communiqué

APRIL - JUNE 2001

Between April and June 2001, the Committee issued recommendations in the following matters:

D-72 The Appellant appealed a decision made by the Adjudication Board who had to reach a decision on 13 allegations that his behaviour was disgraceful. The appeal also concerned the sanction the Adjudication Board imposed, i.e. discharge from the RCMP.

The Appellant's representative submitted the following grounds in support of her appeal. She questioned the Adjudication Board's assessment of witnesses' credibility, deeming it to be tainted with errors in law. The Appellant's representative criticized the Adjudication Board for not having recognized that the Appellant's son had reasons to reject his father, that he embellished his testimony and that he lied. As well, she submitted that the Appellant's ex-wife was motivated by a desire for revenge. The Appellant's representative also claimed that there was no reasonable cause to dismiss the Appellant's statements, especially since his testimony was corroborated by another witness.

The Respondent's representative defended the Adjudication Board's conclusions by emphasizing that the Board had explained why certain aspects of the testimony were credible and others were not.

The Committee found that, given the severity of the allegations, the Adjudication Board was required to conduct a more thorough analysis of the witnesses' credibility than it seems to have done. However, in spite of everything, the Committee found that, even though the Adjudication Board concluded that the Appellant was completely credible, the actions he admitted to were serious enough to justify the RCMP terminating his employment. Also, the Committee indicated that the fact the Appellant tried to influence his son's behaviour, who was 15 at the time, using his service weapon, was sufficient grounds to end his job. Only evidence indicating that the Appellant's behaviour was largely influenced by factors beyond his control could justify imposing a less severe sanction than discharge or an order to resign.

The Committee recommended that the appeal of the Adjudication Board's findings as to the merit of the allegations be dismissed. As to the sanction, the Committee indicated that the Adjudication Board did not explain in its decision why it refused to give the Appellant the opportunity to resign and that this was not a case where discharge was preferable. The Committee therefore recommended that the appeal opposing the sanction be allowed and that the Commissioner substitute this sanction with an order that the Appellant resign from the RCMP within 14 days, or face discharge.

D-73 The Appellant appealed the decision of the Adjudication Board ordering him to resign for breaching the RCMP's *Code of Conduct*. In this case, the member was pursuing a dangerously driven vehicle. At that time, the Appellant was off duty and was driving his private car. He then hit another vehicle and had to stop, at which point he drew his service weapon and pointed it at the vehicle he was initially pursuing.

The Appellant's representative presented the following grounds of appeal. First, he criticized the Adjudication Board for not having attached enough importance to the dangerous driving of the vehicle pursued by the Appellant. The second ground concerns the relevance of the Appellant's disciplinary history. He indicated that the Board was unwarranted in

considering this history since the Adjudication Board did not know the context in which these events happened and they were not of the same nature as the current incident. Third, the Appellant's representative submitted that the sanction imposed was disproportionate.

The Respondent's representative challenged all the grounds of appeal and submitted that there was some similarity between the Appellant's entire discipline file and the current matter, i.e. the Appellant's tendency to lose his temper.

The Committee concluded that neither the Appellant's disciplinary history, nor the severity of the incident in themselves justify the decision to order the Appellant to resign. However, evidence does clearly and convincingly indicate that the Appellant is not likely to radically change the attitude he so often has displayed during the second half of his career at the RCMP. The Committee found that, even without knowing all the circumstances surrounding the Appellant's disciplinary history, it is possible to conclude that the multiple warnings he was given to pay more attention to his conduct towards the public did not produce the expected results.

The Committee recommended that the appeal be denied.

G-260

The Grievor agreed to be assigned to a temporary assignment for a twelve-month period. Although a letter of understanding was signed between the Grievor's supervisor and the person responsible for the temporary assignment, the Grievor was not provided with a copy of that letter. For the first five months, the Grievor was provided with a vehicle which he was able to use to commute between his residence and the workplace where he had been temporarily assigned. However, after that five month period, the Grievor was responsible for making his own arrangements until the end of his assignment. Just when his assignment was about to end, the Grievor learned that other members had received a private vehicle allowance while assigned to other temporary duties. The payment of their allowance had stopped only when a transfer report had been prepared to confirm a change in the member's workplace. The Grievor therefore relied on that information in support of a request for payment of a private vehicle allowance. The Grievor described his temporary place of work as a "point of call" to which he had been authorized to travel directly from his home; he contended that his duties were of an itinerant nature since he had been required to return to his detachment for all administrative matters in relation to his position. The Grievor's request was denied. It was noted that the Grievor had volunteered for the assignment; the Grievor's contention that his duties had been of an itinerant nature was also disputed. It was concluded that the Grievor was not entitled to a private vehicle allowance because he had failed to make his request before undertaking travel.

The Grievance Advisory Board ("GAB") recommended that the grievance be denied because the Grievor did not seek approval from his supervisor to incur private vehicle mileage.

The Level I Adjudicator agreed with the GAB. However, he also concluded that the Grievor should have been advised in writing of the change of place of work. He directed that the Grievor be paid an allowance based on travel incurred during the first month of the period claimed. He concluded, however, that the Grievor could not be reimbursed for anything else because he did not raise this matter as soon as he began using his private vehicle to commute to work.

The Committee concluded that the place where the Grievor was temporarily assigned was not merely a "point of call" for the Grievor but that it had become his workplace when he started the special assignment. The Grievor's workplace was where he «ordinarily» performed the duties of his position, regardless of the fact that the Force failed to provide him with written notice to that effect as stipulated by its own policy.

The Committee recommended that the grievance be denied.

Commissioner's Decision

Acting Commissioner G.J. Loeppky agreed with the Committee's recommendation that the grievance be denied. He found that as a matter of job function, the Grievor effectively worked out of the [city] Regional Police Street Drug Unit. The Acting Commissioner concurred with the Committee "that there is no discernable logic that this member should be compensated for driving to and from work every day because he was not provided written notice of a change of workplace which he was well aware of prior to reporting to the [city] Regional Police Street Drug Unit". Further, his duties were not of an "itinerant nature". The grievance was denied.

UPDATE

The Commissioner has provided his decision in the following matter summarized in the January/March 2001 Communiqué:

G-252 The Grievor is an investigator at a unit where all positions have unilingual French language requirements. The Grievor's supervisor asked that the language requirements of two investigator positions, the Grievor's among them, be modified. The RCMP 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 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 concluded that nothing on file showed that the unit needed to have two bilingual investigator positions. The Committee recommended dismissing the grievance.

Commissioner's Decision

The Commissioner agreed with the findings and recommendations of the External Review Committee (ERC). He maintained that the member had not demonstrated that knowledge of English was essential in his position to allow him to carry out his duties at [unit]. The Commissioner further noted that a position already existed whose incumbent is required to be able to offer services in both official languages as prescribed in the Official Languages Act.

Federal Court confirms Commissioner's decision in *Rendell* as reported in April-June 2000 Communiqué

In November 1997, three allegations of disgraceful conduct were made against Cst. Rendell, for physical assault of his spouse, uttering of a death threat and failing to properly secure and store his service revolver. Cst. Rendell admitted to the particulars of the three allegations. He was convicted of a criminal offence for the assault.

The Adjudication Board found the three allegations to have been established. It imposed a sanction of an order to resign, a reprimand and a forfeiture of pay for three days. The Appellant appealed the sanctions to the Commissioner. When the matter was brought to the External Review Committee, the Committee found that an order to resign was not an appropriate sanction in the particular circumstances, and that the Board erred on several points, namely the credibility of Cst. Rendell, the matter of the incident being part of a "cycle of violence", and the parity of sanction with respect to previous cases.

The Commissioner rejected the grievance and ordered Cst. Rendell to resign. In the Commissioner's view, the impact of Cst. Rendell's actions on the victim and on the integrity of the RCMP, as well as societal expectations, took precedence over the member's state of mind at the time of the incident. In his opinion, a

police officer who has been convicted of assault in a criminal court cannot continue to be employed if public trust is to be maintained. He also stated that the RCMP's policy of zero tolerance in prosecuting cases of domestic violence should be followed, by requiring Cst. Rendell to resign unless there were mitigating circumstances. The Commissioner did not find any mitigating circumstance.

Cst. Rendell applied for judicial review of the Commissioner's decision pursuant to the *Federal Court Act*. He alleged that the Commissioner had erred in refusing to apply the principle of parity of sanction and that it was unreasonable to find that his conduct was part of a "cycle of violence" rather than an isolated incident.

Decision of the Federal Court (Trial Division)

On June 27, 2001, the Federal Court denied the application for judicial review. The Court found that the Commissioner's decision contained no error of law or fact that might justify the Court's intervention. According to Justice Rouleau, while the principle of parity of sanction is of special importance in the RCMP's disciplinary process, it cannot be applied in such a way as to encroach on the discretion conferred by law on the Commissioner. The Commissioner makes his decision on the basis of the facts presented to him and he has the necessary expertise to weigh the evidence. In the case at hand, the Commissioner did not err in law by deciding to accord greater importance to the RCMP's policy in cases of domestic violence, public perceptions, and the integration of the organization, than to the mitigating circumstances.

ARTICLE

Human Rights and Harassment in the Workplace

In its role as employer of the Public Service, Treasury Board has made a commitment to providing a workplace where "all persons...are treated with respect and dignity", and to this end it has amended its policy on harassment ("Policy on the Prevention and Resolution of Harassment in the Workplace"). The new policy has been in effect since June 1, 2001 and it goes beyond the requirements of the *Canadian Human Rights Act* ("CHRA") by addressing other types of workplace harassment such as harassment of a general nature, including rude, degrading or offensive remarks or e-mails, threats or intimidation.

The Treasury Board policy applies to the RCMP's handling of its relations with members and employees. The Force's internal harassment policy (see Administration Manual "AM" ch. XII.1) must therefore comply with the Treasury Board policy. Under the internal policy, employees, supervisors and managers all have specific responsibilities in this matter. Also, whenever a complaint of harassment is made, the RCMP has an obligation to investigate and determine whether it is well founded. The Committee recently reminded the Force of this obligation in case G-251 (See *Communiqué* of January-March 2001).

The main changes arising from the new policy are process-related. The Public Service Commission will now provide advice and training as well as mediation and investigation services to all departments and agencies covered by the policy.

Generally speaking, the new policy emphasizes managers' obligation to act rapidly when a potential harassment situation arises. The policy encourages the use of mediation and facilitation to defuse such situations and put an end to inappropriate behaviour without delay.

Harassment in all its forms is clearly unacceptable, and the RCMP has an obligation to provide a workplace that is free of harassment, and to intervene as soon as possible when a situation arises that may become harassment. It is therefore important for the RCMP to come to an understanding of the extent to which the new policy and the CHRA govern the work environment. This article is intended to detail the extent of these obligations.

Human Rights

Under the CHRA, it is a discriminatory practice to harass an individual on one of the prohibited grounds of discrimination listed in section 3. Thus for the Canadian Human Rights Commission ("CHRC"), harassment is a form of discrimination.

This same notion can be found in the RCMP's general policy on human rights, as set out in chapter II.13 of the AM. The policy stipulates that the RCMP provides its members with a workplace free of any form of discrimination. It also stipulates that the RCMP must comply with all the provisions of the CHRA.

• *Definitions*

RCMP human rights policy states that the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, marital status, family status, conviction for which a pardon has been granted, disability and sexual orientation. This reflects the provisions of the CHRA.

• *Procedure and recourse options*

With regard to the procedure to follow when members or employees believe they have been subject to a discriminatory act, here is what the AM provides:

E.3 *Employees who believe they are the subject of a discriminatory act may submit their complaint directly to the Canadian Human Rights Commission (CHRC) but are encouraged to try and resolve the matter informally by exhausting all RCMP internal resolution mechanisms.*

E.3. a. *Section 41(1)(a) of the* Canadian Human Rights Act *states that "The alleged victim of a discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available." If dissatisfied with the results of the internal review, the complainant may contact a CHRC office.*

Note that the CHRC enjoys a discretionary power under paragraph 41(1)(a). In *Canada (Attorney General) v. Boutilier* [2000] 3 F.C. 27, the Federal Court of Appeal held that it is up to the CHRC to decide whether a case should be sent to a grievance or review procedure until these are exhausted.

Case G-251, mentioned previously, illustrates a situation where a member who believed himself to be a victim of discrimination both grieved and went to the CHRC. The member had complained that he was a victim of harassment by his supervisor. He initially declined to make a complaint of harassment; rather he simply wanted the harassment to stop. However, after five months, the member decided to act because he believed the harassment was continuing. First, he made a complaint to the CHRC, but the Commission determined that it did not have jurisdiction because abuse of authority is not a prohibited ground of discrimination under the CHRA. The member therefore grieved to the RCMP, but the Appropriate Officer took the view that the complaint was not well founded because the abuse of authority was not related to a ground of discrimination prohibited in the CHRA. The Level I adjudicator agreed with this interpretation. The adjudicator also stated that the member could not make a harassment complaint concerning matters which had already been raised through the grievance procedure. These conclusions were completely erroneous. First, any member who is dissatisfied with the results of internal recourses may contact an office of the CHRC. Second, members do not need to demonstrate that the harassment was based on one of the prohibited grounds of discrimination listed in the CHRA. This is because the RCMP is also bound by the Treasury Board policy which provides that abuse of authority constitutes harassment. The Commissioner agreed with the Committee's conclusions in this case.

Harassment

With regard to harassment in the workplace, the RCMP's policy is found in Chapter XII of the AM. It states that "*The RCMP is committed to providing a working environment free from harassment, discrimination and any resulting conflict, in which all employees are treated with respect and dignity. Each individual has the*

right to work in a professional atmosphere which promotes equal opportunity and prohibits discriminatory practices".

• *Definitions*

The Treasury Board policy states that harassment includes degrading remarks, jokes or taunting, insulting gestures, displays of offensive pictures or materials, and unwelcome enquiries or comments about someone's personal life, as well as conduct, comments or gestures of a sexual nature that may offend or humiliate an employee.

Harassment also includes conduct, comments or displays that demean, belittle or cause humiliation or embarrassment to an employee, as well as any intimidation or threat.

ERC 2400-95-004 (G-235) was a case of degrading remarks and jokes that was analysed by the Committee. The member made a complaint in which he alleged that he had been a victim of harassment by a staff sergeant in his division. Specifically, he alleged that derogatory remarks had been made about him. For example, the staff sergeant had apparently said that members who did not support their supervisors to a sufficient degree would pay a very high price. Also, the member alleged that the staff sergeant had criticized him for no reason in a report, and had even blocked his chances of promotion within the RCMP. The allegations were investigated. On the basis of the information gathered, the investigator concluded that it was a problem of performance, not of conduct. When a second-level grievance was made, the Committee stated that it was unnecessary to establish that the harassment was deliberate, but that the fact of not liking someone is not necessarily harassment. With regard to the allegations concerning derogatory remarks, after reviewing the information, the Committee found that the remarks had been made not in private but in public; also they were clearly offensive and unwelcome. With regard to the other allegations, concerning the member's chances of promotion, the Committee was unable to conclude that this constituted harassment. The Commissioner agreed with these conclusions.

The display of offensive pictures is also a form of harassment. An example was discussed in *Charlotte Pond v. Canada Post Corporation*, an unreported decision handed down on June 3, 1994, by a Canadian Human Rights Tribunal. The complainant alleged that her employer had failed to provide an unpoisoned work environment by allowing photos of naked women to be posted inside the station. The Tribunal decided in favour of the complainant, finding that the photographs were pornographic and that the display of such material constituted sexual harassment and poisoned the atmosphere in which the complainant worked.

Furthermore, the RCMP's internal policy considers the improper use of power and authority to be harassment. An example is case ERC 2200-00-007 (G-253). The member had grieved the decision of the NCO in the complaints and internal investigations section who had found that a complaint of harassment she had made was without foundation. The Appropriate Officer had explained to the member that when her supervisor had spoken the impugned words, he was trying to make her aware that the members generally no longer liked her very much and that she should take suitable corrective action. The Level 1 adjudicator upheld the grievance but did not provide redress. The member therefore presented a Level 2 grievance in order to receive an explicit apology. The Committee noted that according to Treasury Board policy, intimidation, threats, blackmail or coercion constitute abuse of authority and are therefore a form of harassment. The RCMP's policy, the Committee noted, was to the same effect. It defines harassment as "any improper behaviour by a person that is directed at, and is offensive to, another employee and which the person knew <u>or ought reasonably to have known</u> would be unwelcome". The Committee concluded that the decision of the Appropriate Officer was irregular and demonstrated that he did not understood the RCMP's policy on harassment. The Commissioner agreed with the Committee's conclusions and recommendations.

It is important to see that the point of reference in a harassment case is the *perception of a reasonable person*. Conduct that is not perceived as offensive by the person engaging in that conduct is nevertheless harassment if a reasonable person would find the conduct to be humiliating, offensive or threatening.

• *Repetition of the conduct*

In *Canada (Human Rights Commission) v. Canada* (Armed Forces) [1999] 3 F.C. 653, the Federal Court held that the harassing nature of the conduct is calculated according to the "inversely proportional" rule: the more serious the conduct and its consequences are, the less repetition is necessary; conversely, the less severe the conduct and its consequences, the more persistence will have to be demonstrated.

• *Responsibility*

The RCMP's internal policy states that it is up to commanders or supervisors to prevent harassment. To this end they must take all necessary action to protect complainants; establish and maintain a work environment that is free of harassment; and take appropriate measures to resolve conflict and intervene in any situation that could develop into harassment.

Treasury Board's policy provides that disciplinary measures may be taken against any manager who is aware of a harassment situation and who fails to take corrective action. This reflects obligations arising from the CHRA.

There is a case law from the Canadian Human Rights Tribunal which establishes that employers may avoid responsibility only if they can prove that three conditions have been met: (1) the employer did not consent to the commission of the act or omission complained of; (2) the employer exercised all due diligence to prevent the act or omission from being committed; and (3) the employer exercised all due diligence subsequently to mitigate or avoid the effect of the act or omission. Everything depends on the employer's response: it must be quick and effective; it must be proportional to the seriousness of the incident. The employer must act in a way that could reasonably be expected to resolve the situation.

The approach taken in the new Treasury Board policy reflects this jurisprudence, with its emphasis on prevention.

• *Reprisals*

A final point to bear in mind is that the RCMP's internal policy, the Treasury Board policy and the CHRA all provide that disciplinary action, up to and including dismissal, may be taken against anyone who interferes with the resolution of a complaint by threats, intimidation or retaliation, or takes or threatens to take retaliatory action against the complainant or the presumed victim.

Conclusion

When a person is harassed in the workplace, everyone suffers. The victim suffers of course, but so do the victim's colleagues and superiors. The morale of the entire team, indeed the organization, is affected. The individual who is guilty of harassment is putting his or her career in jeopardy, and such individuals may also be creating liabilities for their employer. The situation will only get worse if the harassment is tolerated.

That is why preventing harassment in the workplace is everyone's business. Aside from being sensitive to offensive conduct, every employee, executive, supervisor and manager has a duty to help ensure that the climate in the workplace is one of trust and mutual respect.

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ROYAL CANADIAN MOUNTED POLICE

EXTERNAL REVIEW COMMITTEE