Canadian Forces Grievance Board | Comité des griefs des Forces canadiennes

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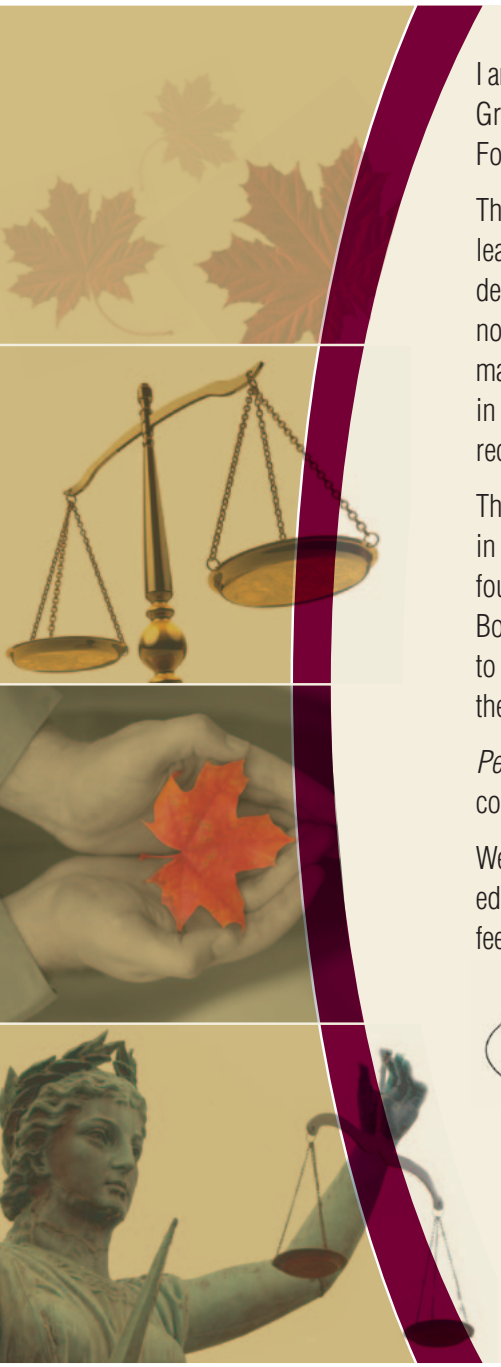
PERSPECTIVES

FROM THE CANADIAN FORCES GRIEVANCE BOARD



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

This edition is exclusively dedicated to the Administrative Review (AR) process leading to non-voluntary release from the military. As all members and decision-makers in the CF know, a non-voluntary release is a serious matter: not only does the member lose his or her job but future employment prospects and reputation may also be affected. The CF has a duty to ensure that the process used in such cases is fair; yet, in the past year, the Board has found fundamental procedural flaws in a number of cases and has recommended a new AR in most of them.

The Board believes it is important to share the issues common to these cases with CF authorities in the hope it may assist in a better understanding of this significant topic. For example, the Board found a lack of procedural fairness in several cases, and deficiencies in evidence in others. In the Board's view, these shortcomings should and can be corrected by putting in place a new AR process to ensure that CF members who are being considered for release are being treated fairly and that their right to procedural fairness is being respected.

Perspectives' intent is to raise decision-makers' awareness to broader issues and trends which come to the Board's attention during the review of individual 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.

ADMINISTRATIVE REVIEW PROCESS LEADING TO RELEASES

PROCEDURAL FAIRNESS ISSUES

The common law duty of procedural fairness generally requires that before an administrative authority makes a decision affecting a person's interests, that person should be informed of the case against him or her and given the opportunity to respond.[1]

A non-voluntary release is a serious matter: not only does the member lose his or her job but future employment prospects and reputation may also be affected.

This fundamental right is recognized in a number of CF regulations and policies. Chapter 15 of the *Queen's Regulations and Orders* (QR&O), which establishes the process for compulsory release, requires that in some cases, depending on rank and years of service, CF members must be provided with a Notice of Intent (NOI) to Recommend Release. Along with the NOI to Recommend Release, the CF member must receive a full statement of reasons in support of the recommendation, and is given 14 days to respond to the recommendation and reasons.[2]

Furthermore, *Defence Administrative Order and Directive* (DAOD) 5019-2 – *Administrative Review* (AR), identifies the steps to be taken to ensure that the AR process is open and fair. These steps are: notification, disclosure, representations, consideration of all information, and provision of a reasoned decision. These provisions create a legitimate expectation on the part of CF members that the procedures contained therein will be followed. At the very least, there is a presumption that: the process will be fair; that members being considered for release will receive notice of the case against them;[3] there is a reasonable opportunity to respond; and that the final decision will be made after full consideration of all the facts, and the grievor's representations, by an unbiased decision-maker.

In the cases reviewed by this Board, an AR synopsis is typically prepared by personnel staff at National Defence Headquarters (NDHQ), setting out the facts and reasons why the member is recommended for release. The synopsis is disclosed to the member, who is given 14 days to respond. While this process is generally followed by NDHQ staff, in two cases seen by the Board, the members did not receive disclosure and only became aware they were being released from the CF once the decision had already been made. In both of these cases, the synopsis contained errors of facts or insufficient information about the CF member's circumstances and, since the members' were unaware of the process taking place, they were denied an opportunity to make submissions resulting in a decision to release them on the basis of an incomplete or erroneous file.

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[1] See Sara Blake, *Administrative Law in Canada*, 4th ed. (Markham, Ontario: LexisNexis Canada Inc., 2006) at 11.

[2] See QR&O paragraphs 15.21 (2), 15.22 (2) and 15.36 (2).

[3] In particular, QR&O 15.36 requires notice be given if the member is above the rank of Sergeant and/or the member has more than 10 years of service.

While disclosure of the material being relied upon by the decision-maker is obviously important, the most common and serious breach of procedural fairness is the absence of a reasoned decision. In the Board's view, the Releasing Authority (RA), who has been delegated (by the Chief of the Defence Staff (CDS)) the significant responsibility for authorizing non-voluntary releases, has an obligation to personally review the entire file, including the member's representations – and then give substantive reasons in support of his/her decision. The reasons should explicitly make reference to the member's submissions so that the member is informed how they were considered by the decision-maker. DAOD 5019-2 states:

REASONS

"*The reasons for imposing an administrative action in respect of a CF member shall contain sufficient information:*

- *to enable the CF member to understand why the administrative action was imposed; and*
- *to permit review by grievance authorities.*

The reasons provided shall specifically:

- *identify the applicable evidence;*
- *explain how the evidence was treated; and*
- *state any findings based upon the evidence, and given those findings, explain why the specific administrative action was imposed.*"

Unfortunately, what appears to be the current practice is that the RA approves the AR synopsis prepared by the staff without additional comments. The mere notation "*approved*" gives no indication of the reasoning process followed by the RA and a reviewing court, or the CDS for that matter, has no way of knowing whether all of the relevant evidence, including the member's representations, were considered.

The duty of procedural fairness generally requires that before an administrative authority makes a decision affecting a person's interests, that person should be informed of the case against him or her and given the opportunity to respond.

In *Tainsh v. Attorney General of Canada*[4] (a case involving the grievance process), the Federal Court noted that "*the adequacy of reasons may be regarded as one aspect of procedural fairness and therefore subject to review based on correctness [...]*". The Federal Court of Appeal in *Via Rail Canada Inc v. National Transportation Agency*[5] set out why adequate reasons are required:

"*Reasons also provide the parties with the assurance that their representations have been considered.*

In addition, reasons allow the parties to effectuate any right of appeal or judicial review that they might have. They provide the basis for an assessment of possible grounds for appeal or review. They allow the appellate or reviewing body to determine whether the decision-maker erred and thereby render him or her accountable to that body. This is particularly important when the decision is subject to a deferential standard of review."

[4] 2011 FC 1180 at para. 22.

[5] 2001 2 FC 25 at para. 17 ss.

The Court went on to say: "*what constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case*" and further "*reasons must address the major points in issue*" and "*the reasoning process followed by the decision maker must be set out*."[6]

In the seven cases reviewed by the Board where no reasons were provided, it was impossible to know whether the member's representations were considered by the RA before the release was approved. For example, in file 2011-039, a member, who was being released for a first-time involvement with drugs, provided medical evidence supporting his request for retention. The Board noted that the file contained no evidence that the AR process was delayed to further investigate this information and neither the AR synopsis or the decision made mention of the newly introduced medical evidence. The Board concluded that the AR was cursory, incomplete and unacceptable. The release under item 5(f) was found to be unreasonable in the circumstances and, since the grievor had been found in breach of the universality of service principle, the Board recommended that his release item be changed to 3(b).

The most common and serious breach of procedural fairness is the absence of a reasoned decision… The reasons should explicitly make reference to the member's submissions so that the member is informed how they were considered by the decision-maker.

In another case, file 2011-115, a member was recommended for release after a number of incidents of misuse of alcohol. The member had been placed on Counseling and Probation (C&P) ten years prior. The AR synopsis detailed a number of alcohol related incidents in which the grievor had been involved and, considering that he had breached his C&P, recommended release. In his representation, the grievor submitted that the C&P referred to in the synopsis had been quashed by the CDS, following a previous successful grievance and questioned (or explained) some of the incidents referred to in the AR. Following the grievor's representation, the Commanding Officer changed his recommendation from release to placing the grievor on C&P, admitting he was unaware that the first C&P had been quashed. The unchanged AR synopsis was nonetheless given to the RA who, without giving reasons, approved the grievor's release.

Given the failure of the RA to provide reasons for his decision, and the failure of personnel staff to properly follow the AR process policy (DAOD 5019-2[7]), it was impossible for the Board to rule out the possibility that the release decision was tainted by the inappropriate use of the quashed C&P in the AR recommendation and the erroneous information contained in the synopsis. The Board therefore found that the release decision should be set aside.

Finally, in file 2010-072 the grievor was convicted of having committed an indecent act; an AR process was initiated but remained dormant until a year later when the member was charged with allegedly having committed another indecent act. The AR was revived and completed by the next day; release was recommended. The member made substantial representations, arguing that he should be placed on C&P. The AR synopsis was simply annotated

[6] *Ibid.*, at para. 21 and 22.

[7] See also Military Administrative Law Manual (A-LG-007-000/AF-010), section 2-11: "reasons for a decision must be given to the affected individual".

"*approved*" with no mention of the member's submission. Again, the Board found that there was a serious interest at stake in this AR; the member's employment was on the line and accordingly, the procedural safeguards should have been high. The Board concluded that the member was not provided with procedural fairness and, as a result, found that the decision to release him ought to be set aside.

"What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case"… "Reasons must address the major points in issue" and "the reasoning process followed by the decision maker must be set out."
– Federal Court of Appeal

EVIDENTIARY BASIS FOR THE ADMINISTRATIVE REVIEW AND THE RELEASE DECISION

In addition to issues of procedural fairness, the Board has reviewed a number of cases where the evidence relied upon by the RA to compulsorily release a CF member was deficient or inappropriate.

As mentioned above, DAOD 5019-2 sets out the AR process used to determine the appropriate administrative action, if any, to be imposed in instances where a CF member's conduct or performance calls into question the viability of the member's continued service. The standard of proof in an AR is a balance of probabilities; the approving authority must be "*satisfied that there is … clear and convincing evidence, that establishes on a balance of probabilities that an incident … or professional deficiency has occurred*".

In a number of cases reviewed by this Board, the RA has relied on findings of fact made by bodies such as Progress Review Boards; Boards of Inquiry (BOI); harassment investigations and, of course, criminal and military courts. The RA then considered whether, in light of the findings, administrative sanctions (including release) ought to be imposed. In other cases, however, the Board has noted that the RA's staff had assumed the fact-finding role. Information relied upon by the staff is either selectively plucked from sources, such as police reports, or taken directly from a complainant's statement; and then, essentially presented to the member as evidence of misconduct. In the Board's view, these examples call into question the integrity of the present process and raise the question as to whether NDHQ personnel staff have the expertise to deal with the potentially complicated issues of evidence, credibility, and findings of fact.

Defence Administrative Order and Directive 5019-2 *states that the approving authority must be "satisfied that there is … clear and convincing evidence, that establishes on a balance of probabilities that an incident … or professional deficiency has occurred."*

For example, in several cases[8], the RA has relied on information contained in Military Police (MP) reports to conclude that the alleged misconduct was proven on a balance of probabilities. In one particular case, file 2010-056, the AR synopsis was dedicated to essentially repeating portions of the contents of a MP report. While the facts alleged in the report, if

[8] For example, file 2010-056 and 2011-117

proven to be true, would have been sufficient cause to find that the member in question had violated the CF policy on sexual misconduct, the problem was the MP report was simply reporting untested and unproven allegations that should never have been accepted at face value as proof of the matters contained therein without further investigation.

In some cases, the Board has noted that the approving authority's staff had relied upon information either selectively plucked from sources, such as police reports, or taken directly from a complainant's statement; and then, essentially presented to the member as evidence of misconduct.

A MP report is prepared for one purpose only: to collect information when it appears an offence may have been committed; whether or not that information becomes evidence depends on whether it meets the rules for admissibility including relevance and trustworthiness. Evidence, of course, may well be admissible but be found to have little weight or probative value. The fact that the standard of proof may be the balance of probabilities in administrative matters does not mean the general rules regarding evidence ought to be ignored; Canadian law requires that individuals be treated fairly even in an administrative context.

In the particular case referred to above, rather than wait for the court proceedings to determine the reliability of the evidence, the RA proceeded exclusively on the basis of the summary presented in a MP report. In the Board's view, this type of summary, without being tested, further examined, or corroborated by other evidence, should not have been given any weight as it clearly constituted "double hearsay".[9] Since the MP report in question contained a synopsis of admissions the member allegedly made to the police, it was even more problematic because the circumstances in which the alleged admissions were made, including the fact that both the context and the full content of the member's statements, were unknown. The Board therefore found that it was unreasonable to conclude there was clear and convincing evidence of the sexual misconduct, based solely on the information in the MP report.

In another case, file 2011-117, a member accused of possessing child pornography was denied an extension to make submissions on the basis that the file contained a report of an admission to the police and a forensic report supporting the charges; the NDHQ staff made comments to the effect that any further submission by the member would be pointless unless he could produce "*new evidence*" proving that he did not make the admission or that the compact disks seized in his bunk space, never existed.

A Military Police report is prepared for the purpose of collecting information; whether or not that information becomes evidence depends on whether it meets the rules for admissibility including relevance and trustworthiness.

[9] Double Hearsay as defined in Black's Law Dictionary, eight edition, p. 739: "... Also termed multiple hearsay or hearsay within hearsay... A statement that contains further hearsay statements within it ..."

The Board found that the statement regarding the need for new evidence clearly showed that, for the RA's staff, it was a foregone conclusion that the sexual misconduct policy had been breached. The Board explained that members do not need to bring fresh evidence; it is open to them to challenge the existing evidence. Moreover, in that particular file, there were allegations that the reports had been falsified, evidence obtained illegally, and in the end, the criminal charges against the member had been dropped – these were relevant factors that should have been considered and addressed by the Releasing Authority prior to authorizing the member's release.

In these circumstances, again, using the MP report as evidence of the offence was problematic as an assessment of such fundamentals as the member's credibility and reliability of the evidence, could not have been properly made using a paper review process.

THE NEED FOR A NEW ADMINISTRATIVE REVIEW PROCESS

The Board is concerned with the current process, when an AR, which, as indicated, can lead to very serious consequences for the member involved, is initiated on the basis of untested charges or allegations and, findings are then made. If the member, for example, denies an allegation made by a complainant in a police report how, absent other evidence, can a NDHQ staff member make findings of fact or of credibility? The Board pointed out that in other organizations, such as at the Royal Canadian Mounted Police (RCMP), serious disciplinary actions, including dismissal, can only be taken following a formal hearing before a panel of three officers.[10]

While it is not suggested that the CF should adopt the exact same model, the Board feels that the difference between the two processes and between the levels of procedural protection one provides versus the other is substantial, yet the seriousness and impact of the decision is the same. In the Board's view, CF members who are being considered for non-voluntary release deserve to be treated scrupulously fairly; the CF leadership should seriously consider whether the current practices and procedures can provide that.

The Board also believes the CF should consider reviewing its current AR policies and processes as they pertain to military members awaiting trial on criminal charges. First of all, there should be a consistent policy as to when members charged with offences should be subject to administrative review. Currently, in some cases, members are released before conviction; in other cases, no action is taken until post-trial (the latter is generally the preferred approach, in the Board's opinion). Where prosecutions do not proceed (or in the absence of a guilty finding) and there remains outstanding concerns as to the member's actions or behaviour, a formal hearing

The Board noted that in other organizations, such as at the Royal Canadian Mounted Police (RCMP), serious disciplinary actions, including dismissal, can only be taken following a formal hearing before a panel of three officers. The Board feels that the difference between the processes followed by these organizations and the Canadian Forces' process is substantial.

[10] See Sec tion 41 and ss. of the RCMP Act, R.S., 1985, c. R-10.

should be convened where evidence can properly be assessed and weighed; the discharge process used by the RCMP could be a useful model. The practice of using MP reports as a basis for a finding of misconduct without any further investigation of fact should also be discontinued.

As indicated at the beginning of this article, no administrative review can be fair without adequate reasons being given by the decision-maker. The policy in DAOD 5019-2 should make it clear that the decision-maker must personally decide and explain in writing his or her reasoning process in light of the available relevant and proper evidence, and a copy of the reasons should be provided to the member.

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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