**Date: 20100720**

**Docket: T-2092-09**

**Citation: 2010 FC 762**

**Ottawa, Ontario, July 20, 2010**

**PRESENT: The Honourable Madam Justice Tremblay-Lamer**

**BETWEEN:**

**DAVID R. JOLIVET**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, for judicial review of a decision by the Senior Deputy Commissioner ("SDC") of the Correctional Service of Canada ("CSC") dismissing at the final level a grievance filed by David R. Jolivet ("the Applicant"). The grievance concerned the decision of the Warden of the Mountain Institution ("the Warden") not to allow the Applicant to return to work as soon as some other inmates following a lockdown of the Mountain Institution.

## BACKGROUND FACTS

[2] The Applicant is an inmate at the Mountain Institution, a medium security penitentiary. He works as the institution's Bleach Coordinator. He is classified as a medium security offender.

[3] On March 29, 2008, there was a riot at the Mountain Institution, resulting in a shutdown of the penitentiary. The Applicant did not participate in the riot.

[4] Following the shutdown, the Warden established a plan for a gradual return to a normal routine. Under that plan, inmates whose ratings of institutional adjustment were "low" were allowed to return to work on May 21, 2008. Inmates whose ratings of institutional adjustment were "moderate" were to resume work on June 17, 2008. However, the Applicant, whose rating of institutional adjustment was also "moderate," was allowed to return to work on June 6, 2008.

[5] During the shutdown and until his return to work, the Applicant was paid at half his usual daily wage, pursuant to paragraph 45(a)(2) of the Commissioner's Directive ("CD") 730.

[6] In May 2008, upon learning that he would not be allowed to return to work at the same time as inmates with "low" ratings of institutional adjustment, the Applicant commenced a grievance process. He now seeks a judicial review of the final denial of his grievance.

[7] The Senior Deputy Commissioner rejected the Applicant's argument that the CD 730 does not provide for a partial shutdown. In his view, the word shutdown in paragraph 45(a) of that directive "encompasses all types of shutdowns, including partial shutdowns." The Warden is

responsible for "managing challenges as they arise in such a way as to return the institution to a safe and secure environment as soon as possible" after an incident, pursuant to paragraph 13(b) of the CD 567, as well as for the control of inmates, management of the penitentiary and the direction of its staff, pursuant to paragraphs (a) to (c) of section 4 of the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*CCRR*"). It was thus open to him to establish a phased schedule for a return to normal following the riot at the Mountain Institution, and to determine that inmates who required more supervision, as demonstrated by higher institutional adjustment ratings, would not be allowed to return to work as fast as those who required less.

[8] The sole issue in this case is whether the SDC erred in concluding that the Warden had the power to decide that inmates with higher institutional adjustment ratings would not be able to return to work at the same time as those whose ratings were "low."

**ANALYSIS**

[9] This issue concerns the Warden's powers under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*) and the *CCRR*, and is accordingly one of jurisdiction. The applicable standard of review is, therefore, correctness (*Dunsmuir v. New-Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at par. 59).

[10] The thrust of the Applicant's argument is that the Warden exceeded his powers by creating "sub security Classifications within Medium Security." Because the inmates at Mountain Institution are classified as medium security, to treat them differently according to the security risk they

represent is contrary to the provisions of the *CCRA* establishing security classifications as well as to the statutory duty to act fairly which is incumbent upon the Warden. Furthermore, the Warden does not have the power to impose a partial shutdown of a penitentiary during which some, but not all, inmates are allowed to return to work. There must be either a complete shutdown or none at all.

[11] The Applicant relies on Offender Redress Bulletins ("the Bulletins") issued by the Correctional Service of Canada ("CSC") which, according to him, prohibit the use of institutional adjustment ratings "to increase or decrease Security Classification Levels in Medium Security Facilities." He also relies on an internal CSC letter in which the Director of its Offender Redress Division expressed doubt as to whether the Warden's actions were within his powers.

[12] The Respondent argues that the Warden had the authority to modify inmates' work routines, including by imposing a schedule of gradual return to work, pursuant to which inmates requiring less supervision resume work earlier. Being responsible for the health and safety of inmates and staff of the Mountain Institution, the Warden has a "broad discretion to develop plans that promote the objectives of the institution's safety." Exercising this discretion, the Warden could validly impose a "partial shutdown," since the CD 730 does not qualify the term "shutdown" and does not require that it be a complete one.

[13] The Respondent submits that some of the provisions of the *CCRA* on which the Applicant relies, which deal with institutional placement and transfers, are irrelevant in this case. The statutory duty to act fairly is also not at issue, because it deals with the manner in which decisions affecting inmates are taken and "does not require that all offenders be treated exactly the same." Finally, the

fact that Parliament has created certain security classifications did not prevent the Warden from taking other security-related factors into account in shaping his response the riot at Mountain Institution. Institutional adjustment ratings are based on the a "[c]lincal judgment" as to the degree of supervision an inmate requires, and while they do not constitute a separate security classification, they were a relevant consideration which the Warden could properly take into account.

[14] I agree with the Respondent for the following reasons.

[15] The term "shutdown" is not defined in the *CCRA*, the *CCRR*, or any of the Commissioner's Directives. CD 568-1, Recording and Reporting of Security Incidents, includes an Annex A entitled "Definitions for the Purpose of Reporting Security Incidents," which defines a "lockdown" as "[a] non-routine situation which results in full suspension of all activities/privileges and the inmates are locked in their cells on a non-individualized basis." However, this definition is only valid "for the purpose of reporting security incidents" and does not limit the Warden's powers. Neither CD 568-1, nor any other provision of the *CCRA*, the *CCRR*, or the Commissioner's Directives prevents the Warden from ordering a gradual lifting of a "lockdown."

[16] Pursuant to paragraph 4(d) of the *CCRA*, the CSC is required to "use the least restrictive measures consistent with the protection of the public, staff members and offenders." Therefore, I am of the view that the Warden *must* have the power to order the partial lifting of a lockdown if allowing some, but not all, inmates to resume their normal routines is consistent with the protection

of the public, staff members, and their own, since such a measure is the least restrictive of their residual liberty.

[17] Inmates' Institutional Adjustment Ratings are relevant to such a decision and the SDC did not err in concluding that the Warden properly took them into account. They are the results of assessments of the "degree of supervision and control within the penitentiary" an inmate requires, which is one of the factors to consider in establishing an inmate's security classification pursuant to section 18 of the *CCRR*. When establishing a plan for a gradual return to normal following a security incident, it is reasonable for the Warden to consider the degree of supervision and control inmates require in order to decide which of them can safely be allowed to resume their ordinary routines first.

[18] In doing so, the Warden does not create a new security classification contrary to the legislative scheme set up by Parliament. He is merely taking a relevant factor into account in devising a temporary response to an emergency situation. The statutory provisions and the Bulletins on which the Applicant relies do not restrict the Warden's power to do so.

[19] Section 28 of the *CCRA* provides that the penitentiary "in which [an offender] is confined is one that provides the least restrictive environment for that person" taking into account a number of factors. Similarly, the Bulletins deal with the placement and transfer of inmates in various medium-security penitentiaries. Neither they nor section 28 of the *CCRA* are relevant on the facts of the present case.

[20] Section 30 of the *CCRA* provides that inmates are to be classified as maximum, medium, or minimum security. The Warden did not contravene it. He did not re-classify the Applicant into some other category but, as explained above, merely took temporary measures in order to respond to an emergency situation. It is noteworthy that the Applicant was allowed to resume his work duties little over two weeks after the inmate**s** with a "low" Institutional Adjustment Ratings were.

[21] Finally, the principle "that correctional decisions be made in a forthright and fair manner," set out in paragraph 4(g) of the *CCRA*, relates to the decision-making process. It justifies, for example, the inmates' right to be heard before certain decisions concerning them are made, and to have access to reasons for such decisions. However, it does not mandate that these decisions conform to any specific understanding of substantive fairness, such as that all inmates at a locked down penitentiary are to be treated in the same way. Nor does it allow this Court, on judicial review, to substitute its own view of what a substantively fair outcome would have been for a decision lawfully taken by the Warden or any other person to whom Parliament has delegated the authority to make such a decision.

[22] The Warden had the power to order a gradual lifting of a shutdown, allowing some inmates to return to work before others. Further, in taking the latter decision in this case, he did not rely on irrelevant considerations or create security classifications contrary to the *CCRA*. Thus the SDC did not err dismissing the Applicant's grievance.

[23] For these reasons, the application for judicial review of the decision is dismissed, without costs.

## JUDGMENT

**THIS COURT ORDERS that** the application for judicial review of the decision be dismissed, without costs.

"Danièle Tremblay-Lamer"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-2092-09 |
| **STYLE OF CAUSE:** | DAVID R. JOLIVET v. AGC |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | July 15, 2010 |
| **REASONS FOR JUDGMENT:** | TREMBLAY-LAMER J. |
| **DATED:** | July 20, 2010 |

**APPEARANCES:**

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| David R. Jolivet | FOR THE APPLICANT |
| Charmaine de Los Reyes | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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