Federal Court  Cour fédérale

Date: 20111219

Docket: T-1839-10

Citation: 2011 FC 1495

Ottawa, Ontario, December 19, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

JEFFREY WILLIAM ROSE,
DAVID WILLIAM SHORTREED AND
AND RICHARD ("RICK") SUEN

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Mr. Jeffrey William Rose, Mr. David William Shortreed and Mr. Richard Suen, are inmates currently incarcerated at the Warkworth Institution in Brighton, Ontario. They are self-represented litigants seeking judicial review of the suspension and the subsequent termination of their employment as Inmate Purchasing Clerks at Warkworth by the Program Board of their penitentiary (the Program Board).

[2] The respondent asks that the present application be dismissed on the ground that it is premature because the applicants have not exhausted the offenders' internal grievance procedure that is available to them.

PRELIMINARY REMARKS

[3] On November 15, 2011, the applicants brought a motion seeking leave from this Court to adduce additional evidence (affidavit material and supplementary record) in their attempt to demonstrate that the grievance procedure is somewhat defective because of its inherent delays and the number of levels (practically speaking, four). Based on the parties' agreement on this preliminary matter at the hearing, the Court accepts both the applicants' additional affidavit and the respondent's sur-reply in support of their respective allegations.

[4] In passing, the respondent has filed the Board's "tribunal record" by way of affidavit sworn by Ms. Diane Dyke, a legal assistant with the Department of Justice. The applicants presented a preliminary objection submitting that in doing so the respondent prevented them from cross-examining the Programs Manager (Mr. Viens) as they intended to. In fact, a three paragraph affidavit signed by the Programs Manager indicates that the Program Board is composed of a single member when considering a work placement suspension and that in the case of the applicants, he was the sole member of the Board who ordered their termination. Upon the applicants' request to cross-examine the Programs Manager, Ms. Dyke submitted an additional affidavit stating that the Department of Justice made no inquiries about the Programs Manager's availability. It is not determinative in this application for judicial review to decide whether or not in seeking to cross-examine the Programs Manager who made the decision for the Board, the applicants could have

sought discovery of relevant matters beyond what is contained in the tribunal's record. The respondent nevertheless submitted that rule 318 of the *Federal Courts Rules* (SOR/98-106) does not require a tribunal to deliver its certified record by affidavit from the tribunal itself, nor do the Rules give the applicants the right to cross-examine a representative of the tribunal which produces a certified record. The Court agrees with the respondent.

[5] Finally, as a further preliminary observation, the respondent has taken the calculated risk in this judicial review application not to make any submissions on the merit of the case. However, it should be cautioned that "the refusal to hear an application for judicial review on the ground that the applicant has not exhausted the grievance procedure and should first have applied to the Commissioner is a matter for the discretion of the Court" (*Poulin v Canada (Attorney General)*, 2005 FC 1293 at para 7, [2005] FCJ 1574 [*Poulin*]; see also *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at paras 30-32 [*Matsqui Indian Band*]). As discussed below, the jurisprudence of this Court, and that of the Supreme Court of Canada, do not endorse a mechanical approach to the general principle of prior exhaustion of the grievance procedure. Fortunately for the respondent, I have determined that the present judicial review application is premature.

FACTS

[6] Inmates in federal correctional facilities are encouraged to participate in paid program assignments which may involve work assignments or educational and training activities approved by a Program Board (see Commissioner's Directive 730 – *Inmate Program Assignment and Payment* [CD 730]).

[7] As part of their program assignments, the applicants were employed as Inmate Purchasing Clerks at Warkworth and, according to the record before the Court, all three of them had excellent work evaluations throughout their employment with the Correctional Service of Canada (CSC).

[8] Yet things turned out badly for the applicants when, on October 6, 2010, an IT technician found that a CSC-owned computer assigned to the inmate purchasing office where the applicants worked was missing and had been replaced by an inmate-owned computer running banned programs (Windows 98 and Office 97 according to the technician's report to Mario Viens, Manager, Programs at Warkworth, and Jim Francis, Program Supervisor).

[9] The respondent submits that a black market in contraband computer hardware has developed inside correctional facilities since the October 2002 ban on inmate-owned computers. In fact, inmates are no longer authorised to have personal computers in their cells, save for those which pre-date the ban and which have since then been subject to certain technical requirements.

[10] Upon receiving the technician's report, the Programs Manager immediately ordered the applicants' suspension from work, effective October 12, 2010, and the Program Supervisor accordingly suspended the applicants. The suspension notice sent to the applicants reads "[…] during the recent lockdown it was discovered that the computer was removed from the office and cannot be located. In view of this discovery, and your inability to locate the missing computer, you are being suspended from your position as a recreation worker".

[11] By reference to subsection 104(1) of the *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*], the "reasons for suspension" section of the CSC Inmate Suspension Form includes the two following options: "you have left your program assignment without authorization" and/or "your actions demonstrate a refusal to participate in your program assignment". The latter reason is checked on the applicants' forms.

104. (1) Subject to subsection (3), where an inmate, without reasonable excuse, refuses to participate in a program for which the inmate is paid pursuant to section 78 of the Act or leaves that program, the institutional head or a staff member designated by the institutional head may	**104.** (1) Sous réserve du paragraphe (3), lorsque le détenu, sans motif valable, refuse de participer à un programme pour lequel il est rétribué selon l'article 78 de la Loi ou qu'il l'abandonne, le directeur du pénitencier ou l'agent désigné par lui peut :
(*a*) suspend the inmate's participation in the program for a specified period of not more than six weeks; or	*a*) soit suspendre sa participation au programme pour une période déterminée, qui ne doit pas excéder six semaines;
(*b*) terminate the inmate's participation in the program.	*b*) soit mettre fin à sa participation au programme.

[12] On October 20, 2010, the Programs Manager ultimately ordered the applicants' termination of employment when other computer components were allegedly found in the purchasing office upon performance of a further search.

[13] The applicants filed a group complaint against the Program Board on October 20, 2010. On October 25, 2010, Assistant Warden, Interventions, Nancy Pearson, acknowledged receipt of the applicants' complaint – now deferred pending disposition of the present application for judicial

review pursuant to section 81 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCRR*] – and advised them in writing that she expected to finalize the response to their grievance by November 26, 2011.

[14] The applicants however did not await the completion of the grievance process, nor did they await the Assistant Warden's response to their complaint. Instead, they filed a notice of application for judicial review of the Programs Manager's decisions on November 4, 2010.

ARGUMENTS OF THE PARTIES

[15] The applicants take issue with their suspension and subsequent termination of employment on two grounds:

[16] First, the applicants submit that they have been subject to backdoor disciplinary sanctions that were permitted by neither paragraphs (a) or (b) of subsection 104(1) of the *CCRA*, as the applicants never stopped or refused to participate, without reasonable excuse or at all, in the program for which they were paid. The Programs Manager thus exceeded his authority in suspending and terminating the applicants' program.

[17] In other words, the applicants submit that in the absence of any other grounds for sanction under the *CCRA* or the *CCRR* in the circumstances, the decision to suspend and terminate their program was of a disciplinary nature and thus had to be made in compliance with the disciplinary regime set out in sections 39 to 44 of the *CCRA*.

[18] In fact, the applicants allege that they were arbitrarily denied the procedural protections afforded to inmates subject to a disciplinary sanction under the *CCRA*. Instead, the decision to suspend and terminate them was made based on incomplete information and without them being properly heard. The applicants submit that the Program Board imposed on them the most severe measure among a range of alternative options that were open to him, without considering their past work records and without hearing their claim that they were not involved in the removal of the CSC-owned computer from their workplace.

[19] Second, the applicants submit that the Programs Manager sat in judgment of his own direction when he later decided to uphold the applicants' suspension and ordered their termination in his capacity as the Board's Chairperson, thus raising an issue of bias or reasonable apprehension of bias on his part.

[20] The applicants further allege that their right to an impartial decision-maker, as a component of the duty to act fairly, has been breached because the Programs Manager could not have approached the matter impartially when upholding his own decision.

[21] The respondent has chosen not to deal at all with the applicants' allegations on the merits. He simply argues that the present application for judicial review is premature and that the applicants should be required to exhaust the internal grievance process before bringing an application for judicial review before this Court (*Giesbrecht v Canada*, [1998] FCJ 621; *Condo v Canada (Attorney General)*, 2003 FCA 99 at para 5; *McMaster v Canada (Attorney General)*, 2008 FC

647 at paras 23-27 [*McMaster*]; *Marachelian v Canada (Attorney General)*, [2000] FCJ 1128 at para 10).

GRIEVANCE PROCEDURE

[22] Section 90 of the *CCRA* mandates the establishment of a formal grievance procedure to guarantee fair and expeditious resolution of offenders' grievances:

90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(*u*).	**90.** Est établie, conformément aux règlements d'application de l'alinéa 96*u*), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire.

[emphasis added]

[23] The procedure for resolution of grievances is established by sections 74 to 82 of the *CCRR*. These provisions provide that an offender who is dissatisfied with an action or decision by a correctional service officer can submit a written complaint to the officer's supervisor. If the supervisor refuses to review his complaint or makes a decision that does not satisfy the offender, he may then submit a written grievance which would set the grievance process in motion. At the first level, the grievance is considered by the institution head. If the outcome is not satisfactory the grievance can be escalated and successively considered at the second (regional) and the third (national) levels:

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	**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

in the form provided by the Service, to the supervisor of that staff member.

écrit et de préférence sur une formule fournie par le Service.

(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.

(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) 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.

(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) 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.

(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) 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.

(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 to subsection 74(4) or where an offender is not satisfied with the decision of a supervisor referred to in

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

subsection 74(3), the offender may submit a written grievance, preferably in the form provided by the Service,

présenter un grief, par écrit et de préférence sur une formule fournie par le Service :

(*a*) to the institutional head or to the director of the parole district, as the case may be; or

a) soit au directeur du pénitencier ou au directeur de district des libérations conditionnelles, selon le cas;

(*b*) where the institutional head or director is the subject of the grievance, to the head of the region.

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) 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.

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) 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.

(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) 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.

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) An inmate grievance

(2) Le comité d'examen des

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.

griefs des détenus doit présenter au directeur ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(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.

(3) Le directeur du pénitencier doit remettre au détenu une 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.

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) The outside review board shall submit its recommendations to the institutional head as soon as practicable after the grievance is referred to the board.

(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) The institutional head shall give the inmate a copy of the institutional head's decision as

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt

soon as practicable after receiving the recommendations of the outside review board.

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 region.

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) 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.

(2) Lorsque le délinquant est insatisfait de la décision rendue au sujet de son grief par le responsable de la région, il peut en appeler au commissaire.

(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.

(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) 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.

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) 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.	(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. In reviewing an offender's complaint or grievance, the person reviewing the complaint or grievance shall take into consideration	**82.** Lors de l'examen de la plainte ou du grief, la personne chargée de cet examen doit tenir compte :
(*a*) any efforts made by staff members and the offender to resolve the complaint or grievance, and any recommendations resulting therefrom;	*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*) any recommendations made by an inmate grievance committee or outside review board; and	*b*) des recommandations faites par le comité d'examen des griefs des détenus et par le comité externe d'examen des griefs;
(*c*) any decision made respecting an alternate remedy referred to in subsection 81(1).	*c*) de toute décision rendue dans le recours judiciaire visé au paragraphe 81(1).

[24] Furthermore, sections 38 to 44 of the *CCRA* establish an internal disciplinary system that defines what constitutes a disciplinary offence and a disciplinary sanction. The disciplinary regime offers procedural protections for inmates subject to disciplinary charges and specifies that no inmate shall be disciplined otherwise than in accordance with these provisions.

38. The purpose of the disciplinary system established by sections 40 to 44 and the	**38.** Le régime disciplinaire établi par les articles 40 à 44 et les règlements vise à

regulations is to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community.

encourager chez les détenus un comportement favorisant l'ordre et la bonne marche du pénitencier, tout en contribuant à leur réadaptation et à leur réinsertion sociale.

39. Inmates shall not be disciplined otherwise than in accordance with sections 40 to 44 and the regulations.

39. Seuls les articles 40 à 44 et les règlements sont à prendre en compte en matière de discipline.

40. An inmate commits a disciplinary offence who

40. Est coupable d'une infraction disciplinaire le détenu qui :

(*a*) disobeys a justifiable order of a staff member;

a) désobéit à l'ordre légitime d'un agent;

(*b*) is, without authorization, in an area prohibited to inmates;

b) se trouve, sans autorisation, dans un secteur dont l'accès lui est interdit;

(*c*) wilfully or recklessly damages or destroys property that is not the inmate's;

c) détruit ou endommage de manière délibérée ou irresponsable le bien d'autrui;

(*d*) commits theft;

d) commet un vol;

(*e*) is in possession of stolen property;

e) a en sa possession un bien volé;

(*f*) is disrespectful or abusive toward a staff member in a manner that could undermine a staff member's authority;

f) agit de manière irrespectueuse ou outrageante envers un agent au point de compromettre l'autorité de celui-ci ou des agents en général;

(*g*) is disrespectful or abusive toward any person in a manner that is likely to provoke a person to be violent;

g) agit de manière irrespectueuse ou outrageante envers toute personne au point d'inciter à la violence;

(*h*) fights with, assaults or threatens to assault another person;

h) se livre ou menace de se livrer à des voies de fait ou prend part à un combat;

(*i*) is in possession of, or deals in, contraband;

i) est en possession d'un objet interdit ou en fait le trafic;

(*j*) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;

j) sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l'ordre écrit du directeur du pénitencier ou en fait le trafic;

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

k) introduit dans son corps une substance intoxicante;

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

l) refuse ou omet de fournir l'échantillon d'urine qui peut être exigé au titre des articles 54 ou 55;

(*m*) creates or participates in
(i) a disturbance, or
(ii) any other activity
that is likely to jeopardize the security of the penitentiary;

m) crée des troubles ou toute autre situation susceptible de mettre en danger la sécurité du pénitencier, ou y participe;

(*n*) does anything for the purpose of escaping or assisting another inmate to escape;

n) commet un acte dans l'intention de s'évader ou de faciliter une évasion;

(*o*) offers, gives or accepts a bribe or reward;

o) offre, donne ou accepte un pot-de-vin ou une récompense;

(*p*) without reasonable excuse, refuses to work or leaves work;

p) sans excuse valable, refuse de travailler ou s'absente de son travail;

(*q*) engages in gambling;

q) se livre au jeu ou aux paris;

(*r*) wilfully disobeys a written rule governing the conduct of inmates; or

r) contrevient délibérément à une règle écrite régissant la conduite des détenus;

(*s*) attempts to do, or assists another person to do, anything referred to in paragraphs (*a*) to (*r*).

s) tente de commettre l'une des infractions mentionnées aux alinéas *a*) à *r*) ou participe à sa perpétration.

41. (1) Where a staff member believes on reasonable grounds that an inmate has committed or is committing a disciplinary offence, the staff member shall take all reasonable steps to resolve the matter informally, where possible.

41. (1) L'agent qui croit, pour des motifs raisonnables, qu'un détenu commet ou a commis une infraction disciplinaire doit, si les circonstances le permettent, prendre toutes les mesures utiles afin de régler la question de façon informelle.

(2) Where an informal resolution is not achieved, the institutional head may, depending on the seriousness of the alleged conduct and any aggravating or mitigating factors, issue a charge of a minor disciplinary offence or a serious disciplinary offence.

(2) À défaut de règlement informel, le directeur peut porter une accusation d'infraction disciplinaire mineure ou grave, selon la gravité de la faute et l'existence de circonstances atténuantes ou aggravantes.

42. An inmate charged with a disciplinary offence shall be given a written notice of the charge in accordance with the regulations, and the notice must state whether the charge is minor or serious.

42. Le détenu accusé se voit remettre, conformément aux règlements, un avis d'accusation qui mentionne s'il s'agit d'une infraction disciplinaire mineure ou grave.

43. (1) A charge of a disciplinary offence shall be dealt with in accordance with the prescribed procedure, including a hearing conducted in the prescribed manner.

43. (1) L'accusation d'infraction disciplinaire est instruite conformément à la procédure réglementaire et doit notamment faire l'objet d'une audition conforme aux règlements.

(2) A hearing mentioned in subsection (1) shall be conducted with the inmate present unless

(2) L'audition a lieu en présence du détenu sauf dans les cas suivants :

(*a*) the inmate is voluntarily absent;

a) celui-ci décide de ne pas y assister;

(*b*) the person conducting the hearing believes on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or

b) la personne chargée de l'audition croit, pour des motifs raisonnables, que sa présence mettrait en danger la sécurité de quiconque y assiste;

(*c*) the inmate seriously disrupts the hearing.

c) celui-ci en perturbe gravement le déroulement.

(3) The person conducting the hearing shall not find the inmate guilty unless satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question.

(3) La personne chargée de l'audition ne peut prononcer la culpabilité que si elle est convaincue hors de tout doute raisonnable, sur la foi de la preuve présentée, que le détenu a bien commis l'infraction reprochée.

44. (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(*i*) and (*j*), to one or more of the following:

44. (1) Le détenu déclaré coupable d'une infraction disciplinaire est, conformément aux règlements pris en vertu des alinéas 96*i*) et *j*), passible d'une ou de plusieurs des peines suivantes :

(*a*) a warning or reprimand;

a) avertissement ou réprimande;

(*b*) a loss of privileges;

b) perte de privilèges;

(*c*) an order to make restitution;

c) ordre de restitution;

(*d*) a fine;

d) amende;

(*e*) performance of extra duties; and

e) travaux supplémentaires;

(*f*) in the case of a serious disciplinary offence,

f) isolement pour un maximum de trente jours, dans le cas

segregation from other inmates for a maximum of thirty days.	d'une infraction disciplinaire grave.
(2) A fine or restitution imposed pursuant to subsection (1) may be collected in the prescribed manner.	(2) Le recouvrement de l'amende et la restitution s'effectuent selon les modalités réglementaires.

[25] With this statutory and regulatory scheme in mind, we are now in a good position to fully appreciate and analyse the preliminary arguments of the parties in respect of the objection made by the respondent that the present judicial review is premature.

PRELIMINARY OBJECTION

[26] The applicants acknowledge that the CSC grievance procedure is usually a prerequisite to judicial review. However, they wish to pursue a judicial review remedy not only because they claim that the grievance process is neither fair nor expeditious and therefore not an adequate alternative for them, but also because they face institutional bias or reasonable apprehension of bias resulting from the fact that CSC decision-makers routinely sit in judgment of their own decisions and often settle for confirming the decision made by the decision-maker preceding them. To my mind, this raises two issues: first, the viability of the alternative administrative remedy in the applicants' case, and second, whether in light of the specific facts of this case, as well as the prejudice suffered and the remedy sought by the applicants, the Court should exercise its discretion to examine the claim on its merits prior to the completion of the grievance procedure.

[27] In exercising this discretion, the Court must examine a variety of factors to determine whether a judicial review should be conducted or if the applicants should be required to pursue the

statutory procedure to challenge the impugned decisions. As stated in *Matsqui Indian Band*, above at para 37:

> […] a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively should require an applicant to proceed through a statutory appeal procedure. These factors include: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). I do not believe that the category of factors should be closed, as it is for courts in particular circumstances to isolate and balance the factors which are relevant.

No excessive delays in the applicants' case

[28] The applicants presented evidence that the grievance process is excessively slow. I have carefully reviewed the applicants' first and second affidavits and exhibits therein referred to. Although this evidence is more or less persuasive for the Court, the grievance procedure cannot be found presumptively flawed or ineffective in a case where the applicants refused to await even the response to their complaint. In fact, the grievance procedure *per se* has not even been initiated in this case. The applicants filed the present application for judicial review on November 4, 2010 – less than ten days after the Assistant Warden acknowledged receipt of their October 20, 2010 complaint which they had submitted, to their own admission, simply "for the record" before this Court.

[29] The applicants rely on excerpts from the 2007-2008 Annual Report of the Office of the Correctional Investigator suggesting that the grievance procedure is inadequate and incapable of answering all complaints and grievances in a timely and effective manner. In brief, this report reviewed the history of the offender grievance procedure with a special focus on the issue of delays. Relying on the 1996 Arbour Report of the Commission of Inquiry Into Certain Events at the Prison for Women, as well as past reports and recommendations of the Correctional Investigator, the

Report looked into the re-instatement of response times at the national level. It also recommended outside assistance to ensure timely and fair resolution of third-level grievances.

[30] Although the issue of undue delays is recurrent in the successive annual reports of the Correctional Investigator, such evidence in itself is insufficient to justify the inmates' bypassing of the grievance system established by legislation.

[31] The applicants also refer to an *ad hoc* audit conducted by the Inmate Welfare Committee at Warkworth which reports a range of delays in fifty random inmate complaints and first level grievances between January 2009 and January 2010. The reported delays range from 5 to 313 days, while section 18 of the Commissioner's Directive 081 provides a timeframe of 25 working days, as of their receipt by the Grievance Coordinator, for routine priority complaints and first level grievances to be treated and responded to by the decision-maker. The timeframe is reduced to 15 days in high priority cases.

[32] On the respondent's side, the reported delays are attributed to a backlog of institutional grievances. Acting Warden Ann Anderson (who was the Assistant Warden in duty at the time the impugned decisions were made by the Programs Manager) states in her affidavit dated November 30, 2011, that the Warkworth management has recently managed to reduce a backlog of approximately 340 late grievances to 20 late grievances. She also attests that recent initiatives have been taken following the Correctional Investigator's 2010-1011 Annual Report in order to encourage inmates to use informal dispute resolution to resolve their complaints at the lowest level.

[33] The applicants' second affidavit refers to several first, second and third level grievance decisions rendered in cases concerning fellow inmates at Warkworth, including decisions of the Program Board, as examples of the long delays inherent in the offender grievance procedure.

[34] However, the fact that the complaints and grievances to which the applicants call this Court's attention were subject to undue delays or ultimately denied under their specific circumstances must be compounded with the fact that judicial recourse itself is subject to delays (in this case, some 13 months) and that the reviewing court is not allowed to render the decision that could have been rendered in the first place at any level of the grievance process. Although the evidentiary record shows that some cases have clearly been subject to excessive delays, in the Court's view, such statistical and anecdotal evidence is simply insufficient to support a general all-inclusive declaration that the grievance procedure is wrought with delay and thus not an adequate alternative to judicial review, including in the applicants' case. This is not to say that in another instance, with the proper evidentiary record, the conclusion of the Court would be the same as today.

No exceptional circumstances

[35] According to the jurisprudence, the Court's discretion with respect to hearing a judicial review where it is established that an adequate alternative remedy exists is subject to consideration of whether there are exceptional circumstances such as cases of emergency, evident inadequacy in the procedure, or where physical or mental harm is caused to an inmate (*Ewert v Canada (Attorney General)*, 2009 FC 971 at para 34 [*Ewert*]; *Spidel v Canada (Attorney General)*, 2010 FC 1028 at para 12; *Gates v Canada (Attorney General)*, 2007 FC 1058 at para 26 [*Gates*]).

[36] First, with respect to the issue of delays, the jurisprudence has recognized that when, as a result of repetitive extensions of time, a grievance has suffered undue delays rendering the process unfair and non-expeditious, the Court can consider the application for judicial review on its merits despite the existence of an adequate alternative remedy (*Caruana v Canada (Attorney General)*, 2006 FC 1355 at paras 40-46). I have already determined that this is not the case of the applicants who refused to submit a grievance or wait for their complaint to be disposed of.

[37] Second, the Programs Manager's overlapping roles in the applicants' suspension and subsequent termination of program are alleged to have created a reasonable apprehension of bias on his part. At the hearing, counsel for the respondent asserted that this allegation may give rise to a procedural fairness issue but cannot be used to support the applicants' allegation of inadequacy of the grievance procedure.

[38] Sections 38-42 of the CD 730 enunciate the rules governing the suspension of inmate program assignments. In fact, the program supervisor has authority to suspend an inmate under certain circumstances. Upon consultation with the program supervisor and consideration of the inmate's written representations, the Program Board shall then review the decision within 5 working days in order to either cancel, reduce, maintain for an additional period, or confirm the suspension. In this last case, the Program Board can terminate the program assignment and provide the inmate with written reasons for its decision within two working days.

[39] Whether the applicants can be reasonably apprehensive of bias where the Programs Manager who issued the direction to suspend them ultimately decided for the Program Board that ordered their termination is, in my view, a question of fact and law, requiring factual determinations such as whether there has been confusion in his investigative and adjudicative functions. Moreover, the issue of institutional bias or lack of institutional independence (at least at the final decision level of the grievance process), notably in light of the rights conferred to individuals by the *Canadian Bill of Rights* and the *Canadian Charter of Human Rights and Freedoms*, cannot be determined by the Court in a factual vacuum. Accordingly, it is appropriate not to express any opinion on this subject.

[40] Coming back to the exceptions recognized by caselaw, in *Gates*, above at para 26, the Court stated that "in cases of compelling circumstances, such as where there is actual physical or mental harm or clear inadequacy of the process […] a departure from the complaints process would be justified". The Court also specified that this should not be regarded as an exhaustive list of circumstances justifying a departure from the principle. I believe, however, that the prejudice suffered by the applicants as a result of the termination of their respective program assignments does not amount to what the jurisprudence of this Court generally considers as urgent or exceptional and compelling circumstances. For instance, in *Poulin*, a case where discrimination based on the applicant's physical disability was at issue, this Court did not hesitate to proceed to an examination of the claim on its merits although he had not sought internal grievance remedies beyond the first level.

[41] Third, the applicants raise the question of whether the sanctions imposed on them are of a disciplinary nature or are administrative decisions, and submit that the impugned decisions should

be set aside because they were not made in compliance with the disciplinary regime established under the *CCRA*. The applicants submit that this question is one of law and should thus be determined by the Court rather than by the grievance procedure.

[42] The respondent relies on *Ewert*, above at para 36, to suggest that where a case raises both legal and operational issues, the legal and operational issues should be addressed together as a package in the grievance procedure.

[43] In fact, by implicit reference to subsection 104(1) of the *CCRA*, section 38 of the CD 730 provides that "the program supervisor may suspend an inmate who leaves a program assignment without authorization or whose actions demonstrate a refusal to participate in a program assignment", and goes on to specify that "this includes any negative behavior or action that necessitates the removal of the inmate from the program assignment". In my view, the question of whether the loss of a CSC-owned computer from the applicants' workplace constitutes a negative behaviour or action on their part so as to necessitate their suspension is not a difficult one, but it is a question to which the institution head and, if need be, the appellate bodies of the grievance procedure are best placed to answer.

[44] In *Gallant v Canada (Deputy Commissioner, Correctional Service Canada)*, [1989] 3 FC 329 at para 28, the Court of Appeal distinguished administrative and disciplinary decisions made by CSC officers as follows:

> In the case of a decision aimed at imposing a sanction or a punishment for the commission of an offence, fairness dictates that the person charged be given all available particulars of the offence. Not so in the case of a decision to transfer made for the sake of the

> orderly and proper administration of the institution and based on a belief that the inmate should, because of concerns raised as to his behaviour, not remain where he is. In such a case, there would be no basis for requiring that the inmate be given as many particulars of all the wrong doings of which he may be suspected. Indeed, in the former case, what has to be verified is the very commission of the offence and the person involved should be given the fullest opportunity to convince of his innocence; in the latter case, it is merely the reasonableness and the seriousness of the belief on which the decision would be based and the participation of the person involved has to be rendered meaningful for that but nothing more.

Thus, in my view, this case raises questions of fact and law requiring an examination of its specific facts; a task for which the internal grievance procedure remains the appropriate forum.

[45] The convenience of the alternative remedy and the remedial capacities of the grievance procedure also justify this approach. I agree with the respondent that given that the remedy sought is the quashing of the impugned decisions and the applicants' immediate reinstatement in their respective program assignments, the internal grievance system rather that the Court is the appropriate forum to grant such a remedy to the applicants. It is also worth noting that the nature of the offender grievance procedure allows each subsequent decision-maker to conduct a *de novo* review and to substitute its decision for that made by the precedent decision-maker (*Lewis v Canada (Correctional Service)*, 2011 FC 1233 at para 30).

[46] The applicants rely on *May v Ferndale Institution*, 2005 SCC 82 [*May*] to suggest that their case should be allowed to go directly to judicial review. However, the question in that case was whether provincial superior courts should decline their *habeas corpus* jurisdiction over CSC decisions affecting the residual liberty of inmates, merely because an alternative remedy exists and seems sufficiently convenient. The Supreme Court of Canada ruled that courts would only be

required to decline such jurisdiction if the legislator had put in place a “complete, comprehensive and expert procedure for review of an administrative decision”, such as the scheme created for immigration matters, and concluded that this was not the case of the offender grievance procedure.

[47] More particularly, the Supreme Court of Canada held in *May* that the language of the *CCRA* and its regulations made it clear that Parliament did not intend to bar federal inmates’ access to *habeas corpus*. Accordingly, timely judicial oversight, in which provincial superior courts are called to exercise the *habeas corpus* jurisdiction, was still necessary to safeguard the human rights and civil liberties of inmates, and to ensure that the rule of law applies within penitentiary walls.

[48] The applicants acknowledge that the *May* does not indicate that the offender grievance procedure fails to constitute adequate alternative remedy, nor does it relieve inmates from pursuing the internal grievance procedure before seeking a discretionary relief by way of judicial review (*McMaster*, above at para 29). The Court wishes to add that the nature of the impugned sanctions, namely the applicants’ suspension and termination of a program assignment for which they remain eligible to reapply, does not justify the applicants’ reliance on the *May* decision.

[49] Finally, the applicants argued that *Canada (Attorney General) v TeleZone Inc*, [2010] 3 SCR 585 suggests that they can ask judicial review of the Programs Manager’s decision instead of challenging them through the grievance procedure because the choice of procedure is theirs and “the legal remedy supersedes the grievance procedure”. The *Telezone* cases do not stand for such a proposition. They rather suggest that judicial review is no longer required as a preliminary step when a claim in damages is made against the federal Crown before a provincial superior court.

[50] In view of the above reasons, the present application for judicial review shall be dismissed. In the exercise of my discretion, considering all relevant factors, including the limited ground for which this application is dismissed by the Court and the fact that the respondent has not addressed in his memorandum the merit of the case, all parties shall bear their own costs.

JUDGMENT

THIS COURT'S ADJUDGES that the present application for judicial review is dismissed. There are no costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1839-10
STYLE OF CAUSE:	**JEFFREY WILLIAM ROSE, DAVID WILLIAM SHORTREED AND AND RICHARD ("RICK") SUEN and THE ATTORNEY GENERAL OF CANADA**
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DATE OF HEARING:	December 7, 2011
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	December 19, 2011

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