

Federal Court



Cour fédérale

Date: 20110729

Docket: T-1704-10

Citation: 2011 FC 965

Ottawa, Ontario, July 29, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SYED, Javed

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 Director General of the Canadian Forces Grievance Authority (DG) dated 13 September 2010 (Decision), which dismissed the Applicant's grievance, made pursuant to subsection 29(1) of the *National Defence Act*, R.S.C, c. N-5 (Act), based on his finding that the Applicant had been treated fairly, reasonably and in accordance with Canadian Forces policies and directives and therefore had not been aggrieved.

BACKGROUND

[2] The Applicant is a member the Canadian Forces. He enrolled in the geomatics technician (geo tech) program in 2006. He failed three baseline exercises at Qualification Level (QL) 4 of the course and, in consequence, a Progress Review Board (PRB) was convened, which determined that he should cease his geo tech training.

[3] The Applicant successfully grieved this decision, was given credit for QL4 and was enrolled in QL5 in September 2007. The Applicant performed poorly in QL5 and failed two performance objectives. In consequence, a second PRB recommended in February 2008 that the Applicant cease geo tech training and be considered for another trade. The PRB found that, despite his efforts, the Applicant was unable to apply his theoretical learning to practical applications and was not ready for operational deployment. Additional assistance and on-the-job training would not remedy this deficiency. The Applicant's commanding officer agreed with the recommendation and ordered that it be put into effect.

[4] On 24 July 2008, the Applicant grieved the decision of the second PRB. His redress of grievance was considered by the Initial Authority (IA), namely the Commander of the Canadian Forces Base Borden/Canadian Forces Support Training Group. In June 2009, the IA concluded that the decision to cease the Applicant's training was appropriate for the reasons stated by the PRB. The IA was satisfied that the PRB acted in accordance with Canadian Forces policies and the Base Borden Standing Administration Instruction (BBSAI 1103).

[5] At the Applicant's request, the IA's decision was submitted for reconsideration by the Final Authority (FA) in the grievance process, namely the Director General of the Canadian Forces Grievance Authority. On 13 September 2010, the FA found that the PRB's decision was reasonable and has been arrived at in accordance with BBSAI 1103. The FA also determined that the process was fair. Although members of the School of Military Mapping (SMM) sat on the PRB, they did not have day-to-day involvement with the Applicant and therefore were deemed objective. This is the Decision under review.

DECISION UNDER REVIEW

[6] The FA reviewed the Applicant's grievance, noting the Applicant's primary claims: that he was not given the opportunity to receive remedial training and be retested on certain assignments, tests and exams; that he was given the opportunity to take a retest for one performance objective but not permitted to take remedial training or redo the assignments; that he was evaluated unjustly on certain assignments because the assignments and questions were open to interpretation; that he was given insufficient preparation time for the PRB; that the PRB failed to disclose information to him during the PRB; and that his grievance was adjudicated by a non-impartial PRB. The FA then noted the Applicant's requested redress which, in short, included receiving credit for the portion of the QL5 that he had completed and an opportunity to redo the failed performance objective after receiving remedial training.

[7] With respect to the Applicant's claim that he was deprived of remedial training, the FA reviewed various forms enumerating the remedial training that had been made available to the Applicant, including individual tutoring and after-hours remedial training. On this basis, the FA found that the Applicant's assertions about the lack of remedial training and instructor availability were inaccurate.

[8] With respect to the Applicant's claim that he was not allowed to be retested, the FA noted that the Applicant was retested on one unnamed practical test, for which he was granted three weeks' preparation time, and that the Applicant was granted another opportunity for a retest, which was cancelled after he had failed a number of evaluations and had no hope of passing, even with a retest. At this point, the Applicant's file was referred to a PRB. The FA agreed that the Applicant was not always permitted the opportunity for a retest but found that the refusal of a retest was based on a sound rationale.

[9] With respect to the Applicant's claim that he was unjustly evaluated because certain assignments and questions were open to interpretation, the FA noted that the school would have evaluated his assignments using the appropriate marking guides. Had the wrong marking guides been used, all of the students would have failed. The FA found, therefore, that the Applicant was properly and fairly evaluated on all aspects of the QL5.

[10] With respect to the Applicant's claim that his fellow students had more opportunity for practical training than he did, the FA found that the Applicant followed the same program as his peers and, therefore, did not have less opportunity for practical training.

[11] The FA acknowledged the Applicant's assertion that his course marks were improving over time but noted that, notwithstanding such improvement, the number of failures still raised concerns that the Applicant may not be suited to geo tech training.

[12] The FA noted the Applicant's assertion that he was given insufficient time to prepare for the PRB. Given that the Applicant was notified on 24 January 2008 and the PRB was convened on 4 February 2008, the FA was satisfied that 12 days' notice was sufficient preparation time.

[13] With respect to the Applicant's claim that some members of the PRB lacked objectivity, the FA stated that he had compared the PRB member's names to those personnel who had signed the incident sheets, assessment forms, monthly reports, counselling record and referral sheets in the Applicant's file. He found that the type of interaction that these members had had with the Applicant did not constitute day-to-day involvement, which is the only type of involvement prohibited by the fairness guidelines under the BBSAI 1103.

[14] The FA was satisfied that the Applicant, although he did not receive full disclosure of all of the relevant information at the time that the PRB convened, did receive full disclosure in proceedings before the IA. In consequence, the Applicant had not been aggrieved.

[15] The FA also found that, under the appropriate regulations, the Applicant, as grievor, was responsible for substantiating his claim that he was not given an opportunity to present his case. The FA found that there was no information for him to analyze and assess on this point.

[16] The FA concluded that, based on the evidence on file, the Applicant had received due process on the QL5 geo tech course and on the QL5 PRB and had been treated in accordance with CF policies and directives. He had not been aggrieved and, therefore, there was no basis for granting the Applicant redress.

ISSUES

[17] The Applicant raises the following issues:

- i. Whether the Decision was reasonable in finding that the Applicant should not have been given the opportunity to retake a test or redo the entire course;
- ii. Whether the Decision was based on erroneous findings of fact; and
- iii. Whether the grievance process was conducted fairly.

STATUTORY PROVISIONS

[18] The following provisions of the *National Defence Act*, R.S.C, c. N-5, are applicable in these proceedings:

Right to grieve

29. (1) An officer or non-commissioned member who has been aggrieved by any decision, act or omission in the administration of the affairs of the Canadian Forces for which no other process for redress is provided under this Act is entitled

Droit de déposer des griefs

29. (1) Tout officier ou militaire du rang qui s'estime lésé par une décision, un acte ou une omission dans les affaires des Forces canadiennes a le droit de déposer un grief dans le cas où aucun autre recours de réparation ne lui est ouvert sous le régime de la

to submit a grievance.

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STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] The first issue concerns the FA's findings of fact for which the appropriate standard of review is reasonableness. See *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at paragraph 14; and *Dunsmuir*, above, at paragraphs 51 and 53.

[21] The appropriate standard of review for an FA's Decision in a Canadian Forces grievance process is reasonableness. See *Zimmerman v Canada (Attorney General)*, 2009 FC 1298 at paragraph 25.

[22] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph

47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59.

Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[23] The third issue concerns procedural fairness. Issues of procedural fairness are reviewable on a standard of correctness. See *Dunsmuir* (above) at paragraph 47.

ARGUMENTS

The Applicant

[24] The Applicant asserts, first, that the Decision rests on erroneous facts; second, that the PRB, IA and FA acted unfairly in refusing to allow him to repeat a segment of the course or to retake the course; and, third, that, in permitting SMM staff members to sit on the PRB, the Decision sacrifices principles of procedural fairness to achieve administrative convenience.

[25] The Applicant argues that the Decision rests on errors of fact. As the Decision acknowledges, the IA erred in assuming that the Applicant repeated second year (QL5); he did not. Also, although the Decision states that the Applicant was offered an opportunity for retest, the Applicant submits that he was not available to complete the retest at that time because he was in the middle of another map-making exam.

[26] Under paragraph 18 of the BBSAI 1103, the PRB had the option, *inter alia*, to allow the Applicant to: continue training with or without remedial instructions; or continue training with reassessment recourse. Instead, the PRB relied on the opinion of the SMM (a non-arms-length body) to find that the Applicant was unable to pass the retest and, therefore, should be subject to the most adverse recourse, namely to cease geo tech training. The Applicant challenges this finding. Other Canadian colleges and universities allow students who fail courses to retake them and, in some instances, they allow a student to rewrite a course exam without repeating the course.

The Respondent

The Decision Was Reasonable

[27] The Respondent submits that, given the ample evidence that the Applicant had failed numerous tests and assignments and was unable to complete the geo tech course successfully, the Decision was reasonable. The Applicant states that the IA erred in finding that he had attended the QL5 course twice, rather than once. The FA acknowledged this error but found it immaterial. Whether the Applicant had attempted the course previously did not affect the ultimate determination that the Applicant had failed QL5.

[28] The Applicant argues that he should have been given the opportunity to redo a map-making test or the entire QL5 course because that is an option in paragraph 8 of the BBSAI 1103. The Respondent contends that the Applicant has mischaracterized the policy. Paragraph 8 of BBSAI 1103 refers to options available at the second level of review before a PRB is held. At the Applicant's level of review, namely the third level, paragraph 18 of the BBSAI 1103 provides that

the PRB can recommend that a member cease training. Moreover, a retest is permitted if the attempt is likely to be successful. In the Applicant's case, a retest was not likely to be successful. Thus, the FA acted reasonably in finding that the decision to deny retesting was sound.

The Applicant's Grievance Process Was Fair

[29] The Respondent submits that the progress of personnel undergoing training in the Canadian Forces is closely monitored to ensure that training issues are addressed in a fair and expeditious manner. The BBSAI 1103 sets out a three-level progress review process, including: a Progress Review; an Independent Review Board; and a Progress Review Board. A PRB reviews all circumstances considered at the first and second levels of review and deals with issues likely to have a significant impact on the learner's future training. A PRB is convened only where there is a serious or prolonged problem or where a learner may be ordered to cease training.

[30] The Respondent submits that procedural fairness consists of three core elements: the right to know the case to be met; the opportunity to make submissions; and the right to an impartial adjudicator. Each element was provided in the instant case.

[31] On 24 January 2008, the Applicant received written notice that a PRB would be convened and why. As the FA acknowledged in its Decision, the Applicant's assignments, student products, test material, marking guides and exams should have been disclosed to him at the PRB stage. This error was subsequently corrected at the IA stage; therefore the FA concluded that the Applicant had not been aggrieved. The Applicant clearly knew the case to be met.

[32] The Applicant also had the right to make submissions to the PRB and exercised that right in accordance with the BBSAI 1103.

[33] Finally, although the Applicant asserts that SMM staff should not have been permitted to sit on the PRB, the Respondent submits that the PRB's composition was in accordance with the BBSAI 1103. Members of the Applicant's school were not precluded from sitting on the PRB, as long as they did not have day-to-day dealings with the Applicant, and they did not. The Applicant has not provided any reasons to substantiate this claim of non-impartiality. Moreover, the Decision under review is the Decision of the FA, not the PRB. The Applicant has not argued that he was denied procedural fairness by the FA.

ANALYSIS

[34] The Applicant is self-represented in this matter. His written and oral arguments allege errors of fact and procedural unfairness, but there is little by way of evidence or cogent argument to support his claims. At the hearing in Ottawa on 19 April 2011, the Applicant withdrew his arguments on procedural unfairness and told the Court that his application is now based upon the unreasonableness of the FA's taking the most drastic recourse and in not allowing him to re-take courses, tests and exams which he had failed.

Errors of Fact

[35] The Applicant says that the Decision is based upon errors of fact. First of all, he says that he was not given an opportunity to retake the failed map-making test. He says he was not available to complete the retest when it was offered because he was in the middle of the map-making exam. He also argues that the map-making test was not related to the decision to withdraw him from the course. That decision was based upon the map-making exam, and he was never given an opportunity to retake the exam at any time.

[36] As regards retesting, the FA points out that the Applicant was retested on one unnamed practical test but that he was not retested on the theory exam for PO 006. The reason for this was also given:

Originally, you were granted the opportunity for a retest, but this was cancelled after you failed six of the seven TDAs and PO 009. Given the number of failures, you could not pass PO 006 no matter how well you scored on the theory exam retest. Therefore, scheduling a re-evaluation would have been pointless, and instead your file was referred to a PRB. As noted on page 70 of the disclosure package, this decision was in accordance with the training plan in effect at that time. It states that a member may be allowed to repeat a performance check on any failed PO if the attempt is likely to be successful. To conclude, I agree that you were not always permitted the opportunity for a retest, and this decision was based on sound rationale.

[37] It looks to me as though the Applicant is being pedantic on this point. According to the training plan, a retest for a performance check is permitted if the attempt is likely to be successful. The Applicant's attempts at a retest were not likely to be successful, hence the finding of the FA that this was sound policy. I do not see any mistake of fact in this regard. The record shows that the Applicant had failed the following:

- a. Military Writing Final Assignment in EO 009.05;
- b. Firearms Skills Test;
- c. Map Reproduction Practical Assignment;
- d. PO 001 overall;
- e. Practical Portion, Final Exam, Survey Operator Exam and Final Theory Exam in PO 002B;
- f. One assignment, the Theory Exam and the Final Practical Exam in PO 003;
- g. Written Performance Check in PO 004 and failure of PO 004 overall;
- h. Three exercises, the Final Written Performance Check, six of the seven Tactical Decision Aids, the Final Theory Exam and the Final Exam in PO 006, resulting in a failure of PO 006 overall; and
- i. General Geomatics Exam and Final Written Performance Check in PO 009, resulting in a failure of PO 009 overall.

Given this record of failure and the training plan, it may be possible to disagree with the FA's Decision, but I do not think it can be said that it falls outside of the range of possible acceptable outcomes which are defensible in respect of the facts and the law. See *Dunsmuir*, above, at paragraph 47.

[38] The Applicant also says that he was not given an opportunity to redo the course as permitted by BBSAI 1103, paragraph 8, section a or b. However, the Applicant is simply mischaracterizing the policy as it applies to his situation. Paragraph 8 of BBSAI 1103 refers to options available at the second level of review before a PRB is held. At the level of review

applicable to the Applicant the PRB can recommend that a member cease training. This is precisely what happened, and the Applicant has not shown a mistake of fact or an unreasonable conclusion in this regard.

[39] The Applicant also says that an error of fact occurs because of paragraph 8 of the IA decision where it is assumed that the Applicant repeated the second year of QL5. However, this is not a mistake in the Decision under review. The FA in his Decision agrees with the Applicant, “You are correct in paragraph 4 of the representation, where you state that you attended QL5 once, not twice.”

[40] Clearly, the FA does not make an error of fact. The FA correctly identifies the situation, but the mistake by the IA makes no material difference to the FA’s Decision. The FA’s Decision takes into account all of the facts on the record. The Applicant has not explained how a mistake by the IA that was correctly identified by the FA and taken into account can mean an error of fact or an unreasonable decision by the FA. He simply disagrees with the Decision.

Unfairness

[41] The Applicant also alleges various forms of unfairness in the Decision but his real complaint as confirmed at the hearing is that

Had [the] PRB, IA or FA applied the principle of reasonable fairness it would not have chosen the most adverse recourse, CT and refer to PSO, relying on technical opinion from School of Military Mapping (SSM) staff in non-arms length body with PRB as to the applicants (*sic*) inability to pass the retest. Canadian Colleges and Universities

allow failed courses to be retaken and in some instances they allow a course exam to be rewritten without repeating the course.

[42] First of all, the Applicant has not argued a lack of procedural fairness by the FA, which made the Decision under review. Although he does not say so, I am assuming that the Applicant wishes to argue that the FA was itself unfair in endorsing a tainted earlier decision and process or that it was at least unreasonable in doing so.

[43] These allegations remain nothing more than bald assertions. The Applicant produces no argument or evidence to suggest that the composition of the PRB in this case did not adhere to established policy, either in their composition or deliberations, or that the members were any less than completely impartial when it came to assessing the Applicant's capabilities or his needs. As the Respondent says, the Applicant has simply failed to demonstrate why staff from his school who had no day-to-day dealings with him but who did have a specialized knowledge about the skills that a geo tech needs could not provide a fair assessment of the Applicant's progress. Also, the fact that other Canadian colleges and universities allow courses and exams to be retaken under certain conditions does not mean that the Applicant was treated unfairly in this context where he is a member of the Armed Forces and is being paid a salary to fulfill identified objectives. The system to which he has subjected himself has its checks and balances. One of the things it does is identify learners who, on the basis of past performances, have no aptitude for geomatics and no chance of qualifying as geomatic technicians. The purpose is not to punish them but to redirect them so that they do not waste time, resources and effort pursuing a course of study that, reasonably speaking, they will not be able to complete.

[44] In his notice of application, the Applicant alleges that PRB member 2 had a conflict of interest and that PRB member 3 lacked objectivity, but these allegations are not substantiated or followed up. The FA fully dealt with this matter.

[45] In reviewing the Decision as a whole, I cannot find anything that could be described as a reviewable error based upon unreasonableness or procedural unfairness. The Applicant is naturally disappointed, but this does not mean that he has not been treated fairly.

[46] I believe that the Decision under review is reasonable and was arrived at in a manner that accorded with the procedure set out in the BBSAI 1103.

[47] The FA, in his Decision, acknowledges the Applicant's hard work in the program, which renders all the more convincing his argument that poor suitability to the geo tech trade is what impairs the Applicant's success.

[48] The Applicant argues that he has been deprived of remedial assistance, but the FA cites evidence that assistance was available by request and that the Applicant did request and receive help.

[49] The Applicant argues that he was given insufficient opportunity to redo various tests and assignments. It is clear from his own submissions and from the evidence considered in the Decision, however, that the Applicant did redo at least one test and was scheduled to redo a second exam in theory. The theory retest was cancelled, however, because the Applicant had failed so many of the

other prerequisites and components that he could not have passed the performance objective no matter how well he scored in the retest. According to policy, a retest is permitted where the attempt is likely to be successful. As the attempt was bound to fail, the decision to withdraw the proffered retest was based on a sound policy.

[50] The Applicant claims that he was treated differently from his classmates. He states that the tests and assignments in the geo tech course were open to interpretation and that this subjective approach worked against him. The FA points out, however, that instructors evaluated students using marking guides, with the same marking guide being used for every student. Moreover, the FA found that the Applicant did not receive less practical training than his classmates; everyone followed the same curriculum.

[51] I note that this application concerns the Applicant's difficulties in fulfilling the requirements of QL5 of the geo tech program. However, the Applicant struggled in a similar fashion at QL4 and advanced to QL5 only after successfully grieving a PRB's recommendation that he should cease his geo tech training.

[52] The Decision identifies a significant concern: the Applicant cannot apply his theoretical learning to practical applications. Despite his efforts and the remedial attention that he has sought and gained, he is not ready for operational deployment because he has difficulty executing tasks independently and requires team support. The Decision is clear in finding that additional assistance and on-the-job training would not remedy these deficiencies. This is based upon what his instructors have said about him: that he was a "weak student"; "showed very little effort"; needed "constant

supervision”; needed “to pay more attention to detail”; needed to “try harder to integrate himself with his new classmates”; did not “grasp material as quickly as the rest of the group”; “relied too much on his peers”; “was advancing at a slower pace than the rest of his class”; continued making errors similar to the errors for which he had previously been corrected; “failed to properly complete 7 of the 11 critical aspects for [the project]”; and was seen taking notes from another student’s independent project without permission.

[53] His instructors further commented that his marks were “going down” despite the extra tutoring; a project was “a very poor product”; there were “obvious inconsistencies” and errors in his map; his work product failed “to comply with the approved standards”; his “entire product was poorly thought out and ineptly constructed”; “there were gaps in data”; and “it was impossible to see any of the sights (*sic*)” his map.

[54] It cannot be said that the FA’s decision to endorse previous conclusions concerning the Applicant’s unsuitability for geomatics is without an evidentiary base. The Court cannot interfere with the Decision merely because the Applicant disagrees with this assessment and feels that he is suitable.

[55] In terms of procedural fairness before the PRB, the FA found that the Applicant had received 12 days’ notice of the PRB, which was considered sufficient. In accordance with paragraph 12 of the BBSAI 1103, none of the SMM instructors who sat on the PRB had day-to-day dealings with the Applicant and, for this reason, were not precluded from sitting on the board. The FA recognized that the PRB did wrongly refuse to disclose certain documents to the Applicant, but he

noted that this error was corrected at the second level of review. With respect to the instant Decision—the third level of review—the Applicant appears to have had access to all relevant documentation. Therefore, any assertion that he was deprived of an opportunity to present his case is unsubstantiated.

[56] It appears that the course of action undertaken by the PRB was well within its jurisdiction and arrived at through fair process. The Applicant is unhappy with that choice, but the rationale for it is well-explained and reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. No costs are asked for and none are awarded.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1704-10

STYLE OF CAUSE: **SYED, Javed**

and

THE ATTORNEY GENERAL OF CANADA

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: April 19, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT** **Russell J.**

DATED: July 29, 2011

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