



PERSPECTIVES

FROM THE CANADIAN FORCES GRIEVANCE BOARD

I am pleased to present this sixth edition of *Perspectives*, the Canadian Forces Grievance Board's newsletter intended for senior management in the Canadian Forces.

In this edition, the Board addresses issues raised by a grievance related to the administration of the Allowance for Loss of Operational Allowances where a Canadian Forces member was denied this benefit due to a restrictive interpretation of the term "military casualty." After reviewing the grievance, the Board made several systemic recommendations regarding the overall administration of the benefit. We were pleased to see that the Chief of the Defence Staff agreed with these recommendations and ordered a review of the approval process including the criteria to be applied.

Another topic introduced in this edition is related to the issuance of remedial measures where the Board noticed recurrent problems, including the lack of procedural fairness and proper justification, as well as inadequate description of deficiencies. Several grievances reviewed by the Board and discussed in the following pages give examples of problems in the way the Defence Administrative Order Directive on remedial measures is often being interpreted and used by the Chain of Command. The Board hopes that by bringing these cases to the attention of the initiating authorities, more care will be taken in the administration of these serious sanctions.

Perspectives' intent is to raise decision-makers' awareness to broader issues and trends which come to the Board's attention during the review of individual grievances.

We hope you will find this latest edition of *Perspectives* as useful and informative as the previous editions which are all available on our website (www.cfgb.gc.ca). We also look forward to your feedback: najwa.asmar@cfgb-cgfc.gc.ca; 613-996-8529; Toll free: 1-877-276-4193.



Bruno Hamel
Chairperson

About the Board

The Canadian Forces Grievance Board is a federal agency external to the Department of National Defence and the Canadian Forces (CF). The Board reviews military grievances referred to it by the Chief of the Defence Staff (CDS) and issues findings and recommendations to the CDS and the grievor in a fair and timely manner. In fulfilling its mandate, the Board strengthens confidence in, and adds to, the fairness and transparency of the CF grievance process.

ALLOWANCE FOR LOSS OF OPERATIONAL ALLOWANCES

The Board recently reviewed a grievance concerning the Allowance for Loss of Operational Allowances (ALOA) and discovered a number of issues with the administration of this benefit. This particular grievance was submitted by a Canadian Forces (CF) member who was diagnosed with a bacterial infection while on leave in Canada. He was subsequently placed on a temporary medical category and deemed unfit for continued duty in Afghanistan. Accordingly, the grievor remained in Canada and was later officially repatriated and denied ALOA.

The Board noticed that the term “military casualty” has been interpreted differently by various Task Force commanders and by staff at National Defence Headquarters; some taking a liberal approach, while others took a more restrictive view.

Compensation and Benefits Instruction (CBI) 205.536 states that the intent of ALOA is to provide financial assistance to a member who becomes a “military casualty” and is no longer able to serve in a Special Duty Area (SDA) or Special Duty Operation (SDO), thus losing allowances otherwise payable. The CBI indicates that to be eligible for ALOA, a member must no longer be able to serve in a SDA or SDO and payment of some or all allowances related to his or her service must have ceased.

The term “military casualty” is defined in the CBI as a member who is injured or becomes ill in a SDA or during a SDO as a result of either hostile actions or the conditions of the deployment, to a degree that requires the member to be repatriated. During the Board’s research, it became clear that this definition has been interpreted differently by various Task Force commanders (TF Comd) and by staff at National Defence Headquarters; some taking a liberal approach,

while others took a more restrictive view. For example, the Board became aware of a case where a CF member was diagnosed with multiple sclerosis while in theatre, was repatriated and received ALOA. It appears that the Surgeon General’s view in that case was that while the member’s illness was latent, it was exacerbated by the conditions in theatre. By contrast, in the fact situation of this grievance, the CF concluded that while it was most likely that the bacterial infection began in theatre, the CF member was denied ALOA because the illness could not be reasonably linked to either hostile action or the conditions of his deployment in Afghanistan.

The Board noted that the term “military casualty” can and should allow for a broad interpretation. The Board added that in determining eligibility for the ALOA, the conditions of a member’s deployment and work in theatre must be taken into consideration. Accordingly, in the case under review, the Board observed that while the member’s illness did not manifest itself until he was on leave in Canada, the evidence on file showed that the infection most likely began while in theatre and was linked to the conditions of the deployment. The member was a gunner and his daily potential exposure or contact with infected objects, surfaces or persons, as well as his chances of getting infected through an open wound (i.e. small cuts from manipulating ammunition or cleaning guns and weapons) was far greater than those he would have been faced with in Canada. These activities were all part of his normal duties and clearly linked to the accomplishment of the mission. The Board recommended that the grievance be upheld and that the member be paid ALOA. The Chief of the Defence Staff (CDS) agreed.

In addition, the Board made systemic recommendations regarding the overall administration of the ALOA benefit. In particular, the Board noted that the CBI providing eligibility criteria for ALOA does not indicate who can authorize the benefit. CANFORGEN 050/07, which amplifies the CBI, states that it is the TF Comd who will confirm eligibility for ALOA on a member’s repatriation message, therefore giving that individual the authority to grant or deny the benefit. This is of concern because, with no clear guidance or a review

process in place, a CF member who may be considered a “military casualty” by one TF Comd, may not be by another.

The Board recommended that the CDS order a review of the process by which the ALOA is being administered to ensure that decisions as to whether CF members meet the eligibility criteria found in the CBI, including the definition of “military casualty,” are consistent. In addition, the Board recommended that the review include the issuance of guiding principles, the imposition of a mandatory consultation with appropriate medical authorities and/or the centralization of the approving authority.

The CDS accepted all of the Board’s recommendations and ordered the Director General Compensation and Benefits to conduct a review of the benefit.



The Chief of the Defence Staff agreed with the Board’s recommendations that the process for determining the eligibility criteria for the Allowance for Loss of Operational Allowances be reviewed to include guiding principles, mandatory consultation with appropriate medical authorities and/or the centralization of the approving authority.

THE ISSUANCE OF REMEDIAL MEASURES

The Board has recently reviewed several grievances from CF members who were the subject of remedial measures, in particular either Initial Counseling (IC) or Recorded Warning (RW), for performance or conduct deficiencies. In most cases, the grievors argued that the remedial measures were not warranted and asked that the documentation be removed from their files. In reviewing these grievances, the Board noticed that there appear to be recurrent problems with the issuance of remedial measures: a lack of procedural fairness, proper justification; and insufficient description of the deficiency.



Remedial measures are not always issued in a manner that is consistent with the policy and the principles of procedural fairness and they do not always include sufficient justification and details.

Remedial measures arise in the context of conduct or performance issues. Pursuant to Defence Administrative Order Directive (DAOD) 5019-0, Conduct and Performance Deficiencies, a conduct or performance deficiency occurs when a member fails to meet the established standards. The DAOD provides that when a member demonstrates a deficiency, the Chain of Command (CoC) shall take appropriate action, either by way of disciplinary or administrative action, or both.

The issuance of remedial measures is governed by DAOD 5019-4, Remedial Measures. This policy confirms that remedial measures are intended to make members aware of conduct or performance deficiencies, assist them in overcoming their shortcomings, and provide them with time to correct their conduct or improve their performance. The DAOD states:

Remedial measures initiated in respect of a CF [Canadian Forces] member are, in increasing significance:

- initial counseling (IC);
- recorded warning (RW); and
- counseling and probation (C&P).

According to the DAOD, remedial measures are intended to assist a member in overcoming a noted deficiency. DAOD 5019-4 indicates that the following factors shall be considered in selecting the appropriate remedial measure:

- *the facts of the case, including the significance and impact of the deficiency;*
- *the member's entire period of service, taking into account the member's rank, military occupation, experience and position;*
- *any conduct or performance assessment, evaluation or constructive criticism previously received by the CF member with regard to the deficiency;*
- *any previous deficiency substantially related to the current deficiency of the member and the amount of time that has elapsed between the two; and*
- *any relevant factors in associated policies or orders related to the specific deficiency.*

Unfortunately, despite the process and considerations set out in DAOD 5019-4, remedial measures are not always issued in a manner that is consistent with the policies and the principles of procedural fairness; further, there is a lack of detailed justification. Contrary to what is contemplated by the policy, remedial measures often represent the CoC's first intervention in addressing a conduct or performance deficiency by a CF member.

PROCEDURAL FAIRNESS

As indicated, one problem that the Board has observed in relation to the issuance of remedial measures is the lack of procedural fairness. Under Canadian law there is a duty of procedural fairness required on the part of public authorities making administrative decisions affecting the rights, privileges or interests of an individual. While DAOD 5019-4 sets out procedural fairness requirements when a C&P is being considered, there are no such provisions in relation to the issuance of an IC or a RW. Nonetheless, given the impact of these measures on members' careers and the fact that the form remains permanently on personal files, it is

the Board's view that members are entitled to at least minimal procedural fairness in relation to the issuance of any remedial measure.

The principles of procedural fairness will generally require that the initiating authority provide the member with notice that the remedial measure is being considered and provide him or her with documents or other evidence to be used to justify the proposed action. Further, these principles dictate that the CF member should be given the opportunity to make representations prior to any proposed action being imposed.

The Board noted that placing a permanent written deficiency on a member's file is not something to be done lightly and suggested that Initial Counseling should generally be preceded by a verbal warning or counseling.

The Board has found that, in several grievances reviewed recently, there was insufficient regard for the principles of procedural fairness when issuing an IC or a RW. In these cases, the grievors were not provided with the documents that were used by the initiating authority to support the decision to initiate a remedial measure, nor were they given an opportunity to respond or present their explanation of events prior to the issuance of the remedial measure.

In one case, although the grievor was offered the chance to present his argument, this did not happen until after the decision had been made to initiate an IC; at that point, it was too late, and the breach of procedural fairness had already occurred. The Board concluded that the IC could not stand.

In some cases, however, the Board has determined that even if an initial breach of procedural fairness has occurred, the grievance process can cure the deficiency by providing the member with an opportunity to view all the evidence and to make representations prior to a final determination regarding the merit of the remedial measures imposed.

In the case referred to above, the Board concluded that the evidence was sufficiently strong to support the issuance of a new IC by the final authority. In another case, however, the member was able to convince the final authority, through her response to disclosure, that the remedial measure she had received was unwarranted in the circumstances.

IMPROPER JUSTIFICATION

The Board has identified another recurrent problem: some remedial measures are being issued without proper justification or for incidents that do not reasonably support a deficiency. Pursuant to DAOD 5019-4, remedial measures are considered “serious” steps and while the policy contemplates that a member may receive counseling or evaluations before a remedial measure, it appears that often these there is no such warning; this is especially true in the case of an IC. The Board has noted that placing a permanent written deficiency on a member’s file is not something to be done lightly and has suggested that ICs should generally be preceded by a verbal warning or counseling.

This was the case in one file where the grievor was issued an IC relating to his leadership skills that stated he would “*shy away from opportunities to address soldiers or control a situation.*” The Board found that there was no indication that the grievor had been verbally counseled by his CoC with respect to the shortcoming, or that he was otherwise mentored in terms of his leadership function as he had been led to believe he would be, prior to the issuance of the IC. As a result, the Board recommended that the IC be removed from the grievor’s file.

In another case, the Board found that two of the items listed as shortcomings in the remedial measure ought not to have been construed as deficiencies. One of the listed deficiencies referred to the grievor closing his office door upon entering the building, which led to the initiating authority noting on the remedial measure that he was being distant and isolating himself. The same remedial measure noted that the grievor had “no issues at home and no personal problems” and that the grievor “questions like a Private.”

The Board noted that none of these statements should be considered shortcomings and that the two latter statements were inappropriately categorized as a deficiency. The Board found that the remedial measure was not warranted, and the CDS agreed.

In another grievance, the Board determined that four of seven alleged incidents set out in an IC did not amount to performance deficiencies. For example, one incident involved the grievor asking for clarification regarding an issue that her CoC believed did not require any further explanation. The Board found that the grievor had reasonably asked for clarification and that her behaviour did not indicate a performance deficiency. Another incident set out in the IC concerned the grievor’s failure to book an EXPRES test as directed; however, the evidence showed that the grievor had, in fact, booked her test.

INADEQUATE DESCRIPTION OF A DEFICIENCY

Even where true deficiencies are apparent, initiating authorities must use caution in drafting the remedial measure. DAOD 5019-4 provides that the description of a deficiency requires sufficient detail that the remedial measure can be reviewed meaningfully by the parties involved. For example, the remedial measure should explain exactly what the member did and why it was deemed to be unacceptable.

In recent grievances, the Board has found that initiating authorities did not sufficiently describe the deficiency in question. In one case where the grievor had repeatedly sent unwelcome emails to another person in the workplace, he received an IC that stated: “[The grievor] *is not to have any contact with [the other person].*” The initiating authority did not explain in the IC that the grievor had sent unwelcome emails, nor was there any description as to what was unacceptable about the emails. In that case, the Board noted that the direction of the DAOD was ignored with respect to the wording of the deficiency and that the IC resembled more of a “non-contact order” than a remedial measure. The Board recommended that a new IC be administered with a clear description of the grievor’s conduct deficiency.

A second example of inadequate detail in the remedial measure came before the Board in a case regarding the content of a RW which contained a single statement that the grievor “lacked the required dedication and leadership.” In this case, the Board found that the description of the deficiency was so vague that it would be virtually impossible for the grievor to determine how to improve his performance. For this reason, as well as others, the issuance of a RW was determined to have been unreasonable.

CONCLUSION

The Board has emphasized on more than one occasion that the imposition of a remedial measure is a serious matter which should not be taken lightly. Given the significance of a remedial measure and the consequences for the grievor, initiating authorities must continue to be aware of the principles of procedural fairness and ensure that they are applied. It is also imperative that the remedial measure be issued carefully; only where warranted, with specific detail, and, in the usual case, only after a verbal warning or counseling has already been provided to the member.

Perspectives was created to share some valuable lessons learned from the review of grievances with key decision-makers and professionals associated with conflict resolution in the Canadian Forces. We look forward to your feedback: najwa.asmar@cfgb-cgfc.gc.ca; www.cfgb.gc.ca; 613-996-8529; toll free: 1-877-276-4193.

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