PA 14572-6

PROTECTED B

MEMORANDUM

5000-12-H TD 91056 (DPLS)

930255

25 Jan 93

Distribution List

APPLICATION FOR REDRESS OF GRIEVANCE

[redacted]

Refs: A. CFB Shearwater BPAdmO 1001 041300Z Jan 92 (encl)
B. DPCAOR 131 041535Z Dec 92

1.(PB) Ref A requested advice as to whether the griever, whose promotion was apparently denied effective 24 Apr 90 solely because of his homosexual orientation, should now be promoted in accordance with ref B, with an effective date of 27 Oct 92 (the date the interim policy was revoked) or 24 Apr 90.

2.(PB) As you may be aware, the griever is one of a number who have both submitted grievances and lodged complaints with the Human Rights Commission. In all such cases, this Directorate has advised the griever that the grievance will be held in abeyance pending resolution of the Human Rights case. By so doing, this will avoid the possibility of inconsistent resolutions of grievances and settlements of overlapping Human Rights complaints. However, despite grievances being placed in abeyance while unresolved Human Rights complaints are being settled, there is a requirement that any continuing negative effects of the former CF policy on the griever/complainant not be permitted to continue if administrative action can ease the situation. Hence, I consider that there is a requirement to implement ref B as quickly as possible, without waiting for Human Rights conciliation procedures which may take some time. (In this regard, I would note that D Pers A has been requested to ensure any release signed in Human Rights settlements on sexual orientation where there is also a grievance outstanding, contains a declaration that the separately-submitted application for redress is withdrawn as being satisfied in full).

3.(PB) Even though DPLS is, therefore, in view of the above action, not now involved in the settlement of specific sexual orientation grievances where concurrent Human Rights

complaints have been lodged, this Directorate will continue to attempt to administratively resolve those cases where only a grievance has been submitted with no overlapping complaints to the Human Rights Commission or to Federal Court. Therefore, it remains a matter of concern, in the interests of consistency and fairness, to ensure that the same "rules" are followed to the greatest extent possible, including "rules" as to the timing of the implementation of any administrative decisions.

4.(PB) As the same standards of fairness must be used for complaints under the Charter or the Canadian Human Rights Act, and for grievances under the National Defence Act, I would consider it necessary to look briefly at the Douglas case, since that is the case that caused CF policy to formally change once and for all. It must be remembered that Douglas was not a Human Rights complaint but, rather, a complaint under Section 15 of the Charter. In declaring that the CF policy was contrary to Section 15 of the Charter, the Judge in effect was saying that the policy had not been legal, at least from the time that section of the Charter came into force and effect, namely, since Apr 85.

5. Since the sexual orientation policy which applied to [redacted] was applied to him in 1990 and, since it was applied contrary to Section 15 of the Charter which was then in effect, it is necessary to "undo" the decision, effective from the time it was made and, to the maximum extent possible, to place him and other persons similarly involved in the same position as if the initial career-limiting decision had never been made. In the [redacted] situation, the only way to put him in the position as if the policy (declared to be contrary to the Charter) had never been applied would be to promote him with effect from 1990. Further, as he has possibly lost some ground in competition with his heterosexual counterparts who actually were promoted in 1990 (eg, PERs as corporals, career courses or career-related postings), he should be considered for such courses as soon as practicable. While it is realized that history cannot be re-written and that [redacted]s PERs of 1991 and 1992 will always be those of a Private instead of a Corporal, such possible future harm done to his career would undoubtedly also be taken into consideration in any resolution of the Human Rights complaint by D Pers A with a Human Rights adjudicator -- a matter beyond the scope of this memo.

6.(PB) Please note that I have limited my remarks on retroactivity and retrospectivity to those cases where a Federal Court has determined a policy to be contrary to the Charter - I have not dealt with either retroactivity or retrospectivity of Human Rights Tribunal decisions (eg, BFOR

in certain medical cases), and certainly not with either retroactivity or retrospectivity of policy changes made by the CF in the absence of Federal Court of Human Rights Tribunal decisions (eg, BMI). These areas require a separate review. I trust the above is suitable for your purposes.

S.H. Forster
Col
DPLS
996-6602

Encl:

DISTRIBUTION LIST

Action	Info
DPCAOR	DGPP
	D Pers A
	D Law/HRI