Canadian Forces Grievance Board | Comité des griefs des Forces canadiennes

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# PERSPECTIVES

## FROM THE CANADIAN FORCES GRIEVANCE BOARD

I have the pleasure of presenting this third edition of *Perspectives*, the Canadian Forces Grievance Board's newsletter intended for Canadian Forces senior officials at the Department of National Defence Headquarters.

*Perspectives* was created by the Board to share some valuable lessons learned from the review of grievances with key decision-makers and professionals associated with conflict resolution in the Canadian Forces. Through the review of individual grievances the Board is able to identify general trends, conflicting or inadequate policies, areas of dissatisfaction and problems of a systemic nature. *Perspectives'* intent is to raise awareness of these trends and broader issues and to contribute to preventing similar problems from reoccurring in the future. It represents another means by which we put into action the Board's commitment to maximizing its contribution to the military grievance process and, thereby, the well-being and morale of Canadian Forces members.

In this issue, the Board looks at a key preliminary jurisdictional issue – the standing of a member to grieve, or whether an individual has been "aggrieved." It is a matter which a decision-maker must consider, prior to looking at the merits of the grievance itself. We also discuss two harassment policy concerns arising from a number of recent grievances the Board has reviewed. The first is an apparent conflict between the harassment and grievance policies and the second relates to a lack of a common understanding of the Situational Assessment component of the harassment guidelines.

We hope that you will find this latest edition of *Perspectives* useful and informative. We also look forward to your feedback: najwa.asmar@cfgb-cgfc.gc.ca; www.cfgb.gc.ca; 613-996-8529; Toll free: 1-877-276-4193.

Bruno Hamel
Chairperson

## About the Board

*The Canadian Forces Grievance Board is a federal agency external to the Department of National Defence and the Canadian Forces (CF). The Board reviews military grievances referred to it by the Chief of the Defence Staff (CDS) and issues findings and recommendations to the CDS and the grievor in a fair and timely manner. In fulfilling its mandate, the Board strengthens confidence in, and adds to, the fairness and transparency of the CF grievance process.*

# WHEN IS A GRIEVOR AGGRIEVED?

In accordance with Section 29(1) of the *National Defence Act* (NDA), in order for a complaint to be considered a valid grievance, it must have been submitted by a serving member of the Canadian Forces (CF), who has been "aggrieved" by a decision, act or omission in the administration of the affairs of the CF, and there must be no other method of redress provided for under the NDA. Other procedural requirements (e.g. signature, presentation through a Commanding Officer, etc.) do not invalidate the grievance itself, but may be cause for delaying the resolution of the grievance. In the Board's experience, what occasionally causes problems is the lack of a commonly shared understanding of what it means to be "*aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces*."

In file 2000-159, one of the first cases referred to the Board, a member complained about a decision made by the Acting Director Claims and Civil Litigation (A/DCCL), an employee of Justice Canada, who had denied his request for compensation submitted as a "Claim against the Crown, Damage to Personal Vehicle."

The Board found that a claim against the Crown was governed by Treasury Board's *Policy on Claims and Ex Gratia Payments* and that, under that policy, DCCL was the proper authority to settle such claims. The Board concluded that the member's claim was properly the subject of a decision by the A/DCCL, which was not a decision made in the administration of the affairs of the CF, and therefore could not be reviewed within the grievance process by the chain of command because the CF adjudicators lacked the authority to override the decision taken by the A/DCCL in the matter. The Board concluded that the complaint was not a valid grievance. The Final Authority (FA) agreed, finding that the decision of the A/DCCL could not be subjected to review within the military grievance process as it had been made outside the authority of the CF.

In file 2009-034, the grievor sought full reimbursement of his meal expenses. The Initial Authority (IA) took the view that the complaint was not a legitimate grievance as defined by the NDA because the grievor had already been paid the portion of his meal expenses it was felt he was entitled to under the policy. By implication, the IA was suggesting that the policy had been applied to the grievor in the same manner as everyone else in the same situation and, therefore, the member was not aggrieved. The Federal Court of Canada (Trial Division) [2001 FCT 878] has considered the meaning of "aggrieved", and has held that for a complainant to be "aggrieved," it was sufficient that the member felt that the decision had a negative and personal impact on him or her. The Court ruled that the issue of whether the policy had been applied correctly or not was a question of the merits, not of standing.

Accordingly, the Board found that the IA's view on the validity of the grievance was incorrect and concluded that the grievor's complaint amounted to a grievance given that he had felt aggrieved when the CF had denied his request for full reimbursement of his expenses. While ultimately the Board agreed that the grievor was not entitled to full reimbursement of his expenses, it recommended that the grievance be denied on its merits rather than on the basis of standing.

In a recent and similar file (2008-043), the Chief of the Defence Staff (CDS) agreed with the Board's position, and stated: "*Like the Canadian Forces Grievance Board, I am of the opinion that the test for whether or not a member has been affected is if they have been personally disadvantaged.*"

*In the Board's experience, what occasionally causes problems is the lack of a commonly shared understanding of what it means to be "aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces."*

In case 2007-099, the grievor objected to a decision denying her a benefit, contending that there was a gap in the relevant policy since her situation was not provided for in the policy. The IA denied the grievance, finding that the grievor was not eligible for the benefit and also concluded that policy concerns could not be addressed within the grievance process. While the Board concurred with the IA's decision that the grievor was not entitled to the benefit requested, the Board agreed with the grievor that the policy did not contemplate her particular situation. Contrary to the IA, the Board could find no legal basis for the IA's position that policy matters could not be addressed through the grievance process. The Board found that it is open to members to grieve a policy on the grounds, for example, that in its theory or application it is unfair or discriminatory or perhaps simply incomplete as alleged by this grievor. Therefore, the Board concluded that a grievor's complaint about a policy could not simply be turned aside as being not grievable, but rather should have been considered on its merits. In this case, the Board recommended that the policy be revised with a view to contemplating situations such as that of the grievor. Although the FA did not agree with the Board that the policy in question needed revision, he did consider the grievor's concern in that regard on its merits.

The Board is hopeful that with these few examples, the difference between rejecting a grievance on the basis of standing, which should only happen on rare occasions (does the member have a reason to feel personally prejudiced?), as opposed to denying a grievance on its own merits (is the member entitled to what he is seeking?), will be better understood by both members and decision-makers within the grievance process.

## HARASSMENT-RELATED GRIEVANCES

Over the years, the Board has reviewed many harassment-related grievances, and although it is evident there has been improvement in how these complaints are handled by CF authorities, there remains a number of problem areas which this article will attempt to highlight.

### *Conflicting Policies*

To begin with, there appears to be a conflict between the CF *Grievance Manual* and the *Harassment Prevention and Resolution Guidelines*, which is a source of confusion for everyone involved in the process.

On one hand, Part 2.9 of the *Grievance Manual,* specifically quoting *Queen's Regulations & Orders for Canadian Forces* 7.16, provides that "*... a grievance shall also be put into abeyance if it concerns a harassment complaint that the appropriate Responsible Officer has not yet answered. In such a case, the grievance will be returned to the unit for proper investigation in accordance with* Defence Administrative Orders and Directives 5012-0." On the other hand, Part 4.10 of the *Harassment Prevention and Resolution Guidelines*, addressing coincidental complaints and grievances, provides that "*If an individual decides to file a grievance on the same issue as a harassment complaint, the applicable grievance mechanism will apply and the harassment complaint file will be closed.*"

*There appears to be a conflict between the Canadian Forces Grievance Manual and the Harassment Prevention and Resolution Guidelines, which is a source of confusion for everyone involved in the process.*

This contradictory direction confuses complainants, grievors, responsible officers and IAs as to which policy should prevail, the *Grievance Manual* or the *Harassment Prevention and Resolution Guidelines*, in cases where a member submits both types of complaint on the same or a related issue.

In file 2009-001, the grievor included allegations of harassment with her initial grievance submission. The IA for the grievance addressed the complaint of harassment concurrent with the adjudication of the grievance in accordance with the direction provided by Part 4.10 of the *Harassment Prevention and Resolution Guidelines*. The grievor objected to this and requested that her harassment complaint be treated independent of her grievance. The Board agreed with the grievor, finding that the direction provided by the *Grievance Manual* to suspend the grievance and pursue the resolution of the harassment complaint, by making full use of the *Harassment Prevention and Resolution Guidelines*, was the more logical way to proceed.

In arriving at this conclusion, the Board noted several advantages to applying the *Harassment Prevention and Resolution Guidelines* as opposed to the use of the grievance process in the resolution of harassment complaints. The *Harassment Prevention and Resolution Guidelines*:

> allow the CF to more quickly ensure a workplace free of harassment;

> assist in quickly determining whether the allegations meet the harassment definition;

> fully respect the rights of all involved in the harassment complaint process;

> minimize the time required to consider and resolve the harassment complaint;

> provide an opportunity for the complainant to subsequently grieve the results of the harassment investigation should he or she not be satisfied; and

> permit the IA or FA to use the resultant harassment investigation report in the determination of the grievance.

The Board has recently raised this issue to the FA's attention by making a systemic recommendation that a general message should be issued to clarify that the harassment process must take precedence over the grievance process in cases where harassment complaints involve CF members (FA decision pending).

### *What is the Situational Assessment?*

The Board has reviewed a number of harassment-related files where the investigation process and/or the result of the investigation have been grieved. The most common issue we see relates however to the way in which the Situational Assessment (SA) is being conducted.

There appears to be more than one understanding of the purpose and conduct of the SA. Some responsible officers conduct a "mini-investigation" of the allegation(s) to determine whether or not the complaint meets the defined criteria for harassment, often relying on the evidence provided by one or more witnesses to reach a decision. This does not appear to be the test contemplated by the harassment policies. Part 4.3 of the *Harassment Prevention and Resolution Guidelines* clearly set out the purpose of the SA as being to determine two issues only; those being:

1. Does the submission contain the essential elements of a complaint? and
2. Do the allegations, as stated, meet the definition of Harassment in Part 1 (of the *Harassment Prevention and Resolution Guidelines*)?

The SA should be based solely on the allegations submitted by the complainant. Responsible officers should not be conducting investigations of any type at this stage of the harassment complaint process. However, all too often, responsible officers are conducting preliminary investigations as part of the SA.

For example, in file 2005-021, the grievor submitted a harassment complaint against his supervisor containing several allegations of inappropriate, demeaning, humiliating and embarrassing behaviour. The responsible officer, after conducting an SA, dismissed the complaint by informing the grievor that, although his submission contained the necessary elements of a harassment complaint, he had concluded that the actions of the grievor's supervisor did not constitute harassment. In fact, the responsible officer actually made a "finding" for each of the allegations he examined in his SA. The responsible officer concluded his SA by stating: "*...I do not consider the actions of [the respondent] to constitute harassment.*" Unfortunately his findings were made without the benefit of a complete and thorough harassment investigation, which should have been conducted before findings were made.

The Board found that the responsible officer effectively considered the validity of the allegations rather than simply applying the harassment definition test called for by the SA procedure. The Board concluded that the responsible officer did not complete the SA properly and so failed to respect the harassment complaint process. The Board completed an SA on the grievor's allegations and found that at least one of the allegations was sufficient to warrant an investigation and that the remaining allegations, in aggregate, presented an overwhelming case for such an investigation. The Board concluded that the grievor had been denied due process by both the responsible officer and the IA when they determined that an investigation was not warranted. The Board recommended that the FA uphold the grievance and direct an investigation into the grievor's original complaint.

*In harassment-related files, completing a Situational Assessment before conducting any investigation of the facts is vitally important because the Situational Assessment and the investigation have distinctly different roles according to the Harassment Prevention and Resolution Guidelines.*

This idea of completing the SA before conducting any investigation of the facts is vitally important because the SA and the investigation have distinctly different roles according to the *Harassment Prevention and Resolution Guidelines*. Part 4.2 d [Responsible Officer's Initial Action] provides:

> *Notify the Respondent that a complaint has been received... As soon as possible, any written allegations with full particulars shall be forwarded to the Respondent. Should the Respondent provide a written response to the allegations, it should be made available to the investigator during the course of the investigation...*

By explicitly stating that a response provided by a respondent during the responsible officer's initial actions should be examined by the investigator, during the course of an investigation, Part 4.2 d is saying that the consideration of any comments by the respondent regarding the allegations is a matter for the investigation, should the responsible officer so order on completion of the SA.

Part 4.4 d [Harassment Criteria Met], which follows the completion of the SA, directs the RO to "*ensure that the Respondent is given the opportunity to respond ... to the allegations.*" The sequence of these directions at Parts 4.2, 4.3 and 4.4 are critically important to a fair process, not only for the complainant but for all involved in the complaint process.

Moreover, there should be no use of the word "evidence" during an SA. The cases where responsible officers are referring to the evidence on file, while conducting the SA, suggest that on the basis of the evidence provided, the responsible officers did not find support for the complainant's allegation. In effect, by doing this, a responsible officer is testing the validity of the allegation with evidence rather than simply accepting it, as stated, at face value, and weighing it against the definition as required by the policy.

In the Board's opinion, responsible officers are not alone in confusing the SA process with the subsequent investigation. The *Harassment Prevention and Resolution Guidelines* clearly direct a two-step process. In step one, the responsible officer must accept the allegations as stated [as if true] and compare them to the definition. If one or more allegations meet the definition, then step two requires that they be investigated. The scope of that investigation is up to the responsible officer but the rights of the complainant and respondent must be respected.

What appears to be happening in some of the cases coming before the Board is that the responsible officers are attempting to complete both steps at the same time. In effect, they are conducting their own investigation of the allegations concurrent with the SA. This abbreviated SA and investigation places the responsible officers at great risk of failing to fully respect the rights of those implicated in the complaint. For example, did the responsible officers disclose the respondent's representations to the complainant before making his (her) finding that no harassment occurred? Further, if the complainant indicated that witnesses were available, were they questioned by the responsible officer? A responsible officer may choose to conduct his (her) own investigation but that does not absolve the responsible officer of the requirement to fully respect the rights of the complainant and respondent. Generally, the responsible officer would benefit from directing a third party to investigate the complaint rather than attempting to do it himself.

The Board understands that the *Harassment Prevention and Resolution Guidelines* document is currently under review and is of the view that this would be an opportune time to make amendments to eliminate the confusion outlined above.

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## www.cfgb-cgfc.gc.ca

### Contact Us

Canadian Forces Grievance Board
60 Queen Street, 10th floor
Ottawa, Ontario K1P 5Y7

cfgb-cgfc@cfgb.gc.ca

**Telephone:** 613-996-8529
**Toll Free:** 1-877-276-4193
**TDD:** 1-877-986-1666
**Fax:** 613-996-6491
**Toll Free:** 1-866-716-6601