

Federal Court



Cour fédérale

**Date: 20200825**

**Docket: T-717-19**

**Citation: 2020 FC 850**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, August 25, 2020**

**PRESENT: The Honourable Associate Chief Justice Gagné**

**BETWEEN:**

**RENÉ POIRIER**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] René Poirier is seeking judicial review of a decision rendered by the Director Canadian Forces Grievance Authority in his capacity as final authority in the Canadian Armed Forces [Forces] Grievance Process. The Director denied Mr. Poirier's grievance after concluding that he

had been treated fairly and in accordance with applicable rules, regulations and policies when he was demoted and reclassified to the position of electrical distribution technician.

[2] Mr. Poirier argues that, if the Director had taken into account the available medical evidence, he would instead have been subject to a compulsory occupational transfer for medical reasons and would have been entitled to maintain his rank as well as his pay conditions.

## II. Facts

[3] René Poirier enrolled in the Forces in April 1998 as an air navigator. After failing the training in September 2000, he was reclassified as an artillery officer. In July 2004, he was promoted to the rank of captain.

[4] In 2005 and 2006, he failed the Forward Observation Artillery Officer Course twice. He needed this course to advance his career as a field artillery officer.

[5] Although the Course Report does not mention this, the applicant states that his failures were due to hearing problems that affected his performance. He alleges that he informed the training managers of this at the time and that he asked to have a hearing test done. However, it was concluded instead that Mr. Poirier was trying to make excuses and that he had difficulty accepting failure.

[6] In any case, this situation led Mr. Poirier's commanding officer to request an administrative review to determine Mr. Poirier's future prospects within the Forces. As a result

of the review, it was decided that Mr. Poirier would be considered for a compulsory occupational transfer, and if another classification was not found for him, he would be discharged from the Forces.

[7] Mr. Poirier was then offered a voluntary occupational transfer as a pastoral associate, which he accepted. He was given four years to complete the theology program at Laval University and two years to complete on-the-job training. Since an officer taking part in this program is only transferred to the chaplain occupation after successfully completing the program, Mr. Poirier remained a field artillery officer throughout his studies.

[8] Mr. Poirier began his studies in August 2007, but was unable to complete them within the allotted time period.

[9] As a result, the director of chaplain training requested an administrative review, and Mr. Poirier was once again assigned to the position of artillery officer [TRANSLATION] “as needed”.

[10] In November 2011, Mr. Poirier’s commanding officer requested another administrative review following Mr. Poirier’s 2006 failure and his withdrawal from the chaplain training program in 2011.

[11] In March 2012, the Director Military Careers ordered that Mr. Poirier undergo an occupational transfer process because it had been more than five years since his last assessment by a unit personnel selection officer.

[12] On June 18, 2012, the unit personnel selection officer determined that Mr. Poirier no longer met the new prerequisites to be assigned to the occupation of artillery officer, which now requires a university degree. Mr. Poirier was therefore offered the occupation of electrical distribution technician at the rank of untrained corporal. The change in rank from captain to corporal came with a drop in Mr. Poirier's salary and the loss of his commission (that is, the document issued by Her Majesty conferring officer status on the recipient member of the Forces).

[13] It was also in 2012 that Mr. Poirier insisted on having a hearing test done.

[14] He first had an audiogram on November 23, 2012, and the results showed [TRANSLATION] "speech discrimination, which [was] excellent in silence; when noise was added . . . , [it] became good". The audiologist added that [TRANSLATION] "the results and case history may suggest a central auditory disorder", and recommended that Mr. Poirier have a central auditory test done.

[15] On February 6, 2014, Mr. Poirier had an audiology test done. The results showed the following:

- Under the category [TRANSLATION] "Identifying Monosyllabic Words in Noise" that [TRANSLATION] "when competing noise was presented ipsilaterally with the same intensity as the speech signal, at

conversational level, Mr. Poirier's **performance was non-standard**" [emphasis in original];

- In the category [TRANSLATION] "Audiological Findings" that [TRANSLATION] "the auditory processing abilities assessment did not show an auditory processing disorder"; that [TRANSLATION] "the non-standard performances in the identification of monosyllabic words in noise could explain Mr. Poirier's difficulties in discriminating the verbal message over the radio in a noisy environment . . . in his artillery duties"; and that [TRANSLATION] "based on what Mr. Poirier has reported, this difficulty in discriminating in noise seems to have been present since at least when he was in school";
- Finally, under [TRANSLATION] "Recommendations", that [TRANSLATION] "the difficulty with hearing in noise, although real and persistent, does not seem to present obstacles to carrying out his activities and to his everyday life. However, this significant difficulty would explain why he could not meet the requirements of his position when he worked in the artillery, such as discriminating the verbal message over the radio in a noisy environment".

[16] It was only a few years later that Mr. Poirier learned that his condition was presbycusis: [TRANSLATION] "an auditory condition, often occurring as individuals age, which presents as a reduced capacity to hear or discriminate sounds".

[17] In an email dated July 3, 2015, in which Dr. Ricard of the Office of the Director Medical Policy of the Forces reported a shoulder problem that Mr. Poirier was suffering from, he stated the following:

[TRANSLATION]

If it is the problem with discriminating sounds, it seems unresolved in the file with respect to the final recommendations. Be aware that, if assessments have shown that he cannot communicate by

radio safely, it would be a limitation that breaches universality of service. . . .

Therefore, I suggest that, when he is put back to G2O2 with regard to his shoulder, you finalize the situation with his hearing. If his ability to perform military duties is not impaired, then G2O2. If there are issues, leave the O blank and submit to D Med Pol [Director Medical Policy] for what will become a G2O3. But, as I have said, any documented problem with the ability to communicate safely by radio would create a problem for a favourable AR/MEL decision. As far as I am concerned, it is more of a problem for a gunner than for an electrician. . . .

[18] To better understand this email, it is important to specify that the Forces' medical authorities establish the medical standards applicable to each occupation. Auditory acuity is classified under category H, and the number that follows that letter represents the level of auditory acuity. The minimum number for the gunner occupation is 2. A specific grade related to the occupation is also assigned under the letter O. The classification O2 is assigned to a member who has no medical employment limitations. The grade O3 is assigned to a member who has a medical employment limitation that can be clearly and precisely defined and may prevent the member from fully participating in common military tasks.

[19] On June 30, 2016, Mr. Poirier therefore asked that his medical condition, as yet undiagnosed when he failed in 2006, be retroactively recognized to justify his occupational transfer. A compulsory occupational transfer for medical reasons, rather than for academic failure, would allow him to have his salary adjusted on the basis of his previous captain's salary in accordance with subparagraph (2)(b) of article 204.03 of the *Compensation and Benefits Instructions*.

[20] That request was first denied on September 14, 2016, because Mr. Poirier's occupational transfer followed his 2006 failure, which was clearly documented to have been due to his lack of leadership and to the fact that he was unable to complete his university studies to become a chaplain, which Mr. Poirier has admitted was unrelated to his medical condition.

[21] This refusal is the subject of Mr. Poirier's grievance.

[22] On July 20, 2017, the initial authority assigned to deal with the grievance concluded that Mr. Poirier had been treated fairly and in accordance with the applicable policies. It noted that Mr. Poirier was never assigned a permanent medical employment limitation and that, because of this, he could not be eligible for a medical occupational transfer. It also commented that Mr. Poirier benefited from several career transfers, one of which required a significant financial investment from the Forces. It was Mr. Poirier who did not hold up his end of the bargain by successfully completing his paid university studies in a timely manner.

[23] The matter was then submitted to the Director Canadian Forces Grievance Authority in his capacity as final authority in the Canadian Forces' Grievance Process. The Director chose to mandate a Military Grievance External Review Committee, in accordance with subsection 29.12(1) of the *National Defence Act*, RSC 1985, c N-5 [NDA]. The grievor then has the opportunity to respond to the Committee's report, which is not binding on the Director.

[24] On April 26, 2018, the Committee recommended that the grievance be denied, noting the following, among other things:

[TRANSLATION]

Although there was no diagnosis of presbycusis concerning the grievor before 2014, it is not impossible that his failures in the air navigator training and in the Forward Observation Officer Course could be related to that condition. However, it seems difficult to arrive at this conclusion, even on a balance of probabilities, since the grievor brought no evidence regarding the sound environment during his air navigator training or during the Forward Observation Officer Course. Logically, the sound environment during his basic field artillery officer training, which he passed, should have been similar to that during the Forward Observation Officer Course, which he failed. Regardless, this does not explain the grievor's inability to successfully complete his university degree in theology within the prescribed time.

[25] After the Committee's report was issued and Mr. Poirier had the opportunity to comment on it, there was follow-up to Dr. Ricard's email dated July 3, 2015; Mr. Poirier's medical category was changed on August 22, 2018. The new medical report classified Mr. Poirier as H1O3. The report specified that Mr. Poirier [TRANSLATION] "should not be employed in positions where he will routinely be exposed to loud noise (firing range, near machinery, close proximity to aircraft engines, etc.) except for operational or training requirements". The numerical value corresponding to auditory acuity remained H1, but the grade taking into account the occupational factor changed from O2 to O3.

[26] Mr. Poirier was informed of this report containing his new permanent medical category at the beginning of September 2018. He forwarded it to the Director afterwards and asked him to take it into account in his final decision.

[27] In his decision dated March 19, 2019, the Director essentially adopted the Military Grievance External Review Committee's findings and recommendations as his own, noting that the Committee [TRANSLATION] "provided a thorough analysis of the issues [concerning



Mr. Poirier]”. The main part of the Director’s analysis (excluding the analysis of Mr. Poirier’s additional or alternative arguments) is relatively short and is worth reproducing in full:

[TRANSLATION]

You propose the argument that your FOO course failures were related to a vocal discrimination problem, not your lack of leadership as stated by the chain of command at the Field Artillery School. You state that you could not pick out the orders that were given to you by radio and that this difficulty discriminating sounds was not identified until February 6, 2014, following an audiology test. I do not accept this argument.

Your medical file was reviewed by a lead at the Office of the Director Medical Policy (D Med Pol). He asked an audiology expert to examine the result of the audiology report dated February 6, 2014. He confirmed that your hearing problem did not present an immediate danger during radio communications. After some consideration, the D Med Pol team determined that your medical category H1 would remain unchanged because you did not pose an immediate risk.

In considering this information, I reviewed your FOO Course Report dated June 2, 2006. The report shows that you had difficulty giving orders and driving your vehicle, especially in more complex situations. You had difficulty prioritizing tasks and giving clear and precise orders. You have also shown difficulty in solving tactical problems and providing logical recommendations. I note that your Course Report states that you had challenges with command and control throughout the entire course, specifically, in tense situations. I note that your Course Report indicates that you had problems that did not stem solely from situations related to radio communication.

On a balance of probabilities, ambient noise was not a relevant factor in your FOO Course failures. You had the means to reduce the noise. Although you state the opposite, I am of the view that the tools and equipment at your disposal enabled you to function adequately in ambient noise. Accordingly, I do not attribute your FOO Course failures to a limited ability to discern sounds, but rather to academic failure.

[28] That decision is the subject of this application for judicial review.

III. Issue and standard of review

[29] The only issue in this case is whether the Director erred in denying the applicant's grievance.

[30] The standard of review applicable to analyzing how a military grievance was dealt with by the Forces' final authority is reasonableness (see *Snieder v Canada (Attorney General)*, 2013 FC 218 at para 20; see also *Beddows v Canada (Attorney General)*, 2019 FC 671 at para 17).

[31] This standard continues to apply since the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[32] When analyzing a decision in accordance with the reasonableness standard, the Court must examine the reasons provided with respectful attention and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

IV. Analysis

[33] The applicant, who is representing himself, puts forward several frustrations resulting from the handling of his grievance, some of which are relevant and supported by the evidence, while others are not.

[34] However, he raises a point that is determinative in my opinion and warrants the Court's intervention.

[35] The Director relied on two key grounds in denying the applicant's grievance:

1. He concluded that the grievance was unfounded because, after a review of the applicant's medical file, the Director Medical Policy of the Forces maintained his permanent medical category at H1.
2. In light of this fact, the Director examined the 2006 Course Report and concluded that the applicant was having problems that did not stem solely from the situations related to radio communication.

[36] The first problem I see with these reasons is that the Director completely ignored the [TRANSLATION] "operational factor" component of the medical report, which resulted in a reservation expressed by Dr. Ricard in his July 3, 2015 email (the content of which is reproduced at paragraph 17 of these reasons) as well as a change in medical category from O2 to O3 on August 22, 2018 (together with comments reproduced at paragraph 25 of these reasons).

[37] The Director admitted that he largely relied on the findings and recommendations of the Military Grievance External Review Committee. However, the Committee's report was issued on April 26, 2018, while the applicant's medical classification was not modified until August 22, 2018. As stated above, the applicant was informed of this in September, and he immediately contacted the Director's office so that the Director would take it into account in his final decision, which was not rendered until March 19, 2019.

[38] The first version of the Certified Tribunal Record filed with the Court in May 2019 does not contain that document. An addendum to the record, containing the new medical classification and the applicant's email, was produced in July 2019, however. This unequivocally confirms that the Director had this information when he issued his final decision.

[39] It is well known that an administrative decision maker does not have to set out all of the evidence filed by the parties (*Vavilov* at para 128). However, when one of the decision maker's main findings tends to contradict an overlooked piece of evidence, it should be questioned whether that piece of evidence was given due consideration.

[40] In this case, in denying the applicant's grievance, the Director first relied on the fact that the Director Medical Policy maintained his H1 classification. As stated above, the auditory acuity factor was not the only one to be considered. The Director should also have considered the operational factor represented by the letter O or, if he considered it irrelevant, justified why the July 2015 warning and the new permanent category assigned in August 2018 had no impact on his decision. The lack of such an explanation makes his decision internally irrational.

[41] The second problem I see with the Director's reasons is that it is difficult to know what the result of his analysis of the 2006 Course Report would have been, had he considered the applicant's new medical category (O3) and the comments accompanying it. They indicate that Mr. Poirier [TRANSLATION] "should not be employed in positions where he will routinely be exposed to loud noise (firing range, near machinery, close proximity to aircraft engines, etc.) except for operational or training requirement".

[42] Not having the Director's military expertise, the Court can only speculate as to what exactly this means and what impact such a recommendation, made in August 2018 after the need to reassess the operational factor was raised in July 2015, may have on the Director's analysis.

[43] The Court is also forced to speculate regarding the Director's basis for finding that the applicant had problems that did not stem solely from situations related to radio communications. This certainly suggests that the problems were partially due to situations related to the radio.

[44] That said, since the Director partially based his decision on the fact that the applicant's medical category was maintained by the Director Medical Policy of the Forces without mentioning that it was actually modified following a recommendation made in 2015, this suggests that he did not take this modification into account in his analysis of the applicant's grievance.

[45] It follows that the Director's decision is not justified in relation to the facts that constrained him. It is also not internally coherent because it requires the Court to speculate on the impact of this evidence on the Director's findings.

## V. Conclusion

[46] For these reasons, the applicant's application for judicial review is allowed, and the matter is referred back to the Director Forces Grievance Authority for redetermination.

[47] Costs in the amount of \$1,500.00 are awarded to the applicant.

[48] Finally, the respondent was correct in asking that the style of cause be modified to substitute the Attorney General of Canada for the Chief of the Defence Staff as respondent.

**JUDGMENT in T-717-19**

**THIS COURT'S JUDGMENT is as follows:**

1. The applicant's application for judicial review is allowed.
2. The decision of the Director Canadian Forces Grievance Authority, dated March 19, 2019, is set aside, and the matter is referred back to him for redetermination.
3. The style of cause is modified to substitute the Attorney General of Canada for the Chief of the Defence Staff as respondent.
4. Costs in the amount of \$1,500.00 are awarded to the applicant.

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"Jocelyne Gagné"  
Associate Chief Justice

Certified true translation  
This 9th day of September 2020.

Michael Palles, Reviser

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

**DOCKET:** T-717-19

**STYLE OF CAUSE:** RENÉ POIRIER v CHIEF OF THE DEFENCE STAFF

**PLACE OF HEARING:** BY VIDEOCONFERENCE BETWEEN QUÉBEC,  
QUEBEC, AND OTTAWA, ONTARIO

**DATE OF HEARING:** JUNE 16, 2020

**JUDGMENT AND REASONS:** ASSOCIATE CHIEF JUSTICE GAGNÉ

**DATED:** AUGUST 25, 2020

**APPEARANCES:**

René Poirier

FOR THE APPLICANT  
(ON HIS OWN BEHALF)

Ami Assignon

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Attorney General of Canada  
Halifax, Nova Scotia

FOR THE RESPONDENT