Communiqué – January to March 2020

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 by the Commissioner of the RCMP or to the delegated decision-maker within the Force.

The types 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/index-en.aspx.

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Findings and Recommendations

Between January and March 2020, the RCMP External Review Committee (ERC) issued the following 21 findings and recommendations:

Current Legislation Cases:

Conduct Appeals

C-032 – Conduct Authority Decision The Appellant, along with another RCMP officer, arrested an individual pursuant to provincial mental health legislation and brought him to a local hospital. The individual was not cooperative while being placed under arrest, but had calmed down by the time they arrived at the hospital. After being at the hospital for what the Appellant estimated to be roughly 90 minutes, he told the doctor treating the individual that he and the other officer would be leaving and to call hospital security or local police should the individual thereinafter pose a problem. Shortly after the Appellant left the hospital, the individual became agitated and threatened the doctor and other health care staff. Local police were called and dealt with the individual.

A *Code of Conduct* investigation took place in relation to the Appellant's actions. Following a conduct meeting, the Respondent issued a written decision wherein he concluded that the Appellant had breached section 4.2 of the *Code of Conduct*, which requires members to be diligent in the performance of their duties including taking appropriate action to aid any person who is exposed to potential, immediate or actual danger.

The Respondent determined that the Appellant was asked by the doctor to remain at the hospital, but ignored this request. The Respondent came to this conclusion after reviewing various witness statements including those of the doctor and the other officer who was with the Appellant on that day. The Respondent found that by leaving his duty area, the Appellant disregarded well established policy on dealing with individuals arrested and brought to a hospital. The Respondent also determined that the Appellant added to his PROS report once he heard that a complaint had been made. The Respondent imposed conduct measures which consisted of a forfeiture of 20 hours of pay and 20 hours of annual leave, no support for promotion for a period of one year, a written reprimand and a letter of apology addressed to the doctor. The Appellant appealed the decision, arguing that the Respondent exceeded the seven-day time limit for issuing the decision as set out in the *RCMP Conduct Policy* (*Policy*) and that the conduct measures imposed were too harsh.

ERC Findings: The ERC dealt with the two grounds raised on appeal. First, while the Appellant did wait 26 days for the decision of the Respondent, which exceeded the seven-day period provided for in the *Policy*, this did not result in procedural unfairness to the Appellant. The Appellant had verbally agreed to the Respondent's request during the conduct meeting for additional time to render his decision and there was no prejudice to the Appellant resulting from the delay. Second, while the Respondent imposed a relatively severe set of conduct measures in the circumstances, they still fell within the range of conduct measures available to him and were not clearly unreasonable. It is evident that the Respondent took the totality of the evidence into consideration including the doctor's assertion that she asked the Appellant to stay at the hospital,

the lack of justification for leaving the hospital and the Appellant's decision to add to his PROS report after he realized a complaint had come forward.

ERC Recommendation: The ERC recommends that the appeal be denied. The ERC also recommends that steps be taken to ensure that conduct authorities comply with the requirements of the *Policy* and seek written consent of the member when the seven-day period for rendering a decision following a conduct meeting cannot be met.

C-033 – Conduct Authority Decision During a traffic stop of a motorhome, the Appellant seized currency from one of the three passengers of the motorhome as potential proceeds of crime. The passenger from whom the currency was seized stated at the time of the seizure that the seized currency contained a certain amount of money. The seized currency became an exhibit in a *Controlled Drugs and Substances Act* (*CDSA*) investigation. When the Appellant attempted to return the currency to the passenger, 16 days after the date of the traffic stop, he counted the currency in front of her and found that there was a different amount in the exhibit bag than the amount that the passenger had stated when currency was seized. She disputed the amount of currency that the Appellant had counted. Given that there was a dispute about the amount of currency in the exhibit bag and no further documentation had been provided by the passenger to verify the source of the currency, the Appellant returned the currency to the Detachment for the purpose of civil forfeiture.

Following a *Code of Conduct* investigation and a conduct meeting, the Conduct Authority issued a written decision where he found that the Appellant did not properly handle an exhibit, contrary to section 4.4 of the *Code of Conduct.* The Conduct Authority imposed conduct measures of two days' forfeiture of pay and a direction for the Appellant to review and discuss applicable policies with his supervisor related to the handling of currency and negotiable instruments.

The Appellant is not appealing the Conduct Authority's finding that the Allegation was established. He is only appealing the conduct measures imposed by the Conduct Authority. The Appellant alleged that the Conduct Authority's decision was clearly unreasonable as the conduct measures imposed by the Conduct Authority were too severe and that the Conduct Authority failed to take into account relevant mitigating factors when imposing those measures. The Appellant also alleged that the Conduct Authority's decision contravened the principles of procedural fairness but he did not provide any submissions in support of this ground of appeal.

ERC Findings: The ERC applied the three-part process set out the *Conduct Policy* and *Conduct Measures Guide* (*Guide*) to analyze the appropriateness of the conduct measures, and found that the conduct measures imposed on the Appellant by the Conduct Authority were not clearly unreasonable. The Conduct Authority identified a broad range of conduct measures he would consider imposing in the Notice of Conduct Meeting. The Conduct Authority's identification of both mitigating and aggravating factors in his decision is supported by the record and not influenced by irrelevant considerations. The conduct measures selected by the Conduct Authority reflected the severity of the misconduct and were not a departure from the pattern of discipline identified in either the *Guide* or in a prior similar case.

ERC Recommendation: The ERC recommends to the Commissioner of the RCMP that she deny the appeal in respect of the conduct measures and confirm the conduct measures of two days' forfeiture of pay and a direction for the Appellant to review and discuss applicable policies with his supervisor related to the handling of currency and negotiable instruments pursuant to subsection 45.16(3)(a) of the *RCMP Act*.

C-034 – Conduct Authority Decision The Appellant was involved in an interaction with a handcuffed and possibly intoxicated suspect who ultimately landed head-first on a cell block floor and suffered a facial wound which required stitches (Incident). The Appellant drafted police reports and notes regarding the Incident, which was captured by Force cameras (CCTV footage of the Incident). In those reports and notes, the Appellant framed the Incident as a failed attempt by him to physically stabilize a reeling suspect. The suspect complained about the Incident, and the Appellant became the subject of an assault charge that was stayed two or so years later. Two allegations were made against the Appellant, namely: (1) he used inappropriate and unwanted force on the suspect, contrary to section 5.1 of the *Code of Conduct*; and (2) he provided false or inaccurate documentation on police reports in relation to the harm sustained by the suspect, contrary to section 8.1 of the *Code of Conduct*.

Following an investigation wherein the Appellant made a detailed statement, and a Use of Force authority furnished a report deducing that the Appellant used inappropriate force on the suspect, a Conduct Meeting was held at which the Appellant declined to supply submissions. His lawyer explained that it was "improper" to continue with the Appellant's conduct process while a related criminal process was ongoing. The Respondent chose to proceed with the Conduct Meeting. In light of the CCTV footage of the Incident, Use of Force report and other evidence, he concluded that both allegations were established and imposed various conduct measures. The Appellant tendered an appeal and two submissions with attachments. His first submission was presented within the statutory limitation period and contained two arguments. His second submission was filed months later and contained three more arguments, including one that the Respondent denied him procedural fairness by ignoring the concern raised by his lawyer at the Conduct Meeting.

ERC Findings: The ERC found that multiple documents attached to the Appellant's first appeal submission were inadmissible on appeal, as they could have been but were not submitted to the Respondent. It further found that two of the arguments set out in the Appellant's second appeal submission, including the procedural unfairness argument, were inadmissible on appeal, as they could have been but were not asserted at the Conduct Meeting or in the first appeal submission.

The ERC then found that the Appellant's three admissible grounds of appeal lacked merit. First, it found that omissions to pursue and assess the evidence of a Sergeant who viewed the CCTV footage of the Incident could have been a palpable error, but not an overriding error, given that the evidence was inconclusive and that the Respondent had not only also viewed the same footage, but did so with the benefit of other evidence which lent context to it. Second, the ERC found that the Respondent did not err by measuring the Appellant's perceptions of the Incident against the CCTV footage of the Incident, as there were no positions or evidence before him on the soundness of such an approach, and the supporting evidence provided by the Appellant on appeal was unhelpful. Third, the ERC found that the Respondent's citing of an assault charge against the Appellant as an aggravating factor was valid, even though that charge was stayed, as it is clear from Conduct Policy that a charge can be aggravating notwithstanding its outcome.

ERC Recommendation: The ERC recommends that the appeal be denied.

C-035 – Conduct Authority Decision Amid the escalation of a localized natural disaster, the Appellant was evacuated from his residential neighbourhood after a state of emergency was declared in the community. The subject member, a Constable stationed in the community, was scheduled for Regular Time-Off that day. The Appellant evacuated his young child, and drove to a nearby city unaffected by the natural disaster. The Appellant was scheduled to resume his shifts at his work location the following day. Instead, the Appellant reported to the divisional

headquarters in the city to which he had driven, where the Appellant claims that he was "stood down" from duty by a member of superior rank. As the sole parent available to care for his child during the natural disaster, the Appellant remained with his child for the next few days.

A *Code of Conduct* investigation took place in relation to the Appellant's actions. Following a conduct meeting, the Respondent issued a written decision wherein she concluded that the Appellant had breached subsection 4.1 of the *Code of Conduct*, which requires that members report for and remain on duty unless otherwise authorized.

The Respondent concluded that while the Appellant had made some efforts to report for duty at the divisional headquarters, the Appellant did not report for duty as scheduled in the member's work location and was thus in contravention of subsection 4.1 of the *Code of Conduct*. The Respondent imposed conduct measures which included a forfeiture of 12 hours pay and 12 hours of annual leave, among other measures. The Appellant appealed the Respondent's finding that the allegation was established, arguing that he was justified in being absent from duty. He pointed to evidence that he had been stood down from duty, and that he had unexpectedly been required to care for his young child as the sole parent available during that time.

ERC Findings: After addressing the preliminary issues of referability and timeliness, the ERC found that the Respondent's decision was clearly unreasonable. The ERC found that the Respondent failed to provide a meaningful analysis of key evidence contained in the record, which suggested that the Appellant could have reasonably considered himself to be authorized to be absent, and that his family situation amounted to a justifiable excuse to be absent. The ERC then undertook its own evaluation of the evidence in accordance with paragraph 45.16(2)(b) of the *RCMP Act*, as a result of which it found that the Appellant was otherwise authorized to be absent from duty, and/or had a reasonable excuse to be absent from duty during the period of the allegation.

ERC Recommendation: The ERC recommends to the Commissioner that she allow the appeal of the Respondent's finding on the allegation on the ground that the Respondent's decision is clearly unreasonable. The ERC further recommends that the Commissioner, in making the finding that the Respondent should have made pursuant to paragraph 45.16(2)(b) of the *RCMP Act*, conclude that the allegation is not established.

Other Appeals

NC-044 – Administrative Discharge The Appellant went on medical leave in April 2011. In May 2016, the Appellant was assigned a temporary medical profile of G3 O5 which meant that the Appellant was deemed fit for administrative duties. A Graduated Return to Work Plan (GRTW) was signed by the Force and the Appellant which stipulated that the Appellant would be working four hours per week from home for a period of six weeks, to be reevaluated after this period.

On more than one occasion, the Appellant did not report for duty and did not communicate with his superior. On April 10, 2017, the Appellant met with his superior, the RTW Coordinator and the Disability Management Advisor (DMA) where the importance of maintaining communication and abiding by the GRTW plan were emphasized to the Appellant. The Force left voicemails and sent letters to the Appellant indicating that he was absent without authorization as the Appellant had not reported for duty since April 24, 2017. The Appellant later provided a medical certificate which deemed him unfit for duty from April 13 to 24, 2017. However, the following medical

certificate, which was overlapping the previous medical certificate, provided by the Appellant deemed him fit for duty, but the Appellant did not report for duty. On May 2, 2017, the DMA sent an email to the Appellant to inform him that he was exceeding 40 hours of consecutive absence without authorization. The Appellant did not respond. In June 2017, the Appellant's superior sent him a letter indicating that he was absent without authorization and requesting that the Appellant contact him within 3 days and informing him that a failure to do so without result in an Employment Requirements process recommending his discharge. The Appellant did not contact his superior.

A preliminary recommendation, a recommendation to discharge for being absent for duty and a Notice of Discharge were prepared and served on the Appellant. The Appellant requested an extension of time to file his response as his health professional was not available. The Appellant also requested the Respondent's recusal as the latter had denied the Appellant's request for secondary employment. The Respondent denied both as the discharge was not based on medical grounds and his previous decision was not relevant to the present discharge process. The Respondent ordered the Appellant's discharge.

ERC Findings: The ERC found that the fact that the Respondent had prepared a draft of the decision before reviewing the Appellant's submission did not create a reasonable apprehension of bias. Furthermore, the Appellant provided his response to the Notice of Discharge after the expiry of his deadline to do so; the Respondent nevertheless considered the late submission. The ERC further found that there was no breach of procedural fairness when the Respondent denied the Appellant's request for extension as the Appellant was not being discharged on medical grounds; therefore, his medical practitioner's opinion was irrelevant in the circumstances. Lastly, the ERC found that the evidence on the record supported the Respondent's decision as this evidence showed that the Appellant was fit for duty, but was not reporting for duty. Lastly, although the Appellant indicated that there were obstacles to his return to work, the ERC found that these obstacles were self-imposed and did not prevent the Appellant from reporting for duty.

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

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

The Appellant commenced his employment with the RCMP. In April 2011, the Appellant went on authorized medical leave. In May 2016, the "X" Division Health Services Officer (HSO) assigned the Appellant a temporary medical profile of G3 O5, which meant he was deemed fit for administrative duties only. A Graduated Return to Work plan (GRTW) considering the Appellant's limitations and restrictions specified that the Appellant would work four hours per week for a period of six weeks and was signed by the Force and the Appellant. The Appellant commenced his GRTW in October 2016.

On multiple occasions, the Appellant failed to follow his GRTW plan. He either showed up late or did not show up at all, communicating only minimally with his supervisor. In April 2017, the importance of following the GRTW plan and maintaining communication with his command team was emphasized in a meeting between the Appellant, his supervisor, the Return to Work Coordinator, and the Disability Management Advisor (DMA). Beginning April 24, 2017, the Appellant stopped reporting for duty altogether, and did not respond to calls, voicemails or letters from his supervisor, and the DMA. On May 18, 2017, the Appellant provided a medical certificate to his supervisor and requested to work in the office during "quiet hours". On June 5, 2017, the

Appellant's Acting Officer in Charge sent him a letter advising him that the medical certificate deemed him fit for duty with restrictions and pending the HSO's assessment of these restrictions, the Appellant was expected to return to work. The Appellant was told he had three days to explain his absence from duty since April 24, 2017, failure of which would result in initiation of an employment requirements process recommending stoppage of pay and allowances and discharge. The Appellant did not respond.

An Employment Requirements process was initiated soon after. The Appellant was served with a Preliminary Recommendation to Discharge, Recommendation to Discharge, and Notice of Intent to Discharge (NOI). The Appellant requested an extension to file his response to the NOI indicating that he wished to seek the opinion of his medical practitioner who was not available at the time. The Appellant also requested the Respondent's recusal as the Respondent had previously denied the Appellant's request for secondary employment. The Respondent noted that the discharge was not based on medical grounds thereby eliminating the need for input from the Appellant's medical practitioner. The Respondent also explained that his previous decision was not relevant to the present discharge process. Accordingly, both requests were denied. The Appellant did not produce a timely response to the NOI. The Respondent ordered his discharge.

The Appellant challenged the Order to Discharge (OTD) on the basis that the decision was procedurally unfair as the Respondent did not give the Appellant the opportunity to be heard and had a reasonable apprehension of bias. He also argued that the NOI failed to contain an allegation or offence and that both the NOI and OTD contained falsehoods.

The appeal was referred to the RCMP External Review Committee (ERC) for review, pursuant to paragraph 17(d)(ii) of the *Royal Canadian Mounted Police Regulations 2014*. The Chair of the ERC recommended that the appeal be denied. The Adjudicator was not persuaded by the Appellant's grounds of appeal and found that there was no breach of procedural fairness, the decision was not clearly unreasonable, and there was no error of law. The appeal was dismissed.

NC-045 – Administrative Discharge Between 2005 and 2015 the Appellant was absent from duty for medical reasons and/or participating in various forms of accommodation through modified work schedules, reduced hours of work, temporary relocation, duty restrictions, physical transfer, and multiple graduated return to work processes. The Appellant participated in a number of return to work (RTW) plans over the 10-year period, three of them being successful in returning the Appellant to full operational duties. A fourth Graduated RTW (GRTW) was attempted for the Appellant from March 23 to June 4, 2015. However, this attempt ended when the Appellant went on sick leave. On January 4, 2016, the Appellant started his last GRTW. The record indicates that the Appellant was performing well and he was respecting his RTW agreement. The record indicates that the Appellant had achieved working full time by March 1, 2016. However, the OIC of his unit prepared a Preliminary Recommendation to Discharge on the same day that the Appellant started his latest GRTW. This Preliminary Recommendation was followed by a Recommendation to Discharge on March 29, 2016.

The Appellant was previously medically discharged from the Force. That discharge was appealed and the ERC recommended in NC-007 that the matter be remitted with directions for rendering a new decision because the Appellant's right to be heard had been denied. The Appeal Adjudicator agreed with the ERC. The Force then re-initiated the discharge process, which led to the discharge order which is the subject of the present appeal.

ERC Findings: The ERC found that the Respondent had made a manifest and determinative error in relying on the Appellant's involvement in outside activities and the related disciplinary matter (NC-007) in his assessment of the duty to accommodate. The ERC further found that the Respondent made a manifest and determinative error in his finding that these activities were not in line with the Appellant's limitations and restrictions. Lastly, the ERC found that the Force did not fulfill its duty to accommodate in that the Respondent based his assessment that the Force had reached undue hardship on assumptions and insufficient evidence.

ERC Recommendation: The ERC recommends that the appeal be allowed.

NC-046 – Harassment The Appellant appealed a decision by the Force which found that her complaint of harassment was not established. The Appellant's harassment complaint involved events surrounding her Graduated Return to Work (GRTW) and the Alleged Harasser's proposition that the Appellant's GRTW be continued at her home unit. As part of her appeal, the Appellant presented new evidence which had not been before the Respondent when he made the decision at issue in this appeal. The Appellant alleged on appeal that the Respondent had erred by misapprehending numerous pieces of evidence; and, in applying the law to the facts by not examining her allegations holistically as per RCMP policy, which states that a series of serious and unwelcome acts over time may be indicative of harassment.

ERC Findings: The ERC found that the new evidence submitted by the Appellant for the first time on appeal was not admissible as the two emails were readily available to the Appellant prior to the Respondent's decision. Regarding the other new evidence, the ERC found that the three email chains involved a third party from whom the Appellant was alleging harassment. This third party was not a party to the proceedings, had not been named in the original harassment complaint and had not had an opportunity to address the allegations made against her. The ERC found that it would be a breach of procedural fairness to make findings regarding the Appellant's allegations against this third party. The ERC found that the three email chains were therefore not admissible.

Regarding the merits, the ERC found that the Respondent's decision was not clearly unreasonable as the Respondent had not misapprehended or ignored evidence. On appeal, the Appellant reiterated her allegation of harassment, but did not explain how the Respondent had erred in his assessment of the evidence.

The ERC further found that the Respondent's decision was not clearly unreasonable as he had not erred in applying the law to the facts by failing to consider the allegations holistically. The ERC noted the requirement to consider whether allegations, while not individually constituting harassment, could cumulatively support a finding of harassment. The ERC found that the Respondent first considered each alleged incident on its own, and then considered the combined effect as required.

ERC Recommendation: The ERC recommends that the Commissioner deny the appeal and confirm the Respondent's decision.

NC-047 – Harassment On or about August 16, 2000, while on duty, the Appellant's firearm was stolen by two women. The Appellant alleged that the women stole the firearm from his vehicle while he was in a restaurant. The women alleged that the Appellant had invited them into his vehicle and while he was talking with one of them, the other stole the firearm.

The Appellant reported the theft and was eventually charged with having conducted himself in a disgraceful manner that brings discredit to the Force contrary to the RCMP *Code of Conduct.* As a result, an Adjudication Board imposed a reprimand and ordered a forfeiture of five days' pay. An investigation report describing the uncertainty surrounding the theft of the firearm was produced by investigators but was never provided to the Adjudication Board.

At first, the incident did not impact the Appellant's career. He was promoted twice within the non-commissioned officer ranks and his performance record has been exemplary. In both 2004 and 2009, the Appellant successfully completed the officer candidate program and was placed on the national eligibility list for promotion on both occasions. However, both times, his eligibility expired without ever receiving a commission as an officer.

In 2010, an access to information request revealed that a Superintendent had told the Director administering promotions that there may have been more to the disciplinary matter than what had been disclosed in the Adjudication Board's decision. Following this, the Appellant began alleging that he was the victim of workplace harassment due to the spreading of gossip relating to the 2000 incident. He filed numerous grievances against members of senior management as a result.

On July 8, 2013, after having received favourable comments from the Federal Court in a judicial review of a grievance, the Appellant wrote to the then Commissioner of the RCMP requesting that he be promoted to the rank of Inspector. On September 13, 2013, the Commissioner rejected the Appellant's request. The Appellant sought judicial review of the Commissioner's decision and was successful before the Federal Court. However, the Attorney General appealed the Federal Court's decision and on June 22, 2015, the Federal Court of Appeal allowed the Attorney General's appeal; thereby setting aside the judgment of the Federal Court.

By October 2016, the Appellant had not been promoted. As a result, he filed a harassment complaint against the former Commissioner of the RCMP.

ERC Findings: The ERC held that the Respondent made a palpable and overriding error in screening out the Appellant's complaint and not mandating an investigation. As a result, the ERC concluded that the decision on appeal is clearly unreasonable.

ERC Recommendation: The ERC recommends that the appeal be allowed.

NC-048 – Administrative Discharge For significant portions of a multi-year period, the Appellant was off duty with an expired medical profile and/or security certificate. She was repeatedly cautioned about her omissions to meet employment requirements, ordered to meet them and told that a failure to do so may lead to an Employment Requirements process and discharge for absence from duty without authorization. By late 2017, the Appellant remained off-duty without an updated medical profile or security clearance. The Force began an Employment Requirements process in which the Respondent served the Appellant with a Notice of Intent to Discharge her (NOI) for her being absent from duty without authorization. The Appellant was invited to file a timely written submission in response to the NOI, which she did. The Respondent's office confirmed the receipt of the submission in writing.

The Respondent did not receive the Appellant's submission, and issued a decision ordering the Appellant discharge for being absent from duty without authorization (Original Decision). Days later, the Respondent emailed the Appellant to explain that she had only just received her written submission in response to the NOI, and that she would review the submission and then promptly

make a revised decision. About a week later, the Respondent issued a new decision in which she addressed key positions in the Appellant's submission and ordered the Appellant's discharge for being absent from duty without authorization (Amended Decision). The Appellant filed an appeal and a brief submission. She asserted that the process preceding her discharge was procedurally unfair and that the decision to discharge her was clearly unreasonable.

ERC Findings: The ERC determined that the Amended Decision, and not the Original Decision, was the decision under appeal. The jurisprudence indicated that an administrative body could re-open a decision if that body failed to comply with a principle of natural justice in reaching the decision. That is what happened in the present matter. Specifically, the Respondent re-opened the Original Decision and made the Amended Decision to cure the procedural unfairness of making the Original Decision without first reviewing the Appellant's written submission. The Respondent's approach was particularly appropriate in the circumstances, as the Appellant's career was in jeopardy and the duty of procedural fairness is more stringent in such situations.

The ERC then found that the Appellant's grounds of appeal lacked merit. First, the Appellant's Employment Requirements process seemingly unfolded in a procedurally fair way, consistent with relevant authorities governing the provision of notice of a case and justification for a decision. The Force followed the main principles for ensuring the fairness of a process used to discharge a member for being absent from duty without authorization, as set forth in applicable legislation and policy. Moreover, the Amended Decision was based on all the information in the record, contained reasons and was promptly served on the Appellant. Second, the Amended Decision did not appear clearly unreasonable. It was grounded upon the facts and evidence in the record. The Respondent also plainly turned her mind to the Appellant's written submission in response to the NOI, and addressed the principal arguments that were presented to her.

ERC Recommendation: The ERC recommends that the appeal be denied.

NC-049 – Harassment The Appellant appealed a decision by the Force which found that his complaint of harassment was untimely and based on behaviours that did not meet the definition of "harassment" set out in RCMP policy. The Appellant's harassment complaint alleged that the Appellant's Recruit Field Coach had embarrassed and intimidated the Appellant.

The Appellant alleged on appeal that he had a legitimate explanation for the delay in filing his harassment complaint. He further argued that the Respondent's decision had breached the principles of procedural fairness and was clearly unreasonable as the Alleged Harasser's behaviours clearly met the definition of harassment and the decision contained incorrect statements of fact.

Under section 38 of the *CSO (Grievances and Appeals)*, the Appellant was required to file his appeal with the Office for the Coordination of Grievances and Appeals (OCGA) within 14 days after the day on which he was served with the decision. The Appellant filed his Statement of Appeal approximately 3 months after being served with the decision. He argued that he had acted in good faith within the time limitation period, and did not know that he had contacted the wrong people. The Respondent asserted that the appeal should be dismissed because the Appellant had presented it late, despite being supplied with timely information on how to file it appropriately.

The ERC noted that the ERC and the Commissioner have consistently underscored that time limits are compulsory and jurisdiction-limiting, and if time limits are not met or extended in accordance with the law, then the Force shall refuse to entertain a matter. The ERC indicated

that an Adjudicator may retroactively grant an extension of the section 38 limitation period pursuant to subsection 43(d) of the *CSO (Grievances and Appeals)* in "exceptional circumstances". The ERC pointed out that RCMP policy does not define "exceptional circumstances" and that the ERC accordingly relies upon the four-factor test set out by the Federal Court in *Canada (Attorney General)* v. *Pentney*, 2008 FC 96, for determining whether to grant an extension of time to commence a proceeding before an administrative tribunal. The Court indicated that the underlying consideration in an application to extend time is to ensure that justice is done between the parties. The Court noted that the test is not conjunctive, every factor may not be relevant, and there may be other relevant and contextual factors to consider. Given this flexibility, the test will be applied differently in each case, as its application will be largely contingent on the facts in play. The four factors cited in *Pentney* are:

1. There was a continuing intention to pursue the appeal;
2. The matter discloses an arguable case;
3. There is a reasonable explanation for the delay; and
4. There is no prejudice to the other party in permitting the extension.

The ERC found that the Appellant did have some intention to file an appeal of the Respondent's decision, but that there was no evidence that this intention was a continuing one. The Appellant had been provided clear, timely and unequivocal information about where to file his appeal and the procedure to be followed. Yet, he provided no details on what action, if any, that he took to follow the appeals process between the time that he had received that information, which was within the 14-day statutory limitation period, and the time when he filed his appeal approximately 2.5 months later. The ERC noted that a member must take ownership of his own case and that a lack of familiarity with applicable authorities is not an adequate rationale for failing to respect a statutory limitation period.

The ERC found that Appellant's argument that he had acted in good faith and had unknowingly sent his "Grievance" to the wrong person was not in any way a reasonable explanation for the delay, and that this was a primary consideration in applying the *Pentney* test in this case. The ERC indicated that it would be prejudicial to the integrity of the Force's appeal process to allow an extension when the Appellant had no continuing intention to file an appeal and no reasonable explanation for the delay. The ERC stated that to allow this extension would provide the Appellant an unfair advantage over other members who either chose not to appeal or were not permitted to appeal because they had missed the time limit, and that it would be an arbitrary and unwarranted 'watering down' of the time limit. The ERC found that in light of its analysis of the other *Pentney* factors, the issue of whether the matter raised an arguable case was simply not sufficiently compelling to be determinative in the circumstances.

ERC Findings: The ERC found that the Appellant had not respected the 14-day statutory time limit to appeal and that an extension of that time limit was not warranted.

ERC Recommendation: The ERC recommends that the Commissioner deny the appeal and confirm the Respondent's decision.

NC-050 – Harassment On or about August 16, 2000, while on duty, the Appellant's firearm was stolen by two women. The Appellant alleged that the women stole the firearm from his vehicle while he was in a restaurant. The women alleged that the Appellant had picked them up and while he was talking with one of them, the other took the firearm.

The Appellant reported the theft and was eventually charged with having conducted himself in a disgraceful manner that brings discredit to the Force contrary to the RCMP *Code of Conduct.* As a result, an Adjudication Board imposed a reprimand and ordered a forfeiture of five days' pay. An investigation report describing the uncertainty surrounding the theft of the firearm was produced by investigators but was never provided to the Adjudication Board.

At first, the incident did not negatively impact the Appellant's career. He has since been promoted twice within the non-commissioned officer ranks and his performance record has been exemplary. In both 2004 and 2009, the Appellant successfully completed the officer candidate program and was placed on the national eligibility list for promotion on both occasions. However, both times, his eligibility expired without ever receiving a commission as an officer.

In 2010, an access to information request revealed that a Superintendent had told the Director administering promotions that there may have been more to the disciplinary matter than what had been disclosed in the Adjudication Board's decision. Following this, the Appellant began alleging that he was the victim of workplace harassment due to the spreading of gossip relating to the 2000 incident. He filed numerous grievances against members of senior management as a result.

On July 8, 2013, after having received favourable comments from the Federal Court in a judicial review of a grievance, the Appellant wrote to the then Commissioner of the RCMP requesting that he be promoted to the rank of Inspector. On September 13, 2013, the Commissioner rejected the Appellant's request. The Appellant sought judicial review of the Commissioner's decision and was successful before the Federal Court. However, the Attorney General appealed the Federal Court's decision and on June 22, 2015, the Federal Court of Appeal allowed the Attorney General's appeal; thereby setting aside the judgment of the Federal Court.

By October 2016, the Appellant had not been promoted. As a result, he filed a harassment complaint against the Director General, Executive Officer Development and Resourcing (2015).

ERC Findings: The ERC held that the Respondent made a palpable and overriding error in finding that the Appellant's complaint was unestablished without clarifying information having been sought from the Appellant. This omission prevented the Respondent from making an informed assessment of whether an investigation into the complaint was warranted. As a result, the ERC concluded that the decision on appeal is clearly unreasonable.

ERC Recommendation: The ERC recommends that the appeal be allowed.

NC-051 – Harassment On or about August 16, 2000, while on duty, the Appellant's firearm was stolen by two women. The Appellant alleged that the women stole the firearm from his vehicle while he was in a restaurant. The women alleged that the Appellant had invited them into his vehicle and while he was talking with one of them, the other stole the firearm.

The Appellant reported the theft and was eventually charged with having conducted himself in a disgraceful manner that brings discredit to the Force contrary to the RCMP *Code of Conduct.* As a result, an Adjudication Board imposed a reprimand and ordered a forfeiture of five days' pay. An investigation report describing the uncertainty surrounding the theft of the firearm was produced by investigators but was never provided to the Adjudication Board.

At first, the incident did not impact the Appellant's career. He was promoted twice within the non-commissioned officer ranks and his performance record has been exemplary. In both 2004

and 2009, the Appellant successfully completed the officer candidate program and was placed on the national eligibility list for promotion on both occasions. However, both times, his eligibility expired without ever receiving a commission as an officer.

In 2010, an access to information request revealed that a Superintendent had told the Director administering promotions that there may have been more to the disciplinary matter than what had been disclosed in the Adjudication Board's decision. Following this, the Appellant began alleging that he was the victim of workplace harassment due to the spreading of gossip relating to the 2000 incident. He filed numerous grievances against members of senior management as a result.

On July 8, 2013, after having received favourable comments from the Federal Court in a judicial review of a grievance, the Appellant wrote to the then Commissioner of the RCMP requesting that he be promoted to the rank of Inspector. On September 13, 2013, the Commissioner rejected the Appellant's request. The Appellant sought judicial review of the Commissioner's decision and was successful before the Federal Court. However, the Attorney General appealed the Federal Court's decision and on June 22, 2015, the Federal Court of Appeal allowed the Attorney General's appeal; thereby setting aside the judgment of the Federal Court.

By October 2016, the Appellant had not been promoted. As a result, he filed a harassment complaint against the Director General, Executive Officer Development and Resourcing (2016).

ERC Findings: The ERC held that the Respondent made a palpable and overriding error in screening out the Appellant's complaint and not mandating an investigation. As a result, the ERC concluded that the decision on appeal is clearly unreasonable.

ERC Recommendation: The ERC recommends that the appeal be allowed.

NC-052 – Administrative Discharge The Appellant has been a member of the RCMP since 2009 and has been assigned to the same unit since the beginning of her career. She went on sick leave for the first time from February 2012 until February 2014. She went back on sick leave in November 2015 and made an unsuccessful return to work attempt in January/February 2016. No return to work attempts have been made since then.

An Employer Mandated Medical Assessment (EMMA) conducted in February 2017 indicated that the Appellant was fit to return to work without limitations/restrictions. Following the EMMA, the Appellant's attending physician disagreed with it and the return-to-work plan proposed by the Occupational Health and Safety Services (OHSS), indicating that the Appellant was still unfit for work. Given the opinion of the Appellant's attending physician, the Health Services Officer (HSO) reviewed the Appellant's medical file, including the EMMA, and concluded that the Appellant was indeed permanently unfit to work for the RCMP. Consequently, the RCMP informed the Appellant of this new medical profile and advised her that she would be discharged for medical reasons. The Appellant then sent the RCMP a gradual return-to-work schedule that had been accepted by her attending physician. The attending physician also sent a limitations assessment questionnaire indicating that the Appellant was fit for a gradual return to work. The HSO reviewed the newly received information and concluded that the Appellant's medical profile would remain unchanged. A Notice of Intent to Discharge was sent to the Appellant along with a preliminary recommendation and a recommendation to discharge as well as all the documents before the Respondent for his decision.

After verifying with the OHSS and analyzing the Appellant's response to the Notice of Intent, the Respondent determined that the Appellant should be discharged from the RCMP.

ERC Findings: First, the ERC found that the Respondent did not fail in his duty to act fairly in seeking the advice of the OHSS on the Appellant's latest return-to-work plan since there was no new information provided by the OHSS. The ERC also found that the Appellant failed to demonstrate that the Respondent did not consider all of the evidence on the record or was not impartial in making his commentary on the Appellant's career. Lastly, the ERC found that the RCMP had fulfilled its duty to accommodate to the point of undue hardship in that the Appellant had spent more than half of her career on sick leave and the OHSS had concluded that there was no new medical information on the record that could alter the Appellant's medical profile.

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

Former Legislation Cases:

Discharge and Demotion Appeals

R-007 – Discharge The Appellant displayed certain strengths as a member. However, he had significant difficulties documenting his files and keeping up with tasks related to ongoing investigations. In an attempt to improve the Appellant's performance, the Force initiated a Performance Enhancement Process (PEP), which provided the Appellant with close supervision by S/Sgt. X over several months. During that time, S/Sgt. X provided written commentary in the Police Reporting and Occurrence System (PROS) directing the Appellant to address specific tasks. He held numerous meetings with the Appellant and shared strategies to address overdue tasks. The Appellant was also occasionally "benched", meaning that he was taken off the call rotation while on shift so he would be able to work exclusively on outstanding matters. S/Sgt. X also offered to sit down with the Appellant on his own days off to help the Appellant. Despite this assistance, the Force concluded at the end of the PEP phase that the Appellant remained unable to perform his duties at a satisfactory level. The Respondent sought the Appellant's discharge through a Notice of Intent (NOI) to which was attached material outlining the Appellant's performance difficulties. A discharge and demotion board (Board) was convened to hold a hearing and consider whether the Appellant should be discharged. Prior to the commencement of the hearing, the Board allowed the Respondent to provide additional material in support of the Appellant's discharge. After a lengthy hearing, during which several witnesses, including the Appellant and S/Sgt. X testified, the Board rendered a brief oral decision ordering the Appellant's discharge. It later issued its written decision explaining in more detail its reasons for that order.

The Appellant appealed the Board's decision. He argued that the manner in which the Board had rendered it oral decision, one and a half hours after closing arguments had taken place, showed the Board had pre-judged the matter, resulting in a reasonable apprehension of bias. He also urged that the Board had improperly allowed the Respondent to submit additional materials in support of the Appellant's discharge before the hearing began. Finally, the Appellant argued that the Board had erred in deciding that he should be discharged, for three reasons. First, the Board had given insufficient weight to the Appellant's high workload and to problems with S/Sgt. X's supervision, which were significant factors explaining his inability to perform. Second, the Board had erred in finding that the Force had made reasonable efforts to move the Appellant to other duties in order to improve his performance. Third, the Appellant claimed that the Board's decision had been based on an insufficient and skewed sample of his work.

ERC Findings: The ERC did not agree that the Board's actions had raised a reasonable apprehension of bias. Despite its relatively short final deliberations, the Board's actions over the course of the entire proceedings, including the last day of the hearing, supported a presumption that the Board had remained open-minded until the final submissions had been delivered and considered. The ERC also found that the Board's ruling to allow additional material to be tendered by the Respondent reflected a proper consideration of applicable statutory provisions. The ruling allowed for a thorough record in order to assess the Appellant's suitability for further employment, and it ensured this was done in a procedurally fair manner.

The ERC further determined that the Board had committed no reviewable errors in ordering the Appellant's discharge. First, its findings regarding the magnitude of the Appellant's workload were supported by the record, as was its finding that the supervision provided by S/Sgt. X was sufficient. Second, the Board had explained how it viewed the assistance given to the Appellant in three separate postings, the latter under S/Sgt. X's supervision, as reasonable efforts to help improve his performance. The evidence supported the Board's explanation of why it did not accept the Appellant's claim that he had requested to be removed from S/Sgt. X's supervision. Third, the ERC disagreed with the Appellant's suggestion that the sample of his work provided to the Board was insufficient and unbalanced. The Board's finding that it had received a comprehensive and thorough representation of the Appellant's work, including its positive aspects, was supported by the record. The Board explained how it had weighed the Appellant's strengths against his continuing difficulties, which it viewed as unsustainable and unacceptable by RCMP policing standards. The Board's findings in this regard reflected an assessment of the facts before it, which were owed deference absent a palpable and overriding error, and no such error was apparent in the record.

ERC Recommendation: The ERC recommends to the Commissioner of the RCMP that the appeal be denied.

Grievances

G-681 – Harassment On or about August 16, 2000, while on duty, the Grievor's firearm was stolen by two women. The Grievor's version of the facts was that the women stole the firearm from his vehicle while he was in a restaurant. The women alleged that the Grievor had picked them up and he was talking with one of them while the other took his service firearm.

The Grievor reported the theft and was eventually charged with having conducted himself in a disgraceful manner that brings discredit to the Force contrary to the RCMP *Code of Conduct.* As a result, an Adjudication Board imposed a reprimand and ordered a forfeiture of five days' pay. An investigation report describing the uncertainty surrounding the theft of the firearm was produced by investigators but was never placed before the Adjudication Board.

At first, the incident did not negatively impact the Grievor's career. He was since promoted twice within the non-commissioned officer ranks and his performance record has been exemplary. In both 2004 and 2009, the Grievor successfully completed the officer candidate program and was placed on the national eligibility list for promotion. In August 2012, he applied for a position for which he was the selected candidate. At the time, the Respondent supported the Grievor's candidacy for a promotion.

On or about November 1, 2012, the Respondent was provided with a copy of the investigation report relating to the 2000 incident. The discrepancies between the differing accounts surrounding the theft of the firearm caused the Respondent concern which ultimately led him to

withdraw his support for the Grievor's promotion. The Respondent met with the Grievor on January 10, 2013 and explained that his decision was not motivated by the Grievor's discipline record, but rather by the inconsistencies between the Grievor's story and that of the women who stole the firearm.

The Grievor is alleging that the Respondent's decision to withdraw his support for the position was an abuse of authority that amounts to harassment.

ERC Findings: The ERC addressed several preliminary issues. The ERC reviewed the relevant harassment test and authorities and decided that it ultimately held that the Grievor did not show on a balance of probabilities that the Respondent engaged in harassment in general, or an abuse of authority in particular. The ERC found that the Respondent's reliance on the investigation report was reasonable and that he was entitled to be concerned with the unresolved issues in the report and added that the process used by the Respondent when withdrawing his support was fair and that his decision did not offend the principle against double jeopardy as claimed by the Grievor. The ERC also reasoned that the Respondent exercised his managerial functions in a way that was professional and that did not violate harassment authorities. Finally, the ERC found no evidence that the Grievor's career was hurt or that he was belittled, humiliated, intimidated or discriminated against.

ERC Recommendation: The ERC recommended that the Commissioner of the RCMP deny the grievance.

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

The Grievor challenged the Respondent's decision to withdraw his support for the Grievor's promotion to Inspector based on an investigative report in the Grievor's disciplinary record from 2000. The Grievor alleged that the Respondent's decision consisted of harassment resulting from an abuse of authority. The Grievor further alleged ongoing systemic harassment linked to "spent" discipline. The Level I Adjudicator denied the grievance on the merits, finding the Respondent acted in good faith, there was no harassment and that the scope of the grievance did not permit an examination of systemic harassment. The ERC recommended the grievance be denied as the Respondent acted in good faith and the decision did not constitute an abuse of authority. The Commissioner accepted the ERC recommendation and denied the grievance.

G-682 – Harassment On or about August 16, 2000, while on duty, the Grievor's firearm was stolen by two women. The Grievor's version of the facts was that the women stole the firearm from his vehicle while he was in a restaurant. The women alleged that the Grievor had picked them up and he was talking with one of them while the other took the firearm.

The Grievor reported the theft and was eventually charged with having conducted himself in a disgraceful manner that brings discredit to the Force contrary to the RCMP *Code of Conduct.* As a result, an Adjudication Board imposed a reprimand and ordered a forfeiture of five days' pay. An investigation report describing the uncertainty surrounding the theft of the firearm was produced by investigators but was never placed before the Adjudication Board.

In February 2007, the Grievor applied for a position which was to become vacant in the summer of 2008. In May 2007, the Grievor and his family were interviewed as part of the selection process. However, the Grievor was eventually advised by the Respondent that a decision had

been made to extend the current officers posting by one year, thereby terminating the selection process in which the Grievor had taken part.

In October 2008, the Grievor applied to four new staffing actions but was not selected for any positions. Upon learning that his candidacy had been rejected because of his past discipline case, the Grievor filed a first grievance against the Respondent. The outcome of this grievance is unknown as the file was never submitted to the ERC for review.

In September 2009, the Grievor again applied to four new staffing actions. On November 16, 2009, he learned that his candidacy had again been eliminated as a result of his past discipline case. The next day, the Grievor filed the present grievance alleging that the Respondent made the decision to exclude his candidacy from the above-noted selection processes. In the Grievor's view, this decision was an abuse of authority that amounts to harassment.

ERC Findings: The ERC addressed several preliminary issues, including the one related to the identity of the proper respondent. The ERC then reviewed the relevant harassment test and authorities and decided that it ultimately held that the Grievor did not show on a balance of probabilities that the Respondent engaged in harassment in general, or an abuse of authority in particular. The ERC found that the Respondent's actions, during his interactions with the Grievor, were reasonable, professional and fair and added that the impugned decision did not offend the principle against double jeopardy as claimed by the Grievor and that the latter was afforded procedural fairness. Finally, the ERC found no evidence that the Grievor's career was improperly impacted or that he was belittled, humiliated, intimidated or discriminated against.

ERC Recommendation: The ERC recommended that the Commissioner of the RCMP deny the grievance.

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

The Grievor challenged the Respondent's decision to disqualify him from the selection process for four international liaison officer positions. The Grievor alleged that the Respondent's decision consisted of harassment constituting an abuse of authority, for which the original Respondent, Director of the International Peace Operations Branch (IPOB) and other senior managers were responsible and had blocked his candidacy since 2007 due to "rumours, innuendo and suspicion" arising from an incident for which he had been disciplined in 2001. On two occasions, collateral issues were determined by separate Level I Adjudicators prior to submissions on the merits, including the identity of the Respondent and document disclosure. The Level I Adjudicator denied the grievance on the merits, finding the Grievor did not prove on a balance of probabilities, harassment constituting an abuse of authority. The matter was referred to the ERC who recommended the grievance be denied. The Commissioner accepted the ERC recommendation and denied the grievance.

G-683 – Private Accommodation Allowance The Grievor was on travel status to investigate a matter. During that time, he was required on a number of occasions to stay overnight in a vacant mobile trailer that was owned by the Force. A number of concerns were noted with respect to the trailer's habitability. The Grievor claimed a Private Non-Commercial Accommodation Allowance (PAA) at a rate of $50.00 per day for the 30 days he resided in the trailer. Pursuant to the National Joint Council Travel Directive (NJCTD), a PAA could be paid if, at the relevant time, the mobile trailer at issue fell within the NJCTD definition of "private non-commercial accommodation". The Grievor's claim was denied by the Force and he filed a grievance. At

Level I, the Adjudicator denied the grievance. The Adjudicator found that the vacant, Force-owned trailer was not a private non-commercial accommodation and that the PAA was not intended to compensate members for inadequate accommodations. The Grievor presented his grievance to Level II.

ERC Findings: The ERC found that the Grievor had standing to present the grievance, and that statutory limitation periods for presenting the grievance had been respected. The ERC also found that new documents furnished by the Grievor at Level II were inadmissible. Regarding the merits, the ERC found that the Grievor was not entitled to the PAA. The trailer was in fact "government and institutional accommodation" as defined in the NJCTD, rather than a private non-commercial accommodation which would allow the payment of a PAA. The trailer was not being rented by another member at the time the Grievor stayed in it, resulting in the absence of a private character which might have justified allowing the Grievor's claim. Further, while there were obvious problems with the trailer's suitability as a living accommodation, this in and of itself did not render it "private non-commercial accommodation" as defined in the NJCTD, nor did it generate entitlement to a PAA.

ERC Recommendation: The ERC recommended that the grievance be denied.

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

The Grievor challenged the Respondent's decision to deny his expense claim for the private non-commercial accommodation allowance (PAA). At Level I, the Adjudicator found that the trailer in which the Grievor had stayed constituted government and institutional accommodation (GIA), rather than private non-commercial accommodation. The Commissioner accepts the ERC finding that the Grievor is not entitled to the PAA. The grievance is denied.

G-684 – Private Accommodation Allowance The Grievor was on travel status to investigate a matter. During that time, he was required on a number of occasions to stay overnight in a vacant mobile trailer that was owned by the Force. A number of concerns were noted with respect to the trailer's habitability. The Grievor claimed a Private Non-Commercial Accommodation Allowance (PAA) at a rate of $50.00 per day for the 37 days he resided in the trailer. Pursuant to the National Joint Council Travel Directive (NJCTD), a PAA could be paid if, at the relevant time, the mobile trailer at issue fell within the NJCTD definition of "private non-commercial accommodation". The Grievor's claim was denied by the Force and he filed a grievance. At Level I, the Adjudicator denied the grievance. The Adjudicator found that the vacant, Force-owned trailer was not a private non-commercial accommodation and that the PAA was not intended to compensate members for inadequate accommodations. The Grievor presented his grievance to Level II.

ERC Findings: The ERC found that the Grievor had standing to present the grievance, and that statutory limitation periods for presenting the grievance had been respected. The ERC also found that new documents and information furnished by the Grievor at Level II were inadmissible. Regarding the merits, the ERC found that the Grievor was not entitled to the PAA. The trailer was in fact "government and institutional accommodation" as defined in the NJCTD, rather than a private non-commercial accommodation which would allow the payment of a PAA. The trailer was not being rented by another member at the time the Grievor stayed in it, resulting in the absence of a private character which might have justified allowing the Grievor's claim. Further, while there were obvious problems with the trailer's suitability as a living

accommodation, this in and of itself did not render it “private non-commercial accommodation” as defined in the NJCTD, nor did it generate entitlement to a PAA.

ERC Recommendation: The ERC recommended that the grievance be denied.

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

The Grievor challenged the Respondent’s decision to deny his expense claim for the private non-commercial accommodation allowance (PAA). At Level I, the Adjudicator found that the trailer in which the Grievor had stayed constituted government and institutional accommodation (GIA), rather than private non-commercial accommodation. The Commissioner accepts the ERC finding that the Grievor is not entitled to the PAA. The grievance is denied.

G-685 - Private Accommodation Allowance The Grievor was on travel status to investigate a matter. During that time, he was required on a number of occasions to stay overnight in a vacant mobile trailer that was owned by the Force. A number of concerns were noted with respect to the trailer's habitability. The Grievor claimed a Private Non-Commercial Accommodation Allowance (PAA) at a rate of $50.00 per day for the 42 days he resided in the trailer. Pursuant to the National Joint Council Travel Directive (NJCTD), a PAA could be paid if, at the relevant time, the mobile trailer at issue fell within the NJCTD definition of "private non-commercial accommodation". The Grievor's claim was denied by the Force and he filed a grievance. At Level I, the Adjudicator denied the grievance. The Adjudicator found that the vacant, Force-owned trailer was not a private non-commercial accommodation and that the PAA was not intended to compensate members for inadequate accommodations. The Grievor presented his grievance to Level II.

ERC Findings: The ERC found that the Grievor had standing to present the grievance, and that statutory limitation periods for presenting the grievance had been respected. The ERC also found that new documents furnished by the Grievor at Level II were inadmissible. Regarding the merits, the ERC found that the Grievor was not entitled to the PAA. The trailer was in fact "government and institutional accommodation" as defined in the NJCTD, rather than a private non-commercial accommodation which would allow the payment of a PAA. The trailer was not being rented by another member at the time the Grievor stayed in it, resulting in the absence of a private character which might have justified allowing the Grievor's claim. Further, while there were obvious problems with the trailer's suitability as a living accommodation, this in and of itself did not render it "private non-commercial accommodation" as defined in the NJCTD, nor did it generate entitlement to a PAA.

ERC Recommendation: The ERC recommended that the Commissioner deny the grievance.

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

The Grievor challenged the Respondent’s decision to deny his expense claim for the private non-commercial accommodation allowance (PAA). At Level I, the Adjudicator found that the trailer in which the Grievor had stayed constituted government and institutional accommodation (GIA), rather than private non-commercial accommodation. The Commissioner accepts the ERC finding that the Grievor is not entitled to the PAA. The grievance is denied.

G-686 – Participation in Outside Activity In 2014, the Grievor made a request to the Respondent to participate in an activity outside of work. After taking into account information provided by various RCMP subject-matter experts and information provided by the Grievor about the activity outside of work, the Respondent denied the request in June 2014. The Respondent's reasons for the denial were that participants in the activity outside of work adopted a manner of dress similar to those engaged in criminal activity, the personal safety of the Grievor, and risks to the Grievor's security clearance. A preliminary issue of the Grievor's compliance with the 30-day time limit to present the grievance at Level I was raised by the Respondent and resolved by a retroactive time extension granted by a Level I Adjudicator in 2016.

In 2018, a different Level I Adjudicator denied the grievance on the ground that the Respondent's decision was consistent with RCMP policy, Chapter XVII.1. of the RCMP Administrative Manual entitled, "Conflict of Interest" and was thoroughly supported by documentation and intelligence explaining how the Grievor's participation in the activity outside of work could be considered an actual, apparent or potential conflict of interest. The Adjudicator acknowledged that the Grievor had made *Charter of Rights and Freedoms* (*Charter*) arguments in his merit submissions but stated that he did not have the jurisdiction or mandate to make any decisions pertaining to the *Charter*. The Adjudicator found that the Grievor's submissions were "personal opinions" and that the Grievor had failed to establish on the balance of probabilities that the Respondent's decision was inconsistent with applicable legislation or RCMP and Treasury Board policies.

At Level II, the Grievor submitted that it was an error for the Adjudicator to not consider his *Charter* arguments, and it was an error for the Adjudicator to dismiss his submissions as "personal opinion" and in doing so, refuse to consider the Grievor's evidence. The Grievor submitted that the Respondent's decision was not reasonable as it was arbitrary and amounted to discrimination against the club that was engaged in the activity.

In 2019, a Level II Adjudicator raised a question as to whether the grievance was moot, noting that the Grievor had been discharged from the RCMP even before the Level I Adjudicator had addressed the matter in 2018. Both Grievor and Respondent made submissions on mootness. The Grievor submitted that even though he had retired and was free to participate in the activity outside of work, there were other serving RCMP members who wanted to participate in the activity outside of work and an outcome of the grievance will affect the other members' rights to participate in the activity.

ERC Findings: The ERC found that merit issues raised in the grievance were moot and that there were no compelling reasons to exercise discretion to examine the merits.

ERC Recommendation: The ERC recommends that the Commissioner dismiss this grievance as it was found to be moot. The ERC commented that while participation in activities outside of work may be in a member's personal interest, this interest must be appropriately balanced with the RCMP's organizational interest in maintaining public trust and confidence in the RCMP's ability to meet its law enforcement objectives in an impartial and effective manner.

G-687 – Participation in Outside Activity In 2014, the Grievor made a request to the Respondent to participate in an activity outside of work. After taking into account information provided by various RCMP subject-matter experts and information provided by the Grievor about the activity outside of work, the Respondent denied the request in June 2014. The Respondent's reasons for the denial were that participants in the activity outside of work adopted a manner of dress similar to those engaged in criminal activity, the personal safety of the Grievor, and risks to the Grievor's security clearance. A preliminary issue of the Grievor's compliance with the 30-day

time limit to present the grievance at Level I was raised by the Respondent and resolved by a retroactive time extension granted by a Level I Adjudicator in 2016.

In 2018, a different Level I Adjudicator denied the grievance on the ground that the Respondent's decision was consistent with RCMP policy, Chapter XVII.1. of the RCMP Administrative Manual entitled, "Conflict of Interest" and was thoroughly supported by documentation and intelligence explaining how the Grievor's participation in the activity outside of work could be considered an actual, apparent or potential conflict of interest. The Adjudicator acknowledged that the Grievor had made *Charter of Rights and Freedoms* (*Charter*) arguments in her merit submissions but stated that he did not have the jurisdiction or mandate to make any decisions pertaining to the *Charter*. The Adjudicator found that the Grievor's submissions were "personal opinions" and that the Grievor had failed to establish on the balance of probabilities that the Respondent's decision was inconsistent with application legislation or RCMP and Treasury Board policies.

At Level II, the Grievor submitted that it was an error for the Adjudicator to not consider her *Charter* arguments, and it was an error for the Adjudicator to dismiss her submissions as "personal opinion" and in doing so, refuse to consider the Grievor's evidence. The Grievor submitted that the Respondent's decision was not reasonable as it was arbitrary and amounted to discrimination against the club that was engaged in the activity.

In 2019, a Level II Adjudicator raised a question as to whether the grievance was moot, noting that the Grievor had been discharged from the RCMP even before the Level I Adjudicator had addressed the matter in 2018. Both Grievor and Respondent made submissions on mootness. The Grievor submitted that even though she had retired and was free to participate in the activity outside of work, there were other serving RCMP members who wanted to participate in the activity outside of work and an outcome of the grievance will affect the other members' rights to participate in the activity.

ERC Findings: The ERC found that merit issues raised in the grievance were moot and that there were no compelling reasons to exercise discretion to examine the merits.

ERC Recommendation: The ERC recommends that the Commissioner dismiss this grievance as it was found to be moot. The ERC commented that while participation in activities outside of work may be in a member's personal interest, this interest must be appropriately balanced with the RCMP's organizational interest in maintaining public trust and confidence in the RCMP's ability to meet its law enforcement objectives in an impartial and effective manner.

Commissioner of the RCMP's Final Decisions

The Commissioner of the RCMP has provided her decision in the following matters, for which the ERC's Findings and Recommendations were summarized in previous issues of the *Communiqué*:

Current Legislation Cases:

Conduct Appeals

C-027 Conduct Board Decision (*summarized in the July – September 2019* Communiqué) The member (Respondent) responded to a 911 call regarding individuals whose vehicle had broken down on the side of the road. When the Respondent and another member arrived at the scene,

two underage youths fled. The Respondent seized approximately 24 bottles of beer in a cooler after issuing a ticket for unlawful possession of alcohol against one of the underage youth. On his next shift, instead of disposing of the alcohol as per policy, the Respondent gave it to the firefighters. A *Code of Conduct* process was initiated where the Respondent faced five allegations of discreditable conduct related to the incident. The Conduct Authority (Appellant) was seeking the Respondent's dismissal. After a contested hearing, all five allegations were found to be established by the Conduct Board (Board). The ERC found that there was no error in the Board's decision on sanction as there is no statutory limit to forfeiture of pay in the RCMP regime. The Board balanced the serious nature of the misconduct of the Respondent against a number of persuasive mitigating factors. The ERC recommended that the appeal be denied.

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

The Respondent was subject of an investigation in which it was found that he engaged in five counts of discreditable conduct contrary to section 7.1 of the RCMP *Code of Conduct*. The Conduct Board imposed conduct measures comprising a total forfeiture of 35-days pay and a reprimand for each of the five contraventions.

The Appellant presented her appeal, arguing that the conduct measures imposed were clearly unreasonable, and based on an error of law.

The matter was reviewed by the ERC. The Chairperson determined that the Conduct Board's decision was not clearly unreasonable, nor based on an error of law. With no manifest and determinative error disclosed, the Chairperson recommended that the appeal be denied and that the conduct measures be confirmed.

The Adjudicator concurred with the Chairperson. In finding no reason to interfere with the Conduct Board's decision, the Adjudicator denied the appeal and, in accordance with paragraph 45.16(3)(b) of the *RCMP Act*, confirmed the imposed conduct measures.

C-028 Conduct Authority Decision (*summarized in the July – September 2019* Communiqué)
The Appellant was the detachment commander of a Detachment. On April 8, 2015, the detachment Sergeant sent an email to the district commander (the Conduct Authority) alleging problems with the Appellant's temper and interpersonal relationships with his subordinates since 2013 and with the municipal police service. On May 22, 2015, the Conduct Authority ordered a *Code of Conduct* investigation. The Conduct Authority found 4 of the 8 allegations were established. The ERC found that the Conduct Authority contravened procedural fairness by failing to postpone the Conduct Meeting and failed to disclose the Operations Officer's notes to the Appellant. The ERC recommended that the appeal be allowed.

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

The Federal Court previously acknowledged in *McBain* v *Canada (Attorney General)*, 2016 FC 829, that "in certain circumstances, administrative appellate tribunals have been found to have the power to cure procedural lapses or unfairness arising in a subordinate adjudication" (para. 46). Accordingly, in my view, the potential to remedy procedural fairness defects in the conduct meeting process on appeal is not as restricted as the Chair suggests given that Parliament purposefully envisioned the possibility of *de novo* reviews in appeals of conduct authority decisions. That said, I do accept the ERC finding that the undisclosed Operations

Officer's notes required further investigation since they allude to the Respondent's knowledge and timing of unspecified information related to the Appellant's impugned behaviour (Material, pages 34-35). I am satisfied that these circumstances represent a breach of procedural fairness that the appeal proceedings have not rectified (Report, paras. 171-174). I am therefore compelled to allow the appeal and find the allegations not established. The Appellant clearly has a history of outbursts and yelling in a supervisory role as reflected in the management review and the conduct investigation. He claims that he has changed and learned coping mechanisms to ensure better self-control. I urge him to remain vigilant. The appeal is allowed. The allegations are deemed not established and the conduct measures rescinded.

C-029 Conduct Authority Decision (*summarized in the July – September 2019* Communiqué) The Appellant and her husband were both RCMP members and served at different locales in "X" Division. The Appellant became involved in a sexual relationship with a Staff Sergeant who was her superior, with whom she had been working on a sensitive file. The affair lasted for months before it was discovered and reported to an Inspector. The RCMP initiated *Code of Conduct* proceedings against both the Appellant and the Staff Sergeant with whom she had been involved in a sexual affair. Three allegations were made against the Appellant. The ERC addressed all the Appellant's arguments on appeal and found that the Respondent did not contravene a principle of procedural fairness, err in law or make a clear and overriding error of fact. The ERC recommended that the appeal be denied.

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

I am persuaded that the Respondent misstated evidence, misinterpreted the *IWR Policy*, and misapplied commentary in the Sexual Misconduct section of Discreditable Conduct in the CMG. First, section 1 does confirm that the *Code of the Conduct* sets out the responsibilities and the standard of conduct for all members both on and off-duty. Moreover, the Respondent failed to explain how the consensual relationship "posed significant risk to the RCMP of civil liability". The Appellant was neither a supervisor nor a person in authority in the circumstances of her relationship with the Staff Sergeant. The Appellant did "ignore" her obligation to report the relationship, but that is precisely the basis of Allegation 2. Lastly, the Respondent's reliance on the CMG commentary for Discreditable Conduct (pages 56-58) and, specifically, the summarized version of the disciplinary board decision in Appropriate Officer "X" Division and S/Sgt. X, 11 (AD) (4th) 327, and the obiter statements made by the board completely disregards the fact that the subtitle of the CMG section is "Abuse of position (intimate relationship)" and the discussion and cases all concern supervisors abusing a position of authority to induce a relationship with a subordinate resulting in an "improper relationship" whether consensual or not. The CMG does not impose additional prohibitions on members beyond those set out in the *RCMP Act*, the *Code of Conduct* and the *IWR Policy*, and surely the test for Discreditable Conduct demands more than a subjective moral compass in the absence of a disrupted workplace, or a statutory or policy violation. The appeal is allowed in part. Allegation 1 is deemed not established and 160 hours of annual leave are to be returned by the Respondent forthwith.

C-031 Conduct Authority Decision (*summarized in the October – December 2019* Communiqué) The Appellant attended a fast food restaurant while off duty and ordered a cheeseburger. Upon inspection, his burger seemed raw to him. He began to swear loudly while standing at the service counter, and tried to photograph the burger patty. The restaurant manager began taking the burger patty off the service counter, at which point the Appellant grabbed his wrist and pulled him with some force. The ERC recommended that the Commissioner allow the appeal of the Respondent's finding that the Appellant engaged in

discreditable conduct, given the Respondent’s omission to consider and apply the governing legal test. It further recommended that the Commissioner make the finding the Respondent should have made in this regard, specifically, that the aforementioned reasonable person would view the Appellant’s off-duty use of force on a fast food restaurant manager as likely to bring discredit to the RCMP. The ERC further recommended that the Commissioner confirm the conduct measure imposed on the Appellant, that being a forfeiture of two days’ pay.

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

The Appellant is a General Duty Member with the RCMP. His work duties in April 2016 were administrative in nature due to an unrelated medical issue. On April 18, 2016, the Appellant, while off-duty, ordered a cheeseburger at a restaurant. When he received it, he believed the patty was raw. The Appellant became upset and raised his voice and used profanities. As he was attempting to photograph the patty, the manager took it away. The Appellant grabbed the manager's wrist and pulled him forward to prevent him from doing so, causing the manager to lose his balance. The manager said that he would contact the police. The Appellant then identified himself as a police officer. Although the manager did not believe the Appellant was a police officer, he was "freaked out" by the Appellant's claim. The manager called 911. The Appellant obtained the store owner's contact information and departed the scene before police arrived. This event (the Incident) was captured on video surveillance.

As a result, a statutory investigation was commenced. The Appellant was charged with assault and causing a disturbance at or near a public place, contrary to the Criminal Code. The charges were subsequently stayed and the Appellant was diverted to alternative measures for the charge of causing a disturbance.

A *Code of Conduct* investigation was initiated into three allegations. The Respondent found that Allegation 2 (the Appellant's inappropriate use of his position as a police officer in his communications with employees) was not established. However, the Respondent found that Allegation 1 (the Appellant treated employees in a disrespectful manner) and Allegation 3 (his use of inappropriate and unwanted force on the manager) were both established. As conduct measures, the Respondent imposed a forfeiture of one day of pay for Allegation 1 and a forfeiture of two days of pay for Allegation 3.

The Appellant accepted the finding for Allegation 1. However, he appeals the Respondent's finding that Allegation 3 was established, arguing that the Respondent's decision was both procedurally unfair and clearly unreasonable.

On November 14, 2019, the ERC recommended that the appeal be allowed. The ERC did not find that any evidence that the decision was procedurally unfair. The ERC also found that the Appellant's arguments had failed to establish that the Respondent's decision was clearly unreasonable - the Conduct Appeal Adjudicator (Adjudicator) agrees with these findings, although for different reasons.

However, the ERC also considered whether the decision was clearly unreasonable because the Respondent had failed to explicitly state and apply an applicable legal test - an issue not raised by the Appellant. On that basis, the ERC recommended that the appeal be allowed and the Commissioner make the finding the Respondent should have made. The Adjudicator agreed with the test identified by the ERC, but disagreed with how the ERC applied that test. The Adjudicator

found that the decision was not clearly unreasonable as there was no clear or manifest error related to the finding that Allegation 3 was established.

The ERC also considered the conduct measures imposed. The Adjudicator found that the Appellant did not appeal this issue so it was not considered.

Other Appeals

NC-027 Harassment (*summarized in the July – September 2019* Communiqué) The Appellant applied for a position with specialized duties but was unsuccessful in the selection process.

The remedy awarded at Level II was a “Redress Order.” The Redress Order provided a mechanism to take place in the event the Appellant applied for future similar positions. The Appellant alleged that the Redress Order was not followed, and that the decision-maker in his selection processes should have been someone other than the Alleged Harasser. The ERC found that the Redress Order signed by a Level II Adjudicator was paramount and was narrowly interpreted by the Alleged Harasser. The ERC found no evidence of harassment and found that the Level I Decision was not clearly unreasonable. The ERC recommended that the Commissioner or her Designated Level II Adjudicator deny the appeal.

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

The Appellant applied for four International Liaison Officer (ILO) positions. During the structured interview stage, the Appellant disclosed he had a history of discipline. The interviewers drafted a memorandum to the Selecting Line Officer (SLO) which stated that the Appellant did not have the experience necessary to be considered for an ILO position and that they were concerned about his disclosure of previous discipline. The SLO advised the Designated Manager for Human Relations (DMHR) that he could not support the Appellant being considered for the ILO positions for the reasons identified in the memorandum provided by the interviewers. The DMHR considered the SLO rationale and drafted an email explaining to the Appellant that he was not the selected candidate for any of the ILO positions he had applied to. The DMHR included the SLO’s concerns in her email, but also raised her concerns about references the Appellant had made in a submission to the DMHR concerning his discipline. The DMHR’s email stated that the Appellant would not be considered for the ILO positions because he did not have the necessary experience. The email suggested the Appellant could address his lack of experience by seeking a transfer, but she raised her concern that the Appellant’s comments to her about his discipline did not appear to accept responsibility for his actions. The DMHR also said that she did not see how the Appellant could overcome the impact of his prior discipline in any future application for an ILO position. The DMHR’s email also raised concerns about the Appellant’s references to personal difficulties and she pointed out that many ILO positions were located in hardship postings. The DMHR sent a copy of this email to the SLO after she provided it to the Appellant.

The Appellant presented a harassment complaint against the DMHR arguing that it was not necessary for her to share his disclosures of his personal difficulties with the SLO and that the Appellant had humiliated him by doing so. The Respondent reviewed the harassment complaint and found that the DMHR’s actions were consistent with her responsibilities within the staffing process, which allowed her to consult the SLO and others in the DMHR’s decision-making process. The Appellant argued that the Respondent’s decision was clearly unreasonable and did not take into account that the DMHR did not need to share the details of the Appellant’s personal difficulties with the SLO and it was inappropriate for her to do so. The ERC reviewed the

submissions and found that the Respondent's decision was not clearly unreasonable as the email written by the DMHR was accurate and sending it to both the Appellant and the SLO was consistent with the DMHR's role in this staffing process. The Adjudicator found that while the DMHR was entitled to consult the SLO about information relating to disclosures from the Appellant as part of her decision-making process, in this situation she had already made her decision when she shared the email with the SLO so it was not necessary for her to do so at that time. However, the Adjudicator noted that the Appellant's information was provided for the staffing process and was only used in that context. The Adjudicator found that even if the DMHR made a mistake, it was not part of a pattern of improper conduct and was not severe enough to constitute harassment. The Adjudicator agreed with the ERC's findings for different reasons. The appeal was dismissed.

NC-028 Medical Discharge (*summarized in the July – September 2019* Communiqué) The Appellant, a Civilian Member of the RCMP, was assigned in 2013 with a temporary medical profile of O6. The Appellant was absent from his workplace since March 2012. Some of these absences were authorized, and some were not. A Stoppage of Pay and Allowances was eventually ordered. The Appellant refused to return to work until a number of conditions were met, including: resolution of a perceived harassment situation, reconsideration of a reclassification of his position, and removal of the Stoppage of Pay and Allowances. The ERC found that the Appellant's medical release from the Force was justified and that the Force had tried to accommodate the Appellant up to the point of undue hardship. The ERC recommended that the appeal be denied.

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

The events that led to the Appellant's discharge from the RCMP occurred under the authority of two Unit Commanders, the previous Unit Commander and his successor who became the Appellant's Unit Commander in March 2016 and who eventually proceeded with the discharge process. As well, these events unfolded under two Human Resources Officer, the previous Human Resources Officer who ordered the Appellant's pay and allowances suspended and her successor, the Human Resources Officer who ordered the Appellant's discharge and who is the Respondent in this appeal. The Appellant joined the RCMP as a civilian member and in March 2012, he began a period of long-term sick leave (ODS), attributing his illness to what he alleged was long term discrimination and harassment in the workplace. He failed to persuade OHSB that his illness was work-related and, although given the opportunity to do so, he did not formalize a complaint of harassment. He continued to receive full salary and benefits until he was served with an Order Directing the Stoppage of his Pay and Allowance (SPAO) on October 29, 2015, having repeatedly failed to submit medical information necessary to support his absence from work. The Appellant appealed this SPAO. In the year that followed the SPAO, the Appellant's health care providers repeatedly deemed him medically fit to proceed with a gradual return to work, as confirmed by nine Medical Certificates, but he failed to participate in the accommodation and return to work processes. Preceded by a Preliminary Recommendation to Discharge a Member dated June 6, 2016, and by a Recommendation to Discharge a Member dated September 28, 2016, the Notice of Intent to Discharge a Member was served on the Appellant on October 31, 2016, along with supporting materials. The Appellant did not ask the Respondent to recuse herself, did not seek additional disclosure and did not request a meeting. He did inform the Respondent that he was engaged in another administrative process, which would require him to "postpone" his written response. However, notwithstanding an extension granted by the Respondent, giving the Appellant a total of 21 days to present written arguments, ultimately the Appellant remained silent. On November 2, 2016, the Commissioner dismissed the

Appellant's Appeal of the SPAO. The Appellant then pursued the matter before the Federal Court. On December 12, 2016, due to his disability for which accommodation could not be afforded short of undue hardship, the Appellant was discharged from the RCMP. This is an appeal of his discharge, the Appellant contending that the Respondent's decision was reached in a manner that contravened the applicable principles of procedural fairness and that it was based on an error of law. The Federal Court dismissed the Appellant's application for judicial review, dashing his hope of having the SPAO rescinded. In this appeal also, the Appellant has failed to argue his case successfully. The Appeal Adjudicator confirmed the Respondent's decision and dismissed the appeal.

NC-032 Harassment (*summarized in the July – September 2019* Communiqué) The Appellant, a Civilian Member, was hired as a manager on a team involved in an Information Technology (IT) project. The relationship between the Appellant and the director to whom she reported (Alleged Harasser) soon became difficult. The Appellant eventually left the Force and lodged a harassment complaint (Complaint) against the Alleged Harasser. The ERC recommended that the appeal be dismissed.

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

The Appellant was a Civilian Member hired to work as a manager on a team involving an Information Technology (IT) project. She began working for the RCMP on March 28, 2011. The Appellant's supervisor (Alleged Harasser) raised concerns in relation to the Appellant's ability to perform her duties. A performance management process was initiated, but prior to it proceeding the Appellant resigned. The Appellant resigned on July 22, 2011, but continued to be paid until December 28, 2011, in accordance with a resignation package.

On January 11, 2012, the RCMP received the Appellant's Exit Questionnaire in which she complained of harassment, discrimination and bullying related to the manner in which the Alleged Harasser managed her. On November 14, 2014, the Appellant lodged a harassment complaint against the Alleged Harasser. The Respondent ordered a harassment investigation on May 4, 2015, but found that the allegations had not been established.

The Appellant disagrees and is appealing the Respondent's decision. This appeal was reviewed by the ERC. The ERC recommended that this appeal should be dismissed on the merits. The Adjudicator agreed with the ERC recommendation and adopted the rationale provided by the ERC in support of that recommendation.

The appeal was dismissed.

While not forming part of the Adjudicator's decision – because the Appellant had not been provided an opportunity to comment on these concerns – the Adjudicator's analysis also commented on two other issues. First, the Adjudicator questioned whether the Appellant had standing to present an appeal of the Respondent's decision as she was no longer a member of the RCMP when she presented this appeal. Second, the Adjudicator raised concerns about the harassment investigation being ordered without the Respondent providing any rationale to demonstrate there were exceptional circumstances to justify this action when over a year had passed since the last alleged incident of harassment.

NC-033 Harassment (*summarized in the July – September 2019* Communiqué) The Appellant and the Alleged Harasser, both Civilian Members, worked in their section since 2010. The

Alleged Harasser was the team leader of the section and the Appellant's direct supervisor. The Appellant filed a Harassment Complaint against the Alleged Harasser and listed five allegations of harassment. The ERC recommended that the appeal be denied.

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 three grounds of appeal: the Respondent erred in not considering medical evidence; there were procedural errors in the investigation; and, the Respondent erred in applying the definition of harassment.

The ERC did not find merit in the Appellant's arguments, determining that the Respondent did not err in his analysis of the events. The Chairperson observed that the investigation included the audio statements from ten witnesses, the Appellant, and the Alleged Harasser, as well as the examination of relevant documents, determining that none of the witnesses corroborated the Appellant's version of the events, and some offered contradictory accounts.

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

NC-034 Harassment (*summarized in the July – September 2019* Communiqué) The Appellant and the Alleged Harasser, both Civilian Members, worked in their section. The Alleged Harasser was the section manager. It appears that the triggering event of the harassment complaint relates to an incident regarding one of the Appellant's files, where a document should have been sent, but could not be found. The ERC recommended that the appeal be denied.

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 appealed the decision arguing that the Respondent failed to consider critical evidence, erred in his evaluation of certain evidence, and failed to mandate a specific allegation for investigation.

The ERC did not find merit in the Appellant's arguments, determining that the Respondent's decision was not clearly unreasonable, was not based on an error of law, and was not contrary to principles of procedural fairness.

The Appeal Adjudicator accepted the ERC'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)*.

NC-035 Medical Discharge (*summarized in the July – September 2019* Communiqué) In June 2009, the Appellant met with the Division Career Development and Resource Advisor (CDRA) to discuss her options for returning to work after six years of LWOP. Discussions were held regarding options for the Appellant between the Health Services Officer (HSO), the CDRA and the Return to Work Coordinator (RTW Coordinator) to find a suitable posting for the Appellant as she had restrictions and limitations. Based on the Employer Mandated Medical Assessment ordered in November 2016, the Appellant's medical profile was modified to a

permanent O6, which signified that the Appellant was permanently unfit for any duty within the RCMP. The ERC recommended that the appeal be denied.

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

After six years of leave without pay, the Appellant returned to work at the RCMP in July 2009 with medical restrictions and limitations. The same day, the Appellant went off duty sick (ODS) until May 2010. During this time, she inquired into her disability pension estimate to determine whether she would agree to a consensual medical discharge.

Upon her return, the Division Career Development and Resource Advisor (CDRA) found the Appellant a three-month temporary position which she began in August 2010. The Appellant went on parental leave in December 2010. After expressing her desire to complete 23 years of service before discharge, the District Officer found the Appellant a temporarily funded position which would conclude with her desired discharge date in July 2012. The Appellant later decided she wanted to complete 25 years of service and changed her discharge date to June 2014. As such, the CDRA found another position for the Appellant in her previous detachment. In December 2012, however, the Appellant stopped attending work and went ODS in January 2013 lasting until her eventual medical discharge.

Beginning January 2013, there was a breakdown in communication between the Force and the Appellant as the Appellant failed to answer calls, return voicemails, or reply to emails from the Commanding Officer, the CDRA, and the Return to Work Coordinator. The Force tried to explore accommodation options with the Appellant, but communications from her were extremely limited and brief. In November 2016, the Appellant was ordered to attend an Employer Mandated Medical Assessment (EMMA). Based on the results of the EMMA, the Appellant's medical profile was modified to "permanent O6" which signified that she was permanently unfit for any duty within the RCMP for the foreseeable future. The Appellant indicated she would provide medical information to counter her medical profile, but failed to do so.

An Employment Requirements process was initiated in March 2017. After reviewing the Appellant's two submissions, the preliminary recommendation, and the recommendation, the Respondent rendered his decision discharging the Appellant in July 2017. He explained that the Appellant had not engaged with the Force in its accommodation efforts, and despite being provided opportunities to do so, the Appellant failed to provide additional medical information that would modify her O6 medical profile.

The Appellant challenged the discharge order on the basis that the decision was procedurally unfair as the Respondent provided no reasons for his decision and did not consider all evidence. Moreover, the Appellant alleged a reasonable apprehension of bias. She also argued that the Respondent failed to consider the harassment she endured at her detachment, and that the Force had not discharged its duty to accommodate her.

The appeal was referred to the ERC for review, pursuant to paragraph 17(d)(i) of the *Royal Canadian Mounted Police Regulations 2014*. The Chair of the ERC recommended that the appeal be denied. The Adjudicator was not persuaded that the RCMP had failed to accommodate the Appellant, and found that there was no breach of procedural fairness and the decision was not clearly unreasonable. The appeal was dismissed.

NC-037 Stoppage of Pay and Allowances (*summarized in the July – September 2019* Communiqué) The Appellant appealed a decision by the Force ordering the stoppage of his pay and allowances (SPA). The SPA order was imposed as a result of *Code of Conduct* allegations and statutory charges that had been brought against the Appellant. The Appellant argued that the Respondent erred in law by breaching the principle of *autrefois acquit* and the rule against double jeopardy and that the Respondent made a clearly unreasonable decision. The ERC recommended that the Commissioner deny the appeal.

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

The Appellant raises two grounds of appeal: the decision is based on errors of law involving the legal principles of *autrefois acquit* and the rule of double jeopardy, as well as the rules of evidence governing character and similar fact evidence, and the decision is clearly unreasonable because the Respondent reversed the presumption of innocence and failed to consider the severe consequences of the SPA. Like the ERC, I note that despite the extensive evidence regarding the *Code of Conduct* allegations and Criminal Code charges contained in the NOI and attachments and SPA decision, the Appellant's appeal arguments center exclusively on the [the Party] incident. The Appellant has not persuaded me that the Respondent committed an error of law in rendering the decision. The Respondent's consideration of the Criminal Code charge related to the [the Party] incident is permissible under section 12 and paragraph 22(2)(b) of the *RCMP Act*, and section XII.5.5.1.1 of the RCMP *Conduct Policy*, and furthermore, the principles of *autrefois acquit* and double jeopardy are not applicable since a SPA order is not a disciplinary measure and does not result in a finding of misconduct or a conviction. I accept the ERC recommendation to dismiss the appeal and adopt the thorough analysis set out in the report.

NC-040 Harassment (*summarized in the October – December 2019* Communiqué) The Appellant and the Alleged Harasser worked together in the Recruiting Section of "X" Division. The parties' working environment was very friendly and members would play tricks on each other and talk openly about sexuality. On September 3, 2015, the Alleged Harasser met with the Appellant while he was the acting supervisor to discuss some shortcomings he saw in her. She was hurt by the Alleged Harasser's comments and later refused to work with him. The ERC recommended that the appeal be dismissed.

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

[*Translation*]

At the time, the Appellant and the member that is the subject of the harassment complaint (the Alleged Harasser) were assigned to "X" Division's Recruiting Section where there was a [*translation*] "very particular work environment" marked by comments and jokes that were sometimes unrestrained and [*translation*] "made in a humorous context." Employees found this environment to be [*translation*] "pleasant, relaxed, funny, friendly..." stating that [*translation*] "the complainant took part in jokes, teased others and seemed very comfortable...". In August 2015, while he was the acting supervisor, the Alleged Harasser met with the Appellant to [*translation*] "discuss some professional shortcomings" she had demonstrated. He then brought these shortcomings to the attention of the supervisor who ordered a *Code of Conduct* investigation. This action taken by the Alleged Harasser gave rise to the conflict that led to the Appellant filing a harassment complaint against him. Two investigators from the Professional Standards Unit were assigned to the file and they submitted their report to the Respondent who, in his capacity

as Commanding Officer, dismissed the complaint in its entirety, [*translation*] "...disturbed, even offended to note the good-natured tone used by the employees to comment on and illustrate their work environment and the comments they exchanged freely with each other." According to the Respondent:

> [*Translation*]
>
> *All of the evidence gathered by the investigators from the witnesses reveals a very particular work environment, one that I am surprised to see in today's era in the RCMP's Recruiting Section. The employees use terms that I will not repeat in my decision, but that are cited in the investigation report. The jokes made were questionable at best and the discussions were about one person's genitals and another person's breasts. All of the employees openly spoke of how things were going in their work environment. They said that it was pleasant, relaxed, funny, friendly, and made in a humorous context.*

The Respondent therefore concluded the following:

> [*Translation*]
>
> *Considering the work environment in the Recruiting Section at the time and the other employees' descriptions of the complainant's behaviour, I cannot conclude that a reasonable person in the same circumstances as the complainant would have concluded that harassment occurred.*

The Appellant subsequently appealed, finding that the Respondent's decision contravened the relevant principles of procedural fairness and was based on an error of law. In her submissions, she raised the reasonableness of the decision instead. The matter was referred to the ERC, whose Chairperson [*translation*] "agreed with the Respondent's comments regarding the work atmosphere in the Appellant's section... it was an unprofessional environment and some members, including the Appellant, behaved in a manner that did not reflect RCMP values." The ERC Chairperson was of the opinion that [*translation*] "the Appellant was complacent in this work environment and actively participated in jokes of a sexual nature," and therefore, ERC recommended to the Adjudicator that the appeal be dismissed. The Appeal Adjudicator accepted the ERC's recommendation, dismissing the appeal on the basis that the Appellant had not demonstrated that the Respondent's decision was clearly unreasonable.

NC-041 Stoppage of Pay and Allowances (*summarized in the October – December 2019* Communiqué) The Appellant appealed a decision by the Force ordering the stoppage of his pay and allowances (SPA). The SPA Order was imposed as a result of *Code of Conduct* allegations and statutory charges. As a release condition, the Appellant could not use a computer or a smartphone with data/internet service. The Appellant appealed the decision and argued breach of procedural fairness as his MWA did not inform him of his right to be represented in the SPA process by the MR Directorate and he said he therefore submitted an inadequate NOI Response. The ERC found that the Respondent clearly informed the Appellant of his right to advice and assistance by the MR Directorate in the NOI to order a SPA and that this notification was sufficient, in and of itself, to meet the high degree of procedural fairness required. The ERC recommended that the Commissioner dismiss the appeal and confirm the Respondent's SPA Order decision.

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

The Appellant's argument simply cannot overcome the fact that the NOI clearly indicated a variety of resources that were available to him including the Health Services office, Employee Assistance Program, MR Directorate and MWA program. Moreover, the Appellant did avail himself of his criminal lawyer to obtain an extension to submit a response to the NOI, and met with an MWA. In addition, the Conduct Authority Representative, writing on behalf of the Respondent to the Appellant's lawyer to confirm the time extension, emphasized that the Appellant, "may seek advice and assistance from a member of the [MR] Directorate". I also agree with the ERC that Appellant's inadequate response to the NOI cannot be blamed on the inexperienced MWA when the Appellant, himself, failed to bring a copy of the NOI to their meeting. While I acknowledge that the release conditions imposed on the Appellant created some challenges, the fact is that the Respondent first informed the Appellant about the availability of an MR in the NOI, and then his representative reiterated this information in a subsequent email to the Appellant's defence counsel. In sum, I find no breach of procedural fairness. I accept the ERC recommendation to dismiss the appeal and fully adopt the analysis set out in the report. The appeal is dismissed.

NC-042 Harassment (*summarized in the October – December 2019* Communiqué) On July 8, 2015, the Appellant made two harassment complaints, which were merged, against an Acting Staff Sergeant who, for a period, had supervised him. During the investigation, the Appellant informed an official that the Alleged Harasser had interfered with one of the witnesses. The official brought this issue to the attention of the investigators. In her decision, the Respondent did not address the Appellant's contention that the Alleged Harasser interfered with the investigation. The ERC recommended that the Commissioner allow the appeal.

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 one ground of appeal specifying that the decision was reached in a manner that contravened the applicable principles of procedural fairness. He claims that critical information was ignored that if considered could have altered the findings.

The ERC found that the investigation was deficient, agreeing with the Appellant that the investigators failed to address crucial evidence related to the Alleged Harasser's interference with witnesses. The ERC found that given the investigation was deficient, it followed that the Respondent's decision based on that investigation, was also deficient.

The Appeal Adjudicator accepted the ERC's recommendation, allowed the appeal and in accordance with paragraph 47(1)(b) of the *Commissioner's Standing Orders (Grievances and Appeals)* directed that the matter be remitted to a different decision-maker to render a decision based on a fulsome investigation inclusive of the noted deficiency.

Former Legislation Cases:

Disciplinary Appeals

D-136 Adjudication Board Decision (*summarized in the October – December 2019* Communiqué) Two allegations of disgraceful conduct under section 39(1) of the *1988 Regulations* were brought against the Appellant which relate to the same series of events.

In April 2010, the Appellant was seen by members of the public driving her vehicle while visibly impaired. The Appellant had driven partially into a ditch and had to request assistance from members of the public to have her vehicle removed from the ditch. She became agitated and defensive, and misled them about her identity. The ERC recommended that the Commissioner deny the appeal.

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

The Appellant had faced two allegations of disgraceful conduct and both were found established by an Adjudication Board. The Appellant appealed the Board's finding on the second allegation that alleged the Appellant had purposefully identified herself as an RCMP officer and was misleading by providing a false or fictitious name. The Appellant also appealed the global sanction imposed by the Board, directing her to resign from the Force within 14 days or be dismissed if she failed to do so. The Commissioner agreed with the Chair of the ERC that the Board did not err in finding the Appellant's conduct, as particularized in the second allegation, was disgraceful. Further, the Commissioner found that the Board did not err in accepting the evidence from the Appropriate Officer Representative's expert, which remained within the evidentiary confines set by the Board. With regard to sanction, the Commissioner considered the mitigating factors in the Appellant's situation and found that they did not render the Appellant's dismissal unwarranted. The Commissioner dismissed the appeal and confirmed the Board's decision.

Grievances

G-676 Harassment (*summarized in the October – December 2019* Communiqué) In December 2007, the Grievor submitted a harassment complaint against two of her superiors based on events that occurred from 2004 to 2006. The harassment complaint contained a multitude of allegations. The Grievor ascribed the adverse treatment by her superiors to discrimination based on her sexual orientation and race. The ERC found that the Respondent had made a Decision to screen out the harassment complaint. The ERC found that the Grievor's complaint should have been screened into the harassment complaint process, including the initiation of a full investigation. The ERC recommended that the Commissioner allow the grievance.

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

The Grievor filed a grievance after her harassment complaint consisting of 25 allegations, including discrimination on the basis of race, sex, sexual orientation, against two supervisors at her detachment had been screened out of the RCMP harassment complaint process. The Level I Adjudicator found the Respondent correctly screened out the complaint on the basis that there was no evidence of discrimination or harassment. The Grievor sought a review at Level II and the matter was referred to the ERC. The ERC recommended the grievance be allowed. The Commissioner agreed with the ERC and found that the Respondent failed to apply the appropriate test in screening out the harassment complaint. The Commissioner apologized to the Grievor for the delay and for the complaint not being handled in accordance with policy. Due to the passage of time, an investigation was no longer feasible.

G-677 Relocation (*summarized in the October – December 2019* Communiqué) The Grievor purchased land near a post to which he would soon be relocated. He decided that he wished to

live on the land, in a new home, the construction of which he would oversee as the general contractor. He formally requested a House Hunting Trip (HHT) beginning on the date construction was scheduled. The Respondent rejected the Business Case on the basis that the Grievor was ineligible for an HHT, as he had already secured a permanent accommodation at his new post by the time of his trip, by way of buying his land and obtaining a building permit based on final plans. The ERC found that the key question in the grievance was: what did the Grievor do on his trip? Unfortunately, there was little evidence in the record to help answer this question. The ERC recommended that the grievance be denied.

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

The Grievor challenged a decision by the Departmental National Coordinator (DNC), Integrated Relocation Program, to deny approval for a House Hunting Trip (HHT) during a relocation, rendering the Grievor ineligible for the reimbursement of unspecified expenses. At Level I, the Adjudicator denied the grievance, finding that the Grievor had not obtained authorization for his trip and that he had already secured accommodations at the new post. The Grievor sought a review at Level II. The ERC recommended that the grievance be denied on the basis that the Grievor failed to satisfy his burden of persuasion in establishing his entitlement to a HHT and related benefits. The Commissioner allows the grievance, finding that authorization for the HHT should not have been withheld.

G-680 Relocation (*summarized in the October – December 2019* Communiqué) In 2011, the Grievor accepted a transfer and relocated as per the *Integrated Relocation Program Policy for the RCMP 2009* (IRP). Prior to the move, the Grievor and the Respondent discussed the weight limitation for shipping his household goods and effects (HG&E) and the relevant IRP provisions. The Grievor claimed that the mover advised him that the HG&E were likely to be under the weight limitation. The HG&E were shipped and the Grievor was invoiced for the overweight HG&E. He grieved the Respondent's decision to invoice him for the shipping cost of overweight HG&E. The ERC found that the Respondent's decision was consistent with the IRP policy and that the Grievor's circumstances did not meet the requirements of 'exceptional circumstances' as per section 1.03.18 of the IRP as they were not rare and extreme. The ERC found that the Grievor chose to take a risk by relying on the informal advice of the mover rather than exercising due diligence and making follow-up inquiries with the appropriate policy centre in the Force to verify that he was in compliance with the IRP. The ERC recommended that the grievance be denied.

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

The Grievor challenged the Respondent's decision to invoice him for excess shipping costs resulting from overweight household goods and effects. The Level I Adjudicator denied the grievance. The Commissioner accepts the ERC finding that the Respondent's decision was consistent with the *RCMP Integrated Relocation Program* (IRP), the Grievor was responsible for familiarizing himself with policy, and the Grievor's circumstances did not meet the requirements of "exceptional circumstances" as envisioned by the IRP. The grievance is denied.