

Federal Court



Cour fédérale

Date: 20180215

Docket: T-827-17

Citation: 2018 FC 183

Ottawa, Ontario, February 15, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

ROY ARMSTRONG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Lt. Col. Roy Armstrong seeks judicial review of a decision of the Final Authority of the Canadian Forces' grievance process, which denied his grievance concerning the convening of a Supplementary Selection Board to decide whether he should be promoted to the rank of Colonel. For the reasons that follow, I am denying his application.

I. Facts and Decision Reviewed

[2] The applicant, Lt. Col. Roy Armstrong, has had a long and distinguished career in the Canadian Forces, in particular as an intelligence officer. He became a Lieutenant Colonel in September 2009. From 2009 to 2013, he served as the Deputy Canadian Forces Intelligence Liaison Officer in Washington DC. From July 2013 to March 2014, he was deployed in Afghanistan, in a position for which he was granted the rank of Colonel (Acting While So Employed). He was granted the Chief of Defence Staff's Commendation for his extraordinary achievements in Afghanistan.

[3] Promotion in the Canadian Forces is based on a combination of minimum time spent in a rank, evaluation and competition. An officer must spend a certain "time in rank" as a Lieutenant Colonel before being eligible for promotion to the rank of Colonel. Every year, a list of eligible candidates is prepared for each rank and unit. That list is called the Selection Board Candidate List [SBCL]. It must contain at least twice as many names as there are positions available. A Selection Board then reviews and assesses the candidates on the SBCL. Promotions are awarded to the candidates who obtained the best ranking from the Selection Board.

[4] In the fall of 2014, a SBCL was prepared for the promotion of intelligence officers to the rank of Colonel. The name of Lt. Col. Armstrong was not considered in that process. Everyone now agrees that this was an error. Apparently, the person who compiled the list mistakenly believed that Lt. Col. Armstrong obtained his current rank in 2014 and was not eligible.

[5] The Selection Board Guidance Manual provides for the convening of a Supplementary Selection Board in certain circumstances, including where a candidate was “missed” when the initial list was prepared. When he learned that his name was mistakenly excluded from the 2014 SBCL, Lt. Col. Armstrong requested that a Supplementary Selection Board be convened to review his case.

[6] The Director Military Careers Support Services 2 [DMCSS 2] dismissed that request on June 26, 2015 [CTR, p. 180]. According to the analysis of the Career Manager, which the DMCSS 2 adopted, Lt. Col. Armstrong’s evaluation scores were below the cut-off for inclusion in the 2014 SBCL. Moreover, even if Lt. Col. Armstrong’s candidacy were assessed according to the criteria employed by the Selection Board, he would have ranked well below the two persons who were promoted. As a result, the DMCSS 2 found that Lt. Col. Armstrong did not have a “reasonable expectation of promotion.” For that reason, he refused to convene a Supplementary Selection Board.

[7] The *National Defence Act*, RSC 1985 c N-5 [the Act] provides for a two-step grievance process, composed of an Initial Authority and a Final Authority. Lt. Col. Armstrong filed a grievance against the decision not to convene a Supplementary Selection Board. On February 25, 2016, the Director General Military Careers, acting as the Initial Authority, dismissed the grievance [CTR, p. 131]. He agreed with the analysis of the DMCSS 2, to the effect that Lt. Col. Armstrong would not have been competitive. Moreover, he rejected Lt. Col. Armstrong’s contention that some aspects of his file had not been properly assessed, resulting in lower than mandated scores.

[8] Lt. Col. Armstrong then brought his grievance to the Director General, Canadian Forces Grievance Authority [DGCFGA], who acts as the Final Authority pursuant to a delegation from the Chief of Defence Staff under section 29.14 of the Act. The Final Authority sent the grievance to the Military Grievances External Review Committee [Committee], whose mission is to review the grievance and to make findings and recommendations to the Final Authority (s. 29.2 of the Act).

[9] On December 14, 2016, the Committee recommended that the grievance be denied [CTR, p. 16]. The Committee decided to obtain the Selection Board files and perform its own assessment of Lt. Col. Armstrong's file according to the selection criteria. The Committee gave him a slightly higher score than the Career Manager (324 points instead of 320 points). However, because the two candidates who were promoted had higher scores (331 and 336 points), the Committee concluded that Lt. Col. Armstrong would not have been competitive and that a Supplementary Selection Board would not have been warranted.

[10] On April 28, 2017, the Final Authority rendered its decision and dismissed the grievance. He adopted as his own the findings of the Committee. He went on as follows [CTR, p. 5]:

In 2015, there were two promotions to Col in the INT Branch. The second officer promoted scored a total of 331 points on the promotion selection list. As such, I find that a similar or greater score would be required to achieve a reasonable expectation for promotion. I note that the CM, the IA, and the Committee all conducted separate analyses to determine whether there would be a reasonable expectation of promotion. In all cases, it was found that your file was not sufficiently competitive to be promoted in 2015. I agree. The CM case analysis using the same [scoring criteria] used by the promotion board estimated your score to be 320 points; and a very thorough and detailed case analysis by the Committee estimated your score to be 324 points. The evidence clearly

indicates that you would have been well short of the points required to be promoted. After my review, I determine these estimates to be fair and reasonable.

Although you had proven performance at the rank of Col, I find that your file, while strong, was not sufficiently competitive for promotion. As explained to you by the Committee and the CM, in relation to the approved selection board criteria, you not only lacked the breadth of experience at the rank of LCol, but also lacked the recognized areas of professional development.

In conclusion, I find that the CM acted fairly, and in compliance with the policies and directives. I determine that your file was not sufficiently competitive for promotion in 2015. I am satisfied that there is not a reasonable expectation for promotion. Therefore, I determine that a supplemental board is not required.

[11] Lt. Col. Armstrong brought an application for judicial review of this decision to the Federal Court.

[12] In parallel with the present proceedings, Lt. Col. Armstrong also filed a grievance against his personnel evaluation review [PER] for 2014-15. That grievance was also denied. He brought a separate application for judicial review against that decision, bearing file no. T-984-17, which is the object of a separate decision rendered today.

II. Analysis

[13] The basic question at issue in this application is whether a Supplementary Selection Board should have been convened to study Lt. Col. Armstrong's file. I will first determine the standard of review applicable to this decision. I will then analyse Lt. Col. Armstrong's arguments.

A. *Standard of Review*

[14] Both parties agree that this Court must review decisions of the Final Authority on a standard of reasonableness. This is in accord with previous decisions of the Federal Court of Appeal on the same subject (*Zimmerman v Canada (AG)*, 2011 FCA 43 at para 21; *Walsh v Canada (AG)*, 2016 FCA 157 at para 9).

[15] Thus, my role is not to decide the case afresh. I must simply assess whether the Final Authority based its decision on a defensible interpretation of the applicable legal principles and a reasonable assessment of the evidence.

B. *Did the Final Authority fail to exercise the full scope of its powers?*

[16] Lt. Col. Armstrong's main argument is that the Final Authority failed to exercise his discretion with respect to what was asked of him; namely, to direct the convening of a Supplementary Selection Board. Instead of doing that, the Final Authority simply assessed whether the Career Manager or the Initial Authority made a reasonable decision. That distinction is crucially important, says Lt. Col. Armstrong, because the lower-level decision-makers were constrained by the terms of the applicable policy, whereas the Final Authority would have a broader discretion.

[17] To assess that argument, it is useful to quote from the policy in question, the *Canadian Armed Forces Selection Board Guidance Manual*, under the heading "Preparation of Supplementary Boards":

Supplementary boards are held for numerous reasons, such as a person may have been missed on the PRELIM list, or had redressed a PER and the outcome was in the person's favour. The Board itself will normally be scheduled during one of the two Supplementary Board sessions in February and June. [...] When looking at convening a possible supplementary board, the following points must be taken into consideration:

- a. Unless directed by an appropriate authority (CDS, CMP, DGCFGA, DGMC), a candidate's competitiveness must be conclusively established in order for a promotion supplementary board to be convened. Indeed the underlying philosophy, as established by the chain of command, is as follows: "The aim of the supplementary board mechanism is to ensure that only those personnel who were incorrectly assessed, and who should have stood considerably higher on the applicable Selection Board Candidates List (SBCL), are reconsidered. Candidates whose chances of "success" are poor will not be reconsidered".

(CTR, p. 151, emphasis in original)

[18] According to Lt. Col. Armstrong, this means that lower-level authorities must establish competitiveness before convening a Supplementary Selection Board. However, the four named authorities, including the DGCFGA acting as Final Authority in this case, would not be so bound, as their power to issue a "direction" is framed as an exception to the requirement of competitiveness. Therefore, goes the argument, the Final Authority had a duty to consider whether a Supplementary Selection Board was warranted even if Lt. Col. Armstrong was not competitive. By not doing so, the Final Authority would have "fettered his discretion" in a manner that renders his decision unreasonable (see, by analogy, *Delta Air Lines Inc. v Lukács*, 2018 SCC 2 [*Lukács*]).

[19] I do not agree with Lt. Col. Armstrong's arguments in this regard.

[20] First, the Final Authority did not ignore Lt. Col. Armstrong's arguments to the effect that he should have been considered for promotion on the basis of factors other than the strict application of numerical scores. The Final Authority mentioned Lt. Col. Armstrong's service as Colonel (Acting While So Employed) in Afghanistan and his CDS Commendation for that service. However, he held that countervailing factors, including not only the numerical scores, but also Lt. Col. Armstrong's lack of breadth of experience and recognized areas of professional development, militated against a Supplementary Selection Board.

[21] Second, even assuming the Final Authority's discretion was not constrained by the policy, it seems logical to refuse to convene a Supplementary Selection Board where the candidate appears to have no chance of success, as the whole process would be pointless. Such a conclusion would be reasonable even in the absence of a policy. In other words, I do not understand the mention that the DGCFGA and other authorities may "direct" a Supplementary Selection Board as a rigid rule whereby the DGCFGA must disregard the lack of competitiveness of a candidate in reaching a decision.

[22] Third, this case is distinguishable from the *Lukács* case. In that case, the Supreme Court of Canada held that the Canadian Transportation Agency had set up an impossible test and fettered its discretion by requiring public interest claimants to show that they challenged the constitutional validity of legislation or administrative action, while complaints brought before the Agency, by their own nature, never involve such a challenge. In this case, the Final Authority did not set up an impossible requirement.

C. *Did the Final Authority reasonably conclude that Lt. Col. Armstrong would not have been competitive?*

[23] In the alternative, Lt. Col. Armstrong argues that it was unreasonable to conclude that he would not have been competitive in the 2015 Selection Board. His argument is based on comparisons with the PER scores of the five candidates referred to that Board. First, he casts doubt on the assertion that his PER scores would have been below the SBCL cut-off. Second, he asserts that, had his file been submitted to that Board, he would have deserved a stronger score than the one calculated by the Committee, which would have made him competitive with the two candidates who were ultimately promoted.

[24] While not devoid of logic, these arguments do not render the Decision unreasonable. Numerical assessments of performance contain a dose of subjectivity. In this case, for example, the Career Manager and the Committee came to slightly different scores for Lt. Col. Armstrong. That does not make either unreasonable. This Court does not have the expertise to make its own assessment and does not have full knowledge of the methodology employed.

[25] Moreover, the Selection Board is not bound by the PER scores given to candidates by their superiors. Selection Board members perform their own assessment. As a result, it is difficult to argue, based on PER scores, that Lt. Col. Armstrong would have deserved a higher Selection Board score than the one calculated by the Committee.

[26] In the end, I am unable to find that the Final Authority's conclusion, to the effect that Lt. Col. Armstrong would not have been competitive and that a Supplementary Selection Board was not warranted, is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed
with costs.

“Sébastien Grammond”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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