

Federal Court



Cour fédérale

Date: 20180119

Docket: T-732-17

Citation: 2018 FC 54

Ottawa, Ontario, January 19, 2018

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CARL LEONE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made by the Senior Deputy Commissioner of Correctional Services Canada (the “Deputy”), upholding in part a grievance made by the Applicant, pursuant to the offender grievance process established by the *Corrections and Conditional Release Act*, SC 1992, c 20.

II. Background

[2] At the relevant time, the Applicant was an inmate at Joyceville Institution (“Joyceville”), a minimum security site in Kingston, Ontario. His sentence expires in 2026; he was granted day parole in April, 2017, and he was moved to a halfway house in June, 2017.

[3] The issues in this application are related to consultations the Applicant had with the Ontario Regional Dietician (“ORD”) of Correctional Service Canada (“CSC”). Those consultations took place at Joyceville on December 15, 2015, and January 13, 2016. The Applicant did not request the consultations, but was referred to the ORD for health reasons.

[4] The first consultation took place in an open lunch area because no private spaces were available. Subsequently, the Applicant filed a grievance with CSC alleging that the location of his consultation caused a breach of confidentiality. That grievance was upheld and resulted in a request that clinics be scheduled in private offices. As well, the Applicant filed a complaint against the ORD with the College of Dieticians of Ontario (“COD”).

[5] After the second consultation, the ORD filed an offence report, alleging that the Applicant had been “...belligerent, condescending and verbally abusive...” during their second meeting. The ORD also filed a Statement/Observation Report (“SOR”), in which she alleged that the Applicant had made an offensive comment, been belligerent and rude, and threatened her professional integrity.

[6] The ORD filed a second SOR on June 30, 2016. That SOR summarized the ORD's experiences at the two consultations. As well, it mentioned the Applicant's complaint to the COD and the grievance he had filed with CSC. Finally, it noted that on June 29, 2016, she had come into contact with the Applicant by coincidence when arriving at Joyceville, and that "...he approached the building, smiled at me and stood beside me. I feel like I am being stalked and harassed."

[7] On December 21, 2016, a letter was sent to the Applicant from the CSC, advising him that there had been a breach of his personal information. The letter explained that during the course of an investigation conducted by the COD, reports containing his personal information and sensitive medical information were disclosed to the COD without his consent. The letter acknowledged the mistake and advised that staff had been reminded of their responsibility to protect personal information. It also advised the Applicant that he was entitled to register a complaint with the Office of the Privacy Commissioner.

[8] In February 2017, the Applicant filed four grievances, all raising issues that stemmed from the incidents described above.

[9] Grievance No. V40R00031285 ("the '285 Grievance") alleged that the ORD disclosed the Applicant's medical information to the COD, namely, two consultation reports and two SORs, contrary to *Commissioner's Directive 060, Code of Discipline [CD 060]* at subsection 18(a), and in violation of the Applicant's personal privacy.

[10] Grievance No. V40R00031286 (“the ‘286 Grievance’”) alleged that the SOR filed on June 30, 2016, had an improper purpose and was not filed in a timely manner, contrary to the requirements of reporting security incidents as set out in *Commissioner’s Directive 568-1, Recording and Reporting of Security Incidents [CD 568-1]*.

[11] Grievance No. V40R00031287 (“the ‘287 Grievance’”) alleged that the SOR filed on June 30, 2016, makes reference to the Applicant’s use of the grievance system, contrary to *Commissioner’s Directive 081, Offender Complaints and Grievances [CD 081]* at section 51.

[12] Grievance No. V40R00031288 (“the ‘288 Grievance’”) alleged intimidation, harassment, improper and discriminatory conduct and overall retaliation by the ORD after she became aware of the Applicant’s breach of confidentiality grievance and complaint to the COD. The Applicant believed that the grievance and complaint coloured the ORD’s interactions with him and led to her filing the SOR on June 30, 2016.

[13] The grievances were reviewed by a Grievance Coordinator, who determined that they should be dealt with at the national level because they involve the ORD, who reports to Corporate Services at CSC’s National Headquarters. Pursuant to *CD 081* at subsection 7(c), national level grievances are classified as final grievances, which are submitted directly to the Deputy for determination.

[14] As well, the grievances were combined and addressed in one response, which is permitted by *CD 081* at section 20, where a grievor submits two or more grievances in reference to a similar issue.

[15] On March 31, 2017, the Deputy upheld the Applicant's grievances in part. She found that the SOR filed on June 30, 2016, should not have included reference to the Applicant's use of the grievance system as this was a violation of *CD 081* at section 51. As a corrective measure, she ordered the Institutional Head of Joyceville to remind all staff to refrain from referring to an offender's use of the grievance process in records outside the process itself. The remaining grounds raise by the Applicant in his grievances were denied.

[16] On May 18, 2017, the Applicant filed an application for judicial review of the Deputy's decision.

[17] On July 25, 2017, CSC took steps to remove all references to the Applicant's use of the grievance process from the SOR filed on June 30, 2016.

III. Issues

[18] The issues are:

- A. Was the Applicant afforded procedural fairness?
- B. Was the Deputy's decision reasonable?

IV. Standard of Review

[19] Issues of procedural fairness in the context of the CSC offender grievance process should be dealt with under the correctness standard. Findings of fact and mixed fact and law made in the context of the CSC offender grievance process are reviewable under the reasonableness standard, and the CSC is owed a high degree of deference by the Court due to its expertise in inmate and institution management (*Fischer v Canada (AG)*, 2013 FC 861 at para 22).

V. Analysis

A. *Was the Applicant afforded procedural fairness?*

[20] The Applicant takes issue with several aspects of the procedure followed by CSC: the consolidation of his grievances; not having been provided with the details of a phone conversation between CSC staff; the lack of an interview; and the escalation of his grievances to the final level.

[21] In my opinion, the Applicant was afforded a fair procedure. Decisions made in the context of the offender grievance process are administrative in nature and attract a relatively low level of procedural fairness (*Yu v Canada (AG)*, 2012 FC 970 [Yu] at paras 36-40). Furthermore, the Commissioner's Directives and Guidelines (*CD-081* and *Guideline 081-1 - Offender Complaint and Grievance Process [GL 081-1]*) contain the procedures to be followed with respect to grievances, and the Applicant has not identified any errors by CSC in compliance with those directives.

[22] The Applicant's grievances were properly considered together. Section 20 of *CD 081* provides that:

When a grievor submits two or more complaints or grievances in reference to a similar issue, the decision maker may choose to address all of the issues in one response. When this is done, it is necessary to identify each of the complaints and grievances being addressed in the response.

[23] All four grievances related to issues surrounding the Applicant's dealing with the ORD, particularly the SOR that she filed on June 30, 2016. They were properly addressed together.

[24] As well, I do not agree that the Applicant should've been provided with the details of a phone conversation between a grievance analyst and the Co-ordinator of the Nutrition Management Program. That phone conversation is referenced in an email discussion contained in the Certified Tribunal Record ("CTR"), an excerpt of which is as follows:

Analyst: [...] I am currently working on multiple grievances filed by [the Applicant] regarding allegations involving [the ORD]. Specifically, concerns are raised pertaining to a [SOR] written by [the ORD] while at Joyceville Institution.

It was brought to my attention that you may be the [ORD's] supervisor – if so, would it be possible to have a quick phone call regarding the SOR and the process of submission? [...]

Co-ordinator: Here are the letters as discussed. The two ones in PDF were sent to him, the third one was not yet sent to him but it should be next week. [...]

[25] The documents that were discussed and emailed to the grievance analyst were included in the CTR and consist of letters advising the Applicant that his personal information had been

inadvertently released and answering his questions with respect to that breach. Both the Applicant and Deputy had those documents when the Deputy's decision was made.

[26] The conversation appears to be administrative in nature. There is nothing to suggest that the information discussed would have affected the Deputy's decision. Furthermore, no summary of the phone calls was provided to the Deputy for consideration. It was unnecessary for that information to be provided to the Applicant.

[27] Furthermore, an interview was not required in this case. *GL 081-01* at section 41 provides that:

An interview must be conducted with the offender if the offender has requested an interview, when the complaint/initial grievance is first received at the institution, parole office or Community Correctional Centre, unless there are unusual or exceptional circumstances which do not permit it or the offender refuses. If the offender resides at a different site than where the analysis and recommendation is being conducted, an interview must still be conducted. At the final level, the offender may be interviewed if it is considered necessary in order to conduct a thorough analysis and review.

[Emphasis added]

[28] The Applicant relies on the following statement in the Deputy's decision: "[a] review at the National level has determined that it is unclear what you are specifically grieving about with regard to that incident." He argues that the lack of clarity necessitated an interview in order to conduct a thorough analysis and review.

[29] However, the Deputy's use of the word "unclear" is directed towards the lack of a factual basis for the Applicant's allegations of harassment. In the same paragraph, the Deputy notes that the Applicant "... [did] not provide specific, corroborative evidence of how the ORD allegedly harassed [him] ..." or "...concrete examples of how the ORD allegedly behaved in this manner..." and that his allegations of harassment were "unfounded".

[30] In this case, the failure to provide substantive evidence did not necessitate an interview. The Applicant has not identified any specific information or evidence that he could have presented orally, which might have affected the Deputy's finding that his harassment allegations were unsubstantiated.

[31] I accept that the escalation of the Applicant's grievance to the final level reduced his ability to obtain an interview. An interview must be conducted at the initial level, if requested by the Applicant (*GL 081-01* at section 41). As well, the escalation resulted in the grievance analysis having been conducted at a different location than where the Applicant resided, making it difficult to satisfy the requirement in subsection 74(2) of the *Corrections and Conditional Release Regulations*, SOR/92/620 that "...every effort shall be made by staff members and the offender to resolve the matter informally through discussion." This Court has interpreted that provision as requiring only a "reasonable effort", given that discussions are not mandatory (*Yu* at para 56).

[32] However, it was not improper for the Applicant's grievances to be escalated to the final level. Section 7 of *CD 081* provides that a final level grievances are handled at the national level rather than the institution where the grievor resides:

7. The offender complaint and grievance process is comprised of three levels:

a) written complaint – submitted by the offender at the institution/district parole office and responded to by the supervisor of the staff member whose actions or decisions are being grieved

b) initial grievance (institution/district level) – submitted to the Institutional Head/District Director

c) final grievance (national level) – submitted to the Commissioner.

[33] The Grievance Coordinator correctly determined that the Applicant's grievances were most appropriately dealt with at the national level because they raised allegations against the ODR, who reports directly to Corporate Services at CSC's National Headquarters. This enabled the Applicant to have his grievances considered by someone with authority over the nature of the grievances in issue and an ability to impose corrective measures, if required.

[34] The Applicant was afforded procedural fairness.

B. *Was the Deputy's decision reasonable?*

[35] The Applicant submits that the Deputy addressed the corrective action at the wrong individual, misunderstood his harassment allegation and did not address all of the issues raised in his grievances.

[36] In my opinion, the Deputy's decision was reasonable. She directed the corrective action at an appropriate individual, did not misunderstand the harassment allegation and reasonably addressed all the issues raised by the grievances.

[37] The Deputy reasonably directed the corrective action at the Institutional Head of Joyceville rather than the ORD's supervisor. The Institutional Head was instructed to remind staff to refrain from referring to an offender's use of the grievance process in records outside of the process itself. This instruction was sent to all staff, even if they do not report directly to the Institutional Head, such as the ORD. As the issue in this grievance arose from the mention of a grievance in an SOR, and a wide array of staff members can file an SOR, this measure directly addressed the issue and imposed tangible steps to prevent its recurrence.

[38] The Deputy also understood the Applicant's harassment allegation and addressed it in a reasonable manner. The Applicant argues that the Deputy misunderstood that allegation as mainly involving the second consultation on January 13, 2016. I disagree. One paragraph of the Deputy's reasons did focus entirely on that meeting; however, elsewhere in the Deputy's reasons the Deputy acknowledges the Applicant's broader allegation:

[...] [A] review of your final grievances at the National level has determined that your allegations of "intimidation" after the ORD became aware of your use of the grievance process, if proven, would meet the definition of harassment, in accordance with paragraph 25 of the GL 081-1 [...]

You believe that the SOR written by the ORD on 2016-06-30 was "frivolous, vexatious and a clear abusive [sic] of power" as you believe that the SOR was written "just two (2) days after being interviewed as a result of [the Applicant's] complaint to the College of Dieticians. [...]"

[Y]ou are grieving the SOR in general and implying that its existence is a form of retaliation against you by the ORD for reporting her to the College of Dieticians (COD) and for submitting a complaint against you through the grievance process.

[39] The Deputy reasonably found the harassment allegation was unfounded.

[40] The Applicant takes issue with Deputy's failure to address the allegation in the '286 Grievance that the SOR filed on June 30, 2016, had an improper purpose and was not filed in a timely manner, contrary to the requirements found in *CD 568-1*.

[41] I find the Deputy addressed this issue in a reasonable manner. She acknowledged the Applicant's implication that the SOR was a form of retaliation against him by the ORD; however, she also noted that the SOR may have been filed because the ORD felt the Applicant was retaliating against her. In that sense, the SOR was filed in a timely manner because many of the dated facts were meant to provide context for more recent events, including the ORD having felt harassed and stalked the day prior to the SOR being filed. The Deputy cited section 6 of *Commissioner's Directive 568-2, Recording and Sharing of Security Information and Intelligence*, as the proper basis for the SOR:

6) The [SOR] will normally be used in the following circumstances:

- a. when staff observe activities, behaviours or receive information that they consider to be significant or out of the ordinary
- b. when staff receive information or observe behaviours that they consider to be of a potentially sensitive nature
- c. to identify offender associates, affiliates, incompatibles and contacts.

[42] Similarly, the Applicant also takes issue with the Deputy's failure to address the allegation in the '285 Grievance that the ORD was in breach of subsection 18(a) of *CD 060*. That provision provides:

18. An employee has committed an infraction, if he/she:
 - a. fails to properly safeguard all documents, reports, directives, manuals, or other information of the Service;

[43] I also find that the Deputy addressed this issue in a reasonable manner. She noted that the Applicant had already been in contact with CSC regarding the improper disclosure of his personal information, that the disclosure was accidental and that the ORD had been reminded of her responsibility to protect personal information. Given that corrective action had already been implemented, that issue required no further action.

[44] Regarding the fact that the Deputy did not specifically mention *CD 060* or *CD 568-1*, reasons provided for the decision need not contain every argument or statutory provision, and need not make an explicit finding on each constituent element leading to a final conclusion, so long as they allow the reviewing court to understand why the decision was made and whether it is within the range of acceptable outcomes (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). Such is the case here.

[45] Lastly, the Applicant argues that the SOR was invalid because it was never signed by the ORD's supervisor. This argument was never raised in any grievance even though the Applicant had a copy in his possession. It was not necessary for the Deputy to address issues not raised by the Applicant.

[46] The Deputy's decision was reasonable.

[47] The Respondent seeks \$500 in costs to follow the event. However, the Applicant has been successful in part in his grievances and his concerns with respect to his privacy and the ORD's conduct are not without some merit. I find that costs are not warranted in this case.

JUDGMENT in T-732-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;
2. No costs are awarded.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-732-17

STYLE OF CAUSE: CARL LEONE V THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

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