Royal Canadian Mounted Police
External Review Committee

communiqué
OCTOBER-DECEMBER 2012

Between October-December 2012, the RCMP External Review Committee (ERC) issued the following recommendations:

D-124

The Appellant admittedly acted in a disgraceful manner by deploying his taser too hastily while trying to place a drunk and resistant suspect into a police truck. The parties proceeded by way of the Early Resolution Discipline Process (ERDP). They cited case law suggesting that a proper sanction ranged from a reprimand to a moderate forfeiture of pay. They sought penalties which respectively fell at the very low end of that range. However, the Board imposed a reprimand, a four-day pay forfeiture, and a counselling recommendation. It did so without telling the parties that it was considering a sanction stricter than those proposed, and without inviting submissions on that prospect. It reasoned that a harsher penalty was required, partly because the Appellant failed to comply with Use of Force policy, acted in anger, and had other members at the scene who could have helped him with the suspect. The Appellant appealed the decision on sanction.

ERC's Findings: The ERC considered numerous preliminary issues. It stressed that while the ERDP is a useful tool, it cannot remove a board's statutory powers, nor relieve it of its statutory duties, nor fetter its statutorily-entrenched discretion. It also observed that because information was not entered under oath or affirmation, or via an affidavit, the Board could consider it only if it was information upon which both parties agreed. In the ERC's view, the record showed that such information was agreed-upon. Furthermore, the ERC determined that the Board acted in a procedurally unfair way by not inviting the parties to make submissions on the possibility of a sanction stricter than those proposed. Yet it added that this breach was rectified, as the parties had an opportunity to present submissions on the impugned penalty during the appeal process.

The ERC then found that the Board's sanction decision contained overriding and determinative errors. The Board overstated the extent to which the Appellant's actions were at odds with Use of Force policy. Moreover, the Board's findings that the Appellant acted in anger, and that other members could have helped him handle the suspect, were unsupported. The ERC ultimately concluded that a sanction consisting of a reprimand and a forfeiture of two-days' pay was ideal. It reasoned that this penalty fell within the agreed-upon sanction range and that it reflected the mitigating and aggravating factors, the severity of the conduct, the nexus between the conduct and the requirements of the policing profession, and an amelioration of the Board's errors.

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ERC's Recommendations: The ERC recommends to the Commissioner of the RCMP that he allow the appeal and vary the sanction to a reprimand and a forfeiture of two-days' pay. In addition, it recommends that:

1. information about the ERDP is clearly documented, easily accessible, and provided to members who are subject to disciplinary hearings so that they are fully informed about the process before making a decision to participate in it;
2. the record confirms that the member subject to discipline received this information; and,
3. adjudication boards are advised of the importance of ensuring that records clearly show that all evidence was tendered in accordance with statutory and regulatory provisions.

G-541

In 2005, the Grievor was temporarily assigned out of his HQ to a new workplace (workplace A). The Grievor remained posted to his HQ. At first, the Grievor commuted to workplace A using a Force vehicle. Later in 2005, the Grievor moved to a rental unit closer to workplace A. The Grievor then requested a further move to workplace B which was about seventy kilometers away from his HQ . Respondent #1 was in the process of preparing a business case to create a permanent position for the Grievor at workplace B, and the Grievor started work at workplace B in late 2005. The Grievor still remained posted to his HQ. The Force allowed the Grievor to continue using a Force vehicle for commuting purposes. In 2006, the Grievor sold his home at the HQ location and purchased a home close to workplace B. In 2007, the Force formally transferred the Grievor to workplace B, and normally the Grievor would have been entitled to relocation benefits based on distance. However, Respondent #2 refused to reimburse the Grievor his relocation expenses for the 2006 move from HQ to workplace B, since this had taken place before the issuance of a formal transfer notice authorizing the move.

The Grievor grieved the decision not to reimburse his relocation expenses. He stated that he had been unsuccessful in obtaining a cost transfer prior to selling his home at HQ, and was also unsuccessful in obtaining an interview with Staffing and Personnel before the sale. He fully anticipated being reimbursed relocation expenses once he received his physical transfer to workplace B, which he understood in 2006 to be imminent based on the business case prepared by Respondent #1. Respondent #2, however, underscored that relocation policy did not allow for reimbursement of expenses incurred before written authorization had been received, and on this basis the Grievor was not entitled to reimbursement. The Level I Adjudicator agreed with Respondent #2 and denied the grievance.

ERC's Findings: Policy was very clear that under normal circumstances, pre-authorization was required for any relocation expenses. Although the Grievor knew that Respondent #1 was in the process of getting a position created for him at workplace B, this did not constitute pre-authorization. However, policy contemplated that in special circumstances, payment of relocation costs could be authorized by Treasury Board Secretariat in cases where pre-authorization had not been obtained. The special circumstances in this case included Respondent#1 accepting blame for the Grievor being insufficiently informed, and also the fact that the temporary work location changes lasted a significant amount of time. Required written notice, which might have assisted the Grievor in being better informed , was not issued upon his moves. The ERC also found that some provisions of the Treasury Board *Travel Directive* may well have been applicable to the Grievor's situation beginning in early 2005, when he started working at sites over 16 kilometers from his HQ.

ERC's Recommendations: The ERC recommends that the Commissioner of the RCMP allow the grievance and find that the Grievor is entitled to be considered for reimbursement of his allowable relocation expenses. It further recommends that the Commissioner order a review to determine the amount of the reimbursement, and that the required approval be sought from TBS. In the alternative, the ERC recommends that the Commissioner allow the grievance and order that a review be conducted of the Grievor's file to determine if he is entitled to be reimbursed for allowable travel expenses incurred during the time he worked at workplaces A and B before his physical transfer was issued.

G-542

In 2005, the Force removed the Grievor from operational duty in light of his hearing condition. It placed him in a graduated return-to-work program in which he did administrative work he found intolerable. In mid 2006, he was diagnosed with stress and depression, and went on sick leave. Over time, several officials, including return-to-work coordinators such as the Respondent, were assigned to his file. They tried to accommodate his disabilities by looking for permanent duties, as well as by offering him temporary or uncertain opportunities which he ultimately turned down.

Throughout the process there were a number of communication breakdowns, delays, and held up appointments. Moreover, records were improperly maintained, officials displayed confusion over their roles, and an impasse arose. The Grievor also believed the Respondent improperly accessed his personal information. In April 2008, a medical doctor stated that the Grievor could perform "*meaningful*" work. Yet it was unclear what that meant. The Force ordered the Grievor to resume administrative functions by partaking in another graduated return-to-work program.

The Grievor presented a grievance in which he challenged the Force's overall administration of his accommodation process. He later retired. A Level I Adjudicator denied the grievance. He concluded that the Grievor's lack of cooperation with the Force conflicted with policy, and was the main reason why the Grievor had not yet been accommodated. He added that the Grievor failed to establish that the Respondent did not try hard enough to locate an accommodation. The Grievor went on to file a Level II grievance. In so doing, he reinforced many of his arguments.

ERC's Findings: The ERC found that the Grievor both met the standing test, and raised live issues. It also found that the grievance was timely. Although the impugned activity began in 2005, the Grievor did not reasonably become prejudiced by the perceived overall failure of his accommodation process until April 2008. He then grieved within 30 days. This had the effect of bringing the entire history of his accommodation process within the scope of the grievance.

The ERC noted that an accommodation process is a multi-party venture in which cooperation is crucial. It found that while the Grievor contributed, at least in part, to missed opportunities, the record revealed that the Force did not satisfy all its accommodation obligations under relevant policies. Specifically, the Force failed to comply with provisions involving consultations, job searches, record-keeping duties, and priorities during lateral/promotional opportunities. Lastly, the ERC found that the Grievor did not show that the Respondent committed a privacy breach.

ERC's Recommendations: The ERC recommends to the Commissioner of the RCMP that he allow the grievance and apologize to the Grievor on behalf of the Force for shortcomings in the Grievor's

accommodation process. The ERC also recommends that the Commissioner order a review of the Grievor's case to help determine how the Force's accommodation process might be improved for the benefit of all stakeholders.

G-543

In 2005, the Force removed the Grievor from operational duty in light of his hearing condition. It placed him in a graduated return-to-work program in which he did administrative work he found intolerable. In mid 2006, he was diagnosed with stress and depression, and went on sick leave. The details surrounding his absence led to confusion, and might have stoked the conflict in this case. Specifically, although Health Services green lighted the sick leave, it did so retroactively, years later, for reasons unknown. Moreover, while the Grievor's superior had no issue with the absence, he never formally approved it as he did not realize that this was his job. As a result, none of the Grievor's clinical reports recommending sick leave contained a superior's signature.

The Respondent became the Grievor's return-to-work coordinator. In late 2007, he inquired about the Grievor's status. A Health Services Officer apparently replied that she could not find medical support for the leave. The Respondent then spent months trying to find some support, but was unable to. In early 2008, he encouraged the Grievor's superior to return the Grievor to work, and gave instructions to that end. A doctor soon deemed the Grievor fit to return, and the Force ordered him to do so. The Grievor thought he could stay home. The Respondent agreed to delay the return, pending an informal meeting. Yet he warned that this was a policy violation, and that the Force had power to dock leave and pursue a discharge for abandonment of post.

The Grievor initiated a grievance in which he purported that the Respondent had harassed him. He also made a complaint of harassment. He later retired. A Level I Adjudicator denied the grievance on the grounds that: the Grievor lacked standing, parts of the matter were moot, and the case failed on the merits. The Grievor grieved at Level II, reinforcing his positions.

ERC's Findings: The ERC found that the Grievor met the statutory test for standing, raised live issues, and grieved on time. It noted that the Grievor's harassment complaint was not a subject of the grievance, and that it in no way barred the Grievor from engaging the grievance process.

Turning to the merits, the ERC reviewed the key components of the RCMP and Treasury Board harassment policies. It went on to highlight the objective test for determining if harassment had occurred, namely, whether or not a reasonable observer would conclude that an impugned act satisfied the definition of "harassment". In applying this test, it found that none of the Grievor's allegations amounted to harassment. The record illustrated that the Respondent carried out his functions as required, based his decisions on the information of health care professionals, gave stakeholders appropriate instructions on their respective functions, and acted without haste or forcefulness in so doing. Moreover, although the Respondent could have been less blunt in his dealings with the Grievor, he expressed his message in ways that were neither rude, degrading, insulting, intimidating, demeaning, or otherwise offensive. He also did not abuse his authority.

ERC's Recommendation: The ERC recommends to the Commissioner of the RCMP that he deny the grievance on its merits.

G-544 The Grievor and his family resided in a house (original home). They had, however, decided to sell the original home and move into a larger one (new home). The new home construction began in January 2009 and the Grievor and his wife placed the original home for sale. On April 30, 2009, the Grievor applied for a new position at a new place of work. The Grievor's original home was sold on May 20, 2009, but, he and his dependents continued to live in it as they awaited completion of the new home. A purchase agreement for the new home was signed on May 24, 2009. On May 25, 2009, a Transfer Notice Form (A-22A) was issued advising the Grievor that he had been selected for the new position. The A-22A was issued as a "*no-cost move*" by the Respondent, because the Grievor was residing in the original home at the time of its issuance and that home was less than 40 kms from his new place of work. The Grievor asked that his new home, situated 48.1 kms from his new place of work, be considered his principal residence, since he had purchased it before the A-22A was issued. He believed that he should be entitled to a Crown-paid relocation from the new home upon its eventual sale. The Respondent advised the Grievor that his original home would be classified as his principal residence, since he was residing in that home at the time of his transfer, and as a result, his transfer was a "*no-cost move*".

The Grievor grieved the decision to deny him a cost move from the new home upon its eventual sale. The Level I Adjudicator denied the grievance. He found that because the Grievor was not occupying the new home prior to the date of the A-22A, the original home was his principal residence, and the *Integrated Relocation Program* did not provide for him to have a Crown-paid relocation from it given that it was less than 40 kilometers from his new place of work.

ERC's Findings: IRP 3.03.1.b. allowed benefits to flow with respect to the sale of a residence which had been purchased by the member but was not occupied due to terms of a purchase agreement or exceptional circumstances beyond the member's control. Under that provision, the Grievor needed to show that he had '*purchased the residence*' within the last six months with the intention of living in it, but had not yet taken possession of it due to circumstances beyond his control. The date of purchase, according to IRP 1.10, was the date where all conditions in a purchase agreement had been met. Although the Grievor and his wife had signed an agreement to purchase the new home before the A-22A was issued, the Grievor had not established, as he was required to, that all of the conditions in the purchase agreement had been met prior to issuance of the A-22A.

However, the ERC found that the Grievor's unique situation met the definition of exceptional circumstances as described in the IRP, and that the Force should have requested the approval of Treasury Board Secretariat (TBS) to authorize his relocation benefits. There appeared to be a significant detrimental impact on the Grievor and his family given that they were not being accorded IRP benefits even though the home they were committed to moving into before the issuance of the A-22A was over 40 kms away from the Grievor's new place of work. There was a clear intent on the Grievor's part to sell the original home and move into the new one approximately two months before the Grievor was advised that he had been identified as a candidate for the new position. The move into the new home was imminent at the time of the transfer.

ERC's Recommendations: The ERC recommends that the Commissioner of the RCMP order a review of the Grievor's case to determine whether the Grievor still wished to pursue a submission requesting TBS approval for a Crown-paid relocation from the new home. If that is the case, the ERC recommends that the review also include the preparation of a submission requesting TBS approval for a Crown-paid relocation.

The ERC observed that TBS approval for a Crown-paid relocation might no longer be feasible if, for example, the Grievor has been re-posted and no move from the new home had ever taken place. In such a case, the ERC recommends that an apology be issued to the Grievor for the Force's decision not to request reimbursement on an exceptional basis.

Update

The RCMP Commissioner has provided his decision in the following matters, summarized in previous issues of the *Communiqué*:

D-123 *(summarized in the January-March 2012* Communiqué*)*
The Adjudication Board found that the Appellant engaged in disgraceful conduct by sending unwanted, inappropriate, and threatening text and voice messages and by conducting an unauthorized information search. The Board imposed a global sanction consisting of a reprimand, a 10-day forfeiture of pay, and a recommendation of counselling. The Appellant appealed on numerous grounds, including reasonable apprehension of bias, procedural fairness and severity of the sanction. The ERC concluded that the Board was not biased against the Appellant nor had it breach the Appellant's right to procedural fairness. The ERC also found that the imposed sanction was neither excessive nor unfairly determined. The ERC recommended that the appeal be dismissed.

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

In a decision dated November 13, 2012, Commissioner Paulson agreed with the ERC's findings and recommendations and denied the appeal.

The Commissioner agreed with the ERC that an informed person, thinking the matter through realistically and practically, would not perceive bias on the Board's part towards the Appellant. He further agreed with the ERC that the Appellant's right to procedural fairness was not breached by the Board's interventions during the hearing, by the Board's reliance on case law not cited by the parties, or by the Board Members referring to their experience with domestic dispute matters when assessing witness testimony.

The Commissioner also agreed with the ERC that the Board did not engage in result-driven reasoning. He further agreed that the Board's findings were supported by clear and convincing evidence and that heightened deference is owed to the Board's findings of fact, including the weighing of evidence and matters of credibility.

The Commissioner further agreed with the ERC that the Board's consideration of the record, its treatment of parties and witnesses, and its reasoning process, were reasonable, sound, and consistent with relevant legal principles.

With respect to the appeal of the Board's decision on sanction, the Commissioner agreed with the ERC that the Board gave clear and fact-driven reasons in support of its decision and that the sanctions imposed were reasonable. The Commissioner found that the Board weighed the evidence, identified aggravating and mitigating factors, and explained why the parties' joint submission on sanction should not be given deference in this case.

G-484 *(summarized in the January-March 2010* Communiqué*)*
The Grievor believed that the Treasury Board Secretariat (TBS) undervalued the Vacation Travel Assistance (VTA) rate for his isolated post. The Respondent allegedly raised it with the TBS. He later stated that the VTA rate was correct. The Grievor argued that the rate was too low. The Level I Adjudicator denied the matter on standing. He held that the TBS properly fixed the disputed rate under statute and policy. The ERC found that the concerns raised by the Grievor were of broad importance to the Force, given that they were prevalent at multiple isolated posts. It also found that the Level I Adjudicator was right in that the *Act* barred the Grievor from contesting it via the Force's grievance process. The ERC also found that the Grievor had not established that the Respondent omitted to address the purportedly faulty VTA rate with the TBS. The ERC recommended that the grievance be denied.

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

In a decision dated November 6, 2012, Deputy Commissioner Steve Graham, Acting Commissioner, denied the grievance for lack of timeliness of the grievance presentation at Level II. Given the passage of time in this matter, and the fact that the ERC made findings and recommendations on the issues of standing and the merits of the grievance, the Commissioner believed that it was only fair that he also comment on those issues.

The Commissioner agreed with the ERC that the grievance was untimely at Level II. The ERC found that the issue was of general importance to the Force as a whole and recommended that a retroactive extension be granted. The Commissioner concluded that an extension of the time limit to present the grievance at Level II was not justified.

The Commissioner commented on the issue of standing. As outlined by the ERC, it appears that the Grievor grieved two issues in this matter: 1) the VTA rates which are fixed by the TBS, and 2) the alleged failure of the Respondent to address the purportedly faulty VTA rates with the TBS. With respect to the VTA rates set by the TBS, the Commissioner agreed with the ERC that they are not a decision, act or omission made in the administration of the affairs of the Force. As such, the Grievor did not have standing to grieve the VTA rates fixed by the TBS. With respect to the second issue, the Commissioner agreed with the ERC that the alleged failure on the Respondent's part to address the VTA rates with the TBS was a decision, act or omission in the administration of the affairs of the Force. Thus, the Grievor had standing to present his grievance with respect to this narrow issue only.

With respect to the merits of the grievance, namely whether or not the Respondent addressed the purportedly faulty VTA rates with the TBS, the Commissioner agreed with the ERC that the record contains correspondence which strongly suggests that the Grievor's concerns with the disputed VTA rates were forwarded to the TBS by National Compensation Services.

In conclusion, the Commissioner stated that had he not denied the grievance for lack of timeliness of the grievance presentation, he would have denied it for lack of merit. He would have agreed with the ERC that the Grievor failed to discharge his burden of proof in showing that, on the balance of probabilities, the Respondent failed to address the purportedly faulty VTA rates with the TBS.

G-490 *(summarized in the January-March 2010* Communiqué*)*

The Grievor, a regular member, was refused a daily Plain Clothes Allowance (PCA) when he worked two days in a month at a non-RCMP agency. The Level I Adjudicator denied the grievance on the merits. The ERC did not make a recommendation as it found that the grievance was not referable and therefore it did not have the authority to review it.

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

In a decision dated November 29, 2012, Commissioner Robert W. Paulson agreed with the ERC that the subject-matter of the grievance did not meet the criteria set out at section 36 of the Royal Canadian Mounted Police Regulations, 1988, and therefore the grievance was not referable to the ERC.This also meant that the grievance could be adjudicated at Level II by a designated Level II Adjudicator rather than the Commissioner himself. Accordingly, the Commissioner referred the grievance to a designated Level II Adjudicator for a decision to be reached on the grievance.

G-535 *(summarized in the July-September 2012* Communiqué*)*

The Grievor was served with a Notice of Intention to Discharge for reason of a physical and/or mental disability. A medical board (MB) hearing was scheduled and the Respondents were appointed as MB members. The Grievor grieved the fact that the MB decided to convene without first dealing with issues he was raising about lack of disclosure and appearance of bias. The Level I Adjudicator concluded the Grievor did not have standing. At Level II, the Grievor attempted to add an additional respondent to his grievance. The ERC recommended that the Commissioner of the RCMP not agree to adding the additional respondent at Level II as it would change the nature of the grievance. The ERC found that the Grievor did not have standing to pursue this grievance. It concluded that there was another process for redress specified in the *Regulations*, namely the medical discharge process. The ERC recommended that the grievance be denied.

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

In a decision dated December 5, 2012, the Commissioner denied the grievance. He agreed with the ERC that the Grievor should not be permitted to add a Respondent at Level II. He also agreed with the ERC that the Grievor did not have standing to present his grievance as there was another process for him to seek redress for issues arising during the medical discharge process, namely the procedure set out in section 20 of the Regulations.

The naming (or appointment) of a medical board and the proceeding (during which the medical board considers the materials provided by the designated officer in support of the discharge and any documentation and representations provided by the member) is governed by section 20 of the Regulations. The materials show that the Grievor was provided with the opportunity to provide submissions and documentation, and to nominate his medical practitioner to the medical board.

The decision to discharge (or retain) the member is not made by the medical board, but by the appropriate officer, after a review of the medical board's report (after the medical board has reviewed the material provided by the designated officer and the member). It is only the decision of the appropriate officer which may be the subject of a grievance under the Act (paragraph 22(a) of the Regulations). As such, the Grievor needs to exhaust the medical discharge process prior to being able to access the grievance process. He has no standing to grieve now.

The Commissioner added that the medical discharge process is intended to be fair, but also expeditious. Should a member bring a grievance regarding the Notice of Intention to Discharge which initiated the process, the appointment of the medical board, or any other step in the process before the final decision of the appropriate officer, this may have the effect of delaying and unduly complicating the process (as stated by the Level I Adjudicator) and may be seen as a collateral attack on the process, and an abuse of process.

G-536

(summarized in the July-September 2012 Communiqué*)* The Grievor was denied a request for reimbursement of her dental expenses. The Level I Adjudicator denied the grievance on the merits. The ERC found that the grievance was not referable to the ERC, and therefore did not have the legal authority to review it or to make any findings or recommendations.

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

In a decision dated November 29, 2012, Commissioner Robert W. Paulson agreed with the ERC that the subject-matter of the grievance did not meet the criteria set out at section 36 of the Royal Canadian Mounted Police Regulations, 1988, and therefore the grievance was not referable to the ERC.This also meant that the grievance could be adjudicated at Level II by a designated Level II Adjudicator rather than the Commissioner himself. Accordingly, the Commissioner referred the grievance to a designated Level II Adjudicator for a decision to be reached on the grievance.

QUICK REFERENCE INDEX (1998 to date)

Disciplinary Matters