

Federal Court



Cour fédérale

**Date: 20161216**

**Docket: T-553-16**

**Citation: 2016 FC 1380**

**Ottawa, Ontario, December 16, 2016**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**CAPTAIN TERRY M. BYRD**

**Applicant**

**and**

**CANADA (ATTORNEY GENERAL)**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] This is an application for judicial review by Captain Terry M. Byrd [the Applicant] pursuant to s. 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a decision made on February 22, 2015 by Colonel (Col) Malo, acting as the Final Authority [FA] in the Canadian Forces [CF] grievance process, in which the FA determined that the Applicant had been treated fairly and therefore refused to grant the redress sought [the Decision], in connection with the refusal of the

Applicant's request for permission to attend a training course. Pursuant to s. 29.15 of the *National Defence Act*, RSC, 1985, c N-5 [*NDA*], judicial review of the FA's decision forms part of this grievance process; the FA decision is final subject to judicial review by this Court.

[1] The Applicant has also filed a human rights complaint with the Canadian Human Rights Commission [CHRC], but the CHRC decided not to proceed with that complaint because the Applicant should first exhaust the grievance processes otherwise available to him.

[2] At issue is whether the FA decision is reasonable in terms of its findings that:

- (1) The Applicant was not denied permission to attend a training course because he had less than eight years before the mandatory retirement age of 55; and,
- (2) The Applicant was denied permission to attend the course because he did not meet the relevant selection criteria. To obtain judicial review, the Applicant must establish that both aspects of this decision are unreasonable.

[3] In my respectful view, both aspects of the FA decision meet the test of reasonableness set out by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*].

Therefore, this application for judicial review is dismissed. My reasons follow.

## II. Facts

[4] The Applicant, at the time of his application for the training course in issue, was a 48-year-old Finance Officer in the Army Logistics Branch who joined the CF Reserve Forces in 1995. He was promoted to the rank of Captain in July 2007, and was transferred to the Regular

Force in April 2010. When he received his Logistics Land qualification in August 2010, he had potentially 11 years of service [YOS] left before he would reach the compulsory retirement age of 55 [CRA-55]; the “compulsory retirement age” is the “age beyond which a member of the CF may not serve, unless an extension to CRA is authorized”. At the time of the grievance, the Applicant had less than 8 years remaining to serve [YRS] before reaching CRA-55. His Terms of Service have since been extended to CRA-2026 and as a result, he no longer falls under the “less than 8 years to CRA 55” category.

[5] The Applicant alleges he was discriminated against on the basis of age as a result of the Army Succession Planning [ASP] policy and that he was denied access to Primary Reserve Army Operations Course [AOC] because of his age.

[6] In March 2014, the Applicant requested permission to attend the AOC. AOCs consist of “web-based [Distributed Learning (DL)] and residency training ... designed to prepare Army Junior officers to act as staff in a tactical headquarters at the unit and formation level within the contemporary operating environment, throughout the full spectrum of operations”. Attendance at AOCs results in an allocation of critical points to officers at the Merit Board level, which are used to score candidates for promotion to higher rankings.

[7] In order to be selected for the course in question, an officer must have successfully completed certain course “Prerequisites” set out in the following outline:

PREREQUISITES

a. Canadian Army

1. ATOC (To be on ATOC, it should be AJOSQ or AJSO plus CAFJOD 1 already)
2. AJSOQ or AJSO Complete + CAFJOD 1 (Available) + CAFJOD 4 & 5 will be highly recommended (onus on students) to be completed prior to residency (Once available on DLN in April 14). Anything less will require Waiver or PLAR.

[8] I will not go into the details of these acronyms because for the most part they are not relevant to this decision.

[9] The Applicant submits that he met these *original* minimum “Prerequisites”. The Respondent does not disagree. In reference to criteria 1, the Applicant had completed ATOC; he therefore satisfied this first minimum criteria. In reference to criteria 2, he also had AJOSQ (but not AJSO, its alternative) and he had completed CAFJOD parts 1 through 5; he therefore also satisfied this second minimum criteria. I should mention that the CAFJOD has six parts, of which the Applicant had completed only five.

[10] However, additional minimum criteria were set by the Logistics Branch, requiring the completion of all six of the CAFJOD course modules. This was done during the selection process to produce a “more thorough and limitative selection process,” and was necessitated by virtue of the fact that there was an “extremely competitive” selection process. The selection process had become even more competitive following a reduction in the number of seats allocated to the Applicant’s branch: a drop from 33 to 28 seats. As a result, the selection criteria with the

additional minimum, required applicants meet all six parts of the CAFJOD qualifications, i.e., parts 1 through 6. While the Applicant had achieved CAFJOD parts 1 through 5, he had not completed part 6 at the time of the selection process.

[11] The record before the FA discloses the above, which is set out as follows:

1. Personnel must meet the following prerequisites to be selected:  
...
  - b. have the Army Junior Staff Officer Qualification [AJOSQ] or Army Junior Staff Officer [AJSO] qualification;
  - c. have the Canadian Armed Forces Junior Officer Development [CAFJOD] qualification;
  - d. have the Army Tactical Operations Course [ATOC] qualification;....

[emphasis added]

[12] Nominations of applicants for these courses are controlled by their career managers [CM], in coordination with their chain of command [CoC]. Following his request to attend, the Applicant was nominated by his CoC to attend the course.

[13] His request was denied on March 26, 2014 by Major [Maj] Kennedy, the CM for the Applicant's Logistics Branch.

[14] Maj Kennedy did not give reasons for the denial. However, the Record before the FA included Maj Kennedy's comment that, although the Applicant met the minimum criteria, he was not a competitive candidate when compared to his peers. The Applicant had earned position 277 on the Selection Board Cut-Off Line and was therefore unable to make the cut off for the 2014 Merit Board, which was drawn at position 185. Maj Kennedy later clarified the Applicant had not met the criteria and that his earlier statements to the opposite effect were in error; specifically, the Applicant had not completed the required CAFJOD courses in time. As noted above, the Prerequisites set out at the beginning of the process were tightened such that the ultimate selection criteria (all 6 CAFJOD courses, as opposed only courses 1 to 3 as essential and 4 and 5 as recommended) effectively excluded the Applicant.

[15] The Applicant however alleges he was not permitted to take the AOC because he had less than 8 YRS before CRA-55. He states that the Army uses succession planning as a tool to determine the potential of a member to achieve the next rank. The Applicant alleges that members who have more YRS have a greater potential to achieve the next rank or fill key appointments. An officer's YRS are calculated as the number of years an officer may serve before either reaching CRA-55 or 35 YOS.

[16] The Applicant alleges that, as a consequence of using YRS as a criterion, the ASP policy favours younger CF members for promotion. As a result of the ASP policy, the files of members who, like the Applicant, have 8 or less YRS before CRA-55, are flagged at the outset of the process and removed from further consideration for career advancement. The Applicant states that this "severely restricts" his career and ability for future career advancement.

[17] In support of these allegations, the Applicant points to multiple slides from both the Army Logistics Council [ALC] and Logistics Career Management [LCM] presentations which, he alleges, sanction the use of YRS as a criterion for succession planning. Specifically, in his Redress for Grievance, he quotes the following from an ALC presentation:

Slide 16, Succession Planning – Officers uses age discrimination under the title, Development of the Selection List, to remove aged members from consideration

Slide 43, Pers were removed if they meet one of the criteria ...:  
“Member has 8 or less years to serve [YRS] to reaching 35 [Years of Service] or CRA 55.”

[18] He also quotes from two slides in the LCM presentation:

Slide 36, the bullet states “pers are removed if less than 8 years left to serve to CRA 55,” and

Slide 38, the bullet under the title: “Scoring Criteria”, includes  
“Remaining years to serve – 10 pts ...”

[19] The Applicant’s Request for Redress of Grievance goes on to allege: “... The points system is not transparent but the points are used to promote younger over older members that have less than ten years remaining to serve.”

[20] The Applicant also references several emails in which reference is made either to the use of YRS in determining his competitiveness for an AOC seat or the use of YRS as a criterion for AOC selection generally.

[21] As a result of the Applicant's grievance, a number of emails were exchanged between various relevant personnel, grievance analysts and grievance officers assigned to the file – these emails have been included in the Certified Tribunal Record. In one such email, Maj Kennedy explains that the increased competition in the AOC selection process is due to a loss of allocated seats reserved for officers from his Logistics Branch:

...Log-Land has lost six seats on AOC this year and it is becoming extremely competitive to be selected for the course .... he Log Branch is targeting Capts who will be employed in posns [sic] that the crse [sic] is targeted towards ... Our seat allocation is based on the number of these types of jobs the branch has, and it is not likely the member in question is going into one of these billets next APS. One must also consider the queue for AOC is long with 305 of my 385 Capts requiring the course ....

[22] In the same email, Maj Kennedy provides insight into the method of selection of candidates for AOC seats:

... I allocate each Div a certain number of seats on each course, and the regional steering committees provide me with their nominations (I review these lists in order to ensure the names have minimum criteria and that the Divisions are all in synch wrt [sic] selection). The nominations for 4 Division come via LCol Harding (cc'd) ....

[23] Set against the emails identified by the Applicant suggesting years to retirement was a relevant consideration for Maj Kennedy is an email from Maj Kennedy denying the use of said practice, stating: **“Age is not part of the criteria in selection for the course, as priority is given to suitability for employment in key Capt billets”** [emphasis in original] and that selection decisions and succession planning “are not linked”.

Filing with the Initial Authority (May 29, 2014)

[24] On May 29, 2014, the Applicant filed his Redress for Grievance with the Initial Authority [IA], alleging age discrimination under the ASP policy. On September 4, 2014, the IA notified the Applicant of a delay in determining his grievance. The IA therefore requested a time extension and informed the Applicant of his right to forward the grievance directly to the FA for determination. On September 10, 2014, the Applicant declined to grant an extension of time and asked that his grievance be adjudicated by the Chief of the Defense Staff [CDS], as FA. Therefore there is no decision by the IA in this matter.

[24] The FA forwarded the grievance to the Military Grievances External Review Committee [Grievance Committee] for its findings and recommendations. The Grievance Committee received the Applicant's grievance on November 6, 2014 and provided its findings and recommendations on May 22, 2015.

The Military Grievances External Review Committee [Grievance Committee] Decision (May 22, 2015)

[25] The issues before the Grievance Committee were whether the Applicant was unfairly denied access to the AOC because of age discrimination, whether the ASP policy encourages discrimination and if so, whether any such age discrimination is saved under section 1 of the *Canadian Charter of Rights and Freedoms* [Charter].

[26] In forming its recommendations, the Grievance Committee considered the potentially negative effect that the Applicant's inability to be enrolled in AOCs could have on his career:

... the grievor, as a Finance officer, does not necessarily require the qualifications provided by the AOC to perform well at the Capt or Major ranks. However, ... attendance on AOC provides critical

points for potential which are then used to score the candidates for promotion to the rank of Major. In other words, without AOC, Capts may not score well enough on Merit boards to be promoted to Major.

[27] It noted that Land Force Command Order 11-79 [LFCO 11-79] directs that selection for an appointment represents a combination of many elements, including an assessment of each individual. In one assessment, officers are scored numerically for merit based on both performance and potential. In a separate assessment, an officer's YRS are calculated. The Grievance Committee determined that the calculation of YRS only applies to Majors and above, not to captains. The Grievance Committee concluded that the calculation of YRS did not apply to a situation like the Applicant's and further found that the Applicant did not suffer age discrimination as a result of the ASP.

[28] The Grievance Committee determined that, despite finding the Applicant was not subject to age discrimination under the policy, it was still required to determine whether the policy contravened subsection 15(1) of the *Charter* and, if so, whether it could be justified under section 1. In making its determination, the Grievance Committee referenced relevant prior grievances and the decision of the Supreme Court of Canada in *McKinney v University of Guelph*, [1990] 3 SCR 229. It found that the ASP was discriminatory and as a result, conducted the Oakes test: *R v Oakes*, [1986] 1 SCR 103. The Grievance Committee ultimately concluded that the ASP was justified under section 1 of the *Charter*:

Within the military context, mandatory retirement provisions give the CDS the needed ability and freedom to plan for long-term human resources needed by the CAF to fulfill their unique role. In my assessment, this is a pressing and substantial objective.

[29] The Grievance Committee also found that the ALC was automatically removing the personnel files of those members within 8 or less YRS remaining before 35 YOS or CRA-55 from the outset of the selection process. The Grievance Committee found this practice to be inherently unfair and not in line with the direction provided by LFCO 11-79, citing emails submitted into evidence by the Applicant in which it was suggested that “YRS is being used to unfairly determine selection for the AOC”.

[30] At the conclusion of its findings, the Grievance Committee made the following recommendations to the FA:

- the ALC amend their selection process in order to conform to LFCO 11-79,
- the ALC cease removing personnel files at the outset based on YRS for ASP selection,
- the ALC be directed to discontinue using YRS as a selection criterion for AOC and,
- the Applicant`s file be assessed on its own merit.

### III. Decision

[31] The CDS, exercising his authority under s. 29.14 of the *NDA*, delegated his function as FA to Col Malo, Director General of the Canadian Forces Grievance Authority [DGCFGA]. Col Malo, acting as FA, exercising his authority under s. 29.13 of the *NDA*, declined to follow the recommendations of the Grievance Committee.

[32] The FA conducted a *de novo* consideration of the Applicant's case, ultimately determining that the Applicant had been treated fairly and denying the redress sought by the Applicant.

[33] The FA agreed with the Committee's finding that the Applicant could not have been denied permission to attend the course because he had less than eight years YRS on a projected CRA-55, as YRS are not applied to Captains. The FA further found that, at the time of the Applicant's grievance, he had not met all the pre-requisites or selection criteria to attend the course – specifically, the Applicant had not completed all six CAFJOD courses. He had only completed five. The FA found that “[t]his alone was sufficient reason to find [the Applicant] ineligible to attend the course”

[34] The FA noted the Applicant's arguments regarding the disadvantage faced by finance officers for potential future promotion, as they are not ranked as highly for participation in the AOC. The FA determined that, while CMs attempt to make seats available for finance officers, “[t]here are a limited number of seats available and a large number of captains who require it” and, as a result, “seats are assigned to those who will require the course for the good of the Service and for successful performance of their duty”.

[35] The FA found there was no “compelling evidence” on file to support the Applicant's contention that one of the criteria for seats at the AOC for captains is a consideration of whether they may be a contender for the rank of lieutenant colonel. The FA further noted that the Committee had also found this was not the case.

[36] The FA found Maj Kennedy's responses to the Applicant's questions regarding being denied loading in the AOC to be "perfectly legitimate".

[37] The FA noted that the "ALC is to ensure that a full analysis of each file is conducted on all of the criteria". Therefore, the FA agreed with the Review Committee's recommendation that that the Applicant's file should be assessed on its merit. The FA stated:

The Committee also recommends that your file be assessed on its merit in comparison with other candidates for selection for the AOC. I agree. Now that you have attained all of the pre-requisites, you are eligible for selection to attend the course. [...] Because the course is in high demand and there are limited placements, difficult decisions must be made to choose the best candidates. In my view, the criteria that have been established are fair and reasonable and are to be applied in all cases.

[38] The FA also agreed with the Committee's findings that the use of the CRA and, by extension, the use of YRS in succession planning, was justified under s.1 of the *Charter*.

[39] In conclusion, the FA found:

... you were not selected to attend AOC because you did not meet the selection criteria. You were missing a qualification. Now that you have this qualification, you should be considered, as all the other Logistic officers, for selection based on the Service's needs.

#### IV. Issues

[40] The issue is whether the FA acted reasonably:

- (1) in finding that the Applicant was not denied permission to attend a training course because he had less than eight years before his mandatory retirement at age 55, and

- (2) in finding that the Applicant was denied permission to attend the course because he did not meet the relevant selection criteria.

V. Standard of Review

[41] In *Dunsmuir* at paras 57, 62, the Supreme Court of Canada held that a standard of review analysis is unnecessary where “the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question.” The applicable standard of review for a decision by the CDS is reasonableness: *Morose v Canada (Attorney General)*, 2015 FC 1112 at para 24; *Harris v Canada (Attorney General)*, 2013 FC 571 at para 30 (aff’d 2013 FCA 278).

[42] In *Rompré v Canada (Attorney General)*, 2012 FC 101 at para 22, Justice Bédard spoke of the considerable level of deference owed to a decision of the CDS noting that the CDS has significant discretion:

... the CDS is the most senior officer in the [Canadian Forces] and he is charged with control and administration of the [Canadian Forces]. For grievances and, more particularly, when appropriate remedies must be determined, he has significant discretion.

[43] In *Walsh v Canada (Attorney General)*, 2016 FCA 157 at para 14, the Federal Court of Appeal stated that the CDS is entitled to a “high degree of deference”.

[44] The Applicant argues that this high degree of deference does not apply in this case because the decision was delegated by the CDS to Col Malo, DGCFFGA, who ranks four levels

below the CDS. Instead, the Applicant submits, a lower and more moderate level of deference is owed in this case, based on differences in experience, leadership, length of service, and authority level between the CDS and Col Malo.

[45] With respect, I do not accept this submission. The Applicant has provided no case law in support of this position. Moreover, this Court recently rejected the very same argument in a different case also involving delegation of FA powers to Col Malo: *Bossé v Canada (Attorney General)*, 2015 FC 1143 at para 28, per Roussel J., with which I agree. Parliament fully authorized this delegation. I see little to commend a variable sliding scale approach to deference owed to decisions of the FA. Therefore, I conclude the FA is entitled to the same high degree of deference as the CDS.

[46] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

## VI. Relevant Provisions

[47] The CF grievance process is outlined in s. 29 of the *NDA*, in Chapter 7 of the *Queens Regulations and Orders (QR&O)* and is summarized in the *Defence Administrative Order and Direction (DAOD)* 2017.

[48] An officer who has been aggrieved by a decision is entitled, where no other form of redress is available under the *NDA*, to submit a written grievance to his or her commanding officer: *NDA* s. 29(1); *QR&O* s. 7.01 (Right to Grieve), s. 7.08(1) (Submission of Grievance). If the commanding officer is unable to act as IA, the grievance must be submitted to the Canadian Forces Grievance Authority, along with any relevant additional information, to be assigned to an appropriate IA for determination: *QR&O* s. 7.09 (Commanding Officer's Duties on Receipt of Grievance). The IA has four months from the date on which the grievance is received to consider and determine the grievance and advise the grievor of its decision: *QR&O* s. 7.15(2) (Duties of Initial Authority).

[49] Should the IA fail to provide the grievor with a decision within four months (where the CDS is not the IA), the grievor may request that the grievance be forwarded to the FA for consideration and determination: *QR&O* s. 7.15(4). That is what occurred here; it is why, as noted already, there is no IA decision in this case.

[50] The CDS is the final authority in the grievance process: *NDA* s. 29.11; *QR&O* s. 7.16 (Chief of Defence Staff). The CDS has the authority to delegate any of his or her powers, duties or functions as FA in the grievance process to an officer that is directly responsible to him or her, so long as that officer is of equal or higher rank as the grievor and so long as the delegation of

powers will not result in a conflict of interest: *NDA* s. 29.14(1), (2); *QR&O* s. 7.17 (Delegation of Powers, Duties and Functions). These requirements are met in this case.

[51] The FA is required to refer certain grievances, provided in *QR&O* 7.21 and *NDA* 29.12(1), to the Grievances Committee; the FA may also exercise a discretion to refer any grievance that does not require a referral: *NDA* s. 29.12; *QR&O* s. 7.20 (Referral to Grievances Committee). The Grievances Committee provides non-binding findings and recommendations to the CDS; should the CDS decline to act on the findings and recommendations of the Grievance Committee when considering and determining the grievance, he or she must provide reasons: *NDA* s. 29.2, 29.13; *QR&O* s. 7.22 (Duties and Functions of Grievances Committee), 7.23 (Findings and Recommendations of Grievance Committee), 7.24 (Action after Grievances Committee Review).

[52] The decision of the FA is final and binding with the exception of judicial review pursuant to the *Federal Courts Act*: *NDA* s. 29.15; *QR&O* s. 7.25 (Decision is Final).

## VII. Analysis

- A. *Did the FA act unreasonably in finding that the Applicant was not denied permission to attend a training course because he had less than eight years before his mandatory retirement at age 55?*

[53] The FA had conflicting evidence on this point. On the one hand, the decision-maker in question, Maj Kennedy, unequivocally reported that age was not part of the criteria in selection

for the course in question; priority is given to suitability for employment in key Capt billets. Maj Kennedy also specifically reported that the selection decision and the Applicant's succession planning "are not linked".

[54] On the other hand, the Applicant pointed to emails from officers, one of which stated that the writer "would like to apply the Maj Succession Board age limits" to the course as a minimum. A second email reports that the Applicant was seen as unsuitable given that he did not have enough time left before mandatory retirement. A third states the Applicant is not considered a strong candidate for the course based on years left to serve "plus a few other points (Base is aware)". A fourth says the Applicant is a very low priority candidate by virtue of his succession planning potential.

[55] One difficulty with the Applicant's submission that the emails establish age discrimination, is that it does not appear that the authors of the emails shared their views with Maj Kennedy or that Maj Kennedy was influenced by them.

[56] Moreover, the Grievance Committee, which reviewed the matter, did not find the grievance established in this respect. Instead, the Grievance Committee found that the YRS policy did not apply to the Applicant, who was a Captain at the time of the selection process, because the policy only applies to Majors and above. It concluded that "since it [the YRS policy] does not apply to Capts, it does not apply to the grievor's situation." In other words, while it was open for the Grievance Committee to find that YRS determined the Applicant's grievance, it did not.

[57] The Grievance Committee did find there was a practice of removing the personnel files for those members who are within eight YRS or less prior to reaching 35 YOS or CRA 55, and that this was contrary to selection policy. However, this finding does not assist the Applicant because there is no evidence that the Applicant was subject to that practice by his CM, that is, Maj Kennedy. In other words, although that finding may assist others, it did not apply to the Applicant in this case as found by the Grievance Committee.

[58] Counsel for the Applicant dismissed Maj Kennedy's reports as an effort to explain away a violation of the selection criteria. I reject this assertion because it is unfounded. With respect, the Applicant challenges a policy that was not applied to him, and which was not applicable to him in the first place.

[59] I conclude based on the record, that the decision of the FA finding the Applicant was not denied permission to attend a training course because he had less than eight years before his mandatory retirement at age 55 is reasonable. It was defensible on the evidence. Therefore it falls within the range of decisions that are defensible on the facts of this case, per *Dunsmuir*.

[60] The Applicant raised *Charter*-based arguments regarding discrimination on the basis of age, relying on the protections afforded by subsection 15(1) of the *Charter*. While this aspect of the Applicant's case was considered and rejected by both the Grievance Committee and the FA, there is no need to consider it further given my findings above.

[61] On the basis of the first issue, judicial review must be dismissed; the Applicant must show that both aspects of the FA's decision are unreasonable to succeed. That said, because the second issue was argued, I will assess the reasonableness of the second basis for the FA's Decision.

B. *Whether the FA acted reasonably in finding that the Applicant was denied permission to attend the course because he did not meet the relevant selection criteria.*

[62] The selection criteria issue deals with the extent to which the Applicant met minimum course requirements concerning CAFJOD. CAFJOD has six parts. The course as originally outlined required completion of parts 1 through 3 and noted that completion of parts 4 and 5 was "recommended". As I stated earlier, while the Applicant had completed parts 1 through 5, he had not completed part 6 at the time of the selection process.

[63] The course requirements set out were minimum selection criteria. They were met by the Applicant. But that is not the issue in this case because additional minimum selection criteria were established.

[64] The record shows that competition for the course was "extreme". In addition, the number of spaces had been reduced considerably. As a result of these changed circumstances, those managing the Applicant's selection process, the Logistics Branch, determined that additional minimum criteria were required – candidates were required to complete all six parts of CAFJOD.

The Applicant had not completed all six parts of the CAFJOD and therefore did not meet the minimum selection requirements in place at the time of the selection process.

[65] As a matter of practicalities, it is clear that simply meeting original minimum selection criteria would not entitle the Applicant to attend the course; I did not hear the Applicant say otherwise. Decisions had to be made regarding who and how to choose as the best candidates in this unique chain of command process. The additional minimum selection criteria put in place had the effect of excluding those who had not completed all six CAFJOD courses, including the Applicant. While the Applicant met the original minimum selection criteria, he did not meet the additional minimum selection criteria.

[66] But the point on judicial review is that on the record before the FA it was reasonable for the FA to find that the Applicant did not meet the minimum selection criteria as added to. On this basis I am satisfied the FA acted reasonably in finding that the Applicant did not meet the minimum selection criteria. That Decision was based on the evidence in the record, and falls within the range of decisions that are defensible on the facts of this case, as required by *Dunsmuir*. Therefore, on the second issue, this application for judicial review also must be dismissed.

[67] I appreciate that judicial review requires an examination of the decision as an organic whole and is not a treasure hunt for errors: *Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. In my respectful view, the decision of the FA is justified, transparent and intelligible. It falls within the range of possible, acceptable outcomes

which are defensible in respect of the facts and law applicable in this case. Therefore this application must be dismissed.

VIII. Costs

[68] The parties agreed that the successful party on this appeal would receive an all-inclusive lump sum cost award of \$2,000.00, covering all taxable fees, disbursements and taxes. I find this amount reasonable. Given the result, the Respondent will have such costs.

IX. Conclusion

[69] The Application for judicial review is dismissed with costs to the Respondent in the all-inclusive lump sum amount of \$2,000.00.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The Application for judicial review is dismissed.
2. The Applicant shall pay the Respondent in the all-inclusive lump sum amount of \$2,000.00.

"Henry S. Brown"

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Judge

## APPENDIX A: RELEVANT PROVISIONS

The *National Defence Act* provides:

### **Right to grieve**

**29 (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.

### **Marginale : Droit de déposer des griefs**

**29 (1)** Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la présente loi

### **Authorities for determination of grievances**

29.1 (1) The initial authority and subsequent authorities who may consider and determine grievances are the authorities designated in regulations made by the Governor in Council.

### **Autorités compétentes**

29.1 (1) Les autorités qui sont initialement saisies d'un grief et qui peuvent ensuite en connaître sont désignées par règlement du gouverneur en conseil.

### **Different authorities**

(2) The regulations may provide that different types of grievances may be considered and determined by different authorities.

### **Note marginale : Règlements**

(2) Les règlements peuvent désigner différentes autorités selon les catégories de griefs.

### **Final authority**

**29.11** The Chief of the Defence Staff is the final authority in the grievance

### **Dernier resort**

**29.11** Le chef d'état-major de la défense est l'autorité de dernière instance en matière de

process and shall deal with all matters as informally and expeditiously as the circumstances and the considerations of fairness permit.

### **Referral to Grievances Committee**

**29.12 (1)** The Chief of the Defence Staff shall refer every grievance that is of a type prescribed in regulations made by the Governor in Council, and every grievance submitted by a military judge, to the Grievances Committee for its findings and recommendations before the Chief of the Defence Staff considers and determines the grievance. The Chief of the Defence Staff may refer any other grievance to the Grievances Committee.

### **Material to be provided to Board**

**(2)** When referring a grievance to the Grievances Committee, the Chief of the Defence Staff shall provide the Grievances Committee with a copy of

**(a)** the written submissions made to each authority in the grievance process by the officer or non-commissioned member presenting the grievance;

**(b)** any decision made by an authority in respect of the

grievs. Dans la mesure où les circonstances et l'équité le permettent, il agit avec célérité et sans formalisme.

### **Renvoi au Comité des griefs**

**29.12 (1)** Avant d'étudier et de régler tout grief d'une catégorie prévue par règlement du gouverneur en conseil ou tout grief déposé par le juge militaire, le chef d'état-major de la défense le soumet au Comité des griefs pour que celui-ci lui formule ses conclusions et recommandations. Il peut également renvoyer tout autre grief à ce comité.

### **Note marginale : Documents à communiquer au Comité**

**(2)** Le cas échéant, il lui transmet copie :

**a)** des argumentations écrites présentées par l'officier ou le militaire du rang à chacune des autorités ayant eu à connaître du grief;

**b)** des décisions rendues par chacune d'entre elles;

grievance; and

(c) any other information under the control of the Canadian Forces that is relevant to the grievance.

c) des renseignements pertinents placés sous la responsabilité des Forces canadiennes.

**Chief of the Defence Staff not bound**

**Décision du Comité non obligatoire**

**29.13 (1)** The Chief of the Defence Staff is not bound by any finding or recommendation of the Grievances Committee.

**29.13 (1)** Le chef d'état-major de la défense n'est pas lié par les conclusions et recommandations du Comité des griefs.

**Reasons**

**Note marginale : Motifs**

(2) The Chief of the Defence Staff shall provide reasons for his or her decision in respect of a grievance if

(2) Il motive sa décision s'il s'écarte des conclusions et recommandations du Comité des griefs ou si le grief a été déposé par un juge militaire.

(a) the Chief of the Defence Staff does not act on a finding or recommendation of the Grievances Committee; or

(b) the grievance was submitted by a military judge.

**Delegation**

**Délégation**

**29.14 (1)** The Chief of the Defence Staff may delegate any of his or her powers, duties or functions as final authority in the grievance process to an officer who is directly responsible to the Chief of the Defence Staff, except that

**29.14 (1)** Le chef d'état-major de la défense peut déléguer à tout officier qui relève directement de lui ses attributions à titre d'autorité de dernière instance en matière de griefs, sauf dans les cas suivants :

(a) a grievance submitted by an officer may be delegated only to an officer of equal or

a) le délégataire a un grade inférieur à celui de l'officier

higher rank; and

ayant déposé le grief;

(b) a grievance submitted by a military judge may not be delegated.

b) le grief a été déposé par un juge militaire.

**Decision is final**

**Décision définitive**

**29.15** A decision of a final authority in the grievance process is final and binding and, except for judicial review under the Federal Courts Act, is not subject to appeal or to review by any court.

**29.15** Les décisions du chef d'état-major de la défense ou de son délégué sont définitives et exécutoires et, sous réserve du contrôle judiciaire prévu par la Loi sur les Cours fédérales, ne sont pas susceptibles d'appel ou de révision en justice.

The *Queen`s Regulations & Orders* provides:

**7.09 - COMMANDING OFFICER'S DUTIES ON RECEIPT OF GRIEVANCE**

**7.09 - OBLIGATIONS DU COMMANDANT SUR RÉCEPTION D'UN GRIEF**

(1) A commanding officer to whom a grievance is submitted shall acknowledge its receipt to the grievor, register it in the National Grievance Registry and examine it to determine whether the commanding officer is able to act as the initial authority.

(1) Le commandant qui est saisi d'un grief en accuse réception auprès du plaignant, l'inscrit dans le Registre national des griefs puis en prend connaissance afin de décider s'il peut, à l'égard de celui-ci, agir à titre d'autorité initiale.

(2) If the commanding officer is not able to act as the initial authority, the commanding officer shall:

(2) S'il ne peut agir à titre d'autorité initiale, le commandant doit :

a. forward the grievance within 10 days after the day on which it is received to the Canadian Forces Grievance Authority and, as soon as possible after

a. transmettre le grief à l'Autorité des griefs des Forces canadiennes dans les dix jours suivant la date de sa réception et, le plus tôt possible par la

forwarding the grievance, forward any additional information that the commanding officer considers relevant to it; and

**b.** inform the grievor of the action taken and provide them with a copy of any additional information forwarded to the Canadian Forces Grievance Authority.

**7.10 - ACTIONS OF CANADIAN FORCES GRIEVANCE AUTHORITY ON RECEIPT OF GRIEVANCE**

**(1)** On receipt of a grievance forwarded by a commanding officer under subparagraph 7.09(2)(a), the Canadian Forces Grievance Authority shall

**a.** forward the grievance to the appropriate authority as expeditiously as possible with any additional information received from the commanding officer; and

**b.** notify the grievor and the commanding officer as expeditiously as possible of the action taken.

**(2)** The Canadian Forces Grievance Authority shall acknowledge receipt to the grievor as expeditiously as possible on receipt of a grievance forwarded by an initial authority in accordance with paragraphs 7.15(5),

suite, tout renseignement supplémentaire qu'il estime pertinent;

**b.** aviser le plaignant des mesures prises et, le cas échéant, lui fournir une copie de tout renseignement supplémentaire transmis à l'Autorité des griefs des Forces canadiennes.

**7.10 - MESURES À PRENDRE PAR L'AUTORITÉ DES GRIEFS DES FORCES CANADIENNES**

**(1)** Sur réception d'un grief transmis par un commandant en application du sous-alinéa 7.09(2)a), l'Autorité des griefs des Forces canadiennes doit :

**a.** le faire parvenir avec célérité à l'autorité appropriée accompagné de tout renseignement supplémentaire fourni par le commandant;

**b.** informer avec célérité le plaignant et le commandant des mesures prises.

**(2)** Elle doit accuser réception avec célérité auprès du plaignant du grief qu'elle reçoit d'une autorité initiale en application des alinéas 7.15(5) ou (8) ou 7.18(4) en vue de l'étude par l'autorité de dernière instance.

7.15(8) or 7.18(4) so that the grievance may be considered by the final authority.

### **7.15 - DUTIES OF INITIAL AUTHORITY**

**(1)** On receipt of a grievance forwarded by the Canadian Forces Grievance Authority, the initial authority shall acknowledge receipt of the grievance to the grievor and their commanding officer, if any.

**(2)** Within four months after the day on which a grievance is received, the initial authority shall

- a.** consider and determine the grievance;
- b.** advise in writing the grievor and their commanding officer, if any, and the Canadian Forces Grievance Authority of

**(i)** the decision with reasons, and

**(ii)** the grievor's entitlement to submit a request that the grievance be considered and determined by the final authority.

**(3)** Once the grievance is determined, the initial authority shall

**a.** return any documents or things submitted by the grievor; and

**b.** maintain a record of the

### **7.15 - OBLIGATIONS DE L'AUTORITÉ INITIALE**

**(1)** L'autorité initiale qui reçoit un grief transmis par l'Autorité des griefs des Forces canadiennes en accuse réception auprès du plaignant et, le cas échéant, de son commandant.

**(2)** Dans les quatre mois suivant la date de réception d'un grief, l'autorité initiale doit :

- a.** étudier le grief et rendre une décision;
- b.** informer par écrit l'Autorité des griefs des Forces canadiennes, le plaignant et, le cas échéant, le commandant de ce dernier :

**(i)** de la décision et des motifs à l'appui,

**(ii)** du droit du plaignant de déposer une demande visant à ce que l'autorité de dernière instance étudie et règle le grief.

**(3)** Une fois sa décision rendue, l'autorité initiale doit :

**a.** renvoyer tout document ou pièce déposé par le plaignant;

**b.** conserver le dossier du grief

grievance in accordance with the applicable information management requirements.

conformément aux exigences applicables en matière de gestion de l'information.

**(4)** If an initial authority, other than the Chief of the Defence Staff, does not determine a grievance within the time limit set out in paragraph (2), the grievor may submit to the initial authority, for forwarding to the final authority, a request to consider and determine the grievance.

**(4)** Si l'autorité initiale – autre que le chef d'état-major de la défense – ne rend pas de décision à l'égard du grief dans le délai prévu à l'alinéa (2), le plaignant peut déposer auprès de l'autorité initiale une demande, devant être transmise à l'autorité de dernière instance et visant à ce que cette dernière étudie et règle le grief.

**(5)** The initial authority shall forward to the final authority through the Canadian Forces Grievance Authority, as expeditiously as possible, on receipt of a request submitted under paragraph (4), the grievance and the grievor's request.

**(5)** Sur réception de la demande déposée en vertu de l'alinéa (4), l'autorité initiale doit, par l'entremise de l'Autorité des griefs des Forces canadiennes, transmettre avec célérité le grief à l'autorité de dernière instance, et y joindre la demande du plaignant.

**(6)** If the Chief of the Defence Staff is the initial authority, the time limit set out in paragraph (2) does not apply.

**(6)** Le délai prévu à l'alinéa (2) ne s'applique pas dans le cas où le chef d'état-major de la défense est l'autorité initiale.

**(7)** The time limit set out in paragraph (2) is 60 days in the case of a grievance submitted before 1 June 2014.

**(7)** Le délai prévu à l'alinéa (2) est de soixante jours dans le cas d'un grief déposé avant le 1er juin 2014.

**(8)** The initial authority shall forward as expeditiously as possible to the Canadian Forces Grievance Authority any grievance to which Section 2 does not apply that has not been determined as of 1 June 2014 for consideration and determination by the final authority.

**(8)** L'autorité initiale qui, en date du 1er juin 2014, n'a pas rendu de décision à l'égard d'un grief qui n'est pas visé par la section 2, doit le transmettre avec célérité à l'Autorité des griefs des Forces canadiennes afin qu'il soit étudié et réglé par l'autorité de dernière instance.

**7.18 - CONSIDERATION OF GRIEVANCE BY FINAL AUTHORITY**

(1) A grievor who has submitted a grievance under article 7.01 (Right to Grieve) and who is of the opinion that the initial authority's decision does not afford the redress that is warranted may submit to the initial authority, for forwarding to the final authority, a request to consider and determine the grievance.

(2) The request is to be in writing and be submitted to the initial authority within 30 days after the day on which the grievor receives the decision of the initial authority.

(3) A grievor who submits a request after the expiration of the time limit set out in paragraph (2) shall include in the request reasons for the delay.

(4) The initial authority shall forward to the final authority through the Canadian Forces Grievance Authority, as expeditiously as possible on receipt of a request submitted under paragraph (1), the grievance, the initial authority's decision, the grievor's request and any additional representations.

(5) If satisfied it is in the interests of justice to do so, the

**7.18 - ÉTUDE DU GRIEF PAR L'AUTORITÉ DE DERNIÈRE INSTANCE**

(1) Le plaignant qui a déposé un grief aux termes de l'article 7.01 (Droit de déposer un grief) et qui est d'avis que la décision de l'autorité initiale ne lui accorde pas le redressement qui semble justifié, peut déposer auprès de l'autorité initiale une demande devant être transmise à l'autorité de dernière instance et visant à ce que cette dernière étudie et règle le grief.

(2) La demande doit être faite par écrit et déposée auprès de l'autorité initiale dans les trente jours qui suivent la date de réception par le plaignant de la décision de celle-ci.

(3) Le plaignant qui dépose une demande après l'expiration du délai prévu à l'alinéa (2) doit y inclure les raisons du retard.

(4) Sur réception de la demande déposée en vertu de l'alinéa (1), l'autorité initiale doit, par l'entremise de l'Autorité des griefs des Forces canadiennes, transmettre avec célérité le grief à l'autorité de dernière instance, et y joindre sa décision, la demande du plaignant de même que toute observation additionnelle.

(5) L'autorité de dernière instance peut, même si la

final authority may accept a request to consider and determine a grievance that was submitted to the initial authority after the expiration of the time limit. If not satisfied, the final authority shall provide reasons in writing to the grievor.

demande a été déposée en retard auprès de l'autorité initiale, accepter d'étudier et de régler le grief si elle est convaincue qu'il est dans l'intérêt de la justice de le faire. Dans le cas contraire, les motifs de sa décision doivent être transmis par écrit au plaignant.

**(6)** Despite paragraphs (1) and (2), a grievor who receives a decision from an initial authority before 1 June 2014 may submit the grievance to the final authority for consideration and determination within 90 days after the day on which that decision is received.

**(6)** Malgré les alinéas (1) et (2), le plaignant qui a reçu la décision de l'autorité initiale avant le 1er juin 2014 peut déposer le grief auprès de l'autorité de dernière instance dans les quatre-vingt-dix jours qui suivent la date de réception de la décision de l'autorité initiale.

**7.19 - DUTIES IF GRIEVANCE NOT REFERRED TO GRIEVANCES COMMITTEE**

**7.19 - OBLIGATIONS – GRIEF NON RENVOYÉ AU COMITÉ DES GRIEFS**

If a grievance is not required to be referred to the Grievances Committee under article 7.20 (Referral to Grievances Committee), the final authority shall

Si le grief n'a pas à être renvoyé en application de l'article 7.20 (Renvoi au Comité des griefs) au Comité des griefs, l'autorité de dernière instance doit :

- a.** consider and determine the grievance;
- b.** advise in writing the grievor and their commanding officer, if any, of the decision with reasons;
- c.** return any documents or things submitted by the grievor; and

- a.** étudier et régler le grief;
- b.** informer par écrit le plaignant et, le cas échéant, son commandant de la décision et des motifs à l'appui;
- c.** renvoyer tout document ou pièce déposé par le plaignant;

**d.** maintain a record of the grievance in accordance with the applicable information management requirements.

**d.** conserver le dossier du grief conformément aux exigences applicables en matière de gestion de l'information

**7.21 - TYPES OF GRIEVANCES TO BE REFERRED TO GRIEVANCES COMMITTEE**

**7.21 - CATÉGORIES DE GRIEFS DEVANT ÊTRE RENVOYÉS AU COMITÉ DES GRIEFS**

For the purposes of subsection 29.12(1) of the National Defence Act, the final authority shall refer to the Grievances Committee any grievance relating to one or more of the following matters:

Pour l'application du paragraphe 29.12(1) de la Loi sur la défense nationale, l'autorité de dernière instance renvoie au Comité des griefs tout grief qui a trait à l'une ou l'autre des questions suivantes :

**a.** administrative action resulting in the forfeiture of or deductions from pay and allowances, reversion to a lower rank or release from the Canadian Forces;

**a.** les mesures administratives entraînant la suppression ou des déductions de solde et d'indemnités, le retour à un grade inférieur ou la libération des Forces canadiennes;

**b.** the application or interpretation of Canadian Forces policies relating to the expression of personal opinions, political activities, candidature for office, civil employment, conflict of interest and post-employment compliance measures, harassment or racist conduct;

**b.** l'application et l'interprétation des politiques des Forces canadiennes qui concernent l'expression d'opinions personnelles, les activités politiques et la candidature à des fonctions publiques, l'emploi civil, les conflits d'intérêts et les mesures régissant l'après-mandat, le harcèlement ou la conduite raciste;

**c.** pay, allowances and other financial benefits;

**c.** la solde, les indemnités et autres prestations financières;

**d.** the entitlement to medical care or dental treatment; and

**d.** le droit aux soins médicaux et dentaires;

**e.** any decision, act or omission of the Chief of the Defence

**e.** toute décision, tout acte ou toute omission du chef d'état-

Staff in respect of a particular officer or non-commissioned member.

major de la défense à l'égard d'un officier ou militaire du rang en particulier.

**7.24 - ACTION AFTER  
GRIEVANCES  
COMMITTEE REVIEW**

**7.24 - MESURES  
POSTÉRIEURES À  
L'EXAMEN DU COMITÉ  
DES GRIEFS**

On receipt of the findings and recommendations of the Grievances Committee, the final authority shall take action as prescribed in subparagraphs 7.19(a) to (d).

Sur réception des conclusions et des recommandations du Comité des griefs, l'autorité de dernière instance doit prendre les mesures prévues aux sous-alinéas 7.19a) à d).

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-553-16

**STYLE OF CAUSE:** CAPTAIN TERRY M. BYRD v CANADA (ATTORNEY GENERAL)

**PLACE OF HEARING:** OTTAWA, ONTARIO

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