Federal Court  Cour fédérale

Date: 20181018

Docket: T-589-18

Citation: 2018 FC 1033

Ottawa, Ontario, October 18, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DWIGHT CREELMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Creelman is an inmate at Warkworth Institution. Under review is the Final Grievance Response issued by the Special Advisor to the Commissioner of the Correctional Services of Canada [the Delegate], pursuant to his delegated authority. The Final Grievance Response rejected the grievance, relying in part on a Commissioner's Directive [CD]:

> [A]s your concerns had already been forwarded to the staff in question and your final grievance submission consisted of allegations of staff not acting in accordance with policy or legislation, but without any direct negative effect on you, and

> consisted of disparaging remarks regarding staff, your grievance is **rejected**, in accordance with paragraph 21 and Annex A of CD 081 [emphasis in original].

[2] The Final Grievance Response makes specific reference to the definition of "Vexatious or not made in good faith" as set out in Annex A of CD 081. That definition reads as follows:

> **Vexatious or not made in good faith**: where the decision maker concludes on the balance of probabilities that the overriding purpose of the complaint or grievance is:
>
> a. to harass
>
> b. to pursue purposes other than a remedy for an alleged wrong, or
>
> c. to disrupt or denigrate the complaint and grievance process. [bolding in original]

[3] Other relevant provisions of CD 081 referenced in the Final Grievance Response are sections 6 and 21:

> 6. Grievors will:
>
> a. use the complaint and grievance process in good faith as a means of redress when they believe that they have been treated unfairly by a staff member, or in a manner that is not consistent with legislation or policy on matters within the jurisdiction of the Commissioner
>
> b. make every effort to resolve matters that are part of a complaint or grievance informally through discussion or by using alternative dispute resolution mechanisms, where such mechanisms exist.
>
> 21. If portions of a complaint or grievance are considered frivolous, vexatious or not made in good faith, or offensive, the decision maker may reject the entire grievance or portions thereof, indicating the reason(s) for this decision.

[4] On March 3, 2015, Mr. Creelman and nine other inmates attended a urinalysis test at Warkworth Institution. Apparently, the purpose of the urinalysis test is to detect whether an inmate has consumed any illegal substances. Section 68 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [the *Regulations*] provides that the inmate is to be given a copy of the results of his test:

> 68(1) A laboratory shall submit to the urinalysis program co-ordinator a certificate and, where requested by the institutional head, an electronically transmitted copy of the certificate, that states the results of the test.
>
> (2) The urinalysis program co-ordinator shall give the donor a copy of the laboratory certificate respecting the sample.

[5] Not receiving a copy of the laboratory certificate showing the result of his test, Mr. Creelman filed a written complaint on March 29, 2015. The corrective action sought was stated as follows: "Where is the lab result respecting the result of my urinalysis and why has the urinalysis program coordinator **again** failed to provide it in accordance with the law" [bolding and underlining in original].

[6] The response from the Acting/Assistant Warden, Operations is dated June 23, 2015. He writes that the sample leaked and was not tested and that the Collector had provided Mr. Creelman with a screen shot of the Offender Management System [OMS] Urinalysis Test showing that. The following paragraphs are the relevant portions of the response:

> Your compliant was received on March 30, 2015. I interviewed J. Moorcraft, Urinalysis Collector and reviewed information relevant to your submission.
>
> …

> It has been determined that your urine sample leaked in the bag prior to the test being sent to the lab; therefore there were no results or test paperwork to receive. J. Moorcraft advised that he sent you a screen shot of OMS Urinalysis Test. He advised that once he receives the results from the laboratory all offenders are provided a copy. [emphasis added]

[7] Attached to this response was the screen shot referenced in it which shows that the sample leaked in the bag. The document shows that it was printed on June 22, 2015 – one day before the response was written, and importantly, nearly three months *after* the complaint was submitted.

[8] Mr. Creelman says that no screen shot was given to him by the Collector, and the first time he saw it was when the complaint response of June 23, 2015 was given to him. In his affidavit filed in support of this application, he notes that paragraph 55 of CD 566-10 stipulates that "Negative test results as well as any technical reasons the sample could not be used will be communicated to the Parole Officer as soon as possible and recorded in OMS within 15 days." He attests that he is informed by his parole officer that she did not receive any communication about his leaked sample. In fact, he attests that "she has not received any urinalysis results for inmates on her case load for several years." Mr. Creelman explained the importance, as an inmate, both within the institution and regarding parole, of having "clean" drug tests, and thus why he was so interested in his results.

[9] Mr. Creelman filed an Initial Grievance on June 29, 2015, pointing out the discrepancy in the date of the screenshot and that his parole officer had not been notified in accordance with CD 566-10. Mr. Creelman met with an Acting Warden who said that he would take his suggestions

under advisement and, as with the complaint, marked the grievance response with "No Further Action".

[10] Dissatisfied with the response, Mr. Creelman filed a grievance at the final level on August 19, 2015, in which he raises four issues:

1. That his parole officer was not informed that the sample had leaked and could not be tested, contrary to paragraph 55 of the CD 586-10;
2. That the response of "No Further Action" was inappropriate "given procedures were admittedly and undoubtedly violated;"
3. That contrary to paragraph 22 of Guideline GL-080-1, his original documentation was not returned to him; and
4. That his grievance had not been investigated and analyzed as required by GL 081-1, Annex E.

He requested the following corrective action:

> That all the issues in this grievance be responded to in accordance with the procedures in Annex "E" of GL-081-1 and that the urinalysis program at WI be operated in strict accordance with the various requirements in the CCRR as opposed to the present process of conducting it in a manner that makes it easy for staff. If the Collector cannot even screw the top on a sample bottle what chance is there that the other procedures are being done right?

[11] As Mr. Creelman attests, the Final Grievance Response rejecting his grievance was received by him "933 days after submission."

[12] In my assessment, this application for judicial review raises four issues that require the Court's attention:

1. What is the standard of review of the decision under review?
2. Was it open to the Delegate to reject a final grievance if it was not rejected at a lower level?
3. Was it open to the Delegate to reject a Final Grievance relying on the provisions of CD 081, or are they invalid, in whole or part, as offending the *Regulations*?
4. Was the Final Grievance Response reasonable?

[13] The Respondent submits, and I agree, that decisions of the Correctional Service of Canada, are questions of mixed fact and law and are to be reviewed on a standard of reasonableness: *Johnson v Canada (Commissioner of Corrections)*, 2018 FC 529.

[14] Regrettably, no party addresses the standard of review relating to the interpretation of the *Regulations* and CD 081. In *Fischer v Canada (Attorney General)*, 2013 FC 861 the Court stated: "Issues of procedural fairness in the context of judicial review of decisions made in the course of the CSC offender grievance process, as well as issues dealing with the interpretation of legislation, are generally dealt with under the correctness standard of review." However, that comment was made prior to more recent decisions of the Supreme Court of Canada and the Federal Court of Appeal which have held that decisions made by persons interpreting their home statutes are reviewable on the standard of reasonableness: *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, *Canada (Human Rights Commission) v Canada (Attorney General*), 2016 CAF 200, affirmed 2018 SCC 31. In my assessment, these authorities

are binding and the interpretation offered by the Respondent's decision-makers of the *Regulations* and CD 081 are to be assessed on the reasonableness standard.

[15] Mr. Creelman says the *Regulations* do not allow the Delegate to reject a complaint for being frivolous or vexatious. He submits that on a proper reading of subsection 74(4) of the *Regulations,* a grievance can only be rejected by a supervisor at the complaint stage of the process and only for those reasons listed.

[16] Sections 74 and 75 of the *Regulations* are as follows:

> 74(1) Where an offender is dissatisfied with an action or a decision by a staff member, the offender may submit a written complaint, preferably in the form provided by the Service, to the supervisor of that staff member.
>
> (2) Where a complaint is submitted pursuant to subsection (1), every effort shall be made by staff members and the offender to resolve the matter informally through discussion.
>
> (3) Subject to subsections (4) and (5), a supervisor shall review a complaint and give the offender a copy of the supervisor's decision as soon as practicable after the offender submits the complaint.
>
> (4) A supervisor may refuse to review a complaint submitted pursuant to subsection (1) where, in the opinion of the supervisor, the complaint is frivolous or vexatious or is not made in good faith.
>
> (5) Where a supervisor refuses to review a complaint pursuant to subsection (4), the supervisor shall give the offender a copy of the supervisor's decision, including the reasons for the decision, as soon as practicable after the offender submits the complaint.
>
> 75 Where a supervisor refuses to review a complaint pursuant to subsection 74(4) or where an offender is not satisfied with the decision of a supervisor referred to in subsection 74(3), the offender may submit a written grievance, preferably in the form provided by the Service

> (a) to the institutional head or to the director of the parole district, as the case may be; or
>
> (b) if the institutional head or director is the subject of the grievance, to the Commissioner.
>
> [emphasis added]

[17] The Respondent did not address this statutory provision; rather it submits that the Commissioner has the jurisdiction to reject a grievance pursuant to paragraph 21 of CD 81:

> If portions of a complaint or grievance are considered frivolous, vexatious or not made in good faith, or offensive, the decision maker may reject the entire grievance or portions thereof, indicating the reason(s) for this decision. [emphasis added]

The Respondent submits that this paragraph of CD 081 shows that the scope of those permitted to reject a grievance is not as narrow as Mr. Creelman says; rather, it includes all decision-makers in the grievance process.

[18] Before turning to the validity of paragraph 21 of CD 081, we must examine the interpretation of the *Regulations*. Because the Delegate relied on paragraph 21 of CD 081 and not the *Regulations*, he did not provide his interpretation of the Regulations, and thus no deference is owed to his interpretation. In my view, Mr. Creelman's interpretation of the *Regulations* is correct, and the only reasonable interpretation.

[19] Section 90 of the *Act* provides: "There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(u)."

[20] The procedure for resolving an inmate grievance is set out in sections 74 to 82 of the *Regulations*, and may be summarized as follows:

1. An inmate who is dissatisfied by an action or decision of a staff member may file a written complaint to that person's supervisor (subsection 74(1));

2. The staff member and inmate shall attempt to resolve the matter through discussion (subsection 74(2));

3. If unresolved and not rejected pursuant to subsection 74(4) and (5), a supervisor reviews the compliant and provides the inmate with the response (subsection 74(3));

4. If a supervisor finds the complaint to be frivolous, vexatious or not made in good faith, he may reject it and refuse to review it (subsection 74(4));

5. If a supervisor rejects a complaint as frivolous, vexatious or not made in good faith, he shall provide his reasons and give them to the inmate (subsection 74(5));

6. If the complaint has been rejected by a supervisor pursuant to subsection 74(4), or if the inmate is not satisfied with the supervisor's decision under subsection 74(3), the inmate may submit a written grievance to the institutional head, or if the grievance relates to the institutional head, to the Commissioner (section75);

7. The institutional head reviews the grievance to ensure that it falls within the jurisdiction of the Correctional Service of Canada (subsection 76(1));

8. The person reviewing the grievance filed under step 6 above, "shall give the offender a copy of the person's decision" as soon as possible (section 78);

9. If the inmate is not satisfied with the decision of the institutional head at step 8, the inmate "may appeal the decision to the Commissioner" (subsection 80(1));

10. The Commissioner or his or her delegate, "shall give the offender a copy of his or her decision, including the reasons for the decision, as soon as possible" (subsection 80(3);

[21] In my view, the only reasonable interpretation of the *Regulations* is that it is only the complaint, and not a subsequent grievance, that may be rejected on the basis that it is frivolous, vexatious or not made in good faith. Accordingly, neither the institutional head nor the Commissioner or his or her delegate has authority under the *Regulations* to reject a grievance. This is reinforced by the fact that the *Regulations* provide that if a complaint is rejected by a supervisor, that decision may itself be grieved.

[22] Having found that the Delegate has no authority under the *Regulations* to reject a grievance because it is frivolous, vexatious or not made in good faith, I turn to consider CD 081.

[23] The Delegate interpreted paragraph 21 of CD 081 as permitting decision-makers both at the complaint and at the grievance stage to reject a grievance as frivolous, vexatious or not made in good faith. I find that to be a reasonable interpretation of the paragraph, and in accordance with the standard of review, cannot be upset.

[24] Nevertheless, even if this is a reasonable interpretation, one must consider whether paragraph 21 of CD 081 is valid. The issue arises specifically because it does expand upon the complaint and grievance procedure set out in the *Regulations*. It expands upon the grounds to reject a complaint by including "offensive" as a possible ground to reject a complaint, and it includes jurisdiction to reject grievances in addition to complaints.

[25] The Respondent submits that Mr. Creelman cannot challenge this CD through the grievance process, or this Court process. The Respondent relies on *Spidel v Canada (Attorney General)*, 2012 FC 1245 [*Spidel*]. Mr. Spidel, an inmate at Ferndale Institution, filed a third level grievance challenging CD 083, a directive related to Inmate Committees. Justice O'Reilly sets out the background in paragraphs 1 to 3 of his reasons:

> In 2009, the warden at Ferndale Institution rejected Mr. Michael Spidel's nomination to serve on the inmate committee. The issue ultimately made its way to this Court by way of judicial review. Justice Anne Mactavish concluded that Mr. Spidel had been treated unfairly and that the warden's decision had been unreasonable (*Spidel v Canada*, 2011 FC 999).
>
> Mr. Spidel subsequently submitted another grievance in which he identified several errors in the Commissioner's Directive relating to Inmate Committees [CD 083]. His main concern is that CD 083 does not accord with Justice Mactavish's decision. He filed this latest grievance at the final, third-level of the Offender Grievance Procedure based on his view that issues relating to the content of Commissioner's Directives should be brought directly to the Commissioner himself. A delegate of the Commissioner, a Senior Deputy Commissioner [SDC], concluded that Mr. Spidel's grievance essentially raised matters of general policy that fell outside the ambit of the grievance process. The SDC therefore rejected Mr. Spidel's grievance and suggested that he bring the matter before an inmate committee, where members can make recommendations relating to matters affecting the inmate population as a whole.
>
> Mr. Spidel argues that the SDC erred in concluding that his complaint fell outside the grievance procedure and that it should

> have been brought to an inmate committee. He asks me to quash the SDC's decision and refer the matter back for reconsideration.

[26] At paragraph 16, the Court held that an inmate could not challenge a Commissioner's Directive through the grievance procedure:

> It is possible that the issue of a Commissioner's Directive is an "action or decision" of the Commissioner. But it is clear to me that a complaint about the content of a Commissioner's Directive does not fall within the Offender Grievance Procedure.

[27] Unlike Mr. Spidel, Mr. Creelman has not filed a complaint or grievance challenging a CD. Had he done so, then *Spidel* might support the Respondent's position. Mr. Creelman never had an opportunity to challenge the validity of the CD the Respondent relies upon prior to this proceeding because it arose only after the response to final stage of the grievance procedure. Unlike *Spidel*, Mr. Creelman challenges in this Court whether the Commissioner or his delegate at the final level of the grievance procedure can reject a grievance using CD 081, when the *Regulations* do not give such power to the Commissioner. In short, he challenges the validity of the authority relied upon by the Delegate.

[28] I agree with Mr. Creelman that he is not prevented from challenging in this application, whether the relevant CD relied upon by the Commissioner does in fact give him the right to reject a grievance at the final stage of the procedure.

[29] He says that from a policy perspective it makes sense that the Commissioner would have no ability to reject grievances, and most especially when those below him did not. He submits

that if those above the supervisor are able to reject complaints, it will allow higher level individuals to reject a grievance for whatever purpose and avoid meaningful review.

[30] Although the Delegate offers nothing explicit in his decision on the question of the validity of the CD 081 in light of the *Regulations*, one must conclude, as his counsel says, that he or she considered CD 081 to be valid, notwithstanding the *Regulations*.

[31] Mr. Creelman submits that a CD legally cannot expand the *Regulations*, and suggests that the Commissioner has unlawfully expanded them to make it easier for him and the corrections staff. There is nothing in the record to support that suggested motive.

[32] Nonetheless, I agree with Mr. Creelman that the Commissioner has no authority to add to, amend or alter the grievance procedure prescribed by the *Regulations*. Section 96 of the *Act* specifically states that the Governor in Council may make regulations "prescribing an offender grievance procedure." Having given such authority to the Governor in Council, the Commissioner may not usurp that authority through a Commissioner's Directive that effectively amends the *Regulations*: See *Thamotharem v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, *Ishaq v Canada (Minister of Citizenship and Immigration*), 2015 FC 156.

[33] For these reasons, I find that the decision of the Delegate that he has authority to reject a grievance at the final level, even if it had not been previously rejected, to be unreasonable. It is not in keeping with the *Regulations* and relies upon an invalid paragraph of CD 081.

[34] Given this finding, it may be unnecessary to address the reasonableness of the Final Grievance Response based on the CD 081, but as this was fully argued, there may be some merit in so doing.

[35] The reason the Delegate gave for rejecting the grievance in its entirety was "… your concerns had already been forwarded to the staff in question and your final grievance submission consisted of allegations of staff not acting in accordance with policy or legislation, but without any negative effect on you, and consisted of disparaging remarks regarding staff…"

[36] The Respondent submits that it was reasonable for the Delegate to conclude that the grievance was frivolous, vexatious, offensive, or not made in good faith.

[37] It is submitted that the grievance was frivolous because there was no serious purpose for it because Mr. Creelman had been informed about the leaked urine sample, but continued his grievance despite being so informed and sharing his concerns with other officials. It is submitted that the grievance was vexatious because its purpose was to harass, pursue purposes other than a remedy for an alleged wrong, or disrupt or denigrate the grievance process. Counsel says that the grievance threatens judicial proceedings; refers to ineptitude; says that the conclusion of the initial grievance ("no further action is required") was to avoid fault; alleges fraud; and questions the abilities of the official conducting the urinalysis. It is further submitted that the grievance was offensive, as it was submitted in an attempt to harm, slander, demean or generally insult the decision-maker against whom it was presented.

[38] I have reviewed the record relating to the grievance, and most particularly the final level written grievance. It expresses, in no uncertain terms, Mr. Creelman's view that the Collector was untruthful in stating that he had provided Mr. Creelman with a copy of the screen shot when he had not. It also alleges that he failed to comply with the CD 566-10 as he did not provide Mr. Creelman's parole officer with a report that the urine sample had not been tested due to the spillage. In so doing, Mr. Creelman was writing no more than his truth. On the record, there is some support for these claims.

[39] Mr. Creelman pointed out in his initial grievance that the screen shot appears to have been printed months after it was allegedly shown to him, and only a day before the response. Although this is by no means conclusive, it adds credence to Mr. Creelman's allegations. One cannot "harm, slander, demean or generally insult" someone with the truth. Counsel's submission, and the decision of the Delegate, assumes there is no truth to these allegation, but the record, had it been examined, arguably shows otherwise. For this reason, I find that the decision that the grievance was offensive to be unreasonable. I would add that while Mr. Creelman used forceful language, it was not vulgar or crass.

[40] The finding that the grievance was vexatious because its purpose was to harass, pursue purposes other than a remedy for an alleged wrong, or disrupt or denigrate the grievance process, is also an unreasonable decision. Again, had the Delegate investigated, he would have found that there was arguably merit to some of Mr. Creelman's concerns regarding the process of the urinalysis, the Collector's failure to report the spilled sample to Mr. Creelman or his parole officer, and the apparent untruth of the Collector in stating that he had informed Mr. Creelman.

[41] On the basis of the record before me, I find that the grievance was made with a legitimate purpose in mind; namely, pointing out that the Collector was failing to comply with the mandated rules regarding the taking of the urinalysis and reporting the results, and with the hope that the procedures would change in the future to comply with the prescribed procedures.

[42] Lastly, the statement made in the Final Grievance Response that "you have not explained how you were affected by these actions" can only be found to be a reasoned response if one assumes that nothing in the process or grievance response was other than fully compliant and truthful. A review of both would have disclosed that it was questionable whether the prescribed process was followed by the Collector vis-à-vis Mr. Creelman's sample and as such his right to have his urinalysis done in the prescribed manner was directly and adversely impacted. A review of the grievance process would also have raised a question whether the Collector had been truthful in stating to the initial grievance decision-maker that he had provided the copy of the screen shot to Mr. Creelman. Given that the response rested in part on that information that too directly impacted Mr. Creelman.

[43] In summary, I find that the Commissioner's Delegate's decision to reject the grievance was based on an invalid paragraph of CD 081, and was unreasonable and cannot stand. Mr. Creelman's concerns deserve a considered examination prior to a response on their merits. For this reason, the decision is set aside and the final grievance is to be considered by the Commissioner or another of his Delegates in accordance with these Reasons.

[44] Mr. Creelman asked for costs of $300 if successful. That is a reasonable sum representing his out-of-pocket expenses and it will be ordered.

JUDGMENT in T-589-18

THIS COURT'S JUDGMENT is that this application is allowed; the decision of the Commissioner's Delegate at the final grievance level dated February 20, 2018, is set aside and the final level grievance is to be considered and responded to by the Commissioner or another of his delegates; and costs of $300 are awarded to Mr. Creelman.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-589-18
STYLE OF CAUSE:	DWIGHT CREELMAN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO BY WAY OF VIDEOCONFERENCE IN COURT
DATE OF HEARING:	SEPTEMBER 18, 2018
JUDGMENT AND REASONS:	ZINN J.
DATED:	OCTOBER 18, 2018

APPEARANCES:

Dwight Creelman	APPLICANT (ON HIS OWN BEHALF)
Jonathan Roth	FOR THE RESPONDENT

SOLICITORS OF RECORD:

- NIL -	SELF-REPRESENTED APPLICANT
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