

Federal Court
of Appeal



Cour d'appel
fédérale

Date: 20120123

Docket: A-264-11

Citation: 2012 FCA 23

**CORAM: PELLETIER J.A.
GAUTHIER J.A.
MAINVILLE J.A.**

BETWEEN:

JORDAN J. MCBAIN

Appellant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on January 11, 2012.

Judgment delivered at Ottawa, Ontario, on January 23, 2012.

REASONS FOR JUDGMENT BY:

PELLETIER J.A.

CONCURRED IN BY:

GAUTHIER J.A.
MAINVILLE J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] While Mr. McBain was a member of the Canadian Forces, the Director Military Careers Administration and Resource Management (DMCARM) placed him on Counselling and Probation as a result of his illicit use of anabolic steroids. One of the steps leading to that disposition was an order by Mr. McBain's Commanding Officer requiring him to provide a urine sample for testing. The test confirmed his use of steroids. However, before the test results were known, Mr. McBain wrote to his Commanding Officer and admitted to his use of steroids. This admission was known to the DMCARM at the time he made his decision.

[2] The order made by the DMCARM was an administrative disposition of a matter that could have otherwise been the subject of disciplinary proceedings.

[3] Mr. McBain, who is self-represented, grieved both the decision ordering him to produce a urine sample and the subsequent decision placing him on Counselling and Probation. This grievance was ultimately disposed of by the Final Grievance Authority, which dismissed Mr. McBain's grievance. Mr. McBain then brought an application for judicial review of the Final Grievance Authority's decision to the Federal Court. Mr. McBain's application for judicial review was also dismissed in a decision reported as *McBain v. Canada (Attorney General)*, 2011 FC 745, [2011] F.C.J. No. 939. A full review of the facts of the case can be found in the Federal Court's decision. Mr. McBain now appeals to this Court.

[4] Mr. McBain's grievance attacked both the order that he provide a urine sample, as well as the DMCARM's recognition of his drug use and the resulting administrative decision to place him on Counselling and Probation. In my view, Mr. McBain's grievance is, in substance, an attempt to expunge from his record the findings related to his drug use as reflected in the decision placing him on Counselling and Probation. The basis of his grievance is that the order requiring him to provide a urine sample for testing was made in breach of his rights and so the results of this test cannot be used to justify any subsequent administrative or disciplinary measures.

[5] Mr. McBain's attack upon the order requiring him to provide a urine sample is two-pronged. He alleges that there was a denial of procedural fairness in the process leading up to the making of the order. That denial, in turn, has two components: on the one hand, institutional bias and a reasonable apprehension of bias on the part of his Commanding Officer who made the order, and, on other hand, a lack of disclosure prior to the making of that order. The institutional bias arises from his Commanding Officer allegedly both ordering the investigation with respect to his drug use, and then ruling on the adequacy of the evidence disclosed by that investigation as a basis for ordering Mr. McBain to provide a urine sample. The allegation of a reasonable apprehension of bias is based on the same facts, considered from the point of view of whether a reasonable bystander, fully informed of the circumstances, would conclude that the Commanding Officer had approached the issue of the adequacy of the evidence with an open mind.

[6] The argument with respect to inadequate disclosure is based on the failure of those in charge to disclose to him certain bizarre allegations apparently made by the person who alleged that Mr. McBain was engaged in illicit drug use. Had this information been disclosed to him, Mr. McBain says, he could have used it to challenge the credibility of the person whose evidence the Commanding Officer relied upon in ordering him to provide a urine sample. Mr. McBain also complains that a DVD of the Military Police's interview with another witness was lost, so that he was denied the opportunity to use this DVD in challenging the credibility of that witness.

[7] The difficulty with these arguments is that the DMCARM's decision was explicitly based upon Mr. McBain's own admission as to his drug use: see Appeal Book page 364. Consequently, even if Mr. McBain is correct with respect to all of the procedural fairness arguments he raises, a matter on which we express no opinion, the DMCARM was nonetheless entitled to recognize his drug use and to place him on Counselling and Probation.

[8] In his representations before the Final Grievance Authority, Mr. McBain attempted to show that his admission was either involuntary, or the result of undue influence. The Final Grievance Authority ruled against Mr. McBain on these issues, as did the Applications Judge. Since these issues involve determinations of fact or mixed fact and law, they are subject to review on a standard of reasonableness. I am satisfied that the Final Grievance Authority's ruling on these points is reasonable. I can only add that, having read the letter in which Mr. McBain admits to his drug use, it impresses me as having been written by a person in possession of his faculties. It may be true that Mr. McBain subsequently experienced difficulties that resulted in his receiving a psychiatric assessment, if not a brief period of psychiatric care, but those circumstances, in and of themselves, are not sufficient to raise a credible doubt as to the reliability of Mr. McBain's admission.

[9] In the circumstances, I would dismiss Mr. McBain's appeal.

[10] Mr. McBain does not seek costs and asks that costs not be awarded against him on the basis that he is a person of limited means, currently engaged in doctoral studies requiring all of his

resources. While I am sympathetic to Mr. McBain's position, I can see no reason to depart from the general rule that costs follow the event. That said, and having regard to the fact that Mr. McBain is already subject to an order for costs in the amount of \$5,000, I would order costs on a lump sum basis in the amount of \$2,500, inclusive of disbursements.

"J.D. Denis Pelletier"

J.A.

"I agree.

Johanne Gauthier J.A."

"I agree.

Robert M. Mainville J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-264-11

STYLE OF CAUSE: **Jordan J. McBain and The
Attorney General of Canada**

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: January 11, 2012

REASONS FOR JUDGMENT BY: Pelletier J.A.

CONCURRED IN BY: Gauthier J.A.
CONCURRING REASONS BY: Mainville J.A.
DISSENTING REASONS BY:

DATED: January 23, 2012

APPEARANCES:

Jordan J. McBain FOR THE APPELLANT
(self-represented)

Craig Collins-Williams FOR THE RESPONDENT

SOLICITORS OF RECORD:

N/A FOR THE APPELLANT
(self-represented)

Myles J. Kirvan FOR THE RESPONDENT
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