

Federal Court



Cour fédérale

Date: 20131203

Docket: T-2136-12

Citation: 2013 FC 1211

Ottawa, Ontario, December 3, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

WILLIAM A. JOHNSON

Applicant

and

**THE COMMISSIONER OF CORRECTIONS,
AS REPRESENTED BY ROSS TOLLER,
DEPUTY COMMISSIONER,
TRANSFORMATION AND RENEWAL TEAM**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of Ross Toller, the Deputy Commissioner of Corrections [the Commissioner], pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7. The Commissioner denied the Applicant's third level grievance over his suspension from full-time employment in CORCAN Industries at Warkworth Institution.

I. Issues

[2] The issues raised are as follows:

A. Was the decision of the Commissioner to deny the Applicant's third level grievance unreasonable?

i. Was the discretionary decision made pursuant to the statutory authority granted to the Commissioner?

ii. Was the decision to suspend the Applicant unreasonable?

B. Was the grievance process procedurally fair?

II. Standard of Review

[3] The discretionary decision to suspend the Applicant attracts the standard of reasonableness (*Crawshaw v Canada (Attorney General)*, [2006] FCJ No 380, at paras 18-25).

[4] With regard to whether there exists statutory authority to issue such a suspension, this is a question that involves the interpretation of the home statute, and attracts the standard of reasonableness (*Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, at para 11). However, as the resolution of this issue depends on an interpretation of law, the range of possible, acceptable outcomes may be narrowed, as widely conflicting interpretations of the authorizing legislation would lead to inconsistencies in the application of the intended law (*B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at para 72; (*Attorney General*) *v Almon Equipment Limited*, 2010 FCA 193, at para 21).

[5] The standard of review for procedural fairness questions is correctness (*Ontario (Commissioner, Provincial Police) v MacDonald*, 2009 ONCA 805, at paras 36-37).

[6] For the reasons that follow, this application is allowed.

III. Background

[7] The Applicant, William Johnson, is an inmate at Warkworth Institution, a medium security institution near Warkworth, Ontario. In 2011, the Applicant worked for CORCAN, a business and rehabilitation program of the Correctional Service of Canada, operating in the manufacturing, textiles, construction and services sector.

[8] On May 11, 2011, while working at a CORCAN workshop, the Applicant was involved in an incident with another inmate. This incident is described in a Report of Inmate Injury dated the same day:

Inmate Hogg was cleaning the panel saw and floor with compressed air. Inmate Johnson noticed that the room was filling up with dust in the air and went over to tell Hogg to stop. A heated argument ensued and Hogg apparently headbutted Johnson then punched him a couple of times. Johnson fell to the floor unconscious for a few seconds. Security was called and Johnson was taken to health care.

[9] An Assessment for Decision dated August 18, 2011, states that the Applicant was not the aggressor in the incident.

[10] In an "Inmate Suspension From a Program Assignment" form [the Suspension Form], dated "2012-05-11," a "Full Suspension" was recommended. The Suspension Form does not specify the

length of the Applicant's suspension, but indicates that the maximum period of suspension is for six weeks. This time frame agrees with section 104(1)(a) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [the Regulations].

[11] The reasons for this suspension are indicated as: "Your actions demonstrate a refusal to participate in your program assignment." These actions are described to be: "[redacted name of inmate] was in a fight with offender Johnson. This action is not tolerated in CORCAN." This form indicates the suspension was made pursuant to paragraph 38 of Commissioner's Directive 730, entitled "Inmate Program Assignment and Payments" [the Directive].

[12] The Applicant sought a review of the suspension and appeared before the Program Board to make representations. On May 17, 2011, the Program Board chairperson confirmed the measures recommended by the Program Supervisor. The Program Board chairperson decided the Applicant was terminated for 6 months, but would be allowed to reapply.

[13] The Applicant filed a complaint, requesting cancellation of his suspension and reinstatement of his job in CORCAN on May 18, 2011. He alleged that section 39 of the *Corrections and Conditional Release Act*, SC 1992, c 20 [the Act] was breached, as was the *Privacy Act*, RSC 1985, c P-21, by virtue of the fact that his Finger Prints Section number was identified on the Suspension Form, and the Suspension Form incorrectly noted the date on the form as occurring in 2012, not 2011. In addition, he made "abuse of power" claims against prison officials.

[14] The response to his complaint upheld his suspension and dismissed all claims, save for his complaints regarding a violation of the Privacy Act and the incorrect date on the Suspension Form. On October 7, 2011, the Applicant filed a first level grievance of the response to his complaint, focussing primarily on the fact that the grounds set out in section 104 of the Regulations do not apply to his situation, as he did not “refuse to participate in the program” nor did he “leave the program.” This grievance was denied on December 8, 2011. The reasons indicated that the Directive provides guidance in interpreting subsection 104(1) of the Regulations, by specifying that negative behaviour or actions which necessitate the Applicant’s removal from the program are included types of behaviour which comprise the grounds for suspension or termination under subsection 104(1).

[15] The Applicant filed a second level grievance on December 14, 2011, primarily arguing that paragraph 38 of the Directive exceeds the Commissioner’s authority under section 97 of the Act. This grievance was denied on April 26, 2012. The denial was based on the allegation that the Applicant’s involvement demonstrated negative conduct, in a manner that jeopardized institutional security and that the Program Supervisor was within his rights to suspend the Applicant in accordance with the Directive.

[16] On May 18, 2012, the Applicant filed a third grievance. The Applicant argued that the suspension was outside the jurisdiction of subsection 104(1) of the Regulations, as he never “refused to participate in the program,” as per subsection 104(1). Further, he argued that the date on the Suspension Form was incorrect.

[17] The Deputy Commissioner denied the Applicant's grievance in a decision dated October 5, 2012:

You explain that paragraph 38 of CD 730... "includes words not in fact found" in section 104(1) of the CCRR...As you italicized "whose actions demonstrate a refusal" and "any negative behaviour or action" in paragraph 38, it appears these are the words you are referring to.

Contrary to your belief, paragraph 38 is not inconsistent with section 104(1) of the CCRR. While section 104(1) of the CCRR defines the grounds for termination, paragraph 38 of CD 730 merely provides a definition of what constitutes a refusal. CSC's elaboration of the concept of "refusing to participate" is not in violation of the CCRR as the CD was written pursuant to sections 97 and 98 of the Corrections and Conditional Release Act.

(...) On 2011-05-11, you were appropriately suspended from CORCAN as your actions demonstrated a refusal to participate in your program assignment. That being said, your file shows that on 2011-12-16, you were re-hired to work with the Cabinet Shop.

[18] The Deputy Commissioner also noted that the incorrect date on the Suspension Form was an administrative error that did not impact the outcome of the decision to suspend the Applicant.

IV. Analysis

[19] The relevant legislation, namely sections 39, 40, 97 and 98 of the *Corrections and Conditional Release Act*, SC 1992, C20; section 104 of the *Corrections and Conditional Release Regulations* (SOR/92-620); and section 38 of the *Inmate Program Assignment and Payments-Commissioner's Directive 730*, are attached as Annex A.

A. *Was the Decision of the Commissioner to Deny the Applicant's Third Level Grievance Unreasonable?*

- i) Was the discretionary decision made pursuant to the statutory authority granted to the Commissioner?

[20] The Commissioner held that the grounds for suspending the Applicant are found in subsection 104(1) of the Regulations, while paragraph 38 of the Directive, which was written pursuant to sections 97 and 98 of the Act, merely elaborates on which situations encompass the authority granted by subsection 104(1).

[21] The Commissioner was correct in finding that sections 97 and 98 give statutory authority to issue the Directive. The purposes of such directives are listed in section 97. Here, the relevant purpose is described in subsection 97(c). This subsection allows for directives to be created in order to carry out the purposes and provisions of the Regulations. In this case, the Directive is intended to give effect to subsection 104(1) of the Regulations.

[22] To determine whether the Commissioner's decision was within the authority granted by the Directive, an examination of the purpose of subsection 104(1) is required. The Applicant cites *Rose v Canada (Attorney General)*, 2011 FC 1495 [*Rose*], where, as in the instant application, it was argued by the applicants that a suspension was outside the authority granted by subsection 104(1). However, Justice Martineau did not rule on this argument in *Rose* because the applicants had not exhausted all grievance procedures. Likewise, the Regulatory Impact Analysis statement that accompanied the enactment of the Regulations on October 29, 1992, does not specifically address subsection 104(1).

[23] Accordingly, subsection 104(1) must be read contextually in a plain meaning and harmonious with the scheme and object of the Act (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, at para 21).

[24] In terms of the plain meaning of the provision, this subsection gives two conditions on which a suspension from a program, for which an inmate is paid, can occur, absent a reasonable excuse. A suspension can be triggered by the inmate either a) leaving the program or b) refusing to participate in a program. As the Directive was clearly not referenced on the basis of the Applicant leaving the program, the only purpose for which it could be invoked is based on the Applicant's supposed refusal to participate.

[25] The plain meaning of the phrase "refusal to participate" does not support an interpretation that the Applicant "refused" to participate in the program by virtue of his actions on May 11, 2011. It is not reasonable to find that the Applicant rejected the demands placed on him at work by verbally confronting a fellow inmate about using an air gun, and subsequently being attacked. Instead, a "refusal" to participate suggests activity such as the Applicant not obeying an order to complete a work task, or refusing to work at all.

[26] Such an interpretation is bolstered by a reading of this provision in context with the Act and Regulations as a whole. The title of section 104 is "Inmate Pay." This is in contrast to section 24 of the Regulations, which is titled "Inmate Discipline," suggesting that subsection 104(1) is not focused on disciplinary infractions such as fighting. Instead, it provides a mechanism to suspend inmates who are not reporting to work or complying with work orders. Furthermore, the Act clearly has a process by which fighting is dealt with: subsection 40(h) of the Act notes that fighting is a disciplinary offence, and subsection 44(1)(b) provides a sanction described as: "loss of privileges."

[27] I believe that the Commissioner's interpretation of the Directive cannot be accepted as reasonable, given the purpose of subsection 104(1).

ii) Was the decision to suspend the Applicant unreasonable?

[28] Given my finding that the Deputy Commissioner did not properly or reasonably exercise the statutory authority to suspend the Applicant for fighting under subsection 104(1) of the Regulations, his decision was unreasonable. There is also no authority to suspend the Applicant's participation in the program for more than six (6) weeks, given the clear and unequivocal wording of section 104(1)(b).

[29] Further, based on the facts relating to the incident, in which the Applicant was beaten by another inmate, I again find that the decision was unreasonable. The Applicant was following his correctional plan, he was fulfilling his shop steward duties at the time of the incident, and he was the victim of an assault by the other inmate, not the aggressor. The second and third level Offender Grievance Responses were wrong on the facts in this regard.

[30] Moreover, given the Applicant's record in the workplace over an extended period of time as being consistently "excellent," it is unreasonable that the suspension of six months was ordered.

B. *Was the Grievance Process Procedurally Fair?*

[31] I need not consider this ground, given my findings above.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's application is allowed, the Applicant should be reinstated retroactively with payments due and owing to him from his date of suspension of May 11, 2011, in accordance with the Act and Regulations;
2. Given the conduct of the parties in the proceeding, no costs are awarded.

"Michael D. Manson"

Judge

ANNEX A

Corrections and Conditional Release Act, SC 1992, C20

Discipline

System exclusive

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

40. An inmate commits a disciplinary offence who

- (a) disobeys a justifiable order of a staff member;
- (b) is, without authorization, in an area prohibited to inmates;
- (c) wilfully or recklessly damages or destroys property that is not the inmate's;
- (d) commits theft;
- (e) is in possession of stolen property;
- (f) is disrespectful toward a person in a manner that is likely to provoke them to be violent or toward a staff member in a manner that could undermine their authority or the authority of staff members in general;
- (g) is abusive toward a person or intimidates them by threats that violence or other injury will be done to, or punishment inflicted on, them;
- (h) fights with, assaults or threatens to assault another person;
 - (i) is in possession of, or deals in, contraband;
- (j) without prior authorization, is in possession of, or deals in, an item that is not authorized by a Commissioner's Directive or by a written order of the institutional head;
- (k) takes an intoxicant into the inmate's body;
- (l) fails or refuses to provide a urine sample when demanded pursuant to section 54 or 55;

Dispositions habilitantes

Objet

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

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

- a) désobéit à l'ordre légitime d'un agent;
- b) se trouve, sans autorisation, dans un secteur dont l'accès lui est interdit;
- c) détruit ou endommage de manière délibérée ou irresponsable le bien d'autrui;
- d) commet un vol;
- e) a en sa possession un bien volé;
- f) agit de manière irrespectueuse envers une personne au point de provoquer vraisemblablement chez elle une réaction violente ou envers un agent au point de compromettre son autorité ou celle des agents en général;
- g) agit de manière outrageante envers une personne ou intimide celle-ci par des menaces de violence ou d'un autre mal, ou de quelque peine, à sa personne;
- h) se livre ou menace de se livrer à des voies de fait ou prend part à un combat;
- i) est en possession d'un objet interdit ou en fait le trafic;
- j) sans autorisation préalable, a en sa possession un objet en violation des directives du commissaire ou de l'ordre écrit du directeur du pénitencier ou en fait le trafic;
- k) introduit dans son corps une substance intoxicante;
- l) refuse ou omet de fournir l'échantillon d'urine qui peut être exigé au titre des articles 54 ou 55;

- (m) creates or participates in
(i) a disturbance, or
(ii) any other activity
that is likely to jeopardize the security of the penitentiary;
- (n) does anything for the purpose of escaping or assisting another inmate to escape;
- (o) offers, gives or accepts a bribe or reward;
- (p) without reasonable excuse, refuses to work or leaves work;
- (q) engages in gambling;
- (r) wilfully disobeys a written rule governing the conduct of inmates;
- (r.1) knowingly makes a false claim for compensation from the Crown;
- (r.2) throws a bodily substance towards another person; or
- (s) attempts to do, or assists another person to do, anything referred to in paragraphs (a) to (r).

Rules

97. Subject to this Part and the regulations, the Commissioner may make rules

- (a) for the management of the Service;
(b) for the matters described in section 4; and
(c) generally for carrying out the purposes and provisions of this Part and the regulations.

Commissioner's Directives

98. (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.

Accessibility

(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.

- m) crée des troubles ou toute autre situation susceptible de mettre en danger la sécurité du pénitencier, ou y participe;
- n) commet un acte dans l'intention de s'évader ou de faciliter une évasion;
- o) offre, donne ou accepte un pot-de-vin ou une récompense;
- p) sans excuse valable, refuse de travailler ou s'absente de son travail;
- q) se livre au jeu ou aux paris;
- r) contrevient délibérément à une règle écrite régissant la conduite des détenus;
- r.1) présente une réclamation pour dédommagement sachant qu'elle est fausse;
- r.2) lance une substance corporelle vers une personne;
- s) tente de commettre l'une des infractions mentionnées aux alinéas a) à r) ou participe à sa perpétration.

Règles

97. Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :

- a) la gestion du Service;
b) les questions énumérées à l'article 4;
c) toute autre mesure d'application de cette partie et des règlements.

Directives du commissaire

98. (1) Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.

Publicité

(2) Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

Corrections and Conditional Release Regulations (SOR/92-620)

Inmate Pay

104. (1) Subject to subsection (3), where an inmate, without reasonable excuse, refuses to participate in a program for which the inmate is paid pursuant to section 78 of the Act or leaves that program, the institutional head or a staff member designated by the institutional head may

- (a) suspend the inmate's participation in the program for a specified period of not more than six weeks; or
- (b) terminate the inmate's participation in the program.

(2) Where the institutional head or staff member suspends participation in a program under subsection (1), the inmate shall not be paid during the period of the suspension.

(3) Where the institutional head or a staff member designated by the institutional head suspends or terminates participation in a program under subsection (1), the institutional head or staff member may reduce or cancel the period of the suspension or cancel the termination where

- (a) taking into account all of the circumstances of the case, it is reasonable to do so; and
- (b) the inmate indicates a willingness to resume the program.

(4) [Repealed, SOR/96-108, s. 1]

Rétribution des détenus

104. (1) Sous réserve du paragraphe (3), lorsque le détenu, sans motif valable, refuse de participer à un programme pour lequel il est rétribué selon l'article 78 de la Loi ou qu'il l'abandonne, le directeur du pénitencier ou l'agent désigné par lui peut :

- a) soit suspendre sa participation au programme pour une période déterminée, qui ne doit pas excéder six semaines;
- b) soit mettre fin à sa participation au programme.

(2) Le détenu dont la participation à un programme a été suspendue en application du paragraphe (1) ne reçoit aucune rétribution pour la période de suspension.

(3) Le directeur du pénitencier ou l'agent désigné par lui peut, après avoir suspendu la participation du détenu à un programme ou y avoir mis fin en application du paragraphe (1), réduire la période de suspension ou y mettre fin ou annuler la cessation de la participation lorsque :

- a) d'une part, il est raisonnable de le faire, compte tenu de toutes les circonstances en l'espèce;
- b) d'autre part, le détenu se montre disposé à participer de nouveau au programme.

(4) [Abrogé, DORS/96-108, art. 1]

Inmate Program Assignment and Payments-Commissioner's Directive 73

SUSPENSIONS

38. The program supervisor may suspend an inmate who leaves a program assignment without authorization or whose actions demonstrate a refusal to participate in a program assignment. This includes any negative behavior or action that necessitates the removal of the inmate from the program assignment.

SUSPENSIONS

38. Le surveillant de programme peut suspendre un détenu qui quitte le lieu de son affectation sans autorisation ou qui, par sa conduite, refuse manifestement de participer au programme auquel il est affecté. Cela comprend tout comportement négatif ou toute action qui oblige le surveillant à renvoyer le détenu du programme.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-2136-12

STYLE OF CAUSE: Johnson v. The Commissioner of Corrections et al.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 26, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** MANSON J.

DATED: December 3, 2013

APPEARANCES:

William Johnson

FOR THE APPLICANT,
ON HIS OWN BEHALF

Karen Watt

FOR THE RESPONDENT

SOLICITORS OF RECORD:

William Johnson
Brighton Township, Ontario

FOR THE APPLICANT,
ON HIS OWN BEHALF

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT