

Federal Court



Cour fédérale

Date: 20150924

Docket: T-1112-14

Citation: 2015 FC 1112

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, September 24, 2015

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

LOUIS-SÉBASTIEN MOROSE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Louis-Sébastien Morose seeks judicial review of a decision dated March 20, 2014, by Colonel J.R.F. Malo, in his capacity as final authority and delegate of the Chief of the Defence Staff [Chief of Defence Staff] pursuant to section 29.14 of the *National Defence Act*, RSC 1985,

c N-5 [the Act], reproduced in the appendix to these reasons. In that decision, Colonel Malo allowed the applicant's grievance dated October 7, 2010, in part.

[2] Mr. Morose had filed a grievance contesting the date of his promotion to the rank of Captain-General Service Officer [Captain], his incentive pay category anniversary date, and the amendment to his pay. His grievance stemmed from a decision of the Canadian Armed Forces [the Forces] in October 2009 to end the practice previously applied to student pilot officers with regard to promotions to the rank of Captain.

[3] As we shall see further on, the rank of Captain is granted on the date the candidate meets the requirements of his or her military occupation classification [MOC]. However, the practice used until October 2009 allowed student pilot officers to be promoted to Captain on the date they met the requirements of their MOC, but backdated to their entry into the promotion zone date, so as to mitigate the prejudicial of their training, which is generally longer than the training for other MOCs.

[4] It should be noted at the outset that the entry into the promotion zone date is defined in section 2 of *Canadian Forces Administrative Orders* [Administrative Orders] number 11-6, *Commissioning and Promotion Policy – Officers – Regular Force*, and that it means “the date an officer completes a specified time in rank in the officer's current MOC which makes the officer eligible for consideration for promotion . . .”. For student pilot officers, this date can be many months, even years, before the date they meet the requirements of their MOC.

[5] In Mr. Morose's case, the difference between the two dates is nearly 22 months, since his entry into the promotion zone date is August 22, 2008, while the date he met the requirements of his MOC is May 7, 2010.

[6] In his decision dated March 20, 2014, the final authority refused to exercise his discretion to allow Mr. Morose the benefit of this former practice and confirmed Mr. Morose's promotion to Captain as of the date he met the requirements of his MOC, without retroactive effect. However, to benefit Mr. Morose financially, he amended the date of Mr. Morose's promotion to Lieutenant from August 22, 2006, to June 19, 2009.

[7] Mr. Morose asks this Court to review the decision dated March 20, 2014, set it aside and refer the file back to the final authority for redetermination on the basis that the final authority must allow his grievance by (1) backdating his promotion to the rank of Captain-General Service Officer to August 22, 2008, his entry into the promotion zone date; (2) adjusting his incentive pay category anniversary date to August 22; and (3) increasing his pay increment accordingly.

[8] The Court is sympathetic to Mr. Morose's situation and notes in passing that it greatly appreciates the courtesy with which he and counsel for the respondent set out their submissions and conducted their debates. However, for the reasons that follow, the Court dismisses his application for judicial review.

II. Background

[9] On August 22, 2005, Mr. Morose enrolled in the Forces as a student pilot officer under the Basic Officer Training Program, at a community college. He already had a commercial pilot licence.

[10] Mr. Morose took the training program offered to him without delay on his part, but it nevertheless took him nearly five years to meet the requirements of his MOC and thus earn his wings.

[11] On July 6, 2007, Mr. Morose completed his basic officer qualification; on August 22, 2008, he entered the promotion zone; on June 19, 2009, he completed Phase II of pilot training; and on May 7, 2010, he qualified for his MOC and received his wings.

[12] On July 6, 2007, Mr. Morose was promoted to the rank of Second Lieutenant, retroactively to his date of enrollment, August 22, 2005. On May 7, 2010, he was promoted to the rank of Captain, without retroactive effect. He was then promoted to the rank of Lieutenant, retroactively to August 22, 2006.

[13] On October 7, 2010, Mr. Morose filed a grievance with his chain of command contesting the effective date of his promotion to Captain.

[14] Relying on the past exceptional practice used to promote student pilot officers, as described above, Mr. Morose then asked the Chief of Staff to exercise his authority under paragraph 11.02(2) of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O], reproduced in the appendix to these reasons, so as to (1) grant him the right to a promotion to the rank of Captain, backdated to his entry into the promotion zone date, August 22, 2008, rather than to the date he received his wings, May 7, 2010; (2) adjust his incentive pay category anniversary date to August 22; and (3) ensure that his pay reflects these adjustments.

[15] On September 21, 2011, Brigadier-General M.K. Overton, Director General Military Careers [Director General-Careers], in his capacity as initial authority, rejected Mr. Morose's grievance.

[16] The initial authority concluded that, [TRANSLATION] "despite previous practices . . . , the fact remains that DND and the QR&O do not provide the authority to backdate a promotion to Capt". He stated that his Division had ended the above-referenced practice in October 2009, since no other provision allows it, and concluded that this was consistent with policies not to authorize Mr. Morose's promotion to Captain until he met the requirements of his MOC, which in this case occurred on May 7, 2010.

[17] Mr. Morose's grievance was then the subject of a discretionary review by the Military Grievances External Review Committee [the Committee], which in accordance with article 7.12 of the QR&O as then in force had to provide the Chief of Staff and Mr. Morose with its findings and recommendations.

[18] On June 29, 2012, the Committee shared its findings and recommendations. It concluded that Mr. Morose had been treated unfairly in comparison with other MOCs and some fellow pilots. The Committee recommended that the Chief of Staff exercise his discretion under paragraph 11.02(2) of the QR&O to waive the requirement on Mr. Morose to meet the requirements of his MOC before being promoted to the rank of Captain and to order that this promotion therefore be backdated to August 22, 2008. The Committee also recommended that the Chief of Staff reject Mr. Morose's request with regard to setting the incentive pay category anniversary date as August 22, 2008.

[19] On March 20, 2014, Colonel J.R.F. Malo, in his capacity as final authority, allowed Mr. Morose's grievance in part. That decision is the subject of this judicial review.

III. Impugned decision

[20] In his decision dated March 20, 2014, the final authority found that Mr. Morose had been penalized in certain respects but treated fairly in others, in accordance with the policies and directives in force, even though some Forces members might have received such benefits in the past.

[21] He found that there was no provision that would allow a Forces member to be promoted to the rank of Captain retroactively, that the past practice used by the Director General-Careers to promote pilots to Captain without their being qualified was contrary to approved policies, and that the Director General-Careers should have put a stop to this once the error had been discovered. He noted that he did not agree with the Committee's conclusion recommending that

the Chief of Staff exercise his discretion under paragraph 11.02(2) of the QR&O, as this exceptional rule is intended to give the Chief of Staff latitude in certain specific cases and such latitude was not required in Mr. Morose's case. He therefore upheld May 7, 2010, as the date of Mr. Morose's promotion to the rank of Captain, without retroactive effect.

[22] Furthermore, to give Mr. Morose some financial benefit, he ordered that the Director General-Careers promote him to the rank of Lieutenant, effective June 19, 2009 (date as corrected in the decision letter dated September 23, 2014) rather than August 22, 2006, which he was allowed to do, and that his pay increments (incentive pay category) to the ranks of Second Lieutenant and Lieutenant be adjusted in accordance with this decision.

IV. Issues

[23] The issues raised by Mr. Morose may be stated as follows:

- Did the final authority err in exercising his discretion under paragraph 11.02(2) of the QR&O such that his decision was unreasonable?
- Did the final authority's decision breach the principles of natural justice and procedural fairness because the reasons given for it were inadequate?
- Did the Chief of Staff unlawfully delegate his discretion to a designated officer?

V. Standard of review

[24] The Court agrees with the parties that the final authority's decisions on grievances are questions of mixed fact and law subject to the reasonableness standard of review, particularly

where, as in this case, the decisions concern a retroactive promotion (*Codrin v Canada (Attorney General)*, 2011 FC 100 at para 44).

[25] However, questions of jurisdiction and procedural fairness are usually subject to the correctness standard of review.

VII. Parties' positions

A. *Position of Mr. Morose*

[26] Mr. Morose submits that the decision dated March 20, 2014, is unreasonable because the final authority (1) abused his discretion by failing to consider past practices and (2) breached the principles of natural justice and procedural fairness by not giving sufficient reasons for his decision to disregard the Committee's recommendations or for his decision not to exercise his discretion; and because (3) the Chief of Staff did not have the power to delegate his final authority in this case.

[27] First, Mr. Morose submits that the final authority failed to follow past decisions, including cases 2010-007 and 2010-008, dated April 20, 2011, by which the Chief of Staff had agreed to apply past practices allowing promotions to Captain to be backdated. Mr. Morose argues that those decisions were rendered six months after his own grievance and that, in his case, the final authority should have followed those decisions to respect the Chief of Staff's intentions.

[28] Mr. Morose further submits that the practice of backdating promotions to the rank of Captain was known to everyone and was applied systematically to all eligible pilots from the mid-1990s until October 2009, when the practice was abolished without prior notice. Mr. Morose therefore argues that it was reasonable and legitimate for him to expect to be promoted to Captain when he earned his wings, but retroactively to the entry into the promotion zone date, that is, August 22, 2008.

[29] Mr. Morose does not dispute that the Forces can abolish past practices, but he contests the manner in which this abolition was applied, without prior notice or transitional measures.

[30] Mr. Morose submits that the Chief of Staff erred in exercising his discretion because the decision is abusive, creates [TRANSLATION] “major and flagrant” injustices between its members without valid reason and represents an abuse of his discretion by disregarding past practices.

[31] Second, regarding what Mr. Morose characterizes as an issue of natural justice and procedural fairness, he submits that the final authority did not give any reasons for his decision to disregard the Committee’s recommendation that he exercise his discretion as required under section 29.13 of the Act. This error is especially egregious because the final authority recognized that Mr. Morose had been treated unfairly but nonetheless refused to exercise his discretion, relying on the explanation that the practice was an administrative error.

[32] Mr. Morose argues that the practice of backdating promotions to the rank of Captain was, on the contrary, a deliberate and intentional use by the Chief of Staff of his discretion and that

this was practice was specifically intended to give pilots additional pay to compensate for delays in their training. Mr. Morose submits that it is wrong to characterize it as an administrative error.

[33] What is more, the final authority failed to substantiate the reasons for not following the Committee's recommendations, or to explain how returning Mr. Morose to a lower rank retroactively responded to his claims or why it was fair to use the arbitrary date of October 2009 as a test for determining whether a person is entitled to a backdated promotion.

[34] Since the Chief of Staff has discretion to grant backdated promotions to Captain, he cannot simply choose an arbitrary date and decide whether he will grant a backdated promotion to Captain.

[35] Moreover, the final authority erred with regard to the date Mr. Morose completed Phase II of his pilot training, which suggests that his grievance was not given all the necessary attention.

[36] Third, Mr. Morose submits that under subparagraph 7.12(1)(a) of the QR&O, the referral to the Committee was mandatory, not discretionary. Therefore, under section 29.14 of the Act, the Chief of Staff could not delegate the final authority powers granted to him under section 29.11 of the Act.

B. *Position of the respondent*

[37] First, the respondent submits that the final authority did not err in exercising his discretion and that his decision is reasonable.

[38] The respondent submits that the final authority noted that the Chief of Staff does indeed have the authority to determine promotion standards in the Forces and that he used this power in adopting Administrative Order 11-6, whose paragraph 17(f), reproduced in the appendix, provides that an officer may not be promoted above the rank of Lieutenant until the officer is MOC qualified in the officer's current MOC. An exception to this rule is set out in Annex A to Administrative Order 11-6, whose sections 15 and 16, reproduced in the appendix, state that a member may be promoted to the rank of Lieutenant retroactively if the completion of training is delayed "for military reasons".

[39] Accordingly, the applicable policies do not allow a member to be promoted to the rank of Captain until the member qualifies. The past practice was therefore contrary to the policies, and the Forces correctly put an end to it October 2009, when the error was discovered. Mr. Morose, having met the requirements of his MOC and earned his wings on May 7, 2010, was therefore not entitled to the benefit of this practice.

[40] Mr. Morose was treated equitably, in accordance with the principles in force, and he cannot claim an acquired right based on the Forces' application of a non-compliant practice. Mr. Morose does not have an acquired right related to this practice and is in the same situation as all other persons who were promoted to Captain after October 2009.

[41] The respondent submits that the Chief of Staff established a new procedure for everyone, that his discretion under paragraph 11.02(2) of the QR&O is an exceptional measure intended to give him latitude in certain specific cases and that no such latitude is required in Mr. Morose's case. The respondent stresses that this Court owes the exercise of discretion a certain degree of deference.

[42] As for the final authority's finding with regard to the date of Mr. Morose's promotion to the rank of Lieutenant, the respondent notes that subsection 29(5) of the Act states that any error discovered as a result of an investigation of a grievance may be corrected, even if correction of the error would have an adverse effect on the grievor.

[43] Moreover, the final authority could vary the practice relating to promotions to the rank of Lieutenant, and Mr. Morose did not show that this conclusion caused him harm and did not seek a remedy.

[44] The respondent submits that Mr. Morose raises, under the heading of a possible breach of procedural fairness, not only a lack of adequate reasons, but also a legitimate expectation argument that was not mentioned in his notice of application and therefore cannot be considered in his memorandum, as per Rule 301(e) of the *Federal Courts Rules*, SOR/98-106. In the alternative, the respondent submits that there is no evidence that the final authority breached a principle of natural justice or procedural fairness and that the legitimate expectation doctrine applies only to procedural aspects.

[45] The respondent submits that the decision dated March 20, 2014, gives adequate reasons and is transparent and intelligible.

[46] The final authority properly considered the essential issues raised in Mr. Morose's grievance, and the typographical error regarding the completion date of Phase II of his pilot training does not constitute a breach of procedural fairness.

[47] Third, the respondent submits that the Chief of Staff did not delegate his authority unlawfully. Mr. Morose's grievance was not covered by subparagraph 7.12(1)(a) of the QR&O as it was drafted at that time and was not subject to automatic referral to the Committee. Therefore, the Chief of Staff could delegate his final authority decision-making power, and section 29.14 of the Act did not prevent him from doing so. The grievance was submitted to the Committee by discretionary referral, in accordance with subsection 29.12(1) of the Act.

[48] Moreover, according to the Act's grievance procedure, the Chief of Staff is charged with interpreting and applying the policies and rules that he has made and for which he is responsible (*Harris v Canada (Attorney General)*, 2013 FC 571 at para 30).

VII. Analysis

[49] Regarding the first argument, the Court is satisfied that the final authority's decision not to use his discretion to authorize the backdating of Mr. Morose's promotion to the rank of Captain is reasonable, as it falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[50] This conclusion is based on the finding that the past practice was contrary to the applicable provisions, could therefore be reasonably characterized as an error and could no longer be used. Mr. Morose found himself in the same situation as all other student pilot officers who met the requirements of their MOC after October 2009. This clearly results in differential treatment of the two groups, but this is justified by the fact that the prior practice was contrary to the provisions in force. The adoption of transitional measures would have perpetuated the use of a non-compliant measure.

[51] Section 28 of the Act provides that officers and non-commissioned members may be promoted by the Minister or by such authorities of the Canadian Forces as are prescribed in regulations made by the Governor in Council. Subparagraph 11.01(2)(a) of the QR&O, meanwhile, provides that the promotion of a member to any rank lower than that of Colonel may be approved by such officer as the Chief of the Defence Staff may designate. The rank of Captain being lower than that of Colonel, an officer designated by the Chief of Staff may therefore approve the promotion to Captain.

[52] As for the date of the promotion, paragraph 11.02(1) of the QR&O provides that no officer shall be promoted to higher rank unless (1) there is an appropriate vacancy in the total establishment for the member's component, (2) the member is recommended by the appropriate authority, and (3) the member meets such promotion standards and such other conditions as the Chief of Staff may prescribe. This provision is subject to an exception, set out in paragraph 11.02(2) of the QR&O, which provides that in any particular instance or in any given circumstances, the Chief of Staff may direct that the requirement to meet any promotion

standards be waived; this provision therefore constitutes the legal basis for the Chief of Staff's discretion.

[53] In particular, paragraph 17(f) of Administrative Order 11-6 specifically provides that an officer may not be promoted above the rank of Lieutenant until the officer is MOC qualified in the officer's current MOC, except under certain conditions which do not apply in the present case. Moreover, the Administrative Orders having been made pursuant to the QR&O, paragraph 17(f) above is subject to the discretion set out in paragraph 11.02(2) of the QR&O.

[54] In the case at hand, the Committee determined that the Chief of Staff had the required authority under paragraph 11.02(2) of the QR&O to exempt Mr. Morose from having to meet the requirements of his MOC before being promoted to the rank of Captain and recommended that this promotion be backdated to August 22, 2008. However, the final authority rejected this recommendation and justified his refusal by relying on the fact that this position was not supported by the relevant provisions and that the prior practice was an error that had to be corrected. The Court is satisfied that this conclusion is reasonable.

[55] The Court notes that the factual situations in the decisions cited by Mr. Morose (at para 27 of this decision) where the Chief of Staff used his discretion can be distinguished from his. In those decisions, the student pilot officers had met the requirements of their MOC before October 2009, when the past practice was ended, whereas Mr. Morose met his requirements several months after that, in May 2010.

[56] When exercising their discretion, decision-makers cannot apply a directive mechanically, thereby failing to consider all the relevant factors (*Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2; Donald J.M. Brown and The Honourable John M. Evans, *Judicial Review of Administrative Action in Canada*, (Toronto, ON: Carswell, 2013, 2014) (loose leaf, Update 3), c 12 at pp 12-43). However, the Court is satisfied that the final authority chose not to exercise his discretion after reviewing the relevant factors, basing his decision on the directive issued by the Directorate of Military Careers (see Pierre Issalys, Denis Lemieux, *L'action gouvernementale: précis de droit des institutions administratives*, 3rd ed., Cowansville, QC: Yvon Blais, 2009 at p 217).

[57] As for the second argument, which alleges that the reasons were inadequate, the Court is satisfied that the final authority gave sufficient reasons for his decision to disregard the Committee's decision, and that his decision met the criteria of justification, transparency and intelligibility and fell within the range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[58] With regard to Mr. Morose's final argument, concerning the delegation of authority by the Chief of Staff, the Court agrees with respondent's position, according to which Mr. Morose's grievance was not covered by paragraph 7.12(1) of the QR&O and was not subject to a mandatory referral to the Committee since such a referral was, in this case, discretionary. The Chief of Staff could therefore delegate his powers as final authority as provided under section 29.14 of the Act.

[59] I therefore reject Mr. Morose's argument on this point.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. Each party shall bear its own costs.

“Martine St-Louis”

Judge

Certified true translation
Michael Palles

APPENDIX

<i>National Defence Act, RSC</i> 1985 c N-5, section 29.14.	Loi sur la défense nationale, LRC 1985 c N-5, article 29.14, tel qu'il était rédigé à la date du grief.
Delegation	Délégation
29.14 The Chief of the Defence Staff may delegate to any officer any of the Chief of the Defence Staff's powers, duties or functions as final authority in the grievance process, except	29.14 Le chef d'état-major de la défense peut déléguer à tout officier le pouvoir de décision définitive que lui confère l'article 29.11, sauf pour les griefs qui doivent être soumis au Comité des griefs; il ne peut toutefois déléguer le pouvoir de délégation que lui confère le présent article.
(a) the duty to act as final authority in respect of a grievance that must be referred to the Grievance Board; and	1998, ch. 35, art. 7.
(b) the power to delegate under this section.	Ordonnances et règlements royaux applicables aux Forces canadiennes
1998, c. 35, s. 7.	
<i>Queen's Regulations and Orders</i>	11.02 CONDITIONS DE PROMOTION
11.02 - CONDITIONS GOVERNING PROMOTION	(2) Dans des cas particuliers ou dans des circonstances données, le chef d'état-major de la défense peut ordonner qu'il soit passé outre à la nécessité de satisfaire à une norme de promotion.
(2) In any particular instance or in any given circumstances, the Chief of the Defence Staff may direct that the requirement to meet any promotion standards be waived.	

Canadian Forces Administrative Order 11-6 (Commissioning and Promotion Policy – Officers – Regular Force)

17(f) An officer may not be promoted above the rank of lieutenant until the officer is MOC qualified in the officer's current MOC except under certain conditions for CFRP and SRCP promotions to captain and where special provisions are provided in Annex A or B.

Annex A to Administrative Order 11-6

15. An officer in the rank of second lieutenant, on attaining one year seniority in that rank, will be promoted to lieutenant if:

- a. the officer has successfully completed on the first attempt the training required for promotion to lieutenant rank in the officer's current MOC in accordance with Appendix 1 (except as provided in paragraph 18).

16. Where successful completion of the training required by subparagraph 15a is delayed for military reasons, the officer will be promoted to the rank of lieutenant, effective the date the member has one year of seniority in the rank of second lieutenant, when all the conditions of paragraph 15 have been met.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1112-14

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GENERAL OF CANADA

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DATED: SEPTEMBER 24, 2015

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