Date: 20071121

Docket: T-1435-05

Citation: 2007 FC 1223

Ottawa, Ontario, November 21, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

DAVID M. WREGGITT

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of a Chairperson of the Public Service Commission Appeal Board, dated June 2, 2005, upholding the finding of a selection board that Mr. Wreggitt was ineligible for appointment to a supervisory position in the Correctional Service of Canada ("CSC"). The Chairperson's decision dealt with the applicant's appeal from a re-assessment directed by the Commission in 2003 following an earlier successful appeal from the selection board.

For the reasons that follow, I find that the Chairperson's decision was reasonable and should not be interfered with by the Court.

BACKGROUND:

[2] Mr. Wreggitt represented himself until shortly before the hearing of this application. The record he filed in these proceedings was compendious but unfocused. The following account of the history of these proceedings was developed with the able assistance of counsel at the hearing and reflects the factual record

[3] The applicant served as a correctional officer at the Joyceville Institution, a medium security facility in Kingston, Ontario. From 1996 through 2001, he was involved with an offender drug and alcohol rehabilitation program, initially called Riverhill and subsequently the Intensive Support Unit (ISU). In the summer of 1998 Mr. Wreggitt attended a social event at the home of the Member of Parliament for Kingston and the Islands, Mr. Peter Milliken, during which the two briefly discussed the Riverhill program. When this was subsequently reported by Mr. Wreggitt to the then Warden of Joyceville, Donna Morin, he was cautioned by her that this was inappropriate for a public servant as funding for the program was at issue. There had been an earlier incident of lobbying for resources by staff at Riverhill which did not involve Mr. Wreggitt. Mr. Wreggitt did not agree that his behaviour had been inappropriate. I note that the evidence indicates that his direct managers and the Wardens were very supportive of his work at the facility.

[4] In April, 2001 the CBC filmed an event at Collins Bay Institution which Mr. Wreggitt attended. On that occasion he met Mr. Lynn Myers, then a Member of Parliament and Parliamentary Secretary to the Solicitor General of Canada, at that time the Minister responsible for CSC. The following day Mr. Wreggitt encountered Mr. Myers' assistant who was touring the ISU range at Joyceville. The applicant was provided with Mr. Myers' business card identifying him as Parliamentary Secretary to the Solicitor General.

[5] Mr. Wreggitt contends that he was not aware at the time that the Parliamentary Secretary was also a Member of Parliament. He prepared and gave the assistant a memorandum addressed to Mr. Myers in which he spoke of his dedication to the ISU concept and commented that "[t]he only frustrating factor has been the anticipation of long term financial support from the CSC." He referred to the concept as "the future of corrections". Mr. Wreggitt concluded the memorandum by offering to provide his services to the development of the ISU concept throughout corrections. He attached some documents indicating the progress achieved by the unit. This contact with Mr. Myers was not reported to his superiors at the institution. The applicant later received a reply to the memorandum from the Solicitor General.

[6] In 2002, Mr. Wreggitt applied through an internal closed competition to be placed on an eligibility list for promotion to the level of Correctional Supervisor. This was a large competition involving 97 applicants from several institutions. A number were screened out for various reasons such as lack of knowledge. Mr. Wreggitt was found by the selection board to be unqualified for failing to meet the minimum marks required for the element of personal suitability. This was based largely on a reference check with Deputy Warden Cecil Vrieswyk in which he had commented that

Mr. Wreggitt had failed to follow proper procedures. He had not followed the chain of command within the institution, for which he had been “verbally counselled”.

[7] Deputy Warden Vrieswyk said that Mr. Wreggitt had written to a Member of Parliament to promote the Riverhill program without seeking prior approval. The Deputy Warden did not have specific information as to the identity of the M.P. or the document. However, his statements about this and other concerns were relied upon by the selection board in its finding that Mr. Wreggitt lacked the personal suitability requirements for the position. Mr. Wreggitt appealed that decision.

[8] While there were a number of factual matters in dispute, the first appeal hearing focused largely on this alleged communication with an M.P. The appeal was granted in large part due to CSC’s failure to substantiate this and other allegations made by the Deputy Warden. It appears that it was assumed by the Board that the M.P. in question was Mr. Milliken, due to evidence submitted by Mr. Wreggitt. The applicant filed a letter from Mr. Milliken to the effect that he had not received any letters from Mr. Wreggitt concerning the ISU program. Mr. Wreggitt denied having written to Mr. Milliken on the topic. CSC management was unable to produce a copy of the letter they alleged Mr. Wreggitt had written.

[9] The Appeal Board found that there were serious doubts as to the fairness and transparency of the selection board’s assessment, and the veracity of Deputy Warden Vrieswyk’s comments. The Commission directed a re-assessment of Mr. Wreggitt’s candidacy subject to corrective measures:

- the selection board was to ensure that the re-assessment was fair and transparent;
- the re-assessment was to be based on accurate and complete information;

- the re-assessment was not to rely on Deputy Warden Vrieswyk's comments; and,
- two new references were to be contacted.

[10] As instructed, the Selection Board undertook a new assessment of Mr. Wreggitt's qualifications for the eligibility list. Two new references were chosen, including Warden Morrin. She filled out only two of the four sections of the referral form, indicating that she was uncomfortable filling out the rest because she had not had recent direct contact with Mr. Wreggitt. In the personal suitability section, Warden Morrin stated that she had asked Mr. Wreggitt not to 'lobby' individuals outside the CSC.

[11] Mr. Wreggitt claims that he first became aware that Mr. Myers was a Parliamentarian on July 14, 2003, when he learned that the department was in possession of the memorandum he'd written to Mr. Myers in 2001. He made a statutory declaration two days later stating that he had not sent Mr. Myers a letter advocating support for the ISU or Riverhill, but had given a note to the assistant addressed to Mr. Myers offering his services to assist in the implementation of the ISU initiative. Mr. Wreggitt stated that he thought that Mr. Myers was a CSC employee.

[12] It is not clear when the declaration was submitted to the selection board members. Mr. Wreggitt testified at the subsequent appeal hearing that he had delivered it by hand to a CSC manager a few days after it was signed. On August 27, 2003. The selection board chairperson Pat Laverty wrote an email message in which he indicates that the members had considered the memorandum. No mention is made of the declaration. The board members did not think at that time that the memorandum demonstrated a lack of integrity sufficient to disqualify Mr. Wreggitt from

eligibility. The message refers to “the history of direct managers that were extremely supportive of Mr. Wreggitt and his work”, no documented performance concerns and that it was apparent that “they”, meaning Morrin and Vrieswyk, “were very pleased with his efforts” at Riverhill. Warden Morrin’s concerns about “lobbying” were not sufficient to change that view. There is an unexplained allusion to “Cec’s concerns”, meaning Deputy Warden Vrieswyk.

[13] On September 19, 2003 a senior departmental official wrote to the Public Service Commission to request that the first appeal decision be reopened on the basis that the testimony given by Mr. Wreggitt before the first Appeal Board was “not accurate", citing the memorandum to Mr. Myers and Mr. Wreggitt’s declaration. By letter dated October 2, 2003, the commission responded stating that the Appeal Board was *functus officio* and that the re-assessment would have to proceed.

[14] There is evidence from the exchange of emails that the selection board was prepared to list Mr. Wreggitt as qualified for the eligibility list on the basis of the reference checks and other evidence as late as October 22nd, 2003. It appears that a meeting was convened at that time to consider “developments” on the file. Mr. Laverty’s evidence before the second Appeal Board was that the members reconsidered their position when they were faced with what appeared to them to be serious contradictions between the content of Mr. Wreggitt’s memorandum to Mr. Myers and the statutory declaration he submitted about this communication. As a result of those concerns, in its decision dated November 18, 2003 the selection board again found that Mr. Wreggitt was unqualified for appointment.

[15] The second appeal hearing was prolonged in part because it was reopened at the applicant's request to receive and consider argument respecting emails obtained by Mr. Wreggitt pursuant to an application he made under the *Privacy Act*, R.S., 1985, c. P-21. These emails show some discussion about Mr. Wreggitt's case between the various members of the Selection Board, and some included or were copied to Warden Morrin and Deputy Warden Vrieswyk.

[16] Warden Morrin testified at length during the second appeal hearing. As summarized by the Chairperson in his reasons, Ms. Morrin spoke of a number of incidents which had caused her not to trust Mr. Wreggitt and to question his integrity. In particular, she stated that he had promised her that he would advise her in advance if he were to speak to anyone outside the Service about internal matters. The issue for Warden Morrin was not whether Mr. Wreggitt could speak to an M.P. or anyone else but that she be informed of this. She was not told of the contact with Mr. Myers. Mr. Wreggit claims that he did not give an undertaking to refrain from approaching persons outside his chain of command.

[17] While Mr. Wreggitt had been represented initially by his union, at the later stages of the second appeal he represented himself. His allegations were overlapping and repetitive. Nonetheless, Chairperson Ojalammi, who headed the second appeal hearing, thoroughly addressed each allegation individually and the related evidence, in 140 pages of reasons.

[18] Chairperson Ojalammi dismissed Mr. Wreggitt's appeal on each of the grounds raised by the Applicant. In my view, the relevant grounds were:

1. The department did not follow the corrective measures ordered by the Public Service Commission;
2. the department used a biased and inappropriate reference in Warden Morrin; and
3. the effect of the foregoing resulted in the selection being contrary to the merit principle.

[19] Chairperson Ojalammi concluded that the Selection Board had applied the corrective measures as instructed by the Commission. He found that the evidence did not establish that Warden Morrin was either biased or an inappropriate reference. Mr. Wreggitt failed to satisfy the Chairperson that he did not know that Mr. Myers was a Member of Parliament. Thus his failure to ascertain the true nature of Mr. Myers' role before approaching him satisfied the Chairperson that the Selection Board had properly demonstrated that he lacked the requisite qualifications for respect and integrity. The Chairperson further found that the email exchanges released under the *Privacy Act* application did not establish that the re-assessment process was compromised. Overall, he concluded, the merit principle had been respected.

RELEVANT STATUTORY PROVISIONS:

Public Service Employment Act, R.S., 1985, c. P-33

10. (1) Appointments to or from within the Public Service shall be based on selection according to merit, as determined by the Commission, and shall be made by the Commission, at the request of the deputy head concerned, by competition or by such other process of personnel selection designed to establish the merit of candidates as the Commission considers is in the best interests of the Public Service.	**10. (1)** Les nominations internes ou externes à des postes de la fonction publique se font sur la base d'une sélection fondée sur le mérite, selon ce que détermine la Commission, et à la demande de l'administrateur général intéressé, soit par concours, soit par tout autre mode de sélection du personnel fondé sur le mérite des candidats que la Commission estime le mieux adapté aux intérêts de la fonction

	publique.
21. (1) Where a person is appointed or is about to be appointed under this Act and the selection of the person for appointment was made by closed competition, every unsuccessful candidate may, within the period provided for by the regulations of the Commission, appeal against the appointment to a board established by the Commission to conduct an inquiry at which the person appealing and the deputy head concerned, or their representatives, shall be given an opportunity to be heard.	**21. (1)** Dans le cas d'une nomination, effective ou imminente, consécutive à un concours interne, tout candidat non reçu peut, dans le délai fixé par règlement de la Commission, en appeler de la nomination devant un comité chargé par elle de faire une enquête, au cours de laquelle l'appelant et l'administrateur général en cause, ou leurs représentants, ont l'occasion de se faire entendre.
(3) Where a board established under subsection (1) or (1.1) determines that there was a defect in the process for the selection of a person for appointment under this Act, the Commission may take such measures as it considers necessary to remedy the defect.	**(3)** La Commission peut prendre toute mesure qu'elle juge indiquée pour remédier à toute irrégularité signalée par le comité relativement à la procédure de sélection.
(4) Where a person is appointed or is about to be appointed under this Act as a result of measures taken under subsection (3), an appeal may be taken under subsection (1) or (1.1) against that appointment only on the ground that the measures so taken did not result in a selection for appointment according to merit.	**(4)** Une nomination, effective ou imminente, consécutive à une mesure visée au paragraphe (3) ne peut faire l'objet d'un appel conformément aux paragraphes (1) ou (1.1) qu'au motif que la mesure prise est contraire au principe de la sélection au mérite.

ISSUES:

[20]

1. Did the Appeal Board err in finding that the corrective measures had been properly implemented?

    a. Was the re-assessment fair and transparent?

    b. Was the re-assessment based on accurate and complete information?

2. Did the Appeal Board make patently unreasonable findings of fact?

ANALYSIS:

[21] I will begin with the perhaps trite observation that where corrective measures imposed on a selection board for a re-assessment are not followed, the merit principle cannot have been respected. Moreover, if the re-assessment was not fair and transparent or based on accurate and complete information, the Appeal Board should not have allowed the selection board's decision to stand, and the applicant should be entitled to a remedy.

[22] With respect to the question of which standard of review is to be applied, I adopt the reasoning of Deputy Judge Barry L. Strayer in *Chopra v. Canada (Attorney General)*, 2005 FC 252, [2005] F.C.J. No. 307 at paragraph 9. Citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, he found that the reviewing court should take into account the expertise of the appeal board, the purpose of its enabling statute and the nature of the question in dispute in deciding whether a more deferential standard of review than correctness is required. The issue of whether the merit principle was violated on the facts is best characterized as a mixed question of law and fact. See also *Gawlick v. Canada (Attorney General)*, 2004 FC 656, [2004] F.C.J. No. 795 at paragraph 20. The standard of review is thus reasonableness, and an intervention should only occur where the Chairperson's decision is not supported by reasons which can withstand a somewhat probing examination: *Ryan*, above at paragraph 55.

[23] On questions of fact, paragraph 18.1(4)(c) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, provides that the Court can intervene only if it considers that the board "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it": *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] S.C.J. No. 39 at paragraph 38. This standard has been equated with that of patent unreasonableness: *Canadian Pasta Manufacturers' Assn., v. Aurora Importing & Distributing Ltd.*, (1997), 208 N.R. 329, [1997] F.C.J. No. 115 at paragraphs 6-7 (F.C.A.). A patently unreasonable decision is one that is clearly irrational or evidently not in accordance with reason. A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand: *Ryan*, above at paragraph 52.

[24] My duty in this case is not to substitute what I would have done for the decision of the Appeal Board, but rather to examine whether that decision was reasonable based on the evidence or was perverse or capricious.

Was the re-assessment fair and transparent?

[25] The Appeal Board initially found that the Selection Board had made a favourable reassessment of Mr. Wreggitt in accordance with the corrective measures, but re-evaluated its conclusions due to the serious concerns that were raised about Mr. Wreggitt's integrity by the statutory declaration and its inconsistency with his memorandum to Mr. Myers.

[26] The applicant cites e-mails exchanged between members of the Selection Board and others while the re-assessment was under consideration between the months of June and October 2003 as evidence that the process was not fair and transparent. The Appeal Board had the benefit of the testimony of the Selection Board chair, Pat Laverty, on this and other issues. The Chairperson stated, at page 111 of his reasons:

> The fact that there was communication among a group of the departmental managers which included Ms. Morrin and Mr. Vrieswyk subsequent to the first appeal being allowed does not seem untoward. The competition [in] question was to staff positions in a variety of locations, not just Joyceville Institution. Thus, communications between the managers in the area would be quite normal. Obviously, Mr. Vrieswyk had concerns which flowed from his involvement with the first appeal hearing. However that is not sufficient cause to eliminate him from any communications involving the competition.

[27] I note that the corrective measures instructed the board not to consider Deputy Warden Vrieswyk's comments. I interpret that instruction to refer to the comments he provided as part of the reference considered in the initial assessment. Mr. Laverty testified that when the selection board did the reassessment as directed in the corrective measures, it did not look at the old assessment. Rather, it obtained the new information which it was told to get, assessed that information, and then assigned marks. Concerning an exchange of e-mail messages between others but on which he was copied, he expressed the view that they had been sent to him for information only. He had declined an opportunity to attend a meeting as he thought doing so might influence the reassessment.

[28] It appears that the Selection Board was prepared, as evidenced by Mr. Laverty's email message of August 27, 2003, to maintain its evaluation of Mr. Wreggitt as qualified notwithstanding its awareness that he had written the memorandum to Mr. Myers and in the face of Warden Morrin's and Deputy Warden Vrieswyk's concerns about his lobbying activities.

[29] While the e-mail exchanges do reflect a certain level of departmental concern over the Selection Board proceedings, they do not appear to me to be clearly showing such 'backroom dealing' so as to indicate that the re-assessment was subject to improper influence by departmental managers including Deputy Warden Vieswryk. An e-mail from him dated August 25, 2003 refers to the applicant being "passed" notwithstanding disclosure of the 2001 letter to Lynn Myers. The Selection Board remained positive about Mr. Wreggitt's reassessment until October 22, 2003. At that time, it seems, they came to consider the implications of his statutory declaration.

[30] The Chairperson was satisfied that Mr. Laverty and the other members of the selection board approached their task with a determination to act independently. It was not until they were apprised of all of the necessary information, including the declaration, that they completed their reassessment. His reasons for arriving at that conclusion withstand a somewhat probing scrutiny and given the evidence before him, it was not an unreasonable conclusion for the Chairperson to have reached.

Was the re-assessment based on accurate and complete information?

[31] The applicant submits that the Appeal Board erred in upholding the selection board's reliance upon Warden Donna Morin as a reference. The fact that Warden Morrin completed only parts of the reference form due to the length of time since she had been at Joyceville meant that her reference was incomplete and inaccurate. The Selection Board therefore failed to comply with the corrective measures as directed by the first Appeal Board.

[32] The Chairperson found that it was not unreasonable in the circumstances for Warden Morrin to have acted as a reference. The competition was for promotion to a supervisory capacity within the correctional service. As part of its assessment process for each candidate the board used one referee who was either a Warden or a Deputy Warden. The pool was limited. According to Mr. Laverty's evidence, if the board had not used Ms. Morrin, there were no other Wardens or Deputy Wardens who would have been able to provide a reference check for Mr. Wreggitt.

[33] Warden Morrin had been the Warden at Joyceville from 1996 to 2002 and had worked with the applicant during that period. Accordingly, she would have had relatively recent personal knowledge of the candidate's personal suitability qualifications. Thus, it was not unreasonable for the Chairperson to uphold her use as a reference by the Selection Board.

[34] The chairperson found that the evidence at the appeal hearing had not established that Ms. Morrin was biased against Mr. Wreggitt. At most, she had expressed some frustration at having to deal with the consequences of Mr. Wreggitt's contacts with people outside of his institution. Her credibility was questioned with respect to her evidence that Mr. Wreggitt had undertaken not to pursue such contacts without informing her in advance, which he denied. The Chairperson concluded that he did not need to resolve that conflict. However, he seems to have lost sight of that conclusion as he refers subsequently in his reasons to Mr. Wreggitt's "undertaking". This is not, in my view, a fatal error as it was not material to the central issues.

[35] In any event, the Chairperson found that the question of Warden Morrin's reference was moot as the selection board had based its conclusion that Mr. Wreggitt was unsuitable for the

position on other evidence, that is, the conflict which it found between the memorandum and the statutory declaration. Thus, Ms Morrin's reference was not a direct cause of Mr. Wreggitt's being found unsuitable for inclusion in the competition. Indeed, had they made their decision based on all of the evidence apart from the statutory declaration, including Ms. Morrin's reference, Mr. Wreggitt would have received sufficient marks to have qualified for the position.

[36] I accept that there was sufficient evidence before Chairperson Ojalammi to support his finding that the re-assessment was sufficiently grounded in complete and accurate information.

Did the Appeal Board make patently unreasonable findings of fact?

[37] The applicant submits that the Appeal Board erred in accepting patently unreasonable findings of fact made by the Selection Board in two respects: a) with regard to his knowledge or lack thereof of the fact that Mr. Myers was a Parliamentarian; and b) that his communication with Mr. Myers was intended as advocacy. He argues that the Appeal Board erred in upholding the Selection Board's conclusion, based on these findings, that there were grave inconsistencies between his statutory declaration and his memorandum to Mr. Myers.

[38] The respondent counters that the applicant's knowledge of Mr. Myers' position was irrelevant to the decision of the Selection Board and that the Appeal Board properly did not overturn their decision. The Appeal Board was not patently unreasonable in upholding the Selection Board's finding that the contradictions between Mr. Wreggitt's statutory declaration and his communication

with Mr. Myers were sufficient to ground a finding that he was not personally suitable for a supervisory position.

[39] As stated previously, the evidence supports the Appeal Board's finding that the Selection Board was prepared to add Mr. Wreggitt to the eligibility list for promotion until they received his statutory declaration and compared it to the memorandum. It thus follows that any focus on occurrences prior to the comparison of the statutory declaration and Mr. Wreggitt's communication with Mr. Myers is somewhat of a "red herring".

[40] Mr. Wreggitt chose to make and submit the statutory declaration denying that he was aware that Myers was a Parliamentarian and denying that the communication advocated support for the ISU program. While it may seem surprising, it is not inconceivable that an employee of a federal government department would not know that the Parliamentary Secretary to the Minister responsible for the department is also a Member of Parliament. One would expect that the business card that Mr. Wreggitt was given by Mr. Myers' assistant would bear those words or the letters M.P. following his name but it is plausible that Mr. Wreggitt overlooked those indications.

[41] It is also plausible that Mr. Wreggitt did not intend to mislead the first Appeal Board when he introduced evidence relating to Mr. Milliken, in effect setting up communication with that M.P. as a straw man which he could easily disprove. But that was all water under the bridge, to employ another metaphor, until Mr. Wreggitt submitted his statutory declaration. It is regrettable that Mr. Wreggitt's integrity was called into question in this process. But he brought that upon himself by his actions.

[42] Mr. Wreggitt may not have been aware of Mr. Myers' Parliamentary status. But it is evident that he recognized that Mr. Myers occupied an important office as Parliamentary Secretary to the Minister. In presenting the memorandum to Myers' assistant, Mr. Wreggitt sought to take advantage of their brief contact. The statement in the declaration that he had not written to Mr. Myers to advocate support for the ISU\Riverhill initiative was clearly false, as the Selection Board and the Chairperson found. Indeed, the Chairperson states in his reasons that Mr. Wreggitt acknowledged this in his testimony at the appeal hearing. On a plain reading of the memorandum, Mr. Wreggitt sought to both promote the program and his own interests. Thus the finding that there was a serious inconsistency between the two documents is easily sustainable.

CONCLUSION:

[43] The Chairperson carefully reviewed and applied the evidence to each of the issues which the applicant raised. In doing so, he made no reviewable error that would justify overturning the decision and returning it for reconsideration. I hold that the Appeal Board did not err in finding that the corrective measures had been appropriately implemented and that the re-assessment was fair, transparent and based on accurate and complete information. The Appeal Board did not make patently unreasonable findings of fact. On the evidence which was before the Appeal Board, I find the decision overall to have been reasonable. Mr. Wreggitt's application is, therefore, dismissed.

[44] The respondent did not request costs in his written representations but asked for them at the hearing. I exercise my discretion not to award them.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application be dismissed. Costs are not awarded.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1435-05
STYLE OF CAUSE:	DAVID M. WREGGITT AND THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 5, 2007
REASONS FOR JUDGMENT:	MOSLEY J.
DATED:	November 21, 2007

APPEARANCES:

Christopher J. Edwards	FOR THE APPLICANT
Jennifer Francis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CHRISTOPHER J. EDWARDS Templeman Menninga LLP Kingston, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT