Federal Court  Cour fédérale

Date: 20130812

Docket: T-36-13

Citation: 2013 FC 861

Ottawa, Ontario, August 12, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

PATRICK DANIEL FISCHER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a third-level grievance decision rendered (grievance number U80A00033079) on August 24, 2012 [the impugned decision] by the Senior Deputy Commissioner [SDC].

[2] The self-represented applicant is a federally incarcerated inmate at the Mountain Medium Security Institution operated by the Correctional Service of Canada [CSC] in the town of Agassiz, District of Kent, British Columbia. The applicant is currently serving a life sentence for first degree

murder. The applicant's grievance was upheld in part but denied in relation to his request for a copy of the executive summary before the rendering of the decision and also denied in relation to the applicant's request for "file corrections". The SDC determined that this issue had already been addressed and subsequently denied during a previous third-level grievance process instigated by the applicant in 2006 (response to third-level grievance V80A00015682).

[3] I pause to mention that the grievance procedure to resolve inmate complaints regarding actions or decisions made by CSC staff members is established in section 90 of the *Corrections and Conditional Release Act*, SC 1992, s 24(1),(2) [CCRA]. Sections 74 to 82 of the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations] outline the four stages in the grievance procedure, which is intended to fairly and efficiently address inmate concerns. The first stage in the procedure involves an initial complaint; the second stage is what is known as the "first-level grievance", which is presented by way of a written grievance to the head of the institution in question; the third stage is the "second-level grievance" and consists of an appeal to the head of the region; and the fourth stage is the "third-level grievance", which is a further and final appeal that is made to the Commissioner. Finally, after the third-level grievance has been completed and the internal process has thus been exhausted, applications for judicial review may be brought.

[4] The crux of the applicant's attack today against this 2012 decision turns on the information contained within his correctional files that he alleges as being inaccurate, out-of-date, unsupported by evidence, and ultimately in violation of subsections 24(1) and 27(2) of the CCRA. It would appear that the alleged inaccurate information goes back as far as 2004. Another component of the applicant's attack is an alleged lack of fairness in the grievance process which is too long,

cumbersome and ineffective in practice. Indeed, three years have elapsed between the filing of the grievance in 2009 and making of the impugned decision in 2012.

[5] For the reasons mentioned below, the present application must fail.

LEGAL FRAMEWORK

[6] Sections 23, 24 and 27 of the CCRA deal with the collection and communication of relevant information:

23. (1) When a person is sentenced, committed or transferred to penitentiary, the Service shall take all reasonable steps to obtain, as soon as is practicable,	23. (1) Le Service doit, dans les meilleurs délais après la condamnation ou le transfèrement d'une personne au pénitencier, prendre toutes mesures possibles pour obtenir :
(a) relevant information about the offence;	a) les renseignements pertinents concernant l'infraction en cause;
(b) relevant information about the person's personal history, including the person's social, economic, criminal and young-offender history;	b) les renseignements personnels pertinents, notamment les antécédents sociaux, économiques et criminels, y compris comme jeune contrevenant;
(c) any reasons and recommendations relating to the sentencing or committal that are given or made by	c) les motifs donnés par le tribunal ayant prononcé la condamnation, infligé la peine ou ordonné la détention — ou par le tribunal d'appel — en ce qui touche la peine ou la détention, ainsi que les recommandations afférentes en l'espèce;
(i) the court that convicts, sentences or commits the person, and	
(ii) any court that hears an appeal from the conviction, sentence or committal;	

(d) any reports relevant to the conviction, sentence or committal that are submitted to a court mentioned in subparagraph (c)(i) or (ii); and

d) les rapports remis au tribunal concernant la condamnation, la peine ou l'incarcération;

(e) any other information relevant to administering the sentence or committal, including existing information from the victim, the victim impact statement and the transcript of any comments made by the sentencing judge regarding parole eligibility.

e) tous autres renseignements concernant l'exécution de la peine ou de la détention, notamment les renseignements obtenus de la victime, la déclaration de la victime quant aux conséquences de l'infraction et la transcription des observations du juge qui a prononcé la peine relativement à l'admissibilité à la libération conditionnelle.

(2) Where access to the information obtained by the Service pursuant to subsection (1) is requested by the offender in writing, the offender shall be provided with access in the prescribed manner to such information as would be disclosed under the Privacy Act and the Access to Information Act.

(2) Le délinquant qui demande par écrit que les renseignements visés au paragraphe (1) lui soient communiqués a accès, conformément au règlement, aux renseignements qui, en vertu de la Loi sur la protection des renseignements personnels et de la Loi sur l'accès à l'information, lui seraient communiqués.

(3) No provision in the Privacy Act or the Access to Information Act shall operate so as to limit or prevent the Service from obtaining any information referred to in paragraphs (1)(a) to (e).

(3) Aucune disposition de la Loi sur la protection des renseignements personnels ou de la Loi sur l'accès à l'information n'a pour effet d'empêcher ou de limiter l'obtention par le Service des renseignements visés aux alinéas (1)a) à e).

24. (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as

24. (1) Le Service est tenu de veiller, dans la mesure du possible, à ce que les renseignements qu'il utilise

accurate, up to date and complete as possible.

concernant les délinquants soient à jour, exacts et complets.

(2) Where an offender who has been given access to information by the Service pursuant to subsection 23(2) believes that there is an error or omission therein,

(a) the offender may request the Service to correct that information; and

(b) where the request is refused, the Service shall attach to the information a notation indicating that the offender has requested a correction and setting out the correction requested.

(2) Le délinquant qui croit que les renseignements auxquels il a eu accès en vertu du paragraphe 23(2) sont erronés ou incomplets peut demander que le Service en effectue la correction; lorsque la demande est refusée, le Service doit faire mention des corrections qui ont été demandées mais non effectuées.

27. (1) Where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information.

27. (1) Sous réserve du paragraphe (3), la personne ou l'organisme chargé de rendre, au nom du Service, une décision au sujet d'un délinquant doit, lorsque celui-ci a le droit en vertu de la présente partie ou des règlements de présenter des observations, lui communiquer, dans un délai raisonnable avant la prise de décision, tous les renseignements entrant en ligne de compte dans celle-ci, ou un sommaire de ceux-ci.

(2) Where an offender is entitled by this Part or the regulations to be given reasons for a decision taken by the Service about the offender, the person or body that takes the decision shall, subject to

(2) Sous réserve du paragraphe (3), cette personne ou cet organisme doit, dès que sa décision est rendue, faire connaître au délinquant qui y a droit au titre de la présente partie ou des règlements les

subsection (3), give the offender, forthwith after the decision is taken, all the information that was considered in the taking of the decision or a summary of that information.	renseignements pris en compte dans la décision, ou un sommaire de ceux-ci.
(3) Except in relation to decisions on disciplinary offences, where the Commissioner has reasonable grounds to believe that disclosure of information under subsection (1) or (2) would jeopardize (a) the safety of any person, (b) the security of a penitentiary, or (c) the conduct of any lawful investigation, the Commissioner may authorize the withholding from the offender of as much information as is strictly necessary in order to protect the interest identified in paragraph (a), (b) or (c).	(3) Sauf dans le cas des infractions disciplinaires, le commissaire peut autoriser, dans la mesure jugée strictement nécessaire toutefois, le refus de communiquer des renseignements au délinquant s'il a des motifs raisonnables de croire que cette communication mettrait en danger la sécurité d'une personne ou du pénitencier ou compromettrait la tenue d'une enquête licite. […]
…	

[7] Section 90 of the CCRA provides for the existence of a grievance procedure for fairly and expeditiously resolving offenders' grievances:

90. There shall be a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the	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

Commissioner, and the procedure shall operate in accordance with the regulations made under paragraph 96(u).	questions relevant du commissaire.

[8] More particularly, from a practical point of view, sections 74 to 82 of the Regulations establish the appropriate mechanisms and procedures to be followed to make and resolve offenders' complaints and grievances:

74. (1) Where an offender is dissatisfied with an action or a decision by a staff member, the offender may submit a written complaint, preferably in the form provided by the Service, to the supervisor of that staff member.	74. (1) Lorsqu'il est insatisfait d'une action ou d'une décision de l'agent, le délinquant peut présenter une plainte au supérieur de cet agent, par écrit et de préférence sur une formule fournie par le Service.
(2) 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 subsection 74(3), the offender may submit a written grievance, preferably in the form provided by the Service,

75. Lorsque, conformément au paragraphe 74(4), le supérieur refuse d'examiner la plainte ou que la décision visée au paragraphe 74(3) ne satisfait pas le délinquant, celui-ci peut présenter un grief, par écrit et 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

(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

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

(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 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.

(2) Le comité d'examen des griefs des détenus doit présenter au directeur ses recommandations au sujet du grief du détenu aussitôt que possible après en avoir été saisi.

(3) 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

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.

outside review board.

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

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

(3) Le directeur du pénitencier doit remettre au détenu une copie de sa décision aussitôt que possible après avoir reçu les recommandations du comité externe d'examen des griefs.

80. (1) Where an offender is not satisfied with a decision of the institutional head or director of the parole district respecting the offender's grievance, the offender may appeal the decision to the head of the 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

81. (1) Lorsque le délinquant décide de prendre un recours judiciaire concernant sa plainte

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.

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).

[9] With this legal framework in mind, let us now examine the relevant background in this case.

BACKGROUND

[10] Upon incarceration, the applicant was allowed to possess a personal computer in addition to assorted software programs. Initially incarcerated in Kent Maximum Security Institution, the applicant was transferred to Mountain Medium Security Institution in August 2004. In September 2004, he was notified that his Windows 98 Software CD had not arrived at Mountain. Since he did not have the software CD, he was unable to prove ownership of the Windows 98 operating system software installed on his personal computer. At this point, the applicant initiated a complaint via the offender grievance system as well as a claim for the replacement of lost or damaged property for which CSC was responsible at the time of the alleged loss or damage of the Windows 98 software CD.

[11] The complaint procedure progressed and at one point a memorandum was issued that stated that there were two pieces of software listed as unauthorized on the applicant's computer in addition to several that required proof of ownership. In response, the applicant asserted that at least one software program had been mistakenly identified as unauthorized and that the other software identified in the memorandum was not actually installed on the applicant's computer at the time. The applicant notes that he also provided proof of ownership for other software programs per the memorandum's request. Ultimately, on or about May 10, 2005, the applicant was issued his personal computer for his possession in his cell, and on October 6, 2005, the applicant received a response to his third-level grievance regarding the lost or damaged software and property. The

grievance was upheld and the applicant received monetary reimbursement. In addition, several items were replaced including his Windows 98 and Office 97 software.

[12] On November 10, 2005, the applicant's computer was seized for inspection and the next day, on November 11, 2005, he received a memorandum from the warden regarding the presence of unauthorized software on his computer. It originally appeared in the memorandum written by Bruce Anderson: "Acting Warden N. Wrenshall gave you the benefit of the doubt that the unauthorized software found on your computer may have been put there by someone else." The applicant now states that the supporting evidence for the presence of unauthorized software included several statements of fact based on the previous issue that had occurred between September 2004 and May 10, 2005. On December 8, 2005, the applicant submitted Inmate Complaint #V80A00015682 contesting the reasons given for seizing his computer and the truth of the statements of fact relied upon regarding the prior proceedings related to his computer. The applicant now explains that the first- and second-level grievances in this matter were both denied, as was the third-level. The applicant received the response denying the third-level grievance on November 21, 2006. It was at this point that an additional statement of fact regarding the prior matter related to his computer was included in this response. The third-level grievance read: "Your computer was inspected again in 2005 and it was found that you were not in compliance with CD 090. The computer was sent to an outside source to be re-formatted at your expense."

[13] The applicant brought a second grievance in 2009 (grievance number V80A00027276). This grievance took issue with the statement that there was unauthorized material on his computer between his arrival at Mountain Institution in 2004 and the return of his computer in May 2005, and

that his computer had been sent to an outside source for reformatting at the applicant's expense. The applicant argued that both of these statements were incorrect. This challenge was forwarded through the inmate grievance process as file #V80A00027276. The applicant was unsuccessful with regard to the unauthorized material on his computer between 2004 and 2005 as it was determined that this issue had already been dealt with in the context of applicant's first grievance. The applicant, however, was successful contesting the statement that his computer had been sent to an outside source for reformatting. No evidence existed to support this statement and his file was amended accordingly.

[14] Then, in 2010, the applicant initiated another new grievance in order to contest the accuracy of the statements of fact that he still currently disputes. This new challenge again progressed through to the third-level and the applicant states he received this last final decision on September 24, 2012 (grievance number U80A00033079). During these procedures the applicant had additionally demanded that he receive the "executive summary" (the recommendation prior to the final decision) from both the second-level of the grievance process as well as from the third-level prior to the rendering of the third-level decision.

DECISION UNDER REVIEW

[15] In coming to the third-level grievance decision, Senior Deputy Commissioner [SDC] Anne Kelly reviewed the applicant's previous submissions; the responses to these submissions; pertinent policy and legislation; and the applicant's correctional file (also known as his Offender Management System [OMS] file). As we will later see in these reasons, the applicant does not challenge the intelligibility nor the transparency of the impugned decision. However, he insists on

the fact that in order to be reasonable, it must be based on accurate information supported by evidence on the record, which he submits is not the case. Regarding the newest grievance procedure, the respondent argues that no new information or evidence was introduced by the applicant. The respondent insists that the applicant only reargued matters that had been on the table in the previous grievances he had filed and for which final decisions had been rendered with no appeal by the applicant.

[16] Regarding the applicant's argument that he had not been provided a copy of the executive summary prior the rendering of the decision and that this was a breach of the duty to act fairly, the SDC stated that she was satisfied that no requirement existed under the CCRA or the Regulations for offenders to review and make representations on an analyst's recommendations (the executive summary) before a decision is rendered. Regarding the applicant's reference to "recent court decisions" that allegedly found in favour of the provision of executive summaries prior to the rendering of a decision, the SDC presumed the applicant was referring to *Lewis v Canada (Correctional Services)*, 2011 FC 1233 [*Lewis*]. The SDC highlighted the CSC's legal obligation per the CCRR to give an offender a copy of the grievance decision, including the reasons for the decision, as soon as practicable after the offender submits the grievance. The SDC additionally noted that subsection 27(2) of the CCRA states that justification for a correctional decision be given after the decision is made. The SDC then referred to subsection 27(1) of the CCRA in order to find that it did not apply as neither the CCRA nor the Regulations establish a right to make representations on a proposed grievance decision before the decision is finalized. The SDC thus denied this portion of the applicant's grievance. The reasonableness of these findings was not challenged, at least in a direct manner, by the applicant who made no oral submissions on this latter

issue when he was heard by the Court. However, the applicant generally questions the fairness of the whole grievance process.

[17] The SDC then turned to the next issue submitted by the applicant pertaining to the contested statements of fact. Regarding the applicant's argument that the content of his correctional file should be adjusted in order reflect accurate information and in order to meet the standards of subsection 24(1) of the CCRA. The SDC explained that no information had been changed by the applicant's parole officer [PO] as the PO had found no specific reference to the issues the applicant raised while reviewing the applicant's case management reports. However, the SDC does note that according to Commissioner's Directive 701, Information Sharing at paragraph 13, "The staff member must ensure that reliable documents or other sources exist which support or contradict the information on file and/or the requested change to the information." The SDC found that even though there were no case management reports regarding the issues raised by the applicant in his complaint on this point, there was also no indication that the PO had reviewed all the files to see if documents existed to support or contradict the allegations. As a result, the SDC upheld this part of the applicant's grievance.

[18] However, the SDC rejected the portion of the applicant's grievance dealing with his assertion that erroneous allegations were made that affected him negatively regarding the findings of unauthorized material in his computer circa 2004-2006. The SDC reasoned that these same arguments had been forwarded by the applicant previously in his grievance V80A00015682 that had progressed to the third-level grievance and had been rejected upon the final decision rendered on November 21, 2006. But the SDC also found that, after reviewing the applicant's correctional file

and outlining the requested changes, the prior level had not included in its decision the initial request for a file correction, or the decision denying the request, or the reasons given for denying the request. As a result, the SDC held in favour of the applicant's position for this portion of his grievance.

[19] The SDC concluded by summarizing that the applicant's grievance had been upheld in part and then outlined the corrective action to take place in order to remedy the portions of the applicant's grievance that were upheld. Specifically, the SDC wrote on page 4 of the impugned decision that:

> As corrective action, the IH of Kent Institution will remind staff of the importance of reviewing offenders' files to determine whether or not reliable documents exist to support or contradict the contested information pursuant to CD 701, paragraph 13. In addition, the IH will direct the appropriate staff member to identify your initial request for a file correction, the decision to deny your request and the reasons for the denial in the MTF, locked 2011-07-25, in compliance with CD 701, Annex B, paragraph 20-23.

[20] However, the applicant, who is still unsatisfied by the fact that no direct corrective actions have been taken with respect to the contested statements of fact, asks this Court to review the matter and grant this application.

THE PRESENT APPLICATION

[21] In my opinion, the present application raises two different issues:

(1) Was the CSC obliged to reconsider the accuracy of the contested statements of fact in relation to the alleged lack of evidence even though their accuracy has already been affirmed by the final stage of past grievance procedures?

(2) Was the process followed by CSC to dispose of his last grievance unfair?

[22] Issues of procedural fairness in the context of judicial review of decisions made in the course of the CSC offender grievance process, as well as issues dealing with the interpretation of legislation, are generally dealt with under the correctness standard of review: *Kim v Canada (AG)*, 2012 FC 870 at para 32 [*Kim*]; Sweet v Canada (AG), 2005 FCA 51 at para 16; *Khosa v Canada (MCI)*, 2009 SCC 12 at para 43; *Tehrankari v Canada (AG)*, 2011 FC 628 at para 24 [*Tehrankari*]. However, findings of fact and mixed fact and law made in the course of the CSC offender grievance process and under the CCRA are reviewable under the standard of review of reasonableness: *Yu v Canada (AG)*, 2012 FC 970 at para 15 [*Yu*]; *Kim* at para 33; *Bonamy v Canada (AG)*, 2010 FC 153 at paras 46-47; *Crawshaw v Canada (AG)*, 2011 FC 133 at paras 24-27; *Tehrankari* at para 24. In addition, CSC is owed a high degree of deference by the Court due to its expertise in inmate and institution management: *Kim* at para 59.

[23] The applicant has originally sought in his notice of application an order setting aside the SDC's decision and granting the issuance of a memorandum to the applicant, which would also be filed in his correctional file to amend the information contained therein in order to render it accurate. However, the respondent has contended that if the applicant were successful in this application, the appropriate remedy would be to simply quash the impugned decision and send it back for re-determination. At the hearing before this Court, the applicant confirmed that he was no longer seeking the other remedies originally sought in his notice of application.

ANALYSIS AND DETERMINATION

[24] In the analysis and the determination that follows, I have taken account of all the arguments made by the parties in their memoranda of fact and law, as well as what the applicant and counsel for the respondent have specifically said about the relevant issues to be determined by the Court when they were heard in Vancouver.

[25] The applicant argues at great length that the 2006 grievance decision was based on incorrect information, and thus flawed and unreasonable. As a result, the applicant asserts that the impugned decision is also flawed because it relies on the allegedly incorrect information in the 2006 decision. The applicant justifies his failure to make an application for judicial review against earlier decisions in his case by the fact that the library at Kent Institution was sparse, that he did not have the possibility at the time to make an application and that he only learned much later that inaccurate information had been used.

[26] The applicant contrasts in his memorandum the SDC's current refusal to review and correct the 2006 grievance with the SDC's 2009 grievance decision that reviewed a portion of the 2006 grievance and determined that no evidence existed to support the statement that the applicant's computer had been sent to an outside source for reformatting at the applicant's expense. The applicant then asserts that it was unreasonable for his current requested corrections to be denied on the basis that a final decision had already been rendered – notably regarding the non-compliance of the programs on his computer during 2004-2005. Specifically, the applicant explains CSC only provided documentation to support the computer inspection that occurred on November 10, 2005.

[27] Regarding the statement made by the acting warden (in the context of the first level proceedings in the 2006 grievance) that the applicant had been given the "benefit of the doubt" that unauthorized software could have been installed on his computer by someone else, the applicant again asserts that there is a lack of evidence to support this statement. The applicant also refers to evidence that contradicts the acting warden's statement in order to demonstrate its inaccuracy. The applicant also contends that if the CSC had in fact found unauthorized software then, they would have removed his computer permanently and would not have allowed him to remove the software himself.

[28] The applicant argues that the authorities did not act in accordance with CSC policy and contravened subsections 24(1) and 27(2) of the CCRA. The applicant asserts that Commissioner's Directive 701 at paragraph 13 and subsection 24(1) of the CCRA require the CSC to ensure that reliable evidence exists to either support or contradict the information in an inmate's file. The applicant argues that CSC did not adhere to these requirements as it ignored the evidence contradicting the statements while failing to provide supporting evidence. In particular, the applicant asserts that he was previously unaware of the casework log of Lisa Saether until he received it in the respondent's Certified Tribunal Record. He argues that it is an extremely important piece of evidence as it supports his version of the events that took place with regard to his computer. He asserts that he should have had access to this document pursuant to subsection 27(2) of the CCRA, not only in the context of the third-level proceedings in the 2012 grievance, but also back in 2006.

[29] In the respondent's view, the applicant is simply seeking to undermine the finality of an administrative decision from 2006 that he never challenged on judicial review at the time. The

respondent explains that now, years later, the applicant is indirectly appealing a final decision via a file correction request. To exemplify this argument, the respondent refers to the substantial portions of the applicant's memorandum that challenge the legitimacy of the 2006 grievance decision. This is simply not permissible (*Apotex Inc v Canada (Health)*, 2011 FC 1308 at paragraphs 19-20). Be that as it may, subsection 24(2) only deals with information to which an offender has been given access pursuant to subsection 23(2) and 23(1) rather than "any information about an offender which is subject to correction." (*Tehrankari v Canada (Correctional Services)* (2001), 188 FTR 206 at paragraphs 52-53 [*Tehrankari* (2001)]). In addition, the respondent also contends that the record suggests that the information the applicant contests was not used to assess the applicant's risk and behaviour as it did not appear in the applicant's case management reports.

[30] For example, the respondent refers to the correction sought by the applicant of the statement allegedly made by the acting warden at the first level of the 2006 grievance proceedings: "The acting Warden at that time gave you the benefit of the doubt that the unauthorized software found on your computer may have been put there by someone else." While the applicant contests that there is no evidence to substantiate the statement that the warden gave him the "benefit of the doubt", the respondent explains that the applicant should have sought recourse at the time by pursuing his grievance to the next level of the grievance process and eventually judicial review rather than now requesting a correction pursuant to section 24(2) of the CCRA. The respondent argues that since the applicant did not do this, he cannot now request that this final administrative decision be altered by way of section 24 of the CCRA or by way of the present judicial review. The respondent asserts the same argument in relation to all of the other statements for which the applicant seeks a file correction.

[31] The arguments made by the respondent are persuasive. At base, I agree with the respondent's assessment of the situation in the sense that the applicant is making a collateral attack. If the applicant were able to contest these statements of fact originating from prior final decisions, then this would compromise the certainty of a final decision. Even if the past decisions that led to the contested statements of fact that now appear in the applicant's correctional file were not sufficiently based on verifiable evidence, at face value it is reasonable for the 2012 decision-maker to not have reconsidered the evidence that the prior 2006 and 2009 decisions were based on. This would constitute reopening final decisions that the applicant did not choose to appeal at the time. Much as in the context of a limitation period that has passed, whether or not the claims at issue are meritorious, the time has passed for the applicant to appeal the final decisions.

[32] This conclusion is determinative of my decision to reject the applicant's argument that the impugned decision is unreasonable and illegal. If the applicant wanted to challenge the legality of the 2006 and 2009 decisions, it was up to him to make an application for extension of time and provide a reasonable explanation for the long delay in this case. In passing, I am ready to accept that there may be some problem with how the CSC has treated this file, but in the end, I do not find it to be a determinative factor in this case. With respect to the particular statement of fact attributed to the acting warden – the "benefit of doubt", in the present record, there does not appear to be any evidence to substantiate the statement. However, I am ready to accept the respondent's explanation that it is normal that there appears to be no evidence supporting the statement in question since such evidence would be found in the record relating to the 2006 decision and would not have been included in the certified record which concerns the legality of the 2012 decision.

[33] The remaining statements of fact contested by the applicant are those related to the presence of unauthorized material on the applicant's computer and I note that the accessible record contains some evidence to support the presence of this material on the applicant's computer during the relevant period. The first time the computer was seized, the various memoranda issued, as well as internal communications, clearly identified which programs constituted the identified unauthorized software. In addition, after the computer was again seized when the computer seals were found to have been tampered with, it is also clearly identified which computer programs were considered to be unauthorized. At the hearing before me, I was notably referred by respondent's counsel to the two memoranda of 2005 (see pages 62 and 67 of the respondent's record). This is enough to support the decision.

[34] The applicant has not satisfied me either that there is a serious flaw in the reasoning of the SDC or that she has ignored relevant legal provisions. Her reasons are articulate and thorough. The SDC acknowledges that even though the third level reviewed the "material to file" and that it appropriately outlined the applicant's requested changes, it did not "begin by identifying [the applicant's] initial request for a file correction, the decision to deny [the applicant's] request or the reasons for the denial." The SDC refers again to the Commissioner's Directive 701, Annex B at paragraphs 20-23 to note that the omission by the third level is inconsistent with Commissioner's Directive 701. Thus, the applicant's grievance was upheld on this matter as well.

[35] With respect to the fairness of the grievance process, I have also considered the applicant's statement that he was previously unaware of the casework log of Lisa Saether until he received a

copy via the Certified Tribunal Record. The applicant submits that this evidence is "an extremely significant piece of evidence as it clearly supports a portion of [his] version of events that the CSC has disputed since 2006." The applicant states that this should have been provided to him earlier pursuant to subsection 27(2) of the CCRA. Yet I do not find that access to this casework log would have been determinative since the applicant's arguments on this matter appear to have been upheld by the SDC.

[36] I venture to add that the same reasoning applies to the applicant's arguments regarding the inaccurate "benefit of the doubt" statement allegedly made by the acting warden. The casework log of Lisa Saether reveals the following statement: "A/Warden Wrenshall concluded that documentation errors may have been made however the only way she will accept that Mr. Fischer has ownership of Windows 98 is to have the ID number on the Manual compared with the ID number on Mr. Fischer's computer." As the applicant asserts, there is no mention of the acting warden giving the applicant the "benefit of the doubt". However, as mentioned above, the impugned decision appears to agree with the applicant's argument as to the inaccuracy of the "benefit of the doubt" statement that appeared in the 2006 grievance decision.

[37] As far as the general allegation goes that the grievance process is unfair, in this particular case, it is simply not supported by evidence in this case, and this last argument must also fail.

[38] In conclusion, I am not satisfied that the impugned decision is unreasonable, or that the process was unfair or that there has been a breach of procedural fairness in this case. There is no reason to intervene in this case.

[39] Despite the fact that the present application must be dismissed, in the exercise of my discretion, considering all relevant factors, including the particular situation of the applicant and the present reasons for judgment, there shall be no costs.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the present judicial review application be dismissed without costs.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-36-13
STYLE OF CAUSE:	PATRICK DANIEL FISCHER v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	July 31, 2013
REASONS FOR JUDGMENT:	MARTINEAU J.
DATED:	August 12, 2013

APPEARANCES:

Patrick Fischer	FOR THE APPLICANT (ON HIS OWN BEHALF)
Liliane Bantourakis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patrick Fischer Agassiz, British Columbia	FOR THE APPLICANT (ON HIS OWN BEHALF)
William F. Pentney, Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT