Canadian Forces Grievance Board | Comité des griefs des Forces canadiennes

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PERSPECTIVES

FROM THE CANADIAN FORCES GRIEVANCE BOARD

I am pleased to present this fifth edition of *Perspectives,* the Canadian Forces Grievance Board's newsletter intended for senior management in the Canadian Forces.

In this issue, the Board discusses the need to update the Home Equity Allowance program given the significant changes in the real estate market in the last ten years; there is also a concern as to how applications for reimbursement of home equity have been dealt with in the Canadian Forces. These issues came to the Board's attention while reviewing several grievances from Canadian Forces members who suffered severe financial losses when, on posting, they were obliged to sell their residences for much less than they had paid to acquire them.

Also in this issue, the Board examines section 29 of the *National Defence Act,* which addresses the right to grieve, and cautions against an erroneous interpretation of paragraph 29(2)*(c)* which may result in restricting the right of Canadian Forces members to grieve many compensation and benefits issues.

Perspectives' intent is to raise decision-makers' awareness of broader issues and trends which come to the Board's attention during the review of individual grievances. In this regard, I would like to share with you some positive feedback we received from the Chief Military Personnel. In a recent letter to the Board, Rear-Admiral Andrew Smith described *Perspectives* as *"an important component of the evaluation of military personnel policies and their application and a valuable tool in helping keep military personnel management responsive and effective."* We are happy to hear that, through *Perspectives,* decision-makers and other stakeholders are benefiting from the valuable information the Board accumulates from its review of grievances.

We hope you will find this latest edition of *Perspectives* as useful and informative as the previous editions which are all available on our website (www.cfgb.gc.ca). We also look forward to your feedback: najwa.asmar@cfgb-cgfc.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.

HOME EQUITY ALLOWANCE

In the last year, the Board has reviewed four grievances from Canadian Forces (CF) members who had suffered very significant financial losses when they were posted and sold their residences for much less than they had paid to acquire them. The grievors had all applied for relief under the Home Equity Allowance (HEA) program. In the three cases completed to date, the Board was critical of the program but, as explained further below, could only recommend relief in one case which, according to the Board, met the eligibility criteria for HEA in a *"depressed market."* The Chief of the Defence Staff (CDS), as Final Authority (FA), recognized the damage done to the grievors but had to acknowledge that his authority in providing redress was limited by the policy.

The number of grievances may seem insignificant, but three factors combine to make HEA worthy of examination and comment. The first is the severity of the losses suffered by the grievors; the second is the inability of the CF to provide relief; and the third is the prospect of further similar grievances due to the current trends in the real estate market.

HEA is part of an overall relocation policy intended to move CF members efficiently and with minimum disruption but at a reasonable cost to the public. This allowance has been in place for well over ten years, although its governing parameters and process changed significantly with the introduction of the CF Integrated Relocation Program (CFIRP). The present HEA program provides compensation to a CF member who suffers a loss on the sale of a residence. In most cases, the maximum compensation is $15,000, unless the Treasury Board Secretariat (TBS) makes a determination that the sale occurred in a *"depressed market"* – a designation for a *"community"* in which the housing market has dropped more than 20% since purchase. Where such a designation is made, the member may be compensated for 100% of the loss.

Significantly, the key numbers – $15,000 maximum compensation and 20% drop in a given housing market to make it *"depressed"* – have not changed in ten years. Over the same period, average house prices in Canada have more than doubled. This means that the potential loss suffered by a CF member before the *"depressed market"* designation is engaged has significantly increased. Further, Treasury Board (TB) apparently takes the position that *"community"* means a broad metropolitan area as a whole, not a smaller area which may be subject to significant local influences on market prices.

As a result, and as noted by the CDS in one recent decision, CF members are exposed to a *"potentially devastating financial loss."* This is certainly borne out by the fact situations presented to the Board, involving losses ranging from $30,000 up to $73,000 after the payment of the maximum compensation under the existing program. In these cases, postings, often unforeseen but driven by "the exigencies of the service" have caused catastrophic financial consequences for CF families.

Three factors combine to make the Home Equity Allowance worthy of examination and comment. The first is the severity of the losses suffered by the grievors; the second is the inability of the Canadian Forces to provide relief; and the third is the prospect of further similar grievances due to the current trends in the real estate market.

It also appears to the Board that some HEA claims may not have been addressed in a helpful or proper way by the CF authority responsible to administer the policy. While the CF has no power to change the HEA program, it is required under the CFIRP to forward individual submissions for the *"depressed market"* designation to TBS. In a case where the grievor had provided evidence of a market depression of 30%, the Board noted that his claim for extended HEA and the resulting grievance have been denied without sending a TB submission forward. This decision is said to be based on an email notification provided by a staff officer at TB in May 2009 to the effect that there are no *"depressed markets"* in Canada. It was later explained to the Board that the matter had not been pursued *"given other more pressing priorities and TBS conviction that there simply isn't a big enough problem to justify a submission for a policy change."*

In the view of the Board, that is just not good enough. In its latest findings and recommendations on this issue, the Board noted:

> *According to the Canadian Real Estate Association, the national average resale home value in Canada was $342,662 in June 2010 (p.197). Under these circumstances, a 19 percent drop in the market would result in a loss of $65,105.78, which would only be reimbursed up to $15,000 under the current policy. For these reasons, [the Board] finds that HEA under the CFIRP is not reasonable or modern and does not achieve the aim of relocating members with a minimum detrimental effect, and therefore, remedial action should be taken in regard to this issue.*

The Board was pleased to see that the CDS agreed. In two cases where the CDS could not provide relief, he nonetheless directed a review of the HEA policy with TB with a view to minimizing the negative effect on CF members. In the one *"depressed market"* case referred to above, the CDS directed that a TB submission be prepared as required by the CFIRP.

The Board has recommended, and the Chief of the Defence Staff has agreed, that the Canadian Forces work with Treasury Board to revise the Canadian Forces Integrated Relocation Program such that members are relocated at a reasonable cost to the public without a detrimental impact on their financial well-being.

In summation, the devastating impact of this type of loss on the family is best described by the spouse of a grievor in a letter to the CDS:

> *You work your whole life to save for your family and relocation from your employer puts you into a bankruptcy position, destroys all savings and puts you into great debt. Why do we have to lose so much because of a posting?*

It must also be said that, in each of the cases the Board has reviewed to date, the CF member had acted prudently in a difficult situation, buying a modest home for the area to which he or she was posted. Being posted wherever and whenever the CF needs one's service is accepted as a requirement of a military career. On the other side of the bargain, CF families, while accepting that they must be moved at a reasonable cost to the public, rightfully expect no detrimental impact on their financial well-being. The Board has recommended (and the CDS has agreed) that the CF work with TBS to revise the CFIRP such that it accomplishes both goals and better supports CF families.

RIGHT TO GRIEVE

The Board has received in recent months numerous files in which an Initial Authority (IA) dismissed a grievance or refused to examine its merits on the basis that the grievance was challenging the application or interpretation of Governor in Council (GIC) regulations. For example, an IA concluded that a CF member did not have the right to grieve a decision taken under the *Compensation and Benefit Instructions* (CBI), given the provisions of paragraph 29(2)*(c)* of the *National Defence Act* (NDA) (see below).

The CDS has also adopted this position, concluding that a CF member could not grieve the application of provisions of the *Canadian Forces Superannuation Act* (CFSA). In his decision, the CDS stated:

> *The CFSA is an act of the Parliament of Canada, and the [Canadian Forces Superannuation Regulation – CFSR] is approved by Treasury Board (TB) for the administration of the CFSA. As a result, both the CFSA and the CFSR come under the jurisdiction of the Governor in Council. This means that both policies are beyond the authority of the CF.*

With respect, the Board does not agree with this interpretation. The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 7.01, reiterates section 29 of the NDA and states the conditions of the right to grieve:

7.01 – RIGHT TO GRIEVE

(1) Subsections 29(1) and (2) of the *National Defence Act* provide:

"29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled to submit a grievance.

(2) There is no right to grieve in respect of

(a) a decision of a court martial or the Court Martial Appeal Court;

(b) a decision of a board, commission, court or tribunal established other than under this Act; or

(c) a matter or case prescribed by the Governor in Council in regulations."

(2) There is no right to grieve in respect of a decision made under the Code of Service Discipline. ...

(G) (P.C. 2000-863 of 8 June 2000 effective 15 June 2000)

7.01 – DROIT DE DÉPOSER DES GRIEFS

(1) Les paragraphes 29(1) et (2) de la *Loi sur la défense nationale* prescrivent :

« 29. (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi.

(2) Ne peuvent toutefois faire l'objet d'un grief :

a) les décisions d'une cour martiale ou de la Cour d'appel de la cour martiale;

b) les décisions d'un tribunal, office ou organisme créé en vertu d'une autre loi;

c) les questions ou les cas exclus par règlement du gouverneur en conseil. »

(2) Ne peuvent faire l'objet d'un grief les décisions prises aux termes du code de discipline militaire. [...]

(G) (C.P. 2000-863 du 8 juin 2000 en vigueur le 15 juin 2000)

... A decision taken in accordance with a regulation can be grieved unless the Governor in Council has specifically stated, in a regulation, that the issue or matter is excluded from the grievance process.

It is important to emphasize that Treasury Board's (TB) policies and regulations are not regulations made by the GIC. Further, paragraph 29(2)*(c)* of the NDA does not prevent CF members from submitting grievances in respect of matters governed by regulations made by the GIC. Rather, it enables the GIC to make regulations excluding specific matters or cases from the grievance process.

It is interesting to note the difference between the English and French versions of this clause. The principles of statutory interpretation dictate that interpretation of a bilingual statute should include a search for shared meaning between the two versions. On its own, the use of the word *"prescribed"* in the English version of the NDA could be considered ambiguous and lead to different interpretations. However, the French version of the clause states that: *"Ne peuvent toutefois faire l'objet d'un grief ... les questions ou les cas exclus par règlement du gouverneur en conseil,"* which means, translated literally, that questions or cases excluded by GIC regulation cannot be grieved. Accordingly, in comparing the English and French versions of the NDA, it is reasonable to conclude that the word *"prescribed"* was meant to mean *"excluded"*.

Thus, the proper interpretation of the above clause is that a decision taken in accordance with a regulation can be grieved unless the GIC has specifically stated, in a regulation, that the issue or matter is excluded from the grievance process.

For the purposes of understanding this kind of regulatory exclusion, one need only refer to QR&O paragraph 7.01(2). This clause is embedded in a regulation enacted by the GIC, as indicated by the letter "G"[1] at the end of the paragraph. Consequently, in accordance with paragraph 7.01(2), there is *"no right to grieve in respect to a decision made under the Code of Service Discipline."* Therefore, a member cannot grieve a decision arising from the summary trial process. This is the only exclusion made by the GIC in existence at the moment.

The Board considers that the application and interpretation of decisions related to Treasury Board or Governor in Council regulations on financial issues can be grieved. To exclude these issues or those related to the Canadian Forces Integrated Relocation Program, on the erroneous interpretation of paragraph 29(2)(c) *of the* National Defence Act, *would result in restricting, on a large scale, the right of Canadian Forces members to grieve many compensation and benefits issues.*

1 QR&O subparagraph 1.24(2) (i) provides for regulations made by the Governor in Council to be followed by the letter "G".

As for decisions relative to TB or GIC regulations on financial issues, the Board considers that their application and interpretation can be grieved. To exclude these issues or even those related to the Canadian Forces Integrated Relocation Program, on the erroneous interpretation of NDA paragraph 29(2)*(c)*, would result in restricting, on a large scale, the right of CF members to grieve many compensation and benefits issues.

In conclusion, the Board notes that the CDS, apart from the recent case mentioned above, has in the past agreed with the Board's interpretation of paragraph 29(2)*(c)* of the NDA. Further, just prior to going to press with this newsletter, the Board received a CDS decision now completely agreeing with the Board's position. The Board hopes that this article will eliminate the persistent confusion regarding the aforementioned section of the NDA and facilitate decision-making by those officers acting as authorities in the grievance process.

Perspectives was created 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. We look forward to your feedback: najwa.asmar@cfgb-cgfc.gc.ca; www.cfgb.gc.ca; 613-996-8529; toll free: 1-877-276-4193.

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