Federal Court  Cour fédérale

Date: 20111012

Docket: T-1636-10

Citation: 2011 FC 1154

Ottawa, Ontario, October 12, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

ROBERT ZEIDLER

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Chief of Defence Staff (CDS) in his capacity as the final authority in the grievance process, dated August 26, 2010. The CDS denied a Redress of Grievance (ROG) on the decision to remove the Applicant as Commanding Officer (CO) of the Queen's Own Rifles of Canada (QOR).

[2] For the following reasons, the application is allowed.

I. Background

[3] The Applicant, Robert Zeidler, was appointed CO of the QOR effective June 27, 2008. A series of events led to a decision on December 16, 2008 to remove him from this command:

- September 16 – Applicant's supervisor, Colonel Mann (Col Mann), issued a direction to all COs stating:

  > Chain of command - …effective immediately no one within LFCA (32 CBG) will speak with staff from a higher or lower HQ unless it is their immediate higher or lower HQ or dir liaison has been auth by the immediate higher HQ.

- September 29 – Applicant communicated disagreement outside his chain of command regarding the redistribution of parachutist positions to soldiers through the Land Force Central Area (LFCA) instead of concentrating all of the positions within the QOR.

- October 2 – Col Mann was prompted to issue an order to the Applicant not to communicate outside of his unit in regards to military matters without authorization from his headquarters.

- October 6 – In an effort to protect his unit, Applicant sent a widely distributed email entitled "QOR Para Tasking" critical of the decision to redistribute parachutist positions and intimating that "[t]he Regiment's leadership will do everything it can to allow saner voices to be heard."

- November 7 – Applicant announced during a military Mess Dinner that he might not support the Chief of Land Staff (CLS) Primary Leadership Qualification (PLQ) promotion policy.

- December 2 – Brigadier General Collin (BGen Collin), Commander LFCA advised the Applicant that he had concerns with his performance. Having reviewed the "QOR Para Tasking" email, BGen Collin considered the tone and many of the statements insubordinate in nature. He noted that the Applicant had previously been counselled on inappropriate discussions. He also commented on the Applicant's implication that he would not comply with the recent promotion policy at the Mess Dinner. The Applicant was to report to BGen Collin to explain his actions.

- December 9 – Applicant met with BGen Collins who suggested that he was "personally insulted" by the email's contents. That same day a Notice of Intent to Remove from Command (NOI) was prepared. The NOI indicated that BGen Collin was considering the Applicant's temporary, perhaps even permanent removal, from command. The Applicant was given 7 days to respond, instead of the usual 14, and no extension of time would be contemplated.

- December 12 – BGen Collins met with his staff assistant or J1 and a Military Policeman whose notes from the meeting provide: "The LFCA Comd further stated he had taken administrative action against LCol ZEIDLER by removing him from his command."

- December 13 – Applicant submitted representations apologizing for any offence his email may have caused and trying to explain his actions.

- December 16 – Applicant was issued a Continuance of Removal from Command signed by BGen Collin. This document intimated that BGen Collin had reviewed the representation and considered it along with other factors. He nonetheless stated that the Applicant's "intentions may have been good, but they were not followed by sound judgement and were certainly disrespectful, insulting and insubordinate in nature." He made reference to a "poisoned command climate" having been created as a result of the Applicant's actions. He concluded that the Applicant was no longer able to effectively command and ordered his immediate removal, stating "[y]ou have lost my confidence and I no longer believe that you are in a position whereby you can insist on loyal conduct from your subordinates."

[4] The Applicant pursued the decision to remove him from command through the CF grievance process. The following steps were taken:

- January 31, 2009 – Applicant submitted an application for ROG through the chain of command to be adjudicated by CLS as the Initial Authority (IA). He cited a lack of procedural fairness and bias on the part of the decision-maker.

- March 9, 2009 - Lieutenant-General Leslie, CLS, recused himself as the initial adjudication authority in the interests of transparency and absolute fairness as the CLS was consulted

before the final decision to remove LCol Zeidler from command. The ROG was therefore sent to the Director General of the Canadian Forces Grievance Authority (DGCFGA).

- October 6, 2009 – Applicant was informed that a Synopsis had been prepared by the CFGA and he would have 30 days from receipt to provide his Response. He requested and was granted an extension to do so. The Synopsis concluded, among other things, that any issues of procedural fairness and apprehension of bias related to BGen Collin were cured by the Grievance Synopsis and documentary disclosure. The Comd LFCA had lost confidence in the Applicant's ability to effectively command because of several "questionable" statements of personal opinion that demonstrated poor judgment.

- December 11, 2009 – Applicant provided his Response to the Synopsis. Shortly thereafter, he requested that DGCFGA recuse himself from acting as the Final Authority due to his long-standing relationship with BGen Collin and that the grievance be sent directly to the CDS.

- January 7, 2010 – Applicant nonetheless agreed to have his file forwarded to the CFGB to be reviewed and findings and recommendations prepared.

- March 31, 2010 – CFGB forwarded their Findings and Recommendations to the Applicant. He requested and received an extension of time to file a response to be forwarded to the CDS along with the CFGB documents for a final decision. The CFGB recommended that the CDS deny the ROG. Although BGen Collin did not comply with all of the

administrative procedures in place, these departures did not result in procedural unfairness. The Applicant was made aware of his intent and knew the case against him in sufficient detail to make representations. The evidence showed that the decision to remove the Applicant from command was taken after he made representations. There was no evidence of an apprehension of bias on the part of BGen Collin. The Applicant had failed to live up to his responsibilities as CO. As the CFGB stated:

> The wording of the 5 October 2008 email authored by the grievor contains language and intent that is sufficient to jeopardize the unique and essential trust relationship between a commander and his subordinate. This, in turn, caused the Comd LFCA to lose confidence in the grievor's ability to command and his moral authority to demand loyal conduct from his own subordinates in the future.

[5] In addition to the removal from command, the Applicant was issued a Recorded Warning (RW) by Col Mann for conduct deficiency on February 2, 2009. The Applicant was informed on July 20, 2009 that his file had been reviewed by a Succession Board and he was being released from the CF. Based on the advice of the CFGB, these decisions are being addressed through the grievance process but separately from the removal of command.

II. Decision under Review

[6] The CDS concurred with the Findings and Recommendations of the CFGB. It was noted that the Applicant's approach in addressing disagreement with the decisions of his superiors was poorly executed. The written comments were insubordinate and providing those opinions to his soldiers was inappropriate. It would be difficult for the Applicant to maintain the loyalty of his soldiers after this incident.

[7] BGen Collin, Comd LCFA, was found to have considered the events that occurred and weighed the benefit of proceeding with administrative measures. BGen Collin recognized that past behaviour was indicative of behaviour that would repeat itself in the future and would have to be addressed by a removal from command. Moreover, according to the CDS, the representations provided by the Applicant did not demonstrate a full understanding of the gravity of his conduct.

[8] The CDS agreed with the CFGB that procedural fairness was afforded to the Applicant. Although documents were not initially disclosed, this issue had been cured as a result of the grievance process. The decision of BGen Collin to give the Applicant only 7 days to respond to the NOI had not prevented him from submitting his representations. As the CFGB found, there was also no evidence of bias, since BGen Collin had considered all of the evidence and allowed the Applicant to make his representations. Having reviewed the evidence on the grievance file that BGen Collin considered, the CDS found he would have reached the same conclusion. The best course of action was to remove the Applicant from command. The decision was therefore correct and without bias.

III. Legislative and Policy Framework

[9] Sections 29 to 29.15 of the *National Defence Act*, RS, 1985, c N-5 govern the CF Grievance Process. They prescribe the relevant procedures and guiding principles. CF members aggrieved by a decision in the administration of the CF are entitled to submit a grievance. The CDS is the final authority in the grievance process. He must also refer grievances to the CFGB to provide findings and recommendations. Those findings and recommendations are not binding; however, the CDS must provide written reasons if it fails to adopt them. With the exception of judicial review to this Court, a decision of the CDS is final and binding. These procedures are expanded on in Chapter 7 of the *Queen's Orders and Regulations* (QR&O).

[10] The QR&O also set out the command structure of the CF. Under Article 19.015, officers are expected to obey lawful commands and orders of a superior officer. They are also not permitted to "make remarks or pass criticism tending to bring a superior into contempt" as prescribed by Article 19.14.

[11] While there is no legislative guidance on removal from command, the CDS issued Removal Guidelines on December 12, 2001. According to paragraphs 4-5, removal from command relates to a "loss of confidence in the person's ability to effectively exercise command" and is "normally a culmination of many tasks or functions that have not been performed in the expected manner." It also suggests that it is "normal that a superior will attempt to correct the performance deficiencies of a subordinate before taking action to remove the subordinate from command." Paragraph 7 dictates

that procedural fairness should be afforded as part of the removal from command, including a notice of intention, disclosure, and an opportunity to respond.

[12] In another policy document entitled Removal/Relinquishment from Command of Key Positions within Land Force Command (LCFO 11-94), it is stated that where a permanent removal process is initiated the CF member will be given disclosure and 14 days to respond.

IV. Issues

[13] This application raises the following issues:

(a) Was the Applicant afforded procedural fairness in the decision to remove him as CO of the QOR and the subsequent grievance process?

(b) Did the conduct of BGen Collin, Comd LFCA in the decision to remove the Applicant from command raise a reasonable apprehension of bias?

(c) Was the decision of the CDS to deny the Applicant's ROG reasonable?

V. Standard of Review

[14] Issues of procedural fairness are reviewed on a standard of correctness (see *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 42-43). As one aspect of fairness, reasonable apprehension of bias is also determined on a standard of correctness (see *Geza v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, 2006 CarswellNat 706 at para 44).

[15] When reviewing the decisions of the CDS related to issues of mixed fact and law, however, this Court has found that the applicable standard is reasonableness (see *Moodie v Her Majesty the Queen*, 2009 FC 1217, 2009 CarswellNat 3887 at para 18). Reasonableness is "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" as well as "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

Issue A: *Procedural Fairness*

[16] The Applicant submits that the Removal Guidelines and related policies created legitimate expectations regarding the procedure that would be followed in removing him from command of the QR&O (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CarswellNat 1124 at para 26). He points to several actions by BGen Collin that were not in accordance with these policies including: failure to consider administrative action prior to removal, not allowing 14 days and the possibility of extension to respond to the NOI, not initiating an investigation, and failure to provide full disclosure. Based on the notes of the Military Policeman, it is asserted that the decision of BGen Collin was a "fait accompli" before any contrary representations were provided.

[17] The Applicant also maintains that the subsequent grievance review process would not necessarily resolve these procedural defects, as the CDS implied in its decision (*Diotte v Canada* (1989), 31 FTR 185, [1989] FCJ No 1138 at para 18). He suggests that the CFGA Synopsis as well as the CFGB and CDS decisions treated issues of procedural fairness merely as issues to be overcome rather than conducting a *de novo* review.

[18] I recognize that the Removal Guidelines would create legitimate expectations on the procedures to be followed and the decision of BGen Collin was made quickly. It is fair to say that I have concerns that BGen Collin provided the Applicant with a relatively short time period to respond to the NOI and seems not to have considered any administrative action prior to removal. Further, it seems clear based on the notes from the Military Policeman that BGen Collin had decided to remove the Applicant from his command position before the Applicant could respond to the NOI. I am also very concerned that the Applicant's immediate supervisor, Col Mann, was fully aware of the October 6 email and November 7, 2008 alumni remarks and took no action until December 4 when ordered to do so by BGen Collin. It is clear that BGen Collin was particularly upset and the driving force behind the removal of the Applicant.

[19] However, the Respondent rightly urges the Court to focus its attention on the final decision-maker under review, the CDS (*Zimmerman v Canada (Attorney General)*, 2009 FC 1298, [2009] FCJ No 1663 at para 35). In *Schmidt v Canada (Attorney General)*, 2011 FC 356, [2011] FCJ No 463 at para 14, Justice Robert Barnes clarified that the CF grievance procedure could provide a grievor a true *de novo* assessment of the case, given the large scope for review, right to disclosure, and opportunities to respond called for in the legislative and policy framework.

[20] However, the CDS failed to live up to its mandate to provide a *de novo* review in this case. In *Schmidt*, above, the CDS set aside the initial decision on the basis of fairness concerns but proceeded to conduct a *de novo* hearing and found Schmidt's removal from command justified. By contrast, the CDS appears merely to have adopted the original findings of the BGen Collin without considering that he may have rushed to judgment on the Applicant's situation. The CDS asserts that he considered the evidence before BGen Collin and simply reached the same conclusion. As a review of the decision demonstrates, however, it serves mainly to reiterate BGen Collin's original findings. It also seeks to explain away many procedural issues that arose and suggests that their impact on the Applicant was minimal. The process was nonetheless tainted from the outset by procedural issues that were not remedied by the reliance placed on the initial decision by the CDS.

Issue B: *Reasonable Apprehension of Bias*

[21] To establish a reasonable apprehension of bias, the Applicant must demonstrate that an informed person, viewing the matter realistically and practically, and having thought the matter through, would probably conclude that an individual would not decide the matter fairly (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369).

[22] As defined by *Committee*, above, I find that there is sufficient evidence to conclude the potential for bias was present in this case. The criticisms levied by the Applicant were directed at policies proposed by BGen Collin in his capacity as Comd LCFA. Though he stated he was

concerned about a loss of confidence in the ability to command, he also suggested that he was "personally insulted" by the Applicant's comments.

[23] BGen Collin's subsequent actions further put his ability to decide the matter fairly into question. He did not afford the Applicant some standard procedural protections. In his comments to the Military Policeman and prior to receiving any representations from the Applicant, he portrayed the decision regarding removal from command as final. This is not indicative of an individual approaching the issue in an impartial manner.

[24] The Respondent contends that the senior officers in the chain of command are in the best place to describe the circumstances of removal of command (see *McIlroy v Attorney General of Canada*, 2011 FC 149, [2011] FCJ No 170 at para 28). Where that same senior officer is intimately connected with the accusations against the member of the CF, such as being the target of criticism found insubordinate and having made their displeasure known; however, they may no longer be best situated to decide the matter fairly. In such cases, there is no reason why another senior officer aware of the demands associated with command would not be in an appropriate position to make a similar determination. It is also instructive to note that the Applicant's immediate superior, Col Mann, knew about the Applicant's activities of October 6 and November 7, 2008 and took no action until December 4 when ordered to do so by BGen Collin. It would seem that Col Mann continued to have confidence in the Applicant during this timeframe.

[25] The CDS erred when it suggested that as long as BGen Collin's initial decision is reasonable, there would be no bias. BGen Collin's connection to the issue and his snap judgment

regarding the Applicant alone were sufficient to raise the prospect that a person looking realistically and practically at the matter would not conclude that B Gen Collin would decide the matter fairly.

Issue C: *Reasonableness*

[26] For many of the similar reasons noted above, the decision of the CDS to deny the Applicant's redress of grievance was unreasonable. It relied heavily on the representations provided by BGen Collin, which can be questioned based on grounds of procedural fairness and apprehension of bias. In its assessment of procedural fairness, the CDS failed to consider whether BGen Collin prejudged the Applicant.

[27] Admittedly, the actions of the Applicant in criticizing his superior's policies were questionable. There are reasons to be concerned that they were not in accordance with CF policies. However, the decisions were marked by procedural irregularities and reasonable apprehension of bias. The manner in which the determination was reached is critical to an assessment of its reasonableness and acceptability on judicial review.

VI. Conclusion

[28] Due to the continued reliance on the initial decision by the CDS, he was unable to overcome procedural irregularities. In addition, there was a reasonable apprehension of bias on the part of BGen Collin based on his personal involvement and subsequent actions that was not cured by the extensive grievance process.

[29] Accordingly, the application for judicial review is allowed and the matter is referred back to the CDS for reconsideration.

[30] The Applicant is entitled to his costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed and the matter is referred back to CDS for reconsideration.

2. The Applicant is entitled to his costs.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

W. Eric Kay	FOR THE APPLICANT
Jacqueline Dais-Visca	FOR THE RESPONDENT

SOLICITORS OF RECORD:

W. Eric Kay Dickinson Wright LLP Toronto, Ontario	FOR THE APPLICANT
Jacqueline Dais-Visca Stewart Phillips Department of Justice Toronto, Ontario	FOR THE RESPONDENT