Federal Court  Cour fédérale

Date: 20191218

Docket: T-602-19

Citation: 2019 FC 1639

Ottawa, Ontario, December 18, 2019

PRESENT: Madam Justice Walker

BETWEEN:

JAMES THOMAS EAKIN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. James Eakin seeks judicial review of a decision (Decision) of the Acting Independent Chairperson (Chair) of the Beaver Creek Institution Disciplinary Court. The Chair convicted Mr. Eakin of a disciplinary offence contrary to paragraph 40(k) of the *Corrections and Conditional Release Act*, SC 1992, c 20 (CCRA) based on a positive (THC) urinalysis sample collected on September 19, 2018.

[2] In his submissions to the Chair, Mr. Eakin challenged a number of the procedural steps taken by officials at Beaver Creek Institution (Institution) in laying the charge against him. The

Chair acknowledged that the Institution's procedure did not comply with the notification requirements of Commissioner's Directive 580 (CD 580) but found that the non-compliance had been cured during the course of the proceeding, which extended over five hearing dates. The Chair also addressed and rejected Mr. Eakin's remaining procedural arguments and concluded that the charge had been made out.

[3] For the reasons that follow, I have concluded that certain of the Chair's determinative findings were not reasonable and will allow Mr. Eakin's application. The successive breaches by the Institution of the requirements of the CCRA, the *Corrections and Conditional Release Regulations*, SOR/92-620 (Regulations) and CD 580 resulted in a flawed disciplinary process that significantly prejudiced Mr. Eakin's right to contest the charge in a timely manner. In addition, the Chair's delays in proceeding with Mr. Eakin's hearing exacerbated what has been an unnecessarily protracted and unfair process.

I. Background

[4] On September 19, 2018, Mr. Eakin was required to provide a random urine sample as part of the Institution's drug testing procedures. The collection of the sample was authorized by Officer Gleadhill, a corrections officer at the Institution. The sample was collected by another corrections officer, Officer Quesnelle.

[5] The positive test results (Toxicology Report) were faxed to the Institution by the testing laboratory on September 24, 2018.

[6] On October 2, 2018, Mr. Eakin was suspended from his job as a grocery store worker at the Institution because his sample had tested positive for THC. The "Offender Suspension from a Program Assignment" form ("Program Suspension Form") gave the reason for the suspension as:

> Positive urinalysis for THC collected 2018-09-21 and resulting charge in contravention of Drug Intervention Strategy and Position of Trust criteria.

[7] On October 16, 2018, Mr. Eakin received an Inmate Offence Report and Notification of Charge (Offence Report). Mr. Eakin was charged under paragraph 40(k) of the CCRA which states that an inmate commits an offence if they take an intoxicant (Charge). According to the Offence Report: (1) informal resolution of the Charge was considered and noted as precluded on October 2, 2018; and (2) the decision to charge Mr. Eakin was taken by Officer Gleadhill and the Charge was laid on October 16, 2018. The Offence Report did not set out a fixed date and time for the proposed date of hearing, nor did it specify a hearing location.

[8] The hearing before the Chair began on October 26, 2018. Mr. Eakin made oral submissions regarding a series of objections to the Institution's process in laying the Charge, including the fact that he had not received the test results of the urinalysis contrary to paragraph 17 of CD 580. The Chair did not have the relevant legislative and regulatory materials with him and asked Mr. Eakin to provide written submissions via Officer Gleadhill. The Chair stated that he could not deal with the matter that day and adjourned the hearing to November 19, 2018. Mr. Eakin objected to the adjournment because he had a parole hearing scheduled for November 8, 2018 and argued that the Charge would significantly affect the outcome of that parole hearing. The transcript of the October 26 hearing establishes that Mr. Eakin provided his written submissions to Officer Gleadhill at the close of the hearing.

[9] Mr. Eakin received a copy of the Toxicology Report on October 30, 2018.

[10] The Chair reconvened the hearing on November 19, 2018. He stated that he had not had the opportunity to review Mr. Eakin's written submissions, which he acknowledged having received promptly from Officer Gleadhill. The Chair adjourned the matter to November 26, 2018. Officer Quesnelle was unable to attend the November 26 hearing resulting in a further adjournment to December 10, 2018. On that date, a fourth adjournment to December 17, 2018 was ordered due to Officer Quesnelle's continued absence. At the brief December 10 hearing, Mr. Eakin indicated he would be raising the issue of delay as an additional procedural objection. In response, the Chair stated that he would dismiss the Charge if Officer Quesnelle was not present on December 17.

[11] The Chair reconvened the hearing on December 17, 2018. Officer Quesnelle was present and Mr. Eakin repeated his procedural arguments. There was considerable discussion of Mr. Eakin's allegation of mishandling of the Urinalysis Testing Chain of Custody form used on September 19, 2018 (Chain of Custody Form) and Officer Quesnelle provided evidence regarding his procedure in completing the form and sealing the sample bottle. The Chair then confirmed with Officer Quesnelle his evidence that Mr. Eakin's sample had tested positive for THC and asked Mr. Eakin whether he had any questions for Officer Quesnelle. Mr. Eakin stated that he did not. Officer Quesnelle and Mr. Eakin made submissions regarding sentencing and, at the conclusion of the hearing, the Chair reserved his decision.

[12] The Chair issued the Decision on January 7, 2019 and Mr. Eakin filed his Notice of Application with the Court on April 9, 2019.

[13] The hearing of this application was first scheduled for November 13, 2019. The Order establishing the date of the hearing was received by officials at the Institution on September 17, 2019 but Mr. Eakin was not informed of the hearing date. He learned of the hearing on the morning of November 13. Mr. Eakin had no opportunity to print and organize his documentary evidence or to consider his oral submissions.

[14] As a result, with the consent of the Respondent, I adjourned the hearing. The hearing then proceeded before me, by video-conference, on December 9, 2019.

II. Decision under review

[15] The Decision focusses on the procedural issues raised by Mr. Eakin. The Chair considered and rejected each of Mr. Eakin's arguments before concluding, very briefly, that the Charge against Mr. Eakin pursuant to paragraph 40(k) of the CCRA had been made out. The Chair imposed a fine of $20 as sanction for the offence, $5 of which was suspended for a period of 60 days. If, within that 60-day period, Mr. Eakin was not convicted of another offence, he would only be required to pay $15 of the fine.

[16] The Chair analyzed each of Mr. Eakin's four procedural objections as follows.

[17] First, the Chair accepted Mr. Eakin's argument that the Institution's procedure in the early stages of laying the Charge breached the requirements of subsection 25(1) of the Regulations and CD 580 in three respects:

- The Offence Report did not specify the time and date of Mr. Eakin's hearing. Instead it indicated that the hearing would not occur before 1:00 p.m. on October 19, 2018;
- The Offence Report did not specify the location of the hearing. The space for this information was left blank; and

- Mr. Eakin did not receive the documentation provided to the Chair within two days of the laying of the Charge. The Toxicology Report was supplied to Mr. Eakin later in the process.

[18] The Chair considered whether the Institution's non-compliance with the Regulations and CD 580 could be cured. He stated that the purpose of the timeliness and evidentiary provisions of the regulatory framework was to ensure a fair process. Although Mr. Eakin was not initially aware of the place, date and time of his hearing, or of the evidence that would be marshalled against him, the Chair found that Mr. Eakin received all of the required information well before the hearing actually occurred and had ample time to respond to the evidence. He concluded that the requirements of the Regulations and CD 580 were mandatory and not directory, and that the Institution's failure to comply could and had been cured.

[19] Second, the Chair addressed Mr. Eakin's allegation that the Offence Report was not duly served on him within two working days of October 2, 2018 as required by paragraph 17 of CD 580. The Chair disagreed, stating that the Charge was not laid on October 2nd. He found that it was laid on October 16, 2018 as set out in the second section of the Offence Report. The Offence Report was served on Mr. Eakin the same day and, therefore, the Institution complied with paragraph 17.

[20] Third, Mr. Eakin alleged that Officer Gleadhill, who laid the Charge, was involved in the incident leading up to the Charge, contrary to paragraph 10 of CD 580. Again, the Chair disagreed with Mr. Eakin's analysis, concluding that Officer Quesnelle, and not Officer Gleadhill, had completed the first part of the Offence Report which describes the incident that precipitated the report.

[21] Fourth, the Chair considered Mr. Eakin's assertion that the required barcode and number which identifies the urine sample collected was not affixed to his copy of the Chain of Custody Form. Mr. Eakin argued that the omission contravened subparagraph 66(1)(f)(ii) of the Regulations. However, the subparagraph required only that the officer who collects the sample affix a label identifying the sample in such a manner that the identity of the donor is not disclosed to the laboratory. The Chair found no breach of the provision in the present case.

[22] The Chair concluded as follows:

> 18. I therefore find that there is no merit in any of Mr. Eakins' preliminary objections to the charge. As Mr. Quesnelle's evidence at the hearing itself went unchallenged, I find that the charge has been made out.

III. Preliminary matters

1. *Style of cause*

[23] With the parties' consent, the style of cause is amended to remove the references to the Correctional Service of Canada and Beaver Creek Institution as respondents, leaving the Attorney General of Canada as the sole respondent.

2. *Certified Tribunal Record*

[24] The Certified Tribunal Record (CTR) filed with the Court is incomplete. It does not contain Mr. Eakin's written hearing submissions (Hearing Submissions) provided to the Chair via Officer Gleadhill on October 26, 2018. The Chair acknowledged receipt of Mr. Eakin's Hearing Submissions on November 19, 2018 and referenced them in the Decision. The Hearing Submissions were also filed with the Court by Mr. Eakin in his record.

[25] The omission of the Hearing Submissions from the CTR does not require the Court's intervention as the record establishes they were considered by the Chair when making the Decision. I have requested that Respondent's counsel remind his client of the importance of ensuring a complete CTR in future cases.

3. *Admissibility of Mr. Eakin's affidavit*

[26] Mr. Eakin filed an affidavit dated February 17, 2019 in support of his application for judicial review. The Respondent submits that the affidavit should be struck out or disregarded to the extent that it offers new evidence that was not before the Chair (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 (*Bernard*); *Connolly v Canada (Attorney General)*, 2014 FCA 294 (*Connolly*)). The Respondent argues that Mr. Eakin's affidavit contains new evidence in the guise of his account of the procedural history of the Charge and that Mr. Eakin should have presented this information to the Chair.

[27] The general rule is that the evidentiary record on an application for judicial review is restricted to the record that was before the decision-maker (Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22 at para 19 (*Access Copyright)*). The rule reflects the different roles Parliament has conferred on the decision-maker and the Court. The decision-maker decides the case on its merits based on the evidence before them. The reviewing court reviews the overall legality of the decision in light of that evidence and does not engage in a trial *de novo* of the questions before the decision-maker (*Access Copyright* at paras 17-19; *Bernard* at paras 17-18).

[28] There are three recognized exceptions to the general rule (*Access Copyright* at para 20; *Connolly* at para 7): (1) new evidence that provides general background information that might

assist in understanding the issues relevant to the judicial review but that is not new evidence relevant to the merits of the case; (2) new evidence that is necessary to bring to the attention of the reviewing court procedural defects not found in the evidentiary record of the decision-maker; and (3) new evidence that highlights the complete absence of evidence before the decision-maker on a particular finding.

[29] I find that Mr. Eakin's affidavit contains general background information that is very helpful in understanding the procedural steps undertaken by the Institution in the Charge process and by the Chair through the various hearing dates. This information is admissible. The affidavit also contains new evidence and advocacy regarding the merits of the case. This new evidence proffered by Mr. Eakin in the affidavit is not admissible. I have disregarded the paragraphs of Mr. Eakin's affidavit that describe two subsequent urinalysis tests he has undergone at the Institution and the documentation regarding those tests contained in Exhibit 7 to his affidavit. Further, I have limited my consideration of the merits of Mr. Eakin's case to the evidence in the record before the Chair, the transcripts of the five hearing dates, the Decision and the written and oral submissions filed by Mr. Eakin (other than submissions regarding the subsequent tests) and the Respondent. To the extent the affidavit contains evidence regarding Mr. Eakin's perspectives and intentions during the hearings before the Chair, I have disregarded this evidence.

[30] One final note regarding the affidavit and the reference to "procedural defects" in the second exception to the rule restricting the introduction of new evidence on judicial review. The issues raised by Mr. Eakin in this application challenge both the Chair's analysis and conclusions in the Decision itself and the fairness of the hearing process. Mr. Eakin's allegations of procedural irregularities in the laying of the Charge against him were considered by the Chair

and adjudicated in the Decision. New evidence regarding these allegations is not admissible even though they are procedural in nature.

[31] Mr. Eakin also alleges procedural unfairness in the Chair's hearing process, arguing that undue delay in the process has caused him significant prejudice. It is here that the second exception comes in to play and would permit the introduction of new evidence of procedural unfairness or defects in the Chair's process. Mr. Eakin does not provide evidence in support of his allegation of delay in his affidavit other than to set forth the timeline of the various hearing dates and the reasons underlying the four adjournments. The timeline and reasons Mr. Eakin describes are consistent with the transcripts of the hearings and I have considered this information in my analysis of the issue of delay.

IV. Issues and Standard of Review

[32] I have organized my analysis of the issues raised by Mr. Eakin in this application as follows:

1. Did the Chair err in concluding in the Decision that the processes followed by the Institution in laying and prosecuting the Charge and in collecting the urinalysis sample were fair to Mr. Eakin?

2. Did the delays in the hearing process and/or the omission to request a formal plea breach the Chair's duty of procedural fairness to Mr. Eakin?

[33] The standard of review of the Chair's findings and conclusions in the Decision is reasonableness, albeit applied with some strictness and intensity (*Sharif v Canada (Attorney General)*, 2018 FCA 205 at paras 8, 12 (*Sharif*); *Amos v Canada (Attorney General)*, 2018 FC 1242 at paras 44, 71 (*Amos*)). The Decision rests on the Chair's application of the provisions of the CCRA, the Regulations and CD 580, provisions that are closely connected with his functions and within his particular expertise, to the facts of Mr. Eakin's case. In *Sharif*, Justice Stratas

considered the meaning of reasonableness in the context of a decision by the Independent Chair of a penal institution's Disciplinary Court where the potential consequences to an inmate such as Mr. Eakin are significant. These consequences may include a fine that takes away most of the inmate's income, the imposition of extra prison tasks, administrative segregation and adverse effects on the inmate's prospects for parole (*Sharif* at para 9). Emphasizing the Supreme Court of Canada's repeated statements that reasonableness "takes its colour from the context", Justice Stratas stated (*Sharif* at para 11):

> [11] Relying on some of these Supreme Court cases, this Court has noted that in circumstances where an administrative decision is important to the affected person, affects the liberty of the affected person, is a liability determination drawing upon legal standards rather than executive policy, or is constrained by narrowing statutory language, this Court may afford the administrative decision-maker a narrower margin of appreciation. In other words, review may be somewhat more intense: *Walchuk v. Canada (Justice)*, 2015 FCA 85 at para. 33; *Canada (Attorney General) v. Boogaard*, 2015 FCA 150, 87 Admin. L.R. (5th) 175 at para. 49; *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006 at paras. 90-92.

[34] The second issue in this application, the procedural fairness of the Chair's conduct of the hearing, does not depend on the substance of the Decision and is reviewable for correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). This Court is required to assess whether the process was fair and just having regard to all of the circumstances, including the nature of the substantive rights involved and the consequences to the individual (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

V. Analysis

1. *Did the Chair err in concluding in the Decision that the processes followed by the Institution in laying and prosecuting the Charge and in collecting the urinalysis sample were fair to Mr. Eakin?*

Legislative and Regulatory Background

[35] I will first outline the legislative and regulatory framework within which the Charge against Mr. Eakin was laid, referring to the provisions of the CCRA and Regulations in force in October 2018. The starting point is section 40 of the CCRA (Disciplinary Offences). The Charge against Mr. Eakin was laid under paragraph 40(k) of the CCRA which provides that an inmate commits a disciplinary offence who takes an intoxicant into their body. Subsection 44(1) sets out the possible sanctions if an inmate is found guilty of a disciplinary offence: a warning or reprimand; a loss of privileges; an order to make restitution or pay a fine; the performance of extra duties; and, in the case of serious disciplinary offences, segregation (this last sanction has now been removed).

[36] Section 42 of the CCRA states that an inmate charged with a disciplinary offence "shall be given" notice of the charge in accordance with the Regulations.

[37] Section 25 of the Regulations then sets out the following notice requirements:

Notice of Disciplinary Charges	**Avis d'accusation d'infraction disciplinaire**
25 (1) Notice of a charge of a disciplinary offence shall	25 (1) L'avis d'accusation d'infraction disciplinaire doit contenir les renseignements suivants :
(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	**a)** un énoncé de la conduite qui fait l'objet de l'accusation, y compris la date, l'heure et le lieu de l'infraction disciplinaire reprochée, et un résumé

summary of the evidence to be presented in support of the charge at the hearing; and	des éléments de preuve à l'appui de l'accusation qui seront présentés à l'audition;
(b) state the time, date and place of the hearing	**b)** les date, heure et lieu de l'audition
(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.	**(2)** L'agent doit établir l'avis d'accusation disciplinaire visé au paragraphe (1) et le remettre au détenu aussitôt que possible.

[38] Subsection 66(1) of the Regulations governs the collection of urinalysis samples and is the focus of one aspect of Mr. Eakin's submissions. Paragraph 66(1)(f) requires the collector of the sample, in the presence of the donor inmate, to seal the container with a pre-numbered seal and "affix a label identifying the sample in such a manner that the identity of the donor is not disclosed to the laboratory" (subparagraphs 66(1)(f)(i) and (ii)).

[39] The Commissioner's Directives are a broad set of administrative rules and policies governing the management of the Correctional Service of Canada and its institutions. The Directives are authorized under sections 97 and 98 of the CCRA.

[40] The relevant paragraphs of CD 580 are as follows:

> **Formal Disciplinary Process**
>
> 7. When informal resolution does not proceed, the formal disciplinary process must be initiated. If circumstances permit and this is not likely to exacerbate the situation, the staff member will:
>
> a. advise the inmate that a report of the offence will be prepared and may result in a charge being laid
>
> b. ensure mental health concerns are considered

c. complete an Inmate Offence Report and Notification of Charge (CSC/SCC 0222), with the details of the incident and a description of informal resolution attempts, and why they did not work

d. submit the report to the Correctional Manager immediately, but no later than 24 hours following the consideration of, or attempts at, informal resolution, unless exceptional circumstances apply.

Advising Inmates of Pending Disciplinary Hearings

17. Within two working days of the laying of the charge, the inmate will be provided with a copy of the offence report that includes the details of the charge, as well as:

a. documentation that will be provided to the [Chair] of the disciplinary hearing

b. a written notice of the place, time and date of the hearing.

18. When any of the preceding requirements cannot be met, the reasons will be documented by the Correctional Manager or designate and shared with the charging staff. This would only be in exceptional circumstances.

Mr. Eakin's submissions

[41] Mr. Eakin submits that the Chair erred in concluding that the words "shall" and "will" used in section 25 of the Regulations and paragraphs 7 and 17 of CD 580 are directory and not mandatory. Mr. Eakin relies on the decision of Justice Muldoon in *Buyens v William Head Institution Disciplinary Court (Independent Chairperson)*, [1992] FCJ No 136, to state that an institution cannot pick and choose which rules of the Directives they will observe. The institution must be fair and even handed "without arbitrary denial of legitimate benefits".

[42] In addition, Mr. Eakin states that the Institution's failure to specify the date, time and place of his hearing in the Offence Report adversely affected his ability to properly prepare for

the hearing and denotes an unacceptably casual attitude to the process. He argues that the Chair erred in concluding:

- that the Charge was laid on October 16, 2018 and, therefore, that the Offence Report was provided to him within the two-day period contemplated in paragraph 17 of CD 580. Mr. Eakin submits that the Charge was laid, at the latest, on October 2, 2018, when he was provided with the Program Suspension Form;

- that the Institution's failure to provide him with the evidence that was to be used against him in the disciplinary hearing within two working days of the laying of the Charge and, in any event, before the first hearing date on October 26, 2018, was cured without prejudice; and

- that Officer Quesnelle properly carried out the proof of identification process required by subsection 66(1) of the Regulations. There is no chain of custody demonstrating that the sample tested by the laboratory was the one Mr. Eakin provided. Mr. Eakin points to his copy of the Chain of Custody Form which does not have affixed to it the required numbered seal that corresponds to the numbered seal on both the sample bottle and the Institution's copy of the form.

Respondent's submissions

[43] The Respondent submits that it was reasonable for the Chair to find that Mr. Eakin's preliminary procedural objections to the timeliness and content of the Offence Report had been cured during the protracted course of the proceedings. The Respondent cites the Chair's finding that Mr. Eakin had all the information he required in order to be able to respond to the Charge "well before the hearing actually occurred". The Respondent argues that Mr. Eakin suffered no prejudice as a result of the late delivery to him of the Offence Report and the fact that it did not indicate the date, time and place of the hearing.

Analysis

A. Mandatory/Directory provisions

[44] I will first address the Chair's conclusion that the relevant requirements of the Regulations and CD 580 were directory and not mandatory. For ease of reference, I have

paraphrased the words in issue in each of section 25 of the Regulations and paragraphs 7 and 17 of CD 580 as follows:

- Subsection 25(1): Notice of a charge (the Offence Report) ***shall***…state the time, date and place of the hearing.
- Subsection 25(2): The Offence Report ***shall*** be issued and delivered to the inmate as soon as practicable.
- CD 580, para 7(d): The Offence Report ***will*** be submitted to the Correctional Manager, immediately, but no later than 24 hours after consideration of or attempts at informal resolution, unless exceptional circumstances apply.
- CD 580, paras 17(a) and (b): Within two working days of the laying of the charge, the Offence Report that includes the details of the charge, as well as the evidence that is to be provided to the Chair and the place, date and time of the hearing, ***will*** be provided to the inmate.

[45] The Chair began his analysis of the distinction between a mandatory and directory requirement by noting that the distinction depends of the object of the regulatory provision in question. The Chair stated that the purpose of the notice requirements in the Regulations and CD 580 was to ensure that Mr. Eakin was afforded an opportunity to respond to the evidence against him (*Hendrickson v Kent Institution*, (1990) 32 FTR 296 (FC)). The Chair found that Mr. Eakin eventually received the required information:

> 7. When he was first handed the Offence Report Mr. Eakin may well not have been aware of the place, date and time of his eventual hearing, or of all the evidence which would be marshalled against him. But he certainly had all this information well before the hearing actually occurred, and in ample time "to respond to the evidence and give his version of the matter."

[46] The Chair concluded the provisions were directory and that "the failure to comply with the requirements can and has been cured".

[47] The use of the word "shall" in subsections 25(1) and (2) of the Regulations is an indication of imperative intent (section 11 of the *Interpretation Act*, RSC 1985, c I-21 (Interpretation Act); *Ha v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 594 at para 11 (*Ha*)). In my view, the word "will" used in CD 580 denotes the same imperative intention. However, as noted by Professor Sullivan in *Sullivan on the Construction of Statutes* (6th ed., 2014) (*Sullivan*), the fact that "shall" is imperative, as opposed to the permissive "may", does not determine whether the provision in which it is used is mandatory or directory. This second determination depends on whether every breach of the provision in question results in an invalid or null action, in which case a breach cannot be cured and the provision is mandatory (*Sullivan*, para 4.81):

> 4.81 If breaching an obligation or requirement imposed by "shall" entails invalidity or nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate in so far as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion. The confusion is compounded when "mandatory" and "imperative" are used interchangeably … [t]hese are distinct concepts. "Shall" and "must" are always imperative (binding); neither ever confers discretion. But they may or may not be mandatory; that is breach of a binding obligation or requirement may or may not lead to nullity. The mandatory-directory distinction reflects the fact that there is more than one way to enforce an obligation.

[48] This Court has considered the mandatory/discretionary distinction in a number of cases involving the failure of a public body or official to comply in a timely manner with a public duty. In *McMahon v Canada (Attorney General)*, 2004 FC 540 (*McMahon*), a case involving the late delivery of a decision by the Superintendent of Bankruptcy, Justice Lemieux recognized that, in certain circumstances, the word "shall" is to be interpreted as directory notwithstanding what is now section 11 of the Interpretation Act. The legislative provision in question provided that the

Superintendent's decision "shall be given...to the trustee not later than three months after the conclusion of the hearing". Justice Lemieux stated that the object and purpose of a statute is often the basis of judicial decisions in this regard and identified three principal factors in making the determination (*McMahon* at para 27):

> [27] Reading these cases and others which were cited by both counsel, I glean the following principal factors which the courts have fashioned to determine whether the word "shall" is to be interpreted as directory:
>
> (1) whether the duty being discharged is a public duty;
>
> (2) where lies the balance of inconvenience or prejudice; and
>
> (3) whether the statute provides for a penalty for failure to comply.

[49] In *McMahon*, the Superintendent in Bankruptcy was discharging a public duty and little inconvenience or prejudice to the trustee awaiting the decision resulted from the Superintendent's failure to comply with the prescribed time limit. The prejudice suffered was a delay in time only (*McMahon* at para 32).

[50] In *Ha*, the issue before Justice Barnes was whether the time stipulated for a ministerial decision under subsection 27(1) of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act, 2000*, SC 2000, c 17, was mandatory or directory. The subsection stated that "the Minister shall" make a decision within 90 days of the expiry of a period referred to elsewhere in the legislation. Justice Barnes concluded that the public interest would not be well-served by interpreting the time limit as mandatory and declaring Ministerial decisions made outside of the 90-day period a nullity (*Ha* at para 21; see also, *Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616).

[51] The requirements at issue in this application, section 25 of the Regulations and paragraph 17 of CD 580, affect the private rights of individual inmates. In *Obeyesekere v Canada (Attorney General)*, 2014 FC 363 (*Obeyesekere*), Justice O'Keefe considered the word "shall" in the context of section 42 of the CCRA and subsection 25(1) of the Regulations. In *Amos*, Justice Roy considered section 43 of the CCRA which requires that a disciplinary hearing "shall be conducted with the inmate present" and subsection 31(1) of the Regulations which provides that an Independent Chair "shall give" the inmate a reasonable opportunity to participate in the hearing. In both cases, this Court concluded that the use of the word "shall" was imperative and the requirements in those provisions obligatory (*Obeyesekere* at para 25; *Amos* at para 59). Although Justice O'Keefe did not refer to mandatory and directory provisions, he contemplated the distinction, stating (*Obeyesekere* at para 31):

> [31] Of course, not all failures to obey an obligatory statutory process are fatal to a decision (see *Society Promoting Environmental Conservation v Canada (Attorney General)*, 2003 FCA 239 at paragraphs 26 to 35, [2003] 4 FC 959). Rather, the consequences of non-compliance will generally flow from analyzing "the object of the statute, and the effect of ruling one way or the other" (see *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development*, [1995] 4 SCR 344 at paragraph 42, 130 DLR (4th) 193 per McLachlin J. (in concurring reasons)).

[52] Justice O'Keefe went on to emphasize the importance of the notice requirements set out in subsection 25(1) of the Regulations in safeguarding the right of an inmate facing serious sanction to have the opportunity to defend themselves.

[53] In *Amos*, Justice Roy acknowledged that there may be narrow exceptions to the imperative or obligatory nature of the notice requirements in the CCRA and Regulations but

emphasized the right of inmates to procedural fairness in disciplinary matters where they face serious sanction (*Amos* at para 59):

> [59] In this case, it may be said that none of the statutory requirements received the attention they deserved. Procedural fairness was, at best, an afterthought as opposed to being at the forefront. First, a part of the hearing on September 13, 2016 has gone missing: a full review of the hearing is impossible as the testimony of witness Keays is unavailable as well as the discussion leading to the decision to view a security tape. The respondent has already acknowledged that the deficiency calls for granting the judicial review application. That piece of evidence (security video) that proved to be critical was presented while the applicant was absent. No substitute, like a detailed description of what appeared on the video, was offered. The Act is clear that the inmate's presence is mandatory. It speaks of a hearing that "shall be conducted with the inmate present" (s. 43). The *Interpretation Act* (R.S.C., 1985, c. I-21) provides that "(t)he expression "shall" is to be construed as imperative" (s. 11). The exceptions to the principle would have to be construed narrowly. …

[54] I find that the Chair did not err in concluding that the provisions of subsection 25(1) of the Regulations and paragraph 17 of CD 580 are directory and not mandatory. The purpose of section 42 of the CCRA, subsections 25(1) and (2) of the Regulations and paragraphs 7 and 17 of CD 580 is to create a regulatory structure that safeguards an inmate's right to procedural fairness in the imposition and prosecution of disciplinary charges. I agree with the Chair that the provisions in question are intended to ensure that an inmate knows the charge against them and has the opportunity to properly defend themselves. While there is no doubt that the provisions are an obligatory set of notice and disclosure requirements, not every breach of those requirements will result in a nullity. There will be circumstances in which a minor failure on the part of an institution to comply with either the timeliness or content requirements of the provisions may be cured without prejudice to the inmate. However, I echo Justice Roy's warning

that any exceptions to the obligatory nature of the notice and disclosure provisions in the CCRA, the Regulations and CD 580 must be construed narrowly.

B. Was the Institution's non-compliance cured?

[55] Having determined that the Institution breached directory provisions of the Regulations and CD 580, the Chair concluded that the breaches had been cured and rejected Mr. Eakin's procedural objections. I find that this conclusion was clearly unreasonable. The Chair's findings were neither justified nor intelligible on the evidence in the record. The Chair relied on delays in the hearing process to rectify significant and successive breaches of Mr. Eakin's rights to procedural fairness, with no consideration of the prejudice he suffered.

[56] Mr. Eakin played no part in the delays that permitted the Chair to conclude that the Institution's non-compliance with the Regulations and CD 580 had been cured. The Respondent's argument that there must be some "give and take" in the process and that Mr. Eakin's procedural objections contributed to the delays is not tenable. Mr. Eakin had the right to contest the Charge. The fact that the actions of the Chair and the Institution combined to delay the Chair's consideration of the Charge and to resolve the non-compliance does not result in a fair process.

[57] I return to the decision in *Sharif* and Justice Stratas' description of the circumstances in which the Independent Chair of a disciplinary committee exercises the role of decision-maker in inmate disciplinary charges (*Sharif* at para 30):

> [30] However, it is appropriate in these circumstances that this Court go beyond what is minimally necessary to determine this matter and say a little more: see the discussion in *Defence Construction Canada v. Ucanu Manufacturing Corp.*, 2017 FCA 133, [2018] 2 F.C.R. 269 at paras. 38-41. This area of law governs

> the relationship between the pressing imperatives of the state and the fundamental rights of inmates detained by it—an area where legal norms are best defined clearly, not left to uncertainty, speculation and later litigation. It is also an area where cases are often evasive of review because inmates do not often have the capability or means to litigate.

[58] The starting point for my review of the reasonableness of the Chair's conclusion is that the provisions in question are imperative and that the Institution was required to adhere to its notification and disclosure obligations within the time frames set forth. Any deviation ought to have been narrowly constrained and without significant prejudice to Mr. Eakin.

[59] My review of the Chair's Decision and the evidence in the record reveals a number of errors.

[60] First, the Chair found that Mr. Eakin received the required notification and evidentiary information "well before the hearing actually occurred". This statement is simply wrong. The hearing began on October 26, 2018. The Respondent submits that the Chair's misstatement regarding the date of the hearing is of no consequence because he considered Mr. Eakin's procedural objections in the Decision. I disagree. The Chair's reasoning ignores the repeated adjournments and fails to take into account the impacts of delay. It effectively negates the time limits set out in the Regulations and CD 580. The two-day time limit became a three-month time limit to accommodate the Institution.

[61] I emphasize that, as of October 26, 2018:

1. Mr. Eakin had been sanctioned for failing the September 19, 2018 urinalysis test. The sanction was imposed on October 2, 2018, despite the fact that the Institution now argues the Charge was not laid until October 16, 2018. In other words, on October 2, 2018, Mr. Eakin was sanctioned for a disciplinary offence of which he had no knowledge and, according to the Institution, had not been charged.

2. Mr. Eakin had received a defective Offence Report on October 16, 2018, three weeks after the Institution received the Toxicology Report. He was not informed of when and where the hearing of the Charge would occur.

3. Mr. Eakin had not received the evidence to be used against him in the prosecution of the Charge.

[62] The Respondent submits that the Offence Report did not state the time or place of the hearing because the Chair did not intend to deal with the merits of the Charge on October 26, 2018. There is no evidence to this effect in the record, nor is there any evidence that the Chair's intention was communicated to Mr. Eakin, who arrived at the hearing on October 26 prepared to make his submissions despite the lack of prior notice. Further, the Institution prepared and delivered the Offence Report. The Chair's intentions on October 26 do not explain the Institution's failure to establish a hearing date from the outset.

[63] Paragraph 25(1)(b) of the Regulations and paragraph 17(b) of CD 580 contemplate a hearing on a fixed date and time. They do not contemplate a preliminary hearing to establish a process for moving forward. The Offence Report was non-compliant and the Chair made no attempt to deal with the Charge on October 26, 2018, despite the fact that Mr. Eakin had voiced concerns about his upcoming parole hearing.

[64] Second, I find that the Charge was laid against Mr. Eakin at the latest on October 2, 2018. The Chair's finding that the Institution took no decision to lay a charge until October 16, 2018 was unreasonable. As a result, the Chair's conclusion that the Offence Report was issued to Mr. Eakin within the two-day time limit set forth in paragraph 17 of CD 580 was also unreasonable.

[65] Mr. Eakin was sanctioned by the Institution on October 2, 2018. On that date, he lost his job in the grocery store at the Institution, resulting in loss of income and an adverse notation in his record. For ease of reference, I repeat the wording from the October 2 Program Suspension Form:

> Positive urinalysis for THC collected 2018-09-21 and resulting charge in contravention of Drug Intervention Strategy and Position of Trust criteria.

[66] The Respondent relies on the fact that the Offence Report was completed and dated on October 16, 2018 but the Institution's evidence and actions are unequivocal. It took punitive action against Mr. Eakin on October 2, 2018. The fact that the Institution papered the Charge two weeks after it suspended Mr. Eakin is not determinative. The Offence Report should have been completed and provided to Mr. Eakin at the latest on October 2nd. No reason has been offered for the Institution's delay in completing the Offence Report or for its actions on October 2, 2018.

[67] Third, the Institution's late disclosure of the Toxicology Report and the Chair's somewhat cavalier treatment of paragraph 17(a) of CD 780 are not justifiable. The right of an inmate to receive the evidence against them prior to any hearing of a charge is fundamental to a fair process. The Institution received the results of the urinalysis test on September 24, 2018. Paragraph 17(a) required the Institution to provide Mr. Eakin the Offence Report "as well as…documentation that will be provided to the [Chair]" within two working days of the laying of the Charge. The Charge was laid on October 2 (or, in the Chair's view, October 16). The hearing began on October 26 and the Toxicology Report was given to Mr. Eakin on October 30, 2018.

[68] The Chair did not address this sequence of events in the Decision, consistent with his focus on the final hearing date in December as the date by which the Institution had cured its non-compliance. The Chair's response to Mr. Eakin's submission at the October 26 hearing that the Toxicology Report was required to be provided with the Offence Report was as follows:

> CHAIRPERSON: All right. I don't think that's the case. You're welcome to it when – if there's going – there is going to be a hearing, but it doesn't come with the charge, uh, and often in fact – often in fact people don't test these, uh… Well, that's not – that's not… Forget that. But it doesn't come with the charge. But you're welcome to look at it at this stage, or if you need more time to study it we can postpone the hearing.

[69] Fourth, the Chair unreasonably failed to consider whether Mr. Eakin had been prejudiced by the Institution's non-compliance with the Regulations and CD 580. There is no acknowledgement in the Decision of the prejudice suffered by Mr. Eakin on October 2, 2018 or of his argument against an adjournment on October 26, 2018 due to his upcoming parole hearing. In my view, this is a material oversight. The prejudice suffered by an individual because of a public body's non-compliance with its regulatory obligations is central to the required balancing of interests in determining whether the public body can be said to have cured its breach and followed a fair process (*McMahon* at para 27).

[70] The foregoing errors result in an unreasonable decision. In addition, Mr. Eakin submits that the Chair erred in concluding that the Institution's handling of the Chain of Custody Form complied with paragraph 66(1)(f) of the Regulations. Mr. Eakin's submission turns on the lack of a numbered seal on his copy of the Form despite Officer Quesnelle's certification that the seal had been affixed. The Chair's findings do not address this issue. Rather, they focus on subparagraph 66(1)(f)(ii) of the Regulations which requires that the Officer place a label on the sample bottle that does not disclose the identity of the donor to the laboratory. The Chair made

no error in concluding that the Institution had not breached this requirement. Mr. Eakin is correct in pointing out that the Form required that the numbered seal be affixed and that Officer Quesnelle's certification that the seal had been placed on Mr. Eakin's copy was incorrect. However, subsection 66(1) does not address the content of the inmate's copy of the Chain of Custody Form.

2. *Did the delays in the hearing process and/or the omission to request a formal plea breach the Chair's duty of procedural fairness to Mr. Eakin?*

[71] My conclusion that the Decision was not reasonable is determinative of Mr. Eakin's application. I will briefly address the issue of delay in the conduct of the hearing as it provided the factual back-drop for the Chair's conclusions. The Chair relied on the hearing delays to find that the Institution had cured its non-compliance with the Regulations and CD 580. Mr. Eakin argues that the delays themselves breached his right to procedural fairness.

[72] The Respondent submits that a delay of three to four months in the processing of the Charge did not breach Mr. Eakin's right to procedural fairness. He states that many administrative processes extend over a similar or longer period of time. I agree, but there are a number of troubling aspects to the hearing delays in Mr. Eakin's case. First, as the Respondent has conceded, Mr. Eakin was improperly sanctioned on October 2, 2018. Second, the delay may have impacted Mr. Eakin's parole hearing. Third, all of the delay was occasioned by the Institution and the Chair. As stated above, Mr. Eakin had the right to raise reasonable procedural objections to the processing of the Charge. The fact that the Chair was not equipped to deal with those objections on October 26, 2018 and had not had time to read Mr. Eakin's written submissions on November 19, 2018, coupled with Mr. Quesnelle's absences, are not Mr. Eakin's responsibility.

[73] The Regulations and CD 580 impose very short timelines on the Institution's notification and disclosure obligations. They use imperative language and speak to the delivery of a notice of charge "as soon as practicable" and "within two working days". I have considered these requirements against the scope of the Institution's non-compliance, particularly the failure to disclose evidence within the prescribed time limit, and the length of the delay. I also note the premature imposition of sanction. In these circumstances, I find that the Chair's delay in completing the hearing unfairly breached Mr. Eakin's right to a timely resolution of the Charge.

[74] Finally, Mr. Eakin argues that he was not afforded the opportunity to enter a plea during the course of the proceedings, contrary to section 33 of CD 580. I agree with the Respondent that it was reasonable for the Chair to infer, by the final hearing date on December 17, 2018, that Mr. Eakin intended to plead not guilty to the Charge. Mr. Eakin was afforded the opportunity make submissions and to provide evidence. He was not prejudiced by the Chair's failure to request a formal plea.

VI. Conclusion

[75] The application is allowed. The Chair's conclusions that the Institution was able to cure its admitted breaches of the Regulations and CD 580 and that Mr. Eakin's procedural objections were without merit, were unreasonable. The Chair's findings permitted the Institution to disregard Mr. Eakin's procedural rights with no consideration of the resulting prejudice he suffered.

[76] For these reasons, the Decision must be quashed. The Decision, the punishment it imposed, and the suspension from his program assignment are to be removed permanently from Mr. Eakin's record. Moreover, any financial loss suffered by Mr. Eakin as a result of the

imposition of the penalty, and pay lost for being unable to work in the Institution's grocery store, is to be paid into his account forthwith.

[77] If the Charge against Mr. Eakin is pursued, it is to be heard by a different Independent Chair. If the Charge is not pursued within thirty (30) days of this Judgment, the Offence Report and all references to it are to be removed from Mr. Eakin's record.

VII. Costs

[78] At the hearing, Mr. Eakin indicated that he had incurred out of pocket costs in the amount of approximately $250.00 and I see no reason why he should not be compensated for the disbursements incurred in bringing his application to this Court. As the amount of $250.00 is reasonable, I will award costs in that amount.

JUDGMENT IN T-602-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The Decision of the Chair dated January 7, 2019 is quashed.

3. Any financial loss suffered by Mr. Eakin as a result of the penalty imposed in the Decision, and pay lost for being unable to work in the grocery store at the Institution, is to be paid into his account forthwith.

4. If the Charge against Mr. Eakin is pursued, it is to be done in accordance with these reasons.

5. If the Charge against Mr. Eakin is not pursued within thirty (30) days of this Judgment, the Offence Report and all references to it are to be removed from Mr. Eakin's record.

6. Costs in the amount of $250.00 are awarded to Mr. Eakin.

7. The style of cause in this application is amended to remove the references to the Correctional Service of Canada and Beaver Creek Institution as respondents.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-602-19
STYLE OF CAUSE:	JAMES THOMAS EAKIN v ATTORNEY GENERAL OF CANADA

HEARING HELD VIA VIDEOCONFERENCE ON DECEMBER 9, 2019, FROM OTTAWA, ONTARIO (COURT), TORONTO, ONTARIO (DEPARTMENT OF JUSTICE) AND GRAVENHURST, ONTARIO (BEAVER CREEK INSTITUTION)

JUDGMENT AND REASONS:	WALKER J.
DATED:	DECEMBER 19, 2019

APPEARANCES:

James Thomas Eakin	FOR MR. EAKIN (ON HIS OWN BEHALF)
Eric Peterson	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS