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The RCMP External Review Committee (ERC) provides independent impartial reviews of appeals of certain internal RCMP decisions regarding labour and employment matters, pursuant to the *RCMP Act* and the *RCMP Regulations*. Following each case review, the ERC issues findings and recommendations for a final decision to the Commissioner of the RCMP or to the delegated decision-maker within the Force.

The kinds of cases reviewed by the ERC include:

- under the current *RCMP Act* - appeals of harassment investigation decisions, decisions to discharge an RCMP member (e.g. due to disability or unsatisfactory performance), decisions to dismiss an RCMP member or to impose a financial penalty for misconduct, and decisions to suspend a member's pay and allowances when the member has been suspended from duty; and,
- under the former *RCMP Act* (i.e. for cases commenced prior to changes made to the legislation in late 2014) - disciplinary appeals and appeals of initial decisions for a range of grievance matters (e.g. harassment, medical discharge, travel, relocation or isolated post expense claims).

This Communiqué provides summaries of the latest findings and recommendations issued by the ERC, as well as summaries of the final decisions taken within the RCMP for the cases that the ERC has recently reviewed. More information on the ERC and its case reviews can be found on-line at <http://www.erc-cee.gc.ca>.

Findings and Recommendations

Between April and September 2018, the RCMP External Review Committee (ERC) issued the following findings and recommendations:

Current Legislation Cases:

C-021 Conduct Authority Decision / Referability

A Code of Conduct investigation was requested by way of a Mandate Letter into four allegations that the Appellant failed to give adequate attention to duties he was required to perform, contrary to section 4.2 of the Code of Conduct.



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A Conduct Meeting was held. The Respondent ultimately determined that the allegations were established and imposed on the Appellant conduct measures consisting of a forfeiture of four days' annual leave, directions that the Appellant review policy and undergo training and a one-year period of ineligibility for promotion. The Appellant appealed the Decision.

ERC Findings: The ERC observed that if an appeal does not relate to the conduct measures identified in paragraphs 45.15(1)(a) to (e) of the *RCMP Act*, or to any finding that resulted in the imposition of such conduct measures, the ERC will not proceed to examine it nor issue findings and recommendations to the Commissioner other than the finding that the case is not referable to the ERC. This appeal falls outside the scope of paragraphs 45.15(1)(b) to (e) of the *RCMP Act*, as it does not involve a demotion, direction to resign, recommended dismissal or a dismissal.

The ERC considered whether the imposition of a forfeiture of annual leave for a period of four days made the appeal referable pursuant to paragraph 45.15(1)(a) of the *RCMP Act*, which refers to "*a financial penalty of more than one day of the member's pay*". The ERC determined that paragraph 45.15(1)(a) does not include a forfeiture of annual leave. There are multiple conduct measures the imposition of which would have a financial impact on a member but which are not a financial penalty of, or deducted from, a member's pay. Sections 4 to 5 of the *Commissioner's Standing Orders (Conduct)* set forth the various conduct measures certain conduct authorities may impose. In both sections, a clear distinction is drawn between a financial penalty deducted from a member's pay and other conduct measures that have or may have financial impacts on the member. Such other conduct measures include ineligibility for promotion, deferment of pay increment, reduction to the next lower rate of pay and forfeiture of annual leave. This distinction is instructive. It clarifies that a financial penalty deducted from a member's pay is a conduct measure separate from a forfeiture of annual leave and from those other conduct measures which, in addition to their immediate effect, also have indirect financial consequences to a member. Only an appeal involving a financial penalty of more than one day deducted from a member's pay falls within the ambit of paragraph 45.15(1)(a) of the *RCMP Act*.

As the conduct measures imposed by the Respondent are not set out in any of paragraphs 45.15(a) to (e) of the *RCMP Act*, the Chair will not proceed to review this appeal to make a further finding on it or a recommendation.

ERC Recommendation: This conduct appeal is not referable to the ERC. As a result, the Chair will not review the appeal further or make a recommendation.

NC-014 Harassment / Time Limits

The Appellant, who is on indefinite sick leave, filed a harassment complaint against the Non-Commissioned Officer (the principal Alleged Harasser) and several other people (the secondary alleged harassers), including the Alleged Harasser in this case. An investigation was ordered by the Conduct Authority and an interim report was submitted to the parties, who had an opportunity to comment on this report. The investigators submitted their final report in September 2015, and on December 7, 2015, the Respondent issued his decision, which determined that the complaint was ill-founded and which was served on the Appellant on December 10, 2015.

The Appellant appealed this decision through a grievance form on January 7, 2016. The Office for the Coordination of Grievances and Appeals (OCGA) informed the Appellant that she had to file an appeal form because the *Commissioner's Standing Orders* effective November 2014 provide that decisions related to the harassment complaint resolution process can be appealed and not grieved. The Appellant sent an appeal form and a request for an extension of the deadline for filing an appeal. She explained that her health and the numerous documents had prevented her from filing an appeal within the statutory 14-day time limit.

ERC Findings: The ERC found that the Appellant had not explained why she had been unable to access her emails, the news, and policies or regulations, and that these are always available to the public.

The ERC also found that the Appellant had failed to provide any explanation or any evidence to suggest that her health or her symptoms had prevented her from acting in a timely fashion. Finally, the ERC found that

when filing an appeal, appellants do not have to provide arguments in support of their appeal. In this case, the Appellant simply had to complete Form 6437 within 14 days and to submit it to the OCGA.

ERC Recommendation: The ERC recommended that the appeal be dismissed.

Former Legislation Cases:

G-651 Medical Expenses/ Referability

After submitting a claim for certain medical expenses, the Grievor received a statement from Medavie Blue Cross indicating that the reimbursed amount for expenses he had incurred for the completion of a medical form was \$25.00 instead of the total \$40.00. The Grievor, who believed that the entire amount should be reimbursed, requested an explanation from the RCMP's Benefits and Medical Services Coordinator, who told him that the RCMP awarded a maximum of \$25.00 for the preparation of a medical report under Chapter II.18 of the Administration Manual. The Grievor filed a grievance against the decision not to reimburse him the full amount. The Grievor also stated that this practice had prejudiced the *[Translation]* "community of RCMP members having to pay for a service at their own expense". As corrective action, the Grievor sought to be reimbursed the amounts plus interest retroactive to 1989.

ERC Findings: The Grievor is challenging through a grievance a decision that solely deals with the application of a policy in Chapter II.18 of the Administration Manual regarding the reimbursement of medical expenses; this is not a government policy that applies to federal government departments.

Since no other government policy under paragraph 36(a) was considered to be related to the grievance, the ERC found that the grievance did not fall under the scope of paragraph 36(a) of the *1988 Regulations*.

ERC Recommendation: The ERC did not make any recommendations regarding this grievance as it was determined not to be a matter that is referable to the ERC.

G-652 Medical Discharge

In December 2012, the Respondent signed an Order that the Grievor be medically discharged from the RCMP. The Order followed the release of a Medical Board report which found that the Grievor had had an ongoing disability since going off duty sick years earlier and that she was unemployable in any capacity within the Force. The Grievor grieved the Respondent's decision. The Office for the Coordination of Grievances (OCG) was unsuccessful in its attempts to obtain a Level I submission on the merits from the Grievor or the Grievor's Lawyer. The OCG later mailed the Grievor's Lawyer a request for a rebuttal to the Respondent's submission, noting that if the rebuttal was not received by a specified deadline and no extension was sought, the case would proceed to the next stage. The lawyer did not reply. The OCG sent the Grievor a transit slip that scrutinized this legal representation and directly invited her to submit a rebuttal, without including a deadline. No rebuttal was received. The OCG ended the Level I submissions stage.

The Level I Adjudicator denied the grievance on its merits. She found that the Grievor failed to meet her burden of persuasion, as no submissions or evidence were provided in support of the position that the medical discharge conflicted with relevant authorities or was otherwise flawed. At Level II, the Grievor says that she was denied procedural fairness at Level I of the grievance process. She claims actions by the Respondent and OCG raised legitimate expectations for the progress of the Level I grievance which were dashed when the Level I process was ended, thus infringing on her right to be heard. Sadly, the Grievor passed away during the Level II process.

ERC Findings: The ERC found the Grievor's Level II submission was admissible even though it raised a new argument that the Level I process was procedurally unfair. Given that this alleged unfairness comprised a series of principally subtle acts and omissions which occurred over time, its total effect did not become evident to the Grievor until she had received the Level I decision. The ERC also found that, while the Grievor's death could potentially render the grievance moot, discretion should be exercised to hear the case, for two reasons. First, the determination of the date the Grievor's employment ceased may have pension and

estate implications. Second, the matter raises the important issue that the RCMP's grievance process must be procedurally fair.

Moving on to the merits, the ERC found that the Grievor was owed a high degree of procedural fairness, as a medical discharge from the RCMP had a potentially substantial impact on her life. The Grievor had a legitimate expectation at Level I of the grievance process, namely, that she would receive opportunities to file a submission with supporting evidence as well as a rebuttal submission on the merits. This expectation was met, as opportunities were given to make those submissions. The record did not support the position that other legitimate expectations existed.

However, the ERC found that the Grievor was denied procedural fairness when the OCG closed the Level I submission stage after directly inviting her to supply a rebuttal without stipulating any deadline for so doing. Given the OCG's stated concerns about the Grievor's representation and knowledge that her employment was in jeopardy and that she had been sick for several years, it should have stated clearly to the Grievor, as it had to her lawyer, that she was required to file a rebuttal or seek an extension by a specific date, failing which those opportunities would be lost.

ERC Recommendation: The ERC recommended to the Commissioner of the RCMP that the grievance be allowed. It recommended that the Commissioner quash the Level I decision on the merits and take whatever measures she deems appropriate to: ascertain who, if anyone, is representing the Grievor's estate; what steps the representative wishes to take, if any; and, if requested, direct that the matter be returned to Level I, permitting the representative to make a rebuttal submission pursuant to the requirements of policy. The ERC also recommended that, if no rebuttal is received, the Commissioner deny the Level I grievance on its merits on the basis that the Grievor's burden of persuasion was not met. This would have the effect of restoring the impugned medical discharge, effective December 2012. Lastly, the ERC recommended that, should the Commissioner allow the grievance at Level II, she acknowledge that the Grievor was owed a higher degree of procedural fairness than she received, given that the Grievor had been off duty sick for years with a serious and documented medical condition, that there

was a stated concern that her lawyer was inadequately representing her and that her livelihood was at stake.

G-653 **Medical Discharge/ Time Limits**

In January 2011, the Appellant received a Notice of Intention to Discharge her from the RCMP on the basis of a disability. The Notice stated that a Medical Board consisting of three doctors, one of whom to be nominated by the Grievor, would be appointed to ascertain the degree of her disability. The Grievor Lawyer advised the Force of the identity of the Grievor's nominee in May 2011. Then, in June 2012, the Grievor's Lawyer and the Force corresponded about the Medical Board process. The Grievor's nominee later received a letter from the RCMP which outlined the mandate of the Medical Board. The Grievor obtained a copy of that letter in early October 2012.

In late October 2012, the Grievor filed a grievance, disputing the decision to appoint the Medical Board. The Case Manager invited the Grievor to provide a submission on the preliminary issue of timeliness. However, no submission was received. The Level I Adjudicator ultimately denied the grievance, finding that it had been initiated after the expiration of the 30-day Level I statutory limitation period. The Grievor promptly presented her grievance at Level II. After receiving two separate requests for a submission, the Grievor wrote to the Case Manager that "*I want my grievance to go to Level II as it is*". Sadly, the Grievor passed away during the Level II process.

ERC Findings: The ERC found that, although the Grievor's death could potentially render the grievance moot, discretion should be exercised to hear the case. The Commissioner could find that the matter is not moot, and would therefore require the ERC's analysis of the central issues before rendering a decision. Additionally, on a more personal level, the Grievor's family has an interest in seeing that closure is brought to the grievance process.

The ERC went on to find the Level I grievance was untimely. Pursuant to paragraph 31(2) (a) of the *RCMP Act*, a Level I grievance has to be commenced within 30 days after the date on which the aggrieved member knew or reasonably ought to have known of the

impugned decision. The evidence showed that the Grievor became aware of the impugned decision to appoint a Medical Board in January 2011 and by no later than June 2012, anywhere from 4 to 24 months before she grieved that decision. The Grievor did not offer any submissions as to why the grievance should be considered timely, although the OCG invited her to do so on more than one occasion.

The ERC further found that an extension of the Level I limitation period was not warranted. It reached this conclusion by applying the flexible and adaptable four-factor test for extending time limits, as set forth by the Federal Court of Canada. The ERC concluded that none of the factors making up that test favoured an extension. The Grievor did not possess a continuing intention to grieve at Level I. It was unclear if the grievance disclosed an arguable case. No explanation for the delay in grieving was provided. An extension would have been prejudicial to the RCMP.

ERC Recommendation: The ERC recommended to the Commissioner of the RCMP that the grievance be denied.

G-654 Travel/Time Limits

The Grievor resided at an isolated post with his spouse and two children. A local medical practitioner directed that the Grievor's two-year-old daughter see a pediatrician. The nearest available pediatric practice was located almost 400 km away by road.

The Grievor's family had access to a medical air transport (Skedivac), but it only traveled three times per week and could only transport one adult escort with each patient. Due to the limitations of the Skedivac service, the family decided that the Grievor's spouse would drive their daughter to the medical appointment.

After the trip, the Grievor submitted an Expense Claim for travel and incidentals at the higher of two kilometric rates available in policy. The Respondent determined that the Grievor was only entitled to compensation at the lower kilometric rate. The Grievor grieved this decision. After the Grievor's Rebuttal, the Office for the Coordination of Grievances (OCG) invited the Respondent to "comment" on the Rebuttal. This prompted the Respondent to make additional substantive submissions.

The Grievor then responded with his own substantive submissions.

The Level I Adjudicator denied the grievance. A Certificate of Service indicated that the Grievor was served with a copy of the Level I decision on December 6, 2013. The Grievor presented his grievance at Level II on December 21, 2013. The Grievor explained that he required additional time to examine the new policy authorities contained in the Level I decision.

ERC Findings: The ERC found that the applicable regulatory framework does not contemplate submissions after a Rebuttal at Level I. Nevertheless, as the OCG invited the parties to make additional submissions at that point, the ERC found that this communication created a legitimate expectation that the parties could submit additional arguments prior to the Level I decision. Therefore, the ERC concluded that the parties' submissions after the Rebuttal were admissible.

The ERC found that the Grievor was served with the Level I decision on December 6, 2013, pursuant to the Certificate of Service. The grievance was therefore presented one day after the 14-day limitation period outlined in paragraph 31(2)(b) of the *RCMP Act*. The ERC further found that a retroactive extension of time was not warranted. The Grievor's sole explanation for the delay was based on his lack of adequate knowledge of the applicable grievance authorities, which, in the ERC's view, was not a reasonable justification for the delay.

ERC Recommendation: The ERC recommended that the Commissioner deny the grievance on the basis that it was not presented at Level II within the 14 day time limit set forth in paragraph 31(2)(b) of the *RCMP Act*.

Commissioner of the RCMP's Final Decisions

Summaries of four final decisions are below, for which the ERC's Findings and Recommendations were summarized in previous issues of the *Communiqué*. The decisions in NC-009 and NC-010 were issued by delegates of Commissioner Brenda Lucki; the decisions in G-649 and G-650 were issued by then Acting Commissioner Daniel Dubeau.

Current Legislation Cases:

NC-009 Harassment

(summarized in the January – March 2018 *Communiqué*) The Appellant lodged a Harassment Complaint alleging that a colleague (Alleged Harasser) had belittled, threatened and otherwise victimized him at a meeting with a representative of a partner agency and during conversations in the presence of other members. Following an investigation, the Respondent concluded that the Harassment Complaint was not established. The ERC found that the Respondent erred by focussing on the intention of the Alleged Harasser when concluding that the Alleged Harasser's actions at a meeting did not amount to harassment. The test to be applied when deciding if harassment occurred requires a review of an alleged harasser's actions from the perspective of a reasonable person who places himself/herself in the complainant's situation, not from the perspective of the alleged harasser. The ERC found that the Respondent erred in applying the correct legal test and analysis to the evidence before him. The ERC recommended to the Adjudicator that he or she allow the appeal and remit the matter to the Respondent or to a new decision-maker with specified directions for a new decision.

Commissioner of the RCMP Decision: The Commissioner's decision, as summarized by her office, is as follows:

The Appellant challenged a decision that found the Appellant's complaint of harassment was not established. The Appellant raised four grounds of appeal: the Respondent erred in considering the allegations separately and not holistically; the Respondent erred in finding

that the April 23, 2014, incident was not severe; the Respondent erred in relying on the Alleged Harasser's intention in meeting with the Appellant on February 12, 2015; and, the Respondent erred in her consideration of certain evidence. The Appellant was served the Record of Decision on August 27, 2015, and presented his appeal on September 10, 2015.

Having found that the Respondent erred in law by failing to apply the reasonable person test to Allegation 7, the Appeal Adjudicator allowed the appeal and remitted the matter for a new decision by the current Commanding Officer in accordance with subparagraph 47(1)(b)(i) of the CSO (Grievances and Appeals).

NC-010 Harassment

(summarized in the January – March 2018 *Communiqué*) The Appellant filed a Harassment Complaint alleging that his supervisor (Alleged Harasser) had failed to adequately shield him from a peer with whom he had experienced conflict, insensitively questioned why he was not over the conflict, tried to undermine his position in another complaint process and generally fostered a disrespectful working environment. Following an investigation, the Respondent concluded that the Harassment Complaint was not established (Decision). The Appellant argued that the Respondent erred in his evaluation of harassment allegations and certain evidence, erred in considering the supervisory responsibilities of the Alleged Harasser to justify the Alleged Harasser's actions and violated the Appellant's right to procedural fairness by referencing in the Decision a report that had not been disclosed to the Appellant. The ERC recommended to the Adjudicator that he or she dismiss the appeal and confirm the decision of the Respondent.

Commissioner of the RCMP Decision: The Commissioner's decision, as summarized by her office, is as follows:

The Appellant challenged a decision that found the Appellant's complaint of harassment was not established. The Appellant raised four grounds of appeal: the Respondent erred in considering the allegations separately and not holistically; the Respondent erred in considering the Alleged Harasser's supervisory responsibilities in justifying the Alleged Harasser's conduct; the Respondent breached

the Appellant's right to procedural fairness by referring to a report that the Appellant did not have an opportunity to address; and, the Respondent erred in his consideration of the evidence. The Appellant was served the Record of Decision on October 24, 2015, and presented his appeal on November 5, 2015.

The Appeal Adjudicator accepted the RCMP External Review Committee's recommendation, dismissed the appeal and confirmed the decision on appeal pursuant to paragraph 47(1)(a) of the Commissioner's Standing Orders (Grievances and Appeals).

Former Legislation Cases:

G-649 Legal Assistance at Public Expense

(summarized in the October – December 2017 Communiqué) Following a physical struggle, the Grievor and a second RCMP member arrested a complainant, who alleged the officers assaulted him. The Grievor was investigated, charged with assault, brought to trial and found guilty. The Grievor appealed the conviction and requested Legal Assistance at Public Expense (LAPE) for the appeal stage. His request was denied by the Respondent. The ERC found that the Respondent's denial of the Grievor's request for appeal phase LAPE violated the Grievor's right to procedural fairness and was inconsistent with the Treasury Board's LAPE Policy (TB LAPE Policy). The ERC found that the Grievor's request for LAPE for the appeal phase should be reconsidered and approved pursuant to the TB LAPE Policy. The ERC recommended to the Commissioner of the RCMP that he allow the grievance.

Commissioner of the RCMP Decision: The Commissioner's decision, as summarized by his office, is as follows:

The Grievor presented a grievance against the Respondent's decision to deny his request for legal assistance at public expense (LAPE) in relation to the appeal phase of his criminal proceedings. The Commissioner agreed with the ERC's findings that the Respondent's decision was inconsistent with applicable policy. The Commissioner suggested that the Grievor present a detailed statement of account of the legal expenses issued by his private counsel, together with submissions and any relevant

and necessary supporting documentation for presentation to the appropriate approval authority.

G-650 Legal Assistance at Public Expense

(summarized in the October – December 2017 Communiqué) Following a physical struggle, the Grievor and a second RCMP member arrested a complainant, who alleged the officers assaulted him. The Grievor was investigated, charged with assault, brought to trial and found guilty. The Grievor appealed the conviction and requested Legal Assistance at Public Expense (LAPE) for the appeal stage. His request was denied by the Respondent. The ERC found that the Respondent's denial of the Grievor's request for appeal phase LAPE violated the Grievor's right to procedural fairness and was inconsistent with the Treasury Board's LAPE Policy (TB LAPE Policy). The ERC found that the Grievor's request for LAPE for the appeal phase should be reconsidered and approved pursuant to the TB LAPE Policy. The ERC recommended to the Commissioner of the RCMP that he allow the grievance.

Commissioner of the RCMP Decision: The Commissioner's decision, as summarized by his office, is as follows:

The Grievor presented a grievance against the Respondent's decision to deny his request for legal assistance at public expense (LAPE) in relation to the appeal phase of his criminal proceedings. The Commissioner agreed with the ERC's findings that the Respondent's decision was inconsistent with applicable policy. The Commissioner suggested that the Grievor present a detailed statement of account of the legal expenses issued by his private counsel, together with submissions and any relevant and necessary supporting documentation for presentation to the appropriate approval authority.

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