



BULLETIN

THE CANADIAN FORCES GRIEVANCE BOARD

MESSAGE FROM THE CHAIRPERSON

I am pleased to present this second edition of the Canadian Forces Grievance Board's *Bulletin*. In addition to informing you about the Board's work within the CF grievance system, the aim of this *Bulletin* is to contribute to your understanding of the grievance system and how the Board's independent review and findings and recommendations can impact and contribute to improved conditions of service.

In the following article, the Board will discuss time limits to submit a grievance and what makes a matter "grievable." These are two key issues that have the potential to cause a grievance to be rejected because one or both have not been understood properly by the grievor. The Board feels it is important that grievors understand how to address such issues should they arise in their own personal circumstances.

Created under the *National Defence Act*, the Board is a federal body with quasi-judicial powers that is independent of DND and the CF; it reviews the military grievances referred to it and provides impartial findings and recommendations to the CDS and the grievor. Since it began operations almost ten years ago, the Board has established itself as a centre of excellence for military grievance resolution and has developed, over the years, extensive expertise in a multitude of subjects related to the administration of the affairs of the CF. Because of its distinct role, the Board strengthens confidence in, and adds to, the fairness and transparency of the CF grievance process.

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




Bruno Hamel
Chairperson



JURISDICTIONAL ISSUES

In this article, the Board will discuss two key issues that sometimes arise in the grievance files that we receive. These issues are also referred to as "preliminary issues" because they must be addressed by the decision making authority to ensure jurisdiction before dealing with the merits of the matter being grieved. Such issues have the potential to cause a grievance to be rejected, either at the Initial Authority (IA) level or at the Final Authority (FA) level or both. For this reason, it is important that grievors understand how to address these matters.

Time Limits

The first issue is the matter of submitting a grievance beyond the permissible time limit. The regulation governing the time limit for submitting grievances to the IA is found in the *Queen's Regulations and Orders* (QR&O), article 7.02, which provides the following:

- (1) A grievance must be submitted within six months after the day that the member knew or ought reasonably to have known of the decision, act or omission in respect of which the grievance is submitted.
- (2) A member who submits a grievance after the expiration of the period referred to in paragraph (1) must submit reasons for the delay.
- (3) An initial authority may consider a grievance that is submitted after the expiration of the period if the initial authority is satisfied that to do so would be in the interests of justice...

Additionally, QR&O article 7.10 provides that the grievor has 90 days after receipt of the IA's decision to submit the grievance to the FA (*excerpts*):

- (2) The grievance must be... submitted to the Chief of the Defence Staff within 90 days of receipt by the grievor of the determination of the initial authority.
- (3) A member who submits a grievance after the expiration of the period... must submit reasons for the delay.
- (4) The Chief of the Defence Staff or an officer to whom final authority has been delegated may consider a grievance that is submitted after the expiration of the period... if satisfied that it would be in the interests of justice to do so...

Historically, IAs and the FA have taken a liberal view of "in the interests of justice" when considering late grievance submissions. However, over the past few years, an increasing number of grievors have failed to submit their grievance within the time limit. In fact, in some of the more notable cases, grievors have missed the limit by several years. As a consequence, IAs and the FA have begun to more closely examine the grievor's reasons for the delay in order to determine whether it would truly be "in the interests of justice" to accept the late submission.

Assume, for illustration purposes, that the IA has rejected a late grievance submission on the basis that the grievor's reasons were not compelling enough to cause the IA to conclude that it would be in the interests of justice to accept the late submission. In such a case, the grievor would have the right to request that the FA consider the late grievance. Assuming that the grievor

Chief of the Defence Staff Visits the Canadian Forces Grievance Board

The CDS visited the CFGB on September 3 where he exchanged ideas with staff members about the military grievance system and thanked the Board for "serving the men and women who serve in Canada and abroad."

General Natynczyk also presented the Board with the CDS Coin as a token of appreciation for the CFGB's dedication and professionalism.



General Natynczyk with the Board's Chairperson Bruno Hamel.

"The Board is key" to the CF complaint resolution system, said the CDS. He also emphasized that the expectation of fair treatment in respect of a complaint is an underlying part of morale and *Esprit de Corps*.

"The Board's input is needed," he said, because by providing an external review of grievances and by interpreting policies

and their application, the Board helps the CF in evaluating the fairness and soundness of those rules.

As the Final Authority in the grievance process, General Natynczyk said "my goal is to have grievances resolved as quickly, efficiently and as fairly as possible".

"I am a part of your team and I truly appreciate your services," concluded the CDS before enjoying coffee and refreshments with the staff.

Mission

To provide an independent and external review of military grievances to strengthen confidence in, and add to the fairness of, the Canadian Forces grievance process.

has gone ahead and made such a request (within the 90-day time limit provided), the FA would consider the grievor's reasons for the late initial grievance submission to the IA. If the FA concludes that it was reasonable for the IA to reject the grievance for being late, the FA will support the IA's decision and, as a consequence, the grievance will also be rejected at the FA level.

Of course, the reverse situation can also hold true. For example, a late grievance that has been accepted by the IA and subsequently arrives at the FA level for consideration could still be rejected by the FA for being outside the time limit. Though the FA would undoubtedly place significant weight on the IA's opinion, he or she will nonetheless need to be satisfied that the IA's decision was a reasonable one.

Before recommending that the FA either accept or reject a late grievance submission (those cases which must be referred to the Board are set out in QR&O 7.12), the Board will examine the reasons provided by the grievor using the following factors on a case by case basis to determine if it would be in the interests of justice to consider the grievance:

- has the grievor demonstrated an intent to pursue the action within the time limit;
- is there an arguable case to be made;
- what was the cause and the actual length of the delay; and
- was there, or would there be, a prejudice caused by the delay.

In case 2009-015, the grievor was advised that the IA had denied his grievance and that he could request that his grievance be considered by the FA. The grievor did not submit his complaint to the FA until four months after the 90-day time limit for doing so had elapsed. In explaining the delay, the grievor wrote that he was unable to submit within the time limit due to his attendance on a course. The Board found that the grievor had failed to provide valid reasons for the delay and that he had shown insufficient interest in proceeding with his grievance within the time limit. The Board recommended, and the FA agreed, that the grievance should be denied on the basis that the grievor failed to meet the time limits for submission.

In case 2008-047, the grievance was denied at the IA level and it was almost six months later before the grievor asked that the FA consider his complaint. In his reasons for the delay, the grievor stated that he received the IA's decision letter a full month after it was signed and, additionally, while within the 90-day window, the grievor forwarded his complaint to the CF Ombudsman. Upon being advised that he must first exhaust the grievance process, the grievor promptly requested that his complaint be referred to the FA level. The grievor's Commanding Officer supported his request.

The Board found that the actual elapsed time, taking into account the delay in receipt of the IA's decision, as well as time lost in misdirecting the complaint to the wrong office, was minimal. The Board considered that the grievor had continuously demonstrated his intent to pursue his grievance and that the minimal length of the delay would not be prejudicial to the CF. The Board recommended that the FA accept the grievance and consider its merits (FA decision pending).

In case 2008-015, the grievor, a Reservist, complained of being aggrieved by the CF Post Living Differential (PLD) policy, a policy in existence for several years prior to his submission. In explaining the reason for the late submission of his grievance, the member pointed out that, although the element of the policy to which he objected had existed for several years, he had never personally been aggrieved by the PLD policy until the CF named the city in which he lived as a PLD eligible location. At that point in time, the PLD policy became applicable to him and, as he was not eligible for the benefit, he promptly submitted his grievance. The Board accepted the grievor's explanation, finding that the grievance had been filed within six months of the day that the grievor became personally aggrieved by the application of the PLD policy (FA decision pending).

The key takeaway here is that the grievor who misses the submission time limit must provide a compelling reason or reasons for the delay. Failure in this regard may mean rejection of the grievance.

When is a Grievor Aggrieved?

The second issue involves the standing of the grievor. In legal terms, has the member been aggrieved as defined in the *National Defence Act* (NDA)? In simpler terms, does the member raise a grievable matter in his/her complaint? QR&O article 7.01 – Right To Grieve, quotes the applicable provision of the NDA:

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

The NDA makes it clear that for a member to have standing they must have been "aggrieved" by a decision, act or omission made in the administration of the affairs of the CF, and finally, there must be no other method of redress provided for under the NDA. Of these requirements, the one that most frequently 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 2009-034, the grievor contended that he had no control over the long delay he experienced in the move of his Household Goods and Effects and he should not be held responsible for the extra expenses he incurred. As a consequence, he sought full compensation of his expenses. The IA took the view that the grievor's complaint was not a legitimate

grievance as defined by the Act because the grievor had been compensated in the same manner as anyone else would have been in the same situation. By implication, the IA was suggesting that the grievor could not be aggrieved by a policy or regulation but rather only by the application of the policy or regulation.

In examining this issue, the Board found it helpful to consider the relevant jurisprudence. In a Federal Court of Canada (Trial Division) decision [2001 FCT 878], the Court accepted that it was sufficient that the decision, act or omission being complained of had had a negative, personal impact on the complainant. In that case, the judge cited with approval a portion of the Royal Canadian Mounted Police External Review Committee recommendations which read:

A member is not prevented from being aggrieved just because the Force asserts that it is applying Force policy. The "aggrieved" requirement does not prevent a member from challenging the validity and/or interpretation of Force policy; it only requires that the member have a personal interest in the matter to do so. Further, whether the Grievor can successfully challenge Force policy in maintaining the rights he asserts is a question of the merits, not of standing.

The Board was persuaded that a decision had, in fact, been made by CF authorities that the grievor felt was contrary to his interests in that the CF had denied his request for full reimbursement of his expenses. The Board also found that the IA's interpretation was incorrect and that the member's complaint amounted to a grievance as defined in the NDA (FA decision pending).

In case 2007-099, the grievor complained of the CF decision to stop her maternity allowance payments and to recover amounts already paid. The grievor objected to the decision and also contended that there was a gap in the policy since her situation, the consequences of a component transfer while pregnant, was not provided for in the policy. The IA denied the grievance, finding that, in accordance with the provisions of the applicable policy, the grievor was not eligible for the benefit. As for the "gap" in the policy complained about by the grievor, the IA concluded that policy concerns could not be addressed within the grievance process.

With respect to the IA's assertion that concerns regarding benefit policies cannot be addressed through the grievance process, the Board could find no legal justification to support such a position. The Board found that it was open to grievors to challenge a policy on the grounds, for example, that in its substance 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 cannot simply be turned aside as not grievable, but rather must be considered on its merits. In this case, the Board agreed with the grievor that there did appear to be a "gap" in the policy and recommended that the policy be revised with a view to addressing situations such as experienced by the grievor. While acknowledging that it was not up to the Board to determine how the policy should be revised, the Board noted that the unintended consequence of the application of the currently flawed policy appeared to be quite unfair (FA decision pending).

Finally, in case 2000-159, the grievor contested a decision by the Acting Director Claims and Civil Litigation of Justice Canada (A/DCCL) who denied the grievor's request for compensation, submitted as a "Claim against the Crown, Damage to Personal Vehicle". The A/DCCL determined that there was no legal liability on the part of the Crown and that an *ex gratia* payment was not possible in the circumstances. The grievor submitted a grievance on the matter which ultimately came before the Board.

While the Board recognized that the grievor had been aggrieved by the A/DCCL's decision, it found that the decision could not be considered "a decision in the administration of the affairs of the CF" given that the DCCL is not a CF authority. Accordingly, the Board concluded that decisions made by the A/DCCL could not be grieved and reviewed within the CF grievance process. The FA agreed.

The key takeaway here is that grievors must clearly identify the decision, action and/or omission of the CF authorities and explain how the alleged treatment has negatively affected them. Failure to demonstrate how one has been aggrieved within the meaning of the NDA may result in the rejection of the grievance.

In Summary

Although numerous considerations go into making an effective and persuasive grievance, meeting the threshold requirements of submitting within the time limits and demonstrating how one has been aggrieved are of primary importance. Either one of these issues can cause a grievance to be rejected.



The Canadian Forces Grievance Board is an independent administrative tribunal reporting to Parliament through the Minister of National Defence.

The Canadian Forces Grievance Board reviews military grievances referred to it pursuant to section 29 of the *National Defence Act* and provides findings and recommendations to the Chief of the Defence Staff and the member who submitted the grievance.