

CANADA / JUDGMENT

Richer v. Freeland

2006 FC 1188

COURT

Federal Court

DECIDED

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Decision Content

Date: 20061005

Docket: T-2303-05

Citation: 2006 FC 1188

Ottawa, Ontario, October 5, 2006

PRESENT: The Honourable Barry Strayer

BETWEEN:

JEAN RICHER

Applicant

and

MARIA LYNN FREELAND, INDEPENDENT CHAIRPERSON,

SASKATCHEWAN PENITENTIARY and

ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant asked the Court to quash a conviction entered against him by an independent chairperson (“the ICP”) at Prince Albert Penitentiary on December 7, 2005. He was found guilty of having refused to provide a urine sample when it was demanded of him pursuant to paragraph 54(b) of the Corrections and Conditional Release Act, S.C. 1992, c. 20 and a fine of fifty dollars was imposed on him. That paragraph provides as follows:

54. Subject to section 56 and subsection 57(1), a staff member may demand that an inmate submit to urinalysis

...

(b) as part of a prescribed random selection urinalysis program, conducted without

individualized grounds on a periodic basis and in accordance with any Commissioner's Directives that the regulations may provide for;

54. L'agent peut obliger un détenu à lui fournir un échantillon d'urine dans l'un ou l'autre des cas suivants :

...

b) il le fait dans le cadre d'un programme réglementaire de contrôle au hasard, effectué sans soupçon précis, périodiquement et, selon le cas, conformément aux directives réglementaires du commissaire;

[2] The facts are not in dispute. On July 20, 2005, the Applicant was asked to provide a urinalysis sample under the random selection process. He refused to provide a sample on the basis that the process did not conform to the Corrections and Conditional Release Regulations, SOR/92-620 ("CCCR") and the Commissioner's Directive 566-10 made under those Regulations. Printed notification to provide a urine sample was given to the Applicant at the time of the request and he signed that form declaring that he had been informed of the basis upon which the sample was required and understood the consequences of non-compliance. He was subsequently charged with the offence of refusing to provide a sample. His hearing before the ICP was adjourned several times and was completed on December 7, 2005 with a conviction and imposition of the fine.

[3] The Applicant raises several objections to the validity of the program and these objections will be described in the analysis that follows.

Analysis

[4] First, he says that pursuant to the Regulations, section 60, the laboratory that may conduct the test of urine samples is defined as "a laboratory authorized by Commissioner's Directives to analyse samples". He complains that in the Commissioner's Directive 566-10, the only definition of a laboratory is "a laboratory contracted by CSC to analyse samples is an authorized laboratory for the purposes of section 60 of the CCRR". It is not disputed that the Correctional Services Canada ("CSC") used a laboratory in Mississauga which is under contract with the CSC to test samples from all over Canada. On his request, the CSC advised the Applicant as to the name of this laboratory. I am satisfied that this adequately complies with the requirements of the Regulations and the Commissioner's Directive with respect to the designation of a laboratory.

[5] The Applicant objects that while section 60 of the Regulations refers to "analysis, using an approved procedure, by a laboratory" there was nowhere in the Regulations or Commissioner's Directive a definition of "approved procedure". However, paragraphs 5, 7, 8, 9 and 10 of the Commissioner's Directive define what constitute positive test results and negative test results, the required quantity of urine to be sampled, and the definition of what would be regarded as a diluted sample. These paragraphs also refer to Annex A of the Directive which specifies various classes of intoxicants and the cut-off levels of ingredients which amount to a positive or negative test result. Again, I am satisfied that the Directive adequately provides criteria for testing and I do not agree with his contention that the Directive must set out the process actually employed for the testing.

[6] The Applicant argues that there was no proper random selection among the prison population of Prince Albert Penitentiary. He relies on the language of subsection 63(2) of the Regulations which provides that inmates shall be chosen for testing "by random selection from among the names of the entire inmate population of the penitentiary". It appears that, in this case, two lists of inmates were made: one comprising those in maximum security, and another consisting of those in medium security. A random selection was made within each of these groups. I fail to

understand how this does not constitute a “random selection from the ... entire inmate population”.

[7] The Applicant points to the definition of “sample” in section 60 of the Regulations which defines it as a “quantity of unadulterated urine sufficient to permit analysis”. On that basis, he objects to the provisions in Annex B of the Commissioner’s Directive 566-10 which provides for “Analysis of diluted/adulterated samples”. It is difficult to comprehend how all this has any bearing on whether the Applicant should have given a sample, but I accept the arguments of counsel for the Respondent that there is a constant possibility that samples provided by inmates will either be diluted (that is through consumption by the inmate before he provides the sample) or adulterated (that is addition of a substance to the sample by the inmate after it is given). Annex B therefore provides criteria for identifying such spurious samples as part of the process of testing samples provided by inmates. I see nothing in the process inconsistent with the requirements of the Directive.

[8] The Applicant argues that he was not given proper notice of the disciplinary offence as required by section 25 of the Corrections and Conditional Release Regulations. That section provides:

25. (1) Notice of a charge of a disciplinary offence shall

(a) describe the conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and
(b) state the time, date and place of the hearing.

(2) A notice referred to in subsection (1) shall be issued and delivered to the inmate who is the subject of the charge, by a staff member as soon as practicable.

25. (1) L’avis d’accusation d’infraction disciplinaire doit contenir les renseignements suivants :

a) un énoncé de la conduite qui fait l’objet de l’accusation, y compris la date, l’heure et le lieu de l’infraction disciplinaire reprochée, et un résumé des éléments de preuve à l’appui de l’accusation qui seront présentés à l’audition;

b) les date, heure et lieu de l’audition.

(2) L’agent doit établir l’avis d’accusation disciplinaire visé au paragraphe (1) et le remettre au détenu aussitôt que possible.

[9] The Applicant’s complaint appears to relate to two documents: a “notification to provide a urine sample” which was handed to him on July 20, 2005, and an “inmate offence report and notification of charge” which advised him of the charge and date of the hearing (July 27, 2005). In part his complaints seem to be that these documents referred or mis-referred to the Commissioner’s Directive 566-10 and that either he should have been advised correctly of the directive number or should have been given the correct directive along with the notice. At best, the references to the Commissioner’s Directive were provided only to indicate the authority for the notification. It was certainly not necessary that the officer serving the notice provide the actual legal authorities for it. If the Applicant wishes to challenge those authorities, he could and did do so at the hearing. He does not assert that he was denied access to the authorities before the hearing. Further, section 25 of the Regulations refers only to the notification of the charge which says that it must “describe the conduct that is the subject of the charge and contain a summary of the evidence to be presented ... at the hearing...”. The notification of charge delivered to the Applicant, apparently on July 21, 2005 (a date inserted by him), and which bears his signature acknowledging his knowledge of his right to instruct counsel, described the incident as follows:

On 2005-07-20 at about 1308 inmate Richer FPS 9278328 refused to provide a urine

sample when demanded pursuant to Section 54(b) of the Corrections and Conditional Release Act and Commissioner's directive 566-10.

[10] It is difficult to understand what further information the Applicant needed to help him prepare for the hearing or how the information provided did not comply with section 25 of the Regulations.

[11] I think the Applicant properly complains of two irregularities in the conduct of the hearing although in my view neither are fatal to the validity of the decision. First, while the proceeding was conducted by the ICP there was present a Mr. Terry Fleury of the Correction Service of Canada. It is clear that the proceeding was quite informal with Mr. Fleury, the Urinalysis Program Coordinator providing information and the perspectives of the CSC. The Applicant took the position that Mr. Fleury was acting as a member of the tribunal. I am satisfied that in fact he was not doing so and that the proceedings were within the boundaries described by Justice Deneault in *Hendrickson v. Kent Institution* (1990), 32 F.R. 296 where he held that such proceedings are administrative in nature and inquisitorial, not adversarial. It is unfortunate, however, that Mr. Fleury co-signed the record of conviction, along with the ICP, on the line reserved for the "signature of presiding officer". The Applicant said that this is a common practice in his experience. I believe that it is inappropriate as it gives the impression that the CSC officer is participating in the decision of what is supposed to be an independent chairperson and while there is no evidence here that that was the case, this signature practice should be stopped. Secondly, the ICP hearing was recorded, as required by section 33 of the Regulations, but I am told that the tapes are nearly inaudible. The Applicant complained of this and in his written submissions asked the Court to review the tapes. At the hearing, he agreed with me that there was no need to review the tapes since both parties agreed that they are inaudible and they were not really necessary to dispose of the issues raised by the Applicant which were essentially of a legal interpretation nature. It was not argued before me that as a general rule the failure to provide a proper recording of a hearing by itself nullifies the hearing. There may well be cases where the lack of a proper recording makes judicial review impossible and, in such cases, an ICP decision might be set aside for that reason. However, in the interest of fairness, and the appearance of fairness, it is important that care be taken to make proper recordings of these hearings.

[12] I am therefore not satisfied that there was anything irregular about the demand for a sample made upon the Applicant, nor that of the conduct of the ICP was in any way invalid.

Disposition

[13] The application to quash the decision of the ICP will therefore be dismissed with costs.

JUDGMENT

THIS COURT ADJUDGES that the application to quash the decision of the ICP of December 7, 2005 be dismissed with costs. "B. L. Strayer" Deputy Judge FEDERAL COURT NAME OF COUNSEL AND SOLICITORS OF RECORD DOCKET: T-2303-05 STYLE OF CAUSE: JEAN RICHER And MARIA LYNN FREELAND, INDEPENDENT CHAIRPERSON, SASKATCHEWAN PENITENTIARY AND ATTORNEY GENERAL OF CANADA PLACE OF HEARING: Saskatoon, Saskatchewan DATE OF HEARING: September 12, 2006 REASONS FOR JUDGEMENT AND JUDGMENT BY: Justice Strayer

DATED: October 5, 2006 APPEARANCES: Mr. Richer FOR THE APPLICANT Ms. Crooks FOR THE RESPONDENT SOLICITORS OF RECORD: John H. Sims, Q.C. FOR THE RESPONDENT Deputy Attorney General of Canada Ottawa, ON

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