

April 30, 2003

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AREA OFFICE

Travis Kienas
Province of B.C. Solicitor General Corrections
8754 Cedar Street
MISSION, BC V4S 1A3

Dear Mr. Kienas:

Subject: **Decision Review – DR200200390**
Inspection Report Number 2002034550231
Order Number #1 – WCA 115(2)(e)

I have completed my review following your appeal of the above inspection report.

Attached is a copy of my decision. I also order that a copy of this letter and the decision be posted in the workplace for 30 days.

Yours truly,

Craig Maynard
Reviewing Officer
Compliance Section
Investigations Department
Prevention Division

CM/lb

Enclosure

Copies to: Mona Sykes, B.C. Government & Service Employees' Union
Kate Bayne, Heenan Blaikie, Barristers & Solicitors
Chair/Secretary of Joint Health & Safety Committee,
Fraser Regional Correctional Centre
A. Johnson, Regional Manager – Burnaby/Coquitlam
B. Janssen, Officer – Coquitlam
P. Orr, Officer – Coquitlam
Firm File #04000-029

WORKERS' COMPENSATION BOARD OF BRITISH COLUMBIA
DECISION REVIEW DECISION
(Workers Compensation Act, Section 206 order)

Reference: DR200200390

Applicant: Travis Kienas, Worker

Applicant: BC Government and Service Employees Union
Represented by: Mona Sykes

Respondent: Government of British Columbia,
Ministry of Public Safety and Solicitor General
(Fraser Regional Correctional Centre)

Represented by: Kate Bayne, Counsel

Interested Party: Occupational Health and Safety Committee,
Fraser Regional Correctional Centre

Review of: Section 4.28(1) of the *Occupational Health & Safety Regulation*
and Section 115 of the *Act*

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Decision Date: April 30, 2003

INTRODUCTION

- [1] This decision is about whether it is appropriate to issue further orders against the Government of British Columbia, specifically the Ministry of Public Safety and Solicitor General (the "Ministry"), who operates the Fraser Regional Correctional Centre ("FRCC") in Maple Ridge, BC. Both Mr. Travis Kienas, a worker at FRCC and the BC Government and Service Employees Union (the "Union") applied on July 2 and 3, 2002, respectively, for a decision review. This was arising from an investigation by an occupational hygiene officer ("the OHO") into a refusal to work complaint. The Ministry had changed the ratio of inmates to correctional officers, and the complainants believed that for a number of reasons that this created an undue hazard to correctional officers.

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[2] While the complainants asked for an oral hearing, I only accepted a telephone conference call and written submissions. I named the Occupational Health and Safety Committee (the "OSH Committee") as an interested party. Furthermore, I ordered the Committee to make recommendations to the Ministry after it considered the discussions in the telephone conference call and the submissions made by the applicant and the Ministry. The OSH Committee submitted their recommendations on September 26, 2002. However, two members dissented (Mr. Kienas being one of the members).

[3] All the parties opined on the evidence adduced during the hearing. Furthermore, I posed several questions to the parties by letters dated July 18 and October 23, 2002. By letters dated July 29, 2002 and November 13, 2002, Counsel for the Ministry opined on the questions, as well as the academic studies. The OSH Committee did not offer a comment.

ISSUES

[4] The issues are whether:

- the Ministry violated the sections of the *Regulation* addressing "violence in the workplace";
- inmates should be declared a workplace hazard;
- staffing levels should be considered when evaluating the risk of violence; and
- to reinstate the Ministry's former "overcrowding policy".

BACKGROUND

- [5] Through its staff, the Ministry has and continues to imprison individuals who have been convicted of criminal offences. The facilities used to imprison have changed over the past 20 years, as has the interactions between correction officer and inmate. In short, inmates used to live in cells that were on long rows and were periodically observed by correction officers.
- [6] The FRCC is part of the newer method of imprisonment. There are newer pod design residences where, until recently, inmates had their own living units that were amongst 20 others and was observable by a corrections officer who has a centrally located workstation. Correction officers are trained and do assist in correcting the lives of those imprisoned. Their job has changed from simply guarding over prisoners to a job that has elements of supervision and social work, to name just two.
- [7] The evidence adduced in this hearing and that is in the public domain suggests that there are sociological explanations behind the causes of violence and, in particular, violence against correction officers. It is clear that violence is not a precise science that has objective measures and which can easily be predicted.
- [8] In 2002, as part of a fiscal management exercise the Ministry increased the number of inmates from one to two per living unit. This change coincided with the Ministry revoking a 1994 "overcrowding policy", which the Union and the Ministry struck following an assessment of workplace violence in Ministry prisons. The Union and Mr. Kienas submitted to the Ministry and the OSH Committee several academic and professional studies (the "studies") that opines on the issue of correctional facility

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overcrowding, prison violence and "double bunking". Neither the Ministry, nor the OSH Committee, until this hearing, opined on the studies.

- [9] This leads to the section 3.12 complaint. The OHO's inspection report says the following:

This inspection was conducted under the "Refusal of Unsafe Work" section of the OH&S Regulation. Both worker and employer representatives called the board in accordance with 3.12(4) - a lack of resolution regarding the planned increase in the inmate population including double bunking and the effect on corrections officer safety. Inmates from other facilities are being relocated to this facility. Corrections officers opined that they anticipate that they will be at greater risk as the result of the increased inmate population, and that staff complement should be increased from one corrections officer to two per double bunked living units.

According the Ministry plans, changes to the prison population will result in an increase of the number of inmates from the current 18 and 20 inmate-units to a maximum of 27 and 30, respectively. One correction officer is expected to oversee the increased inmate count. In anticipation of the changes, risk reduction strategies are being put in place including an increase in staff training, the number of emergency response team members has been increased from 11 to 14, and inmates will be closely scrutinized/monitored for their placement and their "bunkability".

Moreover, for living units with problematic inmates, management will authorize two corrections officers. Another option being considered is to open up presently closed living units to ensure the increase in inmate number is done incrementally until the full complement of inmates is realized over the next 2.5 to 3 months.

The investigation of a work refusal under section 3.12 has not identified an undue hazard or immediate danger or undue hazard at the time of this inspection. Refer to order 1.

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[10] The order says:

In anticipation of increasing the number of inmates, this employer must continue to augment present safety procedures and policies to minimize the risk of staff from violence from inmates and to ensure that staff are provided with adequate information, instruction, training and supervision to ensure they can carry out their work in a safe manner. Safe procedures and policies include but are not limited to the following:

- specific procedures and training therein for minimizing the risk of violence including threat recognition and response/withdrawal criteria for single corrections officers;
- close scrutiny/assessment of inmates (psycho-behavioural profile), initially before placement and on a day-to-day basis;
- practice drills of emergency procedures;
- staff training.

Ensure policies and procedures are revised promptly as situations arise. Monitor the incident history for trends associated with the increased inmate population.

This is a requirement of the *Workers Compensation Act* section 115 (2)(e).

LAW AND POLICY

[11] Section 115 (2)(e) says:

Without limiting subsection (1), the employer must, provide to the employer's workers the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the

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health and safety of other workers at the workplace.

[12] In addition to section 115(2)(e), the *Regulation* provides a more definitive obligation at sections 4.28 to 4.31. Those sections say:

4.28 Risk assessment

- (1) *A risk assessment must be performed in any workplace in which a risk of injury to workers from violence arising out of their employment may be present.*
- (2) *The risk assessment must include the consideration of:*
 - (a) *previous experience in that workplace;*
 - (b) *occupational experience in similar workplaces; and*
 - (c) *the location and circumstances in which work will take place.*

4.29 Procedures and policies

If a risk of injury to workers from violence is identified by an assessment performed under section 4.28 the employer must:

- (a) *establish procedures, policies and work environment arrangements to eliminate the risk to workers from violence;*
- (b) *if elimination of the risk to workers is not possible, establish procedures, policies and work environment arrangements to minimize the risk to workers; and*
- (c) *establish procedures for reporting, investigating and documenting incidents of violence as required by Part 3 of the Workers Compensation Act and Part 3 of this Regulation (Rights and Responsibilities).*

4.30 Instruction of workers

- (1) *An employer must inform workers who may be exposed to the risk of violence of the nature and extent of the risk.*
- (2) *The duty to inform workers in subsection (1) includes a duty to provide information related to the risk of violence from persons who have a history of violent behaviour and whom workers are likely to encounter in the course of their work.*
- (3) *The employer must instruct workers who may be exposed to the risk of violence in:*
 - (a) *the means for recognition of the potential for violence;*
 - (b) *the procedures, policies and work environment arrangements which have been developed to minimize or effectively control the risk to workers from violence;*
 - (c) *the appropriate response to incidents of violence, including how to obtain assistance; and*
 - (d) *procedures for reporting, investigating and documenting incidents of violence.*

4.31 Response to incidents

- (1) *Incidents of violence must be reported and investigated as required by Part 3 (Rights and Responsibilities).*
- (2) *The employer must ensure that corrective actions are taken in response to incidents of violence in accordance with the requirements of Part 3.*
- (3) *The employer must ensure that a worker reporting an injury or adverse symptom as a result of an incident of violence is advised to consult a physician of the worker's choice for treatment or referral.*

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Note: The requirements for risk assessment, procedures and policies, the duty to respond to incidents and to instruct workers are based on the recognition of violence in the workplace as an occupational hazard. This hazard is to be addressed by the occupational health and safety program following the same procedures required by this Occupational Health & Safety Regulation to address other workplace hazards.

[13] The Board's policy says, with respect to section 4.28:

Section 4.28(2) does not state the period in the past which must be considered in performing the risk assessment. This will depend on the location, nature and circumstances of the business and the industry in which the employer is engaged. However, the assessment should include consideration of the number and nature of incidents of violence over a sufficient period to obtain a good representation of past experience. The period should be at least one year.

The object of the risk assessment is to determine the nature and type of occurrences of violence anticipated in the place of employment and the likelihood of their occurring. The factors considered will be dictated by the circumstances of the workplace. The items listed in section 4.28(2) may involve consideration of the following but are not limited to these.

- *number, location, nature, severity, timing and frequency of violent incidents;*
- *layout and condition of the place of work, including the decor, furniture placement, the existence of barriers and fences between workers and the public, internal and external lighting, methods of access and egress and the degree to which the premises would allow a potential assailant to hide;*
- *type of equipment, tools, utensils, etc. that are used or available for use;*
- *extent and nature of contact with persons other than fellow workers and their type and gender, including the use of alcohol and drugs by them;*
- *age, gender, experience, skills and training of the workers concerned;*

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- *existing work procedures, for example, when interacting with the public or in having to enforce the employer's rules or policies with regard to the public;*
- *existing violence prevention initiatives or programs;*
- *communication methods by which, for example, information about risks, incidents or threats of violence or requests for assistance may be sent;*
- *existence of clearly marked exit signs and emergency procedures; and*
- *staff deployment and scheduling, including the extent to which persons work at night, work alone, are checked when working alone and the availability of backup assistance.*

The risk assessment should involve the joint health and safety committee or worker health and safety representative, where one exists, and workers and management personnel in each area affected. Sources of information are first aid records, past injury reports, checklists and questionnaires completed by workers, reports of Board officers, expert advice or relevant publications. A visual inspection of the place of employment and the work being done should be carried out.

Employers required to carry out a risk assessment must do this at the start of operations and whenever there is a significant change in the nature of the business or the location of the workplace.

[14] The policy on section 4.29 says

In determining whether elimination of the risk is possible or what the employer should do to minimize the risk, primary regard will be had to the degree of risk in question. Other factors are:

- *the state of knowledge of ways of eliminating the risk; and*
- *the availability and possibility of ways of eliminating the risk.*

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The policies, procedures and arrangements which an employer may have to implement will vary depending upon the nature of the work being carried out and the circumstances of the work. The factors which create a potential for violence in the place of employment should be shown by the results of the risk assessment. The assessment will guide the employer as to areas where action may be necessary.

As with the risk assessment, the employer should consult with the joint health and safety committee or worker health and safety representative, where one exists, and workers and management personnel in each area affected, in considering what action is necessary to eliminate or minimize any risk of violence. (Where the employer has undergone a proper process of consultation of this nature and has taken reasonable measures to eliminate or minimize any risk shown by the assessment, the Board will generally assume that the regulation has been complied with.) However, the Board always reserves the right to determine whether the measures taken by an employer are in fact sufficient to meet the obligation under section 4.29.

ANALYSIS

The Regulation addressing “violence in the workplace”

- [15] The Ministry gave two answers as to whether they conducted a risk assessment before adding one inmate to each living unit. At page 9 of their July 29, 2002 submission the Ministry said there was no specific risk assessment before or after, but that risk assessments are daily and ongoing. On page 3 of their November 13, 2002 submission they said, “The Employer did not introduce its new multiple occupancy policy without carefully assessing the workplace and making changes to that workplace to enhance safety.” I will conclude that the Ministry believes that their daily assessment of violence is what they meant to say in answer to whether they assessed the workplace before the changes.

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- [16] For certainty, the changes in the ratio of inmates to corrections officer and the double-bunking or multiple occupancy policy change was a significant change, which required a section 4.28 risk assessment. This is because there is some expert evidence to say that prison environments who have relatively higher inmates to correction officer oral contact have lower incidents of violence. In other words, correction officers talk more to inmates and learn about when violence may occur. Furthermore, lower ratios suggest that correction officers spend more time reading inmates' behaviour in predicting violent incidents. All of this is that the changes were significant enough and that the evidence adduced by the applicants should have been considered by the OSH Committee and the Ministry.
- [17] What is clear is that Mr. Kienas and the Union did present the OHO, the OSH Committee and the Ministry with credible opinions about whether the risk of violence could increase because of these changes. The OSH Committee said it met three times to "review the factors involved in ensuring the employer has in place appropriate policy and work procedures to address the risk posed by inmates in living units." However, I find there was no evidence adduced about whether the OSH Committee turned its mind to the studies in any meaningful way. (Because Mr. Kienas was complaining and wanted consultation about the occupational environment he was working in, the OSH Committee should have written to Mr. Kienas to explain its position. Therefore, I find the OSH Committee did not meet its section 130(b) and (c) obligations.) *OMRS?*
- [18] (Regarding the Ministry, they too had an obligation to give an answer to Mr. Kienas about the change in policy.) This does not mean that the Ministry cannot make policy changes to how they manage their prisons. In fact, they are expected to make changes when there are improvements in technology and society's understanding of prisons. However, the

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(Ministry does have to be able to explain policy changes (or no change) to the Board. Therefore, there is no reason to withhold these same explanations from Mr. Kienas or the Union.)

[19] To the Ministry's credit, Counsel clearly articulates an analysis of the academic studies. I need not recite all of Counsel's analysis; however, the theme of her analysis is one that is consistent with the literature that says staffing ratios and double-bunking are not the only factors that are related to an increase in the severity or frequency of violence against correction officers. Counsel correctly noted that there is more to reducing the likelihood and severity of violence than just the number of correction officers and housing facilities for inmates. Counsel described it best when she said:

"While there may be risks of increased violence associated with overcrowding, whether or not a facility is overcrowded is not simply answered by resort to the staffing ratio or the number of inmates in the facility. (It requires a comprehensive review of many different factors) including the infrastructure of the facility, capacity of living units and facility, the quality of management and the nature of inmate supervision and availability of programmes and resources." (my underline)

[20] In my view, this is exactly what is required of the Ministry and which is consistent with the section 4.28 Policy that says:

- * *The risk assessment should involve the joint health and safety committee or worker health and safety representative, where one exists, and workers and management personnel in each area affected. Sources of information are first aid records, past injury reports, checklists and questionnaires completed by workers, reports of Board officers, expert advice or relevant publications. A visual inspection of the place of employment and the work being done should be carried out.*
- * *Employers required to carry out a risk assessment must do this at the start of operations and whenever there is a significant change in the nature of the business or the location of the workplace. (Underlines added)*

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[21] • Therefore, I find a violation and order such an assessment.

[22] Counsel argued that the daily assessments by the correction officers meant the Ministry was complying. The proper approach to reading sections 4.28, 4.29, 4.30, etc., is to recognize that there is a sequence of obligations. The first step is to conduct a proper risk assessment in accordance with the section 4.28 policy. The second step is to create procedures, and so on. In my view, Counsel's argument about daily assessments is better placed in the answer to the question of whether the Ministry would be meeting its section 4.30 obligations. I note the *Policy* on this says:

Section 4.30 includes a requirement for employers to advise workers of the results of the risk assessment under section 4.28 and to instruct workers in the measures they have taken under section 4.29 to eliminate or minimize any risk of violence. The training should be sufficient so that workers are aware of any risk of violence and the appropriate measures to be taken if violence occurs or is threatened. It should cover all the circumstances of the place of employment found to be material to the risk assessment.

Information provided to workers with respect to the nature and extent of the risk of violence in their place of employment must, where practicable, be conveyed to workers prior to their exposure to the risk. This requirement includes information such as:

- *procedures providing for information obtained by workers ending a shift to be communicated to workers starting a following shift; and*
- *procedures for communicating the results of overall past experience, such as the flagging on computer systems of individuals with past records of violence.*

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Inmates Being Declared a Workplace/Undue Hazard

[23] With respect I must disagree that there is an obligation to declare inmates as a workplace hazard. The reason is that because inmates do not have uniform histories, abilities, behaviours and personalities. A "one size fits all" label of "workplace hazard" or "undue hazard" would be inappropriate. Given the more comprehensive history of inmate violent behaviour being available, such as drug abuse and mental disorders, there is no need to generalize. Also, if a generalized approach were ordered, the distinction of inmates who have a high likelihood of violence could be lost under the generalized label of all inmates being workplace hazards.

[24] However, the most salient point is that the Ministry does classify inmates on their potential for violence based on evidence of past behaviour and professional opinion about future behaviour. (Therefore, if the corrections officers are receiving the best information that could be available, they are qualified to assess that information, then a uniform declaration is unnecessary.)?

Staffing Levels Should be Considered when Evaluating the Risk of Violence

[25] All the parties agree that staffing levels should be considered. This is because staffing is one of the factors that helps reduce the likelihood and severity of violent incidents. But, I caution to say it is not the only factor. Even the applicant's studies imply that with increased technology, as well as expertise and training in both the supervising and social work of inmates there should be a reduction in the frequency and incidence of violence. Therefore, it may be justifiable to reduce or raise the ratio of inmates to corrections staff.

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- [26] I would add that the Ministry must consider the demonstrable qualifications of corrections officer. Like the inmates, not all correction officers are uniformly qualified. It may be necessary to grade the qualification of the correction officer, increase staffing levels for the purpose of qualifying and continue to mentor, train and supervise.
- [27] I would agree that one should never assume that an inmate is not potentially violent, and that no precaution is necessary. This is a prison setting and even the historically non-violent inmates can become violent if under the influence ^{PEERS} of mental stress, drugs or alcohol.
- [28] I would stress that it is important for the Ministry to be able to give a rational explanation for the qualification and quantity of correction officers assigned to a group of living units. The Ministry is entitled to some deference given the subjective nature of the analysis. However, the Board can order the Ministry to make changes if important information relative to the particular group of living units or the correction officer assigned were not considered by the Ministry.

Reinstate the Ministry's Former "Overcrowding Policy"

- [29] In my view, applicants may have overlooked the point that an agreement between a union and the employer does not mean there is compliance with the law. Unions and employers can not contract their way into and out of compliance with the Act and its regulations. Therefore, the fact that there was an agreement before, and was subsequently changed (or broken) is not a starting point to determining if orders are appropriate.
- [30] Another reasons to note about agreements, is that obligations for the parties will change when there are changes to the *Act, Regulation* and *Board Policy*. In terms of resources

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needed to comply with a new obligation, they too can rise and fall. Ultimately, it is up to the Board to determine the compliance of the parties based on the events and circumstances of the occupational environment that the workers are likely to experience, or are experiencing. Therefore, it would be wrong for me to say that simply because there was an agreement between the Union and the Ministry in the past, and the Ministry arbitrarily changed that policy, I must re-institute that policy.

[31] Turning to the issue of “overcrowding” and the living units’ original design, the literature suggests that the incidents of violence will likely increase because of the lack of free space available to inmates. Presumably, some inmates become more irritable and thus more violent. The evidence suggests that an inmate with an extremely violent past is likely to be violent towards another inmate to whom they have had previous violent incidents. Therefore, placing these individuals in one living unit is an undue risk to correction officers because the likelihood of a violent incident is high. Corrections officers would have to intercede in such an incident and be exposed to that violence. It follows that where such risks are known, they are undue.

[32] On the other hand, absolute strangers with no evidence of violent histories could be suitable for double bunking. Having said this, the Ministry has to be mindful of its section 4.30 obligations about conveying information from one shift of correction officers to the next. It also has to be mindful of whether correction officers are capable of the purported daily assessment of its inmates.

OHO Consideration of Evidence and Arguments

[33] Regarding the complainant’s listed concerns about the OHO’s assessment of evidence, they do not need to be individually addressed. Section 205 allows a reviewing officer to

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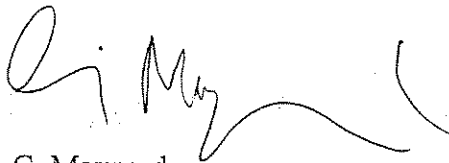
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substitute his or her opinion for that of the original officer irrespective of the OHO's process for reaching his conclusions.

CONCLUSION

[34]

For the reasons stated above, I find that there were violations to sections 4.28(1) of the Occupational Health & Safety Regulation, and section 130 of the Act. The Ministry is ordered to conduct a section 4.28 risk analysis as contemplated by the Board's Policy on section 4.28.



C. Maynard
Reviewing Officer

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