Federal Court  Cour fédérale

Date: 20210409

Docket: T-1716-19

Citation: 2021 FC 304

Ottawa, Ontario, April 9, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

DWIGHT CREELMAN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an Application for judicial review of a September 4, 2019 decision [Decision] by the Special Advisor to the Commissioner of Correctional Service of Canada [CSC] pursuant to subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Decision denied Mr. Creelman's [Applicant] July 2018 Final Level Grievance dealing with urinalysis testing at Warkworth Institution [Warkworth].

[2] The Applicant submits that the Special Advisor made false claims and used false rationale in deciding the issues in the Final Level Grievance. He requests that the Court set aside the Decision. He also requests an Order suspending the urinalysis program at Warkworth.

[3] The Decision canvassed each of the issues raised by the Applicant and responded to them in detail. The role of the Court on judicial review is not to re-weigh the evidence but to assess the Decision within the context of the record that was before the Special Advisor. For the following reasons, the judicial review is dismissed.

II. Background and Context

[4] The Applicant is an inmate at Warkworth. He is diabetic with other medical conditions that requires him to take insulin and other medications.

[5] In March 2018, the Applicant filed an Offender Complaint concerning the use of a Consent for Disclosure of Medical Information Form [Consent Form]. In April 2018, a Correctional Manager denied the complaint, stating that the *Privacy Act*, RSC, 1985 c P-21 [*Privacy Act*] and section 67 of the *Corrections and Conditional Release Regulations*, SOR /92-620 [*CCRR*] requires consent to disclose medical information to the laboratory conducting the urinalysis testing.

[6] The Applicant then filed an initial grievance. He listed the following concerns:

(1) Warkworth failed to inform the laboratory of medications the Applicant is taking in contravention of section 67(a) of the *CCRR*;

(2) Warkworth improperly uses a Consent Form in contravention of section 8(2) of the *Privacy Act*;

(3) The urinalysis test forms [Demand Forms] are being fraudulently used on the basis that they are improperly signed by the Urinalysis Program Coordinator [UPC] and completed by the Collector;

(4) The lab results are not being shared with inmates which contravenes section 68(2) of the *CCRR*; and

(5) The number of persons present at the time of collection contravenes section 66(1) of the *CCRR*.

[7] On July 6, 2018, an Assistant Warden denied the initial grievance stating:

(1) The Laboratory receives inmate medication history via the Consent Form;

(2) The legal interpretation of the *Privacy Act* is beyond the Assistant Warden's authority;

(3) There is no evidence of fraud and the *CCRR* does not set out a mandatory process by which to complete forms;

(4) There is no evidence that inmates do not receive their lab results. The UPC will also be reminded to ensure results are shared with inmates; and

(5) The Collector supervises the donor who is separate from others during collection.

[8] On July 29, 2018, the Applicant filed a Final Level Grievance and restated his issues as follows:

(1) The CSC willfully violates the law by failing to inform the laboratory of medications the Applicant is taking in contravention to section 67(a) of the *CCRR*;

(2) The Consent Form contravenes section 67(a) of the *CCRR*;

(3) The use of the Consent Form violates the *Privacy Act* and the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. Further, the Applicant's medical doctor spied on him and submitted him to an unauthorized urinalysis test;

(4) In accordance with section 24(1) of the *CCRA*, the disciplinary charges in relation to the Applicant's refusal to sign the Consent Form must be removed from his Record;

(5) The Demand Form violates sections 60 and 61 of the *CCRR* because of the manner of signing and completion by the UPC and the Collector;

(6) The Applicant is not receiving his results. He has previously aggrieved this issue in May 2019, January 2013, and March 2015. The Applicant submits that this issue will arise again;

(7) Too many inmates are called at the same time to have urinalysis conducted which contravenes section 66(1)(e) of the *CCRR*; and

(8) Warkworth denied the Applicant an interview, which contravenes section 74(2) of the *CCRR*.

[9] In a September 4, 2019 Decision, the Special Advisor denied the Applicant's Final Level Grievance for the following reasons:

(1) The issues of consent and disclosure of medical information were dealt with in a response to a final grievance (V10R00000117) and addressed in light of *Creelman v Canada (Attorney General)*, 2018 FC 1033;

(2) No evidence was adduced to substantiate that the Applicant was improperly tested;

(3) The record reflects the most up to date information and items cannot be removed in accordance with section 24(1) of the *CCRA*;

(4) Section 61(1) of the *CCRR* allows the UPC to grant prior authorization to staff for offender urinalysis testing. Sections 54 and 55 of the *CCRA* allows staff members the right to demand urinalysis testing from offenders. Therefore, the urinalysis testing forms and the manner they are signed and completed do not violate the *CCRR* or the *CCRA*;

(5) The Applicant did not provide evidence of a specific time when he was not able to obtain test results. The final grievance (V10R00000117) addressed this following the filing of the current final level grievance. No further action was required;

(6) The supervision of donors and the collection of samples complies with section 66(1) of the *CCRR*; and

(7) An interview in response to the Initial Grievance took place on June 4, 2018, though CSC acknowledges that the "offender interviewed by" portion of the Initial Grievance presentation was not completed. Paragraph 41 of the *Guidelines 081-1, Offender Complaint and Grievance Process* [Guidelines 081-1] was satisfied. There is no evidence of a lack of effort to resolve the Applicant's claim.

(8) The Applicant requests a judicial review of this Decision.

III. Issues and Standard of Review

[10] The Applicant submits that there are eight issues and he has outlined several sub-issues. The Applicant also submits that the Respondent violated a Court Order pertaining to a previous decision.

[11] The Respondent submits that the issues are whether the Special Advisor can reject a Final Level Grievance if it was not rejected at a lower level and whether the Decision is reasonable.

[12] From a review of the submissions and after hearing oral argument, I have set out the issues as follows:

(1) Did the Respondent breach procedural fairness by denying an interview?

(2) Was the Decision unreasonable?

[13] The first issue deals with procedural fairness and is reviewable on a standard of correctness. The duty of procedural fairness in administrative law is variable, flexible, and context-specific (*Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*]; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at p 682; *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at paras 22-23 [*Baker*]). The procedural requirements that this duty imposes arises from consideration of all the facts. Where a particular circumstance gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances in the administrative decision-making context (*Vavilov* at para 77; Baker at para 21).

[14] The second issue is reviewable on a standard of reasonableness. Under the reasonableness standard the Court must focus on the decision including the reasoning process and the outcome (*Vavilov* at para 83). This does not include a redetermination of the matter but

rather a consideration of whether the decision is “one that is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). In doing so, the decision-makers’ written reasons must be interpreted holistically and contextually (*Vavilov* at para 97).

IV. Parties’ Submissions

A. *The Applicant*

[15] The Applicant submits that CSC’s approach to its grievance system violates section 4(f) of the *CCRA*, which requires “an effective grievance procedure”, and section 74(2) of the *CCRR*, which requires that “every effort shall be made by staff members and the offender to resolve the matter informally through discussion”.

[16] The Applicant submits that the Respondent refused to deal with numerous issues under the false claim that previous grievances dealt with them. Further, he states that the Respondent has used inaccurate information to deny his claims and that he did not have access to an effective grievance procedure.

B. *The Respondent*

[17] The Respondent states that CSC can reject an issue if already addressed in a separate grievance. They submit that CSC dealt with Consent Forms in the Final Level Grievance (V10R00000117) decision with clear reasons for the rejection. The Respondent states that, while

the Applicant could have submitted an application for judicial review of the Final Level Grievance (V10R00000117) decision, he did not.

[18] On the additional issues, the Respondent states that the Applicant provided insufficient evidence and proper legal foundation to warrant action or approval of his Final Level Grievance. The Decision on these issues were therefore reasonable and justified under both the *CCRR* and the *CCRA*.

V. Analysis

[19] The Applicant's submissions on this application essentially mirrors his Final Level Grievance with some additional details. Considering that the Applicant is self-represented, I will attempt to address his submissions through the analysis of the two issues below.

[20] At the hearing, the Respondent submitted a chart to assist the Court and the Applicant in clearly understanding the processes in question. The Respondent indicated that he had trouble following the chart. For the purposes of this judgement and reasons, I am not relying on the chart but on the parties' written and oral submissions. The Court is able to understand the issues based on these submissions.

A. *Did the Respondent breach procedural fairness by denying an interview?*

[21] The Applicant cites section 74(2) of the *CCRR*, stating that it establishes a mandatory basis for an act of resolution that includes an interview at the final level of a grievance. The

Applicant submits that denying an interview at any point in the grievance period violates section 74(2) of the *CCRR* as it equates to a failure to make an effort to resolve a matter.

[22] In addressing the need to conduct an interview, paragraph 41 of the Guidelines 081-1, as it read prior to the July 26, 2019 amendment, is referenced in the Decision. It states that upon first receiving a "complaint/initial grievance", there must be an interview conducted if the offender requests it "unless there are unusual or exceptional circumstances which do not permit it or the offender refuses". At the final level of the grievance, the "offender may be interviewed if it is considered necessary in order to conduct a thorough analysis and review".

[23] The Decision sets out that on March 6, 2018, the Applicant requested an interview upon filing his Complaint. On June 4, 2018, the Respondent interviewed the Applicant. On July 29, 2018, the Applicant submitted his Final Grievance and requested another interview but one was not conducted.

[24] Given the discretionary nature of Guideline 081-1 over whether an interview is conducted at the Final Level Grievance stage, along with the records indicating that the Applicant was interviewed at the Initial Grievance, I see no contravention of the Guidelines 081-1 by not holding a second interview. I also do not read section 74(2) of the *CCRR* as establishing a requirement to conduct an interview at the Final Level Grievance.

[25] The Applicant also argued that the above events indicated that the decision makers at Warkworth do not make every effort to resolve matters informally through discussion. There was

no evidence to substantiate this assertion in the Applicant's Final Level Grievance. The Decision outlined some shortcomings in the interview record keeping but it was determined that the Assistant Warden interviewed the Applicant at the complaint level.

[26] For the above reasons, I find that the Applicant's rights to procedural fairness were not breached and that there was no requirement for a further interview at the Final Level Grievance process.

B. *Was the Decision Reasonable?*

[27] The Applicant raised several issues that challenged whether the Decision as a whole is unreasonable. I will synthesize his detailed submissions and address them below.

(1) Concerns over the Consent Form

[28] The Applicant submits that the Respondent refused to deal with his concerns over the Consent Form and falsely claimed that a previous grievance dealt with the issue. The Applicant states that the Respondent improperly created a Consent Form despite it not being a form mentioned under the Commissioner's Directive 566-10 and its use contravenes section 67(a) of the *CCRR*. Additionally, he raised a concern over the Consent Forms compliance with the *Privacy Act*.

[29] The Special Advisor found that the Final Level Grievance (V10R00000117) decision dealt with the issue of the Consent Form and therefore there was no need to canvass it again. The Respondent cites paragraph 5 of Guideline 081-1:

5. The issue is being, or has been, addressed in a separate complaint/grievance.	**5.** La question en cause est en voie d'être traitée ou a déjà été traitée dans le cadre d'une plainte ou d'un grief distinct.
If, during the analysis of a complaint/grievance at any given level, it is established that the issue is being, or has been, addressed in a separate complaint/grievance, the complaint/grievance may be rejected. However, if a submission is going to be rejected on this basis, it must be clear that the issue was the same and was addressed in the separate complaint/grievance. The response should also clearly outline the reason(s) for rejecting the complaint/grievance as well as the reference number(s) of the submission that already addressed the issue.	Au cours de l'analyse d'une plainte ou d'un grief à quelque palier que ce soit, s'il est établi que la doléance est en voie d'être traitée ou a déjà été traitée en réponse à une plainte ou un grief distinct, la plainte ou le grief peut être rejeté. Toutefois, si une plainte ou un grief est rejeté pour ces raisons, on doit clairement établir que la doléance était identique et qu'elle a été traitée dans le cadre d'une plainte ou d'un grief distinct. La réponse doit également clairement énoncer les motifs du rejet de la plainte ou du grief ainsi que le numéro du ou des dossiers faisant déjà mention de cette question.

[30] While the Applicant went into significant detail in his materials as to why he takes issue with the Consent Form, the question before this Court is limited to whether the Respondent failed to deal with the concern, leading to an unreasonable Decision.

[31] After reviewing the decision concerning Final Level Grievance V10R00000117, which is in the certified tribunal record, it is clear that the Respondent previously dealt with and addressed

the issue of the Consent Form. Final Level Grievance V10R00000117 was in response to the judicial review of the Final Level Grievance V40R00024015 (*Creelman v Attorney General of Canada*, 2018 FC 1033). The decision in Final Level Grievance V10R00000117 sets out the rationale for requiring the completion of a consent form prior to the sharing of an offender's personal information. This decision was not judicially reviewed.

[32] The Special Delegate's determination that the issue had been previously addressed is reasonable on a review of the record.

(2) Concerns over the demands for test samples and when results are provided

[33] In his Final Level Grievance, the Applicant expressed a concern over how the Institutional Head signs and photocopies blank test forms and then provides them to the Urinalysis Collector to fill out. He states that this method of signing violate sections 60 and 61 of the *CCRR*.

[34] The Respondent submits that the Decision sets out the staff member's authority for requiring an offender to submit to urinalysis.

[35] I am persuaded by the Respondent's submissions. In reviewing the Decision, the Special Advisor analyzed the interplay between section 54 of the *CCRA* and subsection 61(1) of the *CCRR*. Together these provisions provide the authority for how drug tests are initiated and carried out. Section 54 of the *CCRA* confirms "a staff member may demand that an inmate submit to urinalysis". Section 55 of the *CCRA* also confirms that "Subject to section 56 and

subsection 57(2), a staff member, or any other person so authorized by the Service, may demand that an offender submit to urinalysis…". Section 56 and subsection 57(2) of the *CCRA* are not at issue in the present proceeding.

[36] In addition, subsection 61(1) of the *CCRR* confirms, "the power of the institutional head, pursuant to section 54 of the Act, to grant prior authorization for urinalysis may be exercised by the urinalysis co-ordinator". The Special Advisor reviewed these provisions to address the concern of the Applicant. The provisions outlined above, and discussed by the Special Advisor in the Decision, respond to the Applicant's concerns. The Decision is reasonable on this point.

(3) Concerns over unauthorized testing

[37] The Applicant raised a concern that a medical doctor spied on him and submitted him to an unauthorized or "illegal" urinalysis test. The Applicant provided a detailed account of why he felt that this had occurred.

[38] The Respondent submits that the Applicant failed to adduce evidence to support such claims and therefore it was reasonable to deny this aspect of the grievance.

[39] The Decision highlighted an absence of evidence and an inconsistency in the date when this alleged "illegal" test occurred and noted that from a review of the Applicant's file he was randomly selected for the tests in accordance with paragraph 54(b) of the *CCRA*. I see no error in the Special Advisor's treatment of this issue in light of the record.

(4) The removal of disciplinary charges

[40] The Applicant raised the issue of removing disciplinary charges related to his refusal to sign the Consent Forms from his record. He cites section 24(1) of the *CCRA* in support which states:

Accuracy, etc., of information	**Exactitude des renseignements**
24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.	**24 (1)** Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise concernant les délinquants soient à jour, exacts et complets.

[41] The Respondent states that Special Advisor's interpretation of section 24(1) of the *CCRA* is reasonable and that this section requires only that the record reflect the most accurate information concerning the offender. This information would include withdrawals of charges.

[42] In reviewing the Decision, I find that the Special Advisor addressed this issue and highlighted that subsection 24(1) of the *CCRA*, in requiring records to be current, will also reveal that the charges in question were in fact, withdrawn. The Special Advisor also determined that it was speculative to assert that these withdrawn charges would be used against the Applicant in the future. The Special Advisor's determination of this issue is also reasonable.

(5) Receiving test results

[43] The Applicant's Final Level Grievance addressed whether he was receiving his results as required by section 68 of the *CCRR*. The Applicant submits that he provided five examples of a failure to automatically provide him with his results. The Applicant states that having to request lab results contravenes section 68(2) of the *CCRR*. Section 68 states:

Reporting of Test Results	**Rapports des résultats d'analyses**
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.	**68 (1)** Le laboratoire doit remettre une attestation du résultat de l'analyse au coordonnateur du programme de prises d'échantillons d'urine et, sur demande du directeur du pénitencier, en fournir une copie par transmission électronique.
(2) The urinalysis program co-ordinator shall give the donor a copy of the laboratory certificate respecting the sample	**(2)** Le coordonnateur du programme de prises d'échantillons d'urine doit remettre une copie de l'attestation du laboratoire à la personne qui a fourni l'échantillon d'urine.

[44] The Respondent states that the Applicant complains of an issue raised in previous complaints and grievances.

[45] The Decision noted that the Applicant provided no evidence of not receiving the results of a specific test since the previous grievance. A review of the record also confirms this. The Special Advisor also reviewed the processes concerning tests results. The Special Advisor therefore found that no further action was required. The Decision is reasonable on this issue.

(6) The number of inmates called for testing

[46] The Applicant states that too many inmates are called at the same time to have urinalysis testing conducted, which contravenes section 66(1)(e) of the *CCRR*. The Applicant submits that section 66(1)(e) requires that the collector supervise the donor during the full two-hour period and that no other person is present. Section 66(1)(d) and (e) state:

Collection of Samples	**Prises des échantillons d'urine**
66 (1) A sample shall be collected in the following manner**:**	**66 (1)** La prise d'échantillon d'urine se fait de la manière suivante :
(d) the collector shall give the donor up to two hours to provide a sample, from the time of a demand;	d) il doit accorder un délai de deux heures à la personne pour fournir l'échantillon d'urine à compter du moment de sa demande;
(e) the collector shall ensure that the donor is kept separate from any other person except the collector and is supervised during the two hour period referred to in paragraph (d);	e) il doit veiller à ce que la personne soit gardée à l'écart de toute autre personne que lui-même et reste sous surveillance pendant le délai de deux heures prévu à l'alinéa d);

[47] The Respondent concedes that the Collector may not be the party supervising the donor during the full two-hour period if the donor is not actively engaged in giving a sample. Rather, the Collector may ask other staff members to supervise during that time. The Respondent submits that the requirement of separation applies specifically to the period when the sample is collected, which occurs.

[48] In reviewing the Decision, which highlights the relevant legislation and process, I find that there is no requirement that the Collector personally supervise the donor if the donor is not actively giving a sample. Rather, the Collector is to ensure that supervision takes place. There is no evidence that the process outlined in section 66(1) was not followed. In fact, the evidence provided by the Applicant confirms that such process is followed, however, the Applicant takes issue with the extent or distance of the separation. This assertion is insufficient to render the Decision unreasonable on this point.

VI. Conclusion

[49] The Applicant has provided a significant amount of details in his materials. The majority of the submissions, however, focus on restating his evidence for each of the issues within the Final Level Grievance, rather than addressing why the Decision itself was unreasonable or what errors arose.

[50] I find that the Applicant’s procedural fairness rights were not breached and that the Decision is reasonable. The judicial review is dismissed.

JUDGMENT in T-1716-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1716-19
STYLE OF CAUSE:	DWIGHT CREELMAN V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND CAMBELLFORD, ONTARIO
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