Federal Court  Cour fédérale

Date: 20091105

Docket: T-404-09

Citation: 2009 FC 1136

Montréal, Quebec, November 5, 2009

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

EDWARD BRUCE GENDRON

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the independent Chairperson of the Disciplinary Court of Cowansville Institution (the Disciplinary Court) made under subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, finding the applicant guilty, under paragraph 40(*l*) of the *Corrections and Conditional Release Act*, R.C. 1992, c. 20 (the Act), for refusing to provide a urine sample.

[2] The applicant is an inmate at Cowansville Penitentiary. On December 19, 2008, correctional officers had asked him to submit to urinalysis. According to what the applicant then told the court, Mr. Ferland, one of the officers, had explained to him that it was a random selection.

[3] Such a selection is authorized by paragraph 54(*b*) of the Act, which provides that:

> [The] staff member may demand that an inmate submit to urinalysis … as part of a prescribed random selection urinalysis program, conducted without individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for.

A refusal of the inmate to submit to such a selection constitutes a disciplinary offence under paragraph 40(*l*) of the Act.

[4] As contemplated by the Act, a Commissioner's Directive regulates the collection of urine samples. The directive is entitled "Urinalysis Testing in Institutions", No. 566-10, dated December 19, 2008 (the Directive).

[5] The relevant provision of the Directive is paragraph 19, under which "[a]ll demands for a sample shall be presented to the inmate using Notification to Provide a Urine Sample form (CSC/SCC 1064)" (the Notification). It should be noted that the Notification includes an explanation of the applicable penalties, should an inmate refuses to submit to urinalysis.

[6] The Notification was not formally presented to the applicant. The Attorney General emphasizes the fact that the officers had it in their possession and within the applicant's sight, but does not deny that the officers did not formally present it to the applicant.

[7] The applicant refused to provide the urine sample as demanded. The officers did not present him with the Notification so that he could have confirmed his refusal in writing. Instead, they filled out the form themselves, indicating that the applicant had refused to submit to urinalysis.

[8] The officers prepared a disciplinary report. The report constituted, at the same time, the applicant's notice of charge of the offence under paragraph 40(*l*) of the Act, in compliance with subsection 25(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the Regulations).

[9] The Disciplinary Court found the applicant guilty of refusing to submit to urinalysis. The applicant did not deny the facts claimed against him. Rather, he based his defence on the fact that he had not been presented with the Notification and on the deficiencies of the report to challenge the validity of the demand to submit to urinalysis and of the charge. The Disciplinary Court dismissed these arguments. In particular, it did not consider itself to be bound by paragraph 19 of the Directive, which requires the presentation of the Notification to the inmate, concluding that what matters is that the inmate knows of its content.

[10] The applicant is seeking judicial review of this decision, arguing in particular that the presentation of the Notification to an inmate is [TRANSLATION] "a basic requirement of procedural fairness".

[11] The applicant maintained that [TRANSLATION] "the [D]irective would be useless if it can be ignored without consequence" (*ibid*.) The applicant relied on paragraph 54(*b*) of the Act, which

expressly provides that all urinalysis requests must be made “in accordance with any Commissioner’s Directives that the regulations provide for”.

[12] The Attorney General remarked, at first, that the applicant clearly understood the procedure for collecting urine samples, as well as the consequences of a refusal to provide one. Furthermore, he was able to see the Notification that Mr. Ferland had in his possession, even if it was not formally presented to him. According to the Attorney General, [TRANSLATION] “it would impose too rigid a formality if there were a decision in favour of the applicant in this case”.

[13] Paragraph 54(*b*) of the Act provides that the collection of urine samples must be done, if necessary, in accordance with the directives of the Commissioner of the Correctional Service of Canada (the Commissioner). The Commissioner issued the Directive, which unequivocally provides that all urinalysis requests must be presented by using the Notification. As Mr. Royer, counsel for the applicant, pointed out, it was therefore a legislative requirement. This requirement was not respected in this case.

[14] The Attorney General’s argument regarding the formality and concerns about the feasibility of implementing this rule, which seems to have justified, in part, the Disciplinary Court’s decision is unfounded. In fact, the Directive was issued by the Commissioner. Since the Commissioner, as a specialist in “the care and custody of inmates” (Act, par. 5(*a*)), determined that the requirement of a written Notification was appropriate to respect the requirements of procedural fairness, it is not up to the Disciplinary Court nor the Federal Court to water down this requirement**,** by creating vague exceptions that are applied case by case.

[15] In my opinion, the failure to comply with this requirement was fatal. Therefore, I do not need to consider the other argument raised by the applicant.

[16] The application for judicial review should be allowed, and the Disciplinary Court's decision set aside.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and the Disciplinary Court's decision be set aside.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Monica F. Chamberlain

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-404-09
STYLE OF CAUSE:	EDWARD BRUCE GENDRON v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Montréal, Quebec
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REASONS FOR JUDGMENT AND JUDGMENT:	TREMBLAY-LAMER J.
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