

**Making Things Right:
Unfair Treatment by CF
Grievance System**

March 18, 2005

Table of Contents

Executive Summary	1
Complaint.....	5
Investigation.....	9
Summary of Facts.....	11
The Complainant’s Grievance	11
Grievances of Other CF Members Regarding Entitlement to Reimbursement of Mortgage Interest Differential Charges	13
Analysis and Recommendation	19
Conclusion.....	27
Recommendation	29
Appendix A: Letter to the Minister of National Defence	31

Executive Summary

- 1 There are two timeless principles of fairness. The first is that like cases should be treated alike. The second is that formalities should serve justice, not defeat it. The complaint in this case has several dimensions, but it is grounded ultimately in the failure by the grievance process to treat like cases alike and in an unhealthy fixation on form rather than substance.

- 2 This complaint, like so many others that have languished in the Canadian Forces grievance system, dates back more than a decade. It started in 1993. That is when the complainant, as a direct result of being posted, sold his home. Because of the posting, the sale took place prior to his mortgage maturing and cost him \$3,500.10 in “mortgage interest differential charges.” In April 1993, the complainant was advised that this expense was a legitimate relocation expense and that he would be reimbursed for it. He therefore refrained from renegotiating a new mortgage with his bank. On June 25, 1993, an advance was paid to him to cover this cost. Unbeknownst to both him and his Unit, the Director of Compensation and Benefits Administration had issued a policy clarification just three days earlier, stipulating that mortgage interest differential charges were not reimbursable. This clarification was based on a six-year-old Treasury Board directive to the same effect that the Canadian Forces had never acted on. As a result of this change in policy, the complainant was called upon to repay the advance, which he did. Subsequently, appreciating the unfairness in requiring reimbursement under such circumstances, the Director of Compensation and Benefits Administration issued a second directive forgiving repayment of “mortgage interest differential charges” for those who had received them improperly. Unfortunately for the complainant, that directive had a terminal date of June 22, 1993; the complainant missed the forgiveness period by three days.

- 3 In these circumstances, the complainant did what might reasonably be expected. He grieved. On November 18, 2002, just short of ten years after the events, his grievance was denied and he ultimately complained to my Office.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 4 All of this is bad enough, but two further features make this case so compelling. First, the complainant's grievance failed not as a matter of indisputable intrinsic merit but because of mere chance. This complainant's grievance, which was submitted on March 8, 1995, was processed under the old grievance system, which had no Grievance Board and in which the Minister of National Defence made the final determination. Meanwhile, three other materially indistinguishable grievances were in the system, one of which had been filed prior to the complainant's grievance. All three of those grievances were referred to the Grievance Board under the new system. Unlike the complainant's grievance, all three were allowed. Unlike the complainant's grievance, the decision-makers in all three cases noted that there were conflicting legal opinions within the Canadian Forces over whether "mortgage interest differential charges" are recoverable. Unlike the complainant's grievance, these successful grievances found mutual support in notions of precedent. Had the complainant's grievance been channelled down the same path as these grievances, where the same information was available and past practices understood, his grievance would surely have succeeded.
- 5 In my opinion, even leaving aside the substantive merits of the complaint, this complainant was not treated fairly. Despite the best intentions, the Minister of National Defence was handicapped, lacking material information about these other grievances. The result: like cases were not treated alike and the complainant is out of pocket thousands of dollars.
- 6 The second feature that makes this case compelling is that now that I have interceded to try to make things right, a formalistic and unmeritorious objection is being taken. The Director General Canadian Forces Grievance Administration, the Office responsible for administering grievances, will not help to remedy this situation. First, the Director General has advised us that his Office is not concerned with fairness to the individual in the same sense as is my Office. Second, he expressed the belief that the Minister of National Defence, having decided the grievance, is now *functus officio*, a legal concept that deprives a decision-maker who has made a final decision from reconsidering it.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 7 Reliance on this legalistic response is deeply troubling. Technically, it is inaccurate to treat the doctrine of *functus officio* as a rigid impediment to a grievance process. More importantly, relying on such a technicality is not in keeping with the ethic and intent behind the DND/CF grievance process. That process was established to achieve the swift, informal, and effective resolution to human resource issues. It is anathema to that objective to disclaim authority to furnish a sensible solution to an obvious unfairness because of a technicality. The review process should be another measure for doing the right thing; yet the way it is being applied has caused distress to this complainant who, after so many years, sees his claim foundering because of ritualistic adherence to an inappropriately legalistic conception of grievance resolution.
- 8 I am therefore asking you, Mr. Minister, to intervene. This complainant relied to his detriment on misinformation. The Canadian Forces appreciated the unfairness in demanding reimbursement in such circumstances, but the complainant missed the forgiveness policy by mere hours, even though his case reflects the same merits that inspired that policy. Then his grievance based languished for years. Inexplicably, when it was processed, it was channelled down a different path than three similar complaints, depriving his claim of the benefit of precedent and material information. This led ultimately to its rejection. You have the authority to act and my strong recommendation is that you do so. It is not too late to expend what is a paltry sum to purchase good will and to rectify both the conscience of the institution and its pledge to put people first.

Complaint

- 9 The complainant is a former CF member who was released from the CF in April 1995 after 34 years of service. In 1993, while serving in the CF, he was advised of a posting change and, as a consequence, he was forced to sell his home. As a result of the sale of his home, the complainant was required to pay \$3,500.10 in mortgage interest differential charges. This is a common concept in mortgages, which requires that upon early termination of a mortgage the borrower must pay a charge representing interest that would have been paid to the bank if the mortgage had not been terminated.
- 10 The complainant's Base comptroller reviewed the claim for reimbursement of relocation expenses on June 19, 1993, and the complainant was issued a cheque on June 25, 1993, for his relocation expenses, including the mortgage interest differential charge. The complainant was advanced \$4,200 to cover this charge; however, the actual penalty imposed by his bank was ultimately \$3,500.10. The basis upon which the complainant was advanced the funds to cover the mortgage interest differential charge was the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), Chapter 209.96, and an internal Director of Compensation and Benefits Administration policy (#3984 061410Z Nov 87), which indicated that mortgage interest differential penalties could be reimbursed by the CF as a legitimate relocation expense.
- 11 After his move was completed, the complainant was informed that the mortgage interest differential charge was not reimbursable and he was required to repay the advance. This was the result of a policy clarification dated June 22, 1993, issued by the Director of Compensation and Benefits Administration (message #22473 221300Z Jun 93), which indicated that mortgage interest differential charges were not reimbursable by the CF. This clarification was based upon a Treasury Board of Canada Secretariat directive dated June 26, 1987 (#1987-32), which indicated that "mortgage paydowns" or "mortgage interest differential" charges, paid on the termination of a mortgage, were not reimbursable relocation expenses.
- 12 The complainant felt this was unfair, particularly as he had been advised prior to his house hunting trip in April 1993 by Base staff, that he could cancel his mortgage, seek the best rate available elsewhere and be reimbursed the interest differential charge. He indicated that if had he been informed prior to his move date of July 2, 1993, that there had been a change in the policy for reimbursement of mortgage interest differential charges, then he could have re-negotiated a new mortgage with his bank and avoided the charges.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 13 On April 15, 1994, the Director General Compensation and Benefits issued a further message (#228 TRPOL 002/94) indicating that any CF member who had been reimbursed a mortgage interest differential charge before June 22, 1993, was entitled to retain it and would not have to repay the monies. Because the complainant had received his reimbursement on June 25, 1993, he was not affected by this directive and was not entitled to keep the \$3,500.10.
- 14 The complainant presented two complaints in writing to the Director Compensation and Benefits Administration, in January and February 1995. As he had not yet received a reply to these complaints, he submitted a grievance to the Commanding Officer, NDHQ Administrative Unit, on March 8, 1995. The complainant felt that he should have been entitled to have his mortgage interest differential charge reimbursed, as neither he nor his unit were aware of the change in CF policy when the reimbursement was approved. In his view, his claim was approved before the new policy change came into effect and the cheque was issued to him before the policy change was communicated to his unit. He felt that he should have been entitled to keep the money. The complainant also argued that the CF was liable for the accuracy of the information provided to him by his unit, which had indicated that he was entitled to the reimbursement. Finally, the complainant argued that he was entitled to the reimbursement of the mortgage interest differential charge pursuant to QR&O Chapter 209.96, which authorized reimbursement of “any mortgage early repayment penalty” on posting of a CF member.
- 15 The Chief of the Defence Staff denied the complainant’s grievance on February 9, 1998.
- 16 In a memorandum dated February 24, 1998, to the Chief of Review Services, the Director General Compensation and Benefits acknowledged the confusion regarding mortgage interest differential charges and attributed it to poor communication and orders.
- 17 In 1999, the Integrated Relocation Pilot Project came into effect. Mortgage interest rate differential charges were deemed, according to this CF policy, to be reimbursable once again as a relocation expense.
- 18 The complainant’s grievance was forwarded to the Minister of National Defence on December 13, 1999, pursuant to the Canadian Forces grievance procedure in effect at that time. Former Minister John McCallum denied the complainant’s grievance on November 18, 2002. The complainant’s claim for \$2,250.00 in legal fees was also denied.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 19 On January 31, 2003, the complainant contacted the Ombudsman's Office, alleging that he was not treated fairly during the CF grievance process. Under paragraph 3(3) of the Ministerial Directives for the Ombudsman's Office, where complaints are received about the treatment of complaints by existing mechanisms including the CF redress of grievance process, the Ombudsman may review the process to ensure that individuals have been treated in a fair and equitable manner.
- 20 The complainant alleged to the Ombudsman that DND/CF's treatment of his grievance was unfair. In support of his complaint, among other arguments, he put forward that other CF members who grieved denial of reimbursement for mortgage interest differential charges had had their grievances allowed and monies repaid, pursuant to an order of the Chief of the Defence Staff. He also argued that the CF was liable to reimburse the penalty as he was provided inaccurate information as to his entitlement.

Investigation

- 21 The complainant's file was assigned to an investigator in the General Investigations section of the Ombudsman's Office. This section is responsible for attempting to resolve cases, investigating issues that involve individual complainants (as opposed to systemic matters), and investigating complaints from individuals who feel they were treated unfairly during the review of their problem by complaint review mechanisms, including the CF redress of grievance process.
- 22 During the course of this investigation, the complainant was interviewed, as well as DND and CF personnel working in the CF Grievance Administration office including the Director General responsible for this section, and personnel working at the CF Grievance Board. The complainant's entire grievance file was also reviewed, as were the grievance files for three other CF members. CF grievance procedures, the CF Grievance Manual, applicable compensation and benefit instructions, Treasury Board of Canada directives, QR&O and sections of the *National Defence Act* applicable to the review of Canadian Forces members' grievances were also examined and considered.

Summary of Facts

23 **The Complainant's Grievance**

24 On May 29, 1995, the complainant was sent a copy of a memorandum from the Director Compensation and Benefits Administration, in answer to his request for payment of mortgage interest differential charges. The memorandum stated that the request was not approved. It cited messages from Director Compensation and Benefits Administration and the Director General Compensation and Benefits, which stated that as of June 23, 1993, CF members were not entitled to reimbursement of mortgage interest differential charges as relocation expenses. It further stated that mortgage interest differential charges were not reimbursable as they represented money that would have been payable by the member whether the mortgage was terminated early or not. The memorandum did note, however, that the complainant could claim reimbursement for the interest on any funds he had to borrow in order to pay the mortgage interest differential in accordance with CF Administrative Order 209-35.

25 The complainant's grievance was forwarded to the Chief of the Defence Staff. It was denied by the Chief of the Defence Staff on February 9, 1998. The Chief of the Defence Staff indicated the following to the complainant in denying his grievance:

26 *It is unfortunate that confusion existed with respect to MID [mortgage interest differential] charges that resulted in the reimbursement of these charges to members of Canadian Forces prior to 22 June 1993. However as you have indicated in your letter of 2 December 1997, Treasury Board had determined that MID charges paid on the termination of a mortgage are not reimbursable. To continue providing such reimbursement would have been inconsistent with Treasury Board policy, as would acquiescing to the redress that you seek. Based on my review, I am satisfied that you were provided with all the pertinent financial benefits currently available in the Canadian Forces and that you have been treated in a fair and equitable manner.*

27 The complainant's grievance was forwarded to the Minister of National Defence on December 13, 1999.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 28 On June 15, 2000, the new streamlined CF Grievance Procedures came into effect as part of the amendments brought about at that time to improve openness and transparency in the CF and improve complaint review mechanisms available to CF members. Under the new grievance process, the Chief of the Defence Staff replaced the Minister as the final authority on grievances. The CF Grievance Board was also established to make findings and recommendations to the Chief of the Defence Staff on particular grievances, including those which resulted in a financial impact for CF members.
- 29 Pursuant to the procedures set up to transition from the old grievance procedures to the new system, the complainant's grievance remained at the Minister of National Defence level awaiting adjudication.
- 30 On April 19, 2002, a memorandum was prepared by the Director General Compensation and Benefits to assist the Minister in the adjudication of the complainant's case. This memorandum indicated that the mortgage interest differential charge that the complainant paid was not a penalty payable on early termination of mortgage that could be reimbursed pursuant to QR&O Chapter 209.96. The memorandum advised the Minister that the complainant was not entitled to have his mortgage interest differential amount reimbursed because he would have paid this amount if his mortgage had run its course. The memorandum cited DND/CF internal policies plus Treasury Board directives and concluded that there was no provision for the reimbursement of mortgage interest differential charges. A draft letter was subsequently prepared under the signature of then Minister Eggleton denying the complainant's grievance. This draft letter was accompanied by a memorandum dated April 24, 2002, from Lieutenant-Colonel Belovich, Director Canadian Forces Grievance Administration, noting that Director General Compensation and Benefits concluded that the complainant had been treated in a fair and equitable manner in accordance with the provisions of QR&O Chapter 290.96 and "*did not suffer personal oppression or injustice in this matter.*" The memorandum advised the Minister that "*you do not have authority to grant redress since QR&O Chapter 209.96 is a Governor in Council approved regulation.*"
- 31 There is no reference in the Director General Compensation and Benefits memorandum or the Director Canadian Forces Grievance Administration memorandum to the fact that the issue of entitlement to reimbursement of mortgage interest differential charges under QR&O Chapter 209.96 was the subject of other grievances or that the CF Grievance Board had made findings and recommendations on this issue in December 2001 (as noted further on).

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

32 Former Minister Eggleton did not issue the draft letter dismissing the complainant's grievance. However, on November 18, 2002, then-Minister McCallum wrote to the complainant denying his application for redress of grievance. In his letter he indicated the following:

33 *After my review of your file, I agree with the decision of the Chief of the Defence Staff contained in his letter to you dated February 9, 1998. Treasury Board policy dictates that a special charge to cover loss of interest is not reimbursable, as it represents money an employee would have paid whether or not a mortgage was terminated early. As well, there is no provision for the reimbursement of amounts defrayed to discharge the interest that would have been incurred had you not been posted. Consequently I believe you were treated in a fair and equitable manner and did not suffer personal oppression and injustice in this matter. Therefore, I deny the redress you seek.*

34 **Grievances of Other CF Members Regarding Entitlement to Reimbursement of Mortgage Interest Differential Charges**

35 During the time that the complainant's grievance was being considered by the CF, at least three other grievances were also lodged with respect to the denial of a reimbursement for mortgage interest differential charges for members who were forced to sell their homes because of posting changes. Unlike the complainant's case, these three grievances ultimately resulted in a favourable result to the grievors.

36 **Member M's Grievance**

37 In the first case, Member M was required to move from Ottawa to Edmonton on July 12, 1993, as a result of a posting change. He sold his home in Ottawa in April 1994. He was required to pay a fee of \$3,087.25 to his bank upon the early termination of his mortgage. M sought reimbursement of this amount, noting that at the time he entered into his mortgage contract, QR&O Chapter 209.96 allowed him to be reimbursed for a mortgage loan early repayment penalty up to the equivalent of six months mortgage interest. He also felt it was unfair that the Director Compensation and Benefits Administration decision disallowing reimbursement of the mortgage loan penalty was made only a few days before his move to Edmonton.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

38 Member M filed a grievance on October 26, 1994. The Commanding Officer Land Forces Western Area supported M's grievance on December 23, 1994, and on April 3, 1995, Land Forces Western Area Headquarters made representations to the staff of Director Compensation and Benefits Administration that M should be reimbursed. Director Compensation and Benefits Administration replied on January 30, 1996, that the sale of M's home was past the cutoff date of June 22, 1993, and also noted that M would have paid his financial institution the mortgage interest differential charge either as part of his mortgage payments or as a termination charge, regardless of whether or not he sold his home. The Commander Land Forces Western Area supported M's grievance on August 9, 1996. The Director Land Personnel referred M's grievance to the Chief of the Defence Staff on February 8, 2000. On March 24, 2000, Director Compensation and Benefits Administration did not support the request for reimbursement for the same reasons noted above. M's grievance was referred to the CF Grievance Board on June 15, 2000, pursuant to the new CF grievance procedures that had just come into effect.

39 The CF Grievance Board found that M had in reality been required to pay a penalty to permit the early termination of his mortgage as a result of a decision taken by the CF to post him. The Board did not agree with the arguments put forward by the CF that members were not entitled to reimbursement of mortgage interest differential charges under QR&O Chapter 290.96, as these were not penalties but, in fact, represented interest the member would have been required to pay in any event had he continued to the end of the mortgage. The Grievance Board found that the conditions of QR&O Chapter 209.96 were met and M was entitled to have the mortgage interest differential charge reimbursed. The Board recommended to the Chief of the Defence Staff on December 4, 2001, that M's grievance be granted and that he be reimbursed the mortgage interest rate differential amount.

40 The Chief of the Defence Staff wrote to M on September 29, 2003, indicating that he accepted the CF Grievance's Board's findings and recommendations and that he had directed the Assistant Deputy Minister (Human Resources – Military) to ensure that M was reimbursed the full amount of \$3,087.25 in satisfaction of his 1993 relocation claim.

41 **Member S's Grievance**

42 In the second case, Member S was required to pay a mortgage interest differential charge levied by his bank on May 30, 1997, after he sold his home due to a posting change. S claimed reimbursement of this amount on June 3, 1997. His claim was denied. S filed a grievance on June 10, 1997, as result of the denial of his claim.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 43 Member S argued that he had acted in good faith and that his claim for the interest penalty to be reimbursed was reasonable because his mortgage contract was broken as a result of his new posting. He also alleged that he had been initially advised that he was entitled to be reimbursed the mortgage interest rate differential amount but that when he went to finalize his claim, he was told there had been a policy change and that the amount would not be reimbursed. His commanding officer supported his grievance on July 10, 1997. The CO noted that S should not have to make an additional payment because of the CF's requirement that he move to a new location. He also wrote that S and others affected by the CF policy not to recognize mortgage interest rate differential charges as a penalty were being unfairly penalized.
- 44 On November 24, 1997, the Commander Maritime Forces Atlantic also supported S's grievance and found that S should be reimbursed. Maritime Forces Atlantic staff gave the opinion that the portrayal of the mortgage interest rate differential as something other than an early repayment penalty was an attempt to circumvent the intent of QR&O Chapter 209.96, which gave CF members the entitlement to have such penalties reimbursed.
- 45 On March 30, 2000, the CF Director Compensation and Benefits Administration refused to reimburse S, relying on the Treasury Board's position that mortgage interest rate differential charges represented the fulfillment of a contractual agreement between the member and its financial institution and could not be reimbursed. The Director also noted that although members could claim such charges under the new Integrated Relocation Pilot Program, this program was not retroactive to a date prior to April 1, 1999.
- 46 The Chief of the Defence Staff forwarded S's grievance to the CF Grievance Board on June 15, 2000, pursuant to the new CF Grievance Procedures, which came into effect at that time. The Grievance Board found that the mortgage interest differential amount paid by S was in fact an early repayment penalty and that, pursuant to QR&O Chapter 209.96, S was entitled to have this amount reimbursed up to an amount not exceeding 6 months interest. The Board further found that internal CF orders and directives and interpretations of Treasury Board policies could not invalidate this regulation. On December 5, 2001, the CF Grievance Board recommended that the Chief of the Defence Staff allow S's grievance and that he be reimbursed \$1,473.40, which was the full amount of the penalty he was required to pay to his bank, even though S had in fact claimed only a lesser amount in his grievance.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

47 The Chief of the Defence Staff wrote to S on September 30, 2003, indicating that he accepted the CF Grievance Board’s findings and recommendations and indicating that he had directed the Assistant Deputy Minister (Human Resources – Military) to ensure that S was reimbursed the full amount of \$1,473.40 in satisfaction of his 1997 relocation claim.

48 **Member X’s Grievance**

49 In the third case, Member X was posted from Ottawa to Italy in June 1998. On May 29, 1998, X was required to pay a mortgage interest rate differential charge to his bank in the amount of \$4,723.13 upon the early termination of his mortgage. X’s claim for reimbursement of the \$4,723.13 amount as a relocation expense was denied. X filed a grievance on March 10, 1999.

50 In support of his grievance, X made several arguments including that if he had been posted elsewhere in Canada instead of Italy, he could have transferred his mortgage and not have had to pay the early repayment charge. He also made reference to a CF CANFORGEN issued December 7, 1998 which indicated that mortgage interest differential charges on the sale of a home could now be claimed under certain conditions. X further argued that the Director Compensation and Benefits Administration refusal to recognize that the charge he paid was a penalty pursuant to QR&O Chapter 209.96 was “*legal jargon which lets DND legally off the hook and causes undue hardship on the member.*” He noted that he had to cancel the mortgage to satisfy DND needs, that he had no options, and had suffered financially as a result.

51 On June 22, 1999, the Director Compensation and Benefits Administration advised the CF Support Unit (Europe) that X’s grievance could not be allowed because of a Treasury Board policy that stated that the payment by a borrower of a mortgage interest differential charge was not a penalty. They noted that X “*has been treated equitably within a regulatory framework and although existing regulations may sometimes appear somewhat restrictive, they promote consistency, fairness and predictability for all Canadian Forces members.*” On November 4, 1999, the Commanding Officer of CF Support Unit (Europe) denied member X’s grievance application.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 52 Member X's grievance was ultimately forwarded (after some confusion) to the Director General Logistics at NDHQ, Brigadier-General Lashkevich. Brigadier-General Lashkevich initially responded on May 17, 2000, by denying the grievance on the basis of the Treasury Board policy that interest differential was not a reimbursable benefit. He, however, subsequently changed his position and re-reviewed the grievance in October 2000. On March 20, 2001, he referred the grievance to the Chief of the Defence Staff noting that he supported X's grievance on the basis that he was clearly being penalized because of service requirements.
- 53 On June 15, 2000, the Director Canadian Forces Grievance Administration referred Member X's grievance to the Director General Compensation and Benefits as the initial authority under the new CF streamlined redress of grievance system, which had just come into effect. X's grievance was denied by the CF Director General Compensation and Benefits on July 9, 2001. The Director General Compensation and Benefits cited Treasury Board's view that the mortgage interest differential charge was not a penalty and therefore not a reimbursable benefit and found that X had been treated "*in accordance with the regulations and in a manner consistent with others in similar circumstances.*"
- 54 Member X requested that the Chief of the Defence Staff adjudicate his grievance. On November 13, 2001, his grievance was sent to the CF Grievance Board, in accordance with the new CF Grievance Procedures.
- 55 The CF Grievance Board issued its findings and recommendations on October 28, 2002. The Board did not agree with the position of the Director General Compensation and Benefits. The Board found that X had in fact paid a penalty to dispose of his mortgage before the end of the term and that this was a direct consequence of being posted abroad by the CF. The Board referred to another grievance it had decided dealing with the same issue and on similar facts. The Board found that regardless of the interpretation given by Treasury Board and CF administrators to the mortgage interest rate differential charges levied by financial institutions, the fact remained that the charge was, in fact and in law, a mortgage early repayment penalty and that pursuant to QR&O Chapter 209.96, X was entitled to have the penalty reimbursed within a limit not exceeding six months of mortgage interest. The Board recommended that X be reimbursed \$4,224.60, which was the portion of the charge paid, equivalent to six months interest.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 56 The Chief of the Defence Staff wrote to X on November 19, 2003, indicating that he accepted the CF Grievance Board's findings and recommendations and that he had directed the Assistant Deputy Minister (Human Resources – Military) to ensure that X was reimbursed the full amount of \$4,224.60 in satisfaction of his relocation claim.

Analysis and Recommendation

- 57 The complainant's grievance was decided on the basis of the opinions of the Director General Compensation and Benefits and the Director Compensation and Benefits Administration (the subject matter experts) that the mortgage interest differential charge was not payable as a relocation expense. In their opinion, the mortgage interest differential charge was not reimbursable, as the grievor would have paid his financial institution the amount, either as part of his mortgage payment or as a mortgage termination charge, regardless of whether he was forced to sell his home. They also noted that CF policy provided that those persons who had the mortgage interest differential reimbursed before June 22, 1993, were entitled to keep it.
- 58 In each of the three other grievances referred to in the Summary of Facts, the Director General Compensation and Benefits and the Director Compensation and Benefits Administration maintained that mortgage interest charges were not reimbursable for the exact same reasons put forward in the complainant's case, i.e. that the grievor would have paid his financial institution the monies over time regardless of whether he sold his home and that Treasury Board took the view that mortgage interest rate differential charges represent the fulfillment of a contractual agreement between the bank and the homeowner and should not be reimbursed for this reason. In each of the grievances, the Director General Compensation and Benefits and the Director Compensation and Benefits Administration also argued that the mortgage interest rate differential charges were not reimbursable under CF policy as they were incurred after the June 22, 1993 policy change came into effect.
- 59 Each of the three grievances, which were forwarded to the CF Grievance Board in 2000 and 2001, noted that conflicting legal opinions on the issue had been rendered to DND/CF by its legal advisors. The files made reference to one legal opinion, which concluded that mortgage interest rate differential charges were not reimbursable, and to a second subsequent legal opinion that concluded that such claims should be reimbursed. The files also noted that a subsequent legal review by lawyers for the CF agreed with the second opinion.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 60 The CF Grievance Board did not agree with the Director General Compensation and Benefits and the Director Compensation and Benefits Administration arguments. The decision, issued by CF Grievance Board member Naomi Z. Levine, found that QR&O Chapter 209.96 granted CF members the entitlement to a reimbursement of a mortgage early repayment penalty, regardless of whether it is called a pay down or an interest differential charge, not exceeding six months of mortgage interest. The Board found that the Director General Compensation and Benefits did not have the authority to deny the entitlement that was provided for by regulation. The Board issued this finding first on December 4, 2001.
- 61 The Chief of the Defence Staff subsequently agreed with the Grievance Board's findings and recommendations and granted each of the three grievances. M's grievance was granted on September 29, 2003; S's grievance was granted on September 30, 2003; and X's grievance was granted on November 19, 2003.
- 62 After reviewing the grievance process in the complainant's case, I have concluded that the complainant has not been treated in a fair and equitable manner. There is no relevant distinction between the complainant's case and the other three cases where CF members were reimbursed their mortgage interest differential charges by order of the Chief of the Defence Staff.
- 63 When former Minister McCallum adjudicated the complainant's grievance on November 18, 2002, there was no indication that the Minister had the benefit of the same information as the CF Grievance Board. There is no indication that he was made aware of the other outstanding cases involving the exact same issue of entitlement to reimbursement of mortgage interest differential charges under QR&O Chapter 209.96, or that he was advised that the CF Grievance Board had, in fact, considered the matter in 2001 and rejected the position taken by the Director General Compensation and Benefits and the Director Compensation and Benefits Administration. There is no reference in the complainant's grievance file to the Grievance Board's 2001 finding that CF members were entitled to have mortgage interest rate differential charges reimbursed pursuant to QR&O Chapter 209.96 as an early repayment penalty. Although the Minister was not technically bound to accept any findings by the Grievance Board, he should have had the advantage of considering this additional information relevant to CF members' entitlements to have mortgage interest rate differential charges reimbursed, when deciding the complainant's case.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 64 It is reasonable to conclude that the only reason the complainant did not receive the mortgage interest differential charge reimbursement is because the Minister adjudicated his case under the old grievance system without the benefit of the CF Grievance Board's findings and recommendations. Had the complainant's grievance been dealt with under the new grievance system, along with the three other cases referred to the CF Grievance Board, there is absolutely no reason to believe that he too would not have been reimbursed the mortgage interest differential charge.
- 65 In an attempt to resolve the complainant's case, my Office's General Counsel, along with the investigator assigned to the complainant's case, met with the Director General Canadian Forces Grievance Administration, Colonel (Col) A. Fenske. The office of Director General Canadian Forces Grievance Administration was created in January 2003 and is responsible for administering grievances in the CF, including providing analysis and advice to the Chief of the Defence Staff on recommendations of the CF Grievance Board. The Director General of this section is delegated by the Chief of the Defence Staff with the authority to decide grievances with respect to matters that are not referred to the Grievance Board. Prior to the changes to the grievance system, this office in its previous capacity also provided advice and recommendations to the Minister on the adjudication of individual grievances.
- 66 Col Fenske acknowledged that he was aware of the complainant's case and the inconsistency in results between the complainant's grievance and the three identical cases involving mortgage interest differential charges that had been dealt with by the CF Grievance Board and adjudicated by the Chief of the Defence Staff. He indicated that his office had initiated a review of the complainant's case; however, he would not provide any information to my Office as to when this review would be concluded or what the purpose of the review was. Col Fenske also noted that his office was not concerned with "fairness" to the individual in the same sense as the Ombudsman's Office.
- 67 Col Fenske advised my Office that, in his view, the Minister had no authority to intervene and reconsider the complainant's case based on new information. According to Col Fenske, the grievance system is a formal system and the Minister, in deciding upon grievances, is acting in the same capacity as an adjudicator of an administrative tribunal. Therefore, Col Fenske was of the opinion that the Minister was *functus officio* in that the matter had been decided and could not be reviewed by the Minister, regardless of what degree of unfairness may have occurred. Given Col Fenske's position, I cannot be optimistic that his office will offer any relief to the complainant as a result of their review of his grievance file.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

68 With the greatest of respect to Col Fenske, I am unable to agree with his position that the Minister is *functus officio* and that, as Minister, you are powerless to provide any relief to the complainant in this case. In my view, Col Fenske's characterization of the grievance system as a formal administrative tribunal, which is quasi-judicial in nature, is inconsistent with the intention of the *National Defence Act*. The redress of grievance process is an administrative process aimed at providing relief to CF members where warranted, when they have a complaint or a problem.

69 I agree with former Chief Justice of Canada, the Right Honourable Antonio Lamer P.C., C.C., C.D., who conducted the first independent review of the provisions and operation of the 1998 amendments to the *National Defence Act*, when he commented in his report that the CF redress of grievance process was intended to be an informal process through which matters affecting CF members can be dealt with quickly. Former Chief Justice Lamer noted that the current system is far more complicated and bureaucratic than it was ever intended to be. He noted that while grievances must be treated fairly and with administrative justice, grievances should be seen as a human resource issue as they involve matters that affect the morale, well-being and quality of life of Canadian Forces members. He made the following the comments in his report, which I think are instructive in this case:

70 *Soldiers are not second class citizens. They are entitled to be treated with respect, and in the case of the grievance process, in a procedurally fair manner. This is a fundamental principle that must not be lost in a bureaucratic process, even a military one. Grievances involve matters such as benefits, personnel evaluation reports, postings, release from the Canadian Forces, medical issues and harassment – all matters affecting the rights, privileges and other interests of CF members.... Further, unlike in other organizations, grievors do not have unions or employee associations through which to pursue their grievances, nor do grievors generally have recourse to the Federal Court or to the Ombudsman while a redress of grievance is within the grievance process. It is essential to the morale of CF members that their grievances be addressed in a fair, transparent, and prompt manner.¹*

¹ The Right Hon. Antonio Lamer, *The First Independent Review of the Provisions and Operation of Bill C-25*, September 3, 2003, p. 86.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 71 The complainant in this case does indeed feel that he has been treated as a second-class citizen and ultimately denied justice and a fair result by the grievance system. The failure of the system to recognize his entitlement to this benefit, where it has recognized that of others in the same situation, has contributed to his mistrust and lack of confidence in the CF grievance system to treat its members fairly. It is particularly offensive to him that the CF refuses to remedy what is recognized to be an inequitable result in his case, because of the strict and rigid application of rules and administrative procedures.
- 72 I am not convinced that section 29.15 of the *National Defence Act*, which provides that “[a] decision of a final authority in the grievance process is final and binding and, except for judicial review under the *Federal Court Act*, is not subject to appeal or to review by any court,” would prevent you as Minister from intervening to remedy the unfair treatment in the complainant’s case. This section is meant to limit judicial intervention in decision-making by the CF grievance system. It is for this reason it refers to “*subject to appeal or review by any court*” (emphasis added). Even though there is a right to apply for judicial review of a grievance decision, there is nothing in the *National Defence Act* that prevents the final authority in the grievance process from revisiting or reopening a decision when he or she becomes aware that unfairness has occurred during the process, resulting in an unjust result.
- 73 In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, Mr. Justice Sopinka noted that the general rule of *functus officio* – that a formal judgment of a court cannot be reopened – derived from courts whose decisions were subject to a full appeal. For that reason, he states that the rule’s application to decisions of administrative tribunals, which are not subject to full appeal, must be more flexible and less formalistic. “*Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal*” (at page 862). I agree. I believe that administrative processes, such as the CF redress of grievance process, were meant to be flexible. The provisions dealing with the grievance process in the *National Defence Act* – before and after the 1998 amendments – are very wide. There is no reason why as Minister, and as the final authority in the complainant’s case, you do not have the discretion to intervene and remedy the unfair result in this case.
- 74 Under the mandate of the Office, the Ombudsman was given the responsibility to review the processes of CF complaint review mechanisms to ensure that complaints are handled in a fair and equitable manner. I cannot order anyone to do anything, and only have the power to make recommendations. If I discover that an individual was not treated fairly, I can only recommend that steps be taken to rectify the situation.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

- 75 Most Ombudsmen have the power to review and investigate the administrative processes used by government departments and the processes used by administrative tribunals to reach decisions. If the process did not treat the individual fairly, the Ombudsman has the power to make recommendations to make the process more equitable, and to recommend that relief be given to the individual. The Ombudsman for the Province of British Columbia has the power to investigate unfair administrative procedures by public agencies and administrative tribunals in the province. As an example, I note in his 2003 Annual Report a case where the Ombudsman found a complainant had not been treated fairly in the process leading up to a decision being made against her by the Employment and Assistance Appeal Tribunal. While I note that the *Employment and Assistance Act* of British Columbia specifically states in section 24(5) that “[a] decision of [the tribunal] is final and conclusive and not open to appeal to any body, or review in a court except on a question of law or excess of jurisdiction...”, the Tribunal agreed with the Ombudsman’s recommendation to schedule a new hearing for the complainant. The Tribunal agreed to reopen the matter, and obviously did not feel it was limited from doing so. In my view this type of approach would be just and appropriate in the complainant’s case.
- 76 It may be suggested to you that the complainant could have made an appeal to the Federal Court in order to have the decision in his case overturned. Although this may be correct, it does not prevent you as Minister from intervening to remedy what is clearly an unfair situation in this case. I also note that the statutory time limit in which to bring such an application has elapsed. While the complainant still could bring an application for judicial review, and the CF could consent to the application being brought outside of the time limit and also consent to the matter being reopened, I believe that it would be fundamentally unfair to force the complainant to take this route. The complainant has already incurred \$2,250.00 in legal fees trying to collect his mortgage interest differential charge. After the decision of the Chief of the Defence Staff, he attempted to collect the funds through Small Claims Court, and was told that he must exhaust the CF redress of grievance process before turning to the Courts. The complainant did return to the grievance system. It took seven years, from 1995 to 2002, for his case to be concluded in the grievance system. He did not have the means or the energy to pursue his case in Federal Court. I believe it would be unfair now to force him to take further steps and to resort to judicial proceedings in order to obtain relief, especially when a clear case has been made that he has been unfairly treated and there are other means available.

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

77 It is fundamentally important that the CF treat its members in a fair and consistent fashion. Entitlements to benefits should be applied in a manner that is consistent and that, in my view, extends the benefit to the CF member wherever possible. This did not occur in the complainant's case. The complainant has been denied the reimbursement of a charge, which he is entitled to under the QR&Os. This benefit has been extended to other CF members as a result of them exercising their rights through the CF grievance process. The complainant exercised the same rights, but did not obtain the same just result.

78 I am urging you as the current Minister of National Defence to take the appropriate steps to acknowledge the unfair treatment that the complainant has experienced in this case, and to remedy what is clearly an unjust result. In considering this case, I would encourage you to turn a critical and questioning eye to those who attempt to put bureaucratic hurdles and legal precepts in the way of ensuring that the complainant receives the benefits to which he is entitled, and which other CF members who were in the same position and who availed themselves of the same grievance system, ultimately received.

79 **I therefore recommend that:**

- 80 **1. The Minister acknowledge the complainant's entitlement to reimbursement of the mortgage interest differential charge that he paid in 1993, pursuant to *Queen's Regulations and Orders for the Canadian Forces Chapter 209.96*, and take steps to ensure that this former CF member be reimbursed accordingly and without delay.**

Conclusion

- 81 The CF redress of grievance process is an administrative process aimed at assisting CF members in having their complaints addressed. All CF members should be treated fairly and in a consistent manner by the grievance system. The system is intended to be flexible in order to ensure that it is capable of addressing valid complaints without having its hands tied by bureaucratic constraints and processes. In the complainant's case, his grievance remained in the old grievance system and was denied, while other grievances based on the same circumstances were transitioned into the new system and were granted.
- 82 This meant that CF members in the same position as the complainant received the benefit of having mortgage interest differential charges reimbursed, while he did not. The only reason the complainant did not receive this benefit was that his grievance was routed through a different grievance procedure and the person deciding his grievance did not have the advantage of the same information as in the other cases.
- 83 This is simply not fair. The process failed to treat the complainant in a fashion consistent with other members in the same position. As a result, he has lost confidence in the system and its ability to serve members. Military officials responsible for the administration of the grievance system seem to acknowledge that the complainant was not treated the same as others, but have refrained from taking action as they consider that you, as Minister, do not have the power to intervene. Their concerns are rooted in formalistic views of the grievance process. In my view, you as Minister have the authority to intervene to remedy the unfair result in the complainant's case, based on the new information that has been brought to light. I am hopeful that you will take the appropriate action to ensure that the complainant is reimbursed his mortgage interest differential charge in accordance with his recognized entitlement under QR&O Chapter 209.96.



André Marin
Ombudsman

Recommendation

- 1. The Minister acknowledge the complainant's entitlement to reimbursement of the mortgage interest differential charge he paid in 1993, pursuant to *Queen's Regulations and Orders for the Canadian Forces* Chapter 209.96 and take steps to ensure that this former CF member be reimbursed accordingly and without delay.**

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

Appendix A

Letter to the Minister of National Defence



Ombudsman
André Marin

February 21, 2005

The Honourable William Graham, P.C., M.P.
Minister of National Defence
National Defence Headquarters
Major-General George R. Pearkes Building
13th Floor, North Tower
101 Colonel By Drive
Ottawa, Ontario K1A 0K2

BY HAND

Dear Minister Graham:

Please find attached the Special Report: *Unfair Treatment by CF Grievance System*. This report is submitted to you pursuant to paragraph 38(1)(b) of the *Ministerial Directives* for the Ombudsman's Office.

As a result of this investigation, I have concluded that the complainant, Mr. W. Beswetherick was treated unfairly during the review of his grievance under the CF Redress of Grievance process. He was denied reimbursement for mortgage interest differential charges incurred when he was obligated to discharge his mortgage when he sold his house due to being posted to another location. In 2002, his grievance was denied by the Minister of National Defence as the final authority under the old grievance system. At the same time as his grievance was being reviewed, three grievances dealing with the same issue were being reviewed under the new streamlined grievance system. The Chief of the Defence Staff, the final authority, ultimately found that those grievors were entitled to reimbursement for mortgage interest differential charges. I am recommending that you acknowledge the complainant's entitlement to the mortgage interest differential charge and take steps to ensure he is reimbursed accordingly.

.../2

100, RUE METCALLE, SURELLE, 12^e ÉTAGE, OTTAWA, CANADA, K1P 5M1 • TEL/TÉL. : 613 992-0787 • FAX/TELÉC. : 613 992-3167

Canada

Special Report
Making Things Right: Unfair Treatment by CF Grievance System

In light of the subject matter of the report, I am providing additional copies of this report to be forwarded to the Chief of the Defence Staff, and the Assistant Deputy Minister (Human Resources – Military). A copy of my report will also be provided to the complainant, on a confidential basis.

Pursuant to paragraph 38(2)(b) of the Ministerial Directives, I intend to publish the report on the expiration of 28 days from this date.

I look forward to receiving your response to my recommendations in this case.

Yours truly,



André Marin
Ombudsman

Enclosures

c.c.: Chief of Defence Staff
Assistance Deputy Minister (Human Resources – Military)
Complainant