

Federal Court



Cour fédérale

**Date: 20141002**

**Docket: T-1803-13**

**Citation: 2014 FC 936**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Ottawa, Ontario, October 2, 2014**

**PRESENT: The Honourable Madam Justice Bédard**

**BETWEEN:**

**STEPHANE BOURASSA**

**Applicant**

**and**

**DEPARTMENT OF NATIONAL DEFENCE**

**Respondent**

**JUDGMENT AND REASONS**

[1] The applicant, Mr. Bourassa, seeks judicial review, pursuant to section 18.1 of the *Federal Courts Rules*, RSC 1985, c F-7, of a decision dated October 11, 2013, by Colonel J.R.F. Malo (Colonel Malo), acting as final authority in the grievance process of the Canadian Armed Forces (CAF). In his decision, Colonel Malo rejected the grievance filed by Mr. Bourassa on March 14, 2012. For the reasons that follow, the application is dismissed.

## I. Background

### A. *The measures*

[2] Mr. Bourassa enrolled in the CAF in 1996. From 1998 to 2009, he worked as a nursing officer. In May 1989, he was posted to the CAF Support Unit Ottawa (CFSU(O)), and while he was there, he took a basic qualification course for intelligence officers. Mr. Bourassa holds the rank of captain. In his grievance, Mr. Bourassa challenged five measures imposed against him between July 2011 and March 2012.

[3] The first measures challenged by Mr. Bourassa stem from a stay at the CAF Language School at Detachment Saint-Jean (the Language School) between September 20, 2010, and May 20, 2011, where he took a second language training course.

[4] On June 13, 2011, Captain H. Tremblay wrote a course report on Mr. Bourassa's performance and attitude during his second language training. The report states that Mr. Bourassa's academic performance was exemplary, and that he had shown great determination and had made the necessary effort to learn. However, Captain Tremblay also noted that Mr. Bourassa's attitude had been problematic in many respects. For example, Mr. Bourassa had had significant difficulties in his interpersonal relations with his colleagues, the staff and the teachers at the Language School. She also stated that he was very inflexible, was unable to accept criticism and advice, suffered from mood swings and had behaved inappropriately on several occasions. Mr. Bourassa signed this course report on July 28, 2011.

[5] On July 7, 2011, the Commandant of the Language School, Major L. Méthot, wrote a letter of intent to the Commandant CFSU(O) to notify him of the shortcomings in Mr. Bourassa's performance and conduct during his training. Enclosed with the letter was the course report prepared by Captain Tremblay. In his letter, Major Méthot listed several incidents from Mr. Bourassa's training that led him to conclude that Mr. Bourassa had demonstrated a lack of judgment and a poor attitude during his training.

[6] On November 29, 2011, the Commandant CFSU(O) imposed a remedial measure on Mr. Bourassa for misconduct, in accordance with the Defence Administrative Orders and Directives (DAOD) 5019-4, Remedial Measures, specifically, an initial counselling. Notice of initial counselling, along with the letter written by the Commandant of the Language School, was sent to Mr. Bourassa on December 1, 2011. In the notice of initial counselling, the Commandant referred to a written response that Mr. Bourassa had allegedly made regarding the orientation sessions given by the Personnel Selection Office and the conduct noted by the Language School. The Commandant stated that the events illustrated his inability to work with other members and his difficulties interacting with the Language School's staff. The remedial measure form states that Mr. Bourassa [TRANSLATION] "failed to demonstrate the professional attributes required of an experienced CF officer holding the rank of captain", and that [TRANSLATION] "[t]his conduct does not reflect the level of working with others and leadership expected of an officer". The monitoring period for the initial counselling was from November 21, 2011, to May 20, 2012.

[7] In December 2011, Mr. Bourassa was posted to the operations section of Army Intelligence (Army G2) as an on-the-job training candidate.

[8] In March 2012, Mr. Bourassa's supervisor at Army G2, Major R.T. Lenton (Major Lenton), wrote a letter to the Commandant CFSU(O) giving his assessment of Mr. Bourassa's performance and conduct during the first three months of his posting to Army G2.

[9] In his letter, Major Lenton wrote that Mr. Bourassa's work was satisfactory but there were a number of problems with his conduct. He stated, for example, that Mr. Bourassa refused to accept criticism and advice from lower-ranking individuals or from people who, in his opinion, had less experience or seniority than he did. Major Lenton noted that in such circumstances, Mr. Bourassa became defensive and put the blame on others. In his opinion, Mr. Bourassa was immature and had trouble making sound decisions and cultivating positive relationships with his colleagues, his subordinates and his chain of command.

[10] Major Lenton also noted that Mr. Bourassa's conduct had raised concerns among his colleagues and supervisors. He stated that Mr. Bourassa had talked about having problems at home and that everyone in Mr. Bourassa's team had expressed concerns to the chain of command regarding the high levels of stress that Mr. Bourassa appeared to be under. Major Lenton also mentioned that Mr. Bourassa had sent colleagues emails that sounded confused, thus helping to reinforce the impression among his co-workers that he was perhaps depressed or suffering from a stress-related disorder.

[11] In conclusion, Major Lenton recommended terminating Mr. Bourassa's intelligence officer training because, in his opinion, Mr. Bourassa was unsuited to this work.

[12] On March 6, 2012, Major Lenton sent Mr. Bourassa the letter that he had written to the Commandant CFSU(O), along with a remedial measure, namely, a written warning for misconduct in accordance with DAOD 5019-4, Remedial Measures (DAOD 5019-4). In the written warning, Major Lenton states that on several occasions, Mr. Bourassa sent correspondence to colleagues and superiors that was inappropriate for an officer. He also states that these emails demonstrate that Mr. Bourassa is either unwilling or unable to accept responsibility for his actions and is unable to understand or respect the chain of command.

**B. *Grievance filed by Mr. Bourassa***

[13] On March 14, 2012, Mr. Bourassa filed a grievance challenging the following five measures:

- The Language School course report dated June 13, 2011;
- The letter from the Commandant of the Language School to the Commandant CFSU(O), dated July 7, 2011;
- The initial counselling, dated November 29, 2011;
- The letter of assessment written in March 2012 (and given to Mr. Bourassa on March 6, 2012); and
- The written warning dated March 6, 2012.

[14] In support of his grievance, Mr. Bourassa made the following arguments:

*Language School course report – June 13, 2011*

- He disagrees with the contents of the report;

- He did not have access to the report before the end of his training and therefore did not have an opportunity to discuss it or to correct his alleged deficiencies;
- His interpersonal conflicts with his peers, the teachers and the staff at the School tainted the perceptions of the people assessing him, such that he received negative feedback and the report does not contain objective findings regarding his performance and his attitude; and
- He filed a complaint against Captain Tremblay, the author of the report, for allegedly calling him paranoid and comparing him to Russel William, and Major Méthot did not take his complaint seriously.

*Letter from the Commandant of the Language School to the Commandant CFSU(O)–*

*July 7, 2011*

- He challenges the sending and the contents of this letter;
- He did not receive this letter before December 9, 2011, the date his commanding officer gave him notice of initial counselling;
- The unfavourable content of the letter was prejudicial to him upon his return to the unit, and the comments in the letter helped tarnish his reputation.

*Notice of initial counselling – November 29, 2011*

- He did not receive the supporting documentation for this remedial measure, and he was told that it would not be sent to him because he already had it in his possession; and

- The statement of the measure did not clearly set out the criticisms made against him.

Letter of assessment from Army G2 supervisor – March 2012

- This letter was given to him at the same time as the written warning, whereas it should have been given to him at a separate meeting;
- He did not receive the necessary coaching and follow-up during his G2 training;
- His relationship with his supervisor was poisoned from the time he arrived there because his supervisor had received negative references and did not want to see him pass his training course. His supervisor thus hounded him relentlessly so that he would leave the G2 cell, and the letter is full of misperceptions and wrong impressions;
- His supervisor made inappropriate medical observations, as he has neither the competence nor the authority to make a medical diagnosis; and
- The contents of the letter and the medical-related comments that the letter contains tarnished his reputation and interfered with his attempts to exercise his visitation rights in respect of his daughter. They also destroyed any hope he had of becoming an intelligence officer.

Written warning – March 6, 2012

- The remedial measure should have been written in French, not English;
- He was not given advance notice that the meeting would deal with the imposition of a remedial measure;
- He did not receive any supporting documentation for this measure;

- The measure does not specify the criticisms made against him; and
- He asked for 24 hours to consult a lawyer regarding the allegations in the assessment letter, and this request was denied.

[15] Mr. Bourassa's grievance followed the internal process set out in Chapter 7 of the Queen's Regulations and Orders for the Canadian Forces (QR&O) and in DAOD 2017-0, "Military Grievances", and DAOD 2017-1, "Military Grievance Process". On July 6, 2012, Colonel Malo, acting as final authority, advised Mr. Bourassa that his grievance had been forwarded to the Canadian Forces Grievance Board (the Board), as a discretionary referral, for analysis and recommendations.

[16] Mr. Bourassa submitted a number of documents to the Board, including some that concerned facts that arose after the incidents challenged in the grievance and after the grievance itself was filed. Mr. Bourassa apparently obtained a number of these documents as a result of access to information requests.

### **C. *Grievance Board report***

[17] In its report, the Board noted that Mr. Bourassa had filed more than 3,000 pages of documents and that some of his submissions dealt with facts arising after the facts related in his grievance, including recent complaints. The Board stated that its jurisdiction, and therefore its analysis and recommendations, was limited to the issues raised in the grievance dated March 14, 2012. In conclusion, the Board made the following recommendations regarding each measure covered in the grievance.



Language School course report – June 13, 2011

[18] The Board found that the report should have been prepared and given to Mr. Bourassa before he left the Language School. However, it held that this irregularity did not invalidate the contents of the report. The Board stated that Mr. Bourassa confirmed most of the incidents but played them down and offered explanations and excuses without actually accepting any responsibility whatsoever. Based on its analysis, the Board found that the contents of the report accurately reflected the performance and conduct of Mr. Bourassa during his training, and that he had not shown that Language School staff had hounded him or had conducted a concerted campaign to tarnish his reputation. The Board recommended that the report be kept in Mr. Bourassa's file. It also held that the report should have mentioned the difficult personal situation that Mr. Bourassa was going through during his training, which could have affected his performance, and recommended that such a note be added.

Letter from the Commandant of the Language School to the Commandant CFSU(O) –

July 7, 2011

[19] The Board held that it was appropriate for a commanding officer to write to another commanding officer regarding the performance and conduct of a Canadian Forces member who was temporarily under his authority. It also concluded that the letter represented a reasonable portrait of the performance and deficient conduct of Mr. Bourassa observed by a number of people. It also found that the letter should have mentioned the difficult personal situation that Mr. Bourassa was going through so that the Commandant CFSU(O) would be aware of all the circumstances and base his decision to impose a remedial measure on Mr. Bourassa on a

complete assessment of the facts and circumstances. It recommended that the letter remain in Mr. Bourassa's file but that a note regarding his difficult personal situation be added to it.

Notice of initial counselling – November 29, 2011

[20] The Board held that the Commandant CFSU(O) should have given Mr. Bourassa the letter from the Commandant of the Language School as soon as he received it and that he should have shared his concerns and discussed the contents of the letter with Mr. Bourassa before imposing a remedial measure. Furthermore, as the course report and the letter from the Commandant of the Language School did not mention the personal problems experienced by Mr. Bourassa, the Commandant CFSU(O) did not have in his possession all the relevant information when he decided to impose initial counselling on Mr. Bourassa. The Board held that this was a breach of the duty of procedural fairness owed to Mr. Bourassa. It also found that such a breach of procedural fairness could be corrected through the grievance process, since Mr. Bourassa was now fully informed of the criticisms made against him, had the information on which these criticisms had been based and had been given the opportunity to give his version of the facts and make comments during the process.

[21] On the merits, the Board stated that it agreed with the Commandant CFSU(O) that the alleged incidents with Mr. Bourassa had indeed occurred, that he had conflicts with most of the people at the Language School and that he had breached his ethical obligations. The Board did not believe Mr. Bourassa's version of events, according to which all the people involved were conspiring together and biased against him. It added that it understood the stress and pressure that Mr. Bourassa was under because of his personal and family situation but found that this

context did not justify or excuse his misconduct. The Board held that Mr. Bourassa's conduct while he was at the Language School was at odds with many of the fundamental expectations that apply to CAF members and with CAF ethics and values, and that initial counselling was therefore justified.

Letter of assessment from the Army G2 supervisor – March 2012

[22] First, the Board found that although some of the medical-related statements in the assessment letter were poorly worded, the supervisor was not making a medical diagnosis, but describing his observations and concerns, and that it was appropriate for him to share these observations and concerns with the Mr. Bourassa's commanding officer at the CFSU(O). The Board also held that the contents of the letter were reasonable, and it recommended that the letter be kept in Mr. Bourassa's file.

Written warning – March 6, 2012

[23] The Board noted two problems with the written warning. First, it held that the remedial measure should have been written in Mr. Bourassa's official language, French, in accordance with DAOD 5019-4. Second, the remedial measure had been issued by Mr. Bourassa's supervisor at Army G2 when it should have been imposed by his commanding officer or the designate of that commanding officer. The Board therefore found that these deficiencies invalidated the remedial measure and that a review *de novo* would have to be done to determine whether the circumstances warranted imposing a remedial measure and, if so, what measure would be appropriate.

[24] The Board was of the opinion that Mr. Bourassa's behaviour and his misconduct justified a remedial measure and that this measure had to be more severe than a written warning. It recommended imposing the most severe measure, counselling and probation, for several reasons. The Board acknowledged that the Mr. Bourassa's personal, family and financial problems may have had an impact on his interpersonal relations and constituted a mitigating factor. However, it found that Mr. Bourassa's situation did not justify or excuse his frequent misconduct. The Board was of the opinion that despite the deficiencies observed, Mr. Bourassa continued to conduct himself in an unacceptable manner. The Board mentioned that on several occasions, Mr. Bourassa had failed to follow orders and directives and that he was still trying to excuse his actions by seeing in this a concerted effort to tarnish his reputation and never accepting responsibility for his actions. The Board was of the view that its recommendation to impose the severest remedial measure on Mr. Bourassa was justified because of the continuous nature of his behavioural problems. It found that Mr. Bourassa was continually getting into conflicts, that the file showed that he had become a nuisance in almost every unit he was posted to and that instead of seizing the opportunities he was given to mend his ways, he continued trying to prove that everyone was to blame but him.

## **II. Impugned decision**

[25] Colonel Malo dealt with Mr. Bourassa's grievance as final authority in the grievance process.

[26] After receiving the Board's report, Mr. Bourassa sent Colonel Malo a 13-page report containing his comments regarding the Board's analysis and recommendations. In that

document, Mr. Bourassa refers to a number of new facts and to documents that he apparently received after making access to information requests. He mentions, among other things, that all his problems and conflicts stem from a series of incidents starting in 2001. He relates a number of these incidents, particularly one which, in his opinion, demonstrates that Captain Tremblay, who wrote the course report following his training at the Language School, is biased against him. In that incident, Captain Tremblay allegedly decided to call the military police. Mr. Bourassa submits that the audio tape of this incident shows the state of mind of Captain Tremblay, who makes him out as a psychopath to the military police. Mr. Bourassa also submits that various CAF officers engaged in conduct demonstrating that they wanted to make sure he left or was discharged from the CAF, instead of helping him. He also describes an invasion of his privacy and interference with his efforts to obtain visitation rights with regard to his daughter. He submits that, instead of helping him in this regard, information regarding his family situation was used against him, and that the CAF interfered in the family law proceeding.

[27] Colonel Malo rejected Mr. Bourassa's grievance.

[28] First of all, he stated that none of the facts and incidents that arose after the filing date of Mr. Bourassa's grievance, March 14, 2012, could be considered, and that the grievance process could not supplant that role and responsibilities of the chain of command. He added that Mr. Bourassa had to follow the usual administrative processes with regard to events other than those directly covered by the grievance before him. He then gave his position on each of the measures challenged in the grievance.

Language School course report – June 13, 2011

[29] Colonel Malo stated that he agreed with the Board. First, he found that the report should have been given to Mr. Bourassa before he left the Language School, but that this irregularity did not invalidate the report. Second, he was of the opinion that, on a balance of probabilities, the facts and testimony reflected the performance and conduct of Mr. Bourassa. Like the Board, Colonel Malo found that the report should have included a note referring to Mr. Bourassa's difficult personal situation. He therefore ordered that a duly annotated report be placed in Mr. Bourassa's file.

Letter from the Commandant of the Language School to the Commandant CFSU(O) –  
July 7, 2011

[30] Colonel Malo also agreed with the Board's analysis and recommendations regarding the letter prepared by the Commandant of the Language School. In his opinion, the letter's contents give a reasonable picture of the performance, conduct and behaviour of Mr. Bourassa. He also agreed with the Board's recommendation to the effect that the letter should have mentioned Mr. Bourassa's personal problems but found that these problems did not excuse his conduct and his inappropriate actions throughout his stay at the Language School.

[31] Regarding the incident involving the military police, Colonel Malo stated that after listening to the audio tapes, he reached different conclusions from those reached by Mr. Bourassa. Captain Tremblay called in the military police after having been informed that

Mr. Bourassa had declared that he was keeping a hit list of teachers he planned to get rid of and that he had a weapon in his room. Colonel Malo found that Captain Tremblay had acted prudently and wisely in deciding to call in the military police and that she had been motivated by the desire to ensure the safety of everyone concerned, including Mr. Bourassa. Colonel Malo stated that a Captain Tremblay did not try to portray him as a psychopath and added that there was nothing in the audio tapes to support the conclusion that the people involved wanted to have him discharged from the CAF.

*Notice of initial counselling – November 29, 2011*

[32] Colonel Malo, like the Board, stated that he could not explain why the Commandant had waited so long before giving Mr. Bourassa the letter prepared by the Commandant of the Language School. However, he found that this irregularity did not invalidate the remedial measure. He also rejected Mr. Bourassa's allegation to the effect that the Board had played down the breaches of procedural fairness. He found that there had been no unreasonable delay and that Mr. Bourassa had not suffered any harm as a result of these breaches. On the merits, he concluded that Mr. Bourassa's behaviour during his stay at the Language School was contrary to many of the fundamental expectations that apply to CAF members and that this misconduct justified imposing initial counselling.

*Letter of assessment from the Army G2 supervisor – March 2012*

[33] Colonel Malo acknowledged that Mr. Bourassa's supervisor had made some poorly worded comments about his concerns regarding Mr. Bourassa's psychological state, but found

that it was appropriate for Mr. Bourassa's supervisor to share his concerns. Regarding the contents of the letter reporting the inappropriate behaviour of Mr. Malo, he found that they were justified and that the letter should remain in his file. He also rejected the allegations that the CAF had interfered in Mr. Bourassa's case with regard to the custody of his daughter. He concluded that what hurt Mr. Bourassa was not the contents of the letter, but his own behaviour.

Written warning – March 6, 2012

[34] Colonel Malo found that Mr. Bourassa's behaviour justified imposing a remedial measure, but he stated that he disagreed with the Board's recommendation to impose the most severe remedial measure. Colonel Malo noted that as the monitoring period associated with the initial counselling had not yet expired when the G2 supervisor saw fit to impose a remedial measure on him, it was premature to impose on him a measure as severe as counselling and probation. In his view, the efforts to help Mr. Bourassa had just begun, and a written warning was the appropriate measure.

[35] Colonel Malo also commented on the general handling of Mr. Bourassa's situation. He stated that it was clear to him that Mr. Bourassa had done nothing to improve his behaviour and obey his superiors' orders; on the contrary, he became more and more insubordinate, and his actions became more and more inappropriate. Colonel Malo also agreed with the Board that the overall situation required co-ordinated action, stating that it was up to Mr. Bourassa's chain of command to ensure the appropriate monitoring.



[36] In conclusion, Colonel Malo noted that Mr. Bourassa had not shown, on a balance of probabilities, that he had been treated unfairly in the course report, the two letters on file or the two remedial measures imposed on him.

### **III. Issues**

[37] This application raises two issues:

1. Were there breaches of procedural fairness in the handling of Mr. Bourassa's grievance?
2. Was Colonel Malo's decision to reject Mr. Bourassa's grievance reasonable?

### **IV. Standards of review**

[38] It is trite law that whether the rules of procedural fairness have been breached in handling Mr. Bourassa's complaint is an issue that is subject to the correctness standard of review (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502).

[39] Colonel Malo's decision on the merits of the grievance was made in light of the applicable policies and directives and his assessment of all the evidence in the record. In *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190 [*Dunsmuir*], the Supreme Court stated that questions of fact, discretion or policy, as well as questions of mixed law and fact, are reviewable on the reasonableness standard. Again in *Dunsmuir*, at para 57, the Court stated that an exhaustive analysis is not required to determine the applicable standard of review when it is already deemed to have been determined by case law.

[40] In the present case, I am satisfied that the case law has established that decisions of the final authority in the CAF grievance process that deal with questions of fact or question of mixed fact and law must be reviewed in accordance with the reasonableness standard (*Harris v Canada (Attorney General)*, 2013 FCA 278, [2013] FCJ No 1312 (affirming *Harris v Canada (Attorney General)*, 2013 FC 571 at para 30, [2013] FCJ No 595); *Babineau v Canada (Attorney General)*, 2014 CF 398 at para 22, [2014] FCJ No 440; *Osterroth v Canada (Canadian Forces, Chief of Staff)*, 2014 FC 438 at para 18, [2014] FCJ No 483; *Moodie v Canada (Attorney General)*, 2014 FC 433 at para 44, [2014] FCJ No 447; *Lampron v Canada (Attorney General)*, 2012 CF 825 at para 27, [2012] FCJ No 1713; *Rompré v Canada (Attorney General)*, 2012 FC 101 at paras 22-23, [2012] FCJ No 117).

## V. Positions of the parties

### A. *Arguments of Mr. Bourassa*

[41] In his memorandum, Mr. Bourassa essentially disagreed with Colonel Malo's decision and his assessment of the facts. He also repeated the arguments that he raised in his grievance against each of the measures he challenged.

[42] His memorandum also refers to a number of incidents and facts that arose after the incidents that led to the impugned measures. In addition, there are references to other complaints and grievances coming after the grievance he filed on March 14, 2012. Mr. Bourassa is of the view that these are new facts demonstrating the injustice he is facing and the harassment and

concerted action of various people who, in his opinion, want him to be dismissed from the CAF. He asks the Court to consider these facts and documents.

[43] Mr. Bourassa also submits that the grievance process has been tainted by several breaches of procedural fairness. He repeats the arguments made regarding breaches of procedural fairness in imposing the various measures covered by the grievance. He also submits that Colonel Malo refused to consider the new facts and rendered his decision on the basis of an incomplete record, omitting important facts and documents. He also raises the long delays in processing his grievance.

[44] At the hearing, Mr. Bourassa also argued that his grievance should have been dealt with at the final level by the Chief of the Defence Staff (CDS), not Colonel Malo. On this point, he relied on sections 29.11 and 29.14 of the *National Defence Act*, RSC 1985, c N-5 [NDA].

[45] He also stressed that the measures imposed on him, and the comments of several people involved, had harmed his efforts to obtain visitation rights with regard to his daughter. He further submitted that the CAF had interfered in and negatively affected his visitation rights proceedings.

[46] He also referred to the incident during which Captain Tremblay called in the military police. He stated that he had been wronged by the inaccurate and devastating statements made against him.

[47] He asked the Court to refer his grievance file back for redetermination.

**B. *Respondent's arguments***

[48] First, the respondent submits that the Court should not consider the documents submitted by Mr. Bourassa that were not included in the record before Colonel Malo, nor should the Court consider the facts that arose after the grievance.

[49] It also submits that Colonel Malo's decision is reasonable and that no violation of procedural fairness in the handling of Mr. Bourassa's grievance justifies the intervention of the Court. The respondent further submits that it appears from the record that in examining Mr. Bourassa's grievance, the colonel considered the entire record, the decisions rendered by the initial authorities, the analysis and recommendations of the Grievance Board and all the documents and arguments submitted by Mr. Bourassa. In addition, the respondent submits that there was no need for Colonel Malo to mention in his decision all the documents filed by Mr. Bourassa in connection with the process for handling his grievance.

**VI. Analysis**

**A. *Colonel Malo's authority to act as final authority***

[50] I will begin by addressing the allegation according to which the grievance should have been dealt with at the final level by the CDS, not by an officer to whom the CDS delegated his authority.

[51] Section 29.11 of the NDA and article 7.08 of the QR&O provide that the CDS acts as final authority in grievances.

[52] However, section 29.14 of the NDA and article 7.09 of the QR&O allow the CDS to delegate to any officer any of the CDS's powers, duties or functions as final authority in the grievance process under section 29.11 of the NDA, except in respect of a grievance that must be referred to the Grievance Board.

[53] The categories of grievances that must be referred to the Grievance Board are listed in article 7.12 of the QR&O. The grievance filed by Mr. Bourassa does not fall into any one of these categories. The CDS could therefore delegate his power to act as final authority to any officer he chooses. Pursuant to an order in council dated November 15, 2012, the CDS appointed Colonel Malo to the position of Director General Canadian Forces Grievance Authority and delegated to him the power to act as final authority in grievances that do not have to be submitted to the Grievance Board. Colonel Malo therefore had the necessary delegation of authority to act as final authority in this case and to decide Mr. Bourassa's grievance.

[54] Furthermore, section 29.12 of the NDA provides that a grievance may be referred to the Grievance Board even when such a referral is not mandatory. In the present case, Colonel Malo decided to submit Mr. Bourassa's grievance to the Board as a discretionary referral.

[55] Section 29.13 of the NDA provides that the CDS (in this case, the officer to whom the CDS has delegated authority) is not bound by the findings and recommendations of the

Grievance Board, but if the CDS does not act on such a finding or recommendation, the CDS must include the reasons for not doing so in the decision respecting the disposition of the grievance.

**B. *Relevance of the facts, grievances and complaints arising after the grievance – new facts***

[56] Mr. Bourassa asks the Court to consider new facts and evidence that were not submitted to Colonel Malo, on the basis that they demonstrate a continuum in the concerted actions of CAF members to harm him and support the arguments he made in support of his grievance dated March 14, 2012.

[57] The Court cannot grant Mr. Bourassa's request. The Court is sitting in judicial review of the decision rendered by Colonel Malo, and it cannot consider grievances, complaints or allegations that were not included in the grievance and were not decided by Colonel Malo. As the Federal Court of Appeal stated in *Callaghan v Canada (Chief Electoral Officer)*, 2011 FCA 74 at para 82, [2011] FCJ No 199, "[j]udicial reviews of administrative decisions are normally conducted on the basis of the record before the decision-maker". In this case, there are no circumstances that would justify departing from this principle. I also find that the words of Justice de Montigny in *Ochapowace First Nation (Indian Band No. 71) v Canada (Attorney General)*, 2007 FC 920 at para 10, [2007] FCJ No 1195, apply here:

The rationale for that rule is well known. To allow additional material to be introduced at judicial review that was not before the decision maker would in effect transform the judicial review hearing into a trial de novo. The purpose of a judicial review application is not to determine whether the decision of a tribunal was correct in absolute terms but rather to determine whether its

decision was correct on the basis of the record before it: *Chopra*, at paragraph 5; *Canadian Tire Corp. v. Canadian Bicycle Manufacturers Assn.*, 2006 FCA 56, at paragraph 13.

**C. *Procedural fairness in the process of imposing the measures and in handling the grievance***

[58] Mr. Bourassa criticizes Colonel Malo for not considering the facts that arose after the events and the measures challenged in the grievance dated March 14, 2012, and the related documents.

[59] In his decision, Colonel Malo stated that his analysis could not take into account any incidents that occurred or came to light after the grievance was filed, and that Mr. Bourassa was required to follow the administrative procedures in this regard. I see no reason to intervene on this point. Although Mr. Bourassa submits that the subsequent facts and incidents support the arguments he raised in support of his grievance, these are facts that are completely distinct from the letters and measures covered by the grievance before Colonel Malo. There are a number of administrative remedies available to Mr. Bourassa if he wishes to assert his rights with regard to these incidents, and in several cases, he has indeed used such remedies.

[60] The grievance filed on March 14, 2012, deals with specific events, and it is not possible to later add other incidents that occurred after the grievance was filed. Mr. Bourassa could not regard this grievance as an ongoing grievance to which he could add new allegations and new facts that are not related to the measures challenged in the grievance. The fact that Mr. Bourassa sees all the events as a continuum of concerted actions aimed at forcing him out of the CAF does

not make all the subsequent facts relevant to the consideration of the grievance that he filed on March 14, 2012. This grievance clearly concerns five measures, and Colonel Malo was correct not to consider all the subsequent evidence that Mr. Bourassa filed.

[61] Mr. Bourassa also stresses the violations of procedural fairness that occurred in preparing and delivering the letters and remedial measures that he challenged in his grievance. The Grievance Board and Colonel Malo acknowledged that certain irregularities and breaches of procedural fairness occurred in Mr. Bourassa's case, but they found that these irregularities had not been prejudicial to him. Moreover, the Grievance Board and Colonel Malo conducted a thorough review of the entire record and of the evidence leading to the letters and the two remedial measures covered by the grievance. I am satisfied that the grievance process was fair and that Mr. Bourassa had the opportunity to participate actively, submit all his arguments against the letters and remedial measures and argue his point of view before both the Grievance Board and Colonel Malo. In addition, the record clearly shows that Mr. Bourassa knew exactly what criticisms were made against him in the measures he challenged, that he was aware of all the details and that he had a real opportunity to argue his point of view. Therefore, if there were any breaches in terms of procedural fairness, there were adequately corrected in the process of handling Mr. Bourassa's grievance (*McBride v Canada (Minister of National Defence)*, 2012 FCA 181, at paras 42-44, [2012] FCJ No 747).

[62] Mr. Bourassa also raised the delays associated with the handling of his grievance. With respect, he did not show that the grievance process was subject to long delays.



**D. Reasonableness of the decision**

[63] Regarding the merits of the decision, the Court finds that Colonel Malo's decision is reasonable.

[64] The analytical framework used by the Court when reviewing a decision on the reasonableness standard was defined by the Supreme Court of Canada in *Dunsmuir*, at paragraph 47:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[65] In my opinion, the decision of Colonel Malo has all the qualities of a reasonable decision.

[66] It is apparent from the decision that Colonel Malo analyzed the grievance in light of everything in Mr. Bourassa's extensive grievance file and that he considered all the evidence, the decisions of the initial authorities, the Board's report and the arguments raised by Mr. Bourassa.

[67] Moreover, his decision is intelligible and well substantiated. The fact that Colonel Malo's decision does not mention every document or argument on which Mr. Bourassa relies does not support the conclusion that he failed to consider important facts and documents in making his decision. It is well established that a decision-maker is presumed to have considered all of the material before him or her (*Murphy v Canada (Attorney General)*, 2007 FC 905 at para 13, [2007] FCJ No 1184; *Slawinski v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1205 at para 12, [2007] FCJ No 1612; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 16, 157 FTR 35) and that there is no obligation to refer to each and every piece of evidence, fact and argument raised (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708). In this case, the decision clearly shows that Colonel Malo took the time to analyze the Mr. Bourassa's entire file and that he understood and dealt with the arguments made against each of the impugned measures.

[68] I find that Colonel Malo's decision to confirm the measures covered by the grievance (with the addition of a note referring to Mr. Bourassa's personal and family problems in the course report and in the letter from the Commandant of the Language School) is reasonable and that it falls within a range of possible, acceptable outcomes, having regard to evidence. Mr. Bourassa disagrees with Colonel Malo's findings and with his decision to confirm the impugned measures. This disagreement is not enough to warrant the intervention of the Court. An analysis of the record shows that Colonel Malo's findings are reasonably supported by the evidence before him and that his assessment of that evidence is just as reasonable.

[69] I will conclude by addressing the specific elements that Mr. Bourassa stressed at the hearing.

[70] Mr. Bourassa emphasized the incident during which Captain Tremblay called in the military police. Having considered all the evidence regarding this incident, I find that it was reasonable for Colonel Malo to conclude that Captain Tremblay acted in good faith and in a prudent and reasonable manner, and that she was not motivated by any ill will towards Mr. Bourassa.

[71] Mr. Bourassa also emphasized the medical-related comments in the assessment letter prepared by Mr. Bourassa's supervisor at Army G2. Having reviewed all the evidence, I am of the opinion that Colonel Malo's findings, in this regard, are entirely reasonable. It was appropriate, in light of the evidence, for the commander of Army G2 to share with Mr. Bourassa's commanding officer his concerns regarding Mr. Bourassa's psychological health, and the words used in the letter express his concerns without making a medical diagnosis.

[72] Mr. Bourassa also alleged that the CAF had interfered in his legal proceedings to obtain visitation rights with regard to his daughter and that information and documents that he had shared with various persons were used against him by the CAF. With respect, these allegations are unfounded, and there is nothing in the evidence that would admit the conclusion that members or officers of the CAF interfered in the custody proceedings for Mr. Bourassa's daughter or that they used personal information to harm him. Furthermore, the evidence in the record does not support any allegation that the CAF tried to hurt Mr. Bourassa with regard to his

difficult personal situation in general or with regard to his efforts to obtain visitation/custody rights in respect of his daughter. In addition, the references to Mr. Bourassa's family situation in Colonel Malo's decision were included to respond to the arguments raised by Mr. Bourassa.

[73] For all these reasons, the application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed  
with costs.

“Marie-Josée Bédard”

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Judge

Certified true translation  
Michael Palles

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1803-13

**STYLE OF CAUSE:** STEPHANE BOURASSA v DEPARTMENT OF NATIONAL DEFENCE

**PLACE OF HEARING:** OTTAWA, ONTARIO

**DATE OF HEARING:** AUGUST 28, 2014

**JUDGMENT AND REASONS:** BÉDARD J.

**DATED:** OCTOBER 2, 2014

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