PROTECTED B

ANNEX III - ADMINISTRATIVE REVIEW AND RELEASE RELATED TO THE CAF VACCINATION POLICY

Before: Nina Frid, Member
Date: 29 May 2023

ISSUES

The aim of this Annex is to determine whether the Administrative Review (AR) process and the release of the grievor were reasonable and justified.

CONTEXT

The Canadian Armed Forces (CAF) vaccination policy, promulgated during the global pandemic caused by COVID-19 virus[1], directed the chain of command (CoC) to issue remedial measures for misconduct to CAF members deemed non-compliant with the policy.[2] Furthermore, CANFORGEN 012/22 and Director of Military Careers Administration (DMCA) Aide-Memoire directed the CoC to recommend release of members who remained non-compliant despite being placed on a Recorded Warning (RW) for seven days, followed by a Counselling and Probation (C&P) for a period of another seven days. These policies and directives collectively instructed the CoC to set aside provisions of Defence Administrative Orders and Directives (DAOD) 5019-2, Administrative Review and disregard significant steps in the long-established process meant to ensure procedural fairness and respect for the grievors' procedural rights. Abridged timelines impaired the members' ability to submit representations and have these representations considered by the CoC prior to AR decisions. The suite of policies and directives related to mandatory vaccination against COVID-19 and enforcement of this direction via remedial measures identified members maintaining the decision to refuse vaccination or refuse to disclosure their vaccination status as repeating the same conduct deficiency, leading to an AR with the goal to release these members from the CAF.[3] The DMCA's Aide-Memoire provided pre-filled templates and standard wording for the issuance of the Notice of Intent to Release, the AR process and the decision to release in each individual case. The following analysis will examine the process applied to these administrative reviews, the justification for them and whether procedural fairness of these reviews has been respected, in order to answer the question whether these reviews were fair and reasonable or not.

[1] Please refer to Annex I for details and context on this issue.
[2] Please refer to Annex II for details and context on this issue.
[3] CDS Directive 002, at subparagraph 13(e) available at https://www.canada.ca/en/department-national-defence/corporate/policies-standards/dm-cds-directives.html and CANFORGEN 012/22.

ANALYSIS

Was the Administrative Review Process Conducted in accordance with DAOD 5019-2?

DAOD 5019-2 explains the purpose and the process for administrative reviews, stating that:

> **4.1** Each CAF member is required to maintain professional standards of conduct and performance. When an incident, a special circumstance, or a conduct or performance deficiency occurs that violates professional standards and calls into question the viability of a CAF member's continued service, an administrative action may be appropriate.
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> **4.2** An AR is the process to determine the most appropriate administrative action, if any, in such a case ...
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> …
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> **5.5** The selection of administrative action by an [approving authority (AA)] must be based upon consideration of the following:
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> a. the facts of the present case;
> b. the CAF member's entire period of service, taking into account the CAF member's rank, military occupation, experience and position;
> c. any previous conduct or performance deficiency, with consideration of the degree to which the CAF member:
> i. accepted responsibility or demonstrated remorse for the deficiency; and
> ii. took active steps to modify their conduct or performance;
> d. the CAF member's leadership role, if any;
> e. the result of required consultation with local CF Health Services;
> f. the existence of any MEL and disclosed disability, as well as any other employment limitation, subject to the requirements of the principle of U of S in accordance with DAODs 5023-0 and 5023-1; and
> g. the CAF member's representations, if any.
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> …
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> **5.8** As a general principle, the appropriate administrative action is the one that best reflects the degree of incompatibility between the CAF member's conduct or performance deficiency and the CAF member's continued service in the CAF.
>
> **5.9** Once an AR case file has been reviewed and a decision reached, the AA may, under applicable regulations, policies, orders, instructions and directives, initiate an administrative action, including:
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> - remedial measures under DAOD 5019-4;
> - occupational transfer;
> - transfer between sub-components;
> - posting;

- an offer of terms of service in any case in which an offer has not been made by CAF authorities;
- reversion in rank; or
- release or recommendation for release, as applicable.

As seen from paragraph 5.9 of this DAOD, the outcome of an AR process could vary, from occupational transfer to reversion in rank, among other options. Additionally, DAOD 7023-1, Defence Ethics Programme states that members who fail to comply with the CAF Code of Values and Ethics may be subject to change of duties, release or other administrative action mentioned in DAOD 5019-2, as well as a disciplinary action under the *National Defence Act*[4] (NDA). These provisions in both DAODs show that release is one possible outcome but not the only outcome of the AR process. However, the CAF vaccination policy directed release of all non-compliant members as the sole outcome, allowing no consideration of the members' service record, individual circumstances or conditions of service, restricting the chain of command's discretion and authority to consider other options and determine the most appropriate administrative action, raising a serious question about procedural fairness of these AR processes.

Through CANFORGEN 012/22, the CAF set aside provisions of DAOD 5019-2 for the conduct of administrative reviews initiated in response to members who remained non-compliant with the vaccination policy. The CANFORGEN states that there is no need to consider the totality of the members' career in cases where they were non-compliant with the vaccination policy, disregarding criteria listed at paragraph 5.5.[5] The CANFORGEN also directs to consider the only conduct deficiency, which is non-compliance with vaccination policy, disregarding criteria at paragraph 5.5.

In addition, the templates provided in the DMCA's Aide-Mémoire contain a blanket statement for the Initiating Authority to include in the release decisions, saying that "I have taken … representations into consideration and I strongly recommend the member be released under release item 5(f) as he (she) continues to violate the conditions of … remedial measure". While there is no dispute that provisions of DAOD 5019-2 were set aside, I feel compelled to point out that CAF vaccination policy disregarded well-established processes for the conduct of AR, abridging the timelines, limiting discretion in decision-making and in some instances, curtailing or disregarding members' representations. By setting aside important provisions of DAOD 5019-2 in the administration of long-established AR processes, the CAF vaccination policy, knowingly or unknowingly, severely limited procedural fairness of these processes. Further analysis on the issue of procedural fairness is provided below.

Was Procedural Fairness Respected in the AR process and Decision to Release?

The process established under DAOD 5019-2, Administrative Review aims at ensuring that administrative decisions concerning CAF members' career respect procedural fairness, are

[4] R.S.C., 1985, c. N-5.

[5] The CDS directive 003 directed the cancellation of CANFORGEN 012/22, but it remains in force at the time of writing of this report.

justified and reasonable. Deviation from these essential principles renders those decisions unreasonable and invalid, according to jurisprudence.[6]

As noted above, the CAF vaccination policies and directives collectively presented one pre-determined outcome for the CoC of non-compliant members. The Chief of the Defence Staff (CDS) directives explained that "Further repeats of the deficiency while on C&P will similarly lead to an Administrative Review and potential release from the CAF".[7] Although the directives mention "potential release", the release was certain in all instances of non-compliance, as seen from numerous grievances referred to the Committee. However, according to DAOD 5019-2, such recommendation for release and the conduct of an AR are intended as administrative actions to be exercised with discretion by the CoC. Upon review of several decisions to release the grievors, I found no adequate explanation or justification from the initiating authorities as to why a recommendation to release a member from the CAF was the most appropriate action in all cases where members refused vaccination or refused to disclose their vaccination status. Because the CoC had to rely on pre-filled templates provided in DMCA's Aide-Mémoire, there is no evidence in this and other grievances explaining why a grievor's decision regarding vaccination calls into question the viability of their continued military service. The template for the Unit Level Administrative Review in DMCA's Aide-Memoire that had to be followed in all such cases only states that "the most appropriate administrative action would be to issue the [member] a NOI to Recommend Release under the *Canadian Queen's Regulations and Orders for the Forces* (QR&O), Chapter 15, table to article 15.01, item 5(f) – Unsuitable for Further Service" without any further justification.

The decision to release grievors under item 5(f) on the sole basis of their refusal to be vaccinated does not explain how the refusal renders them "unsuitable for further service".[8] Additionally, CANFORGEN 012/22 provides direction to fill the reviews' forms stating: "REPLACE WITH QUOTE ONCE AN AR CASE FILE HAS BEEN REVIEWED AND A DECISION REACHED REFLECTING THE ONGOING REFUSAL BY A MBR TO BE VACCINATED OR TO ATTEST THEIR VACCINATION STATUS, THE AA MAY, UNDER APPLICABLE REGULATIONS, POLICIES, ORDERS, INSTRUCTIONS AND DIRECTIVES, INITIATE RELEASE OR RECOMMENDATION FOR RELEASE, AS APPLICABLE. UNQUOTE". This shows that the outcome of the AR process under the CAF vaccination policy was pre-determined for all non-compliant members: release from the CAF under item 5f – unsuitable for further service. Such narrow and prescriptive outcome left no room to consider the members' service record, their experience, their personal circumstances, not to mention the needs and conditions of the service. Essentially, the discretion of the AA was entirely removed, which calls into question the impartiality and fairness of the AR decisions and impartiality of decision-makers. In my view, the AR process pursuant to the CAF vaccination policy was fundamentally flawed.

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[6] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

[7] CDS Directive 002, at subparagraph 13(e)(2).

[8] The table to QR&O 15.01 describes the 5(f) release item stating that it applies to members who "[b]ecause of factors within the officer or non-commissioned member's control, develops personal weaknesses or has domestic or other personal problems that seriously impair their usefulness to, or impose an excessive administrative burden on, the Canadian Forces".

The DAOD 5019-2 lists criteria for the AA conducting an AR to consider in order to select an administrative action "that best reflects the degree of incompatibility between the CAF member's conduct or performance deficiency and the CAF member's continued service in the CAF". These criteria are usually reflected in the facts of the case, the member's entire period of service considering the member's rank, military occupation, experience and position, any previous conduct or performance deficiency including the member's representations.[9] But for members who did not comply with the COVID-19 vaccination policy, as per the CANFORGEN, the decision to release does not take into consideration any of the criteria linked to the member's entire period of service. This disregards the long-established practice of imposition of administrative actions in the CAF. It also breaches the CAF's duty of procedural fairness in administrative decision-making and leads to unjustified and unreasonable administrative actions.

The aim of DAOD 5019-2 is in safeguarding the duty of procedural fairness when imposing administrative actions, ensuring reasonableness of these decisions. As indicated by the Courts, the requirement for procedural fairness is even higher for decisions of significant importance to the individual, affecting that individual in a major way.[10] For military members, release from the CAF is the most significant outcome of the AR process, with major implications for that member, which requires a higher degree of procedural fairness and respect for the members' procedural rights. Despite DAOD 5019-2 provisions aimed at ensuring procedural fairness in the AR process, I find that procedural fairness of administrative reviews under the CAF vaccination policy was not respected.

Was the Decision to Release Reasonable?

Administrative decisions, such as releasing a member from the CAF, must bear the hallmark of reasonableness – justification, transparency and intelligibility, and show that they are justified in relation to the relevant factual and legal constraints that apply to the CAF. Also, "… a reasonable penalty for professional misconduct in a given case must be justified both with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct".[11]

As a relevant example from a different context that is not binding on the CAF, I note that arbitrators found that the implementation of vaccination policies directing either voluntary or mandatory vaccinations were reasonable and justified during the pandemic in some instances, but that termination as an "automatic outcome for failure to get vaccinated" precluding the employees to rely on any mitigating factors were not reasonable. Arbitrators found that employers could not abrogate their duty to prove just cause for termination by relying solely on their inclusion of the penalty of termination in their vaccination policy without showing the

[9] DAOD 5019-2, paragraphs 5.5 and 5.8.
[10] In *Vavilov*, paragraph 77.
[11] *Vavilov*, at paragraphs 99 (referring to *Dunsmuir*) and 107.

necessity or operational effect of resorting to irrevocable termination in the changing and evolving context of the pandemic.[12]

While there are probably cases where a proof of vaccination would be a justified and necessary operational requirement considering that member's tasks and position, a member's unvaccinated status alone does not demonstrate that their decision to refuse vaccination renders them unsuitable for further military service. The construct of CDS Directives and other policy instruments related to mandatory vaccination against COVID-19 resulted in the expedited release of non-compliant members and deviated significantly from the process established by the DAOD 5019-2. The direction was to initiate release of non-compliant members within 14 days despite statements that CDS directives were meant to be temporary. As anticipated, the CDS directive 003 suspended the mandatory vaccination requirement as of 11 October 2022. Yet, the non-compliant members who were released from the CAF encountered permanent effects on their lives and livelihoods. CDS Directive 003 is not retroactive, which means that releases under the CAF vaccination policy were not stopped or cancelled. While it is understood that CAF members must follow the orders given by their superiors, it is rare that one non-compliance leads to a release from the CAF, unless the CoC can demonstrate the misconduct of such gravity that it makes the member's continued service incompatible.

Also, releasing qualified and competent members in a difficult hiring environment seems contrary to the CAF's objective of maintaining operational readiness. Members who were subject to these remedial measures and administrative actions were often qualified in their occupations with years, if not decades, of dedicated service in the CAF. Even less experienced members had desirable skills and motivation to serve in the military.

Contemplating a definite release of unvaccinated members as the only outcome of the AR process is unjustified and unreasonable, in my view, given that, from the very start, the CDS Directives on mandatory vaccination were meant to be temporary. Given that consideration of the full spectrum of available administrative actions was not permitted, given the temporary nature of the mandatory vaccination, given flawed AR processes and breaches of procedural fairness under the unreasonable CAF vaccination policy, I find that release of non-compliant members was unreasonable and not appropriate.

Appropriate Redress

The appropriate redress in cases where the release of a CAF member was found to be unreasonable and unjustified would be to direct their reinstatement with financial compensation to recompense for the loss of wages and benefits including pension. Unfortunately, it has been a longstanding issue that the NDA does not confer such authority on the CDS when acting as the grievance Final Authority (FA).[13] In past cases in which he found that release decisions were

[12] For example, *2022 CanLII 6832 (ON LA) | Chartwell Housing Reit (The Westmount, the Wynfield, the Woodhaven and the Waterford) v Healthcare, Office and Professional Employees Union, Local 2220* | CanLII, at paragraphs 212 to 243.

[13] "Third Independent Review of the *National Defence Act*" by Justice Fish at recommendation 95 for the implementation of amendments affording the CDS authority to reinstate members who have been improperly

unjustified, the CDS was limited to directing the re-enrolment of grievors who remained eligible and consented to it without adequate financial compensation for loss of pay and benefits. An offer to re-enrol represents partial redress when grievors are still eligible and interested, but it does not fully compensate grievors who experienced loss of wages and benefits. The CDS' options to grant financial compensation are currently limited.

By virtue of Order in Council 2012-0861, the CDS has been empowered by the Governor in Council, as the FA in the CAF grievance process, to authorize *ex gratia* payments in relation to the determination of grievances, subject to conditions imposed by the Treasury Board.[14] *Ex gratia* payment is defined as a "benevolent payment made to anyone in the public interest by the Crown under the authority of the Governor in Council for loss or expenditure incurred for which there is no legal liability on the part of the Crown".[15] Those conditions provide that an *ex gratia* payment may only be made if it does not exceed the prescribed amounts, and a legal opinion is received stating that there is no legal liability on the part of the Crown. It may not be used to fill perceived gaps in legislation or policy or other government instruments. The Federal Court explained that these conditions exist to preclude the use of an *ex gratia* payment if there are other administrative remedies possible. It further stated that an *ex gratia* payment is "a wholly gratuitous payment for which no liability is recognized".[16]

If the CDS is of the view that the conditions for an *ex gratia* payment are not met, he also has the option to seek redress outside of the CAF's grievance process. As set out in DAOD 7004-0, the Director of Claims and Civil Litigation has been designated with the authority to settle potential claims against the Crown. While not ideal, as this practice lacks transparency and consistency, the FA can refer the grievor's file to the Director of Claims and Civil Litigation, who can assess if the grievor's case qualifies for a settlement offer.[17]

Aggrieved members likely suffered a financial prejudice because of being unjustly released from the CAF. Therefore, I find an offer of financial compensation would represent a form of redress for the unjust treatment.

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released administratively as this lack of authority is unfair to CAF members, available at https://www.canada.ca/en/department-national-defence/news/2021/06/third-independent-review-of-the-national-defence-act.html.

[14] Issued on 19 June 2012, available in the decision in *Stemmler v Canada (Attorney General)*, 2016 FC 1299.

[15] DAOD 7004-0, Claims By or Against the Crown and Ex gratia Payments.

[16] *Stemmler v Canada (Attorney General)*, 2016 FC 1299. Also, in *Stagg v Canada (Attorney General)*, 2019 FC 630 where the Federal Court stated "a payment is made *ex gratia* (that is, in the absence of an obligation in the strict sense)".

[17] As set out in DAOD 7004-0, the DCCL has been designated with the authority to settle claims for compensation on behalf of the DND. The Federal Court explained that this authority also arises out of a policy called "Treasury Board Policy on Claims and Ex Gratia Payments" which does not have the force of law. It is a policy intended to avoid unnecessary legal action. If it is decided not to negotiate a settlement, that decision is not a final decision affecting the rights of the applicant. See : *Sandiford v Canada (Attorney General)*, 2009 FC 862, paragraph 29.

FINDINGS

I find that the AR process and release decision were fatally flawed, unjustified and unreasonable, and should be cancelled.

Dated at Ottawa, this 29th day of May 2023

Nina Frid, Member