Federal Court  Cour fédérale

Date: 20161005

Docket: T-437-16

Citation: 2016 FC 1110

Ottawa, Ontario, October 5, 2016

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

FRANCESCO PAONESSA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS AND JUDGMENT

I. Overview

[1] This in an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RCS 1985, c F-7, of a decision of the Chief of Defence Staff [CDS] in his capacity as Final Authority in the grievance process under the *National Defence Act*, 1985 RCS, c N-5 to deny the applicant's grievance of his release from the Canadian Armed Forces [CAF].

II. Facts

[2] The applicant had been a member of the CAF since January 2008 and was a member of the Military Police [MP] at the time of his removal from the CAF. He has had a rocky track record while a member of the CAF and MP.

[1] In October 2011, he publicly questioned the ability of a member of the CAF for which his Commanding Officer [CO] issued him a remedial measure: Initial Counselling for a performance deficiency. A similar incident occurred in February 2012.

[2] In December 2011, a Professional Standards Investigation was opened to review the applicant's conduct. In total, six allegations of improper conduct under the Military Police Professional Code of Conduct were made against him (the last two were added in February 2012 after the second incident of publicly questioning a member of the CAF):

1. under paragraph 4(g): using a weapon in a dangerous or negligent manner, the applicant pointed his firearm at himself, a third party, and a dog;

2. under paragraph 4(i): knowingly and improperly [interfering] with the conduct of an investigation, the applicant intimidated a witness;

3. under paragraph 4(j): use [of] military police information, military police resources or the status as a member of the military police for a private or another unauthorized purpose, the applicant showed his badge to young males passing him

while driving and showed his badge to a trooper to get himself out of a ticket while in Manitoba;

4. under paragraph 4(l): [engaging] in conduct that is likely to discredit the military police or that calls into question the member's ability to carry out their duties in a faithful and impartial manner, the applicant provided an ex-partner with a "stalker-box" containing problematic or inappropriate offerings such as ammunition and various drug related statements;

5. under paragraph 4(h): knowingly [suppressing, misrepresenting or falsifying] information in a report or statement, the applicant denied drafting and sending correspondence he authored; and

6. under paragraph 4(l): [engaging] in conduct that is likely to discredit the military police or that calls into question the member's ability to carry out their duties in a faithful and impartial manner, the applicant drafted and sent correspondence that could discredit the MP.

[3] In December 2011, the applicant was also charged under section 252 of the *Criminal Code*, RSC 1985, c C-46 for leaving the scene of an accident during which he stuck a woman at a crosswalk. As a result, the applicant's MP credentials were suspended pending investigation.

[4] In February 2012, the applicant was disciplined for installing games from a portable storage device on his work computer.

[5] In June 2012, the Professional Standards Investigation concluded that four allegations were substantiated. Therefore, the investigation found that the applicant's actions contravene paragraphs 4(g)(j)(h) and (l) of the *Military Police Professional Code of Conduct*, SOR/2000-14.

[6] In March 2013, the applicant requested permission to attend an alcohol rehabilitation clinic. The request was denied because the CAF did not have a standing agreement with that particular center. The Base Surgeon instead directed the applicant to discuss alternatives with his physician and social worker.

[7] In October 2013, the applicant's CO requested an Administrative Review [AR] of the applicant's performance and conduct deficiencies, and recommended that the applicant be released from the CAF under paragraph 2(a) – unsatisfactory conduct – of the table to article 15.01 of the *Queen's Regulations and Orders for the Canadian Armed Forces*, [QR&O].

[8] The AR was initiated in November 2013.

[9] In April 2014, the applicant was found guilty of leaving the scene of an accident, as a result of which his driving permit was suspended leaving him incapable of performing certain of his core duties in the CAF. He was accordingly given a performance deficiency.

[10] In July 2014, after the conclusion of the criminal trial, the applicant was provided a preliminary AR report in which it was to be recommended that he be released from the CAF pursuant to paragraph 5(f) – unsuitable for further service – of the table to article 15.01 QR&O,

so that he could make representations before a decision was rendered, which he provided in September 2014.

[11] In October 2014, the AR concluded “the Applicant had developed personal weaknesses within his control and imposed an administrative burden on the CAF” and therefore should be released from the CAF pursuant to paragraph 5(f) of 15.01 QR&O.

[12] The applicant filed a grievance of the AR with the Initial Authority in November 2014 which was denied in April 2015.

[13] He then filed a grievance for review of the Initial Authority’s decision in June 2015 to the CDS as the Final Authority. Before the applicant’s grievance was addressed by the CDS, his file was submitted to the Military Grievances External Review Committee [MGERC] for an independent review pursuant to 7.20 and 7.21 QR&O.

[14] In September 2015, the MGERC provided its findings and recommendation to CDS and recommended that the applicant’s grievance be denied.

[15] In November 2015, the applicant provided further submissions to the CDS.

[16] On February 8, 2016, the CDS denied the applicant’s grievance.

III. Decision under Review

[17] After reviewing both the findings and recommendations of the MGERC as well as the applicant's response, the CDS adopted the findings as if they were his own and attached them to his decision.

[18] The CDS addressed and dismissed the applicant's representations in which he compared his situation to other law enforcement agents around the world who had been granted more lenient sanctions.

[19] The CDS then set out the amount and severity of the evidence against the applicant:

> [a] charge under the [*Criminal Code*], the suspension of your military police credentials, three remedial measures, amongst other things. You clearly have demonstrated performance and conduct deficiencies across a broad spectrum. At the same time, your chain of command gave you opportunities to correct these deficiencies through the remedial measures, to no avail. It is true though, to your credit, that since February 2012 you have not been involved in misconduct. Unfortunately, this does not erase previous events.

[20] Accordingly the CDS found that the applicant's release was reasonable and appropriately done under paragraph 5(f) of 15.01 QR&O.

IV. Issue

[21] The sole issue in this case is whether the CDS's decision to deny the applicant's grievance was reasonable.

V. Standard of Review

[22] The standard of review of the CDS's decision to deny the applicant's grievance is reasonableness (*Zimmerman v Canada (Attorney General)*, 2011 FCA 43 at para 21; *Moodie v Canada (Attorney General)*, 2015 FCA 87 at para 51).

[23] As such, this Court will not intervene unless the CDS's decision falls outside the range of possible outcomes that are defensible in light of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Analysis

[24] Firstly, the applicant submits that the CDS erred in finding that the applicant was "unsuitable for further service", *i.e.* that paragraph 5(f) of 15.01 QR&O was the appropriate section of the table to sanction under.

[25] The CDS found the evidence quite compelling and given the multiplicity of misconducts across a broad spectrum, paragraph 5(f) was more appropriate.

[26] The applicant argues that the use of the present tense means the deficiencies must still be alive at the time of the decision.

[27] The CDS disagreed. The passage of time does not erase the applicant's conduct and that at the time the deficiencies were indeed alive, the applicant was given to opportunity (remedial

measures) to remedy them and was unable to. It is clear that he considered the applicant's arguments but, due to the circumstances the applicant was "unsuitable for further service". This was entirely within his discretion.

[28] The applicant further submits that the MGERC's, and therefore the CDS's conclusions were based on a wrongful weighing of the evidence. It is not this Court's role upon judicial review to reweigh the evidence.

[29] The MGERC adopted the AR's definition of administrative burden as it is understood under paragraph 5(f) of 15.01 QR&O, *i.e.*

> as someone who causes the [chain of command] CoC to spend an excessive and disproportionate amount of time, to the detriment of the unit and its missions, through counselling, administering to, disciplining, or supervising to ensure he reflects the standard of conduct and ethos required from a CAF member.

The MGERC saw no reason to part with the AR's proposed definition of administrative burden, nor did the CDS.

[30] In the MGERC's view of the entire file and the evidence before it, notably the applicant's disciplinary record, the applicant had developed personal deficiencies, wholly or partly under his control, which impaired his usefulness to the CAF causing an administrative burden, as understood in the AR definition, on the CAF. Therefore, release under paragraph 5(f) was deemed appropriate by the MGERC. The CDS agreed in its conclusion.

[31] Given the policy considerations and discretionary nature of this decision, this Court must show deference and sees no reason to part with the conclusion of the CDS on this point.

[32] The applicant further submits that the CDS erred by determining a release was the appropriate remedial measure when alternative administrative actions were available and more reasonable under the circumstances.

[33] Again this argument must fail as it would require interfering with the choice of sanctions by the administrative decision-maker which is a question of discretion within the policy expertise of the CDS (*Walsh v Canada (Attorney General)*, 2016 FCA 157 at para 14).

[34] On a reasonableness standard, this Court cannot quash a decision simply because the result could have been different.

[35] For these reasons, this application for judicial review is dismissed with costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

This application for judicial review is dismissed with costs.

"Danièle Tremblay-Lamer"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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