

communiqué

JANUARY - MARCH 2001

Disciplinary measures and conflict resolution

The Committee recently published a *Preliminary Report* on disciplinary measures and conflict resolution in the RCMP. Available on our web site, the report aims to encourage consideration of these important issues by identifying the strengths and weaknesses of the current process and by suggesting possible changes.

The report touches on subjects such as the role of alternative dispute resolution (ADR) in the disciplinary process. It also contains certain comments on current adjudication board procedures, and the impact of the *Southam* ruling. According to one interpretation, this decision could require public access to all hearings and decisions of boards.

Suggestions for change include the implementation of administrative timeframes for disciplinary investigations and hearings, an accelerated process for undisputed cases and better disclosure of settlements resulting from ADR. Many other changes are being discussed, including possible amendments to the *RCMP Act* and Regulations.

This spring, the Committee is meeting and consulting with RCMP members, and other interested parties, to discuss these issues. This exchange of ideas is already bearing fruit and has allowed us to better identify RCMP concerns in this area. Your comments and suggestions are also very important in helping us find the best possible solutions to improve the disciplinary process and promote conflict resolution. Have your say!

Classification of a Position: Decision of the Federal Court

On January 22, 2001, the Federal Court of Canada, Trial Division, reversed a decision of the Commissioner denying a grievance presented by Superintendent Daniel Girouard (case reference: *Girouard v. Canada (Royal Canadian Mounted Police)*, [2001] F.C.J. No. 63). A summary of the case follows.

In 1994, Superintendent Girouard was in charge of an administrative service. Following the amalgamation of his service with another service, the responsibilities of his position increased. His superior officer believed that the position's classification level should be raised,

and he asked that the position be reclassified. However, the classification officer decided not to raise the classification level. Superintendent Girouard presented a grievance. The Level I adjudicator rejected the grievance for the reason that Superintendent Girouard was not aggrieved, as required under subsection 31(1) of the *RCMP Act*. According to the adjudicator, nothing guaranteed that he would remain in the position or that he would necessarily be promoted if the classification level was raised. Superintendent Girouard submitted his grievance to Level II.

The Committee examined the grievance and found that, for a member, the loss of the opportunity to advance his career represented a prejudice that was sufficient for the purposes of subsection 31(1). The Committee also found that there were deficiencies in the relativity study and that the lack of explanations, as to why the group of duties encompassed by the position was less important than that in the benchmark positions, was such that it represented a fundamental error in procedure. In light of the errors found, the Committee concluded that the classification exercise should be invalidated and a new classification



communiqué

~ 2 ~

process begun. It recommended that the grievance be upheld. The Commissioner did not, however, accept the Committee's conclusions and recommendations, and denied the grievance. In his view, the reasons given by the classification officers and the relativity study were sufficient. Superintendent Girouard then filed an application for judicial review in the Federal Court of Canada.

Speaking for the Federal Court, Mr. Justice Rouleau observed that under the *RCMP Act*, the Commissioner must give reasons for a decision not to follow the recommendations of the Committee. He further noted that Treasury Board's policy on relativity studies requires comparison of the position under study with a number of other positions in the organization concerned but that Superintendent Girouard's position was compared to only one position within the RCMP. He found that Superintendent Girouard was entitled to expect the Commissioner to give reasons for departing from established policy. He underlined the importance of the recommendations of the External Review Committee (ERC):

[TRANSLATION] *A reading of the ERC's conclusions and recommendations shows that the problem with the comparisons pertains more to their quality than to their number. While the Commissioner does refer in his decision to the quality issues identified by the ERC, he does not appear to have addressed them in his conclusions. The ERC raised many*

problems of a serious nature which, in my view, deserved at the very least an examination by the Commissioner. In rejecting the ERC's recommendations without really explaining his decision, the Commissioner contravened the [RCMP Act] and exceeded his jurisdiction, making his decision subject to review by this Court.

For these reasons, the Court quashed the Commissioner's decision and ordered the RCMP to conduct a new evaluation of the classification of Superintendent Girouard's position.

Between January and March 2001, the Committee issued recommendations in the following matters:

D-71 The Appellant has appealed the decision of an adjudication board on two allegations, which found that his conduct was disgraceful, when he had engaged in sexual misconduct towards two other members. The Appellant is also appealing the sanction that was imposed by the Board, that is a forfeiture of six days' pay for the first allegation and a forfeiture of 10 days' pay for the second allegation. The Board also recommended that the Appellant issue written apologies to both members and that he be provided with training on sexual harassment.

The Appellant's representative presented three grounds of appeal.

Firstly, she disputed the Board's assessment of the witnesses' credibility, arguing that insufficient reasons were provided in support thereof. Secondly, the Appellant's representative submitted that the Appellant's sexual actions in the case of the second allegation should not be regarded as a violation of the *Code of Conduct* because the member had consented to these actions. Thirdly, she argued that the sanction was too harsh.

The Respondent's representative defended the Board's decision, arguing that the Board had carefully assessed the credibility of the witnesses and had fully appreciated the seriousness of the Appellant's misconduct.

The Committee considered that there were two aspects to the Board's decision which were problematic. First, according to the Committee, the Board did not have sufficient evidence before it to conclude that the incident described in the first allegation had taken place. Indeed, not a single other person who was in the room when this incident allegedly occurred had any recollection of it. Even if the Board's finding on the member's credibility could be sustained, the Committee does not believe that the incident could be regarded as a violation of the *Code of Conduct*. To be able to conclude as such, the evidence would have had to establish that the Appellant had sexual intentions or that the member genuinely perceived that such were

communiqué

~ 3 ~

his intentions. The Committee did not believe that a reasonable person would view those actions as disgraceful. As for the second allegation, the Committee was of the view that since the member claimed that she was asleep and therefore could not have consented, the Board had no choice but to find that the allegation had been established unless it was prepared to state that her evidence was not credible.

The second aspect of the decision which the Committee found problematic related to the sanction for the second allegation, consisting in a forfeiture of 10 days' pay, the most severe sanction available short of dismissal or an order to resign. The Committee considered that this sanction completely failed to respect the principle of parity of sanction, which is a fundamental principle in disciplinary law, and whose application to the RCMP had been recognized many times in appeal decisions.

The Committee recommended that the decision on appeal be that the first allegation was not established and the second allegation was established. The Committee recommended that the appeal on sanction concerning the second allegation be allowed and the sanction be reduced to a forfeiture of eight days' pay and a reprimand.

Commissioner's Decision

The Commissioner agreed with the

Committee that the first allegation had not been proven. With respect to the second allegation, the Commissioner decided to uphold the sanction, namely forfeiture of 10 days' pay, preparation of a letter of apology, and a requirement that the appellant take sexual harassment awareness training. To justify his decision not to follow the Committee's recommendation, the Commissioner mentioned that even though the principle of parity regarding sanctions is important, he wanted to send a clear message to RCMP members that incidents of sexual harassment are very serious and should be penalized more severely than they may have been in the past. According to the Commissioner, this approach reflects changing attitudes in society as well as the measures the RCMP has recently taken to make employees aware of the problem and reduce the number of such incidents.

G-251 The Grievor had informed his Commanding Officer that he felt harassed by his supervisor, but indicated that he did not want to make a formal harassment complaint; he only wanted the harassment to stop. However, he was informed that the RCMP had an obligation to investigate any complaint, and was therefore asked to substantiate his complaint. The Grievor did not comply. Accordingly, the Appropriate Officer decided not to investigate and concluded the

complaint was unfounded. Five months later, the Grievor, who felt the harassment had not stopped, filed a harassment complaint. He explained that the harassment had started when he had refused to transfer to the new District Office. He indicated that his supervisor had since made several decisions, which he had grieved, in order to force him to accept the transfer. He felt that these decisions amounted to a form of abuse of authority. The Appropriate Officer concluded that the Grievor had failed to demonstrate that the abuse of authority related to a prohibited ground of discrimination covered by the *Canadian Human Rights Act*. The Appropriate Officer also concluded that the issues raised in the Grievor's complaint had been dealt with, or should have been dealt with, through the grievance process. The Grievor filed a grievance against the refusal to investigate his harassment complaint.

The Level I adjudicator concluded that the Appropriate Officer had correctly refused to carry a formal code of conduct investigation into the complaint. He indicated that the Grievor had failed to establish that he had been the victim of harassment. He finally agreed that the Grievor could not seek redress through the harassment process when the same recourse had been sought through the grievance process.

The Committee commented the way the Grievor's first complaint was dealt with by the RCMP. The

communiqué

~ 4 ~

Committee noted that while the Appropriate Officer had indicated that the RCMP had an obligation to investigate any complaints, it decided not to investigate. The Committee pointed out that while the Grievor had chosen not to substantiate his initial complaint, the Appropriate Officer still had an obligation to investigate the matter and asking for more submissions from the Grievor was not the only means available to do so.

As for the second complaint, the Committee found that the Appropriate Officer used the wrong definition of harassment when he found that the Grievor had failed to show that he had been discriminated against. The Committee noted that Treasury Board policy on harassment specifically identifies "abuse of authority" as a form of harassment and that the *Canadian Human Rights Act* is not called into play. The Committee also found that a determination as to whether the Grievor had been victim of harassment could not have been made without a proper investigation. The Committee added that an investigation under the harassment policy is independent of a code of conduct investigation because it can lead to different measures. In addition, the Committee noted the differences between the grievance process and the harassment process. It found that while the supervisor's decisions could have been grieved on their merits, it was also opened to the Grievor to complain that in

making these decisions, his supervisor intentionally abused her authority and thereby harassed him. The Committee recommended that the grievance be upheld and recommended that a new investigation be conducted into the complaint in order to determine if harassment took place against the Grievor.

Commissioner's Decision

Acting Commissioner Wayne Wawryk made the decision in this matter. He said that he was fully in agreement with the Committee's findings and recommendations. He therefore upheld the grievance and ordered that a new investigation be made concerning the complaint of harassment.

G-252 The Grievor is an investigator at a unit where all positions have unilingual French language requirements. The Grievor's supervisor, claiming that his unit needed two bilingual positions, asked that the language requirements of two investigator positions, the Grievor's among them, be modified. The RCMP investigated and concluded that the other investigator's position should be modified, but not the Grievor's. The RCMP also decided to modify the language requirements of the supervisor's position. The Grievor filed a grievance alleging that he had

to work in both languages and that he was already bilingual, whereas his supervisor was not. The RCMP indicated that a language designation is given to the position and not to the incumbent. The RCMP added that the unit did not need more than one bilingual investigator position and that the supervisor's position should be bilingual based on his duties.

The Grievance Advisory Board (GAB) recommended the grievance be allowed because the RCMP's decision was not properly justified. However, the Level I adjudicator dismissed the grievance. He believed the RCMP's decision was accurate because it took into consideration the position's needs and not the language skills of its incumbents.

The Committee concluded that the Grievor did not show knowledge of English to be an essential requirement for the position. The Committee agrees that the RCMP's decision was not explained properly but considered the decision to be reasonable nonetheless. The Committee reiterated that the language requirement designation of a position is based on the duties related to that position and not on its incumbent's skills. The Committee noted that the RCMP should now ensure that the Grievor will be able to work in French. The Committee recommended dismissing the grievance.

The Commissioner has yet to render a decision in this matter.

communiqué

~ 5 ~

G-253 The Grievor was assigned as a United Nations civilian police officer in a foreign country. She brought a harassment complaint against three members, one of whom was her supervisor. She charged her supervisor with trying to have her transferred to another detachment, with threatening her, and with making inappropriate comments about her in front of colleagues. As to the other two members, the Grievor indicated that they ordered her repatriation to Canada without reasonable grounds.

The RCMP refused to investigate the merits of the complaint, except for the allegation of threats from the Grievor's supervisor. The refusal to investigate led to another grievance. The RCMP investigated the allegation of threats, but concluded that there was no harassment involved. According to the Appropriate Officer, the supervisor did not intend to threaten the Grievor. The Grievor presented a grievance against this decision.

The Level I adjudicator concluded that [translation] "a reasonable person could have seen the [supervisor's] comments as threatening and intimidating." Therefore, he upheld the grievance and asked the Grievor to consider his decision as a formal apology from the RCMP. The Grievor presented a Level II grievance because she was not satisfied with the redress given.

The Committee concluded that the harassment complaint was justified. The supervisor's comments were threatening and even if he claims to not have intended to threaten the Grievor, he should have known that his comments could be perceived this way. The Committee explained that, except for the RCMP's official apology, there were no other redresses that could be taken because of the time elapsed since the incident. The Committee recommended that the grievance be allowed and that a letter of apology be sent to the Grievor, with copies to her supervisor and superior.

Commissioner's Decision

The Commissioner agreed with the Committee. He therefore ordered the Division's Commanding Officer to send a letter to the member apologizing, on behalf of the RCMP, for failure to provide her a harassment-free workplace, and recognizing that the supervisor's words were improper and hurtful. The Commissioner also ordered, following the Committee's recommendation, that a copy of the letter be sent to the supervisor and to the supervisor's immediate current superior.

G-254 The Grievor was notified that he was being transferred. At the time, he owned a residence and expressed an interest in having the residence sold through the Guaranteed Home Sales Plan (GHSP). As arranged by

the GHSP coordinator, two appraisals of the Grievor's home were conducted in April 1998 and both independently arrived at the same market value estimate for the property, \$105,000.00. Following that, two inspections were carried on the Grievor's home which revealed problems with the pilings and the foundation. As a result, it was recommended that the residence not be accepted into the GHSP because it would be a high risk to the Crown. Therefore, the Grievor decided to have his home repaired. Once the repairs were done, the marketing period had passed and two new appraisals were prepared on the Grievor's home. Both appraisals noted that there had been a significant drop in the property's market value and the GHSP price offered to the Grievor was \$91,750.00 which was accepted by him four days later. The Grievor filed a grievance against the decision not to admit his home into the GHSP and the decision to order that new appraisals be conducted.

The Level I adjudicator found that the decisions which the Grievor was challenging had not been made "in the administration of the affairs of the Force" but rather as a result of the requirement to adhere to Treasury Board Guidelines. The Level I adjudicator concluded that they were not grievable.

The Committee found that both decisions were clearly made "in the administration of the affairs of the

communiqué

~ 6 ~

Force" because the decisions challenged by the Grievor were not ones made by Treasury Board but rather by the RCMP. Concerning the first decision, however, the Committee found that the Grievor failed to act within the 30 day period during which he could challenge the decision. Concerning the second decision, the Committee found that the RCMP was justified in ordering that new appraisals be conducted. The circumstances that led to the delay, as unfortunate as they were, could not be considered in setting the GHSP price. The GHSP price that the Grievor was offered reflected the market value of the property at the time as established by the two appraisals. The Committee indicated that the RCMP acted responsibly throughout the five-month period between the time of the initial appraisals and the time that the Grievor was finally offered the GHSP price. In addition, the Committee found that there is likely no basis upon which the Force could consider offering compensation to the Grievor for his financial losses.

Commissioner's Decision

Acting Commissioner Gary Loepky made the decision in this matter. He said that he agreed with the Committee's recommendations and therefore denied the grievance. He also indicated that in his view the actions of the RCMP did not create an entitlement to compensation.

G-255 The Grievor, stationed in an Isolated Post, contested a decision declaring him ineligible to receive an allowance for fuel and utilities expenses, which is available under certain conditions, through the *Isolated Posts Directive* (Directive). That decision was based on information received from Treasury Board Secretariat that while his Detachment was considered an isolated post under that Directive, it did not meet the criterion for eligibility to that specific allowance. The Grievor's argument was that since another Detachment, which is located approximately 40 kilometres to the east of his Detachment, is eligible, his Detachment should also be eligible. Furthermore, the Grievor's Detachment is a "satellite" of this other Detachment.

The Grievance Advisory Board unanimously recommended that the grievance be denied and the Level I adjudicator agreed with that recommendation. He concluded that the Grievor had failed to demonstrate that he had been aggrieved by the decision.

The Committee found that there was some doubt as to whether the Level I grievance was submitted within the time permitted by the *Act*. However, since the Level I adjudicator had stated that he considered that the grievance had been submitted on time, the Committee decided not to disturb that finding. The Committee concluded that the Grievor had standing to

submit his grievance as he was certainly aggrieved by the decision. The Committee pointed out that the fuel and utilities allowance is only available at certain isolated posts which experience abnormally high prices for fuel and utilities and it was determined that the Grievor's Detachment did not fall in that category. The Committee indicated that one criterion described in the Directive, which can be used to determine eligibility for the allowance is the location of the Grievor's "headquarters" and that expression is defined as "the isolated post to which the employee is assigned". The Committee found that there was no evidence which established that the Grievor was assigned to another Isolated Post rather than his own Detachment. The fact that the Grievor's Detachment was a "satellite" of the other was not relevant. Also, in the end, the Committee commented on whether or not the Directive should be modified to resolve the inequity that appeared to have been created by providing for a fuel and utilities allowance to be paid in the other Detachment, but none in the Grievor's Detachment. The Committee also stated that this issue was not one that could be resolved through the Force's grievance procedure because that decision was not one that was made by the Force.

Commissioner's Decision

Acting Commissioner Gary Loepky made the decision in this matter. In his view, the decision to refuse to pay

communiqué

~ 7 ~

an allowance had been conveyed to the member 10 days earlier than what was indicated on the grievance form, and that consequently the grievance had not been submitted at the first level within the 30-day limit. He therefore denied the grievance.

He did however comment on the merits of the grievance itself, saying that he shared the view of the Committee to the effect that the decision had not been made by the RCMP since the list of detachments eligible for the fuel allowance is drawn up by Treasury Board and not by the RCMP.

The Acting Commissioner did not comment on the point made by the Committee that the RCMP should perhaps raise this matter with Treasury Board in order to put an end to the inequity which appears to exist among different isolated posts.

G-256-7-8-9

The Grievors presented claims for meal expenses incurred during travel on patrol near the end of 1998. The amounts claimed for meals were consistent with the rates set out in the *Travel Directive* of the Treasury Board Secretariat. The four claims were rejected. In three cases, the Grievors were told that they could only redeem the amount they actually spent. As for the fourth case, the Grievor was told to claim a more realistic amount.

The Level I adjudicator decided not to convene the Grievance Advisory Board (GAB). He concluded that the GAB policy on meal expenses for travel of less than one day was clear: the member has a right to have the actual cost reimbursed, i.e. the amount spent by the member up to the rates set out in the *Travel Directive*.

The Committee first stated that the Level I adjudicator was wrong in not convening the GAB to review the grievances. By acting in this way, it breached the *Commissioner's Standing Orders* (grievances) and deprived the Grievors of a significant means of making themselves heard. However, the Committee indicated that, in this specific case, it was possible to draw appropriate conclusions and, for this reason, it was not necessary that the file be returned to the adjudicator to convene the GAB.

The Committee then concluded that, for travel on patrol, it is the actual cost of meals that should be reimbursed. Particularly, the Committee explained that the Directive implemented in 1971 for members of the RCMP was designed to deal with travel situations exclusive to the RCMP. This Directive stated explicitly that the overall Treasury Board policy, the *Travel Directive*, applied to the RCMP. At that time, the 1971 Directive stated that reimbursement for meal expenses, for travel on patrol, was to be determined at a preset rate, the same rate received by public servants

for travel of less than one day. The *Travel Directive* was later modified to base the meal expense reimbursement rate claimed by public servants on actual expenses for travel of less than one day. Consequently, the meal expense reimbursement rate claimed by members of the RCMP was also modified to be based on actual expenses. The Committee noted that this policy had been interpreted differently in the past, but that it was clear that the Treasury Board's intention was to reimburse actual expenses and not to provide a source of income.

Finally, the Committee concluded that the RCMP does not have the right to limit the amount that members could claim. Only the maximum amounts of the *Travel Directive* apply. The Directive should be applied in a consistent and fair way across the RCMP.

The Commissioner has yet to render a decision in these matters.

Update

The Commissioner has provided his decision in the following matter summarized in the October/December 2000 Communiqué:

D-70 The Appellant was the subject of four allegations of disgraceful conduct regarding incidents in which he allegedly entered his girlfriend's

communiqué

~ 8 ~

residence and physically attacked her, resisted arrest and breached the terms of release from custody. The Appellant testified that he had been functioning as an automaton as a result of an adverse drug reaction. The Board rejected the Appellant's defense, found three allegations to have been established and imposed the following sanction: forfeiture of pay for 10 days, a reprimand and recommendations for a transfer and for continued counseling. The Appellant appealed the Board's finding that three allegations of misconduct have been established.

The Appellant argued that the victim's rebuttal evidence presented by the Respondent as similar fact evidence, should have been found inadmissible by the Board. He also argued that the evidence of his two expert witnesses was misapplied by the Board and was not given enough weight.

The Committee found that the rebuttal evidence did not amount to similar fact evidence and that it was not a significant factor in the Board's decision to reject the Appellant's defense. It also found that the Board properly assessed the evidence of the expert witnesses. The Committee recommended that the appeal be dismissed.

Commissioner's Decision

The Commissioner adopted the Committee's findings and denied the appeal.

