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Ombudsman for the Defence Forces Annual Report 2016



Ombudsman for the Defence Forces

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Customer Charter

The Ombudsman for the Defence Forces was established by law to provide a statutorily independent appeals process whereby members of the Defence Forces who have processed a complaint through the Redress of Wrongs system, but remain dissatisfied with the outcome, may refer their grievance to the Ombudsman for review.

The Ombudsman for the Defence Forces also accepts complaints made directly by former members of the Defence Forces, subject to certain conditions.

Pursuant to sections 4 and 6 of the Ombudsman (Defence Forces) Act 2004 the Ombudsman may, with certain exceptions, investigate an action taken by a member of the Defence Forces or a civil servant of the Department of Defence, which

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- (a) has or may have adversely affected a complainant, where
- (b) the action was or may have been
 - (i) taken without proper authority,
 - (ii) taken on irrelevant grounds,
 - (iii) the result of negligence or carelessness,
 - (iv) based on erroneous or incomplete information,
 - (v) improperly discriminatory,
 - (vi) unreasonable, notwithstanding consideration of the context of the military environment,
 - (vii) based on undesirable administrative practice, or
 - (viii) otherwise contrary to fair or sound administration,
- (c) the action was not an order issued in the course of a military operation, and
- (d) in the case of a serving member of the Defence Forces, the matter is not likely to be resolved and a period of 28 days has expired since the complaint was made under section 114 of the Act of 1954.

The Ombudsman for the Defence Forces strives to provide a fair, user-friendly and accessible means of adjudicating cases.

I hereby submit the 2016 Annual Report of the Ombudsman for the Defence Forces pursuant to Section 7 of the Ombudsman (Defence Forces) Act, 2004. This is the 11th Annual Report submitted in relation to the work of the Ombudsman for the Defence Forces since it was established on the 1 December, 2005.

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Patrick Anthony McCourt Ombudsman for the Defence Forces



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The Ombudsman for the Defence Forces wishes to thank the Defence Forces Press Office for the use of the photographs contained in this Annual Report.

https://www.flickr.com/photos/dfmagazine

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Introduction:

am pleased to present the 11th Annual Report of the Ombudsman for the Defence Forces (ODF) for the year 2016. This Annual Report reflects the work of this Office for the eleventh full year since it was established on the 1 Dec 2005. It is also the 5th Annual Report issued by me since my appointment as Ombudsman on the 7th November 2012. This Report covers my fourth full year as Ombudsman for the Defence Forces (ODF). I was re-appointed by the President for a second term of two years with effect from the 7th Nov 2015.

My policy of electronic publication of the Annual Reports of this Office is being continued. I wish to record my sincere thanks to the Chief of Staff of the Defence Forces for his agreement to make my Annual Reports available to all members of the Defence Forces through the Defence Forces Intra-Net. I greatly appreciate his assistance in this regard. Electronic copies will also be made available to various interest groups and individuals by my Office. Annual Reports are also published on the ODF web-site. A small print run will be undertaken for record and archival purposes. These arrangements ensure economic efficiencies and facilitate easy access to the Report.

It is with deep regret that I acknowledge that this Office's operational activities continued to be limited throughout 2016 for legal reasons. A High Court challenge to my appointment was initiated in November 2012. While the legality of my appointment to the Office of Ombudsman for the Defence Forces was upheld by Mr Justice Hedigan in his decision of the 21 November 2013, that decision was appealed to the Supreme Court in Dec 2013. The appeal to the Supreme Court was subsequently transferred to the Court of Appeal upon its establishment. To the end of 2016, more than three full years after the High Court judgment, the appeal had yet to be initiated or listed before the Court of Appeal. Efforts to date to have the matter expedited have been unsuccessful. The fact that the appeal had not been progressed at all by the end of 2016 was deeply disappointing. Once again I urge the relevant authorities to take all necessary steps to have the matter finalised

without delay. Of course, I do take some comfort from the fact that no further legal challenge was made to my re-appointment to this Office on 7 November 2015.

I am pleased to record my sincere thanks and appreciation to Vice Admiral Mark Mellett DSM for his support and his continued commitment to maintaining effective channels of communications between our respective Offices and our staffs with a view to expediting the resolution of complaints referred to my Office. I also take this opportunity to congratulate the Chief of Staff and every member of the Defence Forces for their superb contributions to the great many ceremonial events held throughout the country to mark the centenary of 1916. While the number and variety of events undertaken by Defence Forces personnel throughout 2016 undoubtedly posed both organisational and personal difficulties every ceremonial occasion was performed with the utmost professionalism and precision which we the people of Ireland now expect and take for granted from our Defence Forces. Every member of the Defence Forces is entitled to be proud of the contribution they made. Well done to all. I wish the Chief of Staff continued success in his onerous Office. I greatly appreciated that he found time in his busy schedule to meet with me again during 2016 and that he agreed to continue the very good relationship between our respective Offices. We again agreed to focus on the early resolution of complaints whenever possible. The ongoing level of communication and cooperation between my Office and the various Military Authorities with whom my Office needs to be in contact with is excellent.

The statistics included in this 11th Annual Report provide an overview of the ODF activity during 2016. During 2016, my office received 81 Notifications of Complaints (NOCs) from the Defence Forces, in respect of Redress of Wrongs (ROW) applications pursuant to section 114 of the Defence Act 1954, which had been initiated by serving members of the Defence Forces. In addition, this Office received 1 direct referral of a complaint from a former member during 2016. The total number of complaints notified to this Office for 2016

was 82. This was a significant year on year reduction of 29 (26%) on the 111 notifications received during 2015. The 82 notifications of complaints received in 2016, compared with 111 for 2015, 112 for 2014, 124 for 2013, 127 for 2012, 78 for 2011 and 62 for 2010, indicates that, while the annual number of complaints notified peaked in 2012 and reduced gradually thereafter, they continue to remain above the 2011 and 2010 levels. Of the 81 notifications received from the Defence Forces during 2016 some 40 (49%) were withdrawn or resolved during the year.

The number of cases on hands, at various stages of consideration, decreased from 115 on 1 Jan 2016 to 113 on 31 Dec 2016. In that regard, 2016 was a significant year in which the number of cases under review by my Office was reduced, albeit only by 2, for the first time during my term of office. Some 24 cases were brought to a final determination during the year. During 2016, an additional 22 new cases were referred to the ODF. Accordingly, 137 cases were under review by the ODF during 2016. While this was a 3.8% increase on the 132 cases under review in 2015, a 19% increase on the 115 cases under review in 2014 and a more significant 37% increase on the 100 cases under review in 2013, it may well mark a turning point. 24 Final Reports and 6 Preliminary Reports were issued during 2016. A total of 113 cases remained under review on the 31 Dec 2016, a slight reduction of the previous year ending. A number of Final Reports issued during 2016 related to various aspects of the 2012 NCO Promotion Competition. The high backlog of cases on hand is mainly due to the number of such cases.

Having regard to the continuing and steady decline in 2016 in the level of notifications of complaints received since 2012, I am pleased to report that the previous annual increases in the number of cases under review appear to have been stabilised and for the first time actually reversed during the year. While 2016 appears to confirm a trend towards lower levels of complaints being referred to the ODF since 2012, it is too early to judge if that trend will be sustained in the longer term.

The ODF's role is to provide an independent, impartial and accessible mechanism for reviewing complaints within jurisdiction and overseeing administrative processes and practices in the Irish Defence Forces. My remit also includes reviewing complaints regarding 'actions' taken by, or on behalf of, civil servants in the Department of Defence, concerning the performance of their administrative functions in the Department. The interaction of the Office of the ODF with the Defence Forces and with Departmental officials, together with the responses of the Military and Departmental Authorities to case reports issued in recent years, as well as initiatives undertaken by those Authorities themselves, have together contributed to improvements in the standards of administration. The ODF plays a continuing important role by highlighting, as necessary, the importance of statutory, regulatory and administrative frameworks which must be adhered to and by ensuring that complaints are dealt with in a manner which, having due regard at all times to operational requirements, respects the nature of the Irish Defence Forces as well as the rights of all of its serving and former members. I acknowledge and commend all Authorities for their generally positive and helpful responses to inquiries from and reports issued by the ODF.

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Every member of the Defence Forces is entitled to be proud of the contribution they made.

I believe that the influence of the independent and impartial civilian office of the ODF since it was established in Dec 2005, in the resolution of complaints within the Defence Forces, has been significant. I acknowledge the engagement and leadership shown by the Minister for Defence and his Departmental officials during the period of this report. I also acknowledge the

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support and cooperation of the Chief of Staff, Vice Admiral Mark Mellett, DSM, as well as that of his Senior Staff Officers, members of the Irish Defence Forces and their Representative Associations. I have noted a particular willingness on the part of the Military Authorities to engage with my Office with a focus on bringing complaints to a satisfactory and acceptable resolution, having regard to observations and recommendations of my Office. There is general agreement on the desirability of resolving complaints at the earliest possible opportunity. For this I commend both the Military and Departmental Authorities. In this context and having regard to my own previous recommendations, those of my predecessor and of the IMG report, I have engaged with the Military and Departmental Authorities in discourse on changes to the existing system which would contribute to earlier effective resolution of complaints. I remain of the opinion that the present system includes delays which are excessive. I recommend that a coordinated effort be made to reduce those delays. A significant reduction in the current reliance on lengthy formal reports by my Office, to finalise complaints referred to me, is both desirable and achievable. Effective complaints procedures focus on internal informal early resolution as the norm. Formal multi-layered investigations and reports should be the exception rather than the rule. If the delays in the current system are to be addressed, having regard to available resource levels, changes in that direction are necessary. I have previously recommended the promotion of informal resolution based on direct contact with this Office at the Investigation Officer's report stage, my formal preliminary views and by better use of electronic means of communication between my Office, complainants, military and civil authorities. I have noted that such changes may require amendment to the legislative and regulatory framework. I repeat my offer of the formal or informal assistance of my Office in any circumstance where it could contribute to the early and speedier resolution of complaints. I believe that agreed consultation and interaction with my Office at the Investigation Officer's report stage, either formally or informally, in appropriate cases could significantly

contribute to the earlier resolution of complaints. I welcome and appreciate the Minister's acknowledgement of my interest in streamlining procedures and introducing efficiencies to improve case progression and his undertaking that his officials and the military authorities will continue to work with my Office over the coming year to address that issue.

It is essential that complaints regarding the administrative procedures of the Defence Forces and those of the Department of Defence continue to be subject to external scrutiny by an independent and impartial civilian authority which has a degree of knowledge, understanding and competence in such matters. Members of the Irish Defence Forces are unlike any other class of public service workers. They are citizens who have volunteered to submit to a unique regime within the State. Irish soldiers of all ranks, as 'citizens in uniform', voluntarily submit themselves to military law, which comprises, not only, all of the ordinary laws of the State, but also a strict code of military discipline provided by the Defence Act 1954, Defence Force Regulations, Administrative Instructions and the orders of superiors, both written and verbal. Potentially, non compliance with any element of military law could be a punishable offence. Military law and discipline is enforced by a strict military legal system which can be applied only to a disciplined body with a chain-of-command structure. In such unique circumstances independent civilian oversight of complaints is rightly vested in the ODF by section 4 of the Ombudsman (Defence Forces) Act 2004. Most democratic countries have an Inspector General or a Parliamentary Commissioner or an Ombudsman for the Armed Forces for that purpose.

Subject to a 12 month time limit, the Ombudsman may investigate an *'action'* [defined in the 2004 Act as including *'a failure ... to carry out an act or make a decision'*] by a serving or former member of the Defence Forces, or by a civil servant concerning the performance of administrative functions by that civil servant in the Department of Defence, where it appears to the Ombudsman that the action complained of has or may

have adversely affected a member or former member of the Defence Forces and where the action was, or may have been, *taken without proper authority, taken on irrelevant grounds, the result of negligence or carelessness, based on erroneous or incomplete information, improperly discriminatory, unreasonable (even in the military context), based on undesirable administrative practice, or otherwise contrary to fair or sound administration*, in circumstances where the action complained of was not an order issued in the course of a military operation.

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A significant reduction in the current reliance on lengthy formal reports by my Office, to finalise complaints referred to me, is both desirable and achievable.

Certain 'actions' are excluded by law from investigation by the Ombudsman pursuant to section 5 of the Act of 2004, even though the complainant may be perfectly entitled to complain about them under the current Redress of Wrongs scheme, by virtue of the use of the unlimited term "any matter" in section 114 of the Defence Act. The actions excluded from the remit of the Ombudsman are those in respect of which the complainant has initiated legal proceedings in a civil court, actions which have been or are the subject of an investigation or punishment under the code of military law, an action relating to or affecting security or a military operation (as defined in the Act), an action relating to the terms or conditions of employment in the Defence Forces, including an action relating to the negotiation and determination of rates of remuneration or allowances, which is within the scope of a conciliation and arbitration scheme referred to in section 2(6) of the Defence (Amendment) Act 1990, actions concerning the organisation, structure and deployment of the Defence Forces, actions concerning the administration of military

prisons or places of detention, or actions taken before 1 December 2005.

The Office of the Ombudsman for the Defence Forces was eleven years in existence during 2016. Last year, I recommended a review of aspects of the 'actions' excluded from my jurisdiction by the 2004 Act, in the light of experience to date. I believe that there is an urgent need to clarify the limits or extent of the statutory exclusions and to reconsider whether it is militarily or otherwise necessary to exclude any or all of them totally. In that regard I again raise the question:

In circumstances where maladministration is a primary consideration for an Ombudsman, why should any administrative aspect of most, if not all, of the excluded matters be outside the jurisdiction of the Ombudsman?

Consider two scenarios. Firstly, a member or former member of the Defence Forces can submit a complaint regarding '*any matter*' under the Redress of Wrongs (ROW) provisions of section 114 of the Defence Act. Once the ROW process is exhausted the complainant has a right to have the complaint referred to the Ombudsman, who may have no jurisdiction to investigate the complaint because of the exclusion provisions of section 5 of the 2004 Act. Once again, in the light of experience I ask the simple question:

Are all of the Section 5 exclusions necessary and reasonable in circumstances where the powers of the ODF are limited to a non-binding recommendation to the Minister?

I am advised that a Departmental review of ROW provisions will be finalised shortly. That review will, hopefully, have due regard to my proposals for improved systems.

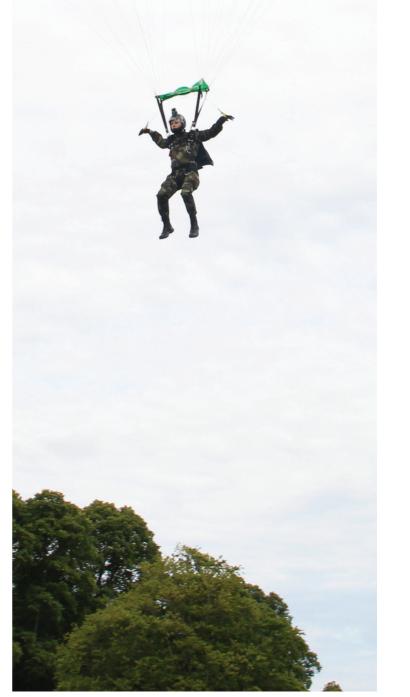
Secondly, a member or former member of the Defence Forces may complain directly to this Office about an *'action'* taken by a civil servant, *concerning the performance of administrative functions by that civil*



servant in the Department of Defence, in circumstances where such a complaint is not admissible under the Redress of Wrongs provisions of section 114 of the Defence Act, and where there is no internal complaint investigation procedure provided therefor within the Department of Defence. In this regard, I again ask:

Is it not readily apparent that there is a need to have an internal complaints procedure within the Department of Defence to receive and address, and where possible speedily resolve, complaints relating to 'actions' of civil servants affecting members or former members of the Defence Forces, before such decisions are appealed to this Office?

I thank the Minister for bringing to my attention the Department's Customer Charter. It includes a general Complaints and Appeals Procedure, published on its website. I have considered its terms. It is an entirely different arrangement to that provided for the resolution of Redress of Wrongs applications pursuant to the Defence Act and the Ombudsman (Defence Forces) Act 2004. Nowhere does the Department's complaints scheme provide a link with this Office's jurisdiction. It does not provide a procedure for complaints by members of the Defence Forces regarding an 'action' taken by a civil servant of the Department. It contains no reference to referral or appeal of a delay or an unfavourable outcome to the Ombudsman under the Ombudsman Act 1980 or to this Office under the Ombudsman (Defence Forces) Act 2004. The Department's Complaints and Appeals Procedure appears more focused on the needs of members of the general public or those of civil servants within the Department, as 'customers', than those of members or former members of the Defence Forces. Complaints by members of the Defence Forces should be addressed within clearly defined procedures at the lowest possible level and at the earliest opportunity. That clearly points to a need to review the lack of such arrangements and to develop and publish a simple, user friendly, internal Department of Defence complaints procedure for complaints by members of the Defence Forces against the administrative 'actions' of Departmental civil servants with a link to this Office. The role of this Office should normally be limited to a review of



the internal investigation of the complaint and of the adequacy and outcome of the Department's complaints process and where necessary the making of appropriate recommendations thereon to the Minister. I welcome the Minister's assurance that, in regard to appropriate investigation arrangements with officials of his Department, the 'underlying working assumption in all dealings with [my] Office is one of co-operation and a willingness to assist [me] in [my] tasks.' My Office is prepared to engage in further dialogue with the Department, at a suitable level, with regard to the development of appropriate arrangements in that regard.

Further to the aforementioned, additional jurisdiction was assigned to my Office pursuant to section 20 of the Protected Disclosures Act 2014. Under that whistleblower legislation the Ombudsman may also investigate a complaint, referred directly to him by a Complainant, that s/he has been penalised, or threatened with penalisation, for having made a protected disclosure under that Act, when the complaint is not one submitted under the Defence Forces Redress of Wrongs legislation. In such sensitive circumstances I reiterate that there remains:

A need to establish and agree appropriate investigation arrangements with the Department of Defence, including procedures for compliance with the production of information provisions of section 8 of the Ombudsman (Defence Forces) Act 2004.

Generally, all 'administrative actions' of the military authorities and of civil servants of the Department of Defence, including 'a failure to carry out an act or make a decision', are, or ought to be, reviewable by this Office. I restate my previous recommendation that these matters be addressed and clarified in an urgent review of the legislation, i.e., the Defence Act 1954 and the Ombudsman (Defence Forces) Act 2004. I again recommend that, in such a review, consideration be given to the adoption of measures which would contribute to reducing delay and speed up the Defence Forces ROW and Complaints processes. Serious consideration ought to be given to a 90 day target for the resolution of complaints referred to the ODF, similar to that contained in the EU Alternative Dispute Resolution (ADR) Directive 2013 on consumer rights. Regard should also be had of available resources. Current practices, procedures and resources would need to be addressed to facilitate the achievement of the proposed time line target.

In the absence of this Office as an independent investigative authority for a complaint by a member or former member of the Irish Defence Forces, such a complaint could, and in some cases would, be addressed by way of Judicial Review in the High Court with resultant significant legal costs for the complainant and for the State.

I believe that it is in the best interests of complainants, the Military Authorities and the Department of Defence, that complaints and concerns regarding administrative procedures and practices are dealt with in a nonadversarial Alternative Dispute Resolution (ADR) type structure, such as that provided by the ODF. The system should allow good interpersonal relationships to be retained and facilitate direct engagement between the parties, to resolve the *'action'* complained of wherever possible. Having regard to resource levels available, I believe that the Office of the ODF continues to provide good value for money.

A Complainant who refers a complaint to the ODF is entitled to expect that a remedy will be available in the event that his/her complaint is upheld. Such remedies may concern an apology for maladministration, a promotion, a place on a career course, or a particular posting or duty. Effecting such a remedy may be problematic where a promotional opportunity is gone, where a course has already commenced or even finished, or where a particular duty, such as an overseas duty may have already commenced. In such cases, this Office acknowledges the patience, realism and enduring acceptance of reality which members and former members of the Irish Defence Forces have demonstrated. Complainants have informed the ODF that, notwithstanding the absence of an appropriate remedy in certain instances, they were pleased that their grievance was investigated and upheld and that they were vindicated in their complaint.

The absence of a suitable remedy may also be due partly to the time delay between the date of the 'action' complained of and the issuing of Final Reports and recommendations by this Office. The proposals I have made above are intended to contribute to the reduction, or elimination, of delays. It continues to be my policy to offer direct and early intervention in any case where it appears that such intervention might contribute to an earlier resolution of the matter between the parties. I am satisfied that with continued good will, improved information exchanges and an open minded approach by all parties, complaints could and would be resolved earlier than heretofore, while suitable remedies remain available. I believe that the ongoing review of the ROW process provides an opportunity for serious consideration of early intervention initiatives, which would contribute to improved and speedier outcomes.

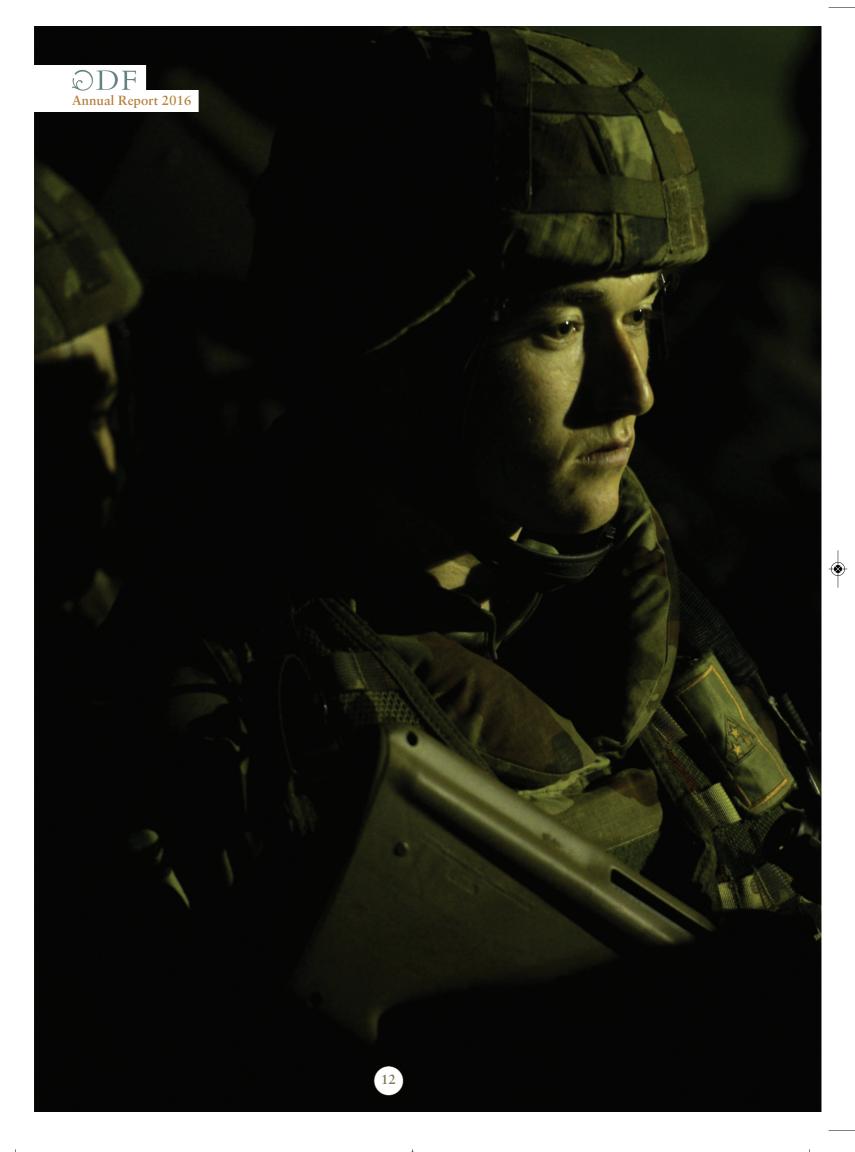
Previous Annual Reports have included recommendations for administrative and systemic reform. Monitoring the implementation of such recommendations, once accepted by the Minister for Defence, remains a function of the ODF. I thank the Department of Defence for providing me with regular updates from the Standing Committee on Defence Forces Personnel Policy Issues on the implementation status of reforms arising from ODF recommendations. In some instances, the implementation of reforms requiring C&A agreement takes too long. In 2016, the ODF in association with the Department of the Defence, audited outstanding administrative and systemic reforms and agreed, where appropriate, timescales for undertaking and completing internal Military/Departmental reviews and implementing such reforms. I acknowledge the support and assistance of the Department of Defence in this regard.

During 2016, the ODF continued its engagements with the Ombudsman Association (OA) – the organisation for Ombudsman and Complaint Handler Office Holders in the UK and Ireland. The ODF membership of the OA was re-accredited in 2013/2014 following a review of all members of the Association. *To underpin independence the OA recommended a minimum* term of Office of five years for an Ombudsman. I have passed that recommendation to the Minister. The ODF also continued its membership of the International Ombudsman Institute (IOI). The ODF continued to engage with the International Conference of Ombudsman Institutions for Armed Forces (ICOAF) the international grouping of Offices of Ombudsman or Inspectorates of Armed Forces. This is a very relevant and interesting international forum for military Ombudsmen, which met in Amsterdam in 2016. The ODF also continued its engagement with the Irish Ombudsman Forum. This Forum of Ombudsman Institutions within Ireland, established in December 2013, pursues matters of common interest to Ombudsman Institutions in Ireland, including engagement with the relevant Oireachtas Committee(s). The year 2016 witnessed the outcome of the further revised 2014 NCO Promotion Agreement. It addressed issues which were the subject of complaints to this Office regarding the 2012 Agreement. Competency based assessments now appear to be more acceptable to the members of the Defence Forces. NCO promotion vacancies continued to be filled from panels established at national level with inevitable disappointments for unsuccessful candidates. While the 2012 promotion system contributed to an upward movement in complaints notified to this Office, the 2014 revised arrangements do not appear to have had as significant an impact on the level of complaints to this Office.

In conclusion, I thank the Minister for undertaking an initiative to address the issue of unrealised career expectations as a Defence Forces HR policy issue, as recommended in my last report. I hope that the development of the Defence Forces Integrated Competency Framework across all ranks will succeed in addressing the management of realistic career expectations.

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Patrick Anthony McCourt Ombudsman for the Defence Forces







Highlights of 2016

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Notifications of Complaint received in 2016, including 1 directly referred by a former member of the Defence

Forces. This was a 26% reduction on the 111 notifications received in 2015.

67 Notifications of Complaint received were in respect of Privates and NCOs and 15 were in respect of Officers. reduction in complaints notified since the 2012 peak of 127.

35%

cases in all were under review by the ODF during 2016. This is a 3.8% increase on the 132 cases under review in 2015.



cases remained under review by the ODF on the 31 Dec 2016, a reduction of 2 from 1 Jan 2016. new cases were referred to ODF in 2016. This includes 1 case that was directly referred to this Office. This is a significant 31% reduction on the 32 new cases referred to ODF in 2015.

cases were brought to final conclusions by the ODF during 2016. In addition, progress was achieved during 2016 in 6 of the remaining cases under review. In addition, Preliminary Reports were issued during 2016 in 6 of the remaining cases under review.



3 Analysis of Complaints & Appeals - 2016

Notifications of Complaint

81 Notifications of Complaint were received by my Office from the Defence Forces during 2016, as well as 1 direct referral for a total of 82. This is a 26% decrease on the 111 complaints notified to my Office in 2015. Of those complaints, 67 were from serving or former other ranks personnel while 15 were from serving or former commissioned officers.

Of the Notifications received during 2016, some 40 were withdrawn or resolved during the course of the year and 12 were referred to the ODF for investigation. 10 other complaints, notified in 2015, were also referred to ODF for investigation during 2016.

The ODF also received some 87 direct contacts from members of the Defence Forces or members

of the public in relation to queries, concerns or information requests. There were also numerous direct contacts between the ODF and the Military Authorities and individual members in respect of individual cases, however, such contacts are not recorded for statistical purposes.

Direct referrals to ODF

Serving members of the Permanent and Reserve Defence Forces must initially process their complaints through the statutory (section 114 Defence Act 1954) Redress of Wrongs procedure and exhaust the internal Defence Forces process before referring their complaint to this Office. Former members of the Defence Forces may refer their complaints directly to this Office, subject to the requirements of the Ombudsman (Defence Forces) Act 2004.



In 2016, only 1 complaint was referred directly to this Office. This is a reduction on the 3 complaints referred directly in 2014 and 2015. The complaint was from a former commissioned officer.

Cases reviewed by ODF in 2016

On 1 Jan 2016, some 115 cases were carried forward under review by this Office. During 2016 some 22 new cases were received by this Office. The total number of cases under review by this Office during 2016 was 137. Of these, some 24 cases were brought to a final conclusion during 2016. Some 113 cases remained under review on 31 December 2016 and were carried forward for consideration in 2017. This represents a slight increase on the numbers carried forward from 2015 and a 13% increase on the number of cases carried forward from 2014.

Details of Complaints Investigated by ODF in 2016

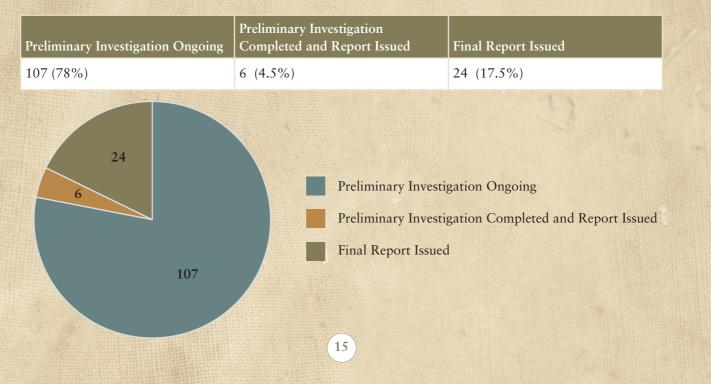
The following Tables set out the nature of complaints considered by this Office during 2016 along with details of complaints by military formation. It should be noted that complaints categorised as 'Maladministration' cover a variety of issues including complaints in respect of



performance appraisal and issues related to discharge among others. Complaints categorised as 'Interpersonal Issues' include those where there appear to be elements of personality conflict, inappropriate behaviour or alleged bullying.

Total cases

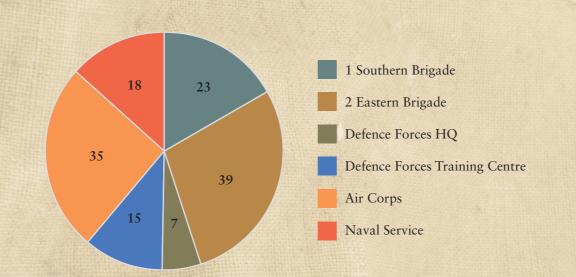
The following table outlines the progression of the 137 cases during 2016 -



Cases by Military Formation

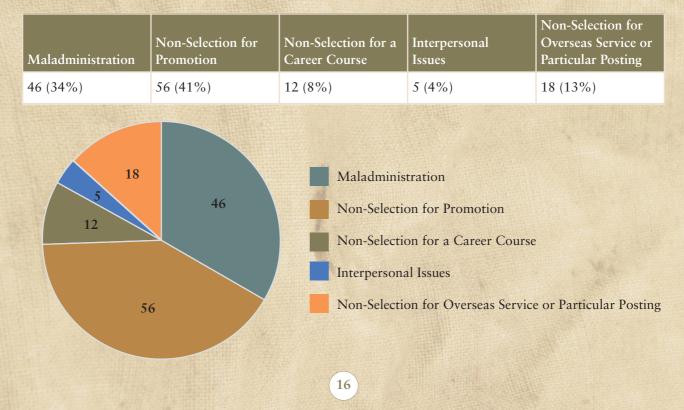
Of the 137 cases on hand during the course of the year, the following table outlines the number of cases arising in each Military Formation.

1 Brigade			Defence Forces Training Centre		Naval Service	Total
23 (17%)	39 (28.5%)	7 (5%)	15 (11%)	35 (25.5%)	18 (13%)	137



Nature of Cases

The nature of the cases on hand with the ODF during 2016 can be broken down into the following broad categories –





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Details of Cases by Formation

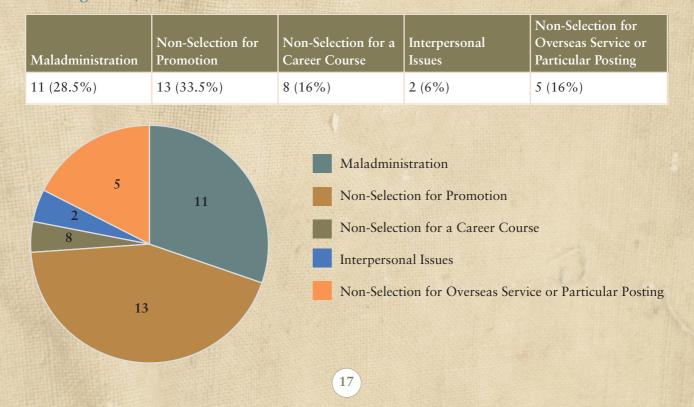
The following tables and charts set out the nature of cases on hand during 2016 by individual Military Formations –

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1 S Brigade - (23)

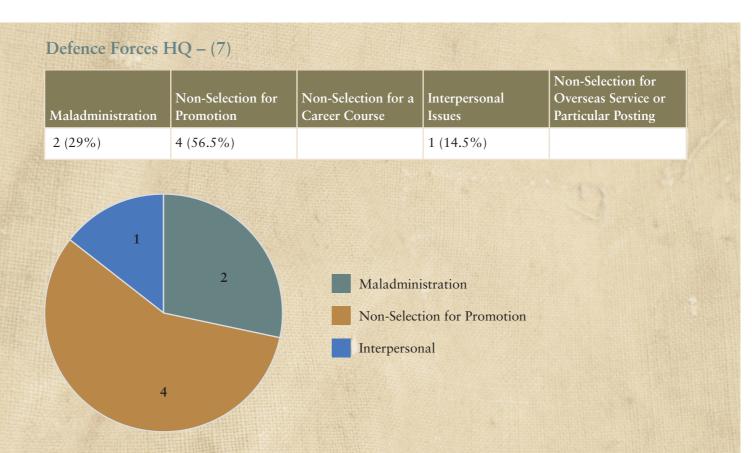
Three is a subscription of the subscription of	Maladministration	Non-Selection for Promotion	Non-Selection for a Career Course	Interpersonal Issues	Non-Selection for Overseas Service or Particular Posting
	7 (31.5%)	10 (42.5%)	1 (4.5%)	1 (4.5%)	4 (17%)
	4	7	Non-Select	ion for Promotion ion for a Career Cour nal Issues	
	10		on for Overseas Service or Particular Posting		

2 E Brigade - (39)



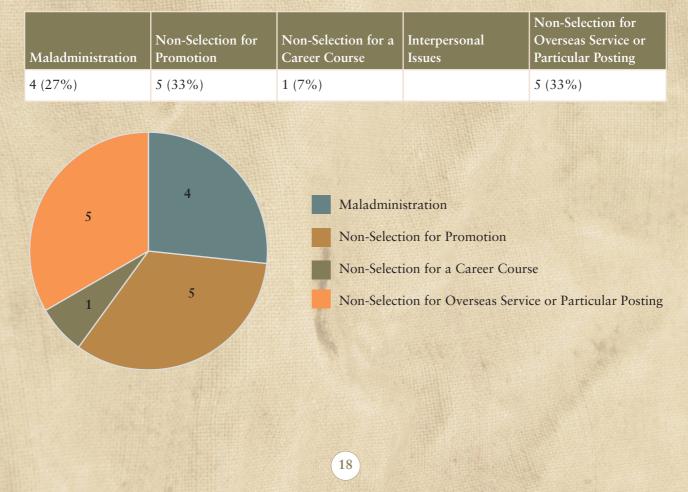
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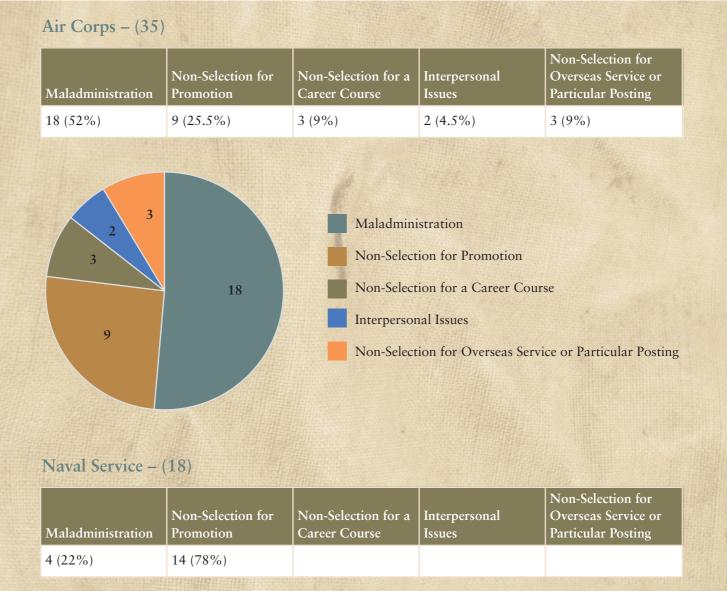


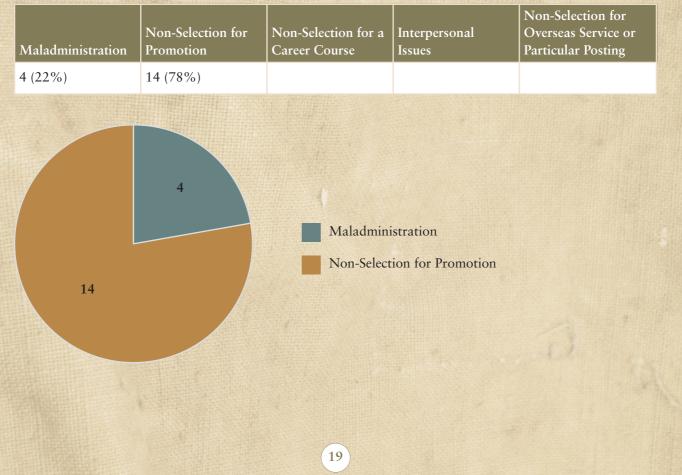
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Defence Forces Training Centre - (15)



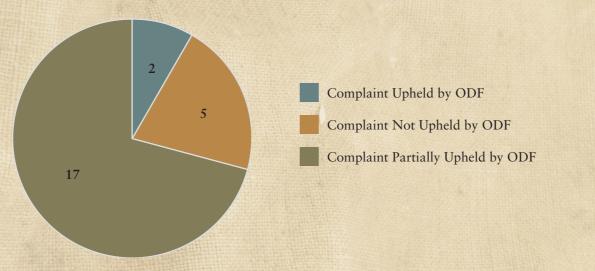
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Complaint Upheld by ODFComplaint Not Upheld by ODFComplaint Not Upheld by ODF**25*17*Includes 2 complaint outside ODF* serms of reference.

** Partially upheld complaints are complaints where the ODF did not uphold a complainant's case, but did make recommendations for administrative or system changes in circumstances where current procedures appeared to be contributory to the complaint's origination.



Minister's Response To ODF's Recommendation



Note: No response has been received from the Minister in respect of 2 complaints. These complaints were upheld by the ODF. A response in these cases has been awaited for some 10 months.

4 Case Summaries

The following case summaries set out details of some of the cases investigated by the Ombudsman for the Defence Forces during 2016.

Case Summary 1

Promotion competition – Complainant excluded due to non-completion of C&S course – Noncompletion of course not fault of complainant – Previous candidates allowed to compete despite non-completion of course – COS discretion to determine candidates had "otherwise reached a satisfactory standard" without having completed course – Legitimate expectation – Admin Instr A 15 (2005), para 25 and 25a – Annex A to Admin Procedure 07/10 dated 10 Mar 2011

Complaint Finding: Partially Upheld

This complaint arose from the exclusion of the Complainant from a senior officer promotion competition. The Complainant was deemed ineligible for the competition because of his noncompletion of a Command and Staff (C&S) course at the time of the holding of the competition. The Complainant was, in fact, undertaking the C&S course at the time of the competition and was within a few weeks of completing it on the date of the interviews. The DF accepted that the Complainant had been denied a place on previous courses due to reasons beyond his control and during the course of the investigation the COS noted that the Complainant had been "particularly unlucky, through no fault of his own, in not being qualified to go forward for promotion". The Complainant was further aggrieved that, due to his age and the dynamics of serving personnel, this was likely to be his last opportunity to compete for the promotion in question.

The Complainant's main complaint was that previous candidates had been allowed to compete

for the promotion in question without having completed a C&S course on foot of them having been certified by the COS, as having "otherwise reached a satisfactory standard". The MIO found as a fact that this had occurred and indeed that a previous successful candidate had been selected for participation in the promotion competition without completing the course and had then completed the course prior to being promoted. The MIO further found that an email from DHRMS had indicated that the qualifying criteria for the promotion in question were provided for in para 25 Admin Instr A 15 (2005) and required completion of the C&S course. However, in his investigation ODF noted that there was no reference to the alternative eligibility criteria provided for in para 25a of Admin Instr A 15 which also appeared to allow for certification by the COS in lieu of completion of the course. ODF further noted that Administrative Circular 07/10, dated the 10 Mar 2011 issued by the DCOS further allowed for alternative certification by the COS where the C&S course had not been completed.

ODF noted that there did not appear to be any definition of, or guidance as to, what constituted 'a satisfactory standard', nor was there any procedure specified in the DFR or in the Admin Instr for the application for, or obtaining of, such certification by a potential candidate requiring such certification. While DHRMS indicated that prior exemption precedents facilitating promotion without the C&S course had been superseded by the 2005 Promotion Agreement, ODF noted that the latter agreement still provided for discretionary certification. ODF noted, however, that it was not competent to second guess the COS's decision to withhold or to issue such a certificate that the Complainant had otherwise reached 'a satisfactory standard'. That said, sound administrative practice appeared to ODF to strongly indicate that the COS ought to have been presented with the case so that he could have made an informed decision thereon. In this case it appeared that the then COS was not asked by the DCOS (Sp) to exercise a discretion in respect of the Complainant, notwithstanding a recommendation by the Complainant's GOC. It appeared that the Formation GOC's recommendation was brought to the attention of the DCOS (Sp) and that the latter did not consider it appropriate to bring it to the attention of the COS.

The Complainant maintained that he had a legitimate expectation that he would be included in the 2011 competition based on his belief that precedents associated with previous competitions remained extant. Whilst ODF accepted the sincerity of his beliefs in this regards, ODF found that such beliefs or assurances did not impose any limitation or restriction on the scope of the discretion available to the COS or to his DCOS (Sp) acting with his authority or on his behalf.

ODF further noted that even had the Complainant been deemed eligible to compete for the promotion concerned, the Complainant would likely have been awarded significantly fewer marks than the two other candidates.

In finding that the Complainant had not been wronged, ODF recommended that in any future determination with regard to eligibility for a competition where the decision made was unfavourable to a candidate that reasons for the decision be recorded in the decision. It would have been preferable if that had been done in this case. Nonetheless, ODF could not second guess a decision by an appropriately authorised military authority in the exercise of a discretionary authority to certify or not to certify that an applicant had "otherwise reached a satisfactory standard" for a particular promotion in the absence of evidence of *male fides* or other sufficient stated reason.

ODF was further of the opinion that there was and may still be a lack of clarity with regard to the parameters of the scope of, and the practice and procedures to be followed for the utilisation of, the available COS's discretion. ODF recommended that clarity be provided for any future use of this discretionary authority and commended to the military and departmental authorities in any such consideration of the scope and procedures related to this discretion that due regard be given to the relevant portions of the judgment of Mr. Justice Eagar in the High Court case of Byrne v. Minister for Defence & Ors [2016] IEHC 464, as delivered on the 25 Jul 2016.

Case Summary 2

'Fixed Period Promotion' of 'Direct Entry Engineer Officers' – Written Conditions - DFR A 15 'fixed period promotion' to Capt. after 3 years and Comdt. after further 9 years – Government Moratorium on Promotion – Promotion to Capt. delayed – Failure to inform Complainant of non-promotion or reason for same was 'undesirable administrative practice' and 'unfair and unsound administration' – Reasonable expectation that Minister would amend DFR A15 and all personnel would be notified - 'otherwise contrary to fair or sound administration' - Computation of time for promotion to Comdt. – unfairly 'discriminatory' – the manner in which the military recommendation for promotion was administered by Dept. of Defence was unsatisfactory and 'contrary to fair or sound administration' - section 6(3) of the Ombudsman (Defence Forces) Act 2004 considered (jurisdictional time limits) – s.5(1)(d)(i) of the Act of 2004 considered (jurisdiction matter relating to terms and conditions of employment) – whether fair and administratively sound implementation or administration of terms and conditions was within ODF's jurisdiction

Complaint Finding: Upheld

The Complainant was commissioned as a 'Direct Entry Engineer Officer' in the rank of Lt. on the 29 Mar 2006. It was a written condition of his appointment that, subject to the terms of Defence Force Regulations, promotion from Lt to Capt was assured after 3 years satisfactory service in rank of Lt; and from Capt to Comdt after 9 years satisfactory service in the rank of Capt. On the 21 Mar 2009, the Complainant held the rank of A/Capt. The Complainant satisfied all the fixed period promotion requirements contained in DFR A 15 para 8(4)(b), and, on the 26 Mar 2009, the Military Authorities completed the preliminary administrative requirements and passed all the necessary paperwork to the Department of Defence ('the Dept.') to enable the Complainant's promotion on 29 Mar 2009. However, on the 27 Mar 2009, the Government declared a 'moratorium' on Recruitment and Promotions in the Public Service until the end of 2010, which was not an 'embargo', but subject to 'exceptions...which [would] arise in very limited circumstances' with the 'prior sanction of the Minister for Finance', which exceptions were sanctioned in numerous other cases. The Complainant was not promoted on the due date, nor was he informed of that fact or of any reason as to why his promotion had not been made. There was no evidence of any amendment to the Complainant's written conditions of appointment, or DFR A 15 para 8(4) (b), before his promotion due date. On his return from overseas service, in October 2009, despite numerous inquiries through the military chain of command, the Complainant was unable to ascertain if or when his 'fixed period promotion'

would be effected. His ROW application on the 1 Mar 2010 alleged the 'removal of his right to fixed period promotion' and a 'failure of the [military authority] and/or [a/the civil servant(s)] of the Dept. to recommend/effect [his] promotion to the rank of Captain'.

By way of redress the Complainant sought:

- Promotion to the rank of Capt.
- Reimbursement of remuneration lost from 29 Mar 2009 when his fixed term promotion became due.
- Credit for "service in the rank of Captain" from 29 Mar 2009 to ensure that his fixed term promotion from Captain to Commandant was not affected.

On the 23 Dec 2010, before the planned expiry of the 'moratorium', the Complainant was promoted to Capt. The COS ruled that the Complainant had not been wronged and the file was referred to ODF on the 21 Mar 2011. While no information was provided as to any action taken to effect the Complainant's promotion, there were subsequent amendments of the 'scheme' relating to the 'Fixed Period Promotion' of 'Direct Entry Engineer Officers'. Such amendments were contained in CCR No. 447 in Nov 2011 and CCR No. 476 in Sept 2015, both of which confirmed that 'Fixed Period Promotions' would continue in accordance with DFR A 15 where the individual was recommended for promotion by the Chief of Staff; and the promotion would be effective from the date of signature of the Minister for Defence.

Regarding the Complainant's promotion to Comdt.,

the DF maintained the Complainant would become eligible for promotion to Comdt. on the 23 December 2019, rather than the 29 March 2018: the former date discounting his service during the 'moratorium' - a stance strongly disputed by the Complainant. The Complainant alleged 'discrimination' where, under CCR No. 476, some officers had their future promotion dates backdated to their original promotion date, whereas other officers, including the complainant, did not. Where, in similar cases, an adjudicator and the High Court upheld such an allegation, ODF referred that aspect of the complaint to the Minister, there being a prime facie case that the Complainant had been 'unfairly discriminated against relative to other officers'. The Complainant further requested that the Dept. accept the ODF's preliminary findings in respect of his complaint and that he be credited with time in the rank of Capt. so that it would not affect his promotion to Comdt. which, he claimed, should be on 29 Mar 2018, rather than 23 Dec 2019. He also requested that the terms of CCR No. 476 be amended to reflect that change.

In addressing the complaint, it was noted that no complaint in respect of 'actions' of civil servants of the Dept. had been referred to ODF previously, and therefore, ODF was entering new terrain. The Dept. was concerned the complaint related to a matter excluded from the purview of ODF by section 5(1)(d)(i) of the Ombudsman (Defence Forces) Act 2004, being a complaint about a 'matter relating to the terms or conditions of employment in the Defence Forces ... which is within the scope of a conciliation and arbitration scheme.' ODF accepted jurisdiction of the complaint, acknowledging that while the substance of 'terms or conditions' of employment or regulations governing employment were not open for him to question, he could examine whether they were implemented or administered with authority, fairly, in a manner that was not discriminatory, and which was administratively sound. He recommended a review of the Ombudsman (Defence Forces) Act 2004 to ensure and clarify that any matter which may be the subject of a ROW application is also within the jurisdiction of ODF to consider and to make a recommendation to the Minister. While the complaint was referred to ODF outside the statutory time limits for doing so, he determined that the delay was due to inaction by the military authorities and was entirely outside of the control of the Complainant, and therefore

accepted jurisdiction. He recommended that the Office of the Ombudsman be given a statutory discretion to accept jurisdiction where he considers it to be 'in the interests of the service to do so'.

ODF opined that where there was conflict between the 'moratorium' and DFR A 15, the interests of 'fair and sound administration' required the Minister to explore with the Department of Public Expenditure and Reform (DPER) the limits of the 'exceptions' available to it in respect of the Complainant's previously 'assured' promotion, and secondly, if his promotion 'as assured' was not possible on account of the 'moratorium', an immediate amendment of DFR A15 para 8(4)(b), to qualify the promotion entitlements provided therein in the context of the Government decision and thirdly, the prompt provision of appropriate information to the Complainant in that regard at all stages. To avoid exercising any of the range of available options and making and issuing a decision thereon and the failure to keep the Complainant informed constituted, in ODF's opinion, 'undesirable administrative practice' and 'unfair and unsound administration.'

Where the 'moratorium' was to effect all public service employees, ODF was of the opinion that it would reasonably have been expected that the Dept. would have immediately amended the existing regulatory provisions of the promotion framework for officers (and men) of the DF and notified all personnel, not just the Representative Associations, of any changes to the promotion frameworks, including reference to the 'exceptions' arrangements. ODF considered the failure to take urgent steps to clarify such an important issue for serving military personnel was 'contrary to fair or sound administration'.

If the 'assured' or 'mandatory' promotion provision for 'fixed period promotion' in para 8(4)(b) of DFR A 15, in contrast to the 'discretionary' promotion provisions provided for in other paragraphs, was not brought to the attention of DPER when sanction was, or ought to have been, sought for an 'exceptions' sanction to promote the Complainant, then that 'action' would also have been 'unfair' to the Complainant and 'contrary to fair and sound administration' – no information was made available by the Dept. in this regard.

ODF was of the opinion that the manner in which





this issue was administered by the Military Authorities up to its recommendation for the Complainant's 'fixed period promotion' was in accordance with the promotion framework for officers of the Defence Forces. The military action was not subject to or influenced by the 'moratorium' as it was completed prior to the 'moratorium' being announced, and therefore, ODF did not uphold the Complainant's ROW application in respect of the alleged failure of any Military Authority with regard to his 'fixed period promotion' due on the 29 Mar 2009.

In the absence of a full satisfactory explanation of any 'action(s)' taken at Dept. level, ODF was unable to avoid the conclusion that the manner in which the military recommendation for the 'fixed period promotion' of the Complainant pursuant to paragraph 8(4)(b) of DFR A 15 was administered by a/the civil servant(s) of the Dept. was unsatisfactory to the extent that it was 'contrary to fair or sound administration'.

ODF deemed the failures:

- to inform the Complainant that his expected promotion on the 29 Mar 2009 was not going to happen;
- to provide him with the reasons why he was not promoted pursuant to the entitlements he had under paragraph 8(4)(b) of DFR A 15; and
- to keep him informed of any action proposed or taken pursuant to the 'exceptions' provisions of the moratorium,
- to have adversely affected the Complainant. Such failures exacerbated any previous 'administrative' failure and were 'contrary to fair or sound administration' by the Dept. and to a lesser extent by the Military Authorities.

Although no information was provided in this regard, ODF was of the opinion that if the Complainant was treated less favourably, in any 'exceptions' promotion submission(s) by the Dept. to DPER, than any other 'Direct Entry Officer' with 'fixed period promotion' entitlements under DFR A 15, or than any other 'Special Service Officer', or than any other officer who was recommended for promotion pursuant to the '*discretionary*' provisions of DFR A 15, such actions may also have been '*improperly discriminatory*'.

While some changes were made or agreed in recent CCRs and the DFR was amended, such amendments

appear applicable only to a different class of serving officer to that of the Complainant and to future officers of that class. The regulatory 'Fixed Period Promotion' entitlements of the Complainant, provided for in paragraph 8(4)(b) of DFR A 15, appear to ODF to have remained unamended from the date of his commissioning until the present time. The proposal to further delay a future 'fixed period promotion' for the Complainant by 21 months, presumably as a consequence of the moratorium which is no longer in effect, appeared to ODF, in the Complainant's particular circumstances, to be indicative of a future intention to be both unfair and improperly discriminatory to the Complainant. The agreed CCR No. 476 provision providing that 'promotions ... will be with effect from the date of signature of the Minister for Defence' appeared to be inconsistent with section 51(3) of the Defence Act which provided that "promotion of an officer ... shall take effect from such date as the Minister may fix". ODF was of the opinion that the CCR cannot fetter the Minister's statutory discretion, and recommended that a direction be given by the Minister that the above terms of the CCR be amended to reflect the statutory provision.

ODF recommended the backdating of the Complainant's '*fixed period promotion*' to 29 Mar 2009. He also recommended the Complainant's promotion to and service in the rank of Capt. include the period between that date and the date of his actual promotion on 23 Dec 2010, a period of almost twenty one months.

He recommended that the Dept. provide a suitably worded expression of regret for its 'administrative' failure or error in that regard. He also recommended that the Complainant's next proposed '*fixed period promotion*' date be reviewed and restored to the 29 Mar 2018.

He further recommended that the Minister direct full recompense to the Complainant of any additional remuneration he would have received if he had been promoted on the 29 Mar 2009, including any delayed or unpaid increments. Finally, ODF recommended that the Complainant be reassured in writing by a senior official that he would not be treated any less favourably on that account for the purposes of past and future 'fixed period promotion' provisions of paragraph 8(4)(b) of DFR A 15.



Case Summary 3

Promotion competition – Complainant taking issue with marks awarded - Revised promotion system – Proliferation of complaints relating to revised promotion system – "Interleafing" of promotion system - Failure to take proper legislative or administrative step to implement CCR agreement – Power to make administrative instructions – Jurisdiction of ODF – C & A scheme - Non retention of notes of interview process – board not composed in accordance with CCR No. 448 – "Informal" agreement as to composition of board not formally incorporated in CCR - Absence of internal review mechanism – Whether candidates sufficiently advised as to changes in promotion procedure - CCR No. 448 – Defence Act 1954, s 84 – DFR A10, para 42 and 42A

Complaint Finding: Not Upheld

This complaint concerned the administration of an NCO promotion system and the marks awarded to the Complainant during the file assessment stage and subsequent interview. The Complainant maintained that the marks awarded to him appeared to be inconsistent with his expertise and the level of work he had undertaken during his service and were not reflective of the contributions made by him to the DF. The Complainant further maintained that the marks awarded at file assessment stage did not appear to be commensurate with those awarded after the interview in that the latter were higher, that the marks awarded to him for the 'file assessment' or the 'interview' were not fair and balanced, that the remarks given in the narrative of the interview were not reflective of the interview w

examples given by the Complainant to the board and that there were a vast amount of anomalies contained within the marks awarded by the board at the file assessment. At later stages of his ROW, the Complainant further maintained that the notes from the interview process had not been maintained, that the methodology used to assess each candidate was not set out by CCR No. 448 and that the board itself was not composed in accordance with the provisions of CCR No. 448.

This complaint was one of a significant number of complaints received by ODF from NCOs of the DF consequent to the holding of a number of promotion competitions for promotion to the NCO rank of

Sergeant and higher NCO rank during the year 2012, following the introduction of a revised promotion system. These complaints were received by ODF during 2013 and the early part of 2014. The competitions were held pursuant to a comprehensive set of new procedures and arrangements which had been the subject of negotiation and agreement between the Department of Defence, the Military Authorities and the Permanent Defence Force Other Ranks Representative Association (PDFORRA). The agreement on the revised arrangements was recorded and adopted in CCR No. 448 on the 27 Feb 2012.

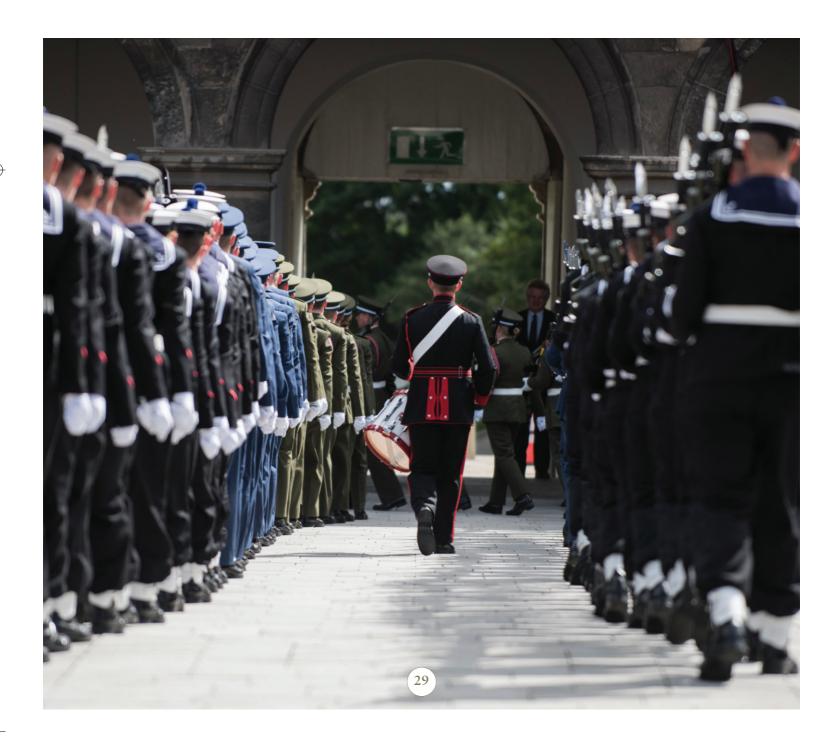
This CCR agreement proposed fundamental changes to the procedures and criteria for NCO Promotion Competitions for the rank of Sergeant or higher NCO rank in the DF, as they were then provided for in 'A' Administrative Instruction Part 10. Prior to this agreement, NCO vacancies and promotions were normally dealt with on a case by case basis as they arose. Under those old arrangements, with a competition for each vacancy as it arose, there were a great many promotion competitions held throughout the DF. That arrangement imposed a considerable administrative burden and would have necessitated the involvement of a large number of personnel to sit on all of the boards which assessed candidates for individual vacancies as they arose. There were undoubted administrative efficiencies to be achieved by reviewing the system. It may also have been perceived by unsuccessful candidates in the past that the old arrangement potentially favoured certain candidates, such as those from the unit where the vacancy existed and those with relative seniority.

The agreed revised system introduced a number of key changes. Firstly, all NCO appointments in the DF would be open to successful candidates who had been placed on a promotion panel following a promotion competition under the revised arrangements, subject to them fulfilling the specified essential qualifications for the particular appointment. Secondly, interviews could or would be conducted at Formation rather than unit level. Thirdly, promotion panels would remain valid for a predetermined period of time and as promotional vacancies arose the next listed suitably qualified candidate would be offered the vacancy in question, wherever it arose. Fourthly, promotion eligibility criteria were agreed. Fifthly, interview boards would assess the relative merit of candidates based on their assessment, across a specified range of competencies, of the candidates' promotion sub-file, and on their performance at a competency based interview, in accordance with the marking system set out in the agreement. The addition of an independent civilian member to the promotion board was a further widely welcomed development. Finally, seniority also ceased to be an influencing factor. The new system resulted in the creation of an Order of Merit by each promotion board at Formation rather than unit level for each competition. A further development was the agreement on, what can only be described as, a complex 'interleafing' system for the integration of all Formation Order of Merit panels into a single DF panel for each promotional rank or ranks as the case may be. While the outcome of Formation level competitions disappointed many lower placed candidates the 'interleafing' system further exacerbated any such disappointment.

The NCOs who submitted complaints to ODF regarding the revised promotion system were disappointed and dissatisfied with the outcome of the 2012 NCO Promotion Competitions and their places on the relevant promotion panel or panels, at both Formation and DF levels, for reasons which included, amongst other things: the alleged non-recognition of candidates' skills, experience or service; the board's notes in some instances being missing, poorly written or not reflecting what was said at interview; the board's narrative details being unacceptable to the candidate; that certain ranks were linked for competition purposes even though the competencies required for them were, or ought to have been, different; a sometimes wide and unexplained variation between the file assessment score of the board and the score it awarded for the interview; missing documents from promotion sub-files; an alleged lack of constructive criticism provided to candidates other than the handwritten notes or the narrative of the board; the composition of the board not being as provided for in CCR No. 448; and the 'interleafing' process for integrating Formation panel lists into a single DF list.

In reviewing this revised promotion system in the course of these complaints, ODF noted that it appeared that neither the CCR nor the 'A' Admin Instruction concerned was formally part of the legal framework governing promotions within the DF and may have been advisory or for 'general information and guidance' only. In response to the observations of

ODF in a similar case, the Military Authorities acknowledged 'that further administrative action was required and that the CCR should have been inserted into the Admin Instruction prior to the commencement of the promotion competition'. ODF also noted that the agreed CCR did not indicate how the provisions of the agreement were to be implemented or 'put in place'. This fact has been acknowledged by the Military Authorities. It appeared to ODF that in order to give legal effect to and to properly implement or 'put in place' the agreed revised arrangements contained in CCR No. 448 and any later informal agreement, some further legislative or administrative action was necessary. While the provisions of DFR A 10 provided a general power to make Administrative Instructions, "not inconsistent with these regulations", it did not appear to ODF to specifically authorise the making of Administrative Instructions for any of the various specific purposes or matters provided for by DFR A 10. ODF would also be concerned about the legality of any attempt to constrain, delimit or reduce a power or authority granted in a DFR by a provision contained in an Administrative Instruction. Any such fetter, as opposed to a purely administrative arrangement, might well be 'inconsistent' with the DFR and, therefore, *ultra vires*.





ODF also noted an ambiguity as regards the status and effect of a CCR. In response to an invitation in a similar case the Military Authorities 'accepted that an administrative instruction should be consistent with the regulation which is the primary document.' They agreed that 'the correct course of action would have been to insert the terms of the CCR into 'A' Admin Instruction Part 10 prior to the commencement of the 2012 NCO Promotion Competition'. There was clear regulatory authority to negotiate and agree the terms of the CCR and an agreed intention to implement and apply the arrangements agreed for future NCO Promotion Competitions. There was, however, an administrative failure to transpose the terms of the CCR into the promotion framework. It was not 'put in place' or linked to the existing terms of DFR A 10 or with those of 'A' Administrative Instruction Part 10 with which it was inconsistent until after the Promotion Competition when the terms of the CCR were inserted into the 'A' Administrative Instruction Part 10, which appeared to ODF to be the correct and appropriate course of action, albeit belatedly. The delay between the agreement of CCR No. 448 on the 27 Feb 2012 and its transposition into Administrative Instruction 'A' 10, was explained in a similar case as being an 'administrative oversight'. While ODF must, at all times, have due regard to the operational requirements of the DF, the delay did appear to have been "unreasonable", notwithstanding consideration of the context of the military environment, and "contrary to fair or sound administration".

ODF fully accepts and agrees with the Department's view that a review or oversight of the 'determination' of a 'promotion scheme' is not a matter within the competence or jurisdiction of ODF. Promotion policy formulation is clearly a matter for the Minister to determine pursuant to the Defence Act 1954. The 'determination' of "systems and general criteria governing promotion", is within the scope of C & A and thereby excluded from the jurisdiction of ODF by section 5 of the Act. Accordingly, the new elements of the revised promotion system, as agreed in the CCR, were not reviewable by ODF. That means that ODF will not accept jurisdiction with regard to complaints about a promotion competition based on the alleged unfairness to a complainant of an element agreed in C & A, or specified in an Administrative Instruction. On the other hand where a complaint based on the alleged unfairness to a Complainant resulting from a failure to comply with procedures or arrangements agreed in a CCR, or perhaps with those agreed in an informal agreement outside of C & A, or with those laid down in an Administrative Instruction, the ODF considers its jurisdiction with regard to an administrative deficiency on a case by case basis.

In this case, no complaint has been made alleging any noncompliance with or breach of any provision of DFR A 10. However, before such promotions were made a competition process, not provided for in the DFR took place. Actions taken in establishing and implementing that competition process appear clearly to ODF to have been administrative in nature. If such actions affected a Complainant and were or may have been comprehended by the terms of section 4(1)(b) of the Ombudsman (Defence Forces) Act 2004, they are, unless excluded by the provisions of section 5 of that Act, within the jurisdiction of ODF under the provisions of that Act. Since ODF has dealt with complaints from members of the DF for 10 years, it can be noted that more than 30% of all complaints received to date are related to the 'administration' of promotions policy or arrangements in the DF. They have always been determined to be within jurisdiction. ODF, therefore, has a mutual interest with all of the relevant parties in contributing, in any way which appears appropriate to it, to the elimination of administrative deficiencies and to the making of administrative improvements which would contribute to a potential reduction in such complaints. That is an important aspect of the context in which comments and observations are offered and in which recommendations are made by ODF.

Proceeding with the competition on the basis of the content of the CCR, which was inconsistent with the Administrative Instructions as they were then, without amending the Administrative Instructions first, suggests a hurried approach to the holding of the competition, although it is acknowledged that in the context of the previous, so called, 'moratorium' on promotions there may well have been operational considerations or imperatives for so doing. There also appears to have been a lack of full understanding on the part of some candidates of the extent and effects of the changes agreed and made to the competition process by the introduction of the competency based assessment process. The abolition of seniority as an assessment factor, the introduction of a new competency based assessment system and the limitation on the service records to be included in

promotion sub-files all seem to have contributed significantly to the level of complaints. The holding of a single Formation level competition for all of the vacancies within a specified timeframe may also have been a contributory factor. This must be considered to be an unsatisfactory situation, which could be due, at least partly, to inadequate briefing of candidates or a lack of understanding on their parts of the detail of the revised system. ODF considers that a greater degree of clarity and certainty with regard to the applicable rules for such significant changes to the NCO promotion system, as well as more comprehensive education and training programmes for prospective candidates, might have been reasonably expected.

In response to an ODF invitation in a similar case, the Military Authorities have confirmed that J1 Branch 'conducted a briefing schedule with all the relevant Bdes and Formations HR personnel prior to the 2012 promotion competition'. They added that 'subsequently each Bde and Formation was tasked with providing briefs and disseminating the agreed changes to promotion to all candidates prior to the competition'. They further acknowledged that 'such significant changes to the NCO promotion system may have required a more centralised approach.' Having considered the briefing notes and work sheets provided to him in the similar case in this regard, ODF was of the opinion that the changes being introduced were far reaching and that more than one briefing period for candidates may have been necessary.

The Complainant, in responding to the MIO's conclusions in respect of his complaint, also raised issues as regards the failure to retain notes in relation to the interview process. While the COS in fact responded to these issues in his ruling, these additional elements added to his ROW were not part of his original complaint and ODF did not consider it appropriate or necessary to further consider those additional aspects.

The COS further considered it important to note that the file assessment and interview were two separate processes within the competition. He considered that it was not unreasonable that a candidate would receive a higher mark in either the file assessment or the interview assessments under the same competency and, in this case, he attributed the difference in scores to the Complainant's stronger performance in interview. The Complainant also raised a further point as regards the composition of the board. The COS accepted that the composition of the board did not conform to the CCR NO. 448 with regard to having a member from the DCOS (Sp) Branch but maintained that there was an additional informal agreement reached in that regard prior to the holding of the competition. ODF did consider it to be 'administratively' unsatisfactory that such informal side agreements were not followed by immediate amendment of the CCR. It also appears that such informal agreements were not reflected in published information regarding other the competition. Nonetheless, ODF noted that there was no allegation made by the Complainant that the change to the composition of the board adversely impacted on his prospects in the competition, nor is there any evidence that it did so.

ODF further found that there was no scope within CCR No. 448, for an independent review of a board's assessment of candidates, either from the file or from the handwritten notes. There was no procedure provided for the reconsideration or re-evaluation of promotion sub-files or of interview assessments, either by an internal appeal or by an external agency or for a review or amendment of the marks awarded. Having regard to the number of complaints received in respect of the 2012 NCO Promotion Competition, ODF recommended that consideration be given to providing for an inbuilt appeal mechanism within the revised promotion competition arrangements. In response to ODF's observations in this regard in a similar case, the Military Authorities maintained that they 'consider that these are matters which would appropriately be considered within the C & A scheme'. ODF agreed with this submission.

Having carefully considered the Complainant's case, ODF concluded that there was no evidence that the board acted other than fairly and impartially in its assessment of the Complainant's file or that they failed to comply with any element of the agreed arrangements, even if the Complainant was disappointed with the result relative to other candidates. In such circumstances, it would not be appropriate for ODF to second guess the board's assessments of the relative merit of the Complainant's candidature or the marks it considered to be appropriate at either the initial file assessment or post interview stages of the competition.

Case Summary 4

Leave – Multiple unsuccessful attempts to contact complainant while on leave – Harassment alleged – Meeting with CO – Bullying alleged - Leave applications were to go through the Coy Sgt of his parent unit – Unfair Treatment alleged - DFR A 11 and Admin Instr A 11 (leave is a privilege)

Complaint Finding: Not Upheld

The Complainant was on long term attachment from his parent unit to an infantry unit, and submitted to the Company Sergeant (Coy Sgt) of the unit to which he was attached a leave application for the period 9 to 13 May 2011, which leave was granted. While on leave, he was away from home, fishing, and left his mobile phone with his wife for 'security reasons', related to his house alarm. It appears that neither his parent nor attachment unit was made aware of this at the time. He complained that throughout the leave period, his wife received approximately 15 to 20 calls per day from 'his parent unit'. He returned home on the 12 May 2011. The following day, while at a family funeral, his wife received from his parent unit more than 15 missed calls in a 45-minute period, and a further 10 to 15 calls that afternoon. No explanation was provided for his wife retaining the mobile phone after he returned home on the 12 May and throughout the 13 May. The reason for the phone calls was that during his leave period a GOC's inspection was due to take place. Unit commanders had been directed that all personnel should parade. The CO of the Complainant's parent unit had not been informed that the Complainant had been granted leave for the period. When that fact was realised, the parent unit was tasked with making contact with the Complainant to ascertain if he was within the State and, if practical, to cancel his leave for the period of preparation for the GOC's inspection. Despite multiple attempts, no contact was made by phone with the Complainant by either his parent unit or the unit to which he was attached. The contact details provided by the Complainant on his leave application were his home address details as recorded on the PMS. While a letter was drafted to be issued to his home address, his parent unit decided not to send it. With regard to the conditions of leave, the CO noted the terms of DFR A11 and Admin Instr A11 as they were at the time of the alleged actions. He quoted paragraph 3(1) of the DFR as follows:

"Leave is a privilege under the provisions of these Regulations and an officer or man on annual or special leave must always be in readiness to rejoin his unit."

He also noted that paragraph 29 of the DFR provided at that time that:

"Prior to his departure on annual or special leave, a man shall notify his commanding officer of his address while on leave or where he has no fixed address whilst on leave, shall furnish an address through which he may be communicated with quickly. Any subsequent change of address must be notified without delay".

The Complainant offered no reasonable explanation as to why, having regard to the aforementioned requirements of DFR A 11 regarding leave, phone calls from identified military telephone numbers were not accepted or responded to by a person of the Complainant's rank, service and experience.

The Complainant claimed that 15 to 20 calls were made to his mobile phone each day. While the CO was unable to find physical proof of that, he stated that three different locations were trying to contact the Complainant during his leave, so, he may have received a significant number of calls during his leave period. The CO found that there may have been a high number of calls to the Complainant's phone. He also found that was not due to any maliciousness or harassment but due to three different locations attempting to contact the Complainant.

The CO recommended that in future only one section should be tasked with contacting an individual in such circumstances. He also recommended the use of alternative means of contact such as email, text, voicemail or letters, if contact by phone is not made. He also found that the Complainant had an obligation to contact his unit.

He noted that the Complainant had not informed either his parent unit or that to which he was attached that his wife would have his phone and that he would not be contactable at that number. The CO found that all personnel should ensure that contact details are recorded on their leave application form, particularly any deviation from normal contact details. The Complainant offered no reasonable explanation as to why he did not accept any of the incoming phone calls from identified unit telephone numbers.

On the 18 May, the Complainant alleged he was paraded to his CO's office with his Coy Sgt present. The CO stated he was not impressed with the lack of contact while he was on leave and that leave was a privilege. The Complainant alleged he was not given an opportunity to speak during the meeting and felt 'vulnerable and fearful' and was left 'in a distressed state'. It was determined that both parties were seated throughout the meeting and both sides were capable of clearly and firmly stating their case in relation to leave and the CO's comment that he was 'going to rectify this matter in the next two weeks' was a reference to the leave granting procedures regarding detached members of the unit so that such a situation would not arise again.

The Complainant was subsequently informed that in future his leave applications were to go through the Coy Sgt of his parent unit, which he believed to be unfair and unlawful, particularly where he had a poor relationship with the Coy Sgt of his parent unit. The new leave arrangements allowed the parent unit to exercise an element of control that was applicable to all detached personnel of the Complainant's parent unit. The Complainant was not singled out in that regard. All members of his unit were subject to the same leave application process regardless of whether they are detached or not and all are required to keep their parent unit informed of their location or movements so as to be contactable if required.

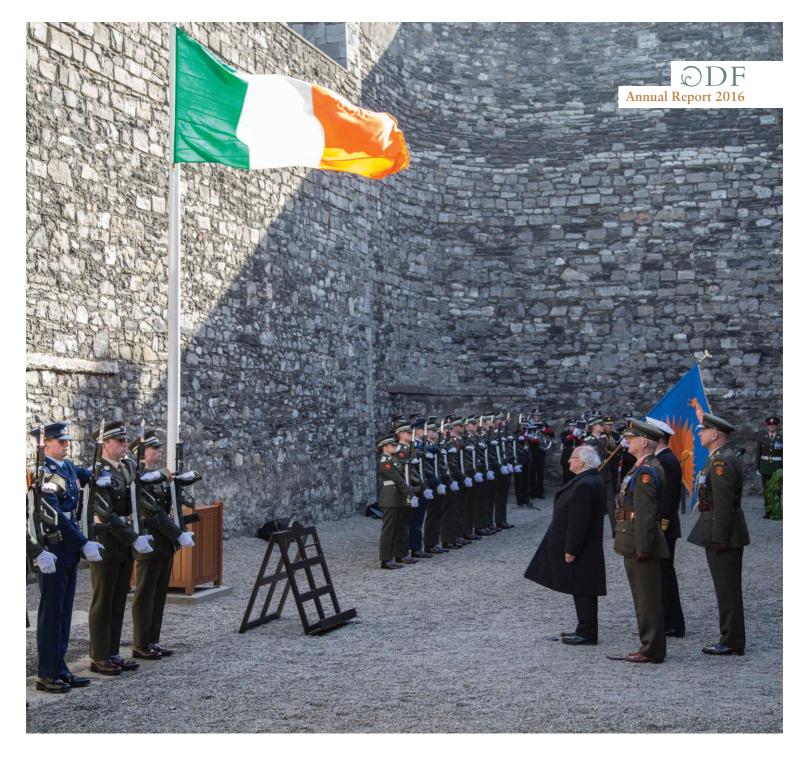
The Complainant said that he was on the duty list for the 8 May and was not on the list again for the remainder of the month. On the 19 May, the Complainant noted that he was listed for duty on the 22 May, although he alleged that he had not been notified of that duty and had not been on the roster the week previous, which he believed to be punishment for the 18 May. The CO's investigation revealed that the Complainant had actually been listed for duty on the 29 May 2011 and had swapped that duty for one on the 22 May 2011. The CO found that May 2011 was a very busy month with high operational commitments due to State visits. He found no evidence that the Complainant was treated unfairly nor was he punished by being detailed for extra duties. The MIO accepted that, in general, the duty list system worked well for those members regularly at the unit HQ but was an inefficient system for informing the Complainant of his duties. While the onus was on the individual to seek out the information, there was also an onus on the unit to make it readily available and accessible.

The Complainant claimed that the conduct of his parent unit during his leave and when he was paraded was 'bullying, intimidation, and harassment of the highest order'. MIO found no evidence nor did the Complainant provide any evidence to support his belief that he had been bullied, as defined in Admin Instr A7, Chapter 1 para 132. On the contrary, the MIO's report clearly and comprehensively indicated that the dealings between the Complainant and his unit were the normal administrative dialogue that transpires between a unit and a unit member and that he was treated with civility and courtesy at all times.

By way of redress, the Complainant requested that his complaint 'be investigated and rectified accordingly'.

It appeared to ODF that, in the circumstances described by the Complainant, there ought to have been greater clarity between the Complainant and the Military Authorities regarding his contact details and arrangements with his parent unit and the unit to which he was on long term attachment. Both units appear to be under the clear impression that the use of his mobile phone number for contact purposes was appropriate. ODF recommended that procedures be reviewed to eliminate any existing lack of clarity in the future.

There was no evidence that the changes to the leave application procedures were either 'unfair or unlawful' or that the Complainant was 'singled out' in any way differently to other members of his parent unit who were on long-term detachment to other units. Accordingly, ODF did not uphold that element of the Complainant's ROW.



In the absence of alternate agreed arrangements, the making of quite a number of calls by the unit authorities to a known mobile number, all of which went unanswered, did not appear to ODF to have been administratively inappropriate, nor to constitute the wrong claimed by the Complainant.

ODF was not provided with any evidence of irregularity or inappropriate behaviour on the part of the CO, or on the part of the Coy Sgt, with regard to that meeting, to support the serious allegations made by the Complainant that he was 'paraded' and subjected to 'bullying, intimidation, and harassment of the highest order.' There was no further evidence or details of any particular unacceptable action on the part of either the CO or that of the Coy Sgt. The allegations made by the Complainant that his CO made him feel 'vulnerable and fearful' which left him 'in a distressed state' had not been established on the balance of probability. ODF did not uphold that element of his complaint due to lack of evidence.

The short notice for the duty in question arose directly from the Complainant's action on the 18 May in swapping his duty from the 29 May to the 22 May. The short notice was not attributable to any administrative inadequacy on the part of the Complainant's superiors. There was no evidence to support his belief that the duty was a punishment for anything. Accordingly, ODF did not uphold that element of the Complainant's ROW.



Case Summary 5

2012 NCO Promotion Competition - Allegation Promotion Board failed to take account of service and experience due to absence of 4 AFs 667 and Logistic Accountancy Course Report affecting complainant's promotion ranking

Complaint Finding: Not upheld

The complaint is against the board convened for the 2012 NCO Promotion Competition that interviewed the Complainant on the 9 May 2012 and assessed his candidature within its Formation for promotion to a senior NCO rank. The Complainant received his board report on the 9 Oct 2012.

The first element to the complaint was that the board did not take full account of his service and experience as A/CQMS and his eight years of logistical experience due to the absence of four of his AFs 667 from his file for the years 2004-2007. The second element to the complaint was that the report for the Complainant's Logistic Accountancy Course, which was completed in 2004, was missing from his file. The third element to the complaint was that without the above report and AFs 667's the board should not have conducted his interview as it did not accurately reflect his experience and, as a result, put the Complainant in a less favorable ranking position for the Order of Merit (OOM) for promotion. The Complainant was placed 35 of 52 candidates in his Formation OOM and 89 of an unknown number of candidates on the DF OOM.

On the 14 Nov 2012, the Complainant submitted an ROW application and on the 19 Nov 2012, an MIO was appointed by the Formation GOC to investigate the ROW. The MIO reported to the GOC on the 25 Jan 2013, confirming that the Complainant had the relevant experience referred to. By way of redress, the Complainant sought to have a re-interview with the board and that they have all the relevant files including those missing from the first interview.

The Complainant retired on the 23 Nov 2013 after 21 years' service. He referred his complaint to the ODF on the 25 Nov 2013.

Under section 6(3) of the Ombudsman (Defence Forces) Act 2004, the Complainant has 12 months

from the date of the action concerned, or the date on which the Complainant became aware of the action, to refer his complaint to ODF. The alleged date of the 'action' (the promotion competition) was the 9 May 2012, but the Complainant was not informed of the outcome of the competition until the 9 Oct 2012. Taking the later date, the complaint was referred to ODF some six weeks outside the statutory limitation period. There was no undue delay on the part of the Complainant. However, DCOS (Sp) acknowledged that there was a delay in forwarding the Complainant's ROW from his Formation to the COS from March until October (seven months) due to 'administrative error'. This delay was entirely outside of the Complainant's control; therefore the delay should not be relied upon to place the Complainant outside of the jurisdiction of ODF.

The Complainant requested his complaint be referred to ODF on the 25 Nov 2013. However, further 'administrative errors' meant that it was not forwarded until 1 Dec 2014 (just over a year later). All of these delays were outside of the control of the Complainant and, therefore, ODF deemed it appropriate to discount one year and seven months from the time. Therefore, the complaint was deemed to fall within jurisdiction.

The MIO in his investigation contacted the Complainant, the President of the promotion board, the Complainant's Commanding Officer and the staff of the records office. The MIO found as follows: there was no requirement within the CCR No. 448 for the board to follow up on missing records; there was an initial enquiry in 2008 into missing AFs 667 records of the Complainant but this had not been followed up by the Complainant or his unit; and that under the terms of CCR No. 448, the Complainant's Logistics Accountancy Course Report was required to be included in his Promotion Sub-File and, whilst it was in his Formation Records file, it was not included in

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his Promotion Sub-File. However, the MIO found that the board acted in accordance with the requirements of the CCR.

The MIO further found that the Complainant was not wronged by the board and the redress he sought was not appropriate; the absence of his career course report was a regrettable administrative error in the preparation of the promotional sub-file; and that the Complainant was wrong in suggesting that the board should not have proceeded with the interview until all documents were present as it was not the board's responsibility to ensure that the documents were on the sub-file.

On the 6 Feb 2013, the GOC concurred with the report of the MIO and also stated that in the board's marking of the Complainant's interview they took into account his amendments to Annex WW regarding missing documents in their assessment of the candidate. The DCOS (Sp) found that the Complainant was not wronged but that any missing AF 667s should be replaced where practicable.

ODF, having considered the complaint, did not find it

appropriate to second guess the board's assessment of the relative merit of the Complainant's candidature or marks awarded during the assessment and interview stage in the absence of any evidence of wrongdoing and that the ranking of the Complainant on the OOM was arrived at in a correct and proper manner in accordance with the agreed arrangements. ODF further advised that his decision to not uphold the complaint was supported by the lack of provision in the NCO promotion scheme or CCR No. 448 for the reconsideration of promotional sub-files or of interview assessments.

ODF did not uphold the complaint or the Complainant's proposed redress as it was not the board's responsibility to ensure all relevant documents were within the sub-file; the Complainant was aware that the files were missing in 2008 but failed to act on it; and the board took into account the Complainant's notes in Annex WW and marked his assessment accordingly. ODF considered that a re-opening of the Competition was not practical and re-interviewing the Complainant and possibly amending the rankings/individual positions on the OOM would not be fair to the other members of the competition.





Case Summary 6

2012 NCO Promotion Competition - BSM/BQMS Line/Tech Gp 1 & 2 Army/Air Corps - Administrative errors in promotion advertising - Excluded ranks of CQMS/FQMS – Ranked in accordance with exclusion – error realised - board reconvened – candidates re-ranked – Complainant's rank dropped from 13 of 64 to 34 of 68 - CCR No. 448 - Administrative Instruction Part 10

Complaint finding: Partially upheld

The Complainant applied for promotion to the Rank of "BSM/BQMS Line/Tech Gp 1 & 2 Army/Air Corps". On 13 Sept 2012, he was informed that he was ranked 13 of 64 candidates on the DF panel for promotion, but on 6 Nov 2012 that was altered to 34 of 68 candidates. The Complainant contended that he was wronged by the amendment of his placing on the DF list by the DCOS (Sp), which was amended Formations, including because some the Complainant's, did not include CQMSs/FQMSs in the initial OOM list. He further contended that the board did not adhere to the terms of CCR No. 448. He further alleged that he was wronged by two CO's, who the Complainant claimed, recommended ineligible candidates for the promotion competition. In support of his claims, the Complainant referred to three Formation Routine Orders (ROs) published by his Formation GOC, advertising the competition, which laid down the essential qualifications as approved by the DCOS (Sp).

On 9 Nov 2012, the Complainant submitted an ROW against DCOS (Sp), the board President and the OC's of two specified units in his Formation. By way of redress, the Complainant sought to be reinstated to his original place on the initial DF OOM list for promotion to the rank of BSM.

In his Considered Ruling of 20 Feb 2013, the COS found the Complainant had not been wronged in the matter complained of. COS acknowledged that the notification sent from EPMO regarding the promotion competition included an 'administrative error'. That error was subsequently incorporated into the Routine Order advertising the competition, which error had the effect of excluding personnel of the rank of CQMS/FQMS from entering the competition for the rank of BSM. The COS confirmed that the notification contravened Annex Y of CCR No. 448, which provided that personnel of the rank of Coy Sgt/CQMS, who had successfully completed the Senior NCO Course, were eligible to compete for the rank of BSM. Once the error was discovered, immediate action was taken to ensure that all qualified candidates were afforded the opportunity to compete for promotion to BSM. A direction by DHRMS to reconvene the relevant boards was published, which had the effect of including four additional CQMS/FQMS to the DF OOM list. The COS emphasised that the relevant Representative Association was consulted and agreed with the decision to reconvene that particular promotion board. The COS noted the Complainant's contention that the additional candidates should have been reinterviewed as they were then competing for the rank



of BSM and not BQMS. The COS acknowledged that these additional candidates were not re-interviewed for the rank of BSM because the competencies outlined in CCR No. 448 were the same for both BSM and BQMS ranks. The additional candidates were already assessed on those competencies for the rank of BQMS and their assessment marks were used for the BSM competition.

The COS also addressed the Complainant's contention that two additional FQMSs were not qualified to compete for the rank of BSM in light of the fact that they did not have the requisite experience in the rank of BQMS. The COS acknowledged that due to the 'administrative error' in the original notification the requirement to have completed a minimum of two years combined service in either the ranks of CQMS & BQMS or Coy Sgt & BQMS was also erroneous, which error was also rectified by the direction to reconvene the promotion board. In addressing the Complainant's claim that Chapter 3 of Admin Instr Part 10 should not have been relied upon in a situation where CCR No. 448 was the agreed document, the COS emphasised that both documents envisage that a CQMS who had completed a Senior NCO Course was eligible for promotion to BSM, and that CCR No. 448 had been incorporated into the Admin Instr Part 10, replacing Section 4, Chapter 3 thereof. The COS considered the ranking amendment to be necessary to ensure that the competition was conducted in accordance with CCR No. 448 and in the interests of fairness to all parties concerned. The COS could not find that the Complainant had been wronged and found that the redress sought was not appropriate. He confirmed that while the direction to reconvene the board was aimed to rectify the error in the initial RO, a corrigendum was necessary to clarify the requirements for promotion. He directed that in the case where any future amendment of a RO is necessary, such a corrigendum be published to ensure transparency and clarity.

He asserted that while CCR No. 448 had been incorporated into the Admin Instr Part 10, it should have been done before the new promotion system commenced in fairness to all.

The Complainant continued to feel that he was wronged and that the competition was 'fundamentally flawed' as two contradictory documents, the CCR No. 448 and Admin Instr Part 10, were used to determine eligibility criteria for promotion to certain ranks in what he described as an *ad hoc* basis. On the 4 Apr 2013, the Complainant referred the matter to ODF.

ODF noted the dramatic change in the Complainants ranking from 13 to 34 with only an additional four candidates to the competition, and recommended that the Minister review any system which could produce such a dramatic change.

ODF considered that neither CCR No.448 nor the Administrative Instruction Part 10 played any part in the legal framework of the competition and that they were for 'general information and guidance' only. He found that the Admin Inst Part 10 was initially followed for the Complainant's competition. However, it was always the intention to follow CCR No. 448 instead. The Military Authorities confirmed that CCR No. 448 and informal agreements were followed for the 2012 competition. However, ODF determined that CCR No. 448 was only followed after the initial OOM list was published and after the 'error' of applying the Admin Instr Part 10 was discovered. He was also of the view that neither the agreed CCR, nor any of the informal agreements associated therewith,



indicated how the provisions of the agreement were to be implemented. He recommended that was an administrative inadequacy to be further considered and addressed by the Military Authorities. The Military Authorities have since accepted that "the correct course of action would have been to insert the terms of the CCR into 'A' Admin Instruction Part 10 prior to the commencement of the 2012 NCO Promotion Competition." The CCR was inserted into the A Admin Instruction Part 10 after the 2012 NCO Competition, on the 15th November 2012 via Amendment Number 33. ODF considered that such amendment was 'the correct and appropriate course of action, albeit somewhat belatedly', and that that delay was "unreasonable".

ODF determined that he has jurisdiction in administrative issues as his Office had a mutual interest with all of the relevant parties to the elimination of administrative deficiencies and the making of administrative improvements. ODF was of the opinion that although the new promotion system was needed, a greater degree of clarity, education and training regarding the new system was needed, specifically in the area of what rules applied to the process/system.

ODF opined that notwithstanding the 'administrative error' made and the informal arrangements agreed to rectify that error, there was no case for the reinstatement of the Complainant to his initial standing in the rankings (13th).

He further recommended, in the interest of 'fair and sound administration', that the Minister direct that steps be taken by the Military and Departmental Authorities to ensure that any future amendment to a promotion framework, should not be acted upon until it had been 'put in place' and transposed into the promotion framework.

Finally, ODF advised that he had no role in overseeing the 'determination' of promotion policy in the Defence Forces or the 'determination' of the procedure thereof, but could consider the administrative shortcomings/actions taken and/or not taken by both Military and Departmental officials in this case.

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Case Summary 7

2012 NCO promotion competition – Complainant taking issue with marks awarded and recommendations made - Recommendation made that the complainant should attempt to complete more overseas service despite being ineligible to do so - Complainant having been refused numerous applications for overseas service due to him representing DF in sporting activities - Revised promotion system – Jurisdiction of ODF – C & A scheme - Absence of internal review mechanism – Whether sporting representation overseas could constitute overseas service – Delay - Complaint not forwarded due to delay by the DF - Purposive approach to jurisdictional issue of delay taken - CCR No. 448 – Ombudsman (Defence Forces) Act 2004, section 6(3) and section 9(3)

Complaint Finding: Partially Upheld

This complaint concerned the administration of an NCO promotion system. The Complainant was dissatisfied with the marks which he received in the promotion competition and his subsequent ranking. He was further dissatisfied with a recommendation made to him that he should consider gaining experience in appointments overseas in circumstances where, by virtue of his age, he was ineligible for overseas service unless he was promoted and where he had in fact been refused a large number of applications to serve overseas previously because he was representing the DF in sporting events. The Complainant maintained that the promotion board took no cognisance of the circumstances that gave rise to his limited tours of overseas duty. He further maintained that the board showed a complete lack of understanding of the regulatory environment for personnel aged over 50 in the rank of Sergeant in recommending that he seek overseas service and that the recommendation made to him was highly insulting and in no way reflected his contribution to the DF over 36 years.

This complaint was one of a significant number of complaints received by ODF from NCO's of the DF consequent to the holding of a number of promotion competitions for promotion to the NCO rank of Sergeant and higher NCO rank during the year 2012, pursuant to a revised promotion system. ODF has, in other cases, referred to issues in relation to the introduction of this new promotion system and the failure to properly put same on an appropriate legal footing at the time of the holding of promotion competitions and this complaint raised the same issues.

It is to be noted that the new promotion provisions contained in CCR No. 448 indicated that without a record of overseas service, career development in the DF was diminished.

The MIO found that the board was 'only concerned with what was included in the promotion sub-file which contained the AF 667As for the overseas trips actually completed by the Complainant' and not an outline of why he would not have completed other trips. The COS also noted that the Complainant had been provided with the opportunity to make written representations to the board prior to the file assessment. On foot of a request from ODF, the COS noted that 'given the totality of military service and experience of the interview board' he found it 'highly likely that the board were aware of the overseas service age limits for various ranks of the Defence Forces at the time'. He expressed his 'opinion that the board should have been reflective of this fact when making their recommendations'.

In that regard, the COS directed that the Complainant receive from the board President an acknowledgement of the failure to provide relevant recommendations for development. As a result of this, the board President wrote to the Complainant acknowledging *"that the career development advice provided to the Complainant on the conclusion of the promotion competition*



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process, particularly in relation to overseas service, was of little consequence in light of his inability to achieve further overseas service as a result of regulatory provisions barring such service on age grounds." He added that the board "understands and acknowledges the frustration and distress that this has caused and seeks to assure that him it was not the intent of the board to cause him such frustration or distress".

ODF noted the COS's direction to and the acknowledgement issued by the board President to the Complainant and commended them both for providing the Complainant with that acknowledgement. Notwithstanding this acknowledgement, ODF upheld this element of the complainant's complaint. The board's action in this regard was most likely based on erroneous or incomplete information or otherwise contrary to fair or sound administration.

ODF further asked if competing in such events involved a kind of overseas service which could or ought to have been considered by the board. The Military Authorities responded that 'Overseas Service which meets the definition as outlined in Para 1004.c. of Admin Instr CS 5 was the type of service considered by all promotion boards'. From this information, it appears that the Complainant's military sporting participation abroad was not reckonable as overseas service by the board.

ODF was further advised that candidates were allowed to make submissions to the board on an Annex WW prior to interview and that they could have raised any special circumstances with the board during interviews, as they saw fit. ODF was advised that the complainant did not complete this Annex. In circumstances where his special circumstances were not put before the board by the Complainant for its consideration, having been given the opportunity to do so, his objections in this regard could not be upheld. Nor was ODF in a position to second-guess the opinion of the board in relation to the complainant's merit vis-avis other candidates, as regards his complaint that his contribution to the DF was undervalued.

ODF readily understands the disappointment of a candidate with the Complainant's excellent service

record and long experience when he was not successful in this new type of competency based promotion competition. It is clear that the Complainant was a well-qualified and experienced NCO. At the time of the competition in question he had thirty-six years' service, he held the rank of Sergeant and had held the Acting rank to which he aspired in an 'on and off' capacity for about five years. His experiences in the higher rank were a clear testament to the esteem and regard in which the Complainant was held by his military superiors who knew his abilities. It was reasonable, in such circumstances, for the Complainant to have hoped that he might be recommended for promotion, for his remaining two years of service prior to retirement, to the substantive rank which he had previously held in an acting capacity both at home and on his last overseas duty. The Complainant's disappointment with his placing on the OOM, and with the marks awarded to him by the board, in that context is very understandable. However, even more understandable was his view that the remarks of the board were insulting to him.

In this regard, while ODF found that the board had not erred in failing to take into account the underlying factors giving rise to a limited number of tours overseas, since this was not provided for in the agreed promotion arrangements, ODF supported the Complainant's request that the recommendations made by the board for his development be expunged from his Appendix 1 to Annex 'EE' even now after he has retired. ODF further recommended that a further written expression of regret by a suitable Military Authority be given to the complainant with regard to the promotion board's inappropriate recommendation for career development.

ODF also expressed a view that perhaps there ought to be some form of appeal or administrative review system of the outcome of NCO Promotion Competitions and this has been acknowledged by the COS. However, as previously acknowledged, it is agreed that any such appeal or review is a matter for consideration within C & A and is not within the ODF's jurisdiction. ODF nevertheless recommends that any new promotion or other selection system which would, in its administrative processes and procedures, preclude a candidate

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from putting his / her special or particular circumstances forward for consideration, as an alternative to a particular experience sought, and thereby mitigate against a candidate's promotional or other career opportunities, on the basis of his / her resultant limited experience, would most likely be considered by ODF as being "based on incomplete information", "based on undesirable administrative practice", "improperly discriminatory", or "otherwise contrary to fair or sound administration", notwithstanding the absence of any mal-intention.

This complaint also raised the issue of delay. After requesting that the matter be referred to ODF there was a delay of approximately 6 months which was entirely outside of the control of the Complainant and entirely attributable to the actions of the Military Authorities. The Military Authorities expressed their regret for this delay citing administrative error and staffing issues. However that delay, on a strict interpretation of the provisions of section 6(3) of the 2004 Act, could have unfairly put this complaint outside ODF's jurisdiction. For the purposes of consideration of this issue, ODF discounted all of the period of the delay attributable to the DF from the point of the Complainant's request for referral to ODF and the Military Authorities raised no objection to the adoption of this purposive interpretation of the time limit provisions in this case.

Nonetheless, ODF offered an unreserved apology to the Complainant for the delay in bringing his complaint to a Final Report stage, due to reasons outside its control.

In response to the Complainant's expressed disappointment that he was not interviewed by ODF in person, ODF notes that his report addresses all elements of the complaint. It has also been prepared having regard to the provisions of section 9(3) of the Ombudsman (Defence Forces) Act 2004, which provides that,

'The procedure for conducting an investigation shall, subject to any regulations under subsection (5), be such as is considered appropriate by the Ombudsman, having regard to all the circumstances concerned.'



Having regard to the detailed and clear complaint submitted by the Complainant and to the clear and detailed investigation reports provided by the Military Authorities at various levels, interviews of the parties to this complaint were not considered necessary.

ODF further recommended that the Minister ask the following question of the Military Authorities and of the Department of Defence:-

"Was it administratively fair to the Complainant in 2012, after he had given almost thirty five years' loyal and distinguished service, to alter promotion criteria and thereby diminish his further promotion prospects, because of his earlier lack of overseas service in the 1980s and 1990s, in circumstances where a number of his earlier overseas service applications were denied by higher military authorities so that the Complainant would be available to represent the Defence Forces in Military Pentathlons abroad and where he had demonstrated, on a number of occasions for periods totaling five years, his suitability and capability for promotion to the higher rank both at home and in 2004 on overseas service?"

If the Minister is not satisfied that the revised arrangements were administratively fair in the aforementioned circumstances, ODF recommends that he seeks further information as to all and any discretion now available to him in respect of the Complainant in this case.

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Case Summary 8

Reserve Defence Forces- Promotion – "15 year rule" - Complainant advised that he had been promoted – No promotion actually made – Legitimate expectation - Whether "automatic" promotion supported by administrative provisions – Failure to properly implement promotion provisions - DFR R5 para 31 (2) and (3) - Admin Instr R5 Para 76a

Complaint Finding: Not Upheld

This complaint concerned a long-serving officer of the Reserve Defence Forces. He was advised in 2009 that he had met the criteria for appointment under the 15 year rule, but due to the moratorium on promotions within the DF, there were no promotions available. He was advised to await the lifting of the moratorium.

In Mar 2012, the Complainant was advised that there were three promotions for Capt. in his Formation. He was thereafter advised, in a telephone call from a junior NCO in his unit Orderly Room that July, that his promotion had been granted and that he was to put up his rank markings from that day forward. The Complainant was issued with Capt. rank markings some four weeks later and attended a Training Camp wearing Capt. rank markings but later noticed that he was paid as a Lt. In Feb 2013 the Complainant became officially aware that he was, in fact, still a Lt and that he had not been promoted as previously advised.

While the Complainant claimed that he was "ordered" to wear the Capt. rank markings ODF did not accept that the Complainant was given a lawful order by a Superior Officer to so do. In response, the Complainant has provided a letter from a similarly ranked colleague to the effect that he also understood the 'instruction' from his CO as delivered by a junior NCO to be 'an order for [him] to draw Rank markings and assume the duties of a Capt.' While ODF did not doubt the sincerity of either officer, ODF did not accept that the telephone conversation between the Complainant and the junior NCO included the issuing of a lawful order to the Complainant. It is clear to ODF, however, that the telephone caller did inform the Complainant that he was promoted with immediate effect. The Complainant was further aggrieved that

another named officer had been likewise "advised that he was promoted". The Complainant stated that this other officer was still wearing rank markings for the higher rank and was being referred to by reference to the higher rank in army documents. The Complainant further stated that his CO advised him that the other officer was not promoted and is still a Lt, although no action was taken in that regard. While ODF noted this information with some concern, it is rightly a matter for urgent action by the appropriate Military Authority rather than a matter within ODF's jurisdiction. ODF queried if there was any reason why the promotion process had not commenced on the 15th anniversary of the Complainant's commissioning, in Nov 2008. He was advised that the Complainant did not meet the criteria for promotion at that point as he had not satisfied the annual training requirement. That was unfortunate for him because the likelihood is that had he satisfied the training requirement he would have been promoted in 2008. The 'moratorium' on promotions introduced in Mar 2009 and continued for some time, further prevented his promotion although he otherwise met the criteria.

It later became apparent that DCOS (Sp) had issued an instruction on an unspecified date that 'there were to be no further RDF promotions in view of the pending RDF VFM Report. While there was liaison between the Complainant's former Formation and COMO in an attempt to progress the promotions, COMO did not inform the Complainant's Formation that he had been promoted to Capt.' It appears that while RDF Gazettes were published throughout 2012, no Lt to Capt. promotions were published at any stage of that year. During the course of the review, ODF found that the Complainant was correct in



his view that it was not necessary that there be a vacancy in establishments at that time as he could have been promoted supernumerary to establishments in accordance with DFR R 5, para 31(3).

On being informed of his promotion, the Complainant put up his rank markings and paraded for training as a Capt. His unit nominal rolls identified him as having been promoted. Subsequently, the Complainant was informed that he was not promoted to Capt. He became so aware, at the latest, on an unknown date between Nov 2012 and 14 Feb 2013. The Complainant stated that this caused him embarrassment both as a serving officer and within his civilian occupation and family.

The MIO recommended that the Complainant's promotion should be confirmed as he had a 'legitimate expectation' that he would be promoted to Capt. and that he had been so promoted. The Complainant's OC disagreed with the conclusions of the MIO Report and found that the Complainant had not been wronged. He referred to the provisions of Admin Instr R 5, Para 76a which provided that officers seeking promotion from Lt to Capt. rank within the RDF must have the recommendation of the COS (the relevant provision appears to be Para 76.c. which does not appear to envisage or require a promotion competition). He further referred to an email dated the 27 Aug 2012 from an officer at Formation RDF HQ to the Complainant's unit which "specifically states that the promotion had not been effected." The OC Formation further stated that it was regrettable that a miscommunication resulted in the Complainant believing that he had been promoted, but that the overarching documents in this case are Admin Instr R 5 and DHRB's letter of instruction of the 16 Jul 2013. He said that these documents superseded any instructions that the Complainant may have been given. This finding did not satisfy the Complainant and the ROW was referred to the COS.

The COS noted that the relevant provision in DFR R 5, Para. 31(2) requires the recommendation of the COS, among other criteria, in order to come into effect. The COS

noted that in this case there was no recommendation from the COS and that, therefore, the Complainant could not have been promoted. The COS found that in the issue which is central to his complaint, his promotion, the Complainant has not been wronged.

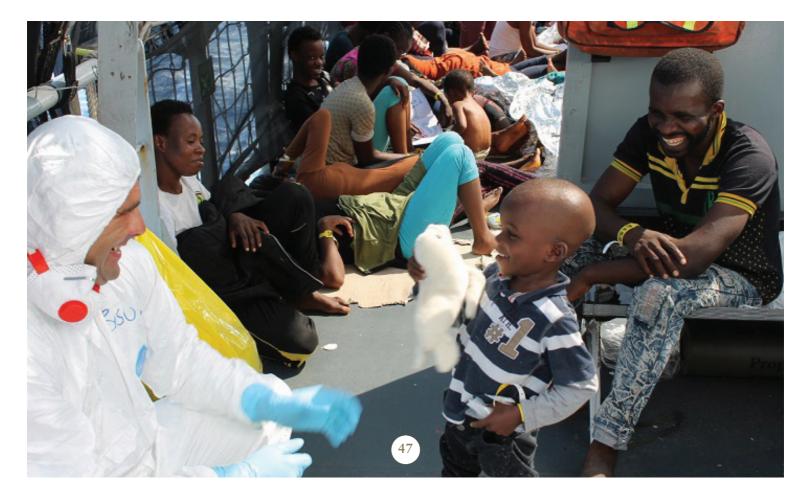
Having carefully considered the wording of the DFR with regard to the 'fifteen years' service' provisions of para 31(2) ODF agreed with the COS's view. ODF was satisfied that without the COS's recommendation the complainant did not meet the laid down promotion criteria, regardless of his service and he could not have been promoted pursuant to para 31(2) of the DFR. Separately, the COS added that due to the reorganisation of the RDF there were currently no officer promotions sanctioned in the RDF and that, therefore, he could not grant the redress sought by the Complainant.

The COS also expressed his disappointment that the Complainant had been informed that he was promoted, that he was issued with rank markings and that he attended RDF events wearing the rank markings of a Captain. The COS could find no satisfactory explanation on file as to how this administrative error occurred. He further indicated that he was seeking a full explanation as to how this scenario arose and how it was to be avoided in the future. He considered that the circumstances that arose for the Complainant were not satisfactory. As a result, the COS was seeking an explanation from the relevant GOC who has since taken steps to prevent communications regarding promotions being issued before authorization by the appropriate authority.

ODF agreed with the COS's view that the circumstances that arose for the Complainant were not satisfactory and recommended that the military authorities further consider how this situation arose and take all necessary steps to avoid a repeat in the future. However, ODF did not uphold the Complainant's claim that he was, or that he ought to have been, promoted. ODF determined that the Complainant with his rank and extensive service would reasonably be expected to have been aware of the seven conditions, specified in DFR R 5, para 31(2), for his promotion to the next rank which had to be fulfilled before he could be promoted by the Minister and that he was or ought to have been aware that until all conditions had been complied with he could not be, and was not in fact, promoted. While the Complainant was reasonably entitled to accept the initial veracity of the information given to him on the 31 Jul 2012 that he had been promoted, it would have been prudent for him to have awaited written confirmation and/or publication of a Gazette amendment or publication in Routine Orders before acting on the verbal information received from a junior NCO and his CO. The Complainant may well have had a genuine and sincere hope of promotion on or about 31 Jul 2012, on the basis of the provisions of para 31(2)of DFR R 5, the earlier information he had received from his CO that he would be promoted, the recommendations of his CO and GOC for his promotion, the fact that he was by that time in his nineteenth year of service as a commissioned officer and the verbal information he was given from both a junior NCO of his unit and his CO on the 31 Jul 2012 that he had been promoted. However, in spite of all of that he did not nor could he have had, in the legal sense, a

legitimate expectation of such promotion, having regard to the terms of the promotion framework for officers of the RDF, as described above, and in particular the unfulfilled conditions precedent specified in para 31(2) of DFR R 5.

The action of informing the Complainant that he had been promoted when in fact he had not been promoted could also be described as being the result of 'maladministration'. In this regard, ODF recommended that the military authorities issue a fulsome written expression of regret to the Complainant for the maladministration which occurred. Any such expression of regret might also cover any professional or private embarrassment caused to the Complainant, although ODF noted that the Complainant made no effort to mitigate any such embarrassment. The military authorities should also acknowledge and compliment the Complainant for giving generously of his private and personal time in his voluntary service to the State over his lengthy service. It seems that the Complainant may still be eligible for consideration for promotion pursuant to the provisions of the DFR referred to earlier, under one or more than one category. If that is the case, ODF recommends that the





Complainant be counselled in that regard and advised of any conditions which must be fulfilled by him before any such promotion could take place. ODF also recommended that the matter be further considered by the military authorities having regard to the content of this report.

During the course of reviewing the provisions underlying the promotion in question, ODF also noted that the phrase "Automatic Promotion officers commissioned on or before 01 October 2005" in the Admin Instr is not contained in the DFR. Therefore, it appears that any automatic right or entitlement which might be inferred by that provision of the Admin Instr is not authorised by either the Statute or the DFR. ODF was therefore of the view that the Admin Instr provisions may not be relied upon to support a claim of 'entitlement' to "automatic promotion". Although the intention may be clear, ODF was not persuaded that the Department's proposed revised RDF promotion arrangements, whether they were agreed within a C&A Scheme or not, had been given effect by being transposed into the promotion framework as it then was.

ODF further queried if the word "may" in Para 31. (2), DFR R5 provided for a 'mandatory' or a 'discretionary' exercise of the power to promote a person meeting all of the conditions precedent provided for in Para 31. (2). On the face of it having regard to the provisions of para 31. (3) of the DFR and the heading of Para 76C of the Admin Instr R5, "Automatic Promotion officers

commissioned on or before 01 October 2005", the word "may" could be understood to mean "shall". However, on further consideration, ODF found that this point was 'moot' in circumstances where the Complainant did not have the necessary 'recommendation' from the COS. Accordingly, further consideration or determination of the appropriate answer to the question raised was unnecessary.

ODF also noted the administrative requirement that "such promotion shall be effected using AF 384" and the fact that the AF 384 used in the case of the Complainant did not facilitate the certification or confirmation of the fulfilment by the Complainant of the seven conditions specified in DFR R5 para 31(2). It appeared to ODF that if this AF continued to be used, as provided for in the Admin Instr, it would be administratively prudent to re-draft it to include certification that all of the required conditions had been fulfilled. In the absence of such certification, the required recommendation of the COS cannot be presumed to have been already made.

ODF also noted that the complaint should have been submitted to the Complainant's Commanding Officer, rather than to his Company Commander, as provided for in the Defence Act. The Complainant responded that he relied on an information booklet in this regard. The Military Authorities have now issued a reminder to all Bdes/Formations regarding the correct procedures.







Corporate Affairs

Staffing

The staffing of the ODF consists of:

- Brian O'Neill, Head of Office
- Michael O'Flaherty, Case Manager
- Lauren O'Donovan, Administrative Assistant

Review of Internal Financial Controls

In common with other publicly-funded Offices, the ODF conducted a formal review of Internal Financial Controls in 2016. This review has been provided to the Comptroller and Auditor General. A comprehensive budgetary system is in operation and expenditure trends are reviewed on a quarterly basis in association with the ODF's external accountants.

Data Protection

The Office of the ODF is registered with the Data Protection Commissioner.

It should also be noted that secrecy of information provisions are applied to the ODF under section 10 of the Ombudsman (Defence Forces) Act 2004 as follows:

- 10.— (1) The Ombudsman or a member of the staff of the Ombudsman (including an investigation officer) shall not disclose any information, document, part of a document or thing obtained by the Ombudsman or an investigation officer in the course of, or for the purpose of, a preliminary examination or an investigation under this Act except for the purposes of—
 - (a) the preliminary examination or the investigation concerned,
 - (b) the making, in accordance with this Act, of any statement, report or notification on that preliminary examination or that investigation, or
 - (c) proceedings for an offence under the Official Secrets Act 1963 that is alleged



to have been committed in respect of information or a document, part of a document or thing obtained by the Ombudsman or an investigation officer by virtue of this Act.

- (2) The Ombudsman or a member of the staff of the Ombudsman (including an investigation officer) shall not be called upon to give evidence in any proceedings, other than proceedings referred to in subsection (1)(c), of matters coming to his or her knowledge in the course of a preliminary examination or an investigation under this Act.
- (3) (a) The Minister may give notice in writing to the Ombudsman, with respect to any document, part of a document, information or thing specified in the notice, or any class of document, part of a document, information or thing so specified, that, in the opinion of the Minister, the disclosure (other than to the Ombudsman or a member of his or

her staff including an investigation officer) of that document, that part of a document, that information or that thing or of documents, parts of a document, information or things of that class, would, for the reasons stated in the notice, be prejudicial to the public interest or to security.

- (b) Where a notice is given under this subsection, nothing in this Act shall be construed as authorising or requiring the Ombudsman to communicate to any person or for any purpose any document, part of a document, information or thing specified in the notice or any document, part of a document, information or thing of a class so specified.
- (4) Where a notice is given under *subsection* (3)(a), the Ombudsman or a member of the staff of the Ombudsman (including an investigation officer) shall not disclose any—(a) document, part of a document,
 - information or thing specified in the





notice, or

(b) class of document, part of a document, information or thing specified in the notice, to any person or for any purpose and nothing in this Act shall be construed as authorising or requiring the Ombudsman or a member of the staff of the Ombudsman (including an investigation officer) to disclose to any person or for any purpose anything referred to in *paragraph (a)* or *(b)*.

Bar Council of Ireland

The ODF is registered under the Direct Professional Access Scheme of the Bar Council of Ireland. The ODF utilises the services of barristers to review case files in appropriate circumstances.

Health & Safety

The ODF has a Health & Safety Statement in place. The Health & Safety Policy regarding the building, in which the ODF is accommodated in, is primarily the responsibility of the Department of Foreign Affairs and Trade.

Freedom of Information

Under the provisions of the Freedom of Information (FOI) Act 2014 individuals have a right to:

- Access records held by a Government Department or certain public bodies, including the ODF;
- Request correction of personal information relating to an individual held by a Government Department or certain public bodies, including the ODF, where it is inaccurate, incomplete or misleading;
- Obtain reasons for a decision made by a Government Department or certain public bodies, including the ODF, where the decision affects an individual.

What records can I ask for under FOI?

Subject to the provisions of the Ombudsman (Defence Forces) Act 2004 detailed below, an

individual can ask for the following records held by the ODF:

- Any records relating to an individual personally, whenever created;
- Any other records created since the establishment of the ODF in December 2005.

A 'record' can be a paper document, information held electronically, printouts, maps, plans, microfilm, etc.

Information precluded under Section 10 of the Ombudsman (Defence Forces) Act 2004

Section 10 deals with the secrecy of information gathered by the ODF in relation to complaints investigated or being investigated. It states:

- 10.— (1) The Ombudsman or a member of the staff of the Ombudsman (including an investigation officer) shall not disclose any information, document, part of a document or thing obtained by the Ombudsman or an investigation officer in the course of, or for the purpose of, a preliminary investigation or an investigation under this Act except for the purposes of-
 - (a) the preliminary examination or the investigation concerned,
 - (b) the making, in accordance with this Act, of any statement, report or notification on that preliminary examination or that investigation, or
 - (c) proceedings for an offence under the Official Secrets Act 1963 that is alleged to have been committed in respect of information or a document, part of a document or thing obtained by the Ombudsman or an investigation officer by virtue of this Act."

In simple terms, the Freedom of Information Act applies only to the administrative files held by the Ombudsman for the Defence Forces. Investigation files are not subject to the provisions of the FOI Act.

ODF Annual Report 2016





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