Federal Court  Cour fédérale

Date: 20150716

Docket: T-2225-14

Citation: 2015 FC 870

Ottawa, Ontario, July 16, 2015

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

STEPHEN WILLIAM JONES

Applicant

and

ATTORNEY GENERAL OF CANADA AND CORRECTIONAL SERVICE OF CANADA

Respondents

JUDGMENT AND REASONS

[1] Mr. Jones is in custody at Springhill Institution, Nova Scotia [the Institution]. He seeks judicial review of a decision made on October 3, 2014 [the Decision], that he had committed the disciplinary offence set out in paragraph 40(m)(ii) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]; namely, he created or participated in an "activity that is likely to jeopardize the security of the penitentiary."

[2] The specific rules governing the discipline of an inmate are contained in three source documents: *CCRA* sections 38-44; *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*], sections 24-34; the Commissioner's Directive 580 "Discipline of Inmates" [Directive 580].

[3] Mr. Jones submits that he was denied procedural fairness in the disciplinary process as set out in these source documents. He further submits that the Decision was unreasonable. Specifically, in his Application he states that the grounds for the application are:

1. The applicant was denied the right to a fair and impartial hearing.
2. Hearing was conducted in an unlawful manner.
3. The ICP [Independent Chair Person] failed to reach a reasonable conclusion based on the evidence.
4. The standard of reasonableness was not applied.
5. The ICP was acting with bias towards the applicant.

[4] The Crown submits that the decision reached was reasonable and argues that "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case." It submits that the source documents above provide for "considerable flexibility in the conduct of inmate disciplinary hearings."

[5] While flexibility is evident in some of the steps mandated in the source documents, it must be kept in mind that flexibility cannot override a requirement set out in a statutory

provision, regulation, or other instrument having the force of law which provides to the contrary: See *Canada (Correctional Services) v Plante*, [1995] FCJ No 1509 (FCTD), para 6.

[6] In my view, there were serious deficiencies in the procedure followed in the processing and hearing of the charge against Mr. Jones from those mandated in the source documents. As a result, he was denied procedural fairness. Moreover, it is my view that the decision rendered is unreasonable based on the evidence. For the reasons that follow, this application will be allowed and the decision will be quashed.

[7] Mr. Jones is the Unit Representative of the inmates in Unit 51 of the Institution. In that role, he filed a complaint with the Institution against CX-II McEachern [the Complaint]. There had apparently been other concerns regarding the officer's conduct in the unit; however, the event that precipitated the Complaint was when CX-II McEachern smashed the wall clock in Unit 51 (which had been taken down temporarily to install air conditioning) in response to an inmate asking him for the time. The officer then replaced the clock with a hand-drawn picture of a clock showing the time as 10:10, the inmates' lock-up time.

[8] Mr. Jones prepared the Complaint on a standard form provided by the Institution, which states that it is "Protected B once completed." Protected B information, the court understands, is "information that, if compromised, could reasonably be expected to cause serious injury outside the national interest, for example, loss of reputation or competitive advantage."

[9] Under the heading "Details of compliant" Mr. Jones wrote "Please see attached." Attached is a sheet of paper containing a five-paragraph description of the details of the Compliant against Mr. McEachern. It is the first paragraph of that attachment, and in particular the last 10 words of it, that led to the charge against Mr. Jones. It reads as follows:

> As Unit Rep, I am placing this grievance on behalf of the inmates of Unit 51. This grievance pertains to CX-II Mr. Kevin McEachern. Mr. McEachern's conduct, performance and his actions trying to incite inmates of Unit 51 cannot and should not be tolerated by us any longer. [emphasis added]

[10] After filing the Complaint, Mr. Jones posted it in Unit 51 in a spot used for inmate information. Sometime later, it came to the attention of Mr. McEachern, who removed it. He prepared an Inmate Offence Report and Notification of Charge [Charge Form]. On it, he described the "description of the incident" as follows:

> I/M Jones breached the privacy act but [*sic*] posting a letter he wrote about CX McEachern. It is protected "B" information which is not supposed to be posted in the unit. I/M Jones made several allegations towards CX McEachern which are false. "Please see attached letter."

The "attached letter" he referenced is the single sheet attached to and forming part of the grievance, as described above.

[11] The Charge Form was then passed to another who apparently decided on August 12, 2014, to lay a charge against Mr. Jones. The Charge Form indicates under the heading "Decision Taken" that "I have reviewed the report and determine that a charge is warranted under paragraph 40 (Mii) [*sic*] of the *Corrections and Conditional Release Act* (see reverse)." The reverse side of the form is not in the record, but counsel confirmed that it does not contain the

wording of paragraph 40(m)(ii) of the *CCRA*. The charge laid against Mr. Jones was that he had created or participated in an activity "that is likely to jeopardize the security of the penitentiary."

[12] The Charge Form indicated the offence category of the charge as "serious" and described the "proposed date of hearing" and location as 0900 hours, August 20, 2014, #2 Building.

[13] The Charge Form indicates, and Mr. Jones confirms, that he was provided with a copy of it on August 12, 2014, by Mr. McEachern.

[14] It is not disputed that the hearing on the charge was not held on August 20, 2014. It is not disputed that Mr. Jones was not told that it was not going to be held that day. It is not disputed that Mr. Jones was never told when the hearing would be held. He has sworn an affidavit in which he attests:

> My court date came and went with no notification as to the status of my charge. No new court date was provided to me what so ever.
>
> On October 3rd, 2014 I was called to serious court. When I arrived for the hearing, there were no instructions as to who the ICP (Independent Chair Person) was nor the ICP Assistant. They then read the charge and asked how do I plea [*sic*].

[15] The hearing commenced with the Chair stating:

> October 3rd, 2014, Springhill Institution, Serious Institutional Court, ICP presiding, Mr. Jeff Earle; Advisor to the Court, Correctional Manager, Doug Mitten; clerical support, Michelle McEachern. [emphasis added]

Contrary to what the Chair stated, Mr. Earle is not an ICP. Mr. Earle is the Institutional Head, the Warden of the Institution.

[16] The limited jurisdiction of the Institutional Head to preside over a hearing of a serious offence is prescribed by paragraph 25 of Directive 580 which provides:

> An ICP, pursuant to section 24 of the CCRR, will conduct the hearing of serious offences. When no ICP is available within a reasonable period of time, the Institutional Head may conduct the hearing.

[17] It is clear from the transcript of the hearing that Mr. Jones was not aware that the decision-maker he was appearing before was the Warden until after he had been found guilty of the offence with which he was charged:

> I didn't know – I don't know who you are. I've never been introduced to you, whether that's a good or a bad thing, I don't know. But I thought it was supposed to be an independent chairperson, somebody from the outside….

[18] Mr. Mitton, the Serious Disciplinary Hearing Advisor [Advisor] and the Institution's Correctional Manager, responds saying: "And, and that's right, and that's the authority there, sir, for you at Paragraph 28 to hear it in the absence of the ICP." The Advisor is not correct. The Institutional Head is permitted and thus has jurisdiction to hear the matter only if the ICP is not available within a reasonable time to hear it.

[19] Mr. Jones has challenged the lawfulness of the hearing including the jurisdiction of the Institutional Head to conduct the hearing. The onus falls on the Crown to offer evidence that establishes that the hearing was lawfully conducted. The Crown offered no evidence.

[20] There is nothing in the record relating to the availability of the ICP, then or at any time. In my view, when the Institutional Head is assuming jurisdiction to hear a serious charge, he or she must inform the inmate who he or she is and why the ICP is not conducting the hearing. This was not done. I do not suggest that the Warden was trying to hide his identity when he said that he was the ICP but, as he did in introducing the Advisor, he ought to have stated his name and his position at the Institution. Moreover, because presumptively the Institutional Head is without jurisdiction to conduct a hearing of a serious charge, he ought to explain why he is doing so in order to establish his or her jurisdiction for the record. There is no evidence before the court that Mr. Earle had any jurisdiction to hear and determine the charge laid against Mr. Jones because there is no evidence that the ICP was absent and could not attend that day or that the ICP was absent for an unreasonable period of time. The burden of proving that the hearing was lawfully conducted by the person who presided in the absence of the ICP rests with the Crown, and it has failed to meet that burden. On that basis alone, the decision may be quashed. However, there are other problems with the procedure and process that were followed.

[21] Paragraph 7 of Directive 580 states that when, as in this case, there is no informal disciplinary process used, a staff member is to "advise the inmate that a report of the offence will be prepared and may result in a charge being laid." There is no evidence that this was done.

[22] Paragraph 16a of Directive 580 states that the "Correctional Manager or designate will ensure the charge and possible sanctions are explained to the inmate." Mr. Jones attests that this was not done. This probably explains why he thought that he had been charged with violating the *Privacy Act* and not with conduct that could jeopardize the security of the institution. As a

result of the Correctional Manager failing to provide the required explanation, Mr. Jones misunderstood the charge against him and prepared a defence to the wrong charge.

[23] Paragraph 17 of Directive 580 states that within two days after the laying of the charge, the inmate is to be provided with a copy of the offence report, as well as "documentation that will be provided to the ICP of the disciplinary hearing" and "a written notice of the place, time and date of the hearing." It is only "in exceptional circumstances" that these requirements need not be met and then the reason they cannot be met must be documented. I am prepared to accept that these requirements were initially complied with; however, when the hearing did not occur as first scheduled, the inmate is to be provided with further notice of the rescheduled hearing date, time, and place. This is evident from Annex C to Directive 580, entitled "Duties of the Serious Disciplinary Hearing Advisor" which provides that the Advisor may be assigned to "notify the inmate in writing of changes in his/her hearing date." Neither the Advisor nor anyone at the Institution advised Mr. Jones of the rescheduled date. In fact, as he testified at the hearing, Mr. McEachern's superior led him to believe that the charge would be dropped. This information and the failure to inform Mr. Jones of the rescheduled hearing date no doubt account for his surprise at the hearing in October 2014.

[24] It is troubling that Mr. Jones' request for an adjournment was dismissed so summarily by the Chair. After he was asked how he pled to the charge, Mr. Jones requested an adjournment.

> Well, at this point in time, I'd like to also look at adjourning it, because of the fact that my Court date was supposed to be August the 20th. This happened in July, so I was prepared back in August, but then all of a sudden today, out of the blue, I was actually told when they dropped another charge that this probably wouldn't see the light of day, and that was by Shaun MacLeod (Sp?).

[25] The first adjournment request was not, as was suggested at the hearing, to permit him to retain counsel; rather it was because Mr. Jones was taken aback that the hearing was taking place. I agree with the Crown that Mr. Jones later asked for an adjournment to retain counsel. Although the Charge Form informed him of that right, his decision to forego counsel was made based on his mistaken understanding of the charge that had been laid against him. Regrettably none of this was explored by the Chair.

[26] Rather than inquire whether Mr. Jones had ever been advised of this new date, the Chair simply observed that Mr. MacLeod "may not have known the exact date," that normally hearings are set within 90 days, this date was within that time frame and "So we are proceeding."

[27] Mr. Jones submits, and I agree, that the Advisor stepped outside his role as mandated and described in the source documents referenced above. The principal duties of the Advisor, as set out in those documents, is to "facilitate the disciplinary process and ensure the security of the ICP and the various persons attending the hearing, ensure the quality and availability of all institutional material, documents or details required for the hearing or requested by the ICP, assist witnesses or any other persons involved in the hearing by providing information about roles and responsibilities in the disciplinary process and hearings, keep staff members of the charged inmate's unit up to date on the case, prior to the hearing, review the inmate's files and/or speak to case management, in order to provide relevant information to the ICP prior to sentencing, should the charged inmate be found guilty, [and] after conviction, but before sentencing, advise the ICP on issues and recommendations which might affect sentencing."

[28] In this case, the Advisor took it upon himself to interject when the Chair was questioning Mr. Jones about the Complaint by reading the allegedly offending words reproduced at paragraph 9 above and then offering his personal opinion that the words used put the officer in danger. He took on the role of cross-examining Mr. Jones – a role well beyond his authority as set out in the source documents.

> MR. MITTON: Can you not understand how publicly posting such a thing would not undermine or attempt to undermine an officer's authority, or his overall condition and employment within that employment? Can you not – can you see that?
>
> MR. JONES: No
>
> …
>
> MR. MITTEN: … how you were telling inmates that none of this can be tolerated? Do you not see how this could, first of all, jeopardize an officer's safety?
>
> …
>
> MR. MITTON: Just by "cannot and should not be tolerated", you are calling the other inmates to arms to say ---
>
> MR. JONES: No, I'm not.
>
> MR. MITTON: That's my interpretation.
>
> MR. JONES: Oh, that's your interpretation.
>
> MR. MITTON: I, I think you endangered an officer's safety just by, just by that …
>
> (emphasis added)

[29] The Chair then becomes involved, explaining to Mr. Jones that he has a right to file the Complaint and take it through the grievance process but:

> On the other hand, this is not an appropriate way to respond to it, and it does put him at risk. On that basis, I am finding you guilty.

[30] In my view, in making the guilty finding without offering Mr. Jones any opportunity to explain what he meant by the statement at issue, examine any witnesses (it is noted that a later attempt by Mr. Jones to examine Mr. McEachern was rejected, the Advisor stating because "the Warden has already made his finding" and "[i]t's too late to go back and restart it"), or offer submissions on guilt or innocence, was a breach of procedural fairness. Paragraph 34 of Directive 580 provides:

> The inmate will be given a reasonable opportunity at the hearing to:
>
> a. question witnesses through the Chairperson
> b. introduce evidence
> c. call witnesses on his own behalf
> d. examine exhibits and documents to be considered in the taking of the decision, unless there are security concerns
> e. make relevant submissions during all phases of the hearing, including submissions regarding the appropriate sanction.

No opportunity was provided to Mr. Jones to do any of the above.

[31] Directive 580 provides in Annex C that it is the duty of the Advisor "after conviction, but before sentencing, to advise the ICP on issues and recommendations which might affect sentencing." It provides that:

> Such issues might include, but are not limited to:
>
> - the inmate's history of disciplinary offences
> - the particular needs and circumstances of the inmate, including the relevant cultural and historical factors in an Aboriginal inmate's background (Aboriginal social history)
> - the particular mental health needs and circumstances of the inmate
> - the recreational privileges that can be considered for sanctions (for loss of privileges)

- institutional policy on loss of privileges
- administrative consequences already imposed as a result of the same offence
- possible conflict with the Correctional Plan.

In this case, the Advisor made no reference to any of these issues; rather he recommended the most severe sanction possible because "he has posted protected B-information, that information that shouldn't be shared" and "basically called to arms all of the inmates in that unit." It is evident from the transcript of the hearing that the Advisor had no idea of Mr. Jones' record (which was excellent) or the impact his proposed sentence would have on his Correctional Plan.

[32] In the end, the Chair imposed a lesser penalty than recommended by the Advisor; namely $40 which was suspended and need not be paid if he was of good behaviour for 90 days, and a loss of recreation privileges for seven nights. The suspension of privileges meant that Mr. Jones was unable to work in the Canteen for seven days, which work was part of his Correctional Plan.

[33] In addition to breaching procedural fairness, the decision under review, in my assessment is unreasonable. The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47, instructs reviewing courts on the meaning of reasonableness:

> A court conducting a review for reasonableness inquiries into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[34] A finding of guilt must be based on the Chair being "satisfied, beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question:" Paragraph 41 of Directive 580.

[35] The disciplinary offence in question was that the posting of the grievance filed against Mr. McEachern "is likely to jeopardize the security of the penitentiary." The only finding made by the Chair (and one made with no reasoning stated) was that the posting "put Mr. McEachern at risk." Even if true, the Chair offers no explanation or analysis as to how putting Mr. McEachern at risk "is likely to jeopardize the security of the institution."

[36] It may be that the Chair accepted the characterization made by the Advisor that the statement complained of was a "call to arms" but that, in my view, is an unreasonable and unsupportable characterization, given the document as a whole. It may have been a reasonable characterization had Mr. Jones posted a sheet of paper with just the words: "Mr. McEachern's conduct, performance and his actions trying to incite inmates of Unit 51 cannot and should not be tolerated by us any longer" - but he did not. He filed a grievance complaining of the conduct and actions of Mr. McEachern and did so, as he directly stated in the grievance, as the Unit Representative. The statement on which the Chair relies should not have been read out of the context in which it was written. Interpreted within that context, it is clear that Mr. Jones is filing the grievance because Mr. McEachern's conduct and actions "cannot and should not be tolerated" any longer. It is no call to arms, as suggested by the Advisor; rather it explains why the grievance is being filed – because we can no longer tolerate his actions.

[37] I suggest that even Mr. McEachern did not see the statement as a call to arms to do him harm because his only complaint was that Mr. Jones had posted Protected B information and it was inaccurate. He never suggests that in posting it, Mr. Jones is attempting to incite the inmates to harm him.

[38] For these reasons, the decision must be quashed. The decision and the punishment it imposed are to be removed permanently from Mr. Jones' record. Moreover, any financial loss suffered by Mr. Jones as a result of the imposition of the penalty, including pay lost for being unable to work at the Canteen, is to be paid into his account forthwith.

[39] If the charge against Mr. Jones is further pursued, it is to be heard by the ICP and not the Warden, and the process and procedures specified in the source documents are to be followed. Mr. Mitten is to have no role at or prior to any such hearing given his previous involvement. If the charge is not further pursued within thirty (30) days of this Judgment, then the Charge Form and all references to it are to be removed from Mr. Jones' record.

[40] Mr. Jones sought his costs; however, I have no evidence that he incurred any legal fees. I order that he is to be reimbursed only for disbursements actually incurred in this application.

[41] As I observed at the conclusion of the hearing, Mr. Jones is to be commended for the respectful and articulate manner in which he conducted himself throughout this application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed;

2. The decision of Mr. Jeff Earle, Warden Springhill Institution, dated October 3, 2014, is quashed, and it and all references to it are to be removed from Mr. Jones' record;

3. Any financial loss suffered by Mr. Jones as a result of the imposition of the penalty imposed as a result of the decision, including pay lost for being unable to work at the Canteen, is to be paid into his account forthwith;

4. If the charge against Mr. Jones is further pursued, it is to be done in accordance with these Reasons;

5. If the charge against Mr. Jones is not further pursued, then the Charge Form and all references to it are to be removed from Mr. Jones' record; and

6. Mr. Jones is entitled to be reimbursed by the Respondents for any fees or charges he actually incurred in filing and pursuing the application.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2225-14
STYLE OF CAUSE:	STEPHEN WILLIAM JONES v ATTORNEY GENERAL OF CANADA ET AL

HEARING HELD VIA TELECONFERENCE ON JULY 14, 2015 FROM OTTAWA, ONTARIO AND HALIFAX, NOVA SCOTIA

JUDGMENT AND REASONS:	ZINN J.
DATED:	JULY 16, 2015

APPEARANCES:

Stephen William Jones	APPLICANT ON HIS OWN BEHALF
Sarah Drodge	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Nil	SELF-REPRESENTED APPLICANT
William F. Pentney Deputy Attorney General of Canada Department of Justice Canada Halifax, Nova Scotia	FOR THE RESPONDENTS