

Federal Court



Cour fédérale

Date: 20170106

Docket: T-136-16

Citation: 2017 FC 25

Ottawa, Ontario, January 06, 2017

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

GREGORY MCMASTER

Applicant

and

**THE ATTORNEY GENERAL OF CANADA
AND THE COMMISSIONER OF
CORRECTIONS AND THE WARDEN OF
BEAVER CREEK INSTITUTION MEDIUM**

Respondents

JUDGMENT AND REASONS

[1] Gregory McMaster is an inmate at the Beaver Creek Institution [BCI] in Gravenhurst, Ontario. In December 2014, a number of incidents occurred at BCI which resulted in Mr. McMaster being removed from his position as Chair of the Inmate Welfare Committee [IWC] and placed in segregation. Mr. McMaster filed internal grievances regarding these and other incidents.

[2] This is a judicial review of the third level grievance decision of the Assistant Commissioner, Policy, of Correctional Service of Canada [CSC] which partially upheld Mr. McMaster's grievance.

[3] For the reasons that follow, this judicial review is dismissed without costs.

I. Relevant Facts

[4] On December 17, 2014, Mr. McMaster attended an Inuit Feast in the gymnasium at BCI. During a head count of inmates, Mr. McMaster attempted to go to the washroom twice, but was told by the staff to wait until an accurate head count was completed. Mr. McMaster takes medication which causes the need for frequent urination. He informed staff of this and requested permission to use the washroom. His request was refused and he became agitated. At some point during this incident, one of the Correctional Officers [COs] made a comment comparing Mr. McMaster's behaviour to that of the CO's five year old son. Mr. McMaster took offense to this remark and stepped towards the COs in an aggressive manner.

[5] On December 18, 2014, Mr. McMaster was suspended from his position as Chair of the IWC. As Chair of the IWC, Mr. McMaster was responsible for maintaining good communication between inmates and the administration at BCI. Mr. McMaster was told that he was being removed from this position because: he insulted another inmate in front of others; he obscured a security camera at a time when an altercation was likely to occur; and, he accused BCI staff of planting contraband to generate overtime. Mr. McMaster says the real reason for his suspension from the IWC was retaliation for the events in the gymnasium the previous day.

[6] On December 19, 2014, a memorandum was issued to CSC staff advising that the IWC position was vacant and that all keys to the IWC office were to be located.

[7] On December 20, 2014, concerns were raised that an inmate had been seen entering the IWC office while Mr. McMaster was present. CSC staff believed that Mr. McMaster kept an unauthorized key to the IWC office. A search of his cell was undertaken. The search was stopped when Mr. McMaster returned the key.

[8] On December 21, 2014, Mr. McMaster was placed in segregation, pursuant to paragraph 31(3)(a) of the *Corrections and Conditional Release Act* (S.C. 1992, c. 20) [CCRA], when a weapon (altered potato peeler) was found in his cupboard. He was told that he was being placed in segregation because of his deteriorating behaviour and the potential risk to the safety of others at BCI.

[9] On December 22, 2014, a “Review of Offender’s Segregated Status, First Working Day Review”, was conducted, which detailed the incidents leading to the placement of Mr. McMaster in segregation. It was noted that Mr. McMaster had been administratively segregated due to an accumulation of information regarding his recent deteriorating behavior which suggested that he may be a danger to other inmates, to staff members, or to himself. These incidents included: a confrontational attitude displayed toward an Officer that resulted in the suspension of his position as Chair of the IWC; Mr. McMaster was seen on camera entering an unauthorized area; and, an altered potato peeler was found in Mr. McMaster’s unit.

[10] On December 30, 2014 at the Segregation Review Board [SRB], Mr. McMaster claimed responsibility for the potato peeler and the SRB recommended his release from segregation. That same day, another segregation review was administered: “Review of Offender’s Segregated Status, Fifth Working Day Review”, where the Institutional Head concurred with the recommendation of the SRB to release Mr. McMaster from segregation. Mr. McMaster was released from segregation later that day.

II. Grievance Decision

[11] As a result of these incidents, Mr. McMaster filed internal grievances pursuant to the Commissioner’s Directive 081- Offender Complaints and Grievances [CD 081]. This judicial review relates to the grievance decision to the third and final-level grievance which was submitted to the Commissioner. In this grievance, Mr. Master raised a number of issues including the following:

- a) Access to the washroom;
- b) Allegations of harassment;
- c) Suspension from his position as IWC Chair;
- d) The non-routine search of his cell;
- e) His placement in segregation; and
- f) The recording of his SRB hearing.

[12] On December 11, 2015, Larry Motiuk, Assistant Commissioner [AC], Policy, issued a decision upholding parts of Mr. McMaster’s grievance but denying other parts of the grievance.

[13] With respect to the parts of the grievance upheld, the AC found that CSC staff should have contacted a manager to determine if Mr. McMaster could have been permitted to use the washroom during the Inuit Feast, given his medical condition. The decision also notes that video footage of the Inuit Feast, which could not be located, should also have been retained.

[14] As well, the decision concludes that the comments made by the CO amounted to harassment.

[15] While the AC upholds the decision to place Mr. McMaster in segregation, he does note that CSC staff did not sufficiently discuss alternatives to segregation with Mr. McMaster.

[16] The AC found that Mr. McMaster's suspension from his position as Chair of the IWC was appropriate because of his deteriorating behavior which violated paragraphs 62(a)(c) of the Commissioner's Directive 083- *Inmate Committees* [CD 083].

III. Preliminary Matters

[17] At the opening of the hearing, Mr. McMaster moved to file a supplementary Affidavit he swore on September 12, 2016. The Respondent objected to the introduction of this Affidavit.

[18] In the Supplementary Affidavit, Mr. McMaster reargues the points already outlined in detail in the Affidavit he filed in support of the application and sworn on March 10, 2016. Further, the Supplementary Affidavit attaches documents which were not considered as part of the grievance process. Finally, the Affidavit was not contained to facts within the personal

knowledge of Mr. McMaster and included argument and speculation. For these reasons, the Supplementary Affidavit of Mr. McMaster was not received into evidence (*Strykiwsky v Stony Mountain*, 2000 FCJ No.1404).

IV. Issues

[19] On this judicial review, Mr. McMaster raises a number of issues which are essentially a recast of the issues raised in his grievance. Therefore in my view, the issues are:

- A. Was the AC's decision reasonable?
- B. Was there a breach of Mr. McMaster's procedural fairness rights?

V. Standard of Review

[20] The parties agree that reasonableness is the appropriate standard of review of the AC's decision. (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47)

[21] Additionally, this Court has recognized that the CSC is owed a high degree of deference in grievance matters due to its expertise in inmate and institution management (*Skinner v Canada (Attorney General)*, 2016 FC 57 at para 21; *Fischer v Canada (Attorney General)*, 2013 FC 861 at para 22).

[22] Allegations of breach of procedural fairness are considered on the standard of correctness (*Moodie v Canada (Attorney General)*, 2015 FCA 87 at para 50; *Mission Institution v Khela*,

2014 SCC 24 at para 79 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

VI. Analysis

A. *Was the AC's decision reasonable?*

[23] The reasonableness of the grievance decision will be considered in relation to the main issues raised by Mr. McMaster.

(1) Washroom incident

[24] Although this part of his grievance was upheld, Mr. McMaster argues that the COs should have been sanctioned for denying him the opportunity to use the washroom in contravention of sections 69 and 70 of the *CCRA*.

[25] The AC noted that the refusal to allow Mr. McMaster to go to the washroom was in accordance with the Commissioner's Directive 566-4- *Inmate Counts and Security Patrols*. Although Mr. McMaster requested the video recording of the events, the recording was not available. The AC determined that he could make a decision of what transpired, based upon the five observation reports submitted by different CSC staff members. In the absence of video evidence, it was reasonable for the AC to consider these observation reports, as they were relevant to the grievance. Although Mr. McMaster argues that additional observation reports should have been sought out, it was reasonable for the AC to determine that he had adequate information to understand the incident in question.

[26] Mr. McMaster was successful on this part of his grievance. However Mr. McMaster argues that the COs should be disciplined. However, discipline of COs staff is not a remedy available to Mr. McMaster as part of the grievance process. Further, the AC notes that Mr. McMaster's health was not impacted. Therefore there is no further remedy available.

(2) Removal as IWC Chair

[27] Mr. McMaster argues that the reasons for his dismissal from the IWC Chair position were not substantiated and were the result of a campaign directed to "get rid" of him. The role as IWC Chair is a position of trust and leadership within BCI. Therefore, to maintain this position, Mr. McMaster had to maintain the confidence of the CSC staff.

[28] Mr. McMaster was advised of the reasons he was being removed from the position and he was granted a hearing, where he made submissions.

[29] The AC considered the events leading to the removal of Mr. McMaster as Chair of the IWC and concluded that his removal was an appropriate response to the behavioural incidents recorded. His removal was in accordance with the *CD 083*, which states at paragraph 62 that the Institutional Head may remove a member of the IWC when the member demonstrates deteriorating institutional behaviour. The AC concluded that the decision to remove Mr. McMaster from this position was justified. This finding is reasonable.

(3) Administrative segregation

[30] Mr. McMaster argues that the AC failed to acknowledge that the COs should have considered alternatives to segregation and he argues there was no justification to his administrative segregation pursuant to subsection 31(3) of the *CCRA*.

[31] Mr. McMaster was partially successful on this part of his grievance. The AC agreed that staff should have discussed alternatives with him prior to placement in segregation. However the AC concludes that the decision to place him in segregation was reasonable because a weapon was found in his unit.

[32] The record shows that Mr. McMaster was advised as to the reasons for his placement in segregation. Essentially, Mr. McMaster disagrees that his behaviour justified the use of segregation as a measure. However, after considering the circumstances, the AC's finding that his segregation was appropriate in the circumstances is a reasonable conclusion. His segregation was it in accordance with Guidelines 709-1 *Administrative Segregation Guidelines* [G709-1], and in keeping with paragraph 31(3)(a) of the *CCRA*.

[33] Given the events leading to the segregation, that could have reasonably posed a risk to the security of others at BCI, Mr. McMaster's segregation was lawful and in keeping with the institutional guidelines and the provision of the *CCRA*.

(4) Event Recordings

[34] To assist in his grievances, Mr. McMaster made requests for recordings of various events at BCI, including the gym incident and his segregation hearings.

[35] The recording of the events in the gym was not retained. This was addressed by the AC in his decision and a directive was issued to CSC staff to ensure future recordings are retained. Therefore, Mr. McMaster was successful on this part of his grievance and no further remedy is available.

[36] Mr. McMaster also grieved the length of time (two months) it took to obtain copies of his SRB hearing. Although no policy outlines the timeframe within which inmates are to be given access to these recordings, the AC notes that two months was an unreasonable amount of time. As such, this portion of Mr. McMaster's grievance was also upheld.

[37] Additionally, Mr. McMaster grieved the fact that the recording of the segregation hearing was incomplete, thus interfering with his ability to prepare his grievance. The AC confirms that the recording ends part way through the hearing. As such, this portion of the grievance was also upheld. It is noted however that all of the information relied upon by the SRB was provided in full to Mr. McMaster.

[38] As Mr. McMaster was successful on these portions of his grievance there is no additional remedy available.

(5) Corrections to his File

[39] In his grievance, Mr. McMaster made various requests that his internal records be corrected or amended. The AC found that the Grievance Process was not the proper avenue to contest the accuracy of this information or to make any changes to the records. The AC identifies the appropriate process for Mr. McMaster to take to have these requests considered (Commissioner's Directive 701- *Information Sharing* at Annex B, paragraph 3).

[40] The AC was reasonable in concluding that he could not address the requested file corrections through this grievance process. (*Skinner*, supra at para 26)

(6) General Harassment

[41] Overall, Mr. McMaster argues that the conduct of the COs at BCI amounts to general harassment against him. He argues that the AC should have ordered a harassment investigation pursuant to sections 26 and 27 of the CD 081.

[42] The AC concluded that the harassment allegations, with the exception of the one incident where a CO made a comment comparing Mr. McMaster's behaviour to that of his five years old son, were not substantiated. The AC found that there was no evidence to corroborate the allegation of general harassment. The AC was therefore under no obligation to conduct further investigation into harassment allegations pursuant to the CD 081. This was a reasonable conclusion for the AC to make and is entitled to deference from this Court.

(7) Violation of sections 7 & 12 of the *Charter*

[43] Mr. McMaster argues that his section 7 and section 12 *Charter* rights have been violated as a result of the incidents outlined in his grievance. In particular he argues that the decision to segregate him contravened his rights under the *Charter*.

[44] Mr. McMaster's confinement to segregation was considered as part of the grievance. It was found to have been justified in the circumstances for the safety of everyone and it was done in compliance with the institutional directives. Accordingly the argument that this was in breach of his *Charter* rights has no merit.

[45] Further despite lengthy written and oral submissions, Mr. McMaster failed to plead any material facts to support the alleged *Charter* violations (see *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 21).

[46] As Mr. McMaster did not present substantive arguments to support his claims, it is not necessary for this Court to undertake a *Charter* analysis.

B. *Was there a breach of Mr. McMaster's procedural fairness rights?*

[47] Mr. McMaster makes general allegations that he was not accorded procedural fairness in his removal as IWC Chair and his placement in segregation.

[48] With respect to his removal as IWC Chair, Mr. McMaster was provided with the Correctional Intervention Board's reasons to suspend him from this position. He received a Notice of Inmate Suspension, which outlined the various incidents where his behaviour had been inconsistent with the position of IWC Chair. All of these incidents were supported by documentation and the reasons for his suspension were fully discussed with him in person. He was also provided with the opportunity to make submissions.

[49] With respect to segregation, Mr. McMaster was advised of the reasons why he was placed in segregation. He was provided with a copy of the First Working Day Review Report, which indicated that there had been an accumulation of information regarding his deteriorating behaviour. The AC recognized that he should have been made aware of the alternatives to segregation. However, ordering that the Institutional head of BCI respect its requirements outlined in the G709-1 was the appropriate corrective action.

[50] Further, according to Mr. McMaster, the BCI Warden and some CSC staff were biased against him and that this should have been considered by the AC. The AC weighed Mr. McMaster's arguments against the accounts of the other witnesses and parties involved, such as the Cos and CSC staff. The AC relied upon the supporting evidence and on his assessment of credibility to conclude that the allegations of bias were not substantiated with any evidence. It was therefore reasonable for the AC to conclude that there is no evidence to support Mr. McMaster's claim that the decision makers he faced were biased.

[51] The AC reasonably considered the procedural fairness arguments and concluded they were without merit.

VII. Conclusion

[52] Clearly, Mr. McMaster disagrees with the decision to remove him as Chair of the IWC. While that may be understandable, the staff at BCI had the mandate pursuant to section 62 of the CD 083 to take the steps they deemed necessary to protect staff and inmates. I find that the steps taken were reasonable and that Mr. McMaster's grievance to the various issues he raised was given appropriate consideration. This is evident from the fact that Mr. McMaster was successful on some portions of his grievance. Overall, the grievance decision is reasonable and it is entitled to deference from this Court. The judicial review is therefore dismissed.

[53] Although the Respondent requested costs, in the circumstances, I decline to award costs against Mr. McMaster.

JUDGMENT

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

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-136-16

STYLE OF CAUSE: GREGORY MCMASTER v THE ATTORNEY
GENERAL OF CANADA AND THE COMMISSIONER
OF CORRECTIONS AND THE WARDEN OF BEAVER
CREEK INSTITUTION MEDIUM

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APPEARANCES:

Mr. J. Todd Sloan FOR THE APPLICANT

Ms. Abigail Martinez FOR THE RESPONDENTS

SOLICITORS OF RECORD:

J. Todd Sloan FOR THE APPLICANT
Barrister and Solicitor
Ottawa, Ontario

William F. Pentney FOR THE RESPONDENTS
Deputy Attorney General of
Canada
Ottawa, Ontario