Federal Court Cour fédérale

Date: 20110204

Docket: T-2159-09

Citation: 2011 FC 133

Toronto, Ontario, February 4, 2011

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ALLAN ARTHUR CRAWSHAW

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Allan Arthur Crawshaw, applies for judicial review of the decision of the Senior Deputy Commissioner (the Commissioner) on October 27, 2009 denying the Applicant's grievance about the implementation of a stand-to count at the Mission Institution in British Columbia where the Applicant is a serving inmate.

[2] The Applicant grieved about the implementation of a 22:40 stand-to count. A "stand-to count", as the name suggests, requires prisoners to stand up for a count by Correctional Services officers. The Applicant raised a number of objections in his grievance about the 22:40 stand-to

count. Since the grievance involved a policy matter instituted by the Commissioner, it proceeded directly to the highest order of grievance, a third level grievance. The Commissioner denied the grievance.

[3] The Applicant now applies for judicial review focusing on one issue: that the Commissioner failed to consider that the 22:40 stand-to count adversely and disproportionably affected him and other elderly inmates.

[4] For reasons that follow, I am denying this application for judicial review.

Background

[5] The Applicant is a 62 year old inmate at the Mission Institution, a medium security institution. He is serving a life sentence with no eligibility for parole for 25 years until May 17, 2015. Due to his age and his various activities in prison including study and tutoring, the Applicant chooses to go to bed between 20:30 to 21:00 hours.

[6] A "stand-to count" is defined in Commissioner's Directive 566-4 – Inmate Counts and Security Patrols as follows:

> A formal count of inmates in a standing position, facing the counting stall member to ensure facial identification is made except in cases where exemptions for medical conditions or physical limitations have been identified.

[7] The Bulletin was issued in response to the recommendations of a Coroner's Inquest and a report by the Officer of the Correctional Investigator into Deaths in Custody. The Jury

recommendations at the Coroner's Inquest into the death of an inmate at the Collins Bay Institution included:

> 1. It is recommended that correctional service of Canada (CSC) undertake a feasibility study on making the count when the cells are locked for the night a stand-to count.
>
> 2. It is recommended that CSC issue a security bulletin reinforcing the existing requirement that ensures correctional staff confirm that an inmate is alive and breathing during a formal count and identify the manner by which such verification is made.
>
> 3. It is recommended that every count be done by a correctional officer (CO) should verify that there is a living and breathing inmate in each occupied cell.

The Office of the Correctional Investigator's report on Deaths in Custody also discussed the failure of correctional officers to ensure that inmates are still alive in their cells as an issue that frequently arose in a review of deaths in custody from 2001 to 2005.

[8] On July 10, 2009, Correctional Services Canada (CSC) issued a Security Branch Bulletin setting out a change with respect to stand-to counts at federal institutions. The Bulletin provided that stand-to counts must be conducted as follows:

> - For maximum, medium, and multi-level security institutions including women's institutions there will be two stand-to counts;
>
> - One of the two stand-to counts must be completed between the hours of 18:00 and 24:00

[9] Following receipt of the Bulletin, CSC staff at Mission Institution consulted with the Inmate Committee. On July 16, 2009, Acting Warden Corinne Justason announced that it had been determined that it would be least disruptive to incorporate the stand-to count into the unit lock up count at 22:40 hours.

[10] The Applicant filed a third level grievance on July 17, 2009 in response to the implementation of the 22:40 stand-to count raising a number of objections and requesting the 22:40 stand-to count be removed as it was arbitrary, capricious and without legal justification.

[11] The Applicant argued the Bulletin did not have the force of law as it was only a directive for administrative purposes. He submitted the CSC must consider the health factor of all elderly prisoners referencing section 87 of the *Corrections and Conditional Release Act* quoting: "the Service shall take into consideration an offender's state of health and healthcare needs (a) in all decisions affecting the offender …" He likens the stand-to count as punishment by means of sleep deprivation . He declares CSC is in violation of section11 of the *Canadian Charter of Rights and Freedoms* and raises an argument for procedural fairness invoking section 7 of the *Charter*. He contends the stand-to count did not ensure the security of any prisoner, staff member or Canadian citizen. He alleged it was discrimination against him because of age. Finally, he claimed there was no consultation with inmates. In short, the Applicant raised a broad range of issues in grieving the 22:40 stand-to count.

[12] His grievance was denied by the Commissioner on October 27, 2009.

Decision Under Review

[13] In the Offender Grievance Response dated October 27, 2009, the Commissioner responded to the Applicant's grievance, grouping the issues the Applicant raises into the four areas. Since the Applicant focuses on one issue, the impact of the 22:40 stand-to count on himself and elderly

inmates, I have extracted and summarized the portions of the Commissioner's decision relevant to the issue the Applicant addresses in this judicial review.

[14] Issue One: Security Bulletin: the Commissioner stated the Bulletin's directive on a late night stand-to count is in response to the Corner's Inquest and the Death in Custody Report recommendations. As such the regulations are not punishment but part of an effort to save lives. Further, exemptions to the stand-to counts exist for medical conditions or physical limitations.

[15] Issue Two: Danger of Being Awoken: the Commissioner noted that Paragraph 11 of CD 566-4 provides that inmates with medical conditions or physical limitations deemed by the Chief of Health Services as unable to respond to, or perform a stand-to count request, are exempt. In such cases inmates must be awake and signal the staff member through an alternative means, normally a hand signal. There is no indication that the 22:40 count poses a significant health risk to the (inmate) population as a whole.

[16] Issue Three Targets the Elderly: the Commissioner wrote "There is no indication why you believe the stand-to counts punish the elderly more than other offenders. There is nothing specific as to who must attend the stand-to as the Bulletin applies to all."

[17] Issue Four: Offender Participation: the Commissioner noted the Inmate Committee was consulted. A number of other times were considered and the 22:40 count was determined to be the most efficient and least disruptive. The morning unlock is 07:00 providing for 8 hours between counts.

[18] The Commissioner denied the Applicant's grievance in each of the above four issue categories addressing the whole of the subject matter of the grievance. The above extracted responses from those categories in the Commissioner's decision relate to the issue the Applicant raises in this judicial review.

Legislation

[19] In respect of health and safety of inmates, the *Corrections and Conditional Release Act*, 1992, c. 20 (the CCRA) provides:

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
4. The principles that shall guide the Service in achieving the purpose referred to in section 3 are … (d) that the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders; (e) that offenders retain the rights and privileges of all	4. Le Service est guidé, dans l'exécution de ce mandat, par les principes qui suivent : … d) les mesures nécessaires à la protection du public, des agents et des

members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence;
…
(g) that correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure;
…
(h) that correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples, as well as to the needs of other groups of offenders with special requirements;
…
70. The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.
…
87. The Service shall take into consideration an offender's state of health and health care needs
(a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and
(b) in the preparation of the offender for release and the supervision of the offender.

délinquants doivent être le moins restrictives possible;
e) le délinquant continue à jouir des droits et privilèges reconnus à tout citoyen, sauf de ceux dont la suppression ou restriction est une conséquence nécessaire de la peine qui lui est infligée;
…
g) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;
…
h) ses directives d'orientation générale, programmes et méthodes respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones et à d'autres groupes particuliers;
…
70. Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.
…
87. Les décisions concernant un délinquant, notamment en ce qui

touche son placement, son transfèrement, son isolement préventif ou toute question disciplinaire, ainsi que les mesures préparatoires à sa mise en liberté et sa surveillance durant celle-ci, doivent tenir compte de son état de santé et des soins qu'il requiert.

[20] The inmate grievance procedures are set out in the *Regulations Respecting Corrections and the Conditional Release and Detention of Offenders* (SOR/92-620) and are appended in part to this judgment.

Issues

[21] The Applicant submits the Commissioner failed to address the central issue raised in the grievance, namely that the 22:40 stand-to count adversely and disproportionately affects the Applicant and other elderly inmates. The Applicant expresses the issue as whether the Commissioner improperly declined to exercise his jurisdiction.

[22] The Respondent submits the issues are whether the Applicant was denied procedural fairness and whether the Commissioner committed a reviewable error based on the standard of review.

[23] In my view, the issues in this judicial review are:

a) Did the Commissioner fail to address the issue that the stand-to count adversely and disproportionately affected the Applicant and other elderly inmates thereby committing a breach of procedural fairness?

b) Was the Commissioner's response reasonable?

Standard of Review

[24] There are now only two standards of review: reasonableness and correctness. A detailed analysis of which standard to apply in a given case is not required if it has been determined in earlier jurisprudence. *Dunsmuir v New Brunswick*, 2008 SCC 9

[25] The standard of review for decisions made pursuant to the *Corrections and Conditional Release Act* was addressed by the Federal Court of Appeal in *Sweet v Canada (Attorney General)*, 2005 FCA 51. (*Sweet)*

[26] In *Sweet*, the Federal Court of Appeal held that correctness applied to questions of law which include issues of procedural fairness, whereas the reasonableness would apply to the application of legal principles to fact and the standard of patent unreasonableness (now reasonableness) would apply to findings of fact. Para.14 in *Sweet* confirms the application of these standards in CSC grievance procedures:

> In assessing the standard of review for prisoners' grievance decisions, the Applications Judge adopted the analysis set out by Lemieux J. in *Tehrankari v. Correctional Service of Canada* (2000), 188 F.T.R. 206 (T.D.) at paragraph 44. After conducting a pragmatic and functional analysis, Lemieux J. concluded that a correctness standard would apply if the question involved the proper interpretation of the legislation, a standard of reasonableness *simpliciter* would apply if the question involved an application of the proper legal principles to

> the facts, and a patently unreasonable standard would apply to pure findings of fact.

[27] Accordingly, the Commissioner’s findings of fact and of mixed law and fact should be evaluated on a standard of reasonableness. In reviewing the impugned decisions against the reasonableness standard, the Court will consider whether these decisions under review fall within a range of possible acceptable outcomes which are defensible in light of the facts and the law. *Dunsmuir* at para. 47

Analysis

[28] The Applicant submits that, given the purpose and role of the grievance process in maintaining a safe, humane and lawful correctional system, the grievance process should provide inmates with an opportunity to be heard and to seek redress in a forthright and fair manner.

[29] The Applicant submits that the Commissioner failed to address one of the central issues he raised in his grievance, namely that he and other elderly inmates were adversely and disproportionately affected by the 22:40 stand-to count, and that he was seeking some type of accommodation based on his age. Instead of addressing this issue of whether the elderly should be accommodated, the Applicant contends the Commissioner only looked at whether the elderly were specifically targeted.

[30] The Applicant submits that the Commissioner’s failure to directly address the central issue in a grievance is a wrongful failure to exercise jurisdiction and statutory power. His specific submission on this point had been:

> There are many elderly prisoners including myself, who will be impacted by the unnecessary late count. Many times, because of the stress of the everyday prison life, I have been forced to retire early to bed in order to reduce the stress and anxiety and get enough rest for next strenuous day, and now I will be discriminated against because of my age.

[31] The Applicant now submits the core of his grievance was not whether the elderly were "specifically targeted" but whether the elderly should be accommodated.

Did the Commissioner fail to address the issues raised by the Applicant?

[32] Although the Applicant now frames the issue of whether the elderly should be accommodated as the central issue, there is nothing in his third level grievance to suggest that this was the central issue. In his third level grievance, the Applicant raised myriad issues. He was not merely seeking accommodation for himself or for other elderly inmates in respect of the 22:40 stand-to count but rather was seeking to remove the 22:40 stand-to count altogether.

[33] In the response, the Commissioner explained the purpose of the stand-to count as being to save lives. The Commissioner also explained that the policy does not specifically target the elderly and that the Applicant did not provide any reason why he believed the stand-to counts punished the elderly more than other offenders.

[34] The Applicant, in his submissions, accepts the elderly are not targeted within the prison population since the Bulletin applies to all inmates. The Applicant now submits he is disproportionately affected by the late night stand-to count because of his age and the

Commissioner failed to address his grievance in terms of adverse impact of the 22:40 stand-to count.

[35] In my view the Commissioner adequately addressed the Applicant's grievance about adverse impacts by: first, pointing out that the stand-to count was implemented in response to recommendations to save lives; second, noting there was no information that 22:40 stand-to count adversely affected other elderly inmates; and third, indicating that there is provision for exemptions from the stand-to count for medical and physical limitations.

Was the Commissioner's response reasonable?

[36] The Applicant cites *Wild v Canada*, 2004 FC 942 to support his claim that an inmate has the right to a restful night's sleep without being unnecessarily awakened. In that case, the applicant inmate was purposely awakened two to three times a night. This is not the situation the Applicant now faces with the regularly scheduled stand-to count at 22:40.

[37] The Commissioner noted there is an eight hour span between the 22:40 stand-to count and the 7:00 morning unlock count. As such, I consider the Commissioner's finding that the 22:40 stand-to count allows for an appropriate period for sleep as reasonable.

[38] The Commissioner was mindful that medical exemptions are available to inmates who qualify and apply for them. At no point did the Applicant address the option of seeking of a personal exemption based on medical or physical limitations.

[39] The onus was on the Applicant to show some basis for his contention that the stand-to count posed a significant health risk to elderly inmates. While the Applicant may be personally unhappy with the time of the stand-to count, there was nothing to show other elderly inmates were negatively affected especially given the fact that an unbroken eight hour span is available for sleep and exemptions are available for medical or physical limitations.

Conclusion

[40] I find the Commissioner's response to the Applicant's grievance adequately addressed the issue the Applicant now raises in this judicial review.

[41] I further find the Commissioner's response satisfies the reasonableness requirements of justification, transparency and intelligibility, and clearly falls within the range of possible, acceptable outcomes, as set out in *Dunsmuir* at para. 47. The Commissioner's response to the Applicant's third-level grievance was reasonable.

[42] I dismiss this application for judicial review.

[43] I make no order for costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

2. No order for costs is made.

"Leonard S. Mandamin"

Judge

APPENDIX

Regulations Respecting Corrections and the Conditional Release and Detention of Offenders (SOR/92-620) (the Regulations)

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. (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. (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. (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 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.	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) 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) 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) 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. (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. Where a supervisor refuses to review a complaint pursuant	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

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

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.
(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.

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

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) 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) Le directeur du pénitencier doit remettre au détenu une

(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.

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 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.

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.
(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) 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

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

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 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

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 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).

(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).

FEDERAL COURT

SOLICITORS OF RECORD

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