms, the rule in *Burchill* provides that once a party brings forward a process and makes certain allegations in that process that form the basis for the relief they seek against the other party or parties, they cannot later, during the course of those proceedings, change those allegations to something different. The rule is there to prevent a party from changing the reasoning behind or the nature of a complaint or grievance, such that the other party would have to address different allegations and perhaps a different legal test.

[117] In *Gill*, while Mr. Gill was the grievor and made a grievance against the termination of his employment, the employer had the initial burden of proof and was required to bring forward and prove (on a balance of probabilities) why it terminated the grievor. The employer stated that it had rejected Mr. Gill on probation under s. 62 of the *PSEA*; this was the reason behind the termination, and the legal test flowed from it. It could not later change that (many years later and in the course of the actual hearing) to a termination on the basis of "unsatisfactory performance". This would have contravened the rule in *Burchill*.

[118] The complainant's *Burchill* objection cannot stand because he made the complaint. He knows why he brought it forward. He alleges that a reprisal was carried out against him due to exercising his rights under s. 128 of the *Code*. In a complaint such as this, the *Code* sets out the basis on which such a complaint can proceed. It provides that the complainant merely has to establish that he or she has made a complaint under s. 133(1) and (i) that the complaint arose with respect to a right being exercised either under s. 128 or 129, and (ii) that the complaint was made not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to it. This is the only burden that the complainant has.

[119] After this point, the burden of proof that a reprisal has not occurred shifts to the respondent. If the complainant cannot establish that the complaint is timely and

that it was made with respect to a right being exercised under s. 128 or 129 of the *Code*, the inquiry ends, as the Board has no jurisdiction.

[120] I agree with the respondent's submission that the complainant either knew or ought to have known what his burden was because it is set out in the *Code*. Nowhere do the respondents admit that he met his initial burden, as set out in s. 133 of the *Code*; nor was it required to. As the complainant made the complaint, it was his burden to establish the bare minimum requirements set out in the *Code*.

B. The respondents' objection

[121] The jurisdiction of the Board to hear complaints under the *Code* flows from s. 240 of 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,*	***240*** *La partie II du Code canadien du travail s'applique à la fonction publique et aux personnes qui y sont employées comme si la fonction publique était une entreprise fédérale visée par cette partie, sous réserve de ce qui suit :*
(a) *any reference in that Part to*	***a)*** *en ce qui concerne la terminologie :*
(i) *"arbitration" is to be read as a reference to adjudication under Part 2 or Division 2 of Part 2.1,*	***(i)*** *« arbitrage » renvoie à l'arbitrage des griefs sous le régime de la partie 2 ou de la section 2 de la partie 2.1,*
(ii) *…* Board *is to be read as a reference to the Public Service Labour Relations and Employment Board,*	***(ii)*** […] Conseil *s'entend de la Commission des relations de travail et de l'emploi dans la fonction publique,*
(iii) *a "collective agreement" is to be read as a reference to a collective agreement within the meaning of subsection 2(1),*	***(iii)*** *« convention collective » s'entend au sens du paragraphe 2(1),*
(iv) *"employee" is to be read as a reference to a person employed in the public service, and*	***(iv)*** *« employé » s'entend d'une personne employée dans la fonction publique,*

(v) *a "trade union" is to be read as a reference to an employee organization within the meaning of subsection 2(1) …;*	***(v)*** *« syndicat » s'entend de l'organisation syndicale au sens du paragraphe 2(1)* […]*;*
(b) *[Repealed, 2017, c. 20, s. 396]*	***b)*** *[Abrogé, 2017, ch. 20, art. 396]*
(c) *the provisions of this Act apply, with any necessary modifications, in respect of matters brought before the Federal Public Sector Labour Relations and Employment Board.*	***c)*** *les dispositions de la présente loi s'appliquent, avec les adaptations nécessaires, aux affaires instruites par la Commission des relations de travail et de l'emploi dans le secteur public fédéral.*

[122] Section 133 of the *Code* sets out the process for making complaints under the *Code*, and the subsections relevant to this case are as follows:

Complaint to Board	***Plainte au Conseil***
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.*	***133 (1)*** *L'employé — ou la personne qu'il désigne à cette fin — peut, sous réserve du paragraphe (3), présenter une plainte écrite au Conseil au motif que son employeur a pris, à son endroit, des mesures contraires à l'article 147.*
(2) *The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.*	***(2)*** *La plainte est adressée au Conseil dans les quatre-vingt-dix jours suivant la date où le plaignant a eu connaissance — ou, selon le Conseil, aurait dû avoir connaissance — de l'acte ou des circonstances y ayant donné lieu.*
(3) *A complaint in respect of the exercise of a right under section 128 or 129 may not be made unless the employee has complied with subsection 128(6) or the Head has received the reports referred to in subsection 128(16), as the case may be, in relation to the matter that is the subject-matter of the complaint.*	***(3)*** *Dans les cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128 ou 129, sa présentation est subordonnée, selon le cas, à l'observation du paragraphe 128(6) par l'employé ou à la réception par le chef des rapports visés au paragraphe 128(16).*
…	[…]

(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.*	***(6)*** *Dans le cas où la plainte découle de l'exercice par l'employé des droits prévus aux articles 128 ou 129, sa seule présentation constitue une preuve de la contravention; il incombe dès lors à la partie qui nie celle-ci de prouver le contraire.*

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

General prohibition re employer	***Interdiction générale à l'employeur***
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*	***147*** *Il est interdit à l'employeur de congédier, suspendre, mettre à pied ou rétrograder un employé ou de lui imposer une sanction pécuniaire ou autre ou de refuser de lui verser la rémunération afférente à la période au cours de laquelle il aurait travaillé s'il ne s'était pas prévalu des droits prévus par la présente partie, ou de prendre — ou menacer prendre — des mesures disciplinaires contre lui parce que :*
(a) *has testified or is about to testify in a proceeding taken or an inquiry held under this Part;*	***a)*** *soit il a témoigné — ou est sur le point de le faire — dans une poursuite intentée ou une enquête tenue sous le régime de la présente partie;*
(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*	***b)*** *soit il a fourni à une personne agissant dans l'exercice de fonctions attribuées par la présente partie un renseignement relatif aux conditions de travail touchant sa santé ou sa sécurité ou celles de ses compagnons de travail;*
(c) *has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.*	***c)*** *soit il a observé les dispositions de la présente partie ou cherché à les faire appliquer.*

[124] Section 128 is the section of the *Code* that permits an employee to refuse to work in certain situations of danger. The subsections relevant to 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*	***128 (1)*** *Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas :*
(a) *the use or operation of the machine or thing constitutes a danger to the employee or to another employee;*	***a)*** *l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé;*
(b) *a condition exists in the place that constitutes a danger to the employee; or*	***b)*** *il est dangereux pour lui de travailler dans le lieu;*
(c) *the performance of the activity constitutes a danger to the employee or to another employee.*	***c)*** *l'accomplissement de la tâche constitue un danger pour lui-même ou un autre employé.*
(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*	***(2)*** *L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas :*
(a) *the refusal puts the life, health or safety of another person directly in danger; or*	***a)*** *son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne;*
(b) *the danger referred to in subsection (1) is a normal condition of employment.*	***b)*** *le danger visé au paragraphe (1) constitue une condition normale de son emploi.*
…	[…]
(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*	***(6)*** *L'employé qui se prévaut des dispositions du paragraphe (1) ou qui en est empêché en vertu du paragraphe (4) fait sans délai*

accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.	*rapport sur la question à son employeur.*
…	[…]
***(8)** If, following its investigation, 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.*	***(8)** Si, à la suite de son enquête, l'employeur reconnaît l'existence du danger, il prend sans délai les mesures qui s'imposent pour protéger les employés; il informe le comité local ou le représentant de la situation et des mesures prises.*
***(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.*	***(9)** En l'absence de règlement de la situation au titre du paragraphe (8), l'employé, s'il y est fondé aux termes du présent article, peut maintenir son refus; il présente sans délai à l'employeur et au comité local ou au représentant un rapport circonstancié à cet effet.*
…	[…]

[125] Section 128(4) of the *Code* has no relevance to this matter as that section is to be read in conjunction with s. 128(3), which pertains to situations that arise on a ship or aircraft that is in operation; there is no ship or aircraft involved in this matter.

[126] 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 made under s. 133 of the *Code* alleging a reprisal under s. 147, I have jurisdiction to hear and determine the matter, if the complainant otherwise satisfies the burden established in ss. 133(2) and (3) of the *Code*.

[127] Pursuant to s. 133(6) of the *Code*, once made, the complaint itself 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.

[128] The initial burden of proof lies with the complainant who must prove only that (i) he or she has made a complaint under s. 133(1) of the *Code* and that the complaint arose with respect to a right being exercised either under s. 128 or 129 of the *Code*;

and (ii) the complaint was made not later than 90 days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to it.

[129] The complaint was made with the Board on April 1, 2022, and that day was within 90 days of the January 12 incident. As such, it satisfies the time restriction set out in s. 133(2) of the *Code*.

[130] What remains is for the complainant to prove that the complaint arose with respect to a right being exercised under either s. 128 or 129 of the *Code*.

[131] For the reasons that follow, I find that the complainant has not met this initial burden that the complaint arose out of the filing of a work refusal under s. 128 of the *Code*.

[132] In the complaint, where it refers to the exchange with CM Anderson at the PECP on January 12, 2022, about wearing the face shield, it states, "Acting correctional manager Leanne Anderson said that if he fails to do so, she won't let him work and he will be sent home." A little further down, it states, "The manager did not follow the procedure set in Canada Labour Code with respect to work refusal and sent the complainant home."

[133] In his grievance, the complainant stated as follows:

> *… APPROXIMATELY 0620 I REPORTED FOR WORK AND WAS DIRECTED TO WEAR A FACE SHIELD. I STATED I WOULD NOT. A/CM LEANNE ANDERSON TOLD ME 'WE WON'T LET YOU IN UNLESS YOU WEAR ONE'… I WAS DENIED THE RIGHT TO REFUSE WORK DUE TO HEALTH & SAFETY CONCERNS.…*

[134] In his first email to Ms. Blanchette, on January 14, 2022, at 15:00, the complainant wrote as follows:

> *…*
>
> *My complaint is not regarding PPE. Its* [*sic*] *regarding when I raised a health and safety concern I was denied entry to the institution, sent home and booked* [off] *sick.*
>
> *… The manager didn't have anything else to say and offered me no other options other than saying I won't* [*sic*] *be permitted entry if I wasn't wearing one.…*
>
> *…*

> *I never booked off sick. I refused to work citing health and safety concerns. These concerns were ignored and I was sent home.…*
>
> *…*

[135] In his second email to Ms. Blanchette, on January 14, 2022, at 15:48, the complainant wrote as follows:

> *…*
>
> *… A/CM Anderson was present at the PE and stated something to the effect of, 'if you don't wear one we won't let you in.' I inquired that, 'I'll be sent home?' She confirmed.…*
>
> *I went home and contacted my union local VP right away via email that my right to refuse work had been violated.…*
>
> *…*
>
> *I was refused entry after I had cited a safety concern. I did not book off sick.*

[136] In his first email to Ms. Saunders of the union, on March 30, 2022, at 16:58, the complainant wrote as follows:

> *…*
>
> *A/CM Anderson who was standing behind Baz then stated something to the effect of, 'if you don't wear one, we can't let you in."*
>
> *… The manager didn't have anything else to say and offered me no other options other than saying I won't* [*sic*] *be permitted entry if I wasn't wearing one* [a face shield].
>
> *I perceived this as instruction to leave the institution. I left shortly thereafter emailing VP Min a synopsis of the situation.…*
>
> *…*

[137] Ms. Saunders responded to the complainant's email of March 30, 2022 at 16:58, inquiring of him if the employer agreed that it sent him home on January 12, 2022. He responded on March 30, 2022, at 17:44, as follows:

> *…*
>
> *I don't know if they dispute it or not.*
>
> *…*
>
> *I articulated that I believed I was sent home. I don't believe that was refuted.*
>
> *…*

[138] The only two people who testified and who were present at the January 12 incident were the complainant and CM Anderson. In their testimonies before me, they both stated that CM Anderson denied him entry into the institution. They both also stated that CM Anderson did not send him home, and again, they both said that he left the PE building. In addition, he confirmed that before he raised any health-and-safety concern, CM Anderson told him that wearing the face shield was mandatory and that if he did not put one on, he would not be allowed entry into the institution. The entire engagement between the two of them lasted, at best, a couple of minutes.

[139] The complainant also admitted in cross-examination the following:

- that he did not feel that he was in danger of being attacked in the PE building;
- that when he was instructed that he had to put on a face shield when at the PECP or he would not be allowed into the institution, he was not in any danger;
- that he would not have been in contact with inmates between the PECP and the briefing room;
- that he could have worn a face shield until he had contact with an inmate or inmates and then refused to work under s. 128 of the *Code*;
- that he did not make a work refusal under s. 128 of the *Code*, stating that he did not want to do that;
- that he said that he admitted at the grievance hearing that he could have made a work refusal under s. 128 of the *Code* but that he did not; and
- that he said that he did not initiate a s. 128 work refusal because he wanted to resolve the situation at the lowest possible level.

[140] Warden Andreassen wrote the second-level grievance decision, in which he reflected the discussion he had with the complainant on April 27, 2022, in which the complainant said that he did not initiate a s. 128 work refusal.

[141] The complainant argued that there are no specific words that must be said that are necessary to initiate a work refusal under s. 128 of the *Code*. I agree. Most frontline employees are likely not familiar with the wording of the *Code* and versed in the exact details of what has to be said or done under it. Its provisions are there to keep people safe. However, the documentation that the complainant authored as well as his testimony before me on what his opinion was about what he had done are contradictory.

[142] For example, in his initial email to Ms. Blanchette on January 14, 2022, at 15:00, he said that his complaint was not about PPE. Yet in fact, it is about the face shield, which is PPE. Later in that email, he said that he refused to work. In his grievance,

dated January 21, 2022, he said that he was denied the right to refuse to work. In his grievance hearing with Warden Andreassen, he stated that he did not call a 128, which is reflected in Warden Andreassen's second-level grievance response. In his testimony before me, he also said that he did not call a 128.

[143] Section 128 of the *Code* is not a set of all-encompassing rules and regulations with respect to health and safety in the workplace. Section 128 is an extraordinary step, and it allows an employee to refuse to work in the face of danger while at work.

[144] The Federal Court of Appeal addressed the meaning of "at work" in *Saumier* at paragraphs 50 to 52, stating as follows:

> *[50] … The mere fact that the applicant reported physically to her employer's office on September 27, 2005, after several months' absence did not result in her being "at work" within the meaning of subsection 128(1) of the Code. In other words, an employee is not "at work" simply by virtue of reporting to her employer's office for a few minutes to give notice that she refuses to work for health reasons, regardless of the task or tasks to be assigned to her.*
>
> *[51] In the context, it is important to note that when the applicant reported to the office of her employer on September 27, 2005, accompanied by S/Sgt. Delisle, she indicated to her employer that she refused to work because she did not want to aggravate her health problems. More particularly, she indicated to S/Sgt. Vaillancourt, who had asked her to specify which duties she refused to perform, that she refused to work [TRANSLATION] "for her health". As well, on December 20, 2005, the applicant again reported to the office of her employer and indicated to Corporal Léo Mombourquette that she refused to work to avoid aggravating her medical condition.*
>
> *[52] Accordingly, the applicant's complaint was not admissible because she was not "at work" when she invoked subsection 128(1) of the Code in support of her refusal to work.*

[145] In *Green*, I addressed the issue of being "at work" when a work refusal is initiated. At paragraphs 437 to 439, 445, and 446, I stated as follows:

> ***437*** *While I find that the grievor's complaint under s. 133 of the* Code *must fail because she did not comply with s. 128(6), it would also fail because she did not comply with s. 128(1).*
>
> ***438*** *Section 128(1) of the* Code *provides for the conditions in which, in certain situations of danger, an employee can refuse to work. It states that "… an employee may refuse … to work in a place or to perform an activity, if the employee while at work has*

> *reasonable cause to believe that … (b) a condition exists in the place that constitutes a danger to the employee …".*
>
> ***439*** *In* White*, the complainant ostensibly refused to work under s. 128 of the* Code *and alleged that a danger existed because he was being required to wear his stab-proof vest while at work, which he stated was constrictive, and when coupled with the heat in the workplace, made breathing difficult. While he was at work when he refused to work under s. 128, the thing causing the alleged danger, the vest, was not. I found that he could not have been in danger due to wearing his vest because he did not have it with him. Hence, he did not properly exercise a refusal to work under s. 128. Therefore, I found that the condition precedent set out by s. 128(1) did not exist.*
>
> …
>
> ***445*** *As set out in s. 128(1) of the* Code*, an employee may refuse "… to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that …". According to the grievor, Mr. B was the danger. However, he had been out of the workplace since February 2013, and she had not seen him since then. Indeed, she had been out of the workplace from July 22, 2013, until September 16, 2013, and again starting on September 26, 2013. There is no evidence that she was aware that Mr. B was at work or that he was at work in her workplace at any time after she received and read his complaint, up to and including when she wrote to the DM on the afternoon of October 4, 2013.*
>
> ***446*** *The grievor was clearly not at work when she refused to work, which is unquestionably a requirement set out in s. 128(1) of the* Code *as a precondition for a work refusal.*

[146] As set out in all of *Saumier*, *Green*, and *White*, for an employee to avail themselves of the protection under s. 240 of the *Act*, they must actually be at work. The protections in the *Code* are not general protections for people in general. They are protections for employees while they are at their jobs, working. Being at work means more that just being at the location of the work. People can be at the location of their jobs and not be at work or working.

[147] The question of whether a person is at work or not is a question of fact and is very fluid depending on the particular circumstances of the type of work a person does. Indeed, a workplace does not always pertain to one particular place either. A simple example, using the CSC and CXs as the example, is as follows: a CX can be at work at an institution, like Mountain; however, the same CX, while escorting an inmate to a hospital, would still be at work while escorting that inmate outside the institution.

[148] There is a point in time when work starts and a person is considered to be at work and no longer on their own time. It is when the person is at work that they have the protection of s. 128 of the *Code*; when they are not at work but on their own time, they are not under that same protection.

[149] The January 12 incident also did not occur when the grievor was at work or working. The evidence disclosed that the CXs' shifts started at 06:30 with them obtaining their post assignments in the CMs office and then proceeding to a briefing room for a shift briefing. The January 12 incident took place over a matter of minutes at or about 06:15 or 06:20, when the complainant attempted to enter the institution before his shift started. He was not allowed to enter the institution, where he worked. After the brief exchange with CM Anderson, he then left. He did not go past the security check at the PECP, his bag did not go through the X-ray machine, he did not swipe his access card to enter the institution, he did not go into the area of the PE building where the CXs donned their PPE, he did not proceed out of the PE building within the perimeter of the institution to the CMs office to obtain his post assignment, he did not attend the morning shift briefing at 06:30 at the start of the shift, and he never went to a post.

[150] In short, when the grievor stated that he was not going to wear the face shield, he had yet to be at work. In fact, in his testimony, he admitted that before he raised any health-and-safety issue that morning, he had been told that if he did not put on a face shield, he would not be allowed into the institution. He was still on his way to work and had yet to enter the perimeter of the institution. He would have been in no different position than would have been any other person, whether they were employed by the Treasury Board and working at the CSC or were a private citizen, who was in the PE building and had yet to be admitted past the PECP. Further, he could not refuse to work, as he had already been told that he would not be allowed into the institution without wearing a face shield.

[151] The complainant did not satisfy the test of being "at work", as set out in *Saumier*, *Green*, and *White*, which is a requirement set out in s. 128(1) of the *Code* as a precondition for a work refusal.

[152] The complainant referred me to *Marois*, a recent decision of the Canada Industrial Relations Board (CIRB). That matter involved a tank-truck driver (Mr. Marois)

who worked for a company that transported gasoline to filling stations in Quebec. Mr. Marois alleged that he was terminated from his position because he exercised his right to refuse to work due to a danger. From the decision, it appears that Mr. Marois was due to work a shift late in the day and that there was a high-wind warning issued by Environment Canada, with winds hovering around 40 kilometres per hour.

[153] The decision states that the complainant did not leave his home and that he did not attend a dispatch centre. The employer argued that the complaint could not stand because the complainant was not at work when he refused to work. The decision in *Saumier* was considered. At paragraph 54, the CIRB found that to find that Mr. Marois was not at work when he refused to perform his shift on the evening in question would be an overly strict application of s. 128 of the *Code*, and in turn, found he was "at work" within the meaning of the *Code*.

[154] I am not prepared to accept that the decision in *Marois* overturns the meaning of "at work" as defined by the Federal Court of Appeal in *Saumier* and the Board. There is insufficient factual information contained within the *Marois* decision to apply the reasoning found at paragraph 54 to the facts in this matter. In *Marois*, the CIRB considered that the employer's dispatcher and the complainant usually communicated by email or text message to determine the complainant's availability and assignment; that the complainant worked nights; and, that the complainant does not work at the company's site, rather, he drives a tank truck according to an assignment sent to him by the employer, often electronically. The *Marois* decision was specific to that employment context, which is not at all the situation with respect to the work performed by the complainant in this case.

[155] For all these reasons, I find that I have no jurisdiction, and the complaint is dismissed.

[156] As I have concluded that the complainant has failed to establish the precondition for making a complaint under s. 133 of the *Code*, I need not continue my analysis and deal with any of the other arguments put forward by the parties.

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

(The Order appears on the next page)

V. Order

[158] I have no jurisdiction to hear the complaint.

[159] The complaint is dismissed.

April 2, 2024

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board