Canadian Forces Grievance Board | Comité des griefs des Forces canadiennes

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PERSPECTIVES

FROM THE CANADIAN FORCES GRIEVANCE BOARD

Grievances, though submitted individually, can sometimes serve as valuable indicators of trends or broader issues. As well, we sometimes come across a policy that may be intrinsically flawed or written in such a way that it is not readily understood. A significant number of grievances expressing the same complaint about such a policy would prompt the Board to recommend that the Chief of the Defence Staff (CDS) cause the policy to be re-examined.

Eight years have passed and over 1000 grievance files have now been reviewed since the stand-up of the Board in June 2000. During this time, the Board has traveled coast-to-coast, visiting Canadian Forces (CF) personnel and establishments in their various environments. During these visits, we are often asked by CF members to speak about the types of issues being raised in the complaints we see (approximately 40% of the grievances at the Final Authority level are mandatorily referred to the Board; these relate generally to pay, financial benefits, harassment and release).

During recent informal discussions, senior CF officials at National Defence Headquarters indicated to the Board that an awareness of the trends or broader issues gleaned from the grievance review process could be quite useful in preventing problems and informing future decisions. Although the Board shares insights on its work through its visits at the Base and Wing level, we rarely have a similar opportunity to discuss such matters with the senior leadership of the CF. The intent of this newsletter is to fill this gap by providing senior leaders with some brief examples of the more common issues and areas of concern arising from the Board's grievance review.

Jim Price
Acting Chairperson

INCONSISTENCIES IN REGULATION AND POLICY

The Board has reviewed cases where inequities or inconsistencies in applying policies and regulations have been found, or where differing interpretations have led to confusion. For example:

> In several Compensation and Benefits related cases, including those falling under the CF Integrated Relocation Program (CF IRP), the Board has noted that the CF policies and regulations contain a number of different definitions of "dependants"[1]. The CDS agreed that these conflicting definitions were confusing and directed that the situation be reviewed.

> A Reserve Commanding Officer (CO) was relieved from the performance of his duties under the Queen's Regulations and Orders for the Canadian Forces (QR&O) 101.08 while facing charges

1 As found in the CF Integrated Relocation Program manual and the applicable Compensation and Benefits Instructions.

in civil court. After being found not guilty by the court, the member requested that he be returned to duty. The member's request was not addressed until three years had passed (pending the results of a lengthy Board of Inquiry). The grievor sought reimbursement of lost pay and allowances for his four years of relief from duty. The CF responded that it cannot pay a Reservist who does not render a service. The Board found that, in a previous case, the CDS determined that relief from duty did not include a forfeiture of pay. The Board also noted that the applicable regulations make no provision for the CF to deduct pay and allowances during periods of relief from duty. The Board recommended that the grievor be paid for the period in question.

The Board has also submitted findings on policies expressed in CF messages or manuals that are in conflict with superior regulations, either because they restricted or added to the provisions of a regulation without proper authority. For example:

> A policy message from the Director Compensation and Benefits Administration improperly restricted Travel Assistance benefits by erroneously disqualifying personnel who otherwise met the Treasury Board eligibility criteria. In this case, the CDS directed that the message be rescinded and a plan be developed to address the irregularities caused by improperly restricting these benefits.

> Sometimes policies have not been updated in light of new or revised regulation. This issue arose in a case concerning Canadian Forces Administrative Orders (CFAO) 16-1 which enables the Director Medical Policy to cancel sick leave despite the fact that the superior regulation [QR&O 16.16 (c)], limits this authority to the examining physician.

> With regard to testing for cause, QR&O 20.11 states that a CO can choose to provide a member subjected to drug testing with a written or oral summary of the information that forms the grounds for ordering the test. However, subparagraph 24 (a) of Annex B to CFAO 19-21 requires that a written summary of the grounds must be provided.

Given the quantity of policies and regulations guiding the administration of the CF, it is imperative that the staff charged with developing CF policy ensure that new or revised policies are confined to the regulatory provisions from which they flow. Consistency between the two is vital in order to limit confusion among users and minimize mistakes in application.

ERRORS IN RECRUIT ENROLMENT

The Board has received a significant number of grievances where erroneous information was provided to new recruits, either during their enrolment process, or in actual enrolment messages. Additional errors have resulted from improper interpretation of recruiting messages by administrative staff at the training schools. The Board found that, in some cases, recruits had relied to their detriment on the information provided and subsequently made important decisions, including financial commitments. Some recruits indicated that they relied upon the erroneous information to the extent that they would not have joined the CF had it not been for the offer of a promotion or a benefit on enrolment, such as a recruiting allowance. For example:

> In some cases, recruits were informed that they were eligible for promotion upon the completion of a course, only to have their new rank later rescinded as it was given in error. Subsequent recovery action was also taken since these members could not keep the salary received for that rank as a result of their erroneous promotion.

> In other cases, recruits were told that they would receive a recruiting allowance upon enrolment only to be advised once they had enrolled that,

during the period between the offer and the actual enrolment, their trade was removed from the list of under-strength military occupations or that they had never qualified for the allowance.

The Board has consistently found that new recruits are entitled to expect accurate and complete information from CF Recruiting Centres. After reviewing a number of such complaints, the Board has concluded that, in simple fairness, the CF has a moral obligation to provide relief to individuals who have been prejudiced by their reliance upon the erroneous information they received.

Recently, the Board has been informed that measures have been taken to implement improvements to the enrolment process, including additional training for recruiting staff. The Board fully supports this initiative.

In the two most recent cases, the Board has also recommended that enrolment messages be replaced by a letter that would provide specific details regarding the rank and salary that a recruit would receive once enrolled. In the Board's view, such a change will help the CF ensure that new recruits have a clear and accurate understanding of all details related to their service conditions, rank and salary prior to their actual enrolment.

PROBLEMS WITH PROCEDURAL FAIRNESS

Issues surrounding procedural fairness have been raised by the Board in many of its findings and recommendations as well as in one of its Annual Reports. The Board continues to see a large number of cases where a member's right to procedural fairness has been infringed. These issues, and other cases where errors have been made, are exacerbated by the fact that the CDS currently has no authority to offer the grievor financial relief. The Board strongly supports the idea of the CDS having such authority.

Procedural fairness encompasses two primary rights:

> The right to be heard, which includes the right of a member to be informed of the case being made against him or her and the opportunity for the member to present his or her comments to the deciding authority.

> The right to a fair and impartial determination of a case, meaning among other things that the decision-maker must be unbiased. Jurisprudence in this area has long recognized that the scope of this right varies according to the nature and relative importance of the decisions under review. In the case of an investigation leading to recommendations and, subsequently, to a decision imposing administrative measures, such as the loss of employment, the rules of procedural fairness dictate that the individuals concerned must have access to all material and evidence being considered by the decision-maker.

These principles also apply to the procedures governing harassment complaint investigations, Boards of Inquiry (BOI), and Progress and Career Review Boards to name a few. For example:

> Following a harassment complaint investigation into his conduct, a member was not provided with the information used in the investigation, and was not given an opportunity to make representations concerning the complaints made against him.

> In another case, a member had his promotion withheld by his CO on the basis of a negative letter written about the member by a senior officer. The CO did not reveal the letter's content to the member nor offered him an opportunity to address the negative assessments it contained. Yet the CO made a decision detrimental to the member on the basis of the letter.

In some cases, breaches of procedural fairness can be cured by the decision-maker ensuring that all available and relevant information is given to the member and by allowing the member to submit representations before an actual decision is rendered.

Regrettably, this is not always done and, in such cases, the final opportunity to correct any breaches of procedural fairness may be through the grievance process itself. Through its grievance review process, the Board seeks to cure, where possible, any breach that it discovers. In the event that the breach cannot be cured through the grievance process, it may be necessary for the Board to recommend that the decision and related measures taken against the member be disregarded. We have seen cases where time-consuming and expensive BOIs were set aside because of a breach of procedural fairness. Consequently, it is of fundamental importance that the basic principles of procedural fairness be well understood by CF leaders at all levels of command.

SUMMARY

The 1000 grievance files reviewed by the Board over the past eight years confirm that, in the majority of cases, the grievor has been treated appropriately by CF leadership within the unique and demanding constraints under which the CF must operate. When things do go off-track, the Board has found that it is often a case of misinterpretation or misunderstanding in one of the areas discussed in this letter.

These are not simple issues and, despite best intentions, errors will occur from time to time; no system of administrative regulations and policies is perfect in scope or provisions. It is in correcting these errors and ensuring a just result for the grievor that the true worth of the CF grievance process is evident. The Board is proud of its role in this process and very much appreciates the strong partnership of the CF in general and the Director General Canadian Forces Grievance Authority in particular, in helping us accomplish our mission. We are hopeful that we will see further expansion of this relationship in the near future.

We intend to continue to communicate with senior CF leadership as we review more cases and accumulate more data.

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