Federal Court  Cour fédérale

Date: 20180215

Docket: T-984-17

Citation: 2018 FC 184

Ottawa, Ontario, February 15, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

ROY ARMSTRONG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Lt. Col. Roy Armstrong seeks judicial review of a decision of the Final Authority of the Canadian Forces' grievance process, which denied his grievance concerning his 2014/15 Performance Evaluation Report. For the reasons that follow, I am allowing his application.

I. Facts and Decision Reviewed

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

[3] There is an elaborate personnel assessment and promotion system in the Canadian Forces. One critical component of that system is the annual Performance Evaluation Report (PER). Every year, officers are evaluated by their supervisors according to criteria related to past performance and criteria related to potential.

[4] The current assessment policy is called the *Canadian Forces Personnel Appraisal System* [CFPAS]. It clearly states that PERs should not be based on a comparison or ranking among peers, but rather on descriptions of levels of achievement, also known as "word pictures," contained in the policy. Former practices known as "high score controls" are now prohibited. It was a common practice to hold ranking boards within a particular unit or command, which then instructed supervisors as to what scores should be given to their personnel. Under those practices, personnel evaluations could be affected by their superiors' views as to who should be

promoted first. CFPAS now states unequivocally that "[t]here are no high score controls." It provides the following explanation:

> PER scores based on peer comparisons rather than individual performance on the job can lead to supervisors assigning scores to an individual that are too high simply because the peer group consists of low performers, or conversely, the individual could be rated too low because the peer group is comprised of high performers. In CFPAS, supervisors are to rate each person against the Word Pictures contained in the Rating Scales of the rank in question.
>
> (CTR, p. 53)

[5] In spite of this, it is common ground between the parties that the Canadian Forces Intelligence Command [CFINTCOM], where Lt. Col. Armstrong works, has repeatedly issued directives to hold ranking boards, thus effectively resorting to the prohibited practice of "high score controls."

[6] Lt. Col. Armstrong grieved his 2014/15 PER on the basis that it was improperly influenced by the results of a ranking board and that it did not accurately reflect his performance and potential. In particular, he alleged that he was told by his Deputy Commander that he was not "succession planned" and that his score was adjusted downwards. He also gave specific examples of scores that did not, in his opinion, reflect his performance or potential and provided reasons why he deserved a higher score. Moreover, he asked that the CDS Commendation he obtained for his exceptional service in Afghanistan be reflected in his 2014/15 PER.

[7] The *National Defence Act*, RSC 1985 c N-5 [the Act] provides for a two-step grievance process, composed of an Initial Authority and a Final Authority. Normally, a grievor's

commanding officer acts as the Initial Authority. However, in this case, because Lt. Col. Armstrong's commanding officer reports directly to the Chief of Defence Staff, the grievance was directly referred to the Director General, Canadian Forces Grievance Authority [DGCFGA], who acts as the Final Authority pursuant to a delegation from the Chief of Defence Staff under section 29.14 of the Act. The Final Authority sent the grievance to the Military Grievances External Review Committee [Committee], whose mission is to review the grievance and to make findings and recommendations to the Final Authority (s. 29.2 of the Act).

[8] On February 11, 2016, the Committee recommended that the grievance be allowed and that Lt. Col. Armstrong's PER be re-written [CTR, p. 38]. The Committee found that:

> The use of scoring thresholds by the CFINTCOM both contradicts and contravenes the CDS approved CFPAS policy. In fact, this instruction represents a significant setback as it appears to bring personnel appraisal where it used to be in 1998, prior to the introduction of the CFPAS. Although I understand that the chain of command's intent was to "preserve ranking integrity and prevent instances where a higher ranked PER is scored below one lower on the list," I find this to be an unacceptable practice.
>
> (CTR, pp. 44-45)

[9] The Committee also noted that "high score controls" were still used by other units of the Canadian Forces. However, the Committee stated that it was not in a position to assess how that practice impacted on Lt. Col. Armstrong's PER. Therefore, it recommended that his supervisor re-write his PER. The Committee also recommended that his CDS Commendation be mentioned in the revised PER.

[10] Sometime after the Committee handed its findings and recommendations, Lt. Col. Armstrong obtained a draft of his 2014/15 PER (CTR, p. 31) and submitted it to the grievance analyst. In respect of two performance criteria, this draft shows a higher score than the final PER (CTR, p. 114). The record does not disclose how Lt. Col. Armstrong came into possession of this draft.

[11] On January 9, 2017, the Final Authority rendered its decision and dismissed the grievance. Although he accepted the finding of the Committee to the effect that the process followed in the Canadian Forces Intelligence Command breached the CFPAS policy, he went on to state that this did not necessarily invalidate Lt. Col. Armstrong's 2014/15 PER. Rather, grievors have the burden of proving why PER ratings do not accurately reflect their performance or potential. Accordingly, the Final Authority reviewed the four performance or potential criteria which were the subject of the grievance, and held that Lt. Col. Armstrong did not provide enough information to substantiate his claim. It concluded that "[p]ersonal declarations by a grievor are not sufficient to warrant changes and, barring any documentation to the contrary, the balance of probabilities rests with the observations of the supervisor." The Final Authority refused to take the draft PER into consideration, as its authenticity had not been confirmed by the supervisor. He also concluded that the CDS Commendation could not be included in the 2014/15 PER, as it related to service in previous years. The Final Authority stated that breaches of the CFPAS policy should be addressed through a "systemic remedy" rather than by giving redress to Lt. Col. Armstrong.

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

[13] In parallel with the present proceedings, Lt. Col. Armstrong also filed a grievance against the refusal to convene a Supplementary Selection Board for promotion to the rank of Colonel in 2015. That grievance was also denied. He brought a separate application for judicial review against that decision, bearing file no. T-827-17, which is the object of a separate decision rendered today.

II. Analysis

[14] The Attorney General conceded that the process followed to establish Lt. Col. Armstrong's PER breached the CFPAS policy. This is no longer in issue in this application. The remaining questions are whether Lt. Col. Armstrong's 2014/15 PER accurately reflected his performance and potential, and what the appropriate remedy is. I will first determine the standard of review applicable to these questions. I will then analyse Lt. Col. Armstrong's arguments.

A. *Standard of Review*

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

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

B. *Did the PER accurately reflect Lt. Col. Armstrong's performance and potential?*

[17] This case turns on the allocation of the burden of proof. The Canadian Forces grievance process is what is commonly called an inquisitorial, as opposed to an adversarial, process. The decision is not made by an independent third party after hearing the grievor and the employer. Rather, the decision is made by representatives of the institution whose conduct is the subject of the grievance. The process is largely written and there is no hearing. The grievor may not be represented by a lawyer and may not call witnesses to testify.

[18] In this context, as in other inquisitorial processes, it is often said that the burden of proof lies on the claimant (see, e.g., *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 (CA) at para 35). This may be accurate with respect to information that is under the control of the claimant. However, other information may be under the control of the institution which makes the decision. In that case, it would be unfair to impose an unabated burden of proof on the claimant, especially where the claimant's means to obtain evidence are severely curtailed.

[19] The issue of the authenticity and source of the draft PER was the subject of an e-mail exchange between Lt. Col. Armstrong and a grievance analyst who was preparing a summary of the case for the Final Authority. The analyst made repeated requests for more documentation

confirming the authenticity of the draft PER. Lt. Col. Armstrong responded that he had made an access to information request which did not produce the relevant document, and that a subsequent request had not yet been processed due to a backlog of requests. On October 26, 2016, Lt. Col. Armstrong was provided with a synopsis of the case prepared for the Final Authority, which included the following passage:

> …the FA could determine that without the grievor providing confirmation of its authenticity, either by a supporting e-mail, letter or other such documentation from his former supervisor, the draft PER is to be considered as being not credible and is therefore to be excluded from further consideration regarding the grievor's case.
>
> (CTR, p. 21)

[20] On November 21, 2016, Lt. Col. Armstrong advised the analyst that he would not submit further documentation.

[21] Was it reasonable to reject the draft PER on the basis that it was not authenticated? I think not. Counsel for the Attorney General conceded that there is no specific reason to believe that the draft PER tendered by Lt. Col. Armstrong is a forged document. He also conceded that comparing the draft PER and the final PER leads to the inference that Lt. Col. Armstrong's scores were adjusted downwards during the process.

[22] In effect, the Final Authority required corroboration of the evidence tendered by Lt. Col. Armstrong before giving it any weight. Yet, the normal rules of evidence do not require corroboration. And, as the Federal Court of Appeal stated in the oft-cited case of *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) at 305: "When an

applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness." The same must be true when the decision-making process is based exclusively on written materials (*Anni v Canada (Minister of Citizenship and Immigration)*, 2016 FC 941 at para 18).

[23] In this case, the Final Authority did not articulate any reason why the draft PER would not be authentic. Moreover, if the Final Authority had any doubts about the authenticity of the document, it could have sought additional information itself. In this connection, one must not lose sight of the fact that the Final Authority is, in principle, the Chief of Defence Staff, who heads the Canadian Forces, and who by necessity has the power to obtain information from anyone within the Forces. The Final Authority could also have asked the Committee to conduct an additional inquiry and to exercise its power to summon witnesses, in particular Lt. Col. Armstrong's former supervisor, the alleged author of the draft PER.

[24] Nor do I believe that it was reasonable to expect Lt. Col. Armstrong to find for himself the corroborating evidence that the Final Authority found lacking. Assuming his superiors still have a copy of the draft PER in their possession, he has no power to compel them to give him that information. His attempts to confirm the authenticity of the document through an access to information were unsuccessful or delayed. He may not know the whereabouts of his former supervisor, who apparently is now retired from the Canadian Forces. In any event, the grievance process affords him no power to compel his former supervisor to testify.

[25] In light of those circumstances, it was unreasonable to exclude a highly relevant piece of evidence. To understand the particular relevance of the draft PER, it is useful to return to the burden of proof. The Final Authority stated, quite correctly in my view, that a grievor's personal views are usually not sufficient evidence to overturn the grievor's PER scores. If that were so, the whole assessment process would be undermined. The draft PER, in contrast, is of a very different nature. It is not a self-assessment. It purports to convey the original opinion of the supervisor. That opinion is a highly relevant indication of Lt. Col. Armstrong's performance and potential. Thus, it tends to show that the final PER was not an adequate reflection of the same, which is exactly what Lt. Col. Armstrong had to prove to sustain his grievance.

C. *Is a "systemic remedy" sufficient?*

[26] The Final Authority also noted that the issue of non-compliance with the CFPAS policy with respect to the prohibition of high score controls was a systemic issue which required a systemic remedy, apparently some form of amendment to the policy. The Attorney General now seeks to sustain the Final Authority's decision on the basis that the choice of remedy is within the expertise of the Final Authority and that this Court should show a considerable degree of deference towards that choice. I am unpersuaded by this argument.

[27] First, it does not appear that the Final Authority's comments with respect to a systemic remedy were intended to preclude an individual remedy. The main portion of the Final Authority's decision deals with the adequacy of Lt. Col. Armstrong's scores. The section concerning the systemic issue comes only at the end, after the conclusion to the effect that Lt. Col. Armstrong's scores were an accurate reflection of his performance and potential. It is by no

means clear that the Final Authority would have refused to grant an individual remedy to Lt. Col. Armstrong had it reached a different conclusion on the main issue.

[28] Second, it does not appear reasonable to deny an individual remedy to a successful grievor. The grievance process set forth in the Act appears to be focused on the individual. Section 29 of the Act confers the right to bring a grievance on an "officer or non-commissioned member who has been aggrieved by any decision, act or omission." The Act does not provide for the unionization of members of the Canadian Forces nor any other kind of collective representation. While I do not wish to be taken as expressing an opinion as to the possibility of a grievance having a collective dimension, I find that the scheme of the Act is centered on the individual grievor.

[29] In that context, I fail to see how it can be reasonably said that Lt. Col. Armstrong could be deprived of a remedy, simply because the problem affecting him also affects other persons, occurs frequently or may be described as systemic.

[30] As a result, the Final Authority's decision is set aside and sent back for a new determination.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed with costs and the matter is returned to the Final Authority for reconsideration.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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