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Royal Canadian Mounted Police External Review Committee

Between April and June 2013, the RCMP External Review Committee (ERC) issued the following recommendations:

G-552, G-553 and G-554

A Complainant alleged that the Grievor harassed her. Shortly thereafter, three superior officers met to address the complaint. The Grievor was later informed that, at the meeting, one of the officers decided to reassign the Complainant, and the other officers supported that decision. The Grievor believed that the decision removed some of his duties and redirected them to the Complainant. The harassment complaint against the Grievor was eventually dismissed. The Grievor submitted harassment complaints against all three superior officers. He contended that they prematurely decided in favour of the Complainant, and that such a decision amounted to an abuse of authority and a breach of policy. The Respondent, a Human Resources Officer (HRO), screened out each complaint. He reasoned that the officers had simply participated in a managerial decision-making exercise, and that none acted with malice or an improper motive.

The Grievor filed three grievances in which he challenged the fairness and thoroughness of the screening processes. The Respondent defended his decisions. He added that the officers had acted with his support. The Grievor countered that this created a perception of bias. A Level I Adjudicator denied the grievances. He held that the Grievor did not prove that the Respondent had erred or mishandled the complaints. Moreover, he rejected the Grievor's perception of bias argument, finding that it was made too late. The Grievor disputed the decision. He also urged that the Adjudicator's objectivity may have been clouded from dealing with all three grievances.

ERC Findings: The ERC found that the Level I Adjudicator's objectivity could not be questioned on the sole basis that he had decided multiple similar grievances. Legislation and policy permitted adjudicators to do this. Second, it found that the Grievor had presented a perception of bias argument at his earliest possible opportunity. The Level I Adjudicator therefore erred by refusing to consider it.

The ERC turned to the merits. It found that the Respondent lacked the authority to make a final decision to screen out the Grievor's complaints, noting that Force policy directed the Responsible

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Officer to make the final screening decision. The ERC also found that the Respondent was in a conflict of interest position throughout the screening process, and that this created an appearance of bias. It reasoned that he could not be a witness and a decision-maker in the same process. Lastly, the ERC found that the Respondent disregarded two procedural requirements at the screening stage. First, he did not seek clarification from the Grievor, and collect more information, before screening out the complaints. Second, he failed to assume that the Grievor's allegations could be true. This led him to bypass the screening function, and assess the merits of the complaints.

ERC Recommendation: The ERC recommends to the Commissioner of the RCMP that he allow the three grievances, and that he apologize to the Grievor for the Force's failure to properly deal with his harassment complaints.

G-555 The Grievor submitted a request to his immediate superior for leave without pay (LWOP) so he could take part in a foreign mission. The mission was to begin about one week later. The immediate superior denied the Grievor's request, citing operational reasons. The Grievor subsequently informed the Commanding Officer (Respondent) several times that he wished to discuss his denied request. Under the applicable policy, only the Respondent could approve LWOP. The Respondent also asked his superiors to clarify the operational reasons for denying the request. A few days before the Grievor's scheduled departure, the Respondent's office informed him that his request would be forwarded to a Human Resources Officer (HRO) for [Translation] "subsequent action," with no additional explanation as to the nature of such action. A few days later, having been unable to meet with the

Respondent or the HRO, the Grievor decided to retire so he could take part in the mission.

The Grievor filed two grievances—one against his immediate superior and the other against another superior involved in the decision-making process. The grievances were identical in that both challenged the refusal to approve LWOP. The Office for the Coordination of Grievances (OCG) combined the grievances and designated the Respondent as the appropriate party to respond to the grievance. The Grievor stated that he had been forced to sign his retirement documents and had been subjected to harassment and discriminatory treatment. He challenged the operational reasons as the basis for the denial of LWOP and indicated that his immediate superiors had settled an issue that only the Respondent could decide on. The Respondent stated that he had been out of the office for most of the brief period established by the Grievor. Even if he had received the request in time, recommendations would have been obtained from the line officers. The Level I Adjudicator dismissed the grievance, indicating that the immediate superior's decision was merely a recommendation and that only the Respondent could decide on the LWOP request. The Adjudicator maintained that the operational requirements outweighed the Grievor's interests and that the Grievor had not been subjected to harassment or discrimination.

ERC Findings: It would have been preferable for the OCG to have referred the issue of the Respondent's identity to a Level I Adjudicator. A new Respondent was designated, while the grievance dealt in large part with the actions of certain managers, who in the grievance process, did not directly respond to their alleged actions. In terms of the merits of the grievance, the

ERC noted that the Grievor could reasonably have expected that an LWOP request sent to his hierarchical supervisor would be dealt with in accordance with RCMP policy. Moreover, the Grievor's superiors indicated that the decision to deny the LWOP request was final, which ran counter to this same policy. Further, the Grievor's superior officers should have demonstrated greater transparency and provided the Grievor with more information about the status of his LWOP request. The ERC also stated that the operational reasons put forward by the Grievor's superiors appeared to be somewhat contradictory, and that the process for considering and conveying these reasons seemed to lack transparency. However, despite the apparent deficiencies in the handling of the Grievor's LWOP request, the ERC found that the Grievor had not been subjected to harassment or discriminatory treatment.

ERC Recommendations: The ERC recommends that the Commissioner of the RCMP allow the grievance and apologize to the Grievor for the manner in which his LWOP request was handled. The ERC also recommends that the Commissioner order a review of the RCMP's leave policy to determine whether it could be amended to clarify the LWOP request process.

G-556 In the months following his attendance at a grisly suicide scene, the Grievor became distracted, depressed, exhausted, and disengaged. He began bingeing on sugar. He also started pilfering change from a peer's work area within a police office. He was caught, and admitted to stealing from his peer numerous times. A *Code of Conduct* investigation was launched, and the Grievor was charged with Theft Under \$5,000. The Grievor began seeing various health professionals, including Dr. R.H., who was a psychologist. Dr. R.H. prepared a report in which he diagnosed the

Grievor with Post Traumatic Stress Disorder (PTSD), a condition he linked to the Grievor's experience at the gruesome suicide scene. Dr. T.M., a Force psychologist, later wrote a report in which she questioned Dr. R.H.'s findings, though she admittedly never examined the Grievor.

The Respondent issued a Stoppage of Pay and Allowances Order (SPAO) against the Grievor. Per the relevant test, he believed the Grievor had been clearly involved in "outrageous" conduct that could amount to a *Code of Conduct* breach. He accepted that the Grievor had PTSD. Yet he did not think the PTSD and thefts were linked, partly in light of Dr. T.M.'s report. The Grievor filed a grievance. He argued that the Respondent failed to attach proper weight to the medical evidence. He also sought permission to submit a report by his psychiatrist, Dr. O.O. The Level I Adjudicator denied the grievance. She found that the Respondent had adequately considered the medical evidence. She also determined that while Dr. O.O.'s report may be admissible and might have "had an impact", she could not decide those matters as she did not have the report.

The Grievor grieved at Level II. He sent the ERC Dr. O.O.'s report, two reports from a different treating psychologist, some case law, and his rationale as to why all of those documents should be considered. The ERC received submissions from both parties on the issue of admissibility.

ERC Findings: The ERC observed that the Level I Adjudicator should have asked to see Dr. O.O.'s report before replying to the Grievor's request that it be admitted. It ultimately found that all the materials the Grievor gave the ERC were admissible under applicable legislation, policy, and case law. Turning to the merits, the ERC found that the Respondent's decision to issue an SPAO was legally unsound, in two respects. First, he

should not have downplayed Dr. R.H.'s evidence of a link between the Grievor's PTSD and conduct, in favour of speculation. Second, once the Force learned of the Grievor's condition, it had an obligation to find out if his thefts were linked to that condition. By basing the SPAO on an unsubstantiated finding that the Grievor's actions were unrelated to PTSD, the Force deprived itself of information vital to an analysis of whether he had engaged in "outrageous" conduct warranting an SPAO. The ERC acknowledged that stealing within a police station is reprehensible. Yet in view of the evidence, it found that the Grievor's thefts were clearly linked to PTSD, and that they therefore could not reasonably be viewed as outrageous. As a result, it concluded that the SPAO was not justified.

ERC Recommendations: The ERC recommends to the Commissioner of the RCMP that he allow the grievance and overturn the Grievor's SPAO. It also recommends that he reinstate the Grievor's pay and allowances, retroactive to the date the SPAO was issued (i.e. May 13, 2011).

Update

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

G-491 (summarized in the January-March 2011 Communiqué)

The Grievor was charged with a number of crimes. The Force suspended him and initiated disciplinary proceedings. It fully reinstated the Grievor after the court acquitted him, and a disciplinary board held that the allegations against him were unfounded. The Grievor later complained about the way the Force treated him. He sought related remedies which some were settled. The Respondent rejected the Grievor's

remaining allegations and requests for redress. The ERC found that the Respondent did not properly address the Grievor's concerns. The ERC recommended that the grievance be allowed and that a review into the Grievor's allegations be ordered, if such a review has not yet been conducted.

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

The Commissioner denied the grievance.

The grievance dealt with the denial of his request for a number of corrective actions from the Force, including (i) an apology from the (then) CO due to the pursuit of formal disciplinary action against the Grievor and the stoppage of the Grievor's pay and allowances; (ii) apologies from the internal investigators for their alleged faulty or non-existent investigation, bad faith, failure to observe his right to legal counsel, and fabrication of evidence; and (iii) compensation for defamation because he had been "labelled" in the RCMP after members of the Force learned about the Code of Conduct allegations. The Commissioner also briefly reviewed two other remedies: (iv) interest and (v) a request that the individual who complained about his conduct (the Complainant) be investigated for allegations of perjury and that charges be laid. While it did not appear that the Grievor still wished to pursue these corrective measures at Level II, the Commissioner nevertheless addressed the issues for a fulsome decision. The Commissioner found it doubtful that the Grievor had named the proper Respondent, but, considering the length of time the matter had been in the grievance system, decided that he would address issues of standing and the merits. The Grievor had made extensive submissions.

Apology from the CO: The Commissioner found that the Grievor's concerns regarding the conduct of the CO should have been raised or addressed at the time the CO's actions were taken. By the time he filed the grievance, it was at least five years later. The CO was not the decision-maker in the matter respecting the stoppage of the Grievor's pay and allowances. The Director of Personnel (DP) was authorized to make the decision and did so after considering the representations made by the CO and the Grievor. The CO was entitled to provide his opinion and recommendation, as his role could be equated to a party in a litigious matter. In any event, he did provide to the DP the materials which the Grievor had requested, as well as the Grievor's submissions. The DP made an impartial decision, and, considering the decision was in his favour, the Grievor suffered no loss of pay and allowances. Furthermore, the Grievor's standing was questionable, as the Grievor should have raised his concerns regarding the CO's conduct in pursuing the matter in his submissions to the DP during that process. Had the Grievor been dissatisfied with the DP's decision he would have had the right to grieve the decision. Similarly, the Grievor could have raised his concerns respecting the CO's actions (as Appropriate Officer) in pursuing formal discipline against him during the formal disciplinary process set out in Part IV of the Act. He could have made arguments in front of the Adjudication Board had he wished to complain about malicious prosecution or the conduct of the CO. The Commissioner pointed out that the burden of proof required for a criminal finding of guilt is quite different from the Appropriate Officer's burden during formal disciplinary proceedings to prove that a member's conduct is disgraceful. Furthermore, the elements of the criminal offences with which the Grievor are markedly different from the elements of disgraceful conduct under the RCMP Code of Conduct. The CO was a party

to the formal discipline and was entitled to pursue it. The Commissioner found that the Grievor had no standing to present a grievance requiring an apology from the CO. He disagreed with the ERC that the Grievor had no method or process for bringing either of these concerns forward.

Grievor's Reliance on Privileged Advice Given by AOR to AO and Settlement Discussions:

The Commissioner found that it was disturbing and entirely inappropriate that the Grievor was able to obtain a copy of a document containing advice from the Appropriate Officer Representative to the CO, as this advice was protected by privilege pursuant to s. 47.1(2) of the Act, and should not have been disclosed to the Grievor. Similarly, the Grievor should not have produced information respecting settlement discussions during legal and administrative proceedings, or any settlement offers which may have been made. Settlement discussions and offers are confidential and without prejudice, and a common law privilege excludes from evidence statements made during negotiations to settle litigation.

Apology from Internal Investigators: The Grievor also did not, at time of the actions of the investigators, seek to complain about their conduct. Furthermore, he had other avenues of recourse. The Commissioner did not agree with the ERC that the Grievor had no method or process for bringing his concerns about the investigators forward. The Grievor could have made a complaint to the investigators' supervisor or through this chain of command. Management would have had the authority to take appropriate action, such as through the performance management process or by ordering an internal investigation. Secondly, he could have advised his representative during the formal disciplinary proceedings. These would have been the appropriate forums to raise allegations regarding the failure to

respect his right to counsel, fabrication of evidence, or that the investigation was poor, non-existent or conducted in bad faith. There was no evidence that the Grievor brought his concerns forward. In addition, he provided no evidence to support these allegations. Further, the Canadian Charter of Rights and Freedoms does not apply to disciplinary proceedings taken pursuant to Part IV of the Act and the corresponding investigation, as they are neither criminal nor quasi-criminal and the consequences are not penal in nature but are designed to correct behaviour (rehabilitate) and to ensure the integrity of the Force (see R. v. Wigglesworth, [1987] 2 S.C.R. 541). The Grievor was not "arrested or detained" within the meaning of s. 10 of the Charter, when questioned in the internal investigation. Therefore, he was not denied his right to counsel under s. 10(b).

Defamation: *In order to prove that he was defamed, the Grievor had to show that (i) the statements were published, meaning they were communicated to a third party, (ii) the statements were about him, and (iii) the statements would tend to disparage his reputation in the eyes of a reasonable person (Grant v. Torstar Corp., [2009] 3 S.C.R. 640, at para. 28). He did not provide evidence to prove these three elements on a balance of probabilities. It appeared from the file that the Grievor's concern was that members of the Force found out that he was the subject of Code of Conduct allegations. He did not provide any evidence that the allegations were discussed or published as established or proven, and did not complain of any other specific comments. It was true that the internal investigators were investigating allegations of disgraceful conduct, and that they could only be established by a finding of the Adjudication Board after a quasi-judicial hearing. Truth is a defence to an action in defamation. Furthermore, there is an absolute privilege*

attached to statements given in evidence in a trial and during quasi-judicial proceedings, which extends to all the participants in the proceeding, including the judge (or board), counsel, parties, and witnesses, and to the contents of documents offered in evidence (Brown, The Law of Defamation in Canada). Statements to the police in furtherance of legitimate investigations are protected by an absolute or qualified privilege, and the protection extends to the individual police officers who are performing the investigation (Evans v. London Hospital Medical College, [1981] 1 W.L.R. 184). The Grievor's claim would fail. Finally, the RCMP's grievance process is not one by which a member may obtain compensation for defamation. There is no authority allowing for such a payment. Grievance Adjudicators acting pursuant to the authority granted by Part III of the Act do not have the authority to order damages. Even if he had proven he was defamed (which he had not), the Grievor did not point to any policy or law which would allow for compensation.

Interest: *There is no authority for the RCMP to pay interest to a Grievor. The Crown is not liable to pay interest unless a contract or legislation authorizes such a payment. The RCMP Act does not. The matter was settled in G-421 and G-455, and has been confirmed recently by the Federal Court in two decisions: Busch v. Attorney General of Canada (March 22, 2012) and Beaulieu c. Le Procureur général du Canada (April 17, 2013). As such, should the Grievor still be seeking interest, his claim would fail.*

Investigation of the Complainant: *Should the Grievor be still seeking an investigation into the Complainant or that charges be laid, his request would be denied. Pursuant to subsection 31(1) of the Act, the grievance process is designed to deal with decisions, acts or omissions which occur in the*

administration of the affairs of the Force. As such, his complaint is not the proper subject of a grievance.

Review: *The Commissioner did not agree with the ERC that a review of the Grievor's allegations or an investigation is warranted. Having found that there are proper mechanisms within the Force which could have been engaged to deal with the concerns raised by the Grievor, he determined he would not inquire into this issue further.*

G-518 *(summarized in the October-December 2011 Communiqué) A Code of Conduct investigation was initiated against the Grievor regarding an allegation that he had acted inappropriately. The Grievor alleged the Respondent's actions in initiating the investigation and in not telling him about his right to grieve, were unfair and harassing. The Level I Adjudicator found that the Grievor did not abide by the statutory time limit and therefore denied the grievance. The ERC found that the grievance was filed many months past the 30-day time limit. 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:*

The Commissioner agreed with the ERC that members are expected to be aware of their rights under the Act, the Regulations, the Commissioner's Standing Orders, and policies which apply to them. Members cannot expect to be informed of their right to grieve, or have the time limits waived or extended because they were not told they could grieve a particular decision, act or omission. He quoted former Commissioner Inkster, who wrote in G-104: "[w]hen members disagree with Force decisions but

fail to submit grievances within the statutory time limits, they lose the right to grieve those decisions."

The Commissioner agreed with the ERC that the grievance was presented well beyond the thirty-day statutory time limit set out in the Act. Therefore, he denied the grievance.

G-519 *(summarized in the October-December 2011 Communiqué) A Code of Conduct investigation was initiated against the Grievor regarding an allegation that he had acted inappropriately. The Grievor believed that the investigation was unnecessary and harassing. Although the Respondent was not the person who initiated the investigation, the Grievor alleged that he was involved in the harassment and as well, he did not inform the Grievor that he had a right to grieve. The Level I Adjudicator found that the Grievor did not abide by the statutory time limit and therefore denied the grievance. The ERC found that the grievance was filed many months past the 30-day time limit. 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:*

The Commissioner agreed with the ERC that members are expected to be aware of their rights under the Act, the Regulations, the Commissioner's Standing Orders, and policies which apply to them. Members cannot expect to be informed of their right to grieve, or have the time limits waived or extended because they were not told they could grieve a particular decision, act or omission.

The Commissioner agreed with the ERC that the grievance was presented well beyond the thirty-day statutory time limit set out in the Act. Therefore, he denied the grievance.

G-520 (summarized in the October-December 2011 Communiqué) A Code of Conduct investigation was initiated against the Grievor regarding an allegation that he had acted inappropriately. The Grievor believed that the investigation was unnecessary and harassing. Although the Respondent was not the person who initiated the investigation, the Grievor alleged that he was involved in the harassment and as well, he did not inform the Grievor that he had a right to grieve. The Level I Adjudicator found that the Respondent was not properly named, and that the grievance was actually against the person who initiated the investigation. The ERC found that the subject of the grievance was the Respondent's conduct, and not the decision to initiate the investigation. However, the ERC found that the conduct complained of was centred around the decision to initiate the Code of Conduct investigation, and the grievance was filed many months after the date of this decision. 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:

The Commissioner agreed with the ERC that the grievance was against the conduct of the Respondent, including his involvement in the Code of Conduct investigation and his failure to inform the Grievor that he could present a grievance. Therefore, the Level I decision to name the person who initiated the investigation as the respondent was erroneous, as was the resulting Level I decision finding the grievance moot.

The Commissioner also agreed with the ERC that members are expected to be aware of their rights under the Act, the Regulations, the Commissioner's Standing Orders, and

policies which apply to them. Members cannot expect to be informed of their right to grieve, or have the time limits waived or extended because they were not told they could grieve a particular decision, act or omission.

He agreed that the grievance was presented well beyond the thirty-day statutory time limit set out in the Act, and denied the grievance.

G-521 (summarized in the October-December 2011 Communiqué)

The Grievor was a candidate in a promotional process for which he was not selected. The Respondent took part in the process. The Grievor filed a grievance against the Respondent's refusal to recuse himself from the process since the Grievor had filed harassment complaints against him. He stated that the Respondent's actions showed ongoing harassment and ongoing prejudice. The file was sent to the Level I Adjudicator for a preliminary decision on the identity of the Respondent. However, the Adjudicator did not address this issue, but found that the Grievor did not have standing and denied the grievance. The ERC found that the Grievor had standing since the grievance was not about the promotional process, but about the Respondent's alleged harassing and prejudicial conduct. Therefore, it also found that the Respondent was properly named. As the parties were not heard on the merits, the ERC recommended that the grievance be allowed and that the matter be returned to the Level I Adjudicator.

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

The Commissioner agreed with the ERC that the grievance was against the conduct of the Respondent and his failure to recuse himself

from the promotion process due to a conflict of interest with the Grievor. The Grievor had standing, and named the proper Respondent.

The Commissioner returned the file to the Level I Adjudicator for a decision on the merits once the parties had an opportunity to present submissions. Considering the passage of time, the Commissioner expected the matter to proceed in a timely manner.

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