

Federal Court



Cour fédérale

Date: 20131129

Docket: T-1684-12

Citation: 2013 FC 1202

Ottawa, Ontario, November 29, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

LEO GERARD GILLIS

Applicant

and

**ATTORNEY GENERAL OF CANADA AND
THE CHIEF OF THE DEFENCE STAFF OF THE
CANADIAN ARMED FORCES**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] Mr. Leo Gerard Gillis (the “Applicant”) seeks judicial review of the August 9, 2012 decision of the Chief of the Defence Staff (the “CDS”) of the Canadian Armed Forces, denying part of a grievance concerning the ranking of his 2004/2005 Performance Evaluation Report (“PER”), the consideration of his candidacy by a 2006 Promotion Selection Board, and the convening of a

supplementary board to consider his substantive promotion to Brigadier-General. The Applicant succeeded in his grievance with respect to the issue of acting pay.

[2] Pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 (the “Rules”), the Attorney General of Canada is named as a Respondent. Collectively, the Attorney General of Canada and the CDS are referred to herein as the “Respondents”.

[3] In this application for judicial review the Applicant seeks the following relief:

An order quashing or setting aside the Chief of Defence Staff’s decision on the requirement to convene a Supplementary Board to consider all the evidence and information before him.

An order quashing or setting aside the Chief of Defence Staff’s decision with respect to preconceived bias of the applicant by his immediate Supervisor in the 04/05 PER Canadian Defence Academy Ranking Board.

II. THE EVIDENCE

[4] The evidence in this matter consists of the affidavit of the Applicant and two affidavits of Major Marjorie Reid filed on behalf of the Respondents.

[5] In his affidavit, dated November 28, 2012, the Applicant sets out the basis of his grievance.

[6] Major Reid is an Analyst, Grievance Administration, with the Canadian Forces. Major Reid deposed to two affidavits on January 11, 2013. In the affidavit found in Volume I of the Respondents’ Record, she stated that she gathered all the non-privileged material that was before the

CDS as the basis of his decision dated August 9, 2012. Attached as Exhibit A to this affidavit is a copy of that material, redacted to remove all third party personal information, pursuant to the Order of Prothonotary Morneau made on November 13, 2012. This exhibit is in effect, the Tribunal Record, pursuant to Rule 318 of the Rules.

[7] In her second affidavit dated January 11, 2013, Major Reid described her work as a Grievance Analyst. She addressed the process by which a grievance is pursued pursuant to the *National Defence Act*, R.S.C. 1985, c. N-5 (the “Act”), in conjunction with the *Queen’s Regulations and Orders for the Canadian Forces* (“QR&Os”). Following submission of the Applicant’s grievance to the CDS, as the “Final Authority”, the grievance was referred to the Canadian Forces Grievance Board (the “Grievance Board”) whose role is to review the evidence and to provide “Findings and Recommendations” (the “F&Rs”) to the CDS. She outlined the process that was followed in respect of the grievance submitted by the Applicant on February 28, 2009.

[8] The facts described below are taken from the affidavits filed on behalf of the parties and from the Certified Tribunal Record.

III. BACKGROUND

[9] The Applicant served in the Canadian Forces from June 1973 to March 2010. He was promoted to the rank of Colonel in 1997. In 2005, he served as Chief of Staff at the Canadian Forces College (the “College”). From February 28, 2005 to August 25, 2005, he was the Acting Commandant of the College.

[10] Around May or June 2005, the Applicant received his PER for 2004/2005, signed by the then Commandant of the College, Brigadier-General Gosselin, and Vice Admiral Jarvis. The Applicant received a generally positive assessment, but he was not ranked relative to his peers and his file did not go forward for promotion. The Applicant was also assessed under a Performance Management Agreement. This too was signed by the Commandant of the College.

[11] From April 30, 2006 to June 25, 2006, the Applicant was again appointed as Acting Commandant of the College. He was appointed Commandant of the College from June 26, 2006 to July 16, 2007. At the time the Applicant held the rank of Colonel. All other Commandants of the College have held the higher rank of Brigadier-General.

[12] On August 16, 2007, the Applicant filed a grievance with the Director General, Canadian Forces Grievance Authority ("Director General"), pursuant to section 29(1) of the Act. This grievance related to the CDS' decision not to recommend that the Applicant be promoted to Acting While So Employed ("AWSE") Brigadier-General for the periods during which he had served as Commandant of the College.

[13] On July 16, 2008, the Grievance Board issued the F&Rs recommending that the grievance be upheld to the extent possible by the CDS, such that the Applicant be retroactively promoted to AWSE Brigadier-General for June 26, 2006, to July 16, 2007. On November 13, 2008, the CDS followed this recommendation and the retroactive promotion to AWSE Brigadier-General was

confirmed on January 29, 2009. The Applicant did not judicially review the decision upon his first grievance.

[14] The Applicant filed a second grievance on February 28, 2009, raising his lack of ranking on his 2004/2005 PER, concerns about the 2006 Promotion Selection Board, allegations of bias, and the issue of acting pay. The grievance proceeded to the Grievance Board and on January 8, 2010, the Applicant was informed that an analyst had been assigned to his file. He was given the opportunity to provide comments on his grievance file and he did so.

[15] The process for prosecuting a grievance is set out in section 29 of the Act and chapter 7 of the QR&Os. The process includes assignment of a Grievance Analyst who is mandated to gather information. The Applicant was given the opportunity to comment on the information that was collected and he availed of that opportunity throughout the process.

[16] The Grievance Board made its F&Rs on July 7, 2010. It recommended that the grievance be partially upheld, in which case the CDS would need to request the approval of the Minister of National Defence (the “Minister”) to promote the Applicant to AWSE Brigadier-General for the period of April 1, 2005 to August 18, 2005. The Grievance Board recommended that the CDS deny those aspects of the grievance relating to the 2004/2005 PER and the 2006 Promotion Selection Board, because they had been submitted beyond the six month period set out in section 7.02 of the QR&Os. The Applicant filed his reply submissions to this report in August 2010.

[17] From February to July 2011, the Grievance Analyst solicited comments from persons involved with the Applicant during the time period relevant to the 2009 grievance, that is Major General Gosselin, formerly a Brigadier-General; Colonel Overton and Rear Admiral (retired) Pile.

[18] In his comments relative to the 2004/2005 PER, Major General Gosselin stated that “notwithstanding the wording on the PER”, the Applicant lacked key attributes such as strategic vision, institutional awareness, inter-personal skills, and noted that he sometimes made fundamental errors of judgment.

[19] On the 2006 Promotion Selection Board issue, Colonel Overton expressed the view that the Applicant was considered less competitive than his peers at this time. Rear Admiral (retired) Pile shared this opinion.

[20] Major General (retired) Hussey’s comments and observations were requested by the Applicant following his review of the Grievance Synopsis dated July 12, 2011, forwarded by the Director General. The Applicant had seen reference to Major General Gosselin’s comments and he questioned why Major General (retired) Hussey had not been contacted.

[21] Following receipt of information from Major General (retired) Hussey in November 2011, the Applicant made further submissions in December 2011. On May 25, 2012, the Director General recommended that the grievance be partially granted and that the Applicant be financially compensated by retroactive promotion to AWSE Brigadier-General.

IV. THE DECISION UNDER REVIEW

[22] By letter dated August 9, 2012, the CDS partially upheld the grievance and recommended the Applicant's retroactive promotion to AWSE Brigadier-General from February 28, 2005 to August 18, 2005, and from April 30, 2006 to June 15, 2006.

[23] Concerning the 2004/2005 PER, the CDS found that the PER was an accurate reflection of the Applicant's potential and actual performance, and that there was no evidence that this PER was inappropriate or departed from the Canadian Forces Personnel Appraisal System ("CFPAS") ranking policy. The CDS noted that the ranking of senior officers is not an exact science, and that the PER had been reviewed at two levels and signed by the Assistant Deputy Minister (Human Resources – Military) ("ADM (HR-Mil)").

[24] Concerning the 2006 Promotion Selection Board, the CDS found that the Applicant had ranked in the top 30% of ADM (HR-Mil) officers for 2005/2006 and 2006/2007. His file had been submitted for consideration, but he was deemed less competitive than others.

[25] As for convening a supplementary board, the CDS stated that he had dealt with that issue in his decision of November 13, 2008, the date of the decision in respect of the Applicant's first grievance. He concluded that since no error had been made in the Promotion Selection Board process or with respect to jurisdiction, and no new information had been presented, he was *functus officio*.

[26] The CDS also concluded that the information supplied did not justify the allegations of bias made by the Applicant, relative to the 2004/2005 PER.

V. SUBMISSIONS

A. *Applicant's Submissions*

(1) 2004/2005 PER

[27] The Applicant argues that his lack of ranking did not correspond with his responsibilities and other performance assessments. He submits that it was reasonable to assume that he should have earned the top PER since he had administered the college in the absence of the Commandant. He argues that in light of achieving the highest rated "Performance Management Agreement" for the relevant period, that the failure to rank him shows a major irregularity in his performance assessment. The Applicant says that he raised this issue in his grievance but there is no indication that the CDS considered it in making his decision.

[28] The Applicant also submits that remarks from his supervisor show that he did not receive an unbiased assessment. He refers to the supervisor's comments that he, the Applicant, was "considered not to have sufficient potential, notwithstanding the wording on the PER". The Applicant submits that he had been inducted into the Order of Military Merit and had received seven consecutive "immediate" PERs before the one in issue and three subsequently.

[29] The Grievance Board F&Rs stated that records concerning the discussions of the 2005 ranking board could not be found. These discussions, according to the Applicant, related to the

ranking of candidates for promotion based on the 2004/2005 PERs. The Applicant says that according to the File Classification system (DSCDS) Records Management, the disposal schedule for Merit Boards and Promotions is five years. He questions the premature disposal of the notes.

[30] The Applicant also submits that during his tenure as Commandant of the College, he received a document that was intended for his supervisor. This document recorded that the identity of officers who would be “pushed” by the Air Force tended to be determined before completion of the PER assessment period. The Applicant argues that this process took place outside the normal chain of command and undermined the purpose of the CFPAS policy.

(2) 2006 Promotion Selection Board

[31] Although the Applicant did not have access to the Promotion Selection Board’s proceedings, he submits that procedural irregularities cast doubt on whether the process followed was consistent with the CFPAS policy.

[32] The Applicant submits that there is evidence that his file was deselected by the Chief of Military Personnel, as stated by the CDS in his decision of August 9, 2012. He argues that the statements by the Chief of Military Personnel about responding to and advising the Applicant about the Board’s deliberations are inaccurate because those discussions did not occur and the Chief of Military Personnel did not pursue the Applicant’s AWSE promotion as he had alleged.

(3) Supplementary Board

[33] The Applicant submits that the CDS erred by refusing to convene a supplementary board. While the F&Rs note that the Applicant's time as Acting Commandant was considered for the purpose of a substantive promotion, he argues that his status as an AWSE Brigadier-General was not taken into account, that he did not receive recognition as AWSE Brigadier-General until the disposition of his 2008 grievance and consequently, he had been deprived of an opportunity to be considered by a selection board.

B. *Respondents' Submissions*

[34] In broad terms, the Respondents argue that the Applicant is seeking retroactive substantive promotion to Brigadier-General, by means of the grievance process and subsequent application for judicial review. They submit that the decision of the CDS was reasonable and made in a procedurally fair manner, and that this application should be dismissed.

(1) 2004/2005 PER

[35] The Respondents submit that the CDS reasonably determined that the Applicant had not substantiated his claim that his lack of ranking was inappropriate. Two levels of review agreed to the Applicant's evaluation. The ADM (HR-Mil) would have signed all ranked PERs in his organization and would have been aware that the Applicant was not ranked. The Respondents submit that the Applicant has failed to make out his claim of bias with respect to the ranking of his 2004/2005 PER.

(2) 2006 Promotion Selection Board

[36] The Respondents argue that the CDS reasonably found that the Applicant had ranked in the top 30% of ADM (HR-Mil) officers, rather than in the top 10%. The CDS also found that part of the process included a review for general competitiveness on an individual basis and the Applicant was found to be less competitive than other officers that year.

(3) Supplementary Board

[37] The Respondents submit that the CDS appropriately denied the Applicant's request to convene a supplementary board. They argue that the CDS reasonably concluded that there was no merit to the allegations regarding the 2004/2005 PER and the 2006 Promotion Selection Board. The fact that the CDS allowed the grievance relating to acting pay does not mean that the Applicant is, or was, in line for a substantive promotion.

VI. DISCUSSION AND DISPOSITION

[38] The Applicant challenges the decision of the CDS on three grounds, that is his lack of ranking in the 2004/2005 PER, the fact that his file was not presented to the 2006 Promotion Selection Board and the failure of the CDS to convene a supplementary board. The Applicant raises an issue of bias in connection with the 2004/2005 PER.

[39] The decision of the CDS in this case relates to the Applicant's grievance about not being promoted. According to the record and the submissions of the Respondents, promotion in the Canadian Forces involves the application of the Act, policies and the QR&Os. The broad issue

about advancement, including the question of ranking, in my view, is one of mixed law and fact. According to the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 53, such an issue is reviewable on the standard of reasonableness.

[40] The decision not to convene a supplementary board was a discretionary decision. According to the decision in *Dunsmuir*, at paragraph 53, such a decision is also reviewable on the standard of reasonableness.

[41] The issue of bias is an aspect of procedural fairness and as such, is reviewable on the standard of correctness; see the decision in *Sketchley v. Canada (Attorney General)*, [2006] 3 F.C.R. 392 at paragraphs 52-55. The finding by the CDS that no bias had been shown is reviewable on the standard of reasonableness; see the decision in *Riach v. Canada (Attorney General)*, 2011 FC 1230 at paragraph 37.

[42] I propose to deal with the question of bias in conjunction with the first issue raised by the Applicant, that is the lack of ranking of his 2004/2005 PER. He grounds his bias allegation upon certain remarks made by Brigadier-General Gosselin in an email dated April 27, 2011. That email was submitted to the Grievance Analyst in the course of gathering information relevant to the Applicant's grievance. In part, that email reads as follows:

In any event, Col Gillis was not ranked because he was considered NOT to have sufficient potential to be a general officer, notwithstanding the wording on the PER. Col Gillis got things done, very well and quickly, and had tremendous energy and passion. If you read the PER carefully, you will note no mention of some key attributes: he lacked strategic vision, lacked institutional awareness, sometimes made fundamental errors of judgment, and lacked inter-

personal relations skills. In short, he was excellent at doing what he was directed to do.

Other officers at CFC certainly had more potential, such as [redacted] (he was ranked #1, if I recall), and [redacted] (now a [redacted]). Gillis was acting Cmdt for periods because he had been in the position of COS for months (as a Logistics Officer), which meant the budget and resources responsibilities. But, I never delegated all my responsibilities to him. He was acting Cmdt only for the small day-to-day stuff. I kept commanding and directing the College, even when working on the Transformation Team, until posted that summer 2005.

[43] At face value, these words appear to be unfair when compared with the language that is found in the Applicant's 2004/2005 PER. That PER was signed by Major General Gosselin, then a Brigadier-General, the Applicant's superior officer. However, having reviewed the process by which officers are ranked and promoted, including chapter 11 of the QR&Os and the comments of Major General (retired) Hussey in his email of November 26, 2011, found at page 320 of Volume I of the Respondents' Record and partially repeated below, I am not persuaded that the remarks from Major General Gosselin in April 2011 can establish a bias on his part in May 2005 when he signed the Applicant's 2004/2005 PER.

[44] Major General Hussey described the ranking as a highly competitive process. He noted that the ranking is done by a board, not by an individual. His reply includes the following:

The board Chair (the ADM himself that year??) attempted to achieve consensus, but that was not always possible and he "broke the ties" so to speak, as this was a very subjective exercise to achieve a one sentence ranking in the PER of some, it did not change the overall PERs. The PERs were as you know only drafts and the words and adjectives used were then subsequently adjusted for Section 6 in particular to reflect the relative ranking of the top group and of course these affected the wording for the remainder of the Cols / Capt(N)s in the Group during the final drafting of the PERs. It should be noted that Section 6 for Outstanding individuals was signed by the

ADM not by the Comds and so Col Gillis was obviously one of the Outstanding individuals in the Group but just not one of the 5 individuals who received a Group ranking sentence at the beginning of the Section, in that year. Difficult to take for an outstanding performer but an unfortunate result of an imposed quota on this for all Groups.

[45] It is clear from the response from Major General (retired) Hussey that whatever opinion was held by Major General Gosselin, during the 2004/005 PER, that such opinion would not have been determinative of the Applicant's ranking at that time. The decision on ranking was made by a board and involved assessment of various factors, not solely the PER.

[46] The CDS found that there was no substance to the Applicant's allegations of bias against Major General Gosselin relative to the 2004/2005 PER. In his decision the CDS said the following in dealing with the bias allegations:

Upon review of your complete submission, I find that the information you supplied does not justify your claim [of bias] and I am not prepared to assign it any probative value. As such, I will not address this issue any further.

[47] In these circumstances, the comments of Major General Gosselin fall far short of the legal test for bias. That test is set out in the decision *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 394 where the Supreme Court said the following:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

[48] I am satisfied that the CDS reasonably determined that there was no bias, having regard to the substantial record that was before him, including the submissions filed by the Applicant as part of the grievance process. The Applicant had many opportunities to present his case and he availed of these.

[49] In his decision of August 9, 2012, the CDS made the following conclusion on the substantive issue regarding the 2004/2005 PER:

For a PER grievance to be supported, a member must be able to clearly demonstrate that a lack of rating is inappropriate, or that CFPAS policy was not adhered to in the preparation of his or her PER. I do not find you have done this nor do I find that the file evidence supports your contention.

[...]

The holding of an “acting” title does not guarantee an elevation in ranking status. I find that the evidence you have provided and the PER you supplied to be an accurate reflection of your performance and potential that year. I have reviewed two of your successive PERs during which time you spent more significant time as A/Cmdt during the reporting periods and note you favoured extremely well in the standings of ADM (HR-Mil) officers. To recapitulate, I find no evidence to support your contention that your lack of ranking was inappropriate nor do I see a departure from CFPAS ranking policy for the 04/05 reporting year.

[50] In these circumstances, I am satisfied that the CDS made a reasonable decision in declining to revisit the 2004/2005 PER and the issue of the Applicant’s ranking. Since he was not ranked, his file could not move forward for promotion in the next promotion year, that is 2006.

[51] The next issue relates to the finding by the CDS that the Applicant’s file was not improperly deselected from the 2006 Promotion Selection Board. The record contains a response dated June 22,

2011 from Rear Admiral (retired) Pile which makes it clear that the Applicant's file was not submitted to the Promotion Selection Board and that there was no impropriety in that regard. Rear Admiral (retired) Pile described a two-step process as follows:

In preparation for the 2006 Cols/Capt(N)s Promotion Selection Board, Level One Commanders conducted their own internal Ranking boards. In addition to the top files ranked by the CMP Ranking Board, only those files that merited consideration at the CF Promotion Selection Board would be submitted – i.e. competitive files. At the CMP Ranking Board, Col Gillis' file was rated within the top 10 of 33 Cols/Capt(N)s or within the top 30%, not the top 10% as he asserts. He did not receive a ranked position, which was reserved for the top five Cols/Capt(N)s within CMP and, in comparison to other CMP peers, his file was not considered sufficiently competitive to be submitted to the annual Promotion Selection Board. This assessment was unanimous among members of the CMP Ranking Board although the final decision on which files would be forwarded to the CF Promotion Selection Board rested with me.

[52] In the face of this evidence and other evidence on the record, I am satisfied that the CDS reasonably found that the Applicant had been treated fairly and in accordance with applicable policies. His decision clearly states that there was nothing surreptitious about the deselection of the Applicant's file from consideration for promotion in the 2007 promotion year, as appears from this part of the decision:

...In the DSA review of individuals for general competitiveness, you were deemed to be less competitive than other officers as they were considered to have more long term potential for advancement. The final list to be considered by the PSB, including the recommendations of files for removal (as in your case), was reviewed and approved by the board chairperson; the 06 PSB chairperson was also Comd CMP. I find no evidence which would support your contention that your file was deselected by someone higher than the responsible personnel involved in the conduct of the PSB. Additionally, I find that you were treated no different than other members being considered for promotion and find you were treated fairly and in accordance with policy in place at that time.

[53] The final issue is the decision of the CDS not to convene a supplementary board. The CDS refused this part of the grievance on the grounds that he had dealt with this issue in making his decision on the Applicant's first grievance, that is the decision of November 13, 2008.

[54] In that decision, the CDS said the following:

You would prefer that I recommend to the MND your substantive promotion to the rank of BGen. In support of your request, you have compared your situation to that of another individual. As the final authority, I must consider each case on its own merits. Promotion to the rank of BGen is extremely competitive. The evidence shows that your file was not forwarded before the selection board for year 2007 (fall 2006). Alternatively, your file was forwarded for consideration by the selection board for year 2008 (fall 2007), where you ranked 55 out of 58. With a promotion forecast of seven to nine promotions, you did not rank high enough to be promoted substantively to BGen in 2008. On that basis, recommending your substantive promotion would be contrary to the principle of merit and competitiveness associated to promotion. I therefore simply cannot acquiesce to your request.

[55] The CDS is crystal clear in his findings in the 2008 decision for which the Applicant did not seek judicial review. Insofar as the present grievance seeks the same relief, that is a recommendation for a substantive promotion to the rank of Brigadier-General, the issue has already been determined. In my opinion the CDS reasonably denied this part of the Applicant's grievance.

[56] In summary, the decision of the CDS rejecting parts of the Applicant's grievance is reasonable. He reasonably found no bias. His other conclusions were reasonable in the face of the record that was before him and the relevant conditions for promotion, in particular sections 11.01 and 11.02 of chapter 11, the QR&Os concerning promotions. I see no errors in the manner in which

the grievance process was followed by the grievance analyst, leading up to the recommendation by the Director General. The Applicant had broad participatory rights which he utilized.

[57] As noted by Counsel for the Respondents, the CDS is the “final authority” for the purpose of grievance redress for members of the Canadian Forces. The Applicant has not shown any breach of procedural fairness or that the CDS otherwise committed any legal error. In the result, this application will be dismissed.

[58] There remains only the question of costs. The Respondents seek costs and the Applicant submits that no costs should be awarded against him.

[59] I am aware of the jurisprudence cited by the Respondents. I am also mindful of the arguments advanced by the Applicant against the award of costs.

[60] The award of costs lies wholly in the discretion of the Court pursuant to Rule 400 of the Rules. In the exercise of my discretion and having regard to the circumstances of this proceeding, I make no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed, no order as to costs.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1684-12

STYLE OF CAUSE: LEO GERARD GILLIS v. ATTORNEY GENERAL OF
CANADA AND THE CHIEF OF THE DEFENCE STAFF
OF THE CANADIAN ARMED FORCES

PLACE OF HEARING: HALIFAX, NOVA SCOTIA

DATE OF HEARING: MAY 16, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** HENEGHAN

J.

DATED: NOVEMBER 29, 2013

APPEARANCES:

Leo Gillis

FOR THE APPLICANT
(ON HIS OWN BEHALF)

M. Kathleen McManus

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Leo Gillis
Marion Bridge, Nova Scotia

FOR THE APPLICANT
(ON HIS OWN BEHALF)

William F. Pentney
Deputy Attorney General of Canada
Halifax, Nova Scotia

FOR THE RESPONDENTS