

Federal Court



Cour fédérale

Date: 20111031

Docket: T-241-10

Citation: 2011 FC 1233

Ottawa, Ontario, October 31, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JASON LEWIS

Applicant

and

**ASSISTANT COMMISSIONER
IAN MCCOWAN OF CORRECTIONAL
SERVICE OF CANADA AND
THE ATTORNEY GENERAL OF CANADA**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present application for judicial review pertains to the Correctional Service of Canada (CSC) third level grievance decision (the impugned decision) rendered on December 18, 2009 in file n° V40A00033184 by Assistant Commissioner Ian McCowan (the respondent Assistant Commissioner), in which he rejected four out of five issues raised by Mr. Jason Lewis (the applicant) on the grounds that they had not been previously raised at the lower levels of the grievance procedure.

[2] For the reasons that follow, I have concluded that the impugned decision should be set aside.

BACKGROUND

[3] In May 2008, while housed in segregation following an incident that took place in his unit, the applicant filed a request for transfer from Warkworth Institution, a medium security institution in Ontario, to Cowansville Institution in Quebec, in order to alleviate his segregated status at Warkworth.

[4] In June 2008, nine days after submitting his application for transfer, the applicant was eventually cleared and released from segregation after further information was received indicating that he did not participate in the incident.

[5] On September 2, 2008, a Security Reclassification Scale (SRS) was made by Acting Parole Officer (APO) Amanda Benett, increasing the applicant's Offender Security Level (OSL) to medium (Security Classification Score increased from 19.5 to 25). The applicant's OSL was afterwards increased to maximum on July 6, 2009 when a second SRS was made by Acting Parole Officer Lisa Charles. Although another grievance is filed against the July 6, 2009 SRS in file n° V40A00034604, the applicant continuously alleged that the second SRS negatively affected – and was negatively affected by – the contested Assessment for Decision (AD).

[6] On October 3, 2008, following up on the applicant's transfer request, an AD was completed by APO Amanda Benett and Manager of Assessment and Interventions (MAI) Cal MacAusland.

The AD contained two recommendations for decisions to be made: (1) a recommendation to refuse the applicant's institutional transfer request (decision 76); and (2) a recommendation, using the September 2, 2008 SRS, that the applicant's Institutional Adjustment score be increased from low to moderate (decision 77). The applicant contends that he was never consulted during the AD process or provided with a copy of the information used to render the decisions. On March 5, 2009, both recommendations were finalized by Acting Warden Angie Vankoughnett.

[7] On April 3, 2009, the applicant filed a first level grievance against the October 3, 2008 AD, arguing that it had not been completed within the required timeframe set forth in Commissioner's Directive 710, and requested that the negative AD be removed from his file in the Offender's Management System (OMS). On June 17, 2009, the grievance was upheld in part. Although the transfer application was in fact not dealt with within the allotted timeframe, the applicant's request to have the AD removed from the OMS was denied because his transfer application was not withdrawn.

[8] The first level grievance response also notes that the applicant refused to meet with MAI MacAusland on June 2, 2009 when the MAI attempted to meet with him to obtain more information about his concerns. The applicant contends that the reason for his refusal was that MAI MacAusland was himself involved in the completion of the impugned AD.

[9] On June 23, 2009, the applicant filed a second level grievance asking that the transfer write-up be unlocked and that his SRS score be returned to what it was prior to September 2, 2008. On August 26, 2009, the second level grievance was denied entirely on the basis that the increase in the

applicant's Security Level and Institutional Adjustment was a result of ongoing behavioural concerns and that there was no additional information to justify what the applicant requested.

[10] On October 8, 2009, the applicant filed a third level grievance making a number of allegations which were resumed in five issues in the impugned decision. The four issues of importance to this judicial review were rejected pursuant to Commissioner's Directives (CD) 081, paragraph 1, for not having been raised at the lower level. The provision states as follows:

Policy objective

1. To support the resolution of offender complaints and grievances promptly and fairly at the lowest possible level in a manner that is consistent with the law.

Objectif de la politique

1. Favoriser le règlement rapide et équitable des plaintes et des griefs des délinquants au plus bas palier possible et d'une manière conforme à la loi.

[11] More specifically, the applicant contended in his third level grievance that 1) MAI MacAusland was involved as analyst in the first level grievance while he participated in the completion of the October 3, 2008, AD; 2) Assistant Warden Vankoughnett (Institutional Head) responded to the first level grievance which concerned a decision she rendered herself; 3) APO Benett accessed the applicant's OMS file while he was no longer on her caseload at the time the October 3, 2008 AD was completed; and 4) the finalization of decision 77 on March 5, 2009 based the calculation of his SRS score after he was cleared and released from segregation was not accurate.

[12] It is worth noting that the respondents in this case have not filed any affidavits contradicting the applicant's version of facts or made any allegations to this effect.

ARGUMENTS OF THE PARTIES

[13] The applicant alleges that the impugned decision is made in breach of procedural fairness and the principle of *audi alteram partem* as the Executive Summary recommendations completed on December 12, 2009 by Analyst Dwight Lalonde, were not made available to him prior to the making of the impugned decision. Had he been given the opportunity to take cognizance of the information relied upon, the applicant contends he would have been able to clarify to the decision maker why he was not able to raise the issues at the lower levels.

[14] In addition to the Common law duty of procedural fairness, the applicant contends that the Assistant Commissioner acted in breach of his statutory duty pursuant to subsection 27(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (the CCRA) which requires the decision maker to provide the offender with “all the information to be considered in the taking of the decision”.

[15] Similarly, the applicant alleges that subsection 80(3) of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the CCRR) requires the Commissioner to provide the offender with a copy of his or her “decision, including the reasons for the decision, as soon as practicable after the offender submits an appeal”.

[16] The applicant also submits that the Assistant Commissioner erred in deciding that paragraph 1 of CD 081 could be used to reject issues not previously raised. It is submitted that the Assistant Commissioner erred in rejecting the above-mentioned issues, contrary to paragraph 47 of CD 081, which states that only when “portions of a complaint or grievance are considered frivolous,

vexatious, offensive or not made in good faith, the decision maker may reject the entire grievance or portions thereof”. Furthermore, the applicant submits that paragraph 37 of CD 081 requires the decision maker to “ensure that grievors are provided with complete, written responses to all issues raised in complaints and grievances”.

[17] The applicant finally contends that the respondent Assistant Commissioner Policy acted beyond the scope of his delegated powers by exercising the decision making authority under subsection 80(3) of the CCRR. It is submitted that although the Assistant Commissioner was provided authorization to exercise the powers, duties and functions of Commissioner under subsection 80(2) of the CCRR, no provision authorizes him to carry out the decision on behalf of the Commissioner.

[18] The respondents submit that the impugned decision is correct and reasonable in holding that since the applicant’s initial submission in this grievance concerned only the timeframe in which the AD regarding his transfer application was completed, no other allegations can be raised at the national level that were not raised at the lower levels. In support of this argument, the respondents allege that, as is well-settled in the jurisprudence, a plaintiff should exhaust the internal grievance procedure with regard to any new claim before seeking a judicial review: *McMaster v Canada (Attorney General)*, 2008 FC 647 at paras 24-25; *Olah v Canada (Attorney General)*, 2006 FC 1245 at paras 13-14.

[19] With respect to the delegation of power by the Commissioner, the respondents submit that paragraphs 5 and 29 of CD 081 authorize the Commissioner to delegate his decision making power in accordance with the CCRA.

STATUTORY AND REGULATORY FRAMEWORK

[20] The relevant sections of the legislation are as follows:

Corrections and Conditional Release Act, SC 1992 c 20

Information to be given to offenders

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.

Idem

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered

Communication de renseignements au délinquant

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.

Idem

(2) Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.

in the taking of the decision or a summary of that information.

Exceptions

(3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize

- (a) the safety of any person,
- (b) the security of a penitentiary, or
- (c) the conduct of any lawful investigation,

the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).

[...]

Grievance procedure

90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(u).

[...]

Regulations

96. The Governor in Council

Exception

(3) Sauf dans le cas des infractions disciplinaires, le commissaire peut autoriser, dans la mesure jugée strictement nécessaire toutefois, le refus de communiquer des renseignements au délinquant s'il a des motifs raisonnables de croire que cette communication mettrait en danger la sécurité d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite.

[...]

Procédure de règlement

90. Est établie, conformément aux règlements d'application de l'alinéa 96u), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.

[...]

Règlements

96. Le gouverneur en conseil

may make regulations	peut prendre des règlements :
[...]	[...]
(u) prescribing an offender grievance procedure;	u) fixant la procédure de règlement des griefs des délinquants;
[...]	[...]

Corrections and Conditional Release Regulations, SOR/92-620

<i>Offender Grievance Procedure</i>	<i>Procédure de règlement de griefs des délinquants</i>
74. (1) Where an offender is dissatisfied with an action or a decision by a staff member, the offender may submit a written complaint, preferably in the form provided by the Service, to the supervisor of that staff member.	74. (1) Lorsqu'il est insatisfait d'une action ou d'une décision de l'agent, le délinquant peut présenter une plainte au supérieur de cet agent, par écrit et de préférence sur une formule fournie par le Service.
(2) Where a complaint is submitted pursuant to subsection (1), every effort shall be made by staff members and the offender to resolve the matter informally through discussion.	(2) Les agents et le délinquant qui a présenté une plainte conformément au paragraphe (1) doivent prendre toutes les mesures utiles pour régler la question de façon informelle.
(3) Subject to subsections (4) and (5), a supervisor shall review a complaint and give the offender a copy of the supervisor's decision as soon as practicable after the offender submits the complaint.	(3) Sous réserve des paragraphes (4) et (5), le supérieur doit examiner la plainte et fournir copie de sa décision au délinquant aussitôt que possible après que celui-ci a présenté sa plainte.
(4) A supervisor may refuse to review a complaint submitted pursuant to subsection (1) where, in the opinion of the supervisor, the complaint is frivolous or vexatious or is not	(4) Le supérieur peut refuser d'examiner une plainte présentée conformément au paragraphe (1) si, à son avis, la plainte est futile ou vexatoire ou n'est pas faite de bonne foi.

made in good faith.

(5) Where a supervisor refuses to review a complaint pursuant to subsection (4), the supervisor shall give the offender a copy of the supervisor's decision, including the reasons for the decision, as soon as practicable after the offender submits the complaint.

75. Where a supervisor refuses to review a complaint pursuant to subsection 74(4) or where an offender is not satisfied with the decision of a supervisor referred to in subsection 74(3), the offender may submit a written grievance, preferably in the form provided by the Service,

(a) to the institutional head or to the director of the parole district, as the case may be; or

(b) where the institutional head or director is the subject of the grievance, to the head of the region.

76. (1) The institutional head, director of the parole district or head of the region, as the case may be, shall review a grievance to determine whether the subject-matter of the grievance falls within the jurisdiction of the Service.

(2) Where the subject-matter of a grievance does not fall within the jurisdiction of the Service, the person who is reviewing the grievance pursuant to

(5) Lorsque, conformément au paragraphe (4), le supérieur refuse d'examiner une plainte, il doit fournir au délinquant une copie de sa décision motivée aussitôt que possible après que celui-ci a présenté sa plainte.

75. Lorsque, conformément au paragraphe 74(4), le supérieur refuse d'examiner la plainte ou que la décision visée au paragraphe 74(3) ne satisfait pas le délinquant, celui-ci peut présenter un grief, par écrit et de préférence sur une formule fournie par le Service :

a) soit au directeur du pénitencier ou au directeur de district des libérations conditionnelles, selon le cas;

b) soit, si c'est le directeur du pénitencier ou le directeur de district des libérations conditionnelles qui est mis en cause, au responsable de la région.

76. (1) Le directeur du pénitencier, le directeur de district des libérations conditionnelles ou le responsable de la région, selon le cas, doit examiner le grief afin de déterminer s'il relève de la compétence du Service.

(2) Lorsque le grief porte sur un sujet qui ne relève pas de la compétence du Service, la personne qui a examiné le grief conformément au paragraphe

subsection (1) shall advise the offender in writing and inform the offender of any other means of redress available.

(1) doit en informer le délinquant par écrit et lui indiquer les autres recours possibles.

77. (1) In the case of an inmate's grievance, where there is an inmate grievance committee in the penitentiary, the institutional head may refer the grievance to that committee.

77. (1) Dans le cas d'un grief présenté par le détenu, lorsqu'il existe un comité d'examen des griefs des détenus dans le pénitencier, le directeur du pénitencier peut transmettre le grief à ce comité.

(2) An inmate grievance committee shall submit its recommendations respecting an inmate's grievance to the institutional head as soon as practicable after the grievance is referred to the committee.

(2) Le comité d'examen des griefs des détenus doit présenter au directeur ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the inmate grievance committee.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité d'examen des griefs des détenus.

78. The person who is reviewing a grievance pursuant to section 75 shall give the offender a copy of the person's decision as soon as practicable after the offender submits the grievance.

78. La personne qui examine un grief selon l'article 75 doit remettre copie de sa décision au délinquant aussitôt que possible après que le détenu a présenté le grief.

79. (1) Where the institutional head makes a decision respecting an inmate's grievance, the inmate may request that the institutional head refer the inmate's grievance to an outside review board, and the institutional head shall refer the grievance to an

79. (1) Lorsque le directeur du pénitencier rend une décision concernant le grief du détenu, celui-ci peut demander que le directeur transmette son grief à un comité externe d'examen des griefs, et le directeur doit accéder à cette demande.

outside review board.

(2) The outside review board shall submit its recommendations to the institutional head as soon as practicable after the grievance is referred to the board.

(3) The institutional head shall give the inmate a copy of the institutional head's decision as soon as practicable after receiving the recommendations of the outside review board.

80. (1) Where an offender is not satisfied with a decision of the institutional head or director of the parole district respecting the offender's grievance, the offender may appeal the decision to the head of the region.

(2) Where an offender is not satisfied with the decision of the head of the region respecting the offender's grievance, the offender may appeal the decision to the Commissioner.

(3) The head of the region or the Commissioner, as the case may be, shall give the offender a copy of the head of the region's or Commissioner's decision, including the reasons for the decision, as soon as practicable after the offender submits an appeal.

81. (1) Where an offender decides to pursue a legal remedy for the offender's

(2) Le comité externe d'examen des griefs doit présenter au directeur du pénitencier ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité externe d'examen des griefs.

80. (1) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le directeur du pénitencier ou par le directeur de district des libérations conditionnelles, il peut en appeler au responsable de la région.

(2) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le responsable de la région, il peut en appeler au commissaire.

(3) Le responsable de la région ou le commissaire, selon le cas, doit transmettre au délinquant copie de sa décision motivée aussitôt que possible après que le délinquant a interjeté appel.

81. (1) Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte

complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.

(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.

82. In reviewing an offender's complaint or grievance, the person reviewing the complaint or grievance shall take into consideration

(a) any efforts made by staff members and the offender to resolve the complaint or grievance, and any recommendations resulting therefrom;

(b) any recommendations made by an inmate grievance committee or outside review board; and

(c) any decision made respecting an alternate remedy referred to in subsection 81(1).

ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.

(2) Lorsque l'examen de la plainte ou au grief est suspendu conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.

82. Lors de l'examen de la plainte ou du grief, la personne chargée de cet examen doit tenir compte :

a) des mesures prises par les agents et le délinquant pour régler la question sur laquelle porte la plainte ou le grief et des recommandations en découlant;

b) des recommandations faites par le comité d'examen des griefs des détenus et par le comité externe d'examen des griefs;

c) de toute décision rendue dans le recours judiciaire visé au paragraphe 81(1).

*Commissioner's Directive 081**Policy objective*

1. To support the resolution of offender complaints and grievances promptly and fairly at the lowest possible level in a manner that is consistent with the law.

[...]

5. Decision-maker: the staff member who responds to a complaint or grievance at any level of the complaint or grievance process (normally the supervisor, Institutional Head, Regional Deputy Commissioner or Commissioner, or their delegate).

[...]

29. The decision of the Commissioner or his/her delegate constitutes the final stage of the complaint and grievance process.

[...]

Responses

37. The decision-maker will ensure that grievors are provided with complete, written responses to all issues raised in complaints and grievances.

[...]

*Rejection of Complaints or Grievances**Objectif de la politique*

1. Favoriser le règlement rapide et équitable des plaintes et des griefs des délinquants au plus bas palier possible et d'une manière conforme à la loi.

[...]

5. Décideur : membre du personnel qui répond à une plainte ou à un grief présenté à tout palier du processus de règlement des plaintes et griefs (normalement le surveillant, le directeur de l'établissement, le sous-commissaire régional ou le commissaire, ou encore leur représentant).

[...]

29. La décision du commissaire ou de son représentant constitue l'étape finale du processus de règlement des plaintes et griefs.

[...]

Réponses

37. Le décideur doit veiller à ce que le plaignant reçoive, par écrit, une réponse complète à toutes les questions soulevées dans sa plainte ou son grief.

[...]

Rejet des plaintes ou des griefs

47. If portions of a complaint or grievance are considered frivolous, vexatious, offensive or not made in good faith, the decision-maker may reject the entire grievance or portions thereof. Where any element of the complaint or grievance relates to an urgent matter, the decision-maker must respond to that portion within the required timeframes. Otherwise the decision-maker has two options:

- a. he/she may respond to the portions of the complaint or grievance that are not frivolous, vexatious, made in bad faith or offensive and reject the inappropriate portions (indicating the rationale for this); or
- b. he/she may reject the entire grievance and return it to the offender indicating the rationale for rejection and requiring the offender to re-draft the complaint or grievance eliminating the inappropriate portions if the offender wishes the complaint or grievance to be reviewed.

47. Si une partie d'une plainte ou d'un grief est jugée futile, vexatoire, offensante ou entachée de mauvaise foi, le décideur peut rejeter la plainte ou le grief en partie ou en totalité. Lorsqu'un élément de la plainte ou du grief concerne une question urgente, le décideur doit répondre à cette partie dans les délais prescrits. Dans les autres cas, le décideur a deux possibilités :

- a. il peut répondre aux parties de la plainte ou du grief qui ne sont pas futiles, vexatoires, entachées de mauvaise foi ou offensantes, et rejeter les autres parties (en indiquant le motif de sa décision);
- b. il peut rejeter la plainte ou le grief en totalité et le retourner au délinquant en indiquant le motif du rejet et en lui demandant de reformuler sa plainte ou son grief et d'en éliminer les parties inappropriées s'il désire que sa plainte ou son grief soit examiné.

ANALYSIS

[21] The question of delegation of power by the Commissioner to the Acting Assistant

Commissioner for the purpose of addressing a third level grievance or rendering a final decision in

the grievance process has been dealt with by this Court in *Mennes v McClung et al*, [2001] FCJ 1830 at paras 20-27. Relying particularly on subsection 2(2) and sections 97-98 of the CCRA, as well as CD 081 and the inclusion printed at the bottom of the decision of the Commissioner (Third level grievance - National), the Court concluded that there is “no requirement under the Act or the Regulations for the Commissioner of Corrections, to individually or directly review complaints at the Third level appeal or at any other level” and that the Acting Assistant Commissioner in that case “held the proper authority by virtue of the aforementioned sources in rendering her final decision of the grievance process under subsections 80(2) and 80(3) of the Act”.

[22] In the present case, the authority has been delegated to the respondent Assistant Commissioner Policy who was, in light of the above jurisprudence, properly authorized to decide the grievance submitted by the applicant. The other question to be addressed is whether the Assistant Commissioner breached the duty of procedural fairness owed to the applicant or committed a reviewable error in deciding the grievance.

[23] It is not disputed that the applicable standard of review for procedural fairness and the interpretation of legislation is correctness while merits of decisions made by the CSC on offender grievances should be reviewed against the standard of reasonableness: *Tehrankari v Canada (Attorney General)*, 2011 FC 628 at para 24.

[24] In deciding whether the applicant was treated fairly during the grievance process, the Court shall determine whether the process followed by the decision maker satisfied the level of fairness required in the administrative context generally (*Canada (Citizenship and Immigration) v Khosa*,

2009 SCC 12 at para 43; *Gallant v Canada (Deputy Commissioner, Correctional Service Canada, [1989] FCJ 70 (CA))* and respected the procedural rights afforded to offenders through the relevant legislative and regulatory provisions.

[25] The jurisprudence is constant that subsection 27(1) of the CCRA gives the offender an additional right to receive all the relevant information prior to any decision being taken on a transfer request, although the extent of this right varies when the decision is more or less discretionary in nature (*Leblanc v Canada (Attorney General)*, 2006 FC 1337 at paras 20-22; *Malette v Canada (Attorney General)*, 2004 FC 151 at paras 39-42). Similarly, in *Mymryk v Canada (Attorney General)*, 2010 FC 632 at para 20, while reviewing a decision of the Appeal Division of the National Parole Board, this Court held that the statutory disclosure obligations (such as sections 27 and 141 of the CCRA) incumbent on CSC when making a decision that concerns an offender, entitles the offender to be supplied with a summary of the information that is going to be relied on in circumstances where CSC justifies the necessity to withhold certain information (subsections 27(3) and 141(4) of CCRA). As the Court mentioned in *Mymryk*, this approach is consistent with the Supreme Court conclusion in *May v Ferndale Institution*, 2005 SCC 82 at para 95, that “s. 27(1) of the CCRA imposes an onerous disclosure obligation on CSC”.

[26] Having reviewed the third level Executive Summary, the Court is satisfied that the recommendations contained in this document have been wholly relied upon and have negatively impacted the decision maker. Since there is no indication in this case that subsections 27(2) and (3) of the CCRA (which permit the withholding of information under certain circumstances) apply here, it is clear that CSC’s failure to follow the procedure prescribed by law kept the applicant from

eventually clarifying his issues against the contested AD and resulted in a violation of the applicant's right to be treated fairly.

[27] Be that as it may, in the case at bar, the respondents do not argue the extent of the common law duty to act fairly, nor do they challenge the statutory obligations under section 27 of the CCRA. Rather the respondents take issue with the fact that the issues raised by the applicant at the third level depart from his initial claim in this grievance which concerned the timeframe to complete the October 3, 2008 AD.

[28] It is nonetheless clear that all of the issues raised by the applicant both in the second and the third level grievances were related to the contested AD of which the applicant sought the removal from his OMS file following his release from segregation. In fact, the applicant's issues either concerned the persons involved in the making of decisions at different levels of grievance or were related to decision 77 and the material on the basis of which it was made, namely the September 2, 2008 SRS. The fact that the applicant requested that the negative AD be removed from his OMS file shows that he also took issue with the content of the AD. Furthermore, it is obvious that the SRS, which determines the appropriate level of security throughout the offender's sentence, is of a continuous nature and contains referential information for CSC decision makers. Therefore the applicant's SRS issue in the third level grievance was not an entirely new one.

[29] I agree with the respondents that, as this Court has stated on many occasions (see for example: *Condo v Canada (Attorney General)*, 2003 FCA 99; *Giesbrecht v Canada*, [1998] FCJ 621; *Collin v Canada (Attorney General)*, 2006 FC 544; *McMaster v Canada (Attorney General)*,

2008 FC 647; *Olah v Canada (Attorney General)*, 2006 FC 1245; and *Ferndale Institution*, above at paras 52-58), the CSC internal grievance process constitutes an adequate alternative remedy which should generally be pursued by applicants prior to a judicial review. However, the respondent's reliance on this jurisprudence is misplaced in the present case because, in my view, the applicant's grievance has entirely been disposed of internally.

[30] Furthermore, it is important to note that every appeal under the CSC grievance procedure is conducted *de novo* and cannot be strictly limited to the allegations as raised in the first level grievance. In *Tyrrell v Canada (Attorney General)*, 2008 FC 42 at paras 37-38, Justice Snider stated:

Grievance procedures under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 are governed by the Corrections and Conditional Release Regulations, S.O.R./92-620, ss. 74-82). The procedure was described by Justice Rothstein in the case of *Giesbrecht v. Canada*, [1998] F.C.J. No. 621 at para. 10 (T.D.) (QL):

Grievances are to be handled expeditiously and time limits are provided in the Commissioner's Directives...Through the grievance procedure an inmate may appeal a decision on the merits and an appeal tribunal may substitute its decision for that of the tribunal appealed from (see also *Wild v. Canada*, [2006] F.C.J. No. 999, 2006 FC 777 at para. 9).

In other words, at each higher level of the grievance procedure, the decision maker may substitute its decision for that rendered by the decision maker below. Therefore, although technically an "appeal", the nature of the grievance process allows each subsequent decision maker to approach a grievance as a *de novo* review and to hear new evidence (see, for example, *Besse v. Canada (Minister of National Revenue - M.N.R.)*, [1999] F.C.J. No. 1790 at para. 5 (C.A.) (QL)).

[31] Thus, in the circumstances, I agree with the applicant that it is contrary to the rationale and the objective of the offender grievance procedure as set out in section 90 of the CCRA and sections

74 to 82 of the CCRR to ask the applicant to restart from square one, should he wish to raise any of the above-mentioned issues against the contested AD. Furthermore, the respondents have not alleged that they suffered any prejudice and there is no evidence of prejudice on their side, while there is definitively a prejudice suffered by the applicant.

[32] I therefore conclude that the CSC also failed to comply with paragraph 37 of CD 081, which provides that the decision maker will ensure that the grievor is provided with complete responses “to all issues raised” in his or her grievance. The impugned decision is thus unreasonable.

[33] In view of the above reasons, the present application for judicial review shall be allowed. In addition, the applicant, who is self-represented, has asked the Court to grant him the costs of his application. In the exercise of the Court’s discretion and considering that in view of the second and the third level grievance responses the applicant was in some way forced into this judicial review, I consider it reasonable to award him costs in the amount of \$350, all inclusive, payable forthwith.

JUDGMENT

THIS COURT ADJUGES AND ORDERS:

1. The application for judicial review is granted;
2. The third level grievance decision rendered on December 18, 2009 in file n° V40A00033184 is set aside and remitted to the Correctional Service of Canada to be determined in accordance with these reasons; and
3. The applicant shall be entitled to costs in the amount of \$350, all inclusive, payable forthwith.

“Luc Martineau”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-241-10

STYLE OF CAUSE: **JASON LEWIS AND ASSISTANT
COMMISSIONER
IAN MCCOWAN OF CORRECTIONAL
SERVICE OF CANADA AND
THE ATTORNEY GENERAL OF CANADA**

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: October 18, 2011

REASONS FOR JUDGMENT: MARTINEAU J.

DATED: October 31, 2011

APPEARANCES:

Jason Lewis FOR THE APPLICANT
(ON HIS OWN BEHALF)

Toni Abi Nasr FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Jason Lewis FOR THE APPLICANT
(ON HIS OWN BEHALF)
Port Cartier, Quebec

Myles J. Kirvan, Deputy Attorney FOR THE RESPONDENTS
General of Canada
Montreal, Quebec