



## Royal Canadian Mounted Police External Review Committee

### A MESSAGE FROM THE CHAIR

#### A clarification with respect to the Committee's mandate to consider grievances

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I wish to raise a concern that will be of particular interest to RCMP Grievance Units, Divisional Staff Relations Representatives who assist members in grievance preparation and RCMP members who are considering filing a grievance at Level II and interested in knowing whether that grievance is referable to the RCMP External Review Committee. There have been a growing number of instances of late where the Committee has received grievances that were ultimately determined to be beyond the scope of the Committee's jurisdiction.

For the most part, the description of referable grievances which is found in s. 36 of the *RCMP Regulations* appears very straightforward. It includes the stoppage of pay and allowances, the Force's interpretation and application of the *Isolated Posts Directive* and of the *R.C.M.P. Relocation Directive* as well as three forms of administrative discharge, including medical grounds. However, one particular category of referable grievances is described in a more convoluted fashion. It consists of grievances relating to "the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members". For example, this includes grievances relating to the application of the official languages' policy or to that of the policy on legal representation. However, a grievance that merely challenges the manner in which the decision-maker interpreted Force policy would not be referable to the Committee on that ground alone. It would only be referable if there is a government-wide directive on the same subject-matter. The lack of information in the grievance record as to whether there is such a directive is the greatest source of difficulty that the Committee faces when trying to ascertain whether a grievance is indeed referable.

Ongoing discussions between the Committee and the RCMP may eventually lead to amendments to s. 36 which would have the benefit of making it easier to ascertain whether a grievance is referable. In the October-December 1999 issue of the *Communiqué*, I indicated that the Working Group on the Committee's grievance mandate had produced its final report on this very subject. In my opinion, the confusion that currently exists as to when grievances can be referred to the Committee could be resolved by implementing the report's recommendation that s. 36(a) be replaced with a more descriptive list of grievance categories based on specific subject matters.



RCMP External Review  
Committee  
P. O. Box 1159,  
Postal Station "B"  
Ottawa, Ontario K1P 5R2  
Tel.: (613) 998-2134  
Fax: (613) 990-8969  
org@erc-cee.gc.ca  
www.erc-cee.gc.ca

At present, a preliminary review of each grievance received by the Committee enables a timely determination to be made as to whether there is sufficient information on file to support the Grievance Unit's conclusion that the grievance was referable. If there is any doubt in this regard, the grievance file may be returned to the responsible Grievance Unit without the Committee reviewing the merits of the grievance. I will not agree to review a grievance merely because neither party has raised an objection to its jurisdiction. All of the requirements of the Act have to be met, including the one that the grievance must be part of a category described by s. 36 of the *Regulations*. An RCMP member who seeks to have a grievance referred to the Committee should therefore ensure that the legal basis for seeking such a referral is clearly mentioned in the Level II grievance presentation.

PHILIPPE RABOT  
CHAIR

### Recommendations of the Committee for the period July to September 2001

**D-74** The member appealed the decision of an adjudication board which concluded that he had contravened the *Code of Conduct* on three occasions. The member is also appealing the sanction that was imposed by the Board, namely an order to resign from the Force for two of the three contraventions, and the forfeiture of five days' pay for the third contravention.

The member's representative presented nineteen grounds of appeal, including arguments about a motion that had been made to the Board to stay the proceedings. Other issues related to the findings of the Board, its conclusions on sanction and the fairness of the hearing itself.

In its findings, the Committee indicated that it was troubled by the approach taken by the Board in addressing the relevant issues of the case. In particular, the Committee found that the Board had made certain assumptions that were simply not borne by the evidence.

Concerning the motion to stay the proceedings, the Committee indicated that the Board made no error when it denied the motion. There are circumstances where a stay of proceedings ought to be considered, for example when it is impossible for a fair hearing to take place, but there was no evidence that this was such a case. On a motion to admit polygraph evidence, the Committee found that the Board had complete discretion to choose whether or not to admit it, as long as it was consistent in the application of this discretion. As for a motion to reopen the hearing on one allegation (because of the disclosure of new evidence), the Committee found that the Board was *functus officio* and that the Board was right to deny the motion.

The Committee also found that there was sufficient evidence before the Board to support its finding that the appellant's actions toward the three victims amounted to violations of the *Code of Conduct*. However, the Committee indicated that the Board's assessment of the appellant's credibility concerning allegation no. 2 was seriously flawed as there were no inconsistencies in his testimony and that, in fact, the one example cited by the Board is not an inconsistency at all.

Concerning the issue of sanction, the Committee found that the Board's assertion that rehabilitation was not an option was completely false and that the Board, in its assessment of the aggravating and mitigating factors, made several statements about the Appellant's conduct which were totally outrageous and not supported by the evidence. The Committee found that the Board was required to abide by the principle of parity of

sanction, which it did not do. Indeed, the Board made no effort to explain in its decision how the sanctions which it imposed for each of the three allegations compare to previous decisions for similar misconduct, despite arguments by both the appellant and the respondent on this point.

Finally, the Committee found that while there most certainly were shortcomings to the Board's hearing process and to the hearing environment, those were not sufficiently serious to conclude that the appellant did not receive a fair hearing before the board.

The Committee recommended that the appeal against the finding that three contraventions of the RCMP's *Code of Conduct* were established should be dismissed. The Committee recommended that the appeal against the decision on sanction should be allowed. For each of allegations 1 and 3, a reprimand should be imposed. In the case of allegation 2, a forfeiture of pay for 10 days as well as a reprimand should be imposed.

**G-261** The Grievor submitted a grievance against a Notice of Medical Discharge. Following a reevaluation of the Grievor's health, the Health Services Officer prepared a new medical profile that outlined major restrictions with regard to the duties the Grievor could carry out. A Notice of Intention to Discharge was issued and a medical board reviewed the case. In its report, the Medical Board concluded unanimously that the Grievor suffered from [TRANSLATION] "a physical condition that affected neuropsychological functioning" and that this condition was chronic, with little chance of improvement in the near future. The Board also added that the restrictions affected his capacity to work as a police officer because he could no longer make quick decisions, handle firearms, drive an emergency vehicle, drive for operational reasons, or work in isolated or semi-isolated posts. It also added that the Grievor was no longer capable of gathering evidence and

testifying in court, of administering and managing operations and resources, or of developing guidelines and policies. One of the Medical Board's members believed nonetheless that the Grievor had some potential and that he could hold a clerical job. The RCMP indicated it could not hire the Grievor to perform clerical duties because no available position fit the restrictions the medical profile imposed. Accordingly, discharge was ordered.

The Grievor submitted his grievance against the decision to discharge without, however, presenting any supporting grounds. Despite numerous extensions, the Grievor failed to produce arguments and the grievance was denied.

The Grievor filed a Level II grievance and requested at that time that the RCMP appoints him a lawyer. The Grievance Unit refused, alleging that the policy relating to the provision of legal assistance did not apply to the grievance process. The Grievor was asked to provide his own representation. No arguments were submitted.

The matter was referred to the Committee. It immediately informed the Grievor that the Commissioner's standing orders on representation within the RCMP gives members who are the subject of a Notice of Medical Discharge, the right to legal assistance. This is a duty that can be taken on by the members' representatives, who are lawyers paid by the RCMP. However, the Grievor never took advantage of his right to mandate a police member representative to act in his name and never presented arguments to support his grievance. Consequently, the Committee recommended that the grievance be denied based on the Grievor's failure to at least present some initial evidence to support his grievance.

**G-262** The Grievor volunteered to work, on five different occasions, in a special program set up by the Insurance Corporation of his province. He traveled to and from the work site in his private vehicle and submitted a claim for a “private vehicle allowance”. The claim was denied by the Officer-in-charge of the Detachment. Therefore, the Grievor submitted a grievance requesting payment of his mileage. The Grievor’s submission was that: (1) the fact that it was voluntary was irrelevant; (2) the grievance is based on the interpretation of the overtime provisions in the Administration Manual; and (3) the program was administered by the RCMP.

The Grievance Advisory Board (“GAB”) recommended that the grievance be denied, saying that the program was not an RCMP program administered by the RCMP but was a provincial campaign.

The Level I adjudicator denied the grievance on the basis that the Grievor had volunteered for the assignments and also because he had not obtained prior authorization for his travel expenses.

The Committee recommended that the grievance be allowed. It noted its disagreement with the premise that members who volunteer for specific assignments renounce any entitlement to travel allowances provided for by Treasury Board’s *Travel Directive*. The Committee pointed out specific past cases supporting that view.

The Committee concluded that the Grievor’s failure to obtain pre-authorization from his superiors for payment of a private vehicle allowance was not relevant. The *Travel Directive* does not state that pre-authorization is required for payment of a private vehicle allowance. Rather, pre-authorization is

required both to travel to the workplace and to work an overtime shift. In this instance, both conditions were met. The Committee indicated that it was important for the Force to understand that it has no discretion in the matter of whether or not it will abide by the requirements of the *Travel Directive* and the practice of attempting to discourage members from claiming allowances to which they are entitled is therefore completely unacceptable.

The Committee concluded that the only relevant consideration for the purpose of determining whether the Grievor was entitled to a private vehicle allowance was whether he was “required to use transportation services other than normal and reasonable public or government-arranged transportation service”. There was not indication from the grievance record that such services were available. Therefore, the Grievor should be entitled to an allowance at the *employer’s request rate*, in accordance with the *Travel Directive*.

#### **Decisions of the Commissioner for the period July to September 2001**

**D-72** (summarized in the April/June Communiqué) The Appellant appealed a decision on 13 allegations that his behaviour was disgraceful, and the sanction imposed, i.e., discharge from the RCMP. The Appellant tried to influence his fifteen-year-old son’s behaviour by using his service weapon.

The grounds of appeal included the assessment of witnesses’ credibility, and the possible motivation of revenge from his son and ex-wife. 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 challenged all the grounds of appeal.

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. 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 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.

#### **Commissioner's Decision**

*The Commissioner agreed with the External Review Committee's recommendations to dismiss the appeal on the allegations. The Commissioner considered the member's behaviour extremely serious, if not completely unacceptable. With regard to the sanction, the Commissioner maintained that the Adjudication Board had correctly emphasized the severity of the offences and upheld the Board's recommendation that the member be discharged immediately. To support his decision, the Commissioner argued that the public's expectations of police officers require police leaders to treat repetitive behaviour, such as the member displayed, with the greatest severity. Therefore, the Commissioner rejected ERC's recommendation to replace the immediate discharge order with an order to resign within 14 days.*

**D-73** (summarized in the April/June Communiqué) The Appellant appealed the decision of the Adjudication Board, ordering him to resign for breaching the RCMP's *Code of Conduct*. The member, while off duty and driving his private car, was pursuing a dangerously driven vehicle. 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 criticized the Adjudication Board for not having attached enough importance to the dangerous driving of the vehicle pursued by the Appellant. Another ground of appeal concerned the relevance of the Appellant's disciplinary history, as well as the sanction imposed.

The Respondent's representative challenged all the grounds of appeal.

The Committee concluded that neither the Appellant's disciplinary history, nor the severity of the incident in them justified the decision to order the Appellant to resign. However, evidence did clearly and convincingly indicate that the Appellant is not likely to radically change the attitude he so often displayed during the second half of his career at the RCMP.

The Committee recommended that the appeal be denied.

#### **Commissioner's Decision:**

*The Commissioner agreed with ERC's recommendations and ordered the member to resign within 14 days or else he will be discharged.*

## G-256, G-257, G-258, G-259

(summarized in the January/March 2001 Communiqué) The Grievors presented claims for meal expenses incurred during travel on patrol. 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 a Grievance Advisory Board (GAB). He concluded that the RCMP 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 stated that the Level I adjudicator was wrong in not convening a GAB to review the grievances. The Committee concluded that, for travel on patrol, it is the actual cost of meals that should be reimbursed.

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.

### Commissioner's Decision

*The Commissioner agreed with the conclusions and the recommendations made by the External Review Committee (ERC). He allowed the grievance concerning the question of a Grievance Advisory Board meeting that was, according to him, necessary in this case and concerning the question of the maximum amount that could be claimed by*

*members for their meals. On this issue, the Commissioner emphasized that Treasury Board and RCMP policies allow for a maximum amount to be claimed and that there is no authority allowing different rates to be set. Concerning the question of reimbursement of meal expenses at the preestablished rate for a trip of less than one day, the Commissioner rejected the grievances. He indicated that a member can only claim expenses actually incurred and that the supervisor has discretion to request a receipt if the claim seems unreasonable. The Commissioner indicated that the goal of the Treasury Board policy is to reimburse actual expenses and not to provide a source of income.*

### ANALYSIS

#### Obtaining legal advice: what are the rights of RCMP members?

Given the particular nature of their duties, RCMP members are often called upon to take part in legal proceedings and, on occasion, to serve as litigants, either for the defence or the prosecution. In such cases, members will wish to obtain legal advice in order to protect their interests. The following article outlines the parameters governing the right to representation for RCMP members, as defined by Government policy and the rules of natural justice.

#### Relevant policy

In 1999, an article appeared in the October/December Communiqué on the application of the *Policy on the Indemnification of and Legal Assistance for Crown Servants* within the RCMP. This policy applies to all civil servants whose employer is listed at Schedule I, Part I of the *Public Service Staff Relations Act*, which includes all civilian and regular members of the RCMP.

Essentially, the policy recognizes the Crown's obligation, as an employer, to indemnify civil servants and afford them a measure of protection regarding certain costs related to the

performance of their duties. RCMP members who are sued for an act they committed while performing their duties as a member of the Force can, under certain conditions, receive legal assistance provided at the Crown's expense. This policy does not apply however to proceedings instituted by members themselves. The RCMP may provide legal assistance to a member at the Crown's expense in the following circumstances:

- when the member is required to appear before or be interviewed in connection with a judicial investigation, or other inquest or inquiry;
- when the member is sued or threatened with a suit;
- when the member is charged or likely to be charged with an offence; or
- when the member is faced with other circumstances that are sufficiently serious as to require legal assistance.

### Eligibility criteria

Under the Treasury Board policy, for legal assistance to be approved, two conditions must be met: the member has to have been acting within the scope of his or her duties; and the action at issue must be in line with RCMP expectations.

One way to determine if the act at issue was within the scope of the member's duties is to assess whether or not it served strictly personal ends. For example, a member will not be eligible for legal assistance at the Crown's expense if he or she is charged with a criminal offence committed solely for personal benefit. Requests for legal assistance were denied in several such cases where the action at issue, though committed while the member was on duty, was not considered within the scope of the member's duties as an RCMP officer (see cases G-134: fraud; G-122: narcotics theft; G-153: sexual relations).

The second part of this test involves ensuring that the action is in line with what the RCMP should reasonably expect of its members. This is an **objective** standard, which is assessed by determining whether or not a reasonable person, acting in good faith with due care and diligence, would have taken the same action. For example, in case G-200, the member had agreed to look after three firearms. He was then accused of possessing a restricted weapon without a registration certificate. The Committee found that, in keeping the firearms, the member had intended to discharge a police duty and had therefore acted "within the scope of his duties". However, the Committee also found that the member had not acted "within reasonable departmental expectations", as he had completely failed to follow official firearm registration procedures and to treat the weapons as confiscated items.

As the Committee stated regarding case G-234, the objectives of the Treasury Board policy are thus twofold: "On the one hand, civil servants and members of the RCMP should be able to count on the support of their employer when they are called upon to appear in court in the course of their duties. It is unreasonable to expect an employee to have to pay legal fees for simply doing his job. On the other hand, if an employee abuses his position, Canadian taxpayers should not have to pay for his legal representation, simply because the act occurred while the employee was at work or because he claimed to be acting on behalf of his employer. "

Once the Department of Justice (DOJ) makes a determination on the validity of the claim, a lawyer is appointed to represent the member. When the case is a civil action, a DOJ lawyer will normally defend the member. Should DOJ determine that a conflict of interest prevents it from adequately representing a member, a private practice lawyer will be retained and paid by DOJ at a predetermined rate.

Where a member is charged with a federal offence, including a criminal offence, the member can be represented by a lawyer in private practice. Unlike civil actions, criminal charges are of such a personal nature that the member must have every confidence in his or her legal representative. This being said, DOJ will determine the level of experience required from a lawyer to defend a given case, and then set an hourly fee accordingly. The hourly fee for a normal case must not exceed \$120 per hour, to a maximum of \$10,000 per case. Higher fees can be authorized, on an exceptional basis, for very complex cases. In either event, the fee must be authorized **in advance** of securing the services of a lawyer.

The Policy on the *Indemnification of and Legal Assistance for Crown Servants* was amended on June 1, 2001, to reflect changes made to the *Policy on the Prevention and Resolution of Harassment in the Workplace*, which is highlighted in an in-depth article in the April/June 2001 *Communiqué*. The main changes are designed to grant automatic legal assistance to public employees who are the subject of a harassment complaint pursued before a court or tribunal if the complaint is determined to be unfounded at the departmental level.

Contrary to other indemnification requests, where the RCMP has discretion to approve or deny legal assistance, it will now be **mandatory** for the RCMP to provide counsel to a member if the harassment complaint brought against the member is determined to be baseless following an internal review. In such cases, the member has only to inform his immediate superior that such a complaint has been lodged against him before a court or tribunal and to request that defence counsel be assigned to him.

### **Right to prosecution assistance**

While the Treasury Board policy provides for legal assistance at the Crown's expense when employees are involved in cases as respondents, the *RCMP Act* also gives members the right to be represented by a lawyer or by another member when they themselves institute the proceedings. In such cases, if the member chooses to be represented by a lawyer, he or she must bear all related costs. Under the *RCMP Act*, the member can be represented when appearing or testifying before a board of inquiry (s. 24.1), a hearing to inquire into a grievance conducted by the External Review Committee (s. 35), an adjudication board hearing regarding a serious disciplinary action (s. 45.1), a discharge and demotion board (s. 45.22) or the Commission for Public Complaints against the RCMP (s. 45.45). In all these circumstances, the member's representative may act on his or her behalf as it relates to appearing, presenting written evidence, making representations and cross-examining witnesses.

Also, under section 47.1 of the *RCMP Act* and the 1997 Commissioner's Standing Orders (Representation), the RCMP grants legal assistance to members in certain circumstances. Within the RCMP, there is a Member Representative Unit, made up of members having received legal training who represent any member who: is subject to serious disciplinary action; is subject to discharge and demotion proceedings; is a party to a hearing before the External Review Committee; or is presenting a grievance relating to administrative discharge (restricted to discharge for physical or mental disability, abandonment of post or irregular appointment). Members' representatives must meet all standards applicable to members of the legal profession. In addition, they must adhere to the *Representative's Code of Conduct* [AM ch. XII.9-1].



### Right to retain counsel

Above and beyond the right to representation set out in the *RCMP Act*, do RCMP members have the right to retain private counsel if they deem to have been adversely affected by a decision made by their employer or if they are subject to an inquiry? Be it because the member was denied legal assistance at the Crown's expense, or because he himself instituted the proceedings, can a member of the RCMP be represented by counsel, like any other citizen, if he agrees to bear all related costs?

The courts have recognized that an agency subject to procedural fairness should ideally respect the right to representation by counsel. This right is not however absolute, and agencies enjoy considerable discretion as relates to granting or denying legal representation. Where the law has not formally prescribed the right to representation, the employer must consider the irrevocable nature of the decision and its impact on the rights of the employee.

In *Laroche v. Canada (RCMP)*, [1981] F.C.J. 1108, the Federal Court of Appeal spoke to the right to representation by counsel before an RCMP discharge and demotion board. The applicant in that case claimed that the board's decision was contrary to the rules of natural justice, because he had not been given the opportunity to exercise his right to be represented by a lawyer. Justice Le Dain found that guidelines allowing "any member to be represented by any other member" do not preclude the right to be assisted by independent counsel. The *RCMP Act* has since been amended to include the right to representation by counsel before boards of inquiry constituted under the *Act*.

More recently, in case G-248, the issue of the right to counsel was raised in the context of an internal RCMP inquiry into public complaints brought against a member. In that case, the Appropriate Officer refused to share certain documents with the member's lawyer, arguing that the member did not have the right to be represented by counsel at that stage of the process, and that the information requested

was protected by the *Privacy Act*. Though the grievance was denied, because it had not been submitted within the required time-frame, the Committee made the following remarks concerning the Appropriate Officer's position on the right to counsel:

*Firstly, I wish to address the Appropriate Officer's comment that there is "no authority for legal representation within the public complaints process unless it is as a result of an investigation and hearing by the Public Complaints Commission". It may be that the Force considers that it is not under an obligation to pay a member's legal expenses, but that does not mean that the member would not be entitled to be represented by legal counsel. On what basis the Force would seek to deny a member's right to legal representation under such circumstances is not evident to me.*

[...]

*The requirement to be objective, impartial and neutral necessarily carries with it an obligation to inform the member who is the subject of the complaint of the evidence against him or her and provide the member with an opportunity to respond. If a member considers that the presence of legal counsel will be of assistance in that regard, the member should not be deprived of that opportunity, as long as it is understood that the recognition of that right does not necessarily entail a commitment on the part of the Force to pay that member's legal fees.*

Given these remarks and the overall rules of procedural fairness that apply to all administrative decisions that affect a member's rights, it would be difficult for the RCMP to deny a member's right to counsel when the member is prepared to bear all related costs, especially since no section of the *RCMP Act* precludes such representation.

MADELEINE RIOU  
LEGAL COUNSEL

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