T-631-96

OTTAWA, ONTARIO, THE 28TH DAY OF JANUARY 1997.

BEFORE: THE HONOURABLE MR. JUSTICE PINARD.

BETWEEN:

RONALD SAVARD,

Applicant,

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent.

O R D E R

The application for judicial review of the decision made on February 21, 1996 by the independent chairperson of the Cowansville Institution disciplinary tribunal, finding the applicant guilty of refusing to give a urine sample, is allowed, the subject decision of the chairperson of the disciplinary tribunal set aside and the matter referred back to the Cowansville Institution disciplinary tribunal to be decided by it on the basis that the applicant cannot be found guilty of the offence in question because the related notice of charge contains no statement of the evidence in support of the charge, thereby infringing s. 25 of the Corrections and Conditional Release Regulations.

YVON PINARD
JUDGE

Certified true translation

C. Delon, LL.L.

T-631-96

BETWEEN:

RONALD SAVARD,

Applicant,

- and -

THE ATTORNEY GENERAL OF CANADA,

Respondent.

REASONS FOR ORDER

PINARD J.

The instant application for judicial review is from a decision made on February 21, 1996 by the independent chairperson of the Cowansville Institution disciplinary tribunal finding the applicant guilty pursuant to s. 40(*l*)[1] of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("the Act"), of refusing to provide a urine sample as required by s. 54(*a*) of the Act.[2]

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[1] Section 40(*l*) reads as follows:

40. An inmate commits a disciplinary offence who

. . . . .

(*l*)fails or refuses to provide a urine sample when demanded pursuant to sections 54 or 55 . . .

[2]Section 54(*a*) of the Act reads as follows:

54. Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis

(*a*)where the staff member believes on reasonable grounds that the inmate has committed or is committing the disciplinary offence referred to in paragraph 40(*k*) and that a urine sample is necessary to provide evidence of the offence, and the staff member obtains the prior authorization of the institutional head . . .

Section 40(*k*) reads as follows:

40. An inmate commits a disciplinary offence who

. . . . .

The applicant maintained that his refusal to provide a urine sample was justified since the allegation in support of the sample request was too vague and imprecise for him to submit an intelligent response under s. 57(1) of the Act.[3] Further, the applicant alleged that he had a reasonable apprehension of bias at the hearing before the disciplinary tribunal, on account of the fact that the urine sample coordinator at the Cowansville Institution, Daniel Chateauneuf, performed double duty at the hearing. The applicant objected that Mr. Chateauneuf had acted as an assessor for the independent chairperson and had also testified against him before the disciplinary tribunal.

At about 7:30 a.m. on January 10, 1996 the applicant went to the Institution infirmary complaining of "bad headaches". The nurse, Angèle Lacasse, found that he staggered when he walked, talked slowly and had a dry mouth. The nurse later testified that she then decided to place the applicant under observation, as she found he was not in a [TRANSLATION] "normal condition". Following a conversation between this nurse and the security officer Jacques Grenier, the latter called Pierre Sansoucy to tell him that the applicant was not in a normal condition. Mr. Sansoucy in turn called Daniel Chateauneuf, the urine sample coordinator at the Cowansville Institution, to pass on the information to him. Mr. Chateauneuf then asked for the applicant to have a urine test. The applicant categorically refused this request, which caused an offence report to be issued based on s. 40(*l*) of the Act. The hearing on this incident was held on January 31 and February 21, 1996. At that hearing the urine sample coordinator, Daniel Chateauneuf, was the assessor for the independent chairperson, and counsel for the applicant objected to this. The objection was upheld. Although at one point Mr. Chateauneuf then objected to the witness Grenier being heard, the independent chairperson disregarded this objection and adjourned this hearing to allow Mr. Grenier to testify later, as counsel for the applicant wished.

(*k*)takes an intoxicant into the inmate's body . . .

[3]Section 57(1) of the Act reads as follows:

57. (1) An inmate who is required to submit to urinalysis pursuant to paragraph 54(*a*) shall be given an opportunity to make representations to the institutional head before submitting the urine sample.

At the hearing in this Court reference was made to the judgment which I rendered in *Picard v. Drummond Institution Disciplinary Tribunal*.[4] In that case, which also involved an offence of refusing to provide a urine sample requested pursuant to s. 54(*a*) of the Act, I quashed the decision of the independent chairperson of the disciplinary tribunal because of departures from ss. 56 and 57 of the Act, s. 25 of the Corrections and Conditional Release Regulations ("the Regulations")[5] and thus a breach of s. 7 of the *Canadian Charter of Rights and Freedoms*. In the case at bar, I allowed counsel for the parties to be heard on the apparent infringement of s. 25 of the Regulations. In my view there was a flagrant breach of this provision, as the notice of charge contained absolutely no "summary of the evidence to be presented in support of the charge at the hearing". This breach is fatal.

It is not simply a Commissioner's Directive that was not observed, but a regulation enacted pursuant to the Act. In the Supreme Court of Canada judgment in *Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, Pigeon J. made the distinction very clearly at 129:

> I have no doubt that the regulations are law. The statute provides for sanction by fine or imprisonment. What was said by the Privy Council with respect to orders in council under the *War Measures Act* in the *Japanese Canadians* case, at p. 107, would be applicable:

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[4](1996) 107 F.T.R. 1.

[5]25. (1) Notice of a charge of a disciplinary offence shall

(*a*)describe the conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and

(*b*)state the time, date and place of the hearing.

(2) A notice referred to in subsection (1) shall be issued and delivered to the inmate who is the subject of the charge by a staff member as soon as practicable.

The legislative activity of Parliament is still present at the time when the orders are made, and these orders are "law".

> I do not think the same can be said of the directives. It is significant that there is no provision for penalty and, while they are authorized by statute, they are clearly of an administrative, not a legislative, nature. It is not in any legislative capacity that the Commissioner is authorized to issue directives but in his administrative capacity. I have no doubt that he would have the power of doing it by virtue of his authority without express legislative enactment. It appears to me that s. 29(3) is to be considered in the same way as many other provisions of an administrative nature dealing with departments of the administration which merely spell out administrative authority that would exist even if not explicitly provided for by statute.
>
> In my opinion it is important to distinguish between duties imposed on public employees by statutes or regulations having the force of law and obligations prescribed by virtue of their condition of public employees. The members of a disciplinary board are not high public officers but ordinary civil servants. The Commissioner's directives are no more than directions as to the manner of carrying out their duties in the administration of the institution where they are employed.

As the notice of charge in the case at bar contains merely a description of the offence and no summary of the evidence to be presented in support of the charge at the hearing before the disciplinary tribunal is given, I am forced to find that the authorities did not carry out the will of Parliament, which intended to give an inmate charged with a disciplinary offence a specific and particular means of preparing a full and complete defence, which is a recognized rule of natural justice.

Consequently, this departure seems a sufficient basis for allowing the instant application for judicial review without further consideration of the other arguments made by the applicant.

An order is therefore made quashing the subject decision of the independent chairperson of the Cowansville Institution disciplinary tribunal and referring the matter back to that tribunal to be decided by it on the basis that the applicant cannot be found guilty of the offence charged because the related notice of charge was not issued in full compliance with s. 25 of the Regulations.

YVON PINARD
JUDGE

OTTAWA, Ontario,
January 28, 1997.

Certified true translation

C. Delon, LL.L.

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE No.:T-631-96

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