

RCMP External Review Committee



GRIEVANCES

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Royal Canadian Mounted Police
External Review Committee

Comité externe d'examen de la
Gendarmerie royale du Canada



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A. History

In 1976 the *Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure Within the Royal Canadian Mounted Police* (The Marin Report) issued its report.

This report began the process of change to the RCMP grievance system. It recognized that the grievance process was not open to scrutiny and expressed a need for simplifying the process.

Out of this report came two independent agencies:

- The Commission for Public Complaints against the RCMP (current name); and
- The RCMP External Review Committee

The legal provisions come in force in 1988.



B. Mandate: The Committee's Role

- An **independent tribunal**, reporting to Parliament through the Solicitor General (Public Safety and Emergency Preparedness Canada).
- Mandated to **make recommendations** to the RCMP Commissioner on:
 - Appeals from disciplinary measures imposed on members by adjudication boards
 - Appeals of discharge and demotion decisions
 - Certain categories of grievances (second level)

The Commissioner retains final decision making authority, subject only to the Federal Court's power of judicial review.



Final Level in Grievance Process: Level II

- Commissioner's decision in respect of any grievance is final and binding and, except for review under the *Federal Court Act*, is not subject to appeal to or review by any court.
- The Commissioner is not bound by the Level I adjudicator's decision or by the findings and recommendations provided by the ERC in relation to the grievance. If the Commissioner does not act on the ERC recommendations, he shall include in the decision the reasons for not acting.



Section 32(2) *RCMP Act*

- *Girouard v. Canada* [2001] F.C.J. No. 63
Federal Court reiterated the duty of the Commissioner to give reasons, agreed with the applicant's view and allowed his application
- *Muldoon v. Attorney General of Canada* [2004] F.C. 380
"Section 32(2) of the *RCMP Act* acknowledges that the Commissioner is not bound by a decision of the ERC. However, it does require the Commissioner provide reasons if deviating from the recommendations of the ERC. The Commissioner failed to do so."



Role of the RCMP External Review Committee


Grievances

Reference to Committee (sections 33 to 36 of the *RCMP Act*).

If Grievor wishes to appeal, submits Level II grievance to Commissioner.

The Commissioner refers grievances to the ERC before making a decision, if the matter is referable.

Grievor may request Commissioner not to refer the grievance to the ERC and the Commissioner may comply or nevertheless refer grievance to ERC (section 33(2)).



Section 36 of RCMP *Regulations*

- Five categories of grievances can be referred to the ERC.

Section 36 of the *Regulations*:

- ❖ Interpretation and application of government-wide policies that apply to members of the RCMP;
- ❖ Stoppage of pay during suspension of a member;
- ❖ Interpretation and application of the Isolated Posts Directive;
- ❖ Interpretation and application of the Relocation Directive (Integrated Relocation Policy);
- ❖ Administrative discharge under 19 (a), (f) or (i).



Section 36(a) and The 'list of sixteen'

- Section 36(a): the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members.

- Some of the more relevant areas include:
 - ❖ Language Profile of positions in Job Opportunity Bulletins
 - ❖ RCMP Travel Directives
 - ❖ Legal Fees and Disbursements
 - ❖ Living Accommodation
 - ❖ Harassment in the workplace



What is not included?

- Some areas not referable to the ERC include:
 - ❖ Promotions
 - ❖ Transfers
 - ❖ Classifications (new process)



C. ERC Review

- Generally ERC bases its review of the grievance on the entire grievance record.
- Where additional background information or submissions are needed, the parties may be requested to provide them.
- When making additional submissions, the other party is always given an opportunity to respond.
- Oral hearings are also possible, but rare.



C. ERC Review

- Questions that might be considered include (but are not restricted to) these examples:
 - ❖ In some cases, the ERC might ask whether the matter **was in fact referable to it**.
 - ❖ Have issues such as **standing and time limits** been properly addressed?
 - ❖ Were **policies** correctly applied?
 - ❖ What were **previous ERC** recommendations in similar cases?
 - ❖ What is the **jurisprudence** applicable to any legal issues **involved**, reasons given?



C. ERC Review

Burden of persuasion:

- In arbitration under collective agreements, there is a general presumption that the party bringing the grievance has the ultimate burden of proving the case (Re Central Park Lodges 88 L.A.C. (4th) 188).
- ERC has indicated that, in line with this principle, members must show on a balance of probabilities that the Force decision being grieved is wrong (burden of persuasion). It is not up to the Force to prove that a decision is correct (G-91, G-170, G-234, G-326).
- Adjudicators cannot act as investigators when they examine a grievance. It is up to the parties to present the evidence they deem is relevant. Parties should not expect that the Adjudicator will search for and obtain relevant evidence which is not on file (G-234).



C. ERC Review Level I Reasons Essential

- Essential that “proper and adequate” reasons be provided to the Grievor.
- Proper reasons demonstrate that the Adjudicator understood the facts and addressed the issues raised by the parties.
- Example of ‘boiler plates’ that are inadequate:
“I have reviewed your grievance, the documentation and available policy and find thatwere processed in accordance with existing policy. Therefore, thewere properly applied and I must reject the grievance.”
- Chair of the ERC reviews entire file and prepares findings and recommendations.
- Chair’s findings and recommendations are forwarded to the Commissioner.



D. Standing and Time Limits

- Section 31 of the *RCMP Act*
- **Standing:** member's ability to come within the terms of subsection 31(1).
- **Time Limits:** a member's compliance with the statutory time limits set out in subsection 31(2).
- Although an examination of the issues under section 31 may be linked, the issue of time limits is **separate** from the issue of standing.



D. Section 31 of the *RCMP Act*

- Only “members”
- Must be “aggrieved”
- In the administration of the affairs of the Force
- “Standing” and “Merits”
- Is there another process for redress?
- Time limits
- For more information, refer to Communiqués



(1) Standing: Common Pitfalls

- **Standing vs. Merits:** Standing is a preliminary question as to whether a member can present a grievance. It does not concern the ultimate merits of the substantive issues in the grievance.
- e.g. Argument that no standing because of an assessment by Respondent that a relevant policy has been correctly applied. This confuses merits with standing.
- **No Standing because no tangible loss:** The legislation does not contain such a requirement.



(1) Standing: Common Pitfalls

- Standing when change in application of policy, leading to correct application of policy before presentation of grievance:
- **G-301:** Committee: "It appears that the Grievor was successful in obtaining part of the remedy that he had requested in his Level I grievance presentation ... However, there has not been an acknowledgement on the part of the Respondent that the order was inappropriate to begin with..."



(2) Standing: Retired members

- The **ERC** has recommended that in some cases members who have retired should be granted standing to bring their grievances. e.g. G-321:
- Classification grievance, new evaluation arrived at same conclusion as old evaluation. Grievance brought after member retired;
- Inadmissible at Level I;
- **ERC** : Admissible at Level II because decision pertains to classification of position at time incumbent held it;
- **Commissioner**: The Commissioner agreed that the decision of the classification committee was a continuity of the first decision. He disagreed on the merits.



(2) Time Limits



- Section 31(2) of the *Act* sets out time limits.
- At Level I, the member must present the grievance within 30 days after the day the member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance.
- At Level II, the member must present the grievance within 14 days after being served with the Level I decision.



(2) Time Limits



- Time Limits are mandatory, cannot be waived.
- Time Limits can be extended, retroactively and prospectively by the Commissioner, pursuant to section 47.4(1), where the Commissioner is satisfied an extension is justified.



(2) Time Limits: G-280

- Grievor and spouse both members on travel status. Advised Respondent of "*alternate accommodation at a condo for this same rate*". Choice of accommodations approved, but advised them that they could not have separate accommodations. There was no response by Grievor to this direction.
- Several weeks later, Grievor's travel claim included six nights where he and spouse had separate accommodation. Respondent denied reimbursement. Grievance on travel claim denial.
- Level I Adjudicator found that the grievance was out of time. Should have been brought at time of approval of alternate accommodation. This is when the Grievor knew he had been aggrieved.
- Committee agreed. Commissioner followed Committee recommendation.





(3) Disclosure

- Section 31(4): mandates that a Grievor be provided with any information relevant to the grievance.
- Member must establish that information sought is (i) under the control of the Force; (ii) relevant, and ;(iii) reasonably required to properly present grievance.
- It is up to the member to establish that these criteria are met (G-295/G-296 & G-234). However, this burden is not a heavy one (G-147), and in fact the burden may shift to the AO to explain why info should not be disclosed (G-147).
- Where large amount of information requested, and some of it appears relevant, Force should address request for info in a manner that leaves the member with the impression that the Force is being mindful of its obligation under s.31(4) (G-242).



(3) Disclosure

- Certain information is excluded from disclosure: (i) injurious to defence of Canada or prevention of hostile activities; (ii) injurious to law enforcement (see CSO on grievances s.8);
- Access to Information and Privacy legislation do not bar disclosure pursuant to s.31(4) (G-266/267 and G-234);
- « Make an access request » not an appropriate response to a request for info under section 31(4).



E. Government Policies

Section 36 of the *RCMP Regulations* provides the types of grievances which are to be referred to the Committee. Subsection 36(a) addresses government policies:

(a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;

Examples of these types of policies include:

- Travel Directives
- Official Languages
- Legal Representation
- Harassment



(1) Legal Representation

Policy on the Indemnification of and Legal Assistance for Crown Servants (effective 1 June 2001)

Provides that where Crown servants acted honestly and without malice within their scope of duties or employment and met reasonable departmental expectations, it is government policy to authorize provision of legal assistance to Crown servants in the following circumstances:

- when they are required to appear before or be interviewed in connection with a judicial, investigative, or other inquest or inquiry;
- when they are sued or threatened with a suit;
- when they are charged or likely to be charged with an offence; or
- when they are faced with other circumstances that are sufficiently serious as to require legal assistance.
- Under no circumstances is legal assistance to be authorized for claims or actions initiated by Crown servants.



(1) Legal Representation

- G-282
- When will threat of a lawsuit justify legal assistance to the member?
- Threat of litigation does not necessarily justify application for legal funding, if it is not serious and imminent.



(2) Travel: G-301

Facts:

- The Grievor was assigned to a murder investigation and was on travel status for an extended period of time.
- Initially, he stayed at hotel, then ordered to move to a facility, given expected length of investigation.
- Grievor sought rescission of the order.
- Level I Adjudicator found the Grievor did not have standing.

Results:

- The Committee found that the Grievor had standing.
- The Committee also found that the RCMP facility in question did not comply with "suitable police quarters" definition in the Treasury Board Travel Directive.
- The Commissioner agreed with Committee recommendation and allowed the grievance.



(3) Relocation

Since the introduction of the Treasury Board policy “Integrated Relocation Program – Pilot” in 1999, section 36(a) also operates to provide the Committee with a mandate to review relocation grievances.

The Committee provides Findings and Recommendations to the Commissioner on a variety of relocation issues; including:

- Reimbursement for rental cars
- Funding of house hunting trips
- Home equity loss
- Interim accommodation
- Legal fees



(3) Relocation: Incorrect Advice (G-299)

Facts:

- The Grievor complained that the Force failed to advise him that he might be entitled to additional compensation if he delayed his move until the implementation of IRP.
- The Level 1 Adjudicator found the Grievor lacked standing.

Results:

- The Committee found that Grievor was entitled to challenge Force's omission to provide him with information about the IRP. However, he waited too long to file his grievance.
- On the merits of the grievance, the Committee held that there was insufficient evidence that the Force acted in bad faith by failing to inform the Grievor of the terms of the IRP before he made the decision to enter the GHSP.
- The Committee recommended that the grievance be denied and the Commissioner agreed.



(4) Harassment

- Force's internal harassment policy must comply with the Treasury Board policy.
- RCMP has an obligation to investigate and determine whether harassment complaint is well-founded.
- Obligation of commanders/supervisors to prevent harassment.



(4) Harassment

- Harassment includes: Degrading remarks, jokes, taunting, insulting gestures, displays of offensive pictures or materials, unwelcome enquiries or comments, conduct, comments or gestures of a sexual nature that may offend or humiliate an employee.
- Person “knew or reasonably ought to have known” would be unwelcome.
- Harassment is also a form of discrimination under the *Canadian Human Rights Act*: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, conviction for which a pardon has been granted, disability.



(4) Harassment : G-235

- Grievance of decision arising from harassment complaint investigation, which found allegations to be unfounded on basis that (1) a “personality conflict” between Grievor and his supervisor, and (2) insufficient evidence to establish that the supervisor “deliberately” harassed Grievor.
- Level I: Dismissed.
- **ERC** recommended allowing grievance in part:
 - Demeaning remarks constituted harassment.
 - Not necessary to establish deliberate intent to harass the Grievor.
 - Correct question: should the supervisor have reasonably ought to have known his actions/comments would be offensive?



F. Stoppage of Pay

- Stoppage of Pay- referable under ss 36(b) of *Regulations*
- *RCMP Act*, section 22(3): *The Treasury Board may make regulations respecting the stoppage of pay and allowances of members who are suspended from duty.*
- *Stoppage of Pay and Allowances Regulations*, under the *RCMP Act* state that the Commissioner, a Deputy Commissioner or an Assistant Deputy Commissioner may order the stoppage of pay and allowances of a member who is suspended from duty pursuant to this section.



F. Stoppage of Pay

- **Committee:** No legal authority for the RCMP to stop the pay and allowances. No indication in *Regulations* as to what criteria the RCMP is required to consider to determine whether stoppage of pay and allowances is appropriate.
- Instead, such criteria have been developed by the RCMP itself and were published in the Force's Administration Manual.
- **Commissioner:** No legal authority to pronounce on validity of *Regulations*.



F. Stoppage of Pay: Issues

- “Extreme circumstances” which the Force's policy identifies as a requirement to stop a member's pay and allowances.
- Timeliness of order to stop pay.
- Interpretation of policy: will not apply to summary convictions, provincial statutes or minor Criminal Code offences.



G . Medical Discharge: Duty to Accommodate

- Medical discharge is referable under subsection 36(e) of *Regulations*.
- *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 R.C.S. 3 ("*Meiorin*") -SCC decision imposes a higher standard to accommodate a member of the Force.
- Three pronged test: An employer may justify workplace standard by establishing:
 - (1) that the employer adopted the **standard** for a **purpose rationally connected** to the performance of the job;
 - (2) that the employer adopted the particular standard in an **honest and good faith belief** that it was necessary to the fulfilment of that legitimate work-related purpose; and,
 - (3) that the standard is **reasonably necessary** to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is **impossible to accommodate individual employees** sharing the characteristics of the claimant **without imposing undue hardship** upon the employer.



G. Medical Discharge: The Duty to Accommodate

- *Meiorin* suggests several different questions:
 - ❖ Were alternative approaches that do not have a discriminatory effect considered?
 - ❖ If so, why weren't they implemented?
 - ❖ Is it necessary that all employees meet a single standard or could different standards be adopted?
 - ❖ Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?
 - ❖ Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom it applies?
 - ❖ Would the employer face hardship if alternative standards were adopted or if accommodation was provided?



G. Medical Discharge

G-266 & G-267

- **ERC:** The Force has completely failed to meet its duties, pursuant to the "*Meiorin*" decision of the Supreme Court of Canada, and did not discharge its duty to accommodate.
- Recommends that grievances be upheld.
- **Commissioner:** Agrees that current process is flawed and must be changed.
- Orders complete review in G-266. Commissioner allows grievance in G-266, but says he has sufficient information to discharge member in G-267.



G. Medical Discharge G-266/G-267 Commissioner's Policy Review

- Pressing need to revise current policies in three main areas to address *CHRA* and *SCC Meiorin* decision with regard to the duty to accommodate:
 - A. More guidance on application of the duty to accommodate regular members with medical restrictions;
 - B. More guidance to ensure all other options are considered to the point of undue hardship where regular members cannot be accommodated in the front-line;
 - C. Ensure that Grievors have access to sufficient information with regard to efforts to accommodate and those accommodation arrangements made with other members.



G. Medical Discharge

***Muldoon v. Canada* [2004] FC 380**

- Federal Court set aside Commissioner's decision in G-267.
- Federal Court:
 - The RCMP has not established that it cannot accommodate the member adversely affected by the standard without experiencing undue hardship.



H. Administrative Discharge

G-272

- Notice of Intention to discharge: Grievor allegedly made fraudulent statement when hired (did not disclose prior involvement in criminal activity).
- Administrative Discharge Board (ADB) convened and denied Grievor's request for an oral hearing. Found some allegations of involvement established based on witnesses whose credibility was called into question.
- AO issued Notice of Discharge. Grievance denied.
- **ERC:** ADB erred in not holding hearing: Credibility (Grievor/witnesses), cross-examination, consequences on Grievor severe.
- Evidence only established suspicion that Grievor involved.
- Clear and convincing evidence was required in such a case.



I. Other examples...

- **G-325:** mandatory retirement, *bona fide* occupational requirements, *Meiorin* test.
- **G-269:** partially allowed for payment of expenses of escort at birth while at isolated post (though not for other expenses).
- **G-265:** meal expenses where member forced to eat at hotel while doing security.
- **G-253,G-237:** refusal to investigate harassment complaint.
- **G-216:** harassment/abuse of authority.
- **G-184:** Compassionate leave, same-sex relationship.



J. Useful Information

- ERC Resources
- Communiqués, other reports
- Web site: <http://www.erc-cee.gc.ca>
- Summaries: ERC findings & recommendations, decisions of the Commissioner.
- Questions, comments, issues:
(613) 998-2134, e-mail address: org@erc-cee.gc.ca