

Federal Court



Cour fédérale

Date: 20230124

Docket: T-288-20

Citation: 2023 FC 111

Ottawa, Ontario, January 24, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

DENNIS PEARCE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Dennis Pearce, is an inmate at Bath Institution (“Bath”), a federal prison operated by the Correctional Service of Canada (“CSC”). He seeks judicial review of the Offender Final Grievance Response (the “Decision”) dated January 31, 2020, made by the Special Advisor to the Commissioner (“Special Advisor”) of the CSC.

[2] The Decision is the culmination of the Applicant's escalation of his complaint through the CSC offender complaint and grievance process, which involved the Applicant's Offender Complaint Presentation, Offender Initial Grievance Presentation and finally, the Offender Final Grievance Presentation.

[3] The Decision is the response to the Applicant's final grievance.

II. **Background Facts**

[4] The complaint was initiated in November 2017 after the Applicant learned that correspondence addressed to him from the College of Nurses of Ontario ("CNO") had been opened by administrative staff at Bath.

[5] The opened envelope was then forwarded to the health care unit at Bath, at which time it was allegedly viewed by a nurse employed at Bath who was the subject of an ongoing complaint with the CNO.

[6] In his final grievance presentation, the Applicant raised the following concerns before the Commissioner:

1. In accordance with subsection 89(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 ["CCRR"], the correspondence from CNO should not have been opened as it related to an ongoing complaint against a nurse of the health care department of Bath.

2. The NHQ should take corrective action with new protocols in place to prevent further incidents such as these from happening. The Applicant specifically requests that the CSC consider adding the College of Physicians and Surgeons of Ontario and the College of Nurses of Ontario to the list of privileged correspondents in Annex A of the Commissioner's Directive 085 and the Schedule to subsection 94(2) of the *CCRR*, as they are agencies for filing complaints "no different from writing a complaint to the Correctional Investigator of Canada".

III. **The Decision**

[7] The Special Advisor upheld the Applicant's grievance in part. They found no error in the opening of correspondence from the CNO as it was not a privileged correspondent:

With respect to the processing of your correspondence, it is important to note that staff are not authorized to open an envelope containing privileged correspondence without authorization from the IH, in accordance with paragraphs 11 and 12 of CD 085. As mentioned at the previous levels, the College is not included as a privileged correspondent in Annex A of CD 085 and, accordingly, staff are permitted to open correspondence from the College in order to verify the contents and inspect the envelope, in accordance with paragraph 5(a) of CD 085. Accordingly, this portion of your grievance is denied.

[8] However, the Special Advisor also acknowledged that the correspondence was inappropriately forwarded to the healthcare unit after it was incorrectly identified as being related to a medical appointment. As such, the Special Advisor found that the CNO correspondence should not have been read for the purpose of assisting with scheduling a medical appointment.

[9] The Decision clearly states that, in accordance with paragraph 8 of CD 085, while staff are permitted to verify correspondence for its contents they are not to read its substance:

8. Normally, letters to and from inmates shall not be read. However, pursuant to subsection 94(1) of the Corrections and Conditional Release Regulations, the Institutional Head or designate may, in writing, authorize a staff member to read correspondence when he or she believes on reasonable grounds, that:

- a. the correspondence between the inmate and the member of the public contains or will contain evidence of an action that would jeopardize the security of the penitentiary or the safety of an individual; and
- b. interception of the inmate's correspondence with the member of the public is the least restrictive alternative available in the circumstances.

[10] Moreover, the Decision confirms the CNO is not responsible for the scheduling of medical appointments and there is no reason for BI staff to be reading or intercepting correspondence addressed to an offender for such a stated purpose. Therefore, the handling of the correspondence from the CNO at BI was found to be not in accordance with the *CCRR* and Commissioner's Directives 085 and 568-10.

[11] In response to the Applicant's request for additions to the existing list of privileged correspondents, the Special Advisor held that such policy concerns ought to be raised to the Inmate Committee and not in the grievance process:

With respect to your concern with the correspondents identified as privileged and included in Annex A of CD 085, please note that the complaint and grievance process is not the appropriate mechanism for raising concerns with CSC policy. Rather, offenders with concerns about policy are encouraged to forward their concerns, in writing, to the Inmate Committee, who can

follow the appropriate procedures and bring forward those concerns.

[12] The handling of the correspondence from the CNO at BI was found by the Special Advisor to be not in accordance with the *CCRR* and Commissioner's Directives 085 and 568-10. As a result, the Applicant's grievance was upheld in part.

[13] The Decision concluded with the following:

The Institutional Head of Bath Institution will ensure that correspondence from the College of Nurses is no longer forwarded to anyone except the offender, in accordance with Commissioner's Directive 085 *Correspondence and/or Telephone Communication*.

IV. **Standard of Review**

[14] Both parties submit that the applicable standard of review is reasonableness. I agree.

[15] Findings of mixed fact and law made during the CSC offender grievance process are reviewable under the reasonableness standard: *Creelman v Canada (Attorney General)*, 2020 FC 936, (*Creelman*) at para 22, citing *Skinner v Canada (Attorney General)*, 2016 FC 57 at para 21.

[16] Under reasonableness review, a reasonable decision is based on an internally coherent and rational chain of analysis, and it is justified in relation to the facts and law that constrain the decision maker: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 85.

[17] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from “reweighing and reassessing the evidence considered by the decision maker”: *Vavilov* at para 125.

V. **Analysis**

[18] The issue before the Court is whether the Decision is reasonable.

[19] The Applicant submits that the Special Advisor erred in law in finding that the CNO is not a privileged correspondent.

[20] Specifically, the Applicant argues that the CNO should be considered a “provincial ombudsperson”, which is one of the listed privileged correspondents in Annex A of the Commissioner’s Directive 085 and the Schedule to subsection 94(2) of the *CCRR*. The reason for this submission was that the CNO functions as a professional regulatory body empowered by the *Nursing Act*, which is provincial legislation.

[21] In addition, the Applicant submits that the failure to consider the Applicant’s argument regarding the “legitimacy of the CNO’s exclusion from the existing list” is an error in law, contrary to the clear intention of Parliament in its enactment of the *Corrections and Conditional Release Act*, SC 1992, c 20 the *CCRR* and Commissioner’s Directives.

[22] The Respondent maintains that it was reasonable for the Special Advisor to find that CSC staff was permitted to open the CNO letter in order to inspect the envelope's contents in accordance with paragraph 5(a) of CD 085.

[23] With respect to the Applicant's argument that the CNO ought to have been considered a "provincial ombudsperson", the Respondent notes that this argument is being raised for the first time before this Court. It was not included in the Applicant's complaint or final grievance submissions.

[24] The Applicant's arguments were based on his concern that the CNO was excluded from the Schedule, and he requested it be added to the Schedule. The Respondent submits that the Special Advisor cannot be faulted for failing to address an interpretive argument that was not before them and that contradicted the Applicant's final level grievance submissions.

[25] I agree with the Respondent. It is well known that judicial review proceeds on the basis of the evidence that was before the 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. It follows that evidence that was not before the Special Advisor and goes to the merits of the matter is not admissible in an application for judicial review in this Court: *Creelman* at para 17.

[26] I also find it to be self-evident that if Parliament had wished to include the CNO as a privileged correspondent it easily could have done so by adding the CNO to Annex A of the Commissioner's Directive 085 and to the Schedule to subsection 94(2) of the *CCRR*.

VI. **Conclusion**

[27] In this case, the Applicant not only failed to include the interpretation of the provincial ombudsperson in his final grievance where it could have been raised, his request to add the CNO was based on the acknowledgement that CD 085, and the *CCRR* as it currently stands, both fail to mention the CNO.

[28] The Applicant cannot now submit that the Special Advisor erred by finding that the CNO is not a privileged correspondent. As such, this application for judicial review is dismissed.

[29] The Applicant's request for relief is denied.

[30] The Respondent requested unspecified costs. However, considering the Applicant was partially upheld by the Special Advisor and taking into account that the Applicant was self-represented in all matters prior to this review, and he remains incarcerated, in the exercise of my discretion, I decline to award costs to the Respondent.

[31] The application is dismissed for the reasons set out herein.

JUDGMENT in T-288-20

THIS COURT'S JUDGMENT is that the application is dismissed.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-288-20

STYLE OF CAUSE: DENNIS PEARCE v ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: HELD BY WAY OF VIDEOCONFERENCE

DATE OF HEARING: MARCH 8, 2022

JUDGMENT AND REASONS: ELLIOTT J.

DATED: JANUARY 24, 2023

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