

Federal Court



Cour fédérale

Date: 20110510

Docket: T-1145-10

Citation: 2011 FC 537

Ottawa (Ontario), May 10, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

ERIC GALLANT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judicial review of a third level grievance rendered by Mr. Marc-Arthur Hyppolite, Senior Deputy Commissioner at Correctional Services Canada (CSC), on June 23, 2010, which upheld in part the Applicant's grievance.

1. Facts

[2] On March 15, 2010, the Applicant filed two third level grievances stating that the continuing delays in responding to his other grievances were deliberate and constituted an infringement by CSC on his right to use the complaint system.

A. Decision of the review tribunal

[3] The Commissioner addressed two grievances dealing with the same issue as per paragraph 46 of the *Offender Complaints and Grievances* (Directive 081). In both cases, the Commissioner concluded that the grievance was not treated in the allotted timeframe of 25 days, and as such, upheld that part of the grievance. Since the Applicant was provided, in the both cases, with the reasons for the delay, as per the applicable Directive, the Commissioner concluded that part of the grievance was unfounded.

[4] In his decision, the Commissioner also mentions that a significant increase in the volume of second-level grievances has hindered the Region's ability to respond in the allotted timeframe. Corrective measures have been implemented and an action plan has been put in place to address this issue.

B. Arguments of the parties

(1) Applicant's arguments

[5] The Applicant argues that CSC has breached its undertaking by failing to answer all complaints and grievances in a timely manner, as stated in Directive 081, and has compromised the proper grievance system.

[6] The Applicant states that CSC has an obligation to provide a grievance system that is fair and expeditious, as stated in sections 90 and 91 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA]. In his brief submissions, the Applicant argues that judicial intervention is warranted to ensure that CSC complies with its legal obligations as per the Directives, the CCRA and the Regulations.

[7] The Applicant is seeking the following orders: 1) that the Regional Head Quarter answer all grievances according to the applicable policies, 2) that the Regional Head Quarter put in place a system in compliance with the Directives, the CCRA and the Regulations, and 3) costs and punitive damages.

[8] At the hearing, the Applicant further relied on his exhibit B, a two page undated abstract from the Annual Report of the Office of the Correctional Investigator, which alludes to past recommendations and the performance of CSC in dealing with third level high priority grievances in

2006-2007, as evidence that the Respondent is in breach of his legal obligations to answer all complaints and grievances in a timely manner.

(2) **Respondent's arguments**

[8] The Respondent argues that because CSC properly followed the lawful procedures, with regards to the extension of timeline for a response, the third level decision was fair and reasonable. Furthermore, there are no other remedies available to the Applicant in these circumstances.

[9] The Respondent states that the applicable standard of review is that of reasonableness with regards to issues of fact and of mixed facts and law and correctness with regards to issues of natural justice and procedural fairness (*Bonamy v Canada (Attorney General)*, 2010 FC 153, 8 Admin LR (5th) 221) [*Bonamy*].

[10] The Respondent argues that the Commissioner did not err when he rendered his decision. The Commissioner relied on Directive 081, enacted pursuant to the CCRA. The Respondent states that the Commissioner reviewed the applicable law and applied it to the facts presented to him. The Respondent further contends that the proper procedures were followed to address the delays, as the Applicant received reasons for the delay and a date as to when to expect a response. There is no evidence to demonstrate that this delay was intended to sabotage the Applicant's right to use the complaint system.

[11] The Respondent then states that the decision was fair, as the Applicant's grievances were handled in accordance with the offenders' grievance procedures put in place in Directive 081. To refute the Applicant's argument with regards to the unfairness and the length of the offenders' grievance process, the Respondent mentions that the Applicant's grievances were not high priority and cites the case *Ewert v Canada (Attorney General)*, 2009 FC 971, 355 FTR 170 [*Ewert*], which deals with this issue.

[12] The Respondent argues that the Applicant was afforded procedural fairness as he was provided with reasons for the delays. The Respondent states that CSC followed paragraph 41 of Directive 081 and that there was no breach of procedural fairness. He also notes that the third level response came within the allotted timeframe and that there can be neither suggestion nor evidence that the Applicant's grievances were not taken seriously.

III. ANALYSIS

A. Questions in issue

[13] This case raises the following issue:

Did the Commissioner err in fact or in law when concluding that the Applicant's grievance should be upheld in part?

B. Standard of review

[14] The question of the standard of review of a third level offender's grievance is discussed in *Bonamy*, above, cited by the Respondent J. Mainville, states at paragraph 47 that:

Subsequent to *Dunsmuir v New Brunswick, 2008 CSC 9 [Dunsmuir]*, Federal Court decisions have found that a correctness standard applies to questions of procedural fairness and a reasonableness standard applies to questions of fact and of mixed law and fact.

[15] In this case, as the Applicant raises issues of procedural fairness, those have to be dealt with according to the standard of correctness. The application of the law to the facts has to be reviewed on the standard of reasonableness.

Did the Commissioner err in fact or in law when concluding that the Applicant's grievance should be upheld in part?

[16] Sections 90 and 91 of the *CCRA* describe the grievance process and state that:

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).
Access to grievance procedure

90. Est établie, conformément aux règlements d'application de l'alinéa 96u), une procédure de règlement juste et expéditif des griefs des délinquants sur des questions relevant du commissaire. Accès à la procédure de règlement des griefs

91. Every offender shall have complete access to the offender grievance procedure without negative consequences.

91. Tout délinquant doit, sans crainte de représailles, avoir libre accès à la procédure de règlement des griefs.

[17] Directive 081 determines the timeframes for the processing of grievances:

35. Decision-makers will respond to complaints and grievances in the following timeframes:

35. Les décideurs doivent répondre aux plaintes et aux griefs dans les délais décrits ci-après.

Complaint, First Level and Second Level

High Priority - Within fifteen (15) working days of receipt by the decision-maker.

Routine Priority - Within twenty-five (25) working days of receipt by the decision-maker.

Third Level

High Priority - Within sixty (60) working days of receipt by the decision-maker.

Routine Priority - Within eighty (80) working days of receipt by the decision-maker.

Plaintes, griefs au premier et au deuxième paliers

Prioritaires - Dans les quinze (15) jours ouvrables suivant la réception de la plainte ou du grief par le décideur.

Non prioritaires - Dans les vingt-cinq (25) jours ouvrables suivant la réception de la plainte ou du grief par le décideur.

Griefs au troisième palier

Prioritaires - Dans les soixante (60) jours ouvrables suivant la réception du grief par le décideur.

Non prioritaires - Dans les quatre-vingts (80) jours ouvrables suivant la réception du grief par le décideur.

[18] At paragraph 41 of the Directive, it is stated that :

41. If the Institutional Head, the Regional Deputy Commissioner or the Director of Offender Redress considers that more time is necessary to deal adequately with a complaint or grievance, the griever must be informed in writing of the reasons for the delay and of the date by which he/she may expect to receive the response.

41. Si le directeur de l'établissement, le sous-commissaire régional ou le directeur des Recours des délinquants juge qu'il a besoin d'un délai plus long pour traiter adéquatement une plainte ou un grief, il doit informer le plaignant par écrit des raisons de la prolongation du délai et de la date à laquelle il peut s'attendre à recevoir une réponse.

[19] In this case, the Commissioner informed the Applicant that delays could be incurred because of the number of demands. In such case, the Applicant would be provided with another response date, as per paragraph 41 of the Directive 081. As such, the Commissioner abided by his obligations under the Directives, the CCRA and the Regulations. In my opinion, CSC cannot be faulted because of a sudden increase in the number of grievances filed.

[20] The undated report cited by the Applicant references a situation that would have taken place between 1998 and 2006. It is therefore not relevant to the present case which is based on the treatment of two grievances filed in 2010.

[21] The Applicant argues that, in general, because of the delays incurred, CSC is not respecting its obligations under the Directives, the CCRA and the Regulations. In the case *Ewert* above, cited by the Respondent, the Federal Court discussed the issue of the delays in the offenders' grievance process. Justice Lemieux commented on undue delays in the grievance process of inmates and concluded at paragraph 39 that:

As pointed out by counsel for the Respondent whether the grievance system has been reasonably responsive from a timing perspective depends on the facts and circumstances of each particular case. There may well be contributing factors complicating the decision making process. I agree with the Respondent, the CSC inmate system on the evidence before me cannot be found presumptively flawed on account of undue delay in processing grievances.

[22] This comment from Justice Lemieux applies in this case. Even though Parliament intended for grievances to be dealt with in a relatively short timeframe, other factors, such as the number of grievances to be processed, can have an effect on this requirement. The facts and evidence before this Court do not permit us to conclude that undue delays rendered the process unfair and non-

expeditious or contrary to sections 90 and 91 of the *CCRA*. The appropriate procedures were followed and the Applicant was provided with another response date. The six month delay incurred in the present case needs to be assessed in the light of the applicable regulations and more precisely paragraph 41 of Directive 081, as well as the fact that the grievance was not of high priority. The decision rendered was both correct and reasonable, in that there were neither breaches of procedural equity, nor errors of facts or law.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
without costs.

"André F.J. Scott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1145-10
STYLE OF CAUSE: ERIC GALLANT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: April 13, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: May 10, 2011

APPEARANCES:

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