



PERSPECTIVES

FROM THE CANADIAN FORCES GRIEVANCE BOARD

I have the pleasure of presenting this fourth edition of *Perspectives*, the Canadian Forces Grievance Board's newsletter intended for senior management in the Canadian Forces.

In this issue, the Board revisits the question of procedural fairness, this time within the operational context, as a number of grievances we have recently reviewed gave rise to a consideration as whether different standards of procedural fairness may be applicable in operational theaters.

You will also find in this issue updates on some of our recommendations highlighted in *Perspectives'* previous articles. Having now received the Chief of the Defence Staff's decisions in respect of some of these recommendations, we felt it may be useful to share these decisions in the form of updates to the original articles. We hope you will find this information to be of assistance when dealing with future cases. All previous *Perspectives'* issues are available in HTML and PDF formats on our website (www.cfgb.gc.ca).

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 the prevention of similar situations from reoccurring in the future. This initiative 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.

We hope 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.

PROCEDURAL FAIRNESS IN AN OPERATIONAL THEATRE

The common law, as refined in a series of Supreme Court of Canada decisions (and generally reflected in CF personnel policies), places a duty on CF decision-makers to ensure that when the specific interests of a member are in play, basic rules of procedural fairness are applied. The failure to observe the most fundamental rule – the right to know the case one has to meet and an opportunity to respond – can give rise to a grievance or, ultimately, judicial review by the Federal Court.

In our first issue of *Perspectives* (Vol. 1, No. 1 October 2008), we set out several examples where CF members were denied procedural fairness. More recently, there have been a number of grievances arising from incidents where deployed members have been relieved from duty/command or repatriated early (against their wishes). These cases give rise to a consideration as to whether a different standard may be applicable in operational theatres where the time frame may be compressed and operational considerations are the pre-eminent concern. Is a Commander, in these circumstances, justified in ignoring or limiting the rules of procedural fairness in decisions affecting the specific interests of his subordinates?

In a recent grievance, the CDS has agreed with findings and recommendations from the Board that in cases such as repatriation from an operational theatre, the basic rules of procedural fairness must still be applied:

- > A member must be notified that there is an issue with his/her performance or behavior and specifics of the concerns/allegations so that he/she has sufficient time to properly respond (all information and documentation that is to be considered by the decision-maker should be disclosed);

- > A member must be given an opportunity to make representations to the decision-maker. Whether the representations will be made orally or in writing will be determined by the situation but it is preferable that the notice, the response and the decision be in writing.

Consider the following recent cases involving early repatriation reviewed by the Board:

- > A Task Force Commander (TF Comd), not satisfied with the performance of one of his subordinates, directed the early repatriation of the individual (although he was not the appropriate authority to do so), without having given the grievor clear notice of his intention, information concerning the allegations against him, or the opportunity to make representations prior to the final decision being made.
- > A TF Comd determined that, because an individual under his command was apparently involved in a relationship with another individual in theatre (who was employed at a different location), his judgment might become clouded and he might jeopardize safety within the operation. This assessment was made on no apparent factual information, and the grievor was never given an opportunity to respond to the Commander's concerns, or to make representations, prior to the decision being made to repatriate him.

In both of these cases, it appeared that the TF Comd felt, given the circumstances, he had absolute authority to make unilateral decisions and to dispense with the usual rules of procedural fairness.

In the Board's view, procedural fairness can be adapted to a time frame suitable to the environment and the particular situation. For example, in a case where a grievor was removed from his position (although not repatriated), while on an operation, the TF Comd met the first criterion of procedural fairness by ensuring that the member was briefed on his intention to remove



him from his position for specific reasons. However, the TF Comd did not provide the grievor with a copy of the evidence against him, which in totality consisted of a four-page minute sheet; nor did he allow the grievor an opportunity to make representations prior to making the final decision to remove him from the position. The grievor was therefore found to have been denied procedural fairness.

The Board found, in the context of the operational tempo, it would have been reasonable for the TF Comd to provide the grievor with a copy of the minute sheet and allow him 24 hours to respond. Delaying the decision to re-assign the grievor by 24 hours would not have caused undo risk to the operation, and the grievor's representations, had they been considered, may have resulted in a different decision. Either way, the grievor could have easily been afforded procedural fairness notwithstanding the operational environment.

Decisions to repatriate members early from an operational theatre can have far-reaching financial and career implications, not to mention the stigma and embarrassment caused by such action. The difficulty is that even if the CDS subsequently finds that a member was denied procedural fairness, or that the decision was unfair or incorrect, there is little he can offer in the way of remedy where the member has already left the theatre and cannot be compensated for time not served on an operation.

The bottom line is that in-theatre personnel decisions must be made in accordance with the rules of procedural fairness; the dedicated men and women of the Canadian Forces who serve abroad deserve nothing less.

UPDATES

The Board has received the CDS' decisions in respect of some of the recommendations highlighted in *Perspectives'* previous editions. In the following article, the Board presents updates on three of these recommendations in light of the CDS decisions, in the hope this information will be of assistance when dealing with future cases:

Conflict between Directorate of Compensation Benefits Administration Aide-Memoire and Compensation and Benefits Instructions (*Perspectives* Vol. 1, No. 2 – June 2009)

The Board raised concerns with several inconsistencies between the Compensation and Benefits Instructions (CBI) and an Aide-Memoire which had been issued by the Directorate of Compensation Benefits Administration (DCBA) in 2006 to assist with the administration of non-relocation benefits, such as Separation Expense (SE). In a recent case related to SE, the CDS agreed that although the grievor met the criteria for the SE benefit, in accordance with the CBI, additional restrictions in the Aide-Memoire removed this entitlement. The CDS acknowledged that although the Aide-Memoire had received "Approval in Principle" from the Treasury Board (TB), this was not an official TB approval of a new policy, and the Aide-Memoire could therefore not purport to limit the entitlement outlined in the CBI.



Conflicting Policies in Harassment-Related Cases (*Perspectives* Vol. 1, No. 3 – March 2010)

The Board pointed to conflicting policies regarding grievances in respect of harassment complaints; the *Harassment Guidelines* (ensuing from the Defence Administrative Order and Directive (DAOD) 5012-0) suggest a grievance has the effect of ceasing the harassment investigation, while the *Grievance Manual* says grievances which amount to harassment complaints should first be investigated. Although the CDS acknowledged the conflict between the two policies, he was satisfied that an upcoming amendment to DAOD 5012-0, as well as a new DAOD relating to grievances, would clarify the issue and that no additional interim direction was required.

Confusion regarding Situational Assessments in Harassment Cases (*Perspectives* Vol. 1, No. 3 – March 2010)

The Board noted that there appeared to be confusion on the part of Responsible Officers (RO) concerning the conduct of Situational Assessments (SA) in harassment cases. In a number of cases seen by the Board, RO were conducting investigations at the SA stage of the harassment complaint process. In a recent decision, the CDS confirmed that the SA should determine two things only: 1) Does the submission contain the essential elements of a complaint?; and, 2) Do the allegations, as stated in the complaint, meet the definition of harassment? If the answer to both of these questions is “Yes”, then an investigation shall be conducted.

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