

Federal Court



Cour fédérale

Date: 20210511

Docket: T-760-20

Citation: 2021 FC 421

Ottawa, Ontario, May 11, 2021

PRESENT: Madam Justice McVeigh

BETWEEN:

SCOTT PODMOROFF

Applicant

and

ATTORGEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant, Scott Podmoroff, seeks judicial review of a decision related to an unsuccessful promotion, rendered on June 12, 2020, by a Final Level Adjudicator [“FLA”], for a grievance under section 31 of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [“*RCMP Act*”].

II. Background

[2] The Applicant, Scott Podmoroff, is a Corporal in the RCMP. He applied for a promotion to a position that carried the rank of Sergeant, and did not receive the promotion. He filed a grievance on December 29, 2015.

[3] The initial grounds for the grievance were that the successful candidate was not the right fit for the position, because the Applicant thought he was a more appropriate choice due to more experience and skill. He further alleged that the rationale provided by the officer was not meaningful, and that attributes in the rationale were not identified as desirable in the job description.

[4] Part of the way through the grievance process, Cpl Podmoroff learned that the successful candidate had received help from two more-senior members of the RCMP. Cpl Podmoroff submits that this is contrary to RCMP policy. The RCMP argued that the successful candidate did not receive help, but only feedback, which is not contrary to policy.

[5] Later he discovered that one of the senior officers who gave the assistance to the successful candidate was involved in the selection process. Insp. Mundle, the selecting line officer [“SLO”] asked S/Sgt Jordan as a subject matter expert [“SME”] to assist him in selecting and ranking the candidates. S/Sgt Jordan reviewed the functional competency examples and then he ranked the candidates and submitted those rankings.

[6] The RCMP grievance process has two levels: The “Initial Level” and the “Final Level”. The Initial Level Adjudicator [“ILA”] agreed that the process was flawed, not because the successful candidate received help from S/Sgt Jordan to prepare his competencies and application but rather because the officer who gave feedback was then involved in the selection process as a SME, which is clearly not appropriate. In a decision dated November 5, 2019 [“Initial Decision”], the ILA found that there was “a real likelihood or probability of bias during the selection state of this staffing action” (Initial Decision at para 59) and that the SME should have recused himself when he was identified as the SME in the process. As a result, the ILA found the selection process was not completed in accordance with policy.

[7] As a remedy, the ILA ordered that Cpl Podmoroff’s application be compared against the successful candidate’s by an unbiased assessor. If successful, this would not affect the successful candidate’s promotion, and Cpl Podmoroff would be promoted to a similar position with the promotion retroactive to the effective date of the originally selected candidate.

[8] However, that was not the remedy that Cpl Podmoroff sought or felt was appropriate given the evidence before the ILA.

[9] Cpl Podmoroff grieved the ILA’s decision to the Final Level Adjudicator [“FLA”].

A. *Decision under Review*

[10] Cpl Podmoroff alleged at the FLA that the ILA was both procedurally unfair, and clearly unreasonable.

[11] Regarding procedural unfairness, Cpl Podmoroff alleged that the remedy provided by the ILA did not alleviate any prejudice, but rather perpetuated the bias found.

[12] The FLA found that the ILA reasonably allowed new evidence by Cpl Podmoroff, and did not violate any other of his procedural rights. They also noted that the allegations regarding the remedy go to the reasonableness of the decision rather than to the fairness of the proceedings.

[13] The FLA found that the ILA considered the test for reasonable apprehension of bias, as set out in *Yukon Francophone School Board v Yukon (Attorney General)*, 2015 SCC 25 at paragraph 20. They held that the ILA noted that bias is not only limited to the final decision-maker but everyone involved in the decision-making process, and that even well-intentioned people are susceptible to confirmation bias.

[14] The FLA confirmed that the ILA established the apprehension of bias was because the SME after assisting the candidates participated in the selection process thus being in a dual role. The FLA said the ILA would not have found bias if the SME had not been in a dual role as it “was accepted if not common, for senior member to assist junior members in preparing their application packages, it becomes problematic if that senior member then participates in the selection process.”

[15] The FLA in the June 12, 2020 reasons said that Cpl Podmoroff had not on a balance of probabilities proved that the ILA’s decision was based on an error of law, contrary to the

principles of procedural fairness, or clearly unreasonable (subsection 18(2) CSO (Grievances and Appeals)). They confirmed the underlying decision and remedy of the ILA.

III. Issue

[16] The issue is whether the decision of the FLA was reasonable.

IV. Standard of Review

[17] The judicial review will be under the standard of reasonableness. Although the decision relates to allegations of apprehension of bias, which would be a procedural fairness issue and reviewable on a different standard, this judicial review is not looking at any issues of bias in the FLA's decision, but rather her treatment of the decision below. There are no allegations of bias in either the ILA or the FLA's decisions but only in the actual promotion process. Therefore, my task is to evaluate the reasonableness of the decision of the FLA. If her decision falls within the standards of a reasonable decision, outlined below, then this application will be dismissed.

[18] Under the reasonableness standard, the Court will intervene only if it is satisfied "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 100 [*Vavilov*]). These criteria are met if the reasons allow the Court to understand how the decision-maker came to their conclusions, and enable the Court to determine whether it falls within the range of acceptable

outcomes defensible in respect of the facts and law (*Vavilov*, at paras 85-86, citing *Dunsmuir* at para 47).

V. Analysis

[19] In his submissions, Cpl Podmoroff argued that the ILA directed the matter back to the perceived point of error, the selection of the candidate for the promotion. He alleges, however, that the real point of error was when the successful candidate received help, which was more than feedback, on their application by the officer that then was part of the selection process.

[20] As well, Cpl Podmoroff maintains that having help on the application amounts to cheating, which is against the rules of the RCMP.

[21] The Final Level Decision summarized the Respondent's argument as:

The Respondent argues that the assistance rendered by the SME is not contrary to policy, stating that it is common for members seeking promotion to obtain feedback on the contents of their application packages. The Respondent contends that the Griever has not demonstrated that the assistance provided could be construed as cheating as there is no evidence that the SME developed, prepared, wrote or completed the application package submitted by the successful candidate.

(Final Level Decision at para 70)

A. *The Process*

[22] The candidates each had to file a competency record and covering letter that gave examples of their functional capacities without "assistance from any outside agency to complete

the promotion process...” (Career Management Manual s 2.1 [“CMM”). The competency record and covering letter are to give examples of experience with certain competencies that are considered for the promotion process.

[23] The CMM regarding the promotion application process states that:

Supervisor

3.3. If you are unable to verify an example or if the accuracy of the description is in question, meet with the candidate and attempt to resolve any concerns and disagreements. An example that cannot be verified cannot be used.

[24] An officer seeking a promotion has to have their supervisor support their application, so the supervisor is involved in the process (CMM s 4.10.1.4.2). A candidate meeting with their supervisor to verify a description of an incident that was being included as a functional competency or even the suitability was authorized and available to a candidate.

[25] After the promotion application is submitted, an SME, as part of the process, may examine the competency resume. The SME is to evaluate whether the functional competencies put forward by the candidates meet the level of functional competency needed for the position, as long as that officer does not participate in the selection process pursuant to section 4.10.11.7.1 of the CMM.

[26] The wording of the forms which the candidates must sign are as follows:

I certify that the information provided herein is accurate and true to the best of my knowledge. I understand that misrepresentation of information provided may disqualify me from the Promotion Process. I also understand that the covering letter must only be

developed, prepared, written and completed by me and that proof to the contrary will be deemed as cheating.

and

I certify that the information provided herein is accurate and true to the best of my knowledge. I understand that misrepresentation of information provided may disqualify me from the Promotion Process. I also understand that the example must only be developed, prepared, written and completed by myself, and that proof of otherwise will result in my disqualification from the promotion process.

(Forms 5147 & 5144, emphasis added)

[27] The CMM includes policy for promotions, and section 4.1.1.7 states that “[a] member who cheats on a promotional process will be removed from the applicable promotion opportunity...”

[28] Subsection 18(2) of the *Commissioner’s Standing Orders (Grievances and Appeals)*, SOR/2014-289 states that the FLA considers the ILA’s decision on a standard of clearly unreasonable which has been found to be deferential when the evidence is “merely to be insufficient to support the finding...” (*Kalkat v Canada (Attorney General)*, 2017 FC 794 at para 62).

B. *Bias in the Promotional Process*

[29] The participation of the SME in assisting/helping the successful candidate to choose, develop or decide the suitability or strength of his functional competencies examples to include in his application may or may not be “cheating” or contrary to what Cpl Podmoroff alleged. That specific finding was not determined by either level decision-maker and nor will I.

[30] But, unlike the ILA and upheld by the FLA, I do find that it was unreasonable not to find that there was a reasonable apprehension of bias (if not actual bias) at two points in the process. I agree with the ILA that S/Sgt Jordan participating in the selection process after assisting a candidate attracts a reasonable apprehension of bias. Where I diverge from the ILA and FLA, is there is evidence to support a finding of an apprehension of bias as well from the point that S/Sgt Jordan's assisted the candidates in preparing their applications. His assistance with selecting examples of competencies which was then later evaluated by himself taints the entire selection process. Given the tainting in the promotional process at the assistance point and at the selection point, I find that the remedy is unreasonable. This was not sufficiently recognized or addressed by the FLA as is addressed below.

[31] The FLA's confirmation of the IFA's finding that there was no problem with what happened if S/Sgt Jordan had not been involved in selecting is unreasonable. Just because he always helped candidates with developing and choosing their competency examples, does not make it compliant with the manuals, policy, and attestations executed. Without this compliance the ILA finding that the assistance provided was ok was clearly unreasonable and the FLA's finding it was not is unreasonable.

[32] S/Sgt Jordan responded to a request in 2019 from Insp Corinne Scott (OIC National Promotions Unit/Officer responsible, Group national des promotions) to "verify information when the integrity of the process comes into question." His evidence is that he had given "input"

to two candidates (one of who was successful) who had approached him. That statement, in the form of an email, is reproduced below:

Unfortunately, I can't recall specific or approximate dates, however I can say that during the phase of the promotion process where applicants were [*sic*] preparing their examples for validation, I was approached by two members who indicated to me they were applying for the position and wished input from me as to the strength of examples they were working on.

Member 1: Cam Holloway. Cpl HOLLOWAY approached me with a draft of his examples and indicated he had previously approached the OIC, Supt ROMANCHUK, who had reviewed some or all of his examples. Cpl Holloway was seeking my input as a recent past supervisor and one of less than a handful of members in Kelowna who had participated in validation committees in the past. I reviewed his draft examples and provided feedback in the vein of: on several of the examples I felt he was too vague on his own actions when discussing how incidents unfolded generally. He advised me that the OIC had advised him likewise. I encouraged him to be specific about his own actions and write less generally.

Also, and with the passage of time, I cannot recall exact examples, but Sgt HOLLOWAY asked for my input in at least one competency when he was mulling which of several examples would be suitable to demonstrate his competency in that area. Being his recent past supervisor I was familiar with many of the examples he had used or was considering using and did provide opinion on which may be easiest to write to.

Member 2: I was also approached by Cpl Jim DEHOOG to review examples prior to him submitting his examples for validation. Cpl DEHOOG approached me when I was working a nightshift, when he was in the office on his own time working on his package. Again, with the passage of time, I cannot recall the date, but I do recall that it was in close proximity to when his package was due. I remember this as he had only a few examples prepared to that point and was concerned he may not be able to complete the entire package before the deadline.

I cannot recall how many examples Cpl DEHOOG had prepared at that point and had asked me to look over, however I do recall that he had one specific example, I believe in a competency concerning conflict resolution, where I offered my opinion that it would possibly not validate and that he may have missed what the

competency called for. I suggested he consider writing to another example if possible. I had known Cpl DEHOOG for many years at that point, however had not supervised him (to the best of my recollection).

I don't recall anyone else approaching me when they were preparing their packages for the validation committee (which I was not a part of). I suspect most, if not all of those members requested input from Sr. members or supervisors who they knew as well.

...

As for discussions with any other member regarding my impartiality, Sgt Brad SWECERA, my 2i/c of the Watch at the time, was present in the general area when I discussed validation examples with Cpl HOLLOWAY and possibly later with Cpl DEHOOG. Brad had a running gag for some time around this period that with the exception of him, past or present subordinates of mine were "always" successful. He would remark on an ongoing basis that I would "clap" and people would be promoted. Part of the ongoing joke was that Sgt SWECERA had been attempting to be promoted to S/Sgt and had also competed for lateral movement to unit commander and had recently been unsuccessful on several occasions. He would joke that I had not "clapped" correctly for him, but that I liked Cpl HOLLOWAY and would surely "clap" correctly for him. Brad is a joker and took the ongoing banter as such.

Additional Remarks:

Over the years, I have been routinely approached by Kelowna Detachment members who are in the process of preparing documents to be validated. As one of the few local members who have sat on validation committees, I have never said no to providing input to those who seek it out.

I was not on the validation committee (that I recall) for this job, but was designated to assist Insp Mundle when he made his selection from those who validated.

Insp Mundle worked alone to come up with a short list, requesting no input. After he had come up with a short list, he emailed me several competencies from each of the three members on his short list and asked me to rank order them in several competencies as he wished to compare what I came up with to his own conclusion.

I prepared a grid and went through each of the identified competencies for each of the applicants, each of whom I knew as

they were local to Kelowna Detachment. I recall it was with great difficulty that I placed them in order as each candidate was very strong. I emailed Insp Mundle my opinion on the rank ordering of the three within the competencies he had supplied me with and supplied the grid I prepared. I was never advised in advance of the official announcement, who he selected.

At no time did I feel a need to recuse myself from the selection process, limited as my role in that process was. I have a great number of colleagues, and even friends, from my circle of work associates over the 30+ years with the RCMP. I am beholden to none of them, and feel no compunction to offer an advantage to any of them.

(CTR at pages 381-383)

[33] As can be seen in the above quote, S/Sgt Jordan assisted at least two candidates that he can remember. He was a past supervisor of the successful candidate, but was not their supervisor at the time of the application for promotion. He had known the other candidate he assisted for years but had never been their supervisor.

[34] My understanding from his statement is that he was one of very few people in the Kelowna Detachment that had been involved in the past on valuation committees. He said he routinely helps candidates. There is no doubt he would have an inside track on what competency examples would be successful on an application.

[35] S/Sgt Jordan's own evidence when addressing his impartiality said that: "Brad had a running gag for some time around this period that with the exception of him, past or present subordinates of mine were "always" successful. He would remark on an ongoing basis that I would "clap" and people would be promoted" (CTR at page 439).

[36] Regarding the successful candidate, S/Sgt Jordan assisted and reviewed draft examples and gave feedback about their writing. As well, he gave input on at least one competency when the candidate could not decide which to use. S/Sgt Jordan recalls assisting the non-successful candidate in a competency concerning conflict resolution, and gave his opinion on whether that particular example could validate the competency. He then suggested he use another example.

[37] The confidentiality agreement related to NCO Promotion Process form 5182 and was signed by S/Sgt Jordan as the SME on October 21, 2015 and witnessed by Sgt Brad Swecera on October 22, 2015. The agreement includes the statement: “Having been made aware of the candidates, I declare that to the best of my knowledge, I am not related to any of the candidates, and the nature of my association, if any, with these candidates is such that I can perform my role in the NCO Promotion Process in an impartial manner” (CTR, at page 73).

[38] The Applicant filed two statements at the ILA. One from Sgt Brad Swecera and one from Cpl Jim Dehoog. Both are produced below.

[39] The evidence of Sgt Brad Swecera dated December 3, 2018 is:

In reference to Promotional Opportunity posting 442-37-E-291-15-16

At the time of this posted promotional opportunity, was working as a Sgt in Kelowna when I observe S/Sgt. JORDAN assisting then Cpl. HOLLOWAY with his application package for the competition. This was also observed by several other Kelowna NCO's specifically Corporal PETERS, Corporal CARROLL, and Corporal DEHOOG.

I was aware that S/Sgt. JORDAN was appointed as a SME in this competition At that time, I approached and questioned S/Sgt. JORDAN about the poor perception of him assisting a

member involved in the competition when he was part of selection making process noting other members and NCO's observed him doing so. He assured me that it was not a problem as he has assisted other members with promotion examples in the past.

Later S/Sgt. JORDAN asked if I could witness his signing of his confidentiality agreement as SME for this Promotional opportunity - I was somewhat uneasy signing it as some members were now questioning the perception of him assisting a candidate and that may have skewed the process.

(CTR at page 301)

[40] Included in that evidence is that S/Sgt Jordan knew he was the SME when he was assisting the successful candidate.

[41] Cpl Jim Dehoog's statement dated December 2, 2017 says:

During the first week of September 2015 I was in the Kelowna city detachment preparing my promotional package for the above noted staffing action. While in the detachment I did observe Corporal HOLLOWAY in a closed door meeting with Staff Sergeant JORDAN. I noted that there were numerous pages strewn over Staff Sergeant JORDAN's desk. I also noted that the pages appeared to be the focus of their meeting and that the format of the pages was structured in the same manner as a competency resume' [*sic*]. At the conclusion of the meeting Corporal HOLLOWAY did take all the papers with him when he left the office.

I can also state that during the month of December, 2015 I was advised by Sergeant SWECERA that he observed Staff Sergeant JORDAN on several occasions assisting Corporal HOLLOWAY with the preparation of his promotional package relating to the above staffing action. At the time Sergeant SWECERA made this statement he had no stake in the results of the staffing action.

(CTR at page 288)

[42] In this statement, Cpl Jim Dehoog does not say how S/Sgt Jordan helped him and only comments on what he observed regarding the successful candidate and S/Sgt Jordan. He does say that “[a]t the time Sgt Brad Swecera made this statement he had no stake in the results of the staffing action.”

[43] Surprisingly, the officer in charge [“OIC”] of the National Promotions Unit, which was responsible for oversight and the integrity of the promotional process, appears not to have reached out to the successful candidate for their statement or anyone else.

[44] There is the appearance of bias—if not actual bias—when working with a candidate in order to develop particular examples to use and then providing input on at least one competency that, if used, would be successful and later giving recommendations and ranking candidates, while knowing you are the SME. There is evidence that would lead an ordinary person to believe that there was no impartiality in the process. The finding that a re-evaluation of the materials would correct any fairness issues is unreasonable because that would not correct the help that provided to the successful candidate, and potentially to other candidates.

[45] The process outlined in the manuals is very structured and has many procedures to follow through out the process. Although S/Sgt Jordan says that the type of input he gave was something that is done always, the manual indicates that only a supervisor may give it. S/Sgt Jordan no longer supervised one of the candidates, and he never supervised the other. The manual is clear only a supervisor can provide feedback (see paragraph 23). It is surprising that S/Sgt Jordan felt he could sign the confidentiality agreement or participate in the selection.

[46] What happened in this promotion process directly contravened written policy, and the FLA does not adequately explain why this is acceptable, as required by the Supreme Court (*Vavilov*, at para 84). Simply because S/Sgt Jordan said it had always been done does not mitigate the clearly unreasonable decision of the ILA—that is, to find that it is not contrary to policy. The FLA should not have found the remedy of the ILA-clearly reasonable. It is the role of the RCMP (or possibly legislators) to amend the policy, act, regulations or manuals to meet what is practically happening, if they wish.

[47] I agree with Cpl Podmoroff's arguments regarding the unreasonableness of the remedy. Given that the successful candidate received assistance from someone that was the SME rather than his supervisor gave him an advantage in the process and an overall apprehension of bias which tainted the integrity of the promotion process. The FLA's decision is unreasonable.

[48] This staffing action was posted on August 19, 2015, and it appears that Cpl Podmoroff knew he was not the successful candidate by approximately December of 2015. The successful candidate could have been in that same position for six years by now or been promoted again. As well, Cpl Podmoroff could have received a subsequent promotion. This is not material that was before the decision-maker nor was it in the record before me. However, the merits of a promotion need to be tested in a fair process. Cpl Podmoroff's seeking the remedy some six years later to remove the successful candidate, is not something that I will grant. Nor will I grant the remedy sought by Cpl Podmoroff that he should receive the promotion and that it be backdated.

[49] Therefore, the suitable remedy is to send the grievance back to be redetermined by another decision-maker, and Cpl Podmoroff will be allowed to present further material as part of the process. Available remedies, if the grievance is successful, are provided for in the CMM, ch 4 at 5.5 regarding grievances.

VI. Conclusion

[50] I will quash the decision and send this back for redetermination. I will suggest, though not direct, that a decision-maker from outside the Kelowna detachment and outside Division E (if possible) should be used for the redetermination given that some of the same personal may be in the same positions, and may be better evaluated by a completely “fresh set of eyes” for the redetermination.

VII. Costs

[51] The parties agreed that the costs should be in the lump sum amount of \$2500.00 to the successful party. Given the success of the Applicant, the amount of \$2500.00 (inclusive of disbursements and tax) will be payable forthwith by the Respondent to the Applicant.

JUDGMENT IN T-760-20

THIS COURT'S JUDGMENT is that:

1. The decision is quashed and set back to be re-determined by a different decision-maker;
2. Costs in the amount of \$2500.00 inclusive of taxes and disbursements will be payable to the Applicant by the Respondent forthwith.

"Glennys L. McVeigh"

Judge



Royal Canadian Mounted Police
Gendarmerie Royale du Canada

CONFIDENTIALITY AGREEMENT
NCO Promotion Process

ENTENTE DE CONFIDENTIALITE
Processus de promotion des sous-officiers

Staffing Action Number - N° de la mesure de d'affection 442-37-291-15-16	Job Opening - Ouverture d'emploi 52489	Division E
Position Title - Titre du poste Detachment/District Policing Supervisor/Investigator/Analyst	Position No. - N° du poste E6443 10396	Location - Lieu Kelowna Detachment - Kelowna, BC (Location Code: E601)

I understand and acknowledge that I will be given access to information and material related to the NCO Promotion Process, some of which are Protected "B". I will not reveal to any person, or persons, except those authorized by the Royal Canadian Mounted Police, any material, deliberations or results stemming from my role in the NCO Promotion Process.

Je comprends et reconnais que j'aurai accès aux renseignements et aux documents relatifs au processus de promotion des sous-officiers, dont certains sont désignés Protégé B. Je ne révélerai à qui que ce soit, sauf aux personnes autorisées par la Gendarmerie royale du Canada, les documents, les délibérations ou les résultats découlant de mon rôle dans le processus de promotion des sous-officiers.

Having been made aware of the candidates, I declare that to the best of my knowledge, I am not related to any of the candidates, and the nature of my association, if any, with these candidates is such that I can perform my role in the NCO Promotion Process in an impartial manner.

J'ai pris connaissance de la liste des candidats et, autant que je sache, je n'ai de lien de parenté avec aucun d'entre eux; de plus, les relations que j'aurais pu avoir avec eux ne sont pas de nature à influencer mon rôle dans le processus de promotion des sous-officiers.

Completed by (Role) - Rempli par (Rôle)

Validation Stage - Étape de sélection:

- Validation Committee Member
Membre du comité de validation
- Staff Relations Representative
Représentant des relations fonctionnelles

Structured Interview Stage - Étape de l'entrevue dirigée:

- Structured Interview Committee Member
Membre du comité d'entrevue dirigée
- Staff Relations Representative
Représentant des relations fonctionnelles

Selection Stage - Étape de sélection:

- Line Officer
Officier hiérarchique
- Line Officer Delegate
Délégué de l'officier hiérarchique
- Subject Matter Expert
Expert en la matière
- Staff Relations Representative
Représentant des relations fonctionnelles

Name and Title - Nom et titre S/Sgt. John JORDAN	Empl. ID - Id. de l'empl. 000040100	Signature 	Date 15-10-21
Witness Name and Title - Nom et titre du témoin SGT B. SWECERA 45560	Empl. ID - Id. de l'empl. 000045560	Signature 	Date 15-10-21

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-760-20

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DATED: MAY 11, 2021

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