Federal Court  Cour fédérale

Date: 20211118

Docket: T-820-19

Citation: 2021 FC 1264

Ottawa, Ontario, November 18, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

MITCHEL TIMOTHY NOME

Applicant

and

ATTORNEY GENERAL OF CANADA
(CORRECTIONAL SERVICE OF CANADA)

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mitchel Timothy Nome, has applied for judicial review of an April 18, 2019 disciplinary decision by an Independent Chairperson (ICP) for the Correctional Service of Canada (CSC) finding the Applicant guilty of possessing contraband goods at Stony Mountain Federal Institution (SMI) contrary to section 40 of the *Corrections and Conditional Release Act*, SC 1992 c 20 [*CCRA*] and sentencing him to a $30 fine (the Decision).

[2] The Applicant seeks to have the Decision set aside and the disciplinary offence withdrawn. The amount of the fine was not contested directly on judicial review although if the Decision is set aside that would negate the fine. The Applicant also seeks an order that CSC expunge all references from its files, including the Applicant's file, in relation to the conviction for the disciplinary offence and return the $30 fine paid, as well as any lost or reduced wages arising from the conviction.

[3] In the alternative, the Applicant asks that a new hearing be ordered and that CSC be required to provide proper disclosure to the Applicant, including but not limited to the video surveillance footage of the incident.

[4] The respondent seeks to have the application dismissed with full costs.

II. **Decision under Review**

[5] At the conclusion of the disciplinary hearing, based on what he had heard from the officers that testified and the arguments of the parties, the ICP found the Applicant guilty of the offence of being in possession of contraband contrary to subsection 40(i) of the *CCRA*.

[6] As no written reasons were provided, it is necessary to rely on the transcript of the hearing to ascertain the reasons for the Decision, to review the evidence and consider any relevant rulings made during the hearing.

[7] The following facts are taken from a combination of the transcripts of the hearing, the memorandums of the parties and documents in the Certified Tribunal Record.

III. **Background Facts**

[8] The Applicant is an inmate with a Dangerous Offender Designation, serving an indeterminate sentence. At the relevant time, he was incarcerated at SMI for assault causing bodily harm. He was transferred to Bowden Institution on December 10, 2020.

A. *Events leading to the disciplinary offence*

[9] On January 17, 2019, the Applicant was outside in the SMI North Courtyard while working his job as a cleaner. The Applicant was the only person in the Courtyard. He was observed by Officer Kardal fishing something on a line". Thereafter, Officer Kim Karish seized a small package from the Applicant's pocket. The package was subsequently found to contain two 150mg Bupropion pills. Bupropion is an anti-depressant and is considered contraband where its possession is not authorized by the institution. It is uncontested that the Applicant did not have a prescription or an authorization for the Bupropion.

B. *The January 30, 2019 Serious Institutional Charge and the Applicant's Disclosure Request*

[10] On January 30, 2019, a serious institutional charge of Possession of Contraband, contrary to subsection 40(i) of the *CCRA*, was instituted against the Applicant with a hearing date of February 14, 2019. This is the charge underlying the Decision.

[11] The Inmate Offence Report and Notification of Charge form (the Offence Report) containing the charge was given to the Applicant on January 30, 2019 to notify him of the charge. The Applicant then made written requests for disclosure of the observation reports of the officers involved in the incident, a DVD copy of two videos of January 17, 2019 being the Healthcare Centre from 10:00 to 11:00 a.m. and the North Courtyard video of the Applicant from 10:00 to 10:30 a.m. In addition the Applicant requested copies of the SORs, which are statement/observation reports, made by Officers Karish, Kardal and Van Gerwen in relation to the incident, the Security Intelligence Officer (SIO) report and Drug Identification Memo of Ms. Elyk as well as photographs of the seized material, including the packaging.

[12] The Applicant requested a copy of the lab test results for the 2 pills which was coupled with a request that the charge be dismissed as he was not told what the pills were. He said that CSC "jumped the gun".

[13] The Applicant also made a written request that Officers Karish, Kardal, and Van Gerwen be called to testify at his hearing.

C. *The Disclosure Memo to the Applicant*

[14] On February 8, 2019, the Applicant was provided with a memo responding to his requests for disclosure and that witnesses be called at his hearing. The Applicant had requested that Officers Kardal and Van Gerwen provide testimony but the response memo indicated that the only evidence to be called on behalf of the institution was to be the oral testimony of Officer Karish, photographs of the seized material and the drug identification memo. The Applicant's

other requests for disclosure were denied but he was advised that he could seek any other information by requesting it from the applicable department and/or through an Access to Information and Privacy request.

[15] The request for video tapes was denied on the basis that they need not be provided simply because they were requested and that procedural fairness required CSC to consider the request and disclose the video where it contains information that is relevant to the disciplinary matter. It was determined that for the offence in question "there would be no video that would be relevant to the Disciplinary Offence CCRA 40(i) "is in possession of, or deals in, contraband". The Charging Officer's "Description of Incident" and photographed evidence is sufficient to determine that video is not required to support the charge."

[16] The Applicant was provided with the drug photographs and identification memo. He was not provided with any video footage. Subsequently, he turned down the ICP's offer at the hearing for his legal counsel to review the CCTV footage with the ICP. The Applicant was also not provided with the written reports that the arresting officers made because the respondent was not going to be putting them before the decision-maker.

D. *February 14, 2019 hearing - Day 1*

[17] On February 14, 2019 the hearing began. The Applicant pled not guilty and repeated his request for disclosure. He indicated he would be submitting a motion for dismissal based on the non-disclosure and that an Informal Resolution had already been attempted and was successful before the charge was laid. The ICP adjourned the hearing to February 21, 2019 to enable the

Applicant to get his motion organized, the institution to organize witnesses and the ICP to consider various unspecified matters.

[18] On February 19, 2019 the Applicant submitted his motion for dismissal of the charge. The basis for the motion was that (1) there had been an informal resolution; (2) he was not informed that he would be institutionally charged and if he had been he would have taken steps to preserve all the evidence; (3) there was a 14 day delay in charging him, contrary to section 26 of Commissioner's Directive #580; (4) there was unreasonable delay for the date of his first appearance; (5) there is video evidence that exists of the incident that shows he was minding his own business, performing his duties in the Courtyard and the alleged contraband allegedly seized from him is in fact NOT what was allegedly seized from him; (6) the SDHA (Nordin) is illegally and improperly denying him access to evidence in the possession of CSC/SMI/CMO - Note: the balance of the 6th allegation is libelous against the SDHA and will not be repeated here; (7) more libelous personal allegations are made against officers which will not be repeated; (8) there is an allegation that Officer Kardal filed a vexatious retaliation charge against the Applicant; (9) the Applicant is being denied access to a document scanner which is needed to prepare his case for the tribunal and other anticipated actions; (10) video will show the Applicant was not fishing; (11) no evidence has been provided to the Applicant.

[19] Prior to February 21, 2019 the matter was further adjourned to February 28, 2019. Subsequently it was adjourned to April 4, 2019 at which time it proceeded.

[20] On March 5, 2019 the Applicant was provided with a Memo from the Serious Disciplinary Hearing Advisor (SDHA), Ms. Nordin, indicating that evidence to be presented at the hearing on April 4, 2019 would be the oral testimony of Officer Karish and SIO Elyk, as well as Officers Van Gerwen and Kardal - if called upon by the ICP. Photographs of the physical evidence and the SIO drug identification memo were noted to have been previously provided to the Applicant.

E. *April 4, 2019 hearing - Day 2*

[21] On April 4, 2019 the hearing resumed with the Applicant being assisted by a Legal Aid articling student, acting as duty counsel. The ICP opened with a ruling on the Applicant's motion, which it denied. The reasons given were that they had reviewed the motion but were satisfied that the matter could proceed with the oral testimony of the charging officers, photographs of the evidence and the Drug Identification Memorandum. The ICP also noted that the Applicant could appeal the denial for review by this Court.

[22] The hearing then began on the merits of the charge against the Applicant. The Institution called two witnesses: SIO Elyk to speak to the Drug ID memo and photographs and charging Officer Karish to speak to the issue of whether there was informal resolution.

[23] At the end of Officer Karish's testimony, the SDHA indicated they would not be calling any further evidence.

[24] The Applicant objected, saying that he wanted to hear from charging Officer Kardal. The SDHA indicated that Officer Kardal was not available and would not be called. The ICP indicated they wanted to hear from Officer Kardal as their testimony would be important.

[25] Taking into account the non-availability of Officer Kardal and the importance of Passover to the Applicant, the hearing was adjourned to April 18th, 2019.

F. *April 18, 2019 hearing - Day 3*

(1) Fishing Line and Contraband

[26] When the hearing reconvened, Officer Kardal testified regarding the events that led to the charges against the Applicant. Briefly, Officer Kardal said that he was working as an escort officer that day and he left one area (Healthcare) to go to checkpoint one. On the way he saw the Applicant facing south toward Unit 4. Officer Kardal crossed in front of the Applicant and saw in his hands a fishing line with a roll of toilet paper at one end. The Officer proceeded into the checkpoint and went around the corner toward Unit 1 to have another look at what the Applicant was doing. On stepping out of the checkpoint the Officer saw the Applicant throw the toilet paper roll onto the roof of the walkway and then pull the line down and throw it up again.

[27] The Officer then went back into checkpoint one, called Healthcare and asked the officers to get a key so that the Applicant could be removed from the yard.

[28] Officer Kardal testified that the Applicant was removed from the yard and taken straight into Healthcare where Officer Karish searched him and found saran wrap in the his pocket. When she asked the Applicant whether he knew what was in the package he had replied "probably pills".

[29] The ICP questioned Officer Kardal on details. The ICP confirmed with the Officer that he was present during the search of the Applicant and checked what time it occurred. The Officer stated it was after 10:30 a.m. and before 11:00 a.m. as it was before lunch lockup. After the search was done in Healthcare, the fishing line was put in the garbage by the Officer and thrown out.

[30] On follow-up questioning by the SDHA it was confirmed that the Applicant was the only one in the yard at the time and that the "fishing line" was not a rod and pole but rather a roll of toilet paper with a long piece of fabric hanging from it so that the roll could be thrown up and pulled back.

[31] The ICP confirmed that it was unknown whether the Applicant already had the items in his pocket or if they were fished by him. The Officer noted that typically, when inmates fish, it's for contraband and in any event, it's suspicious behaviour. It was confirmed by Officer Kardal that he did not know whether anybody was on the roof at the time of the fishing.

[32] After asking the ICP to ask the Officer whether he "in fact asked me to pull this line from a rain gutter and hand it to him at the door when he was maybe ten feet away". Upon the Officer

denying that allegation, the Applicant requested the video to show that there was a “contradiction in [the Officer’s] evidence”.

[33] The ICP noted that the Applicant was not charged with fishing, the charge was being in possession of contraband found in the Applicant’s pocket.

[34] The Applicant told the ICP it was important to see the videos because the institution was alleging there were other fishing lines and one of them contained methamphetamine which the Applicant said they were trying to associate with him.

[35] The ICP confirmed with Officer Kardal that when he went through the garbage there was only one fishing line as well as garbage such as apples and banana peels. When asked by the ICP at the suggestion of the Applicant, the Officer did not recall seeing a fishing line hanging off the roof.

(2) Gangs, Duress and Informal Resolution

[36] The Applicant’s counsel confirmed with Officer Kardal that gangs, which are known to be violent, were present in the institution and that drugs enter the jail. When queried by the ICP as to the purpose of the questions it was said to be part of trying to establish a defence of duress.

[37] The questions then turned to whether or not there had been an informal resolution between the Applicant and Ms. Reese-Bergen, the Chief of Healthcare. Officer Kardal said he saw them having a conversation at about 4:00 o’clock in the afternoon but did not know what

was said between them. As to informal resolution, the Officer noted that he did not lay the charge against the Applicant.

[38] Returning to violence in the institution, there was reference made to a very recent murder of an inmate in the maximum security unit, a very serious stabbing of an inmate said by the Applicant to have been two dozen times, the prior weekend and another inmate who was killed a week prior.

[39] Questions were then put to Officer Kardal about the package retrieved from the Applicant's pocket. It was confirmed that he saw Officer Karish pull something out of the Applicant's pocket. Officer Kardal was not the searching officer but he did confirm he was a witness to the frisk search. In reply to a question from the ICP, which originated with the Applicant, Officer Kardal indicated that he was not with Officer Karish when she prepared the items taken from the Applicant for evidence as she had left Healthcare by then. Officer Kardal confirmed to counsel for the Applicant that he was not able to view what was going on or tell what was in the package.

(3) Request for Rebuttal Witnesses

[40] Following a labour code discussion, the Applicant indicated a desire to call rebuttal witnesses. The ICP however indicated that it wasn't clear how it would be relevant. It was suggested that they get to closing arguments. But counsel for the Applicant submitted they would like to call some witnesses "so it wasn't just the institution's witnesses".

[41] The ICP said they were able to make sense of it and they didn't need any more witnesses as the case was pretty clear. The witness just observed the Applicant doing some suspicious activity and allegedly saw the Applicant throwing something.

[42] At that point counsel for the Applicant said "Well -- no. Hold on. That's –" at which point he was interrupted by the ICP saying "I don't want to spend the whole day on this" and counsel's reply was "Well, neither do I, and as we said on the first day, if we had the surveillance footage (inaudible)."

[43] The ICP stated "there won't be any surveillance footage, there won't be any reports, there won't be any notes" followed by "who else would you like to add here as a witness?"

[44] After some further dialogue between counsel and the ICP as to the possible defence of duress and the need to call witnesses for it, the ICP invited counsel to tell him about the duress. Counsel stated that they would like to have the Applicant testify to establish the basis for the duress argument. When it was suggested they would also like somebody from the institution "to corroborate aspects of the Applicant's story" the ICP said "No" - He would listen to the story first and then, if he felt there was a requirement to bring a witness afterward maybe to corroborate but he would like to hear the evidence.

[45] Counsel indicated again that it was anticipated that the Applicant would testify. The Applicant added that he had a document authored by Coral Thompson, "discussing some of the stuff here right here."

(4) The ICP doesn't want to hear anything else

[46] Following the foregoing exchange, the ICP stated to the Applicant that on the 17th of January:

> -- you were observed -- we heard -- suspicious activity in the yard, we heard from a witness. And then from there you were brought back to Healthcare and then you were searched and you were found in possession of two pills in your pocket. They were analyzed, Officer Elyk testified to that. Kim Karish testified to the fact that she found the pills when she did a frisk search. And now this officer kind of -- he testified to tell us what led to you being brought back to the unit and frisk searched. I don't want to hear anything else.
>
> (Transcript April 18, 2019, page 223, Lines 3 - 12)

[47] Notwithstanding the ICP's reluctance to hear any more evidence, the Applicant was permitted to testify following a brief adjournment. The Applicant's evidence will be discussed later.

IV. **The Issues**

[48] The Applicant submits that the issues are:

1. Did SMI fail to provide the Applicant with disclosure of information related to his institutional charge as required by section 27 of the *CCRA* and the requirements of procedural fairness?

2. Did the ICP fail to comply with paragraph 31(1)(a) of the *CCRR* by not letting the Applicant call relevant witnesses?

3. Did the ICP fail to conduct the hearing according to the principles of fairness and natural justice by refusing to consider the Applicant's defence of duress?

[49] The respondent submits that each of the above matters were reasonably and fairly handled in light of the record.

V. **The Standard of Review**

[50] The Applicant submits that the first two issues are questions of procedural fairness while the third issue raises a question of law. As such, the Applicant states all the issues are reviewable on a standard of correctness.

[51] The cases cited by the Applicant pre-date the recent decision by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] where the standard of review for administrative decisions was extensively re-examined. It is now the case that there is a rebuttable presumption that whenever a court reviews administrative decisions the standard is reasonableness. This presumption can be rebutted in certain situations, none of which apply in this matter : *Vavilov* at para 17.

[52] Should there be any doubt, reasonableness as the standard for issues arising under the jurisdiction of the ICP has recently been confirmed by Mr. Justice Pamel in *Perron v Canada (Attorney General)*, 2020 FC 741 [*Perron*] at para 46.

[53] In reasonableness review, the onus is on the applicant to demonstrate the Decision is unreasonable. This task has been described in *Vavilov* at para 100 as follows:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are

> sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[54] The third issue raises the question of whether the hearing was conducted in a manner that was procedurally fair. This attracts a standard of review that is as close as possible to the standard of correctness: *Perron* at para 48.

[55] In considering whether or not the requirements of procedural fairness have been met the ultimate question to be answered by a reviewing Court is whether an Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at para 56.

VI. **Procedural Fairness requirements in inmate disciplinary hearings**

[56] In *Perron*, at paragraph 52, Justice Pamel articulated the principles of procedural fairness that apply in disciplinary proceedings. Drawing from a variety of case law, Justice Pamel provided an extensive list of principles:

> [52] In *Hendrickson v Kent Institution*, [1990] FCJ No 19, 32 FTR 296, 9 WCB (2d) 131 [*Hendrickson*], Judge Denault presented a summary of the principles applicable to the prosecution of disciplinary offences in prison:
>
> > The principles governing the penitentiary discipline are to be found in *Martineau (No. 1) (supra)* and

No. 2; Re Blanchard and Disciplinary Board of Millhaven Institution; Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution, and may be summarized as follows:

> 1. A hearing conducted by an independent chairperson of the disciplinary court of an institution is an administrative proceeding and is neither judicial nor quasi-judicial in character.
>
> 2. Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.
>
> 3. There is an overall duty to act fairly by ensuring that the inquiry is carried out in a fair manner and with due regard to natural justice. <u>The duty to act fairly in a disciplinary court hearing requires that the person be aware of what the allegations are, the evidence and the nature of the evidence against him and be afforded a reasonable opportunity to respond to the evidence and to give his version of the matter.</u>
>
> 4. The hearing is not to be conducted as an adversary proceeding but as an inquisitorial one and there is no duty on the person responsible for conducting the hearing to explore every conceivable defence, although there is a duty to conduct a full and fair inquiry or, in other words, examine both sides of the question.
>
> 5. It is not up to this Court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly.

> 6. The judicial discretion in relation with disciplinary matters must be exercised sparingly and a remedy ought to be granted "only in cases of serious injustice".
>
> [Footnotes omitted in original]
>
> [Emphasis in original]

[57] In several subsequent paragraphs Justice Pamel set out other principles applicable to hearing applications for judicial review. Over paragraphs 54 to 64, and paragraph 87, these include the following statements of note which I have somewhat abbreviated and, as they may be found in *Perron*, from which I have removed all the internal citations:

- the disciplinary process is flexible when it comes to the presentation of evidence;
- the inquisitorial nature of the process involves an obligation for the independent chairperson to question witnesses, including the inmate charged with the offence;
- because of the inquisitorial nature of the process, the independent chairperson has considerable flexibility in procedural matters. For example, the independent chairperson has discretion in the presentation of evidence, provided that it is done flexibly and in a manner consistent with the principles of natural justice and procedural fairness;
- the independent chairperson must balance the two primary objectives applicable. On the one hand, a fast and efficient disciplinary proceeding is an important objective since it ensures the maintenance of order and discipline in the correctional system;
- on the other hand, the independent chairperson has an obligation to act fairly in conducting proceedings and to comply with the requirements imposed by Act and its regulations;
- in particular, the independent chairperson must respect the inmate's right to make full answer and defence against the allegations, without, however, elevating the disciplinary hearing to a criminal or quasi-judicial proceeding;
- this right includes the opportunity to make representations and question witnesses and the obligation to provide the inmate with a summary of the evidence to be presented in support of the charge;
- the failure to disclose evidence to the inmate in support of the charge is a violation of the right to make full answer and defence;

- although a breach of procedural fairness or another reviewable error may constitute grounds for judicial intervention, the reviewing court must still accord deference to the decision since its intervention is only justified in cases of "serious injustice";
- care must be taken not to impose procedural safeguards stemming from the criminal context where the objective and the role of proceedings are different from those of disciplinary proceedings. On this point . . . the procedural fairness requirements are less stringent for disciplinary offences in correctional facilities;
- the accused's right to defend themselves is not the same as in criminal matters; it is assessed against the requirements of procedural fairness.

[58] In reviewing the Decision, I will keep in mind these principles, together with the provisions of the *CCRA*, the *Corrections and Conditional Release Regulations,* SOR/92-620 [*CCRR*] and the Commissioner's Directive 580.

VII. **Did SMI fail to provide the Applicant with the disclosure required by section 27 of the *CCRA* and the requirements of procedural fairness?**

[59] The Applicant submits that he and the charging Officer had very different accounts of their interaction with the pills.

[60] The Applicant's requests for disclosure of written reports prepared by the involved Officers and any video surveillance were denied by the SDHA on February 8, 2019 on the basis that the institution is only obligated to disclose the documents they intend to introduce at the hearing.

[61] This position is supported by section 27(1) of the *CCRA* which provides that in relation to a decision to be taken about an offender they shall be given, a reasonable period before the

decision is taken, all the information "to be considered in the taking of the decision or a summary of that information."

A. *Video Surveillance Tapes*

[62] The February 8, 2019 written response to the Applicant's request for disclosure of the video tapes said that procedural fairness requires CSC to consider the request and disclose the video where it contains information that is relevant to the disciplinary matter. Relevant was said to refer to something "closely connected or appropriate to what is being done or considered" or "having significant and demonstrable bearing on the matter at hand".

[63] It was determined by the SDHA that for the offence in question "there would be no video that would be relevant to the Disciplinary Offence CCRA 40(i) "is in possession of, or deals in, contraband". The Charging Officer's "Description of Incident" and photographed evidence is sufficient to determine that video is not required to support the charge."

[64] The Applicant submits that he and the charging Officer had very different accounts of their interaction when the pills were seized, including specific actions taken and words spoken by the Applicant which the video would resolve. He further submits that if disclosure is limited to the narrow interpretation of section 27 taken by the institution this will allow the institution to avoid having to disclose any prejudicial information by simply choosing not to introduce it to the tribunal.

[65] However, a problem was identified by the ICP during the April 4, 2019 hearing. The ICP confirmed that although the SDHA had requested the videos, the Security Intelligence Unit, with the approval of the Director General of Security, were not compelled to provide security intelligence reports or CCTV footage for the purpose of disciplinary hearings: Transcript April 4, 2019, page 29 lines 6 - 9. In other words, it was not possible for the SDHA to obtain the videos.

[66] Commissioner's Directive 580, item 34(d), provides that after a not guilty plea an inmate will be given a reasonable opportunity to examine exhibits and documents to be considered in the taking of the decision, *unless* there are security concerns. It appears therefore that even if the videos had been entered as exhibits, with the existing security concerns in place the Applicant would not have been able to examine them.

[67] At the hearing, after the ICP identified the security issue with providing the video evidence they offered to the Applicant, as an alternative, the option that the Applicant's legal counsel be provided with access to the CCTV footage to review with the ICP. The Applicant rejected that solution and counsel never raised it during the hearing at any time when he was arguing the importance of disclosing the video footage. In that respect, failure to review video footage was ultimately caused by the Applicant's actions.

B. *Motion for dismissal ruling*

[68] At the hearing on April 4, 2019, the ICP indicated to the Applicant that the rules of evidence in criminal matters do not apply in disciplinary hearings. The ICP also stated that as the

chair of the disciplinary hearing he could admit any evidence he considers reasonable or trustworthy. These statements are taken from section 37 of Commissioner's Directive 580.

[69] In dismissing the Applicant's motion for dismissal of the charge based on faulty disclosure, the ICP discussed the video issue. The reason for doing so was that he was satisfied they could proceed with the oral testimony of the charging officer, photographs of the evidence and the drug identification memo.

[70] The Applicant submitted to the ICP during his motion for dismissal that he had taken the issue of procedural fairness and disclosure of evidence to the Supreme Court of Canada. He stated that he had "won against CSC for video evidence".

[71] The case was not submitted to the Court and no citation for it was provided by the Applicant. A search of the Supreme Court of Canada website did not turn up the case. Therefore, I am unable to consider or comment upon it.

C. *Written Reports*

[72] The Applicant submits that in the context of a serious disciplinary hearing, where the institution intends to call oral testimony, the offender is entitled to the written reports (SORs) of those officers (redacted as appropriate) prior to the hearing as a summary of what they can be expected to testify to. Failure to provide these reports did not meet the requirements of section 27 and the Applicant says that alone is enough to render the hearing procedurally unfair.

[73] I disagree.

[74] Determining which information SMI is required by section 27 of the *CCRA* to give to the Applicant depends on the information that was taken into account in the decision to charge: *Perron* at para 109.

[75] According to the Offence Report, the information underlying the decision to charge was that the Applicant had been observed fishing something on a line from/to Unit 4 and upon return to the HCC unit the charging officer, Kim Karish, frisk searched the Applicant and found in his pant pocket 2 pills that were not his.

[76] The documentation that was to be provided to the ICP, being the drug identification memo and the photographs of the physical evidence that was seized, were provided to the Applicant. Other than that, only oral evidence was put forward at the hearing.

[77] The Applicant was advised of these facts in the Memorandum dated March 5, 2019, well in advance of the hearing. From that he knew the case to be met and he had a full and fair chance to respond. For the same reasons as discussed with respect to the videos, as SMI did not intend to rely on the written reports of the Officers, I find the ICP was correct when he did not require them to be disclosed to the Applicant.

[78] The Applicant had raised the issue of lack of disclosure before the ICP as a preliminary matter by filing a motion to dismiss on the basis that he ought to have been provided with the written reports of the officers. The ICP denied the motion.

[79] As with the request for the videos, the Applicant raised the issue of the written reports several times throughout the hearing. Each time he was advised by the ICP that the rules of evidence in criminal law matters do not apply in disciplinary hearings and the written reports would not form part of the evidence.

[80] The Applicant submits that where it can be reasonably demonstrated that some evidence in the exclusive possession of the Institution be highly relevant to assist the trier of fact in determining a contested and material issue that absent compelling reason to the contrary the evidence should, at least in some form, be disclosed to the inmate and be able to be presented at the hearing.

[81] The Applicant did not provide a book of authorities but did provide a list of authorities. Where case references are made in the Applicant's Memorandum, pinpoints were provided. No authority was provided by the Applicant for this submission.

D. *Conclusion*

[82] Although the ICP denied the Applicant's motion to dismiss for lack of disclosure, he continued to raise it throughout the hearing.

[83] The Applicant has not shown the disclosure he did receive was procedurally unfair. He knew the case against him from the Offence Report and the disclosed documents. The Applicant was entitled to, and did, question the Officers who testified. He also gave his own evidence and his counsel made submissions to the ICP.

[84] The Applicant could not be provided with video footage and he turned down the ICP's offer at the hearing for his legal counsel to review the CCTV footage with the ICP. That begs the question of how important the video actually was to the Applicant.

[85] I find for all the foregoing reasons that SMI did not breach the Applicant's right to procedural fairness. SMI provided sufficient disclosure to the Applicant both prior to the hearing and during the course of the hearing.

[86] Although a breach of procedural fairness or another reviewable error may constitute grounds for judicial intervention, as the reviewing court I must still accord deference to the decision since my intervention is only justified in cases of "serious injustice": *Perron* at para 63.

[87] Considering the facts, the law and the underlying record, I find that even if the hearing was procedurally unfair to the Applicant, which I have found it was not, I do not find that any serious injustice has occurred. That the Applicant disagrees with the outcome and has complaints about process does not create a serious injustice.

VIII. **Did the ICP fail to comply with paragraph 31(1)(a) of the *CCRR*?**

[88] Paragraph 31(1)(a) of the *CCRR* provides that "the person who conducts a hearing of the disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmates behalf and examine exhibits and documents to be considered in the taking of the decision."

[89] The Applicant submits that although the ICP is more inquisitor than Judge, the hearing is nonetheless structured in a semi-adversarial fashion which makes the process very different than a purely administrative decision.

[90] This submission overlooks several of the fairness principles set out earlier including:

- Except to the extent there are statutory provisions or regulations having the force of law to the contrary, there is no requirement to conform to any particular procedure or to abide by the rules of evidence generally applicable to judicial or quasi-judicial tribunals or adversary proceedings.
- There is no duty for the person responsible for conducting the hearing to explore every conceivable defence although there is a duty conduct a full and fair inquiry or, in other words, examine both sides of the question.
- Care must be taken not to impose procedural safeguards stemming from the criminal context where the objective and the role of proceedings are different from those of disciplinary proceedings. On this point . . . the procedural fairness requirements are less stringent for disciplinary offences in correctional facilities.

[91] The Applicant testified, and included in his motion to dismiss, that shortly after the incident leading to the charge, an informal resolution had been attempted and was successful. If an informal resolution was successful then the serious incident charge must be dismissed because

subsection 41(2) of the *CCRA* states that where an informal resolution is not achieved the institutional head may issue a charge of a minor disciplinary offence or a serious disciplinary offence.

[92] The Applicant said this occurred in a meeting with the supervisor of the Medical Unit, Andrea Reese-Bergen. The Applicant also said the Officers Karish and Kardal were present.

[93] Officer Kardal confirmed to the ICP that he informed Officer Karish that he saw the Applicant fishing in the yard. He also confirmed that he was present during the search by Officer Karish of the Applicant when something was discovered in his pocket.

[94] The Applicant wished to call Ms. Reese-Bergen to attest to the fact that an informal resolution was done with her. He submits that "the refusal of the ICP to call her [and other witnesses] was in flagrant disregard of the CCRR" and "it significantly prejudiced the Applicant's ability to advance a valid defence"

[95] The purpose of calling Ms. Reese-Bergen related solely to the issue of whether, as stated by the Applicant, an informal resolution had been accomplished.

[96] The Applicant submits that section 41 of the *CCRA* indicates a charge can only be laid after an informal attempt at resolution has occurred. No authority was cited for this proposition.

[97] Section 5 of Commissioner's Directive 580 addresses informal resolution, including attempts at informal resolution. It specifies in paragraph 5a that it will "be considered by the staff member laying the charge as an option, at any point in the process, with the agreement of the parties involved." (My emphasis)

[98] This provision confirms, as noted by the ICP, although contested by the Applicant, that informal resolution is to be considered by the staff person laying the charge. This accords with the testimony of charging officer Karish, which is set out below.

[99] Officer Karish was directly asked by the ICP whether she attempted an informal resolution with the Applicant regarding the pills. Her reply was quite detailed:

> MS. KARISH: Yes. I asked him if he had anything to which he replied, "No, I have nothing in my pockets." I allowed him three different times to produce the evidence or what he had in his pocket because I thought we had a very good rapport. And then the third attempt when he attempted to hide it within his hand, that's when I had to physically reach into his pocket and take it out. So there was an opportunity for Mr. Nome to come forward with the product that he had had with an explanation and he chose not to.
>
> THE CHAIRPERSON: Okay. Because on the charge sheet itself, Officer Karish, it says that no informal resolution was attempted, that's why I'm a little --
>
> Karish: Well, in terms of informal resolution, it would be after the pills were found there would be a discussion on what they were and why he had them and then a decision could have been made based on a conversation in terms of what the reason was, how he came about them and then we could have used discretion in how we were going to proceed.
>
> Unfortunately, Mr. Nome denied the whole presence of any kind of contraband, so that didn't really allow for informal resolution based on what it was -- had it been something different and had it not been pills, had it been a phone number, had it been something like that then certainly based on my experience -- and Mr. Nome has

> had interactions in the past where I have informally resolved things (inaudible).
>
> (My emphasis)

[100] The ICP accepted the detailed testimony of Officer Karish that informal resolution was considered by her but she concluded it was not possible in this case.

[101] Officer Karish also testified that the Applicant may have been trying to do informal resolution with Ms. Reese-Bergen to secure his job because she does the hiring and firing but she had no authority over the charges being laid by correctional officers.

[102] When subsequently asked to explain in more detail the procedure of how the charge came about Officer Karish indicated she thought the seriousness of the contraband was probably the most significant piece of evidence because of the harm it can do within the institution. She stated that she and the Applicant had done informal resolution in many instances but in this case, considering the Applicant's continuation of denying that he had the pills and the seriousness of him perhaps distributing them caused her to feel that the charge was necessary.

[103] It is not for this court to second-guess the fact-finding of the ICP. Keeping in mind the principle that it is not up to this Court to review the evidence as a court might do in a case of a judicial tribunal or a review of a decision of a quasi-judicial tribunal, but merely to consider whether there has in fact been a breach of the general duty to act fairly I am satisfied that the refusal of the ICP to call Ms. Reese-Bergen was reasonable as, not being the charging officer, she had no authority under Commissioner's Directive 580 to conduct an informal resolution.

Under those circumstances, the ICP's refusal to call Ms. Reese-Bergen did not breach any duty of fairness owed to the Applicant.

IX. **Did the ICP fail to conduct the hearing according to the principles of fairness and natural justice by refusing to consider the Applicant's defence of duress?**

[104] The Applicant cites *Amos v Canada (Attorney General)*, 2018 FC 1242 [*Amos*] to say that the common-law defence of duress exists in the context of a prison disciplinary hearing.

[105] I agree that is an accurate statement.

[106] In considering whether the Applicant can avail himself of this defence Justice Roy in *Amos* at paragraph 69 noted that, as the Court put it in *R. v Ryan,* 2013 SCC 3 "(d)uress is, and must remain, an applicable defence only in situation (*sic*) where the accused has been compelled to commit a specific offence under threats of death or bodily harm."

[107] Evidence of threats of death or bodily harm are missing in the Applicant's case.

[108] The Applicant argued that he was under duress because gang members had been yelling at him to pick up the fishing line with the pills and he was afraid of being attacked if he disobeyed. He testified that he was going to be transferred into an area where he would be seeing those gang members and was therefore afraid for his life.

[109] No evidence of a pending transfer of the Applicant was put forward as part of this application.

[110] The Applicant submitted to the ICP that given these fears he "chose the lesser of two evils", which provides a "full excuse".

[111] The ICP concluded that the defence of duress did not provide a full excuse.

[112] The ICP remarked that he did not know if anybody was yelling at the applicant for sure, at which point he said to counsel "that's the duress you're talking about, right?" To which counsel replied "I'm talking about that he was being yelled at at that particular moment to take what we now know to be the Wellbutrin, right. So that raises the excuse of duress."

[113] The ICP found the excuse of duress was not raised because the Applicant had an opportunity to tell the officer when he came in "they yelled at me and I picked that up and here it is."

[114] In *L'Espérance v Canada (Attorney General),* 2016 FCA 306, [*L'Espérance*] the FCA noted that the ICP had found that the applicant in that case did not meet the third component of the defence of duress because he could have sought protection by talking to an officer and "[h]aving reached that conclusion, the independent chairperson was no longer required to continue his analysis to examine the last three elements of the defence of duress. He cannot be faulted for that omission. He was also convinced beyond a reasonable doubt that the respondent

had committed the alleged offence. The intervention of this Court is therefore not warranted.": *L'Espérance* at para 12.

[115] In this case, the ICP similarly found that the applicant could have provided his explanation about being pressured by gang members to an officer on the day of the incident but did not. The ICP reasonably accepted the testimony of the officers on this point. The ICP also expressed concern that the applicant's narrative and arguments did not add up. As such, the ICP was convinced beyond a reasonable doubt that the applicant committed the alleged offence.

X. **Summary**

[116] There was no breach of procedural fairness in the disclosure provided to the applicant. The institution appropriately provided the evidence that was to be considered by the decision-maker in the taking of the decision.

[117] The ICP noted several issues regarding inconsistencies in the applicant's testimony and accepted the officer's evidence on the disputed points. Having found that the applicant could have informed the officers of the threats as an avenue of escape from the duress he alleges he was under, the ICP's determination that the defence of duress was not made out was reasonable.

XI. **Conclusion**

[118] Based on my review of the transcript, considering the principles applicable to disciplinary hearings as well as the submissions of the parties, and taking into account the ICP's comments

regarding inconsistencies in the applicant's story, I find the Decision was reasonable and procedurally fair to the Applicant.

[119] The application is dismissed. The Respondent seeks costs and, as the successful party they, are entitled to their costs.

JUDGMENT in T-820-19

THIS COURT'S JUDGMENT is that:

1. This application is dismissed.

2. Costs are awarded to the Respondent.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-820-19
STYLE OF CAUSE:	MITCHEL TIMOTHY NOME v ATTORNEY GENERAL OF CANADA, (CORRECTIONAL SERVICE OF CANADA)
PLACE OF HEARING:	HELD BY WAY OF VIDEO CONFERENCE
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DATED:	NOVEMBER 18, 2021

APPEARANCES:

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