Federal Court  Cour fédérale

**Date: 20220830**

**Docket: T-259-20**

**Citation: 2022 FC 1241**

**Toronto, Ontario, August 30, 2022**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

**GARRY HART**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of an Offender Final Grievance Response dated December 13, 2019 [Final Decision] made by a Special Advisor to the Commissioner [SA] of the Correctional Service of Canada [CSC]. The Final Decision denied the Applicant's grievance of a suspension from his work assignment in the kitchen, including a 10-day period without pay.

[2] For the reasons set out below, I find that the Applicant has failed to demonstrate that the Final Decision, which determined that the suspension was made in accordance with CSC's policies and regulations, was unreasonable. The Applicant's further argument based on the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter] was not advanced before the SA or in his Notice of Application and cannot be considered by this Court. The application is accordingly dismissed.

## I. Background

[3] The Applicant, Garry Hart, is an inmate at Bath Institution. Between November 20, 2018 and May 23, 2019, he was on a program assignment in the institution's kitchen.

[4] On May 22, 2019, a number of items from the institution's kitchen were found in Mr. Hart's cell. On May 23, 2019, Mr. Hart was suspended from his work assignment. The Applicant's suspension was upheld by the Correctional Intervention Board [CIB] on June 13, 2019 [Program Board Decision]. Upon noting that Mr. Hart had been offered an alternate job in the kitchen that he had refused to accept, the suspension was found to be justified and a further penalty of 10 days without pay was imposed.

[5] On June 20, 2019, Mr. Hart instituted a complaint alleging that the suspension and 10-days without pay were improper sanctions made without jurisdiction under the disciplinary scheme set out in the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] and

under the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR]. He sought reinstatement and back pay.

[6] The complaint was denied by the Assistant Warden, Interventions [AWI] on June 26, 2019 [Complaint Response] who confirmed after review of the complaint, consultation with the Applicant, and discussions between the program manager and the kitchen staff, that Mr. Hart had been offered, but refused to take alternative positions in the kitchen prior to suspension. On the basis of this refusal, the AWI found that the suspension was appropriately upheld and denied the complaint.

[7] On July 16, 2019, Mr. Hart grieved his complaint. He argued that the suspension was made without jurisdiction and outside section 104 of the CCRR, which governs when an inmate may be suspended from a program assignment, and section 39 of the CCRA, which relates to disciplinary action.

[8] He further argued that the Complaint Response was contrary to Commissioner's Directive 081, *Offender Complaints and Grievances* [CD 081] and Guideline 081-1, which provides that CSC decision-makers are to provide grievors "with complete, documented, comprehensible, and timely responses to all issues that are related to the subject of the original submission" (at paragraph 2). Mr. Hart asserted that the Complaint Response failed to respond to the issues raised and relied upon irrelevant considerations.

[9] The initial grievance was denied by the A/Warden [AW] on July 31, 2019 [Grievance Response] who concluded that all relevant policies and procedures were followed and that the suspension and conditions imposed against Mr. Hart were properly made.

[10] On August 6, 2019, Mr. Hart submitted his final grievance. Mr. Hart asserted that the Grievance Response failed to address the issues he had raised. He asked for the grievance to be remitted back to the AW under a new grievance number.

[11] The SA denied the final grievance on December 13, 2019. The salient paragraphs of the Final Decision are as follows:

> ...a review of documentation on your OMS file confirmed that you were employed as a kitchen worker at Bath Institution. Upon review of documentation on your file, it was determined that a search of your cell was conducted on 2019-05-2022, during which you were found to have been in possession of items stolen from the kitchen. Following this, you were no longer authorized to work in your position in the kitchen. In order to allow you to keep your program assignment, alternative positions in the kitchen were offered to you in accordance with paragraph 47 of Commissioner's Directive (CD) 730, *Offender Program Assignments and Inmate Pay* (2016-08-22). You refused to accept these positions. As a result, you were suspended from your position in the kitchen on 2019-05-23. The CIB upheld the suspension on 2019-06-13 and imposed a sanction of ten (10) days without pay.
>
> Section 104(1) of the *Corrections and Conditional Release Regulations (CCRA)* states that an offender may be suspended from a program assignment if they refuse to participate in the program without a reasonable excuse. Furthermore, paragraph 2 of Commissioner's Directive (CD) 081, *Offender Complaints and Grievances* (2019-06-28) states that offenders must be provided with complete and comprehensible decisions that are related to their grievance.
>
> Upon review of the above information, it has been determined that, prior to suspending you from your position in the kitchen, you were offered alternative work within the same program assignment

> in areas where you were authorized to be. You refused all of these positions. The refusal to work in areas in which you are authorized constitutes a refusal to work as per paragraph 46 of Commissioner's Directive (CD) 730. As such, it was reasonable for you to be suspended and for the CIB to uphold the suspension with imposition of a sanction per section 104(1) of the *CCRA*. As such, this portion of your grievance is **denied**.
>
> With regards to the responses to your complaint and your initial grievance upon review of the above information, it has been determined that the AWI and the Institutional Head both clearly addressed your concerns, as the circumstances that led to your suspension were clearly outlined and a clear rationale was given for the denials. As such, the decisions provided to you occurred in accordance with legislation and policy. Accordingly, this portion of your grievance is **denied**.
>
> Overall, your grievance is **denied**.

## II. Issues and Standard of Review

[12] The parties dispute the characterization of the primary issue in this judicial review. The Applicant argues that the primary issue is whether the CSC acted outside of their jurisdiction under the CCRR and CCRA when instituting the suspension and period without pay. He argues that this raises an error of law that is subject to the correctness standard.

[13] The Respondent asserts that the primary issue is not one of pure jurisdiction, but instead involves the interpretation of the CSC's home statute and policies. It argues, and I agree, that the focus is on the Final Decision. The primary issue is whether the SA erred in concluding that the Applicant's suspension and penalty of a 10-day period without pay fell within section 104 of the CCRR and paragraphs 46 and 47 of Commissioner's Directive 730, *Offender Program Assignments and Inmate Pay* (2016-08-22) [CD 730].

[14] The standard of review for CSC grievance decisions is reasonableness: *Henry v Canada (Attorney General)*, 2021 FC 31 at para 19. There is no reason to rebut the presumption of reasonableness review as applied here: *Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17, 25.

[15] As stated in *Vavilov* at paragraph 67:

> ...Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[16] In conducting reasonableness review, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A reasonable decision, when read as a whole and taking into account the administrative setting, bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

[17] The Applicant also asserts that there has been a breach of section 7, paragraph 32(1)(a), and section 26 of the Charter. As a further issue, the Court must determine whether it should hear this Charter argument and if so, whether a Charter breach has occurred. As this argument was not raised before the SA, it is not subject to a standard of review analysis.

III. Relevant Legislative Provisions

[18] Under subsections 104(1) and (2) of the CCRR, an offender may be suspended from a program assignment without pay if he refuses to participate in the program without a reasonable excuse. Subsections 104(1) and (2) of the CCRR state:

| **Inmate Pay** | **Rétribution des détenus** |
|---|---|
| **104 (1)** Subject to subsection (3), where an inmate, without reasonable excuse, refuses to participate in a program for which the inmate is paid pursuant to section 78 of the Act or leaves that program, the institutional head or a staff member designated by the institutional head may | **104 (1)** Sous réserve du paragraphe (3), lorsque le détenu, sans motif valable, refuse de participer à un programme pour lequel il est rétribué selon l'article 78 de la Loi ou qu'il l'abandonne, le directeur du pénitencier ou l'agent désigné par lui peut : |
| **(a)** suspend the inmate's participation in the program for a specified period of not more than six weeks; or | a) soit suspendre sa participation au programme pour une période déterminée, qui ne doit pas excéder six semaines; |
| **(b)** terminate the inmate's participation in the program. | b) soit mettre fin à sa participation au programme. |
| **(2)** Where the institutional head or staff member suspends participation in a program under subsection (1), the inmate shall not be paid during the period of the suspension. | (2) Le détenu dont la participation à un programme a été suspendue en application du paragraphe (1) ne reçoit aucune rétribution pour la période de suspension. |
| [. . .] | [. . .] |

[19] Paragraph 47 of CD 730 provides for the program supervisor to try to resolve negative behaviour with an inmate before suspension:

> 47. Where appropriate, the program/work supervisor will normally try to resolve the offender's poor attendance or negative behaviour informally prior to suspending the offender from the program assignment. Informal mechanisms may include, but are not limited to, establishing a behavioural contract with the offender.

[20] Under paragraph 46 of CD 730, an inmate may be suspended where they refuse, without reasonable excuse, to participate in their program assignment:

> 46. The program/work supervisor may suspend an offender who, without reasonable excuse, leaves a program assignment, or whose actions demonstrate a refusal to participate in a program assignment.

[21] Inmates who are suspended from a program assignment receive zero pay for 10 working days and are not eligible to work during the zero pay period (paragraph 51 of CD 730).

[22] Section 39 of the CCRA provides that "inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 and the regulations." Disciplinary offences are defined in section 40 of the CCRA and the procedure for issuing charges are outlined in sections 41 and 42, including for a hearing (section 43) and a decision from the hearing (section 44).

## IV. Analysis

### A. *Did the SA err in concluding that the Applicant's suspension and penalty of a 10-day period without pay fell within CSC's policies and the CCRR?*

[23] Mr. Hart asserts that his suspension was made without jurisdiction as there was no refusal to work in the kitchen as required by section 104 of the CCRR and the CSC is prohibited by

statute from imposing discipline outside of the framework of the CCRA. Mr. Hart relies on the initial suspension document, which states that he was suspended for being caught with unauthorized items that came from the kitchen. He disputes that theft was ever established, that he refused to work, and that he was offered and refused an alternate position in the kitchen. He argues that there is no evidence to establish any of these facts.

[24] The Respondent argues that the Final Decision was reasonable as was the suspension. It asserts that the actions of the program supervisor and CIB do not engage the CCRA disciplinary scheme. Rather, Mr. Hart was suspended because he refused to work within the offered positions in his program assignment. It argues that the relevant facts are established on the record and are set out in the Final Decision, and that such facts justify a suspension under section 104 of the CCRR and paragraphs 46 and 47 of CD 730.

[25] I agree that there is no reviewable error arising from the Final Decision and the suspension is not a disciplinary charge engaging the disciplinary scheme set out in the CCRA.

[26] Although the initial suspension form indicated that Mr. Hart was “caught with many unauthorized items that came from the kitchen” and that this was the reason for suspending Mr. Hart from his work assignment, the Program Board Decision establishes that Mr. Hart was offered an alternate job in the kitchen but that he refused to take it. It was on this basis that his suspension was upheld, and the 10-day period without pay imposed.

[27] These facts were subsequently confirmed by the AWI through consultation with Mr. Hart and discussions between the program manager and the kitchen staff as part of the complaint process.

[28] There is no basis to dispute these facts on the face of the record that was before the SA, and there is no evidence that during the grievance process Mr. Hart disputed that an alternate work position within the kitchen was made available to him before the suspension.

[29] In his grievance submissions, Mr. Hart stated that he did not refuse to participate in his kitchen job. He referred to the offer of a different position within the kitchen as being "intriguing" but "NOT THE ISSUE" before the AW (initial grievance submissions). He did not dispute that the offer was made; nor was this raised before the SA in his final grievance submissions.

[30] Mr. Hart asks this Court now to reweigh the evidence and conclude that no such alternative offer was made. That is not the Court's role on judicial review: *Vavilov* at para 125.

[31] In my view, it was reasonable for the SA to find that the circumstances satisfied the criteria for a suspension under section 104 of the CCRR and paragraphs 46 and 47 of CD 730 and for there to be 10 days without pay (paragraph 51 of CD 730).

[32] Because unauthorized items from the kitchen were found in Mr. Hart's cell, he was no longer permitted to work in his position in the food preparation area of the kitchen. Alternative

positions within the kitchen were offered to Mr. Hart to allow him to maintain his program assignment in accordance with paragraph 47 of CD 730. However, because these positions were refused, Mr. Hart was suspended.

[33] In my view, it was reasonable for the SA to find that the refusal to work in other areas within the same program assignment constituted a refusal to work in the program as per paragraph 46 of CD 730. Similarly, it was reasonable for the SA to find that a refusal to participate in the program without a reasonable excuse satisfied subsection 104(1) of the CCRR.

[34] The decision does not engage section 39 of the CCRA as no disciplinary charge was made.

[35] As excerpted at paragraph 11 above, the Final Decision fully explains why the suspension is being upheld, including an overview of the factual background and statutory basis for the decision being made. It exhibits the hallmarks of justification, transparency, and intelligibility and is responsive to Mr. Hart's submissions: *Vavilov* at paras 99-101, 127-128. In my view, Mr. Hart has failed to demonstrate a reviewable error.

[36] Mr. Hart's further complaint regarding the timing of the grievance process is also not persuasive. The time between the SA receiving Mr. Hart's submissions and rendering the decision was 88 working days. This is slightly more than the 80-day timeframe stated in CD 081 (at paragraph 12). However, it is far below the average response time of 281 days for routine

cases from the Office of the Correctional Investigator Annual Report, 2017-2018. I do not agree that the timing of the Final Decision amounts to an unreasonable delay.

B. *Should this Court hear the Charter arguments and if so, has there been a breach of the Charter?*

[37] With respect to the second issue, I agree with the Respondent that Mr. Hart should not be permitted to raise Charter issues for the first time before this Court as these arguments were not raised before the SA or at any point during the grievance process. Nor are they included in the Notice of Application.

[38] As stated in *R v Conway*, 2010 SCC 22 at paragraph 79: "an administrative tribunal is to decide all matters, including constitutional questions, whose essential factual character falls within the tribunal's specialized statutory jurisdiction." Charter issues may be decided under the CSC grievance procedure: *Fabrikant v Canada*, 2012 FC 1496 at para 11.

[39] In *Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245, the Federal Court of Appeal commented on the importance of Charter arguments being raised before administrative tribunals. As stated at paragraph 43 of that decision:

> The approach of placing the constitutional issues before the Board at first instance respects the fundamental difference between an administrative decision-maker and a reviewing court: here, the Board and this Court. Parliament has assigned the responsibility of determining the merits of factual and legal issues – including the merits of constitutional issues – to the Board, not his Court. Evidentiary records are built before the Board, not this Court. As a general rule, this Court is restricted to reviewing the Board's decisions through the lens of the standard of review using the evidentiary record developed before the Board and passed to it. See generally *Association of Universities and Colleges of Canada*

> *v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297.

[40] Further, Rule 301(e) of the *Federal Courts Rules*, SOR/98-106 requires that a Notice of Application set out a complete and concise statement of the grounds to be argued, including reference to any statutory provisions to be relied upon. The Court has repeatedly held that it will not consider new grounds of review that have not been invoked in a Notice of Application, which would prejudice a respondent who does not have an opportunity to address the new issue: *Vézina v Canada (Defence)*, 2012 FC 625 at para 21; *Canada (Attorney General) v Iris Technologies Inc*, 2021 FCA 244 at para 36. This principle has been found to be particularly important in the context of Charter claims, which require a contextual inquiry and a strong evidentiary foundation: *Hickey v Canada*, 2006 FC 998 at para 35.

[41] In this case, there is no supporting evidentiary foundation on the record before the Court for the Applicant's Charter argument. The Notice of Application does not raise any Charter issues. I do not agree with Mr. Hart that the catch-all paragraph 2.14, which states that "Such further and other grounds as the applicant may advise" provides any effective notice, including of the Charter arguments now sought to be raised.

[42] The Applicant's argument under the Charter is accordingly dismissed.

[43] For these reasons, the application is dismissed in its entirety.

## V. Costs

[44] The Respondent has requested that $1,000 in costs be awarded on this application. However, after hearing submissions from the parties on this issue and taking into consideration the financial restrictions imposed on Mr. Hart, I exercise my discretion to award only nominal costs for this matter. Accordingly, an award of $100 will be awarded to the Respondent.

**JUDGMENT IN T-259-20**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.

2. Costs are awarded in the amount of $100 to the Respondent.

"Angela Furlanetto"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-259-20 |
| **STYLE OF CAUSE:** | GARRY HART v ATTORNEY GENERAL OF CANADA |
| **PLACE OF HEARING:** | HEARD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | AUGUST 24, 2022 |
| **JUDGMENT AND REASONS:** | FURLANETTO J. |
| **DATED:** | AUGUST 30, 2022 |

**APPEARANCES:**

| | |
|---|---|
| Garry Hart | FOR THE APPLICANT (ON HIS OWN BEHALF) |
| Maryse Piché Bénard | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| Attorney General of Canada<br>Ottawa, Ontario | FOR THE RESPONDENT |