



The Canadian Forces Grievance Board

About the Board

The aim of this *Bulletin* is to inform CF members about the Canadian Forces Grievance Board, what it does and how its findings and recommendations can impact and contribute to improved conditions of service.

Created in 2000 as an external administrative tribunal, the Board's mandate, as stipulated in the *National Defence Act*, is to review military grievances referred to it by the CDS. The Board has now provided findings and recommendations in over 1000 grievances.

With quasi-judicial powers, the Board can summon witnesses, require oral or written evidence and hold private or public hearings.

The Board's grievance officers and legal counsel work with Board members to provide analyses and legal opinions. After the review of each case, the Board

submits its findings and recommendations to both the CDS and the grievor. As the final authority on military grievances, the CDS is not bound by the Board's report, but must provide his reasons in any case where the Board's findings and recommendations are not accepted.

Although the Board is independent from the CF and DND, the CF retains overall responsibility for the grievance process. The Board reports directly to Parliament through the Minister of National Defence.

The Board is hopeful CF members will find this *Bulletin* useful and welcomes their feedback (www.cfgb.gc.ca; (613) 996-8529; Toll free: 1-877-276-4193). The Board intends to publish this *Bulletin* on a regular basis.

CFGB Members

The Board is made up of Governor in Council appointees who, alone or in panel, are responsible for reviewing grievances and issuing findings and recommendations to the CDS.



James Price, the current Acting Chairperson and full-time Vice-Chairperson, brings to his position extensive experience as a CF legal officer in all areas of military law, including the military justice system, administrative law, international law and operational law.



Part-time Vice-Chairperson, **Denis Brazeau**, assists the Chairperson in his duties. As a retired CF member with 30 years of service, he has a broad understanding of the day-to-day activities and challenges faced by CF members.



Part-time members, **Michael Auger** (left), a retired artillery officer, and **Frederick Blair**, a retired senior military lawyer, complement the Board's team. These two individuals bring a combined 62 years of military experience to the review of grievances.



Another part-time member has recently been appointed to the Board. **Carina Anne De Pellegrin** is a legal professional, former CF aeronautical engineering officer and a graduate of the Royal Military College.

Case Summary #1

Error in Rank on Component Transfer

CFGB Findings and Recommendations

A Master Seaman on a period of Class C Reserve Service accepted an offer of Component Transfer (CT) to the Regular Force under the Naval Combat Systems Technician Training Plan (NCSTTP). He was advised that he would be CT'd in the rank of Acting Leading Seaman (A/LS). Subsequent to moving his family to the new posting, he was informed that an error had occurred and he was not entitled to the rank and pay offered at transfer. As a result, his rank and pay were adjusted to that of Ordinary Seaman and he was required to repay a three-month overpayment of salary.

The grievor, although strongly supported by his chain of command in his request to have the repayment requirement rescinded and his rank and pay restored, was denied redress by the Initial Authority (IA), the Commander, CF Recruiting Group Headquarters. Though sympathetic to the grievor's financial and personal stress, the IA found that the grievor did not possess the necessary qualifications to be granted the rank of A/LS and that the error had to be corrected and the overpayment of salary recovered.

The Board agreed that the grievor was not properly qualified to transfer in the rank of A/LS but found that the error made was wholly within the control of the CF and that the CF should have ensured that the information provided to the grievor was accurate in order for him to make a decision as significant as transfer to the Regular Force. The Board found that the grievor relied upon the information to his detriment and that the grievor's case met the necessary conditions for a claim of negligent misrepresentation. The Board concluded that, even if the facts were ultimately found not to meet the strict legal test for negligent misrepresentation, they were nonetheless compelling and, in simple fairness, relief ought to be afforded.

The Board found that it would be fair and reasonable to restore the grievor to the rank of A/LS, effective the date of his transfer, and that the CDS could exercise his authority under *Queen's Regulations and Orders* (QR&O) paragraph 11.02(2) to waive the qualifications for the rank in question rather than have the grievor proceed with a claim against the Crown. The Board recommended that the CDS restore the rank and pay the grievor was originally offered, effective the date of his CT.

CDS Decision

The CDS acknowledged the error committed by the CF while transferring the grievor to the Regular Force. He agreed with the Board that he had the authority under QR&O article 11.02(2) to waive the missing qualification and indicated that he was prepared to exercise his authority in this case because he found the circumstances to be unique and compelling.

The CDS based his decision on three key findings: 1) that the grievor made significant and binding personal, career and financial decisions based on the terms of the CT offer and the drop of salary combined with the recovery of overpayments caused considerable stress for the grievor and his family; 2) that the grievor, had he been properly informed, would have deferred his application for the NCSTTP until he had accumulated the necessary qualifying time to transfer in the rank of A/LS; and 3) that the NCSTTP does not annually fill all available spots; hence, the grievor's likelihood of being accepted into the program in a later year was good.

The CDS directed that the grievor's rank and pay level be restored to A/LS IPC Basic, effective on the CT date and that the grievor receive Specialist 1 Pay since it was also available to this rank and pay category at that time.

CF Grievance System: A Two-Level Process

Level I: Initial Authority (IA)

The CF member submits the grievance to his or her CO, who may be the IA.

If the CO cannot act as IA, the grievance is submitted to someone who can, such as the Director General at National Defence Headquarters responsible for dealing with the subject matter.

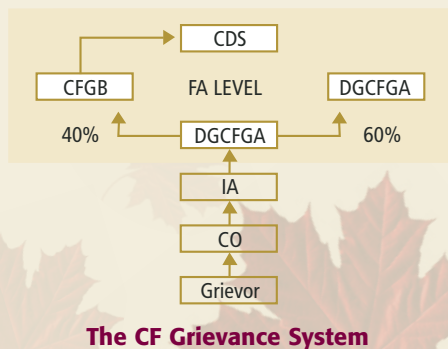
Level II: Final Authority (FA)

If the grievor is not satisfied with the IA's decision, he or she may ask to have his or her grievance reviewed at the FA level, that being the CDS or his delegate, the Director General Canadian Forces Grievance Authority (DGCFGA).

Grievors submit their request through their CO to the IA who then forwards the grievance to the FA.

If the grievance falls within the mandate of the CFGB, the CF must then forward the grievor's file to the Board for its findings and recommendations.

Approximately 40% of grievances received at the FA level are referred for review by the CFGB which then sends its findings and recommendations to the CDS for the final decision. The remaining 60% of grievances are reviewed and decided internally by the DGCFGA.



Case Summary #2

Release Item 5 (f) Changed to 2 (a)

CFGB Findings and Recommendations

The grievor was convicted of sexual assault and sentenced to serve time in Provincial jail. He received and signed a Notice of Intent to Recommend Release under item 5(f) to the table of *Queens Regulations and Orders* (QR&O) 15.01. An Administrative Review (AR) conducted by the Director Military Careers and Resource Management (DMCARM) approved an item 2 (a) release. The grievor objected to the change in release item and to the fact that he was not given an opportunity to make submissions regarding the new release item. He also objected to the recovery of an overpayment made to him for a brief period of his incarceration when the pay system did not immediately cease his pay.

The Board found that procedural fairness was breached when it was not disclosed to the grievor that the AR had changed the release item and the grievor was not provided an opportunity to respond. The Board further found that those procedural breaches would be corrected through the grievance process. The Board also found that the grievor's conviction by a civil court for a serious offence reflected discredit on the Service, met the QR&O 15.01, item 2 (a) release definition, and justified changing his release item from 5 (f) to 2 (a).

With respect to the overpayment made to the grievor, the Board noted that it was not reasonable for the grievor to expect that he would be paid by the CF while serving time in jail. The Board found that the circumstances of the case did not meet the criteria to remit, forgive or write-off the overpayment, and that the CF was justified in collecting the debt.

The Board recommended that the CDS deny the grievance.

CDS Decision

The CDS found that procedural fairness had been breached by the AR process and he set aside the DMCARM decision changing the release item from 5 (f) to 2 (a). The CDS also found that the grievance process provided an opportunity for the grievor to make representation concerning the item 2 (a) release, thus correcting the breach.

In considering the grievor's argument, the CDS explained that he had the authority to release the grievor under either item 5 (f) or item 2 (a) and he described the offence for which the grievor was convicted as very serious and which has the effect of reflecting discredit on the CF whenever it is committed by a military member. The CDS concluded that the applicable release item in the grievor's case was item 2 (a).

Regarding the recovery of salary overpayment, the CDS agreed with the Board that the circumstances did not meet the criteria to remit, forgive or write-off the overpayment. Therefore, the CDS found that the CF was obliged, under the *Financial Administration Act*, to recover the funds paid to the grievor in error.

The CDS denied the grievance.

Case Summary #3

Counselling and Probation Rescinded

CFGB Findings and Recommendations

The grievor was placed on Counselling and Probation (C&P) for a number of absences without authority and for issues relating to professionalism and dedication. He had also previously been issued a Recorded Warning for substantially the same reasons.

After being placed on C&P, the grievor was diagnosed by a psychiatrist with a major depression disorder. The grievor claimed that his state of depression had affected his performance and decision-making and his treating physician agreed. The grievor requested that the C&P documentation be removed from his file and that his Personnel Evaluation Report (PER) file be amended to delete any mention of the C&P.

The grievor's CO did not believe that his medical condition absolved him of responsibility for his performance shortcomings. The Initial Authority (IA) denied the grievance, finding that the CO had acted in a fair manner and that the grievor should have sought help sooner for his depression before he was ordered to do so.

The Board noted that the grievor did not submit any medical evidence until after his C&P was imposed. The CO may therefore not have been aware of the full extent of the grievor's medical condition. As a result, the Board was satisfied that, based on the information at hand at the time, the issuance of C&P was reasonable.

Nevertheless, the Board found that the grievor was suffering from a major depression which substantially affected his behaviour and performance. The Board considered that the grievor's previous and current performance reports (PERs) were relevant to this matter. These PERs confirmed the grievor's return to good performance levels and corroborated medical opinions that his decline in performance during the period in question was due to the depressive episode.

The Board found that, given the new medical information, the career implications of C&P were too severe and outweighed any benefit to the CF in preserving the relevant documentation on the grievor's personal file. The Board found that, in light of the medical evidence and the grievor's more recent performance, the fair and just result would be to remove the C&P report from the grievor's files and to expunge the reference to C&P from his PERs.

The Board recommended that the Final Authority (FA) [in this case the Director General Canadian Forces Grievance Authority (DGCFGA) as delegated by the CDS] uphold the grievance and grant the redress sought.

Decision of Final Authority

The FA agreed that there was substantive evidence to support the initial issuance of C&P and that the grievor's CO had correctly applied the C&P as an administrative remedial attempt to resurrect the grievor's career. The FA acknowledged the new medical information that came to light following the imposition of the C&P and determined that, on a balance of probabilities, it was the grievor's medical condition that had prevented him from performing at an acceptable level. The FA found that, even though the C&P was warranted and properly administered, the career implications of retaining the C&P documentation in the members' personal file were too severe for the grievor under the circumstances. Finally, the FA determined that C&P was not the appropriate measure to correct the grievor's deficiency.

The FA upheld the grievance and directed that all documents associated with the C&P be removed from the grievor's personal file, that the 04/05 PER be destroyed, and that all references to the C&P be expunged from the 05/06 PER. The FA also directed a review of the Selection List Reduction for 2006 and subsequent years to confirm whether the grievor's new placement would require any further action.

Grievances Reviewed by CFGB

According to Article 7.12 of the *Queen's Regulations and Orders for the Canadian Forces*, the CDS shall refer to the Board any grievance relating to:

- administrative action resulting in the forfeiture of, or deductions from, pay and allowances, reversion to a lower rank or release from the CF;
- application or interpretation of CF policies on the expression of personal opinions, political activities and candidature for office, civil employment, conflict of interest and post employment compliance measures, harassment or racist conduct;
- pay, allowances and other financial benefits; and
- entitlement to medical care or dental treatment.

The CDS must also refer to the Board for its findings and recommendations every grievance about a decision or act by the CDS regarding a particular officer or non commissioned member.

Section 29.12 of the *National Defence Act* also stipulates that the CDS may refer any other grievance to the Board on a discretionary basis.