

Federal Court



Cour fédérale

**Date: 20200928**

**Docket: T-403-19**

**Citation: 2020 FC 936**

**Ottawa, Ontario, September 28, 2020**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**DWIGHT CREELMAN**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This case concerns a decision made by Mr. Larry Motiuk (the “Delegate”), an Assistant Commissioner of the Correctional Service of Canada (“CSC”), to deny Mr. Dwight Creelman’s (the “Applicant”) grievance in part (the “Final Grievance Decision”). In the Final Grievance Decision, the Delegate denied the aspect of the Applicant’s grievance that alleged he had been harassed. The Delegate found that these allegations did not meet the definition of harassment

and that there was no information to support them. However, the Delegate upheld the aspect of the Applicant's grievance where it could not be determined whether the Applicant had been provided with an interview at the first level grievance stage, despite his request to receive one.

[2] The Applicant is an inmate at Warkworth Institution ("Warkworth"). He is a diabetic with other medical conditions that require him to take insulin, among other medications. In January 2018, the Applicant submitted an initial grievance alleging harassment (the "First Level Grievance") against Nurse Randy Lang ("Nurse Lang"), who works at Warkworth. The First Level Grievance was denied, and the Applicant subsequently submitted a final level grievance (the "Final Level Grievance"). The Final Level Grievance was denied in part by the Delegate in the Final Grievance Decision.

[3] On this application for judicial review, the Applicant submits that the Delegate's Final Grievance Decision is unreasonable because it failed to address the incidents of the harassment stemming from Nurse Lang, who allegedly withheld or mismanaged medication and medical treatment, among other things.

[4] For the reasons that follow, I find that the Final Grievance Decision is reasonable. This application for judicial review is therefore dismissed.

## II. Facts

[5] The Applicant is a 65-year-old inmate at Warkworth. Nurse Lang works at Warkworth Health Care ("Health Care"). Since 2015, the Applicant has brought multiple grievances

alleging that Nurse Lang engaged in harassment against him, based on a series of interactions since May 2014. As noted in the Final Grievance Decision, CSC provided multiple final level grievance responses to the Applicant's allegations.

A. *First Level Grievance*

[6] On or around January 23, 2018, the Applicant filed the First Level Grievance, alleging that Nurse Lang harassed him on numerous occasions. He alleged that Nurse Lang dispensed health care in a malicious and vindictive manner, and entertained himself by depriving the medical needs of the inmates. The Applicant noted 12 incidents of alleged harassment ("Allegations 1-12"), many of which formed the grounds for his previous grievances.

[7] The Applicant alleged that Nurse Lang:

- i. falsified the timeline that the Applicant consumed his medication while performing a medication audit on May 20, 2014;
- ii. on May 20, 2014, refused to take the Applicant's empty blood pressure medication card that was due to be refilled the next day, resulting in the Applicant going without his medication for a day;
- iii. only checked Tylenol 3s when performing a medication audit;

- iv. put two of the same insulin cartridges in both of the Applicant's insulin pens (when he required two different ones), which would have been very dangerous for the Applicant's intake;
- v. falsified information provided to the Institutional Joint Occupational Safety and Health Committee in order to force inmates to pick up their insulin supplies at Health Care, which allowed Nurse Lang to avoid going to individual cells to supply medication during the cold winter months;
- vi. submitted a charge against the Applicant for failing to keep all of his insulin supplies at Health Care, despite having forced him to sign an agreement that all insulin supplies were to be kept in his cell;
- vii. failed to provide the Applicant with medication for a day;
- viii. used inmates as "pawns" to achieve his goal of arranging overtime for additional nurses, while depriving inmates of their medication;
- ix. charged the Applicant for possession of a wooden block that the Applicant used to ensure that he had the correct number of needles, and that Nurse Lang "shorted" the needles for diabetic inmates;
- x. noted the wrong medication, causing another nurse to refuse medication to the Applicant;

- xi. delivered medication 2.5 hours late during a lockdown; and
- xii. refused to accept the Applicant's case of used needles earlier than a specified time.

[8] In February 2018, CSC denied the First Level Grievance on the ground that the allegations did not meet the prescribed definition of harassment. CSC determined that Allegations 1-11 were "personal concerns" between the Applicant and Nurse Lang that dated back many years. CSC also found that the Warkworth Chief of Health Services discussed these issues with the Applicant and proposed mediation to find a resolution.

[9] Regarding Allegation 12, CSC found that Nurse Lang complied with existing procedures for distributing, re-stocking, and accepting insulin supplies. CSC noted there were authorized pick-up and drop-off periods for insulin supplies, and that such supplies were not to be accepted at any other time. CSC therefore found that Nurse Lang's refusal to accept the Applicant's case of used needles earlier than the authorized time did not constitute harassment.

**B. *Final Grievance Decision***

[10] On or around February 27, 2018, the Applicant escalated his grievance and filed the Final Level Grievance. In addition to his harassment allegations, the Applicant claimed that he had not been provided with an interview for the First Level Grievance.

[11] On January 18, 2019, the Delegate rendered the Final Grievance Decision, which denied the Final Level Grievance in part.

[12] The Delegate upheld the aspect of the Final Level Grievance where it could not be determined whether the Applicant had been provided with an interview upon his request during the First Level Grievance.

[13] The Delegate denied the aspect of the Final Level Grievance pertaining to harassment. In doing so, the Delegate affirmed the First Level Grievance decision and determined that the Applicant's allegations did not meet the definition of harassment. The Delegate found that Nurse Lang's actions were in line with his responsibilities, and that there was no information to support the allegation that his actions were intended to harass the Applicant.

[14] Regarding Allegations 1-11, the Delegate noted that the Applicant submitted multiple grievances concerning Nurse Lang, and was provided with final level grievance responses in: V40R00027414+2, V40R00024818, and V40R00021153+1. In particular, one of these responses previously addressed Allegations 1, 2, 5, 6, 9, and 10.

[15] The Delegate reiterated that the Warkworth Chief of Health Services previously discussed the Applicant's concerns regarding Allegations 1-11, and suggested mediation, which the Applicant refused. The Delegate noted that paragraph 6(b) of the Commissioner's Directive ("CD") 081, *Offender Complaints and Grievances* requires grievors to make every effort to resolve matters that are part of a complaint or a grievance informally through discussion.

III. **Preliminary Issue: Admissibility of Evidence**

[16] The Respondent submits that large portions of the Applicant's affidavit and memorandum of argument consist of evidence that was not before the decision maker, and therefore argues this evidence should be struck or disregarded by this Court.

[17] I agree. It is well established that judicial review on the merits is to proceed on the basis of evidence that was before the original decision-maker (*Henri v Canada (Attorney General)*, 2016 FCA 38 at para 39, citing *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19). Evidence that was not before the Delegate and goes to the merits of the matter is not admissible in an application for judicial review in this Court.

[18] Considering the above, portions of the Applicant's affidavit and factum that include such evidence will be disregarded. Among others, this evidence includes the Applicant's complaints to the Health Professions Appeal and Review Board ("HPARB"), and incidents or allegations of harassment that postdate the Final Grievance Decision.

IV. **Issue and Standard of Review**

[19] The sole issue on this application for judicial review is whether the Final Grievance Decision is reasonable.

[20] Under the framework in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], reasonableness is the presumed standard of review. This presumption can be rebutted in two types of situations: first, where the legislature has indicated that it intends a different standard to apply, i.e., where it has explicitly prescribed the applicable standard of review, or where it has provided a statutory appeal mechanism from the administrative decision maker to a court; and second, where the rule of law requires that the standard of correctness applies, i.e., in certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole, and questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[21] The Respondent submits that neither of the exceptions in *Vavilov* apply in this case, and that the Final Grievance Decision is thus reviewable under the reasonableness standard. The Respondent asserts that the first exception does not apply because the *Corrections and Conditional Release Act*, SC 1992, c 20, does not set out an explicit standard of review or a statutory appeal mechanism for final level grievances. The Respondent further submits that the second exception does not apply because the Final Grievance Decision does not raise a legal question that warrants the correctness standard of review.

[22] I agree. Findings of mixed fact and law made during the CSC offender grievance process are reviewable under the reasonableness standard (*Skinner v Canada (Attorney General)*, 2016 FC 57 at para 21, citing *Fischer v Canada (Attorney General)*, 2013 FC 861 at para 22). In my view, *Vavilov* does not alter this approach.



V. Analysis

[23] Given that the Applicant is a self-represented litigant, I am mindful that his submissions may not provide the type of legal analysis that this Court receives from counsel. As such, I have attempted to distill his arguments into a framework that is helpful in reviewing this application for judicial review.

[24] The Applicant's overarching submission is that the Delegate failed to address Nurse Lang's persistent and ongoing harassment, and erred by denying the Applicant's allegations. The Applicant also submits that the Delegate breached procedural fairness by denying the Applicant's grievance without giving him an opportunity to discuss the matter pursuant to subsection 74(2) of the *Corrections and Conditional Release Regulations*, SOR/92-620.

[25] The Applicant submits that it was unreasonable for the Delegate to claim "CSC takes allegations of harassment very seriously" and not comment upon Nurse Lang's disciplinary matters with the College of Nurses or HPARB. The Applicant further submits it was unreasonable for the Delegate to conclude that Allegations 1-11 amounted to "personal concerns", as Nurse Lang's actions put the Applicant's health at risk.

[26] The Applicant argues that the Final Grievance Decision is merely a summary of the allegations and that the Delegate failed to consider the allegations as a whole. The Applicant submits that the Delegate falsely claimed that he previously refused medication. The Applicant

contends that CSC erred by failing to provide him with an interview with regard to the First Level Grievance, and that the Delegate also erred by failing to provide him with an interview.

[27] The Respondent submits that the Final Grievance Decision is reasonable because it demonstrates a clear line of analysis that led the Delegate to arrive at a conclusion that is justified in light of the available evidence. The Respondent notes that the Final Grievance Decision sets out the relevant test, facts and issues, and the applicable CD in its three-page decision.

[28] The Respondent contends the Delegate reasonably determined that Allegations 1-11 did not meet the prescribed definition of harassment because Nurse Lang's actions were in line with his responsibilities as a nurse. The Respondent argues the Delegate reasonably found that these allegations amounted to personal concerns between the Applicant and Nurse Lang, as described in the First Level Grievance response. In arriving at this finding, the Respondent submits the Delegate properly considered the history of the Applicant's proceedings against Nurse Lang, which date back to 2015. The Respondent submits that the Applicant continually sought to re-litigate the same allegations of harassment against Nurse Lang, and that the Final Grievance Decision was one of multiple final level grievance responses in which the harassment allegations were determined to be unfounded.

[29] Regarding Allegation 12, the Respondent notes that all inmates who required insulin supplies were to attend Health Care on Mondays at 1:00pm for their weekly supplies. Based on this evidence, the Respondent submits it was reasonable for the Delegate to conclude that Nurse

Lang's refusal to accept the Applicant's case of used needles outside of the specified time was in line with his work responsibilities and did not constitute harassment.

[30] The definition of harassment provided in the Final Grievance Decision reads as follows:

Any improper conduct by a CSC staff member, that is directed at and offensive to an offender, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.

[31] First, I note that the Applicant's submissions regarding the breach of procedural fairness is a non-issue, as this aspect was upheld in the Final Grievance Decision. The Delegate acknowledged that the Applicant was not provided with an interview with regard to the grievance following his request at the first level. As corrective action, the Delegate determined that the Institutional Head of Warkworth must conduct an interview with the Applicant, if requested, pursuant to paragraph 41 of the Guidelines 081-1, *Offender Complaint and Grievance Process*.

[32] In my view, the Final Grievance Decision is reasonable. Contrary to the Applicant's assertion that the decision was merely a summary of the harassment allegations, the Delegate provided sufficient reasons to explain why the Applicant's grievance was denied in part. The Delegate noted that the Applicant rejected a mediation opportunity to find a resolution for Allegations 1-11. Under paragraph 6(b) of CD 081, *Offender Complaints and Grievances*, the Applicant was obligated to "make every effort" to resolve a grievance through informal

discussions, but refused to do so. As such, it was reasonable for the Delegate to conclude that CSC staff attempted to resolve the Applicant's issues with Nurse Lang and to address the grievance. I agree with the Respondent that many of the allegations were already addressed in other grievances filed by the Applicant and were attempts to re-litigate the same issues.

[33] The Delegate also determined that the Applicant was informed that complaints concerning Nurse Lang before the HPARB and the College of Nurses were outside of CSC's authority, and were therefore inappropriate considerations for the Delegate's review. Although the Applicant attempted to introduce external complaints to strengthen his arguments, in my view, it was reasonable for the Delegate to disregard this information and limit the grievance to the complaints before CSC.

[34] The Delegate reasonably found that Nurse Lang's refusal to accept the Applicant's used needles aligned with his professional duties and responsibilities. Warkworth had implemented a specific time and location to allow inmates to obtain their weekly insulin supplies and return used needles. As noted by the Delegate, it was clear that such items would not be accepted at any other time. By refusing to accept the Applicant's needles outside of this prescribed time, Nurse Lang simply abided by the existing procedures. It was therefore reasonable for the Delegate to conclude that this refusal by Nurse Lang did not constitute harassment.

VI. **Costs**

[35] Both parties have requested that costs be awarded. Under Rule 400(1) of the *Federal Courts Rules*, SOR/98-106, this Court has full discretionary power over the amount and allocation of costs. Having considered all the factors, no costs will be awarded.

VII. **Conclusion**

[36] In conclusion, I find that the Delegate's decision is reasonable. This application for judicial review is therefore dismissed.

**JUDGMENT IN T-403-19**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed.
2. No costs are awarded.

"Shirzad A."

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-403-19

**STYLE OF CAUSE:** DWIGHT CREELMAN v ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, TORONTO, AND CAMPBELLFORD, ONTARIO

**DATE OF HEARING:** AUGUST 5, 2020

**JUDGMENT AND REASONS:** AHMED J.

**DATED:** SEPTEMBER 28, 2020

**APPEARANCES:**

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