

Federal Court



Cour fédérale

Date: 20110815

Docket: T-1933-10

Citation: 2011 FC 999

Vancouver, British Columbia, August 15, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

MICHAEL AARON SPIDEL

Applicant

and

CANADA (ATTORNEY GENERAL)

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Michael Aaron Spidel seeks judicial review of a decision of the Senior Deputy Commissioner of the Correctional Service of Canada (CSC). The Senior Deputy Commissioner denied Mr. Spidel's third-level grievance regarding the refusal of the Warden of Ferndale Institution to approve his nomination for a position on the Inmate Committee at the Institution.

[2] For the reasons that follow, I have concluded that Mr. Spidel's application for judicial review is moot as a consequence of his transfer from Ferndale Institution. However, both the Warden's decision and the decision of the Senior Deputy Commissioner may have ongoing

collateral consequences for Mr. Spidel. As a consequence, I am satisfied that it is in the interest of justice that the application be determined on its merits. I have further concluded that Mr. Spidel was not treated fairly in relation to his grievance, and that the decision of the Senior Deputy Commissioner was unreasonable. As a result, the application for judicial review will be allowed.

Background

[3] Mr. Spidel is a federal inmate serving a life sentence for second-degree murder. He was incarcerated in Ferndale Institution for a number of years and had served on the Institution's Inmate Committee, including a term as Chair of the Committee. In late 2009, there were new elections for the Inmate Committee, and Mr. Spidel nominated himself for a position on the Committee.

[4] Mr. Spidel subsequently received a letter from the Warden dated December 29, 2009 informing him that the Warden would not approve Mr. Spidel's nomination. The Warden relied upon Commissioner's Directive 083, which sets out the criteria for Inmate Committee members. One of the criteria is that the inmate "has demonstrated a commitment to reasonably resolve issues in conjunction with the institution's management team as well as with the other members of the Inmate Committee."

[5] In refusing to approve his nomination, the Warden advised Mr. Spidel that:

I believe that you become over-involved in issues. You demonstrate an over-confidence in the correctness of your position to the point where you cannot accept a differing opinion. In your specific case these are behaviors that are concerning as they are thinking errors that contributed to your index offence.

[6] The Warden noted that a 2006 psychological report made reference to positive changes made by Mr. Spidel, but cautioned that it was important that he “continue to challenge and modify the thinking styles related to his index offence”. The report counseled Mr. Spidel to avoid overconfidence and “over-involvement in helping others manage their daily lives”. The Warden went on to state that Mr. Spidel’s past performance representing inmates raised concerns about the “thinking styles” referred to in the psychological report. The Warden suggested that Mr. Spidel should focus his attention on his personal progress rather than become overly involved in other inmates’ issues.

[7] Mr. Spidel grieved the Warden’s decision. He noted that the Warden had failed to provide him with an opportunity to make representations with respect to the prohibition on his participation in the Inmate Committee, as required by section 77 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] and subsection 99(2)(b) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [CCRR].

[8] Mr. Spidel further asserted that the Warden’s refusal to approve his nomination violated his Charter rights to freedom of peaceful assembly and association. He claimed that the Warden’s authority to deny inmates’ nominations for committees was limited to situations where there were issues of safety or security. Mr. Spidel also disputed the Warden’s statement that he had not demonstrated a commitment to resolving problems, pointing to his positive evaluations with respect to his work with other inmates and the success of his past work on the Inmate Committee, which post-dated the psychological report relied upon by the Warden.

[9] Because the decision in issue had been made by the Warden, it was immediately forwarded for second-level review. The grievance was denied at the second level on May 28, 2010 on the basis that the Warden had the authority to reject the Applicant's nomination pursuant to paragraph 22 of the Directive. The analysis also noted that management felt that during his tenure as Chair of the Inmate Committee, Mr. Spidel had not represented the population of Ferndale Institution and had not accurately and impartially presented information to the inmates in the Institution. The second-level decision does not address Mr. Spidel's claim that he had not been afforded an opportunity to make representation with respect to the Warden's decision.

[10] Mr. Spidel then took the matter to the third level of the grievance process. He raised essentially the same arguments as in his initial grievance, but provided a considerable amount of supporting documentary evidence including evaluations of his performance and an inmate petition signed by most of the inmates at Ferndale Institution supporting his candidacy for the Inmate Committee.

[11] Mr. Spidel stated in his third-level submissions that he had been unable to locate any information in his file suggesting that he had not properly represented the population of Ferndale Institution while he was on the Inmate Committee, or that he had not accurately and impartially presented information to inmates. Mr. Spidel asked that the Warden issue him a written apology for the violation of his rights and that the Warden's letter be expunged from his record.

[12] The grievance was denied at the third level on October 7, 2010 in a decision rendered by the Senior Deputy Commissioner of the CSC. The decision noted Mr. Spidel's contention that there

was no documentary evidence supporting the allegation that he had proven himself incapable of working in conjunction with the management of Ferndale Institution or with inmates. However, the decision stated that Mr. Spidel's "ability to work with staff to resolve issues might not be wholly documented as it is reliant on the personal relationship that you have developed with staff and particularly with the IH [Institutional Head or Warden]".

[13] The Senior Deputy Commissioner further determined that the Warden had the authority to reject Mr. Spidel's nomination pursuant to Commissioner's Directive 083, and that the Warden's letter explained the reasons for the refusal. Finally, the Senior Deputy Commissioner's decision held that the right to participate in inmate committees was not protected by either the Charter or the CCRA. Once again, no reference is made in the decision to Mr. Spidel's claim that he had not been afforded an opportunity to make representation with respect to the Warden's decision.

Is the Application for Judicial Review Moot?

[14] A few days before the hearing of this application, the respondent brought a motion seeking to have the application summarily dismissed on the basis that it had become moot as a result of Mr. Spidel's transfer out of Ferndale Institution. Mr. Spidel was initially transferred from Ferndale (a minimum security institution), to Mission Institution (which is a medium security institution).

[15] Mr. Spidel then brought an application for *habeas corpus* in the Supreme Court of British Columbia with respect to his reclassification and transfer. Before the matter could be finally determined by the Court, the CSC agreed to return Mr. Spidel to a minimum security institution and a consent order was issued to that effect. It appears that the CSC also agreed to rescind the

information on Mr. Spidel's file that led up to his reclassification and transfer to a higher security institution. Mr. Spidel is presently incarcerated at the Kwìkwèxwelhp Healing Lodge which is another minimum security institution.

[16] Mr. Spidel filed a lengthy record responding to the respondent's mootness motion, which included copies of five affidavits that had been prepared in connection with the *habeas corpus* application. Two affidavits were from a psychologist, two were from a social worker, and one was from a retired Social Program Officer. All of these individuals had worked with Mr. Spidel at Ferndale Institution.

[17] I do not intend to review each of the affidavits in detail. Suffice it to say that the picture painted by the evidenced adduced by Mr. Spidel is troubling. While I understand that other evidence was put before the British Columbia Supreme Court by the respondent to justify the decision to reclassify and transfer Mr. Spidel, the affidavits before me suggest that the Warden of Ferndale Institution had become very irritated by Mr. Spidel as a result of grievances that he had brought, and that a variety of retaliatory measures were taken by the Warden against Mr. Spidel, including the abolition of a mental health program in order to justify the firing of Mr. Spidel.

[18] Each of the affiants attests to the positive relationship that he had with Mr. Spidel and of the good work that Mr. Spidel had done within Ferndale Institution. Two of the affiants state that they were not aware of the issues or concerns that were relied upon to justify Mr. Spidel's transfer, despite the fact that they had worked closely with Mr. Spidel.

[19] Two affidavits were provided by the psychologist who authored the document relied upon by CSC to justify the transfer. He deposes that he had been told that “management wanted Mr. Spidel gone and they wanted an assessment report ... that would assist in accomplishing this end”. While the psychologist says that he did not provide such a report at that time, he later drafted the note that provided the justification for moving Mr. Spidel. The psychologist swears that he was misled with respect to the alleged behavior of Mr. Spidel, and that he did not take any steps to confirm what he had been told by CSC management before writing the note in question.

[20] As the Supreme Court of Canada noted in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, mootness is a policy or practice that allows a court to decline to decide cases that do not involve a live controversy between the parties, but raise only hypothetical or abstract questions.

[21] According to *Borowski*, the live controversy must exist, not only at the time that the application for judicial review is commenced, but also at the time that the Court is called upon to reach a decision. As a result, if intervening events extinguish the live controversy between the parties after the application for judicial review is commenced, a case will become moot.

[22] I am satisfied that this application is moot. The underlying controversy between Mr. Spidel and the CSC related to whether or not Mr. Spidel could stand for election as a member of the Inmate Committee at Ferndale Institution. With his transfer out of Ferndale, Mr. Spidel is no longer eligible to serve on the Institution’s Inmate Committee. Thus that controversy is no longer a live one.

[23] However, even if it is determined that a case is moot, it is open to the Court to exercise its discretion to hear the matter. In my view, this is an appropriate case for the exercise of that discretion.

[24] While it is not necessary for me to make an express finding in this regard, the uncontradicted affidavit evidence before me suggests that the involuntary transfer of Mr. Spidel out of Ferndale Institution may have been taken in retaliation for Mr. Spidel having used the grievance process to challenge management decisions.

[25] Moreover, I am satisfied that even if Mr. Spidel can no longer stand for election to a position on the Inmate Committee at Ferndale Institution, there may be collateral consequences arising out of both the Warden's decision and the decision under review that provides the necessary adversarial context for this proceeding.

[26] In this regard I note that in *Borowski*, the Supreme Court noted that one of the principles underlying the principle of mootness is that a court's competence to resolve legal disputes is rooted in the adversary system, which helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

[27] The Supreme Court went on to observe, however, that this requirement may be satisfied even where the live controversy has ceased to exist "if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail". As an example of where this will occur, the Court cited situations where "although the litigant bringing the proceeding may no longer

have a direct interest in the outcome, *there may be collateral consequences of the outcome that will provide the necessary adversarial context.*” [Emphasis added, at para. 31]

[28] In this case, the result of the third level grievance decision is that the Warden’s December 29, 2009 decision remains on Mr. Spidel’s correctional file. The Warden’s letter makes negative comments about Mr. Spidel’s conduct which, the respondent conceded, could potentially have negative consequences for him down the road.

[29] In these circumstances, I am satisfied that it is appropriate to exercise my discretion to deal with Mr. Spidel’s application for judicial review on its merits.

Standard of Review

[30] There are two issues on the application for judicial review. The first is whether Mr. Spidel was treated fairly in the grievance process. Where an issue of procedural fairness arises, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para. 43. In addition to Mr. Spidel’s common law procedural fairness rights, consideration must be given in this case to the procedural rights afforded to inmates through the relevant legislative provisions.

[31] Insofar as the merits of the third level grievance decision are concerned, the decision should be reviewed against the standard of reasonableness. Such decisions are highly dependant on their

facts, and CSC personnel are better situated than the Court to make and review decisions arising in the carceral setting.

[32] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para. 47, and *Khosa* at para. 59.

Was Mr. Spidel Treated Fairly?

[33] Section 99 of the *Corrections and Conditional Release Regulations* provides that:

99. (1) The institutional head or a staff member designated by the institutional head may prohibit an inmate from participating in an assembly of inmates or in the activities of an inmate organization or committee if the institutional head or staff member believes on reasonable grounds that the inmate's participation would jeopardize the security of the penitentiary or the safety of any person.

(2) Where the institutional head or staff member designated by the institutional head prohibits an inmate from participating in an assembly or activities under subsection (1), the institutional head or staff member shall give the inmate

(a) written notice of the

99. (1) Le directeur du pénitencier ou l'agent désigné par lui peut interdire au détenu de prendre part à une réunion de détenus ou à des activités d'une organisation ou d'un comité de détenus lorsqu'il a des motifs raisonnables de croire que la participation du détenu compromettrait la sécurité du pénitencier ou de quiconque.

(2) Lorsque le directeur du pénitencier ou l'agent désigné par lui interdit au détenu de prendre part à une réunion ou à des activités d'une organisation ou d'un comité de détenus en application du paragraphe (1), il doit donner au détenu :

a) un avis écrit de l'interdiction et ses motifs;

prohibition, including the reasons for the prohibition; and

(b) **an opportunity to make representations with respect thereto.**
[emphasis added]

b) **la possibilité de présenter ses observations à ce sujet.**
[je souligne]

[34] Section 27(1) of the *Corrections and Conditional Release Act* further provides that:

27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period **before the decision is to be taken,** all the information to be considered in the taking of the decision or a summary of that information. [emphasis added]

27. (1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable **avant la prise de décision,** tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci. [je souligne]

There is no suggestion that subsection 27(3) (which permits the withholding of information in certain specified circumstances) applies here.

[35] Neither the second nor the third level grievance decision addressed Mr. Spidel's submissions with respect to the flaws in the process followed by the Warden. The respondent now concedes that Mr. Spidel was legally entitled to make representations in relation to the Warden's decision, and that he was not afforded an opportunity to do so. However, the respondent submits that Mr. Spidel was very familiar with the grievance process, and that he could have made submissions if he wanted to do so.

[36] With respect, Mr. Spidel's evident familiarity with the rules and regulations governing inmates' rights does not relieve CSC of its obligations under the law. Not only does paragraph 99(2)(b) of the CCRR require that inmates be permitted to make representations with respect to decisions affecting them, subsection 27(1) of the CCRA gives the offender the additional right to receive information prior to the decision being taken. This did not happen here. The failure of the CSC to follow the procedure prescribed by law in this case violated Mr. Spidel's right to be treated fairly.

Was the Warden's Decision Reasonable?

[37] While the procedural error discussed in the preceding section provides a sufficient basis for setting aside the third level grievance decision, I am also satisfied that the decision was not reasonable.

[38] Section 22 of *Commissioner's Directive 083 – Inmate Committees* (Correctional Service Canada, September 26, 2008) requires that inmates interested in serving on an Inmate Committee must submit their names and position of interest for approval by the Warden of their institution at least two weeks prior to the date of the scheduled election.

[39] Section 32 of the same Directive lists the criteria to be applied in determining the eligibility of an inmate to serve on the Inmate Committee. Section 32(9) provides that the inmate must have "demonstrated a commitment to reasonably resolve issues in conjunction with the institution's management team as well as with the other members of the Inmate Committee".

[40] I accept that the ability to work with the institution's management team and with other inmates is a legitimate matter for the Warden to consider in deciding whether or not to approve the candidacy of an inmate for a position on the Inmate Committee, as it could affect the safety and security of the Institution. I further accept that this assessment will necessarily be somewhat subjective in nature, as it is not something that lends itself to empirical measurement.

[41] That said, the assessment of an inmate's suitability for a position on an Inmate Committee cannot be entirely subjective, as that would permit arbitrariness in the assessment process. There must be an objective basis for the Warden's assessment.

[42] In this case the Warden relied upon a 2006 psychological report that made reference to Mr. Spidel's "thinking styles", and counseled Mr. Spidel to avoid over-confidence and "over-involvement in helping others manage their daily lives".

[43] However, in the years following that assessment, Mr. Spidel actually served as both a member and as the Chair of the Inmate Committee at Ferndale Institution. There is nothing in the evidentiary record that would support the Warden's claim that "Mr. Spidel's past performance representing inmates raised concerns about the "thinking styles" referred to in the psychological report". Indeed, the record before me suggests that Mr. Spidel made a valuable contribution to the work of the Inmate Committee.

[44] The Senior Deputy Commissioner recognized that there was no documentary evidence supporting the Warden's statement regarding Mr. Spidel's past performance on the Inmate Committee. This is implicit in the third-level decision provided to Mr. Spidel and is explicit in the "Offender Grievance Executive Summary (Third Level)" subsequently produced by the respondent.

[45] However, the Senior Deputy Commissioner went on to state that Mr. Spidel's "ability to work with staff to resolve issues *might not be wholly documented* as it is reliant on the personal relationship that you have developed with staff and particularly with the IH [Institutional Head]" [my emphasis]. With respect, it was not a question of the evidence with respect to Mr. Spidel's inability to work with other inmates and institutional staff not being wholly documented. When invited to do so, counsel for the respondent could not point me to *any* evidence in the record that supported the Warden's allegations.

[46] In the absence of an evidentiary foundation for the Warden's negative assessment, I am satisfied that both the Warden's December 29, 2009 decision and the Senior Deputy Commissioner's third level grievance decision lack the justification, transparency and intelligibility required of reasonable decisions.

[47] Given my conclusion with respect to these issues, it is not necessary for me to deal with Charter issues raised by Mr. Spidel.

Remedy

[48] For the above reasons, the third level decision made with respect to Mr. Spidel's grievance will be set aside. Given that Mr. Spidel is no longer at Ferndale Institution, nothing is to be gained by referring the matter back for re-determination.

[49] I do not accept Mr. Spidel's contention that the ban on his participation in Inmate Committees remains in effect and that relief should be granted in this regard. The Warden of Ferndale Institution clearly had no power to make a decision affecting the participation of an inmate on the Inmate Committee at a different institution.

[50] That said, as discussed earlier in these reasons, both the third-level grievance decision and the Warden's original decision regarding Mr. Spidel's participation on the Inmate Committee at Ferndale Institution could potentially have consequences for Mr. Spidel down the road. The Warden's decision is not technically before me on this application for judicial review, which is directed solely to the third-level grievance decision. In the circumstances, I direct that a copy of these reasons be placed on Mr. Spidel's correctional files so as to ensure that a complete picture is provided with respect to the events giving rise to this application for judicial review

[51] Mr. Spidel also seeks compensation for his disbursements, which he estimates at \$350 for photocopy expenses and filing fees. The respondent does not dispute these amounts and I am satisfied that they are reasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed;
2. The Senior Deputy Commissioner's third-level grievance decision is set aside;
3. A copy of these reasons shall be placed on any of Mr. Spidel's correctional files containing either the Warden's December 29, 2009 decision and/or the third-level grievance decision; and
4. Mr. Spidel shall have his costs fixed in the amount of \$350.

"Anne Mactavish"

Judge

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1933-10

STYLE OF CAUSE: MICHAEL AARON SPIDEL v.
CANADA (ATTORNEY GENERAL)

PLACE OF HEARING: Vancouver, British Columbia
Held by Videoconference

DATE OF HEARING: August 9 and 11, 2011

**REASONS FOR ORDER
AND ORDER BY:** MACTAVISH J.

DATED: August 15, 2011

APPEARANCES:

Michael Aaron Spidel

FOR THE APPLICANT
(ON HIS OWN BEHALF)

Aman Sanghera

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nil

FOR THE APPLICANT

MYLES J. KIRVAN
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FOR THE RESPONDENT