

## ONTARIO LABOUR RELATIONS BOARD

**3736-01-HS** Ontario Public Service Employees Union, Appellant v. **Ministry of Correctional Services** (Toronto West Detention Centre), Ministry of Labour, and Michael Chappel, Inspector, Responding Parties.

**BEFORE:** Harry Freedman, Vice-Chair.

**APPEARANCES:** S.B.D. Wahl, S. Andrews, D. Pickett and Linda Spires for the appellant; Michael Kennedy, Tony Roth, Gary Commeford, Barry Thomas and Mary Pat Moore for the Ministry of Correctional Services (Toronto West Detention Centre); Bruce Arnott, Steve Mason and Judie Im for the Ministry of Labour and Michael Chappel, Inspector.

**DECISION OF THE BOARD;** April 8, 2002

1. This is an appeal under section 61 of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O. 1, as am. (the "Act") arising out of a refusal by the nurses who normally work at the Toronto West Detention Centre (the "Detention Centre") to enter the Detention Centre on March 13 and 14, 2002. The refusal arose because Correctional Officers who were to work within the Detention Centre were not at work, either because they too had engaged in a work refusal under the Act or because the Ministry of Correctional Services (Toronto West Detention Centre) (the "Employer") has not permitted them to return to work. No order was made by the Inspector.

2. The work refusal and this appeal take place in the context of an ongoing strike by employees represented by the appellant. The strike began on March 13<sup>th</sup> and continues to date. Orders have been made by the Board, differently constituted, in connection with events that have occurred at both the Detention Centre and other jails and detention centres throughout the province.

3. The appellant submitted that the work refusal was prompted because the nurses understood that the Employer had engaged managers to perform the work that would otherwise have been done by Correctional Officers under the parties' Essential Services Agreement who were not properly trained. Counsel argued that having inadequately trained managers performing work in a maximum security facility like the Detention Centre creates a serious risk to the health and safety of nurses. Counsel adds, in addition, that with the strike, the situation in the Detention Centre becomes more volatile and there is therefore a heightened concern that the nurses have properly trained people to accompany them in their rounds and when escorting inmates to the health centre where the nurses work.

4. On the first day of the work refusal, the refusing nurses left the secure area of the Detention Centre but were still at the premises. No meaningful discussions ensued between the parties. They returned and reported for their next shift but did not enter the Detention Centre. Once again, there were no discussions between the Employer and the workers' representatives.

5. The Employer takes the position that the nurses have not engaged in a proper work refusal because they did not even come into to the Detention Centre to see who from among the

managerial staff would be working with them and what work they would be assigned. Counsel for the Employer contends that no workplace investigation was even warranted when the nurses themselves had not properly invoked the procedures for a work refusal under section 43 of the Act. Simply put, counsel submits that a worker cannot properly engage in a work refusal unless the worker is actually at work before engaging in a refusal, and in any event, the workers had no objective basis for engaging in a refusal since their assertion about untrained managers was, at best, speculation.

6. In my view, depending on the circumstances, a worker need not actually be in the workplace before engaging in a work refusal contemplated by the Act. A simple example will suffice. If the workers, before entering the institution, learn that the cell doors are not working properly, i.e., they cannot be locked, then there is no need for them to enter the institution and then leave because the cell doors cannot be locked. They can engage in the refusal from outside the institution, so long as their supervisor is informed of the reasons for the refusal.

7. As for not having an objective basis for engaging in a refusal, while there is certainly a good deal of merit to the Employer's submission that the refusing workers should be specific as to the cause of their concerns, a nurse who sincerely believes that the persons who will be accompanying her while doing her medical rounds and who are escorting prisoners between their living areas and the health centre are not adequately trained can, in my view, invoke the right to refuse under section 43(3)(b) of the Act since maintaining proper levels of security within the Detention Centre is, arguably at least, an element of the physical condition of the workplace.

8. By letters dated March 14, 15 and 16, the refusing nurses advised the Employer that their refusal was based on their understanding that the "jail is dangerously understaffed by management personnel, many of whom are not trained or accustomed to working in a jail environment." That information was in the possession of Inspector Michael Chappell when he advised the Employer on March 20, 2002 that a proper work refusal had not been taken by the nurses because their letters "do not meet the test of a work refusal, as workers may only refuse work under section 43 of the Act when they are actually at work, and faced with a condition that meets the test of sections 43...." The Inspector went on to advise the employer that a work refusal "cannot be made on a remote basis, and the Act was never intended to contemplate workers refusing from home, based on hypothetical concerns."

9. In my view, the focus of the refusal was narrowed by the communications between the workers and the Employer as set out in those letters. It was clear what the nurses' concerns were; the adequacy of training received by the managers who were carrying out the work within the Detention Centre while the Correctional Officers remained absent.

10. The Board, differently constituted, in a decision dated March 20, 2002 in Board File No. 3589-01-M (an application under Part IV of the *Crown Employees Collective Bargaining Act* and section 100 of the *Labour Relations Act, 1995* wrote at paragraphs 3 and 4:

The applicant [Employer] has known since at least March 14, 2002 that the nurses at the Toronto West Detention Centre have not been working because they are concerned for their safety in the absence of correctional officers from the facility. Nevertheless, the applicant has not taken any steps which an employer is required to take when faced with such a health and safety complaint and work refusal. There have no discussions between the parties and no Occupational Health and Safety Inspector has been contacted.

The Board therefore adjourned the application until the health and safety process has been complied with.

Despite the Board having contemplated that the process under the Act would be undertaken by the parties, nothing further was done by the Employer, based, in part, on the advice it had received from the Inspector.

11. The appellant's co-chair of the Joint Health and Safety Committee at the Detention Centre wrote to the Employer on March 20 and again on March 21, 2002 advising that the Joint Health and Safety Committee was to meet and discuss the nurses' concerns in accordance with the Board's March 20<sup>th</sup> decision and to discuss the work refusal initiated by Greg Kitzul, a manager, on March 17<sup>th</sup>. (Mr. Kitzul's work refusal related to concerns about his safety arising from Correctional Officers returning to the Detention Centre based on threats and intimidation he had experienced from them.) No meeting between the Employer and the appellant has taken place.

12. Both the Employer and the Ministry of Labour submit that in the absence of an investigation and stage one meeting between the parties, an inspector cannot be called to investigate and therefore there is nothing to appeal from. The Ministry of Labour concedes, however, that the unilateral refusal by an employer to meet to deal with the worker's refusal cannot preclude access to the inspector and an investigation by the inspector.

13. In this case, the strict position taken by the Employer, explained in large part by the surrounding circumstances of an ongoing strike and the difficulties with which the local management at the Detention Centre had to contend and the advice received from the inspector which arrived after the Board's March 20<sup>th</sup> decision, cannot be sustained. There was a work refusal by the nurses who had a subjective concern about the adequacy of the training undertaken by many of the managers who were brought into the Detention Centre to do the essential services work of the Correctional Officers. Those subjective concerns appear to have been borne out to some degree by a subsequent event concerning a failure by a manager to remain as back up to the nurse while she was on rounds.

14. In addition, the Employer in its response indicated that in addition to the 32 managers who work at the Detention Centre, 31 other managers, 11 of whom have experience working in correctional institutions were assigned, to the Detention Centre. It appears therefore that some 20 managers working at the Detention Centre have not had the experience or training of Correctional Officers or the other managers who have worked at the Detention Centre. Counsel for the Employer advised that everyone received a half-day orientation session. The training program for Correctional Officers is about six weeks' duration.

15. There is an obligation under the Act for the Employer to provide competent and adequately trained supervisors. See *Ministry of Solicitor General and Correctional Services*, [1998] O.O.H.S.A.D. No. 163, decision dated May 27, 1998 (Bradbury) at paragraph 37. A half-day orientation would not, in my view, meet the minimum obligation described by Adjudicator Bradbury. Although counsel for the Employer advised that it had arranged a pairing or "buddy" system so that the less experienced managers would always be accompanied by an experienced and properly trained manager, it was apparent during the submissions, that on occasion, the less experienced manager might be called upon to be the back up for a nurse, or be with the nurse if the more experienced manager was the back up. That situation, in my view, also provides some substantial basis for the concerns of the nurses.

16. Therefore, I am satisfied that in the circumstances of this case, a proper work refusal was initiated by the nurses. Furthermore, it is imperative that the Employer and the appellant engage in the first stage investigation to review the nurses' concerns, and in particular, provide the nurses with sufficient information about the experience, training and qualifications of the managers who are working at the Detention Centre who had not worked there before the commencement of the strike. Finally, the nurses are entitled to have properly trained managers or supervisors accompany them when they are doing their rounds, when inmates are being escorted to and from the Health Centre and in the control room when nurses are working in the institution.

17. The appeal is allowed. I direct the Employer to provide the nurses with information about the training, experience and qualifications of the managers who had not worked at the Detention Centre prior to the strike. I further direct the Employer to ensure that when the nurses are scheduled to work at the Detention Centres, properly trained managers are present to accompany them in their rounds and as back up and that a properly trained manager be assigned to the control room.

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“Harry Freedman”  
for the Board