ANNUAL REPORT

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ROYAL CANADIAN MOUNTED POLICE

EXTERNAL REVIEW COMMITTEE

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Royal Canadian Mounted Police
External Review Committee

CANADA

Comité externe d'examen de la
Gendarmerie royale du Canada

Chairman Président

May 12, 1998

The Honourable Andy Scott
Solicitor General of Canada
Sir Wilfrid Laurier Building
340 Laurier Avenue West
Ottawa, Ontario
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Mr. Minister:

Pursuant to Section 30 of the *Royal Canadian Mounted Police Act*, I hereby transmit to you the Annual Report of the Royal Canadian Mounted Police External Review Committee for fiscal year 1997-98 for transmission to Parliament.

Yours sincerely,

F. Jennifer Lynch, Q.C.

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Acting Chairperson

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RCMP External Review Committee

Annual Report--1997-98

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OVERVIEW

INTRODUCTION

The RCMP External Review Committee is an independent, neutral component of a two-level redress mechanism available to members of the Royal Canadian Mounted Police who are not satisfied with disciplinary actions, discharges or demotions, and with other Force decisions, acts or omissions which impact upon their employee rights and in respect of which no other redress process is provided by the *RCMP Act* or its Regulations. The Committee independently reviews grievances and appeals referred to it and submits recommendations to the RCMP Commissioner who acts as the second and last level of the review process. The RCMP Commissioner is not required to accept the recommendations of the Committee, but when he chooses not to do so, he is required to provide his reasons. His decision is final although it is subject to judicial review by the Federal Court.

MANDATE, ROLES AND RESPONSIBILITIES

Under the *RCMP Act*, the RCMP Commissioner refers all appeals of formal discipline and all discharge and demotion appeals to the Committee unless the member of the RCMP requests that the matter not be referred. In addition, pursuant to s. 33 of the *RCMP Act*, the RCMP Commissioner refers certain types of grievances to the Committee in accordance with regulations made by the Governor in Council. Section 36 of the *RCMP Regulations* lists the kind of grievance which the RCMP Commissioner has to refer to the Committee; they are as follows:

a) the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members;
b) the stoppage of pay and allowances of members made pursuant to subsection 22(3) of the *RCMP Act*;
c) the Force's interpretation and application of the Isolated Posts Directive;
d) the Force's interpretation and application of the RCMP Relocation Directive; and
e) administrative discharge on the grounds of physical or mental disability, abandonment of post, or irregular appointment.

In each case, the member may request that the matter not be referred, in which case, the RCMP Commissioner has the discretion whether to refer the matter or not.

The Chairperson of the Committee reviews all matters referred to it and renders *Findings & Recommendations* to the RCMP Commissioner and the parties in the form of a judgment. The Chairperson also has the option, exercised rarely, of initiating a hearing to consider the matter.

The RCMP Commissioner may accept or reject the Committee's recommendations but if he rejects a recommendation, he must provide written reasons to the member involved and the Committee.

In conducting its review of matters referred to it, the Committee attempts to achieve a balance amongst the many complex and different interests while ensuring that the principles of administrative law are respected and the remedial approach taken by the *RCMP Act* is followed. In each case, the interests of the individual member of the Force must be balanced against those of the Force's management, of other members and of the force's clients: the public, as represented by Attorneys and Solicitors General.

PROGRAM ORGANIZATION

The legislation provides for a full-time Chairperson, a Vice-Chairperson and three other members who can be appointed on a full-time or part-time basis, and who are available to assist with its work (e.g.: hearings). The Committee is currently operating with one member: the Vice-Chairperson who acts as Chairperson. Case review and administrative support are provided by staff who report to the Chairperson through the Executive Director. The Committee's offices are located in Ottawa.

Several activities or program components are provided in whole or in part to the Committee by the private sector and in partnership with other government agencies. For example, the Committee uses the services of partners such as the RCMP Public Complaints Commission and the Department of the Solicitor General for the sharing of facilities and equipment, or the provision of services which would otherwise have to be obtained through Committee resources. When in need of other more specialized types of services, the Committee always looks at alternatives such as contracting with the private sector or obtaining services from another department rather than creating its own expertise in those areas.

ENVIRONMENT

The Committee does not control the number or the nature of cases referred to it. The number of referrals depends, in part, on the members' decision as to whether they should submit their cases to level II, and on the Force's interpretation of the *RCMP Regulations* which establish the Committee's jurisdiction. In fact, just

as the Committee is not involved in the decision as to whether a matter should be referred to it, neither is it possible for the Committee to monitor, of its own motion, whether certain grievances were not referred to it which ought to have been. Section 36 of the *RCMP Regulations* provides that grievances relating to a number of matters are to be referred to the Committee. While sub-paragraph 36(b) through (e) are specific, this is not so with sub-paragraph 36(a) - the Force's interpretation and application of government policies that apply to government departments and that have been made to apply to members of the RCMP. Whether or not a matter is referable to the Committee under this provision requires an interpretation in each case. While the vague wording of sub-paragraph 36(a) only affects this one paragraph, it has disproportionate effects given that it accounts for a large part of the Committee's grievance referrals.

Any specific legislative and policy initiatives undertaken by the RCMP in the area of labour relations could also potentially have a significant impact on the Committee's workload.

A last factor will impact on how the Committee will conduct its business in the future. It has to do with the fast-changing RCMP environment. In order to adapt to a rapidly changing world, the RCMP has, over the last two years, undertaken several initiatives aimed at cultural transformation, addressing morale issues, improving internal communications, and making the grievance process more efficient and effective. One of the RCMP's major initiatives in this regard is the Alternate Dispute Resolution program which is implementing early interest-based approaches to resolution of disputes, and a broader system of conflict management which is resulting in an institutionalization of this approach in all of RCMP labour relations, with emphasis on conflict prevention and systemic change. Such a direction should, in the long run, have a profound and positive effect on labour relations within the RCMP and eventually could have an effect on the Committee's mandate and workload.

THE YEAR UNDER REVIEW

Coping effectively and efficiently with the workload, and providing the RCMP Commissioner with its best advice on the specific matters referred to it continued to be a priority for the Committee during 1997-98. In addition to, the Committee undertook or pursued certain key activities, such as the following:

- contributing to the modernization of RCMP conflict management processes by :
  - collaborating with the RCMP in its attempt to resolve employee-employer conflicts through means other than those involving the formal grievance/appeal procedure, e.g.: through promoting the use of alternative dispute resolution mechanisms wherever possible;
  - completing the review of the Committee's mandate as it relates to grievances, a study which was initiated under the leadership of the Committee, and which is designed to make the Committee's mandate even more efficient and in tune with today's RCMP reality;
- sharing with others by :
  - allowing stakeholders to make a greater use of the Committee's resources and expertise, e.g.: by promoting the giving of informal advice to RCMP members in the preparation of their grievance;
  - participating in the orientation of the new Divisional Staff Relations Representatives, elected members whose responsibility is to represent the Force's membership in matters pertaining to staff relations;
  - creating and publishing communication materials such as the Committee's bi-monthly *Communiqués*;
- communicating with partners by :
  - participating in federal and international fora such as the International Association for Civilian Oversight of Law Enforcement (the A/Chairperson is a member its Board of Directors), the Canadian Association for Civilian Oversight of Law Enforcement, the Council of Canadian Administrative Tribunals, and and the Small Agencies Administrators Network;
- continuous learning by :
  - attending a variety of conferences, courses and seminars;
  - reviewing modern literature on best practices in conflict management;
  - inviting experts of various interest groups to speak to Committee staff;
- undertaking or pursuing initiatives aimed at further increasing the efficiency and effectiveness of the Committee's review processes by :

- participating in a review conducted by the Auditor General's Office during the year;
- completing the amendment of the Committee's *Rules of Practice and Procedure*;
- implementing the integration of the Committee's informatics support systems with those of the Solicitor General Department for a greater efficiency and economy.

A LOOK AHEAD

The year 1998 marks the Committee's tenth anniversary, at least from an operation's point of view - although the Committee was created in 1986, it became fully operational on June 30, 1988, that is when Parts III, IV and V of the *RCMP Act* were enacted.

PRIORITIES

With a successful record in its first decade, the Committee's future priorities are two-fold: to maintain its diligence and professionalism in providing fair and independent review of individual cases, and to continue to encourage awareness and implementation of modern conflict management processes. There is a clear nexus between proper conflict management within an organization and cultural transformation. Over the past three years, the RCMP has undertaken many initiatives, including an Alternative Dispute Resolution Projet, aimed at moving its culture toward a more consensus-based, participatory model, away from an internal command-control culture. These initiatives are important to bring the institution in alignment with its client services, such as community-based policing. The Committee will pursue its efforts to encourage the interest-based approach to problem solving and has implemented internal measures and ensure that its own processes are modern and flexible enough to adapt to the changing landscape of conflict resolution.

In fulfilling its mandate, the Committee is committed to providing the RCMP with impartial, useful, and timely advice on specific cases referred to it. It will also continue to participate where appropriate in the larger issues related to labour relations within the RCMP, always in a manner that respects and balances the interests of the RCMP, its members, and members of the Canadian public.

KEY PLANS AND STRATEGIES

In order to meet its priorities, the Committee has identified the following key plans and strategies:

1. **Providing leadership in adapting to the new environment, by :**

- *Communication*: maintaining effective communications with all stakeholders to ensure that the Committee remains current in its understanding of underlying interests and the organization's culture.
- *Mandate Review*: taking leadership in an all-party consensus-based review of the Committee's mandate and internal review processes in order to continuously improve the services we provide, while assuring

its independence, accountability, efficiency and effectiveness.

- *Modern Conflict Management Processes*: supporting the RCMP's initiatives in alternative dispute resolution and interest-based problem solving, and introducing processes within the Committee to ensure the availability of ADR mechanisms at every level. The Committee will also continue to develop its use of processes which encourage the use of modern interest-based approaches for the resolution of appropriate cases, and will provide resources where possible for coaching or mediation.
- *Technology*: implementing on a shared basis with the RCMP, an electronic data base of the Committee's recommendations and research, thus providing fairer and more efficient access to guiding principles and jurisprudence in such specialized areas of police discipline and grievance, and natural justice.
- *Legislation and Policy*: proactively responding to RCMP legislative and policy initiatives and advising where appropriate on matters which can lead to healthy systemic change.
- Issues Development: providing research, best practices studies and advice where appropriate on specific issues affecting labour relations within the RCMP.

2. Managing the Committee effectively and efficiently, by :

- *Internal Culture*: the Committee's own culture is a team-based, shared leadership culture which encourages and receives the highest quality of professionalism and commitment from its employees. It will continue to place a high priority on nurturing and maintaining this culture, of which it is extremely proud.
- *Process re-engineering*: in recent years, the Committee has undertaken a targeted and continuous review of its processes, successfully developing a streamlined, smooth-functioning and timely approach to case review. Continued attention to its processes will enable the Committee to continue to attempt to meet its commitment to process most cases within 90 to 120 days.
- *Workload Management* for improved workload planning: enhanced communication between the various sectors within the RCMP whose referral of cases can dramatically affect the Committee's workload has enabled it to plan its resource needs much more successfully. This communication will continue.

CASES

What follows is a short description of the specific cases reviewed by the Committee during the year. It excludes those cases which, under the leadership of the Committee, were resolved informally between the parties through mediation.

The number in bold print at the beginning of each summary is the reference number assigned by the Committee upon completion of the case. At the end of each summary, the disposition of the case by the Commissioner is provided, except in those cases where he has not yet issued a decision.

A) GRIEVANCES - PART III OF THE *RCMP ACT*

i) Harassment in the Workplace

G-190 Following a complaint by two employees concerning their supervisor's conduct, the RCMP found that the supervisor had harassed them. The member was criticized for having been, in general, brusque and intimidating. An investigation had concluded that there was no evidence that the member had made derogatory or intimidating comments, or that he had intentionally harassed the complainants. Rather, the RCMP's decision was based on the fact that the complainants said they were afraid of the member. The member grieved the decision, claiming that the applicable policy on harassment had been misinterpreted. Basically, the member maintained that he was the victim of his demanding management style.

The Level I adjudicator dismissed the grievance on the grounds that the member did not have standing to grieve. According to the adjudicator, the member had not suffered any prejudice in the case at hand, since no disciplinary action had been taken against him. The day after this decision, the member received a disciplinary reprimand.

The Committee first examined the issue of standing, in light of the three criteria set out in the *RCMP Act* (subsection 31(1)). First, the decision that is the subject of a grievance must be related to the administration of the affairs of the RCMP. The Committee found that this criterion had been met, since the grievance concerned an RCMP decision on a harassment complaint lodged by employees working for the RCMP.

Under the second criterion, the member must have been aggrieved by the decision. The Committee found that the member had in fact been aggrieved by the RCMP's decision that he had harassed the complainants. The adjudicator was wrong to conclude that the member had not suffered any prejudice on the grounds that no disciplinary measures had, to that point, been taken against him. The

decision that was the subject of the grievance was an administrative one, taken on the basis of the harassment policy. Whether or not a member is subsequently subject to the disciplinary procedure has no bearing on the existence of prejudice. Being labelled a harasser can certainly damage a member's credibility, reputation and career. The member is entitled to contest this prejudice.

The third criterion for presenting a grievance requires that no other process for redress from the prejudice be provided by the *RCMP Act*, the regulations or the Commissioner's standing orders. At first glance, one might conclude that a disciplinary appeal is the procedure to follow to contest a decision that a harassment complaint is founded. However, such is not the case, since a disciplinary appeal can only serve to contest a decision that the Code of Conduct was violated or to contest the sanction imposed as a result of that decision. The disciplinary process is separate from the process established by the policy on harassment, and a disciplinary appeal could not have rescinded the grieved decision, which had been taken under the policy on harassment. For all these reasons, the Committee concluded that the member had standing to grieve the decision in question.

The Committee then examined the merits of the grievance. It determined that, on the basis of the applicable policy, harassment necessarily involves improper conduct on the part of the alleged harasser. It is not sufficient for the alleged victim to feel harassed. The Committee concluded that the factual elements that came to light during the harassment investigation did not support a finding that the member's conduct had been improper. The decision based on this investigation, namely that the member had harassed the complainants, was therefore erroneous. The Committee recommended that the grievance be upheld.

The Commissioner agreed with the Committee and upheld the grievance.

G-191 During an interview conducted in furtherance of a disciplinary investigation regarding another member, the member felt that the investigator was harassing her. She informed him that she was ending the interview and left the room. The investigator ordered her to come back in and sit down. As the member walked away, the investigator also got up and followed the member out of the room, ordering her to return. The member eventually returned to the interview room, and the interview was concluded. The member filed a complaint of harassment against the investigator.

After an investigation, the RCMP found that there had been no harassment, but that the member had likely been

insubordinate to the investigator. The member submitted a grievance against this decision. The grievance was denied at Level I. It was felt that there was insufficient evidence that the investigator had shouted at the member to establish that he had harassed her. The adjudicator also found that the member had been obliged to follow the order of the investigator. The adjudicator concluded that the investigator's actions did not amount to harassment.

The Committee examined the RCMP Harassment Policy, and found that this policy operates independently of the RCMP Code of Conduct. It also found that the actions of the member were relevant only insofar as they related to the propriety of the actions of the investigator: it was the investigator's actions that were to be examined, and not the member's.

The Committee found that the appropriate inquiry to be made was whether the evidence disclosed that the actions of the investigator constituted "improper behaviour ... directed at and offensive to" the member, that the investigator "knew or ought reasonably to have known would be unwelcome"; the behaviour must not only have been offensive to the member, but must also be considered to have been "improper" in the circumstances. The evidence did not support a finding that the investigator's actions had been improper, in the specific circumstances of the case.

The Committee made comments regarding a possible apprehension of bias in the process; while there was no finding of bias in this case, the Committee emphasized the importance of the appearance of fairness to the success of the harassment complaint process, and recommended that the RCMP obtain the investigatory and decision-making services of persons wholly unrelated to the events or parties involved in the complaint, in future cases.

The Commissioner agreed with the Committee and denied the grievance.

G-192 A member complained of a number of incidents, which the member felt amounted to harassment by his superior. The first of two principal incidents occurred at a meeting dealing with administrative matters. Superior officers, as well as peers and subordinates of the member, were in attendance. The superior felt that the member had not followed certain instructions which had been given to him. The superior loudly berated the member and told him "I'm fed up with you". Afterwards, the superior apologized for getting annoyed. The second principal incident occurred a few days later when the superior called the member to his office to advise him of a performance log entry in relation to the member's non-compliance with the administrative instructions. The superior was alleged to have pointed his finger at the member and stated words to the effect

of "that's once, don't let it happen again".

A harassment investigation was conducted. It was determined by the RCMP that there was no evidence of harassment. The member grieved this decision. The Level I adjudicator agreed with this and found that the complaint was unfounded. The adjudicator accepted that the member had felt intimidated by his superior. In fact, the adjudicator noted that this superior was a large, forceful and imposing man who had surely left many other members feeling somewhat intimidated. However, for the adjudicator, what intimidation might have resulted from the superior's direct behaviour was certainly always unintended. The adjudicator found that the superior's behaviour towards the member did not amount to harassment as the superior had acted "in a manner precisely as those who know him would expect".

The Committee first examined the applicable harassment policy and explained that although an intentional element might be more significant in dealing with an allegation of abuse of authority, which is a specific type of harassment, the policy's general definition of harassment does not require proof of intention. The proper inquiry to be made, rather, is whether the conduct constituted improper behaviour, directed at and offensive to the complainant, which its author knew or ought to have known would be unwelcome.

Based on this test, the Committee examined the incidents at the base of the complaint. The first incident concerned the fact that the superior loudly berated the member on a performance issue before superiors, peers and subordinates of the member. The Committee found that, even in supposing that the superior was correct in perceiving a lack of compliance with directions which had previously been given to the member, there was no reason for the superior to act in this manner in a meeting dealing with administrative matters. The performance problem perceived by the superior could easily have been dealt with afterwards, in private. In addition, the superior's remark, "I'm fed up with you", not only served to identify a shortcoming in the member's performance, but it disparaged the member personally before those in attendance at the meeting. The superior's behaviour was therefore improper. The Committee also found that the superior's behaviour was sufficiently serious that he could reasonably be expected to have known that it would be unwelcome. His behaviour thus met the two principal criteria of the harassment policy. The Committee concluded that the superior's behaviour towards the member at the meeting constituted harassment.

With respect to the second incident in the superior's office, the Committee concluded that his behaviour had not been improper and could thus not

constitute harassment. The Committee noted that the discussion in the superior's office, unlike the general meeting in which the first incident occurred, was held for the specific purpose of addressing what the superior felt were performance problems. The Committee recognized that the discussion left the member feeling intimidated and hurt. However, it noted that such discussions will normally cause a certain degree of negative feelings on a subordinate's behalf, especially in cases where the subordinate receiving the comments disagrees with them. The Committee explained that such feelings must be provoked by some improper behaviour by the alleged harasser for there to be harassment; the Committee was satisfied that this was not the case, here.

Based on these findings, the Committee recommended that the grievance be partially upheld. The Committee then examined the issue of the appropriate remedy which should be granted to the member. The Committee acknowledged that an apology had been provided by the superior at the meeting. The Committee explained that there will always be outbursts between co-workers and the author of such an outburst must be able to remedy a potential harassment incident with a well-worded apology. In the current case, however, there was no information on file as to the precise wording of the apology, nor as to whether the apology was directed at the member or at those in attendance at the meeting. Although the Committee felt that the superior's apology was undoubtedly well-intentioned, there was insufficient information to conclude that it remedied the behaviour. The Committee recommended that, in addition to any other measure which the Commissioner might deem fit, the RCMP should, as the member's employer, recognize that it had failed to ensure him a harassment-free workplace and apologize for this in a letter to him.

The Commissioner did not agree with the Committee's conclusion that the behaviour in the first incident constituted harassment. The Commissioner denied the grievance.

ii) Provision of Legal Assistance

G-200 A member had agreed to keep three antique handguns for safekeeping for the members of a family whose mother had passed away, pending the settlement of her estate and the proper registration of the weapons. The family was concerned about the safety of one of its members, whose reaction to his mother's death was expected to be quite grave, and the family was worried about the handguns being close by during this period. The member kept the weapons at his office until the offices were moved, at which time he took the weapons to his home. During a break-in at the member's house, the weapons were stolen. They

were subsequently seized by the municipal police force. The member was charged with possession of a restricted weapon without a registration certificate, under subsection 91(1) of the *Criminal Code.*

The member sought payment of his legal fees at public expense, to defend against the charge. His request was denied on the basis that he had been rendering a personal favour to his friends, and not acting within the scope of his duties. The member grieved this decision.

The Level I adjudicator denied the grievance on the basis that the member was not acting in the scope of his duties in helping his friends. While he could have been so acting originally, in taking the weapons to his house, he indicated that he was treating the weapons as personal possessions rather than as items seized by the RCMP.

The Committee found that the member's intention in possessing the weapons was to discharge a police duty, and nothing in his actions indicated a change in that intention. Thus, the member had been acting within the "scope of his duties" throughout the period of his possession. However, the Committee found that the member had failed to keep any record of his dealings with the weapons, or to document or identify the weapons in any way that would have been consistent with his intention to discharge a police function. This indicated that he had not acted in accordance with "reasonable departmental expectations", the second and subsidiary requirement of the applicable policy on legal fees. While he could have exhibited less than perfect compliance with operational Manual provisions regarding the processing of seized articles and still met those expectations that were "reasonable", he complied with none of the guidelines for such a situation, over a very long period of time. Therefore, despite the member's honourable intention and good faith, the Committee recommended that the grievance be denied.

iii) Stoppage of Pay and Allowances

G-202 A member was suspended from duty, with pay, after being arrested and charged with assaulting his wife. He was then made the subject of disciplinary allegations relating to the spousal abuse. After the member pleaded guilty to the criminal charge and was sentenced, he was served with a Notice to Recommend Stoppage of Pay and Allowances, which was based on the disciplinary allegations and the criminal conviction. The then Director of Personnel (DOP) found that the recommendation came too late after the RCMP knew the nature of the member's conduct, and did not approve it.

The member then underwent a disciplinary hearing, at which an agreed statement of facts was submitted, and he

admitted to the allegations. The Adjudication Board imposed a direction to resign, which sanction the member has appealed. After the hearing, the member was served with a second Notice to Recommend Stoppage of Pay and Allowances, which was based on the fact that the hearing and the agreed statement had established both the continual nature of the member's abuse of his wife, and an occasion on which the member had pointed his firearm at her. The member's pay was stopped.

The member grieved this decision. A unanimous Grievance Advisory Board (GAB) recommended upholding the grievance on the basis that the RCMP had known the nature of the member's conduct for a long period of time, the disciplinary hearing did not constitute new developments justifying a new decision, and the second recommendation was therefore untimely; the GAB agreed with the views expressed in the first decision to the effect that the stoppage of pay at such a late stage in the process made the measure appear punitive, which was not its purpose. The Level I adjudicator disagreed and denied the grievance.

The Committee examined the policy on suspension without pay (SWOP), and found that it is a continual process that develops with the circumstances of a case; therefore, where new developments arise, a new decision may be taken. In this case, however, the Committee found that the disciplinary hearing had not revealed any new facts or developments that would affect the previous decision. That is, the disciplinary hearing had established the member's involvement in the previously alleged conduct, but that involvement had been "clear", in the words of the SWOP policy, long before the hearing. The RCMP had conducted the investigation leading to the charge and had made the allegations on the basis of the evidence gleaned in the investigation; the DOP had found the member's involvement in the alleged conduct to have been "clear" after the first recommendation to stop pay. The SWOP policy requires the RCMP to await the establishment of charges or allegations only where the involvement of the member in the alleged conduct is not clear; this was not the case here. Therefore, the establishment of the allegations did not constitute a new development which could properly give rise to a new decision to stop pay, in this case. In light of the purpose of SWOP, the protection of the integrity of the RCMP, the measure can serve its purpose only where it is used in a timely manner. The Committee agreed with the GAB and with the first decision in the matter, that the stoppage of pay could not be considered timely, and therefore recommended that the member be reimbursed his lost pay and allowances.

The Commissioner agreed with the Committee and upheld the grievance.

iv) Medical Discharge

G-197 A member had been on sick leave, either periodically or continually, for a period of several years. The Health Services Officer had recommended that the medical discharge process be initiated in relation to the member, although the member's medical condition had not been diagnosed at that time. A medical board found that the physical and mental condition suffered by the member was of a chronic nature with little likelihood of significant improvement in a foreseeable future. On that basis, the RCMP discharged the member. The member grieved her discharge, arguing that it had been premature and that due process had not been followed. The Level I adjudicator denied the grievance; he found that the discharge was appropriate, fair and reasonable. The Committee noted that this case was a difficult one, in that the RCMP had attempted to medically discharge the member, who had been on sick leave, either periodically or continually, for several years: this was an extremely long period of time to be on sick leave, from anybody's perspective. There is no doubt that the lengthy absence had caused great stress on the member, as well as placing important pressure on the detachment where the member was posted. However, these stresses and pressures were not relevant in law to the central issue that had to be decided, which was whether or not due process had been followed in the circumstances. The RCMP has an obligation to ensure that, when it takes steps towards the medical discharge of a member, this be done in accordance with due process.

Subsection 28(1) of the *RCMP Regulations* provides that, when a designated officer considers a member's ability to work for the RCMP to be impaired because of a physical or mental condition, a medical board is appointed to determine the degree of the member's impairment. The essence of this provision is that a Notice of Intention to Discharge is in the nature of an allegation that needs to be tested by a medical board. In this light, the existence or absence of a medical diagnosis would be more determinative at the time a medical board assesses the allegation that the degree of the member's impairment is such as to justify discharge. The Committee therefore found that a medical diagnosis is not, by itself, a prerequisite to a Notice of Intention to Discharge. The Committee found that there was nothing to support a finding that the Notice of Intention to Discharge was not valid.

The Committee then examined the Medical Board's report and found several problems. The Board had failed to report on the physical or mental condition of the member and its relationship with any impairments to the member's ability to work for the RCMP; in fact, there had been no analysis in support of the

limitations and impairments identified by the Medical Board. The Medical Board had also failed to make any specific recommendations as to the member's continued service in the RCMP, in either a regular or civilian member capacity. The report had not addressed many of the issues the Medical Board should have considered, such as: 1) a diagnosis or an assessment of the member's physical and mental condition; 2) a determination of any effect such a condition could have on the member's ability to perform any kind of work for the RCMP; 3) in the event it was found that the member's ability to perform would be impaired, a determination of whether such an impairment would be of a) a temporary or permanent nature and b) a partial or total nature. The Committee concluded that the deficiencies of the Medical Board's report were fatal to the medical discharge process, and that the report had not enabled the Appropriate Officer to make any kind of finding on whether the member should be medically discharged. This being the case, the Committee recommended that this grievance be upheld.

Because of its lack of medical expertise, and because the record contained no up-to-date medical information on the member's physical and mental condition, the Committee declared itself unable to make any findings or recommendations regarding the member's ability to work for the RCMP. In this light, the Committee recommended that a new medical board be appointed to determine the member's physical and mental condition and whether such a condition would impair the member's ability to work for the RCMP.

Finally, in light of all the circumstances of this case, the Committee strongly encouraged the member and the RCMP to cooperate, through the medical board process, in determining the best approach to ensure that the member's medical and mental condition is fairly and objectively assessed in a timely fashion.

The Commissioner accepted the recommendations of the Committee. He upheld the grievance and ordered that a new medical board be appointed to examine the matter.

v) Relocation Directive

G-194 After her retiring member husband received authorization to take a pre-retirement house-hunting trip (HHT), the member made a request for paid leave to accompany him on the HHT. Her request was denied for the reason that she did not qualify under the RCMP Relocation Directive for time off because she was not, herself, retiring or otherwise being transferred. The member submitted a grievance against this decision, arguing that it represented an incorrect interpretation of the RCMP Relocation Directive and constituted a violation of

her right against discrimination based on her marital status, which right is protected under the *Canadian Human Rights Act.*

The Level I adjudicator determined that the grievance had been rendered merely academic and hypothetical because, according to his own inquiries, no HHT had actually been taken by the member or her husband. Thus, the issue of the member's entitlement to paid leave for such a trip was now merely academic, in his view, so that the member no longer had standing to bring the grievance.

The Committee determined that the member had standing and that the grievance had not been rendered merely academic. The member had a direct interest in challenging the validity of the decision, a remedy could be effective for her and she satisfied the "aggrieved" requirement in subsection 31(1) of the *RCMP Act.*

On the merits of the grievance, the Committee determined that the member did not qualify for paid leave under the terms of the RCMP Relocation Directive. While her husband qualified under the Directive for time off for an HHT as a retiring member, she could not establish her own entitlement. As she was not being relocated by the RCMP as a consequence of her employment, she qualified for only those benefits allowed to the spouses of relocating members. Thus, her expenses for the trip had been authorized, but she did not qualify for paid leave. The Committee also found that the decision had not been discriminatory.

The Commissioner agreed with the Committee's recommendation and he denied the grievance.

G-196 A member purchased a residence. At the time of purchase, the member spent a considerable amount of money to replace soiled and worn carpeting in the residence. The member was subsequently transferred and, having experienced a monetary loss on the resale of his residence, the member applied for and received reimbursement under the Home Equity Assistance Plan (HEAP). The RCMP, however, did not consider the amount for the carpet replacement to be an allowable part of the purchase price for the purpose of HEAP. The calculation of the member's equity loss, and hence the HEAP reimbursement, did not take this amount into consideration. The member grieved.

The grievance was denied at Level I on the issue of time limits. The member had received an extension of time to present the grievance at Level I. When it was submitted, the grievance was stamped as received by the grievance unit on a date one day later than the last day of the extended time limit. The adjudicator found that time limits must be interpreted and applied strictly and that the present grievance was outside the time limit.

The Committee reviewed the matter and noted that the grievance had been sent by mail. As such, in accordance with a Federal Court precedent, it was the date of mailing which was the date the grievance should be taken as having been presented. Given that the grievance was received only one day after the expiry of the time limit, given that it was mailed a considerable distance from the place where it was received, and given the member's own statement about the date on which he mailed it, the Committee found, on a balance of probabilities, that the grievance had been submitted within the applicable time limit.

In another preliminary matter raised in the grievance submissions, the member made an argument about possible conflict of interest: the same officer who acted as Level I adjudicator had had some involvement in the decision on the member's HEAP claim. The Committee found nothing which would suggest that the Level I adjudicator executed his function in a biased or intentionally unfair manner. Nevertheless, it recognized from the perspective of the member the appearance of the adjudicator's actions as giving rise to a possible *apprehension* of bias. It commented that such a situation should be avoided in the future.

The Committee found that although the grievance had not been subject to adjudication on the merits at Level I, the Committee was in a position to deal with the merits at Level II. Addressing the merits, the Committee observed that in a number of earlier cases—G-110, G-111, G-158—the Committee had recommended that certain amounts for renovations performed on a residence could be included in the calculation of the purchase price for the purpose of HEAP notwithstanding that the renovations were not found in the specific list of improvements set out in the HEAP provisions of the Relocation Directive. In specific, the Committee found that basic renovations related to the integrity or livability of the residence could be included. In each previous case, however, the former Commissioner and present Commissioner had disagreed with the Committee and maintained a stricter interpretation of the purchase price calculation.

The Committee found that there were key distinctions between the facts of the present case and the facts of the previous cases such that, even if the underlying logic employed by the Commissioner in these cases were to be applied, the present claim could be paid. In the present case, the purchase of the carpeting was very closely related to the purchase of the residence. Both parties to the purchase agreement had acknowledged—through the price negotiation process—that the vendor would have to absorb the cost of the new carpet by either paying for it, or by discounting the price of the house by a corresponding amount. The carpet was

replaced before the member and his family began occupying the residence. Another distinctive element in the present case was that there was no indication in the present case that the house was an "amateur carpenter's special". Such a concern had arisen in earlier cases. With respect to the present case, the Committee noted that a house with a bad carpet can still be a wise investment, both from the point of view of the member who purchases it and the RCMP which partially indemnifies against losses stemming from market decline. The Committee urged the Commissioner to consider these distinctions and to uphold the present grievance.

The Committee also urged the Commissioner to reconsider the rationale for the Level II decisions in the previous grievances. It noted that while there are distinctions between the present grievance and these previous grievances such that the present grievance could be upheld despite the denial of the previous grievances, the Committee nevertheless continued to hold the opinion expressed in the Findings and Recommendations issued for these previous grievances. The Committee observed that the Commissioner had expressed concerns about excessive subjectivity in distinguishing between expenses which merely maintain a residence to its standard at the time of purchase and amounts that would be allowed under the Committee's suggested criteria. However, the Committee pointed out that real estate assessors are able to distinguish between mere maintenance and added-value renovations necessary to the integrity or livability of the residence; such assessments can be part of their assessments provided to the RCMP for the purpose of HEAP applications (as it was in this case). Furthermore, RCMP financial reviewers are able to make decisions based on this advice from real estate assessors, as they do in other parts of the HEAP assessment.

The Commissioner agreed with te Committee that the grievance had been submitted within the statutory time frames but on the merits, did not accept the Committee's Findings and Recommendations and denied the grievance.

G-198 A member who was subject to the Work Force Adjustment Directive sought to sell his house, and applied for consideration under the RCMP's Home Equity Assistance Plan (HEAP), since he would suffer a loss on the sale. He sought to include in the calculation of the purchase price of his house $64,000 he had spent making a number of renovations to the property, which included about $34,000 in landscaping. The RCMP approved the HEAP application, allowing the price of certain improvements to be added to the purchase price, but disallowing $46,000

of the improvements, which included the landscaping expenditures.

The member grieved the decision regarding the amounts excluded from the calculation. He argued that his expenditures had added value to the house and ought to be considered part of his equity in the house. The Level I adjudicator denied the grievance. He determined that HEAP was not meant to cover expenditures made for any and all renovations that were a matter of personal choice and taste.

The Committee first noted that the policy explicitly allows expenditures for "necessary landscaping (excluding decorative)" to be included in the purchase price. The Committee indicated that what was "necessary" would depend on the circumstances of the case and that, in some circumstances, standards of the community could be a relevant factor. In this case, however, the member had not given any compelling reasons indicating the necessity of his expenditures, and his landscaping was more extensive than that of the community.

Examining the other expenditures, the Committee reiterated its view that the lower of cost or added value of basic renovations necessary to the integrity or livability of a residence should qualify for inclusion in the purchase price under HEAP, as long as they are not maintenance expenses. However, in this case, the expenditures related to items of a personal choice nature that constituted "extras" and did not relate to the integrity or livability of the house. On this basis, the Committee recommended that these items not be included in the purchase price of the member's house, and that the Commissioner deny the grievance.

The Commissioner agreed with the Committee's recommendation on the disposition of the grievance and denied it.

G-199 After a relocation, a member's claim for reimbursement of a mortgage default insurance (MDI) premium had been denied on the ground that, contrary to the terms of the RCMP Relocation Directive, the member had failed to transfer the full equity from his old-post residence to his new-post residence. The member had grieved and, following Findings and Recommendations by the Committee in G-92, the Commissioner found that there had been clerical errors in the RCMP's calculation of the member's claim. He ordered that the matter be returned for a new determination. In the new determination, the RCMP found that, after correcting the clerical errors, the claim still should be denied on the basis of failure to transfer the full equity. The member grieved again, arguing that the RCMP had failed to inform the member of the requirement to make a full-equity transfer.

The Level I adjudicator found that there was insufficient evidence that the member had been misled about the need

to make a full-equity transfer. The grievance was denied at Level I.

The matter was referred to the Committee. The Committee reviewed the facts and found, on a balance of probabilities, that the member had specifically asked a RCMP financial analyst about the reimbursement of the MDI premium and, in response, the analyst had not informed the member of the full-equity transfer provision, nor had the analyst referred the member to the applicable section of the Relocation Directive.

The Committee found that, as a matter of principle, the Committee's reasoning in G-55 was applicable to this grievance: in that previous case, the Committee had found that the RCMP must provide complete and accurate responses to requests for information made to relocation contacts; despite the brevity and relative simplicity of the provision describing the full-equity transfer requirement for MDI, the RCMP had failed to give the member full information in response to his request; the Committee had found that, in the circumstances, it would be manifestly unfair for the RCMP to rely upon the strict terms of the full-equity transfer restriction.

The Committee then considered the former Commissioner's decision in G-55. In its view, the principles set out by the Commissioner in G-55 were consistent with payment of the member's claim in the present case. The member in the present case had attempted to inform himself in advance of his entitlements under the Relocation Directive, and, specifically with respect to MDI, he had done so by means of a telephone enquiry of a RCMP financial analyst. While the member could also have checked this information in the Administration Manual, where a member makes an enquiry and where an analyst from Financial Services and Supply Branch responds, the member is entitled to rely on the response. Naturally, therefore, the response should not be such as to mislead the member. The RCMP's obligations in a case of actually misleading verbal advice are not negated by the existence of better advice in the Administration Manual, and the Committee did not read the Commissioner's reasons in G-55 as saying otherwise.

The Committee found that the advice given to the member was, in fact, misleading. Where a member specifically asks about the reimbursement of a MDI premium, and where the RCMP financial analyst does not inform the member of one or both of the simple and basic restrictions on reimbursement (lack of lump-sum payment, lack of full-equity transfer) or provide the caveat of referring the member to the policy provision where these restrictions can be found, then this advice is misleading.

The Committee was further persuaded to recommend that this

grievance should succeed due to the fact that, since the Commissioner's decision in G-55 was issued in 1992, there have been numerous new management initiatives and many of these have involved the human resources area. The RCMP now recognizes that its own employees are the 'clients' of the various employee-relations policy centres and it is seeking to strengthen the services provided to these clients. The Committee felt that the decision on this grievance should take into consideration these new management philosophies within the RCMP.

The Committee thus recommended that the grievance be upheld and that the member be reimbursed his MDI premium. The Committee emphasized, however, that the decision in this case was based on the particular facts presented and it cautioned that not all cases should or could be upheld on the basis of the reasons given in this matter.

The Commissioner did not accept the Committee's recommendation and denied the grievance.

G-205 A member who was to be transferred to another division sought approval under the RCMP's Home Equity Assistance Plan (HEAP) because he anticipated losing money on the sale of his house. He sought to include in the calculation of the purchase price the cost of the renovations he had made to the house. He was denied coverage under HEAP, as the RCMP determined that his sale price had not been lower than his purchase price; the RCMP had allowed some of the member's renovations to be included in the purchase price, but had disallowed others. The RCMP had also found that the calculation of the purchase price could not include the value of a piece of land that was attached to the house lot. The member submitted a grievance against the decision, seeking inclusion of all of his renovation costs and challenging the exclusion of the value of the additional land from the purchase price.

An informal resolution of the issue regarding the additional land was reached, resulting in a decision that the member did qualify for HEAP. However, the member continued his grievance on the issue of the inclusion in his purchase price of his cost for the installation of carpet and hardwood flooring, which had been disallowed by the RCMP. The Grievance Advisory Board (GAB) recommended that the grievance be denied, as it found that the flooring renovation could not be included in the purchase price for the house; it stated that the list of allowable improvements in the definition of purchase price in the policy on HEAP was exhaustive, and flooring renovations were not on the list. The Level I adjudicator agreed and denied the grievance. The member sought Level II determination of the grievance.

The Committee examined the definition of purchase price in the policy,

and reiterated its view that the lower of cost or added value of basic renovations which are necessary to the integrity or livability of a residence should qualify for inclusion in the purchase price under HEAP, as long as they are not expenditures which maintain the value of the residence. In this case, the entire house had been covered in commercial linoleum tile flooring of a nature commonly found in hospitals and schools; the Committee found that to remove this kind of flooring and replace it with residential flooring was a matter related to the livability of the house, and was reasonable in the circumstances. There was no argument by the RCMP that the flooring materials used by the member were extravagant or were beyond what would constitute reasonable residential flooring materials; the Level I adjudicator had accepted that the flooring installed was in accordance with the norms and standards of the community. The Committee found that the flooring renovation had not been a value-retentive or maintenance expense, but had added value to the residence; the Committee therefore recommended that the value added to the house by the flooring renovation be included in the member's purchase price, and that the Commissioner allow the grievance.

vi) Living Accommodation Charges Directive

G-201 After a member was transferred, he learned that his replacement at the old post, who occupied the same Crown-owned accommodation that the member had occupied while there, had sought a recalculation of the rental charges levied for that unit, and had received a reduced rental charge along with a retroactive reimbursement of overpayments. The member submitted a request for retroactive reimbursement of the "overpayments" he had made while living there, stating that he had faced the same conditions his replacement had, and therefore deserved the same reduction in rent. That request was denied, and the member grieved that decision.

In his decision denying the grievance, the Level I adjudicator accepted that the conditions faced by the member were "similar" to those faced by his replacement, but found that, since the onus was on occupants to discover problems with rental charges during their tenancy, and the member had not done so, he could not assert a right to a retroactive payment after accepting and paying the rental charges while he lived in the unit.

The Committee accepted the similarity of the conditions faced by both occupants of the unit, and found that the changes to the charges enjoyed by the member's replacement indicated that the

charges levied against the member had been excessive. The Committee found that the onus for the proper administration of the Living Accommodation Charges Directive (LACD) rested with the RCMP rather than with the occupants of the accommodation. It also found that the LACD contemplated reimbursements of overpayments to occupants, retroactive to the date of the error or change. As a former occupant, the member was entitled to a reimbursement, in the Committee's view, since it had been the RCMP that had not correctly administered the LACD.

vii) Bilingualism Bonus

G-204 This grievance concerned the retroactive payment of the bilingualism bonus. In consequence of the Federal Court decision in the *Gingras* case, the RCMP undertook to pay members who had been eligible for the bonus in the past, but who had not been paid. In the present matter, the RCMP informed a bilingual member that he had been denied payment of the bilingualism bonus for a certain period of time. During this period the member had been posted at a detachment located in a unilingual region for which no unit bilingual complement (UBC) had been identified. The RCMP's rationale for denying the bonus to the member was that Treasury Board had directed that the bilingualism bonus be paid only to members who were in a UBC unit.

The member grieved the RCMP's decision. The member argued that he had provided French language services at the detachment and he also noted that he had been bound by an administrative arrangement to provide French language services at a neighbouring detachment where a UBC had been identified, but which had no bilingual member posted at the detachment. Further, the member pointed out that he had been identified as a bilingual resource in the divisional administration manual supplements.

A Grievance Advisory Board (GAB) recommended that the grievance be upheld, but only for the period during which the member had provided bilingual services to a neighbouring UBC detachment. The GAB found that, due to this administrative arrangement, the member had become *de facto* part of a UBC detachment during this period.

The Level I adjudicator agreed that, for the reasons given by the GAB, the member had been in a position very much akin to being in a UBC while he had provided French-language services at the neighbouring detachment. The adjudicator upheld the grievance. However, due to the Treasury Board criteria, the adjudicator stated that the remedy he could provide was limited to directing that the Official Languages Branch approach Treasury Board with the circumstances of the case so that Treasury Board could determine whether the member qualified for the bonus.

The Officer-in-charge (OIC) of Official Languages Branch denied implementation of the remedy directed by the Level I adjudicator. He noted that the RCMP had already approached Treasury Board on related matters and had received the firm response that there could be no departure from the established eligibility rules. In response to the decision of the OIC Official Languages, the member submitted the grievance to Level II, arguing that he had not received the remedy he had been awarded at Level I.

The grievance was referred to the Committee. After receiving the grievance, the Committee invited the parties to make additional submissions with regard to a letter from the Treasury Board Deputy Secretary, Official Languages and Employment Equity Branch in which eligibility criteria with respect to retroactive payment of bonus were supposedly set out. The Committee enquired whether the letter *was* or *was based upon* an instrument of Treasury Board formally amending or supplementing, for the RCMP, published Treasury Board policy applicable to the public service with respect to the bilingualism bonus. The RCMP provided submissions stating that the letter in question neither *was*, nor *was based upon*, such an instrument. The submissions stated that the letter was rather a reiteration and clarification of certain decisions taken by staff at the RCMP and at Treasury Board.

The Committee issued its Findings and Recommendations. With respect to the refusal, by the OIC Official Languages, to implement the Level I adjudication, the Committee referred to its Findings and Recommendations in G-90. In that case the Committee had indicated that, in exceptional circumstances where, in the RCMP's view, an adjudication was clearly incorrect and could threaten the good administration of the RCMP, the RCMP could refuse to implement such a decision. In such a case, nevertheless, the RCMP was required to forward the grievance to Level II for final adjudication. The Committee was willing to apply the procedure in G-90 to the present case and to treat the case as properly referred for full review at Level II of the process.

On the merits, the Committee found that, based on the record and submissions before it, the Committee had nothing to indicate that the criteria set out in the Treasury Board Deputy Secretary's letter were, or were based upon, actual Treasury Board policy. Rather, the letter from the Deputy Secretary, and another related letter from another public servant, appeared to be letters from staff members at Treasury Board Secretariat. The Committee noted that a Deputy Secretary of Treasury Board is not a member of Treasury Board itself and that, whatever the extent of authority of a Treasury Board Deputy Secretary may be, it does

not include abrogating or amending a Treasury Board policy by means only of the Deputy Secretary's own letter.

The Committee reviewed the applicable policy actually adopted by Treasury Board. An important principle became apparent. Treasury Board had provided that it was to be individual federal institutions, and not Treasury Board Secretariat, which would identify the language requirements of each institution's positions. The Committee found that the RCMP had failed to follow the Treasury Board policy with regard to the identification of positions. Eligibility for the bonus was defined according to whether members occupied bilingual positions. For the purposes of payment under the bilingualism bonus policy in UBC areas, where individual positions were not previously linguistically identified, retrospective consideration was to have been given as to which positions should be identified as having been bilingual positions. In accordance with Treasury Board policy, the identification of bilingual positions was to be performed by the RCMP. However, instead of turning its own mind to what positions were, in effect, its bilingual positions during its relevant period, the RCMP had seen itself as having been constrained by the criteria from Treasury Board Secretariat which purported to establish which position-holders should be paid the bonus.

The Committee recommended that the grievance be upheld. The Committee recommended that the RCMP exercise its own best judgment —according to its own knowledge of the manner in which the RCMP organized its workplace—as to which members should be identified as having occupied bilingual positions. Thus, in the present case, the question of the member's eligibility for the bilingualism bonus should be remitted to the appropriate administrative decision-centre for redetermination in accordance to the RCMP's best judgment.

The Committee acknowledged that, despite its analysis, it was possible that the Commissioner might disagree with the Committee's approach and find that the RCMP did not consider itself constrained by the criteria set out by staff at Treasury Board Secretariat. Such a finding would be difficult to support. Nevertheless, even if it were made, such a finding would not affect the final conclusion. If it were found that the RCMP adopted the criteria as its own view of how to determine which were its bilingual positions, it further could and should be found the RCMP *itself* failed to take into account its own policies and practices. The Committee noted that the grievance would be upheld on essentially the same basis as described previously.

In a further alternative, the Committee recommended that if the Commissioner were to find that the RCMP was compelled to apply the

criteria set out by the Treasury Board Deputy Secretary, it nevertheless could and should be found that the RCMP's *interpretation* of these criteria was incorrect on at least one ground: it could and should be found that, contrary to the RCMP's determination, a member who is tied to a UBC through an administrative arrangement, is, in effect, part of the UBC for the purpose of eligibility under the criteria set out by the Treasury Board Deputy Secretary.

viii) Language Requirements in Staffing Actions

G-195 The member in this matter presented a grievance against his preclusion, some four years earlier, from a job competition. The member had been precluded on the basis of language requirements. The member explained in his grievance that he had recently learned that another member, who had also been precluded from the same job competition on the basis of language requirements, had since successfully grieved these requirements. The other member having had his candidacy re-examined, as a result of his grievance, the member in this grievance was now seeking to be provided similar consideration.

The Level I adjudicator denied the grievance on the basis of time limits. He found that regardless of the outcome in the other member's grievance, the member here became aggrieved at the time of his preclusion and not upon learning that another member had successfully grieved the language requirements.

The Committee noted that a difficulty with this matter was that the subject of the grievance was not entirely clear. On one hand, the member appeared to be contesting the RCMP's decision to preclude him from consideration in the job competition on the basis of language requirements. On the other hand, certain arguments also appeared to be directed at the RCMP's omission to re-examine his candidacy, as it had done for the member in the other matter. The Committee found that to the degree that the grievance was directed at the decision precluding the member from the job competition, the grievance was outside the statutory time limit and should thus be denied. The member became aggrieved on the date on which he learned of that decision and had 30 days to grieve it. Clearly, his grievance presented some four years later did not respect this time limit. The Committee noted that in certain very specific circumstances, where a member asks the RCMP to reconsider its initial decision, the new decision taken by the RCMP can become grievable in and of itself. In this case, however, there was no such new decision on which the grievance could be based.

The Committee then found that to the degree that this grievance was

directed at the RCMP's omission to re-examine the member's candidacy when it was determined, as a result of the other member's grievance, that the language requirements for the 1992 staffing action were invalid, such an issue is strictly a staffing matter and the Committee does not have jurisdiction to examine it, as per section 36 of the *Royal Canadian Mounted Police Regulations*. The Committee thus refrained from making any finding on this aspect of the grievance and left it to the Commissioner to deal with the matter.

ix) Classification

G-193 A new job description was approved for a civilian member's position and a classification exercise was performed. The position was given the same classification which it previously had. The member grieved and the grievance was upheld at Level I, with the adjudicator ordering a new classification exercise to take place. A new classification exercise was performed, but again the position received the same classification. The member grieved again. He argued that two factors of his job had been undervalued in the classification exercise, that the classification committee had not used all the tools available to it in assessing his position and had failed to consider relativity to other positions, and that the classification committee had not given him an opportunity to make representations on the classification.

Before making a decision, the Level I adjudicator asked the RCMP to provide the "full rationale" for the classification decision. In response, the RCMP requested that another classification evaluator assess the position, albeit only on the factors disputed by the member. The new evaluator came to the same conclusion as that of the classification committee and this conclusion was transmitted to the Level I adjudicator by the RCMP. The Level I adjudicator then rendered his decision and found that the grievance record revealed no error of fact or process; he also stated that he could not ignore the fact that numerous classification evaluators had now assessed the position and were not in agreement with the member's opinion on the classification.

The Committee reviewed the matter and found no clear error of fact or process in the assessment, by the classification committee and the final classification evaluator, of the two job factors the member disputed. The Committee also found no support in the member's arguments with respect to failure to use certain classification tools, namely a bench audit and the assistance of a technical expert in the member's field. Use of a bench audit could be relevant to a dispute over a job description, but the proper description of the member's job was not at issue here.

The Committee found, however, that there was support for the member's general argument that the classification committee needed more information to properly understand his position and the Committee found that there was vital information from the member's submissions which shed light on the position and which was not before the classification committee. The Committee nevertheless found that this information had been provided to the final classification evaluator; in light of this, this issue did not justify upholding the grievance.

The Committee did, however, recommend upholding the grievance on the issue of relativity. Classification evaluation is more than a factor-by-factor assessment: as a final step, the position being rated must be considered as a whole against other positions to ensure the validity of the total rating. This comparison was not done in this case. This error was serious enough, in view of the importance of relativity, as underlined by the Federal Court in the Chong case and in view of instructions in the classification standard itself, to require that the classification be redone in order that relativity be fully and adequately examined. The Committee also observed that retroactivity of the classification should be addressed in the new classification exercise and this must be done with reference to a determination of a reasonable date for the assignment of new duties and responsibilities.

Addressing the issue of the right of the member to make submissions to classification evaluators, the Committee found no specific rights of this nature in current policy. It noted, however, that this result might not hold if the issue were examined against general duties of fairness and rights to natural justice in administrative law. Given that the grievance was resolved on other issues, it was not necessary for the Committee to make specific findings and recommendations on this issue.

G-203 A member held the position of Regional Environmental Health and Safety Advisor (REHSA) for his division, and sought reclassification of that position. A generic job description applicable to all REHSAs across the RCMP was submitted for review. It was determined that the existing classification for all REHSA positions was valid; in a further explanation, it was stated that a possibility that there might be further delegation to field positions indicated that the job description might have to be resubmitted. The member filed a grievance against the failure to increase the classification level of his position. The RCMP took the position that there had been no decision made, and that the submission of the job description had been merely to "test the waters".

The Level I adjudicator denied the grievance on the basis that the member had no standing. It was found: that there was no decision made; that the member was not personally affected by the evaluation of the generic job description; that even if there had been a reclassification, there was no guarantee that the member would have been promoted to the higher level; and that the grievance was premature, as there had not yet been a final decision rendered.

The Committee found that the member had standing to grieve the refusal to reclassify his position. The job description that was submitted applied to all REHSAs, including the member; it was evaluated and a decision was made to maintain the classification level. The member was personally affected by this decision, as he had a direct interest in the proper classification of his position, and had lost the opportunity for promotion to a higher level as a result of the decision. While it appeared that the decision could possibly be reconsidered on a further submission of the job description, the member did not know at that time whether it would be reconsidered, and was therefore entitled to grieve the decision when he did.

The record indicated that, after initiating the grievance, the member had held it in abeyance while his superiors updated the generic job description and resubmitted it. This led to a second decision to maintain the position's classification level. This second decision, which was not the subject of the grievance, was found by the Committee to have rendered ineffective any remedy that could be granted in this grievance. That is, the proper remedy to be given if the grievance were well-founded would be a re-examination of the classification using an accurate job description. Since this process had already been done, a remedy could no longer be effective against the first decision; only a remedy against the second decision could have been effective. If the member had also grieved the second decision, the merits of the grievance could be considered and a remedy could have been effective. Since the grievance did not relate to the second decision, the Committee recommended that the grievance be denied on the basis that it was moot.

The Committee expressed its concern regarding the process that had led to the first decision, and suggested that the Commissioner consider ordering a full classification exercise to be done.

G-206 A member worked as a translator in a division. A classification committee met to review the classification of his position. After a review of the member's position and the classification standard, the classification committee recommended that the classification of the member's position remain at the same level. This recommendation was accepted.

The member filed a grievance against this decision. He requested that his position be reclassified upward or, at the very least, that he be paid a supplement by the RCMP in recognition of the superior requirements of his position, namely the obligation that he translate in both directions: from English to French and from French to English. The member indicated that at RCMP Headquarters, as at the Secretary of State, the staffing policy was such that translators were hired to translate only in one direction: from English to French or from French to English. However, translators in the RCMP divisions were required to translate in both directions. The member also advanced further arguments related to the link between his position and the position of the member in charge of the Translation Branch. He asserted that he worked autonomously and that his work required little or no revision. According to the member, he should be classified at the same level as that of the member in charge of the Translation Branch.

The Level I adjudicator concluded that the increased difficulty involved in translating in both directions was irrelevant to the determination of the classification level. The adjudicator also concluded that the classification level of the member in charge of the classification branch was based not only on his supervisory functions, but also on the nature of the position and the quality of work required. The Level I adjudicator found that the classification committee had applied the classification standard in accordance with the prescribed procedures and that the member had not shown that there was any factual or procedural error in the classification committee's decision.

The grievance was referred to the External Review Committee. The Committee recognized that the obligation to translate in both directions requires knowledge and skills greater than those required for translation in one direction. However, it concluded that the requirement to translate in both directions is not recognized by the standard as an element distinguishing among the levels in the standard. The Committee was therefore unable to accept the member's argument that, on the basis of the standard, the obligation to translate in both directions should lead to the upward reclassification of his position. The Committee also concluded that the applicable salary provisions do not provide for a pay supplement for translation in both directions.

With respect to the factors relating to supervision and autonomy, the Committee concluded that there were differences between the nature of the member's work and the nature of the work of an incumbent of a position at a higher level, as described in the classification standard. Admittedly, these differences are not necessarily large, and

there are also aspects of the member's work that are similar to the work of a higher level. However, the fact that a position includes some requirements similar to a position at a higher level (or lower level) is not unusual. The qualitative differences between positions often represent a matter of degrees. However, the classification levels, as such, are distinct. In the end, the relevant question was to determine whether a factual or procedural error had occurred in the classification review of the member's position. With regard to the factors relating to supervision and autonomy, the Committee concluded that there had been no such error.

However, a strong point in the member's favour remained: the classification committee had apparently not considered the question of relativity. In the previous matter of G-193, the Committee had concluded that a study of relativity is normally a necessary stage in a classification exercise. The Committee felt that the lack of such a study in the present case was equivalent to a material procedural error. It therefore recommended that the grievance be allowed on this last point and that the classification matter be referred to a classification committee for a thorough review of relativity.

The External Review Committee made an additional comment that lack of recognition of translation in both directions—in the classification standard or in the provisions concerning pay supplements—was unfair. However, since these policies are dictated by Treasury Board, correction of this situation cannot be achieved by way of a formal remedy in a grievance against the RCMP. However, it is still possible—and the Committee so suggested—for the RCMP to approach Treasury Board to investigate whether it would be possible to make improvements to the standard or to the pay supplements.

B) DISCIPLINE - PART IV OF THE *RCMP ACT*

D-49 A member faced an allegation of disgraceful conduct bringing discredit on the RCMP. It was alleged that the member made numerous personal long-distance and local cellular phone calls using RCMP lines. The Appropriate Officer's case was comprised largely of telephone records, together with circumstantial evidence intended to show the member's responsibility for the calls and the personal nature of the calls.

At the close of the Appropriate Officer's case, he sought to introduce a series of questions and responses from a statement given by the member during the internal investigation. The member objected to the introduction of this evidence, citing the protection offered by subs. 40(3) of the *RCMP Act*. The Appropriate Officer noted that the member had objected to some questions

during the internal investigation interview, and had been required to answer these questions under subs. 40(2); the responses to such questions were protected by subs. 40(3). However, the member had not objected to other questions, and according to the Appropriate Officer, the member's responses to these questions were voluntary and thus not protected by subs. 40(3).

The Adjudication Board adopted the Committee's reasoning from the previous disciplinary case of D-16 and found that subs. 40(3) automatically protects a member against subsequent use of any incriminating statement made in the course of an investigation under s. 40 of the *Act*, even if the investigator did not specifically require an answer to his questions. The Board inferred that the questions and responses that the Appropriate Officer sought to introduce in this case would tend to incriminate the member and subject him to a penalty and therefore fell within the protections provided by s. 40. The portions of the statement sought to be introduced by the Appropriate Officer were thus not admitted into evidence.

The member then made a motion for a non-suit, arguing that the Appropriate Officer had presented no evidence that the calls mentioned in the allegation were of a personal nature. The Board upheld the motion and the Adjudication Board proceedings came to an end.

The Appropriate Officer appealed, arguing that i) the Board had erred in refusing to allow into evidence the portions of the statement tendered by the Appropriate Officer, and ii) the Board had erred in upholding the motion for non-suit.

Examining the first ground of appeal, the Committee performed an extensive review of the issues of s. 40 statements under the *RCMP Act*. It considered its previous Findings and Recommendations in D-16 and a number of legal precedents and, upon review, found that the Committee's approach set out in D-16 continued to be correct. In neither the words of s. 40, nor in the case law, did the Committee find support for an approach by which the protection against the subsequent use of a response arises only upon the member's specific objection to a question and a specific requirement to answer. Further, it found that the case law also reveals no support for an approach by which the protection against the subsequent use of a response arises only upon a specific requirement to answer, even in the absence of an objection by the member. In the view of the Committee, a member answering questions in a s. 40 investigation is inherently compelled to answer. All incriminating responses to such questions, or responses that tend to subject a member to a proceeding or penalty, are protected under subs. 40(3).

The Committee agreed with the limitation set out by the B.C. Court of Appeal in the Gustar case to the effect that subs. 40(3) only protects responses that actually are incriminating or actually tend to subject a member to a proceeding or a penalty. In this case, it found that it could legitimately be inferred that the portions of the statement sought to be introduced by the Appropriate Officer were incriminating or would tend to subject the member to a proceeding or a penalty.

The Committee emphasized that its conclusions here did not go so far as to say that there could never be, in any circumstance, a voluntary statement given by a member under s. 40 of the *RCMP Act*. It acknowledged the possibility that the subs. 40(3) protections might not arise when, after being clearly and adequately warned, a member clearly insists that he or she wants to give a fully voluntary statement to which no privilege is attached. In the present case, however, the Committee found that the warning the member had been given was deficient and misleading. The preliminary requirement of an adequate warning not being met, the Committee went no further in considering whether the responses of the member might fall within the possible category of s. 40 responses which can be taken as voluntary. The Committee therefore recommended against upholding the appeal on the first ground.

In addressing the second ground of appeal, the Committee observed that the issue of whether to grant a non-suit is a question of law for which the appropriate standard of review on appeal is that of correctness. The test on a motion for a non-suit is whether there is any admissible evidence, whether direct or circumstantial, upon which a reasonable adjudication board could find that the allegation is established. On a motion for a non-suit, the adjudication board is not to weigh the evidence or to test its quality or reliability once a determination of its admissibility has been made. Where there is some evidence going to each of the essential elements of the allegation, the motion for non-suit should be denied.

The Committee found that the Appropriate Officer provided some evidence, with respect to each element of the allegation, upon which an adjudication board could find that the allegation against the member was established. The Committee emphasized that the question of whether the allegation was actually established is not the relevant test at that stage of the proceedings. The threshold for a non-suit is, rather, the lower threshold of 'some evidence', thus allowing the case to proceed. The Committee also observed that while the case against the member relied extensively on circumstantial evidence, such evidence is far from valueless.

The Committee thus recommended that the appeal be upheld on the second ground and that there be a new hearing into the allegation.

The Commissioner disagreed with the Committee's conclusions on the degree of protection provided by subs. 40(3). The Commissioner then examined the issue of the motion for non-suit and accepted the Committee's recommendation that a new hearing be held.

D-50 (*Note: This case concerns the same events as those in G-200, summarized above*)

A member had agreed to keep three antique handguns for safekeeping for the members of a family whose mother had passed away, pending the settlement of the estate and the proper registration of the weapons. The family was concerned about the safety of one of its members, whose reaction to his mother's death was expected to be quite grave, and the family was worried about the handguns being close by during this period. The member kept the weapons at his office until the offices were moved, at which time the member took the weapons to his residence. During this time, the member consulted with the family regarding the status of the registration process, and was given to understand that the weapons would be properly registered. In the course of a break-in at the member's house, the weapons were stolen. They were subsequently seized by the municipal police force.

A disciplinary allegation of disgraceful conduct was brought against the member. It was alleged that the member had been in possession of restricted weapons without "a proper permit". The Adjudication Board concluded that the allegation was founded, and imposed a reprimand and forfeiture of one day's pay.

The member appealed the finding of disgraceful conduct on two bases. Firstly, the member argued that the particulars of the allegation had been "void for vagueness" because they had not named the permit that the member should have obtained. Secondly, the member argued that his conduct related to an issue of performance, and not an issue of disgraceful conduct.

The Committee did not recommend allowing the first ground of appeal. It found that while the drafting of the particulars had been less than ideal, and should have been more specific, the member had not been misled as to the nature of the allegation. The drafting defect was merely a technical defect, and the Appellant had not been prejudiced by it. The meaning of the allegation was sufficiently identified for the Appellant to know the case to meet and to put forward a defence.

The Committee recommended allowing the second ground of appeal. The nature of the member's conduct had

to be evaluated as against a standard of how a reasonable person, apprised of the relevant circumstances, including the realities of policing in general, and the RCMP in particular, would perceive that conduct. The allegation, as particularized, related only to the member's possession of the weapons without legal justification, and did not allege any improper handling or storage of the weapons. Therefore, it was only the possession of the weapons that was relevant to the question of whether the member's conduct was disgraceful.

The Committee noted that the member had never intended to reap any personal gain from keeping the weapons; his good faith and honourable intention had not been questioned by the Adjudication Board. Taking into account the relevant considerations, including the lack of registration, the duration of the possession, the member's impression that the owner of the weapons was pursuing the matter of acquiring lawful possession, and the member's good faith and honourable intention, the Committee determined that the reasonable person, apprised of all of the relevant information and circumstances, would not be offended or scandalized by the conduct of the member, and would not find his conduct to have been disgraceful.

The Commissioner did not agree with the Committee's view that the member's actions lacked a disgraceful character. He found that the allegation had been established and denied the appeal.

D-51 (*Note: This case concerns the same events as those in G-202, summarized above*)

A member faced three allegations of disgraceful conduct bringing discredit on the RCMP. It was alleged that the member had engaged in various acts of violence against his spouse over a period of nearly four years. At the adjudication board hearing, the member admitted the allegations and an agreed statement of facts was entered. The statement described several violent incidents. It explained that approximately two years after the violence began, the police were called to the member's residence as a result of an altercation with his spouse. The member was then referred to an RCMP psychologist and undertook a group-therapy program for abusive men. Some two months after the therapy ended, the violence erupted again and continued for seven months, until the Appellant was eventually arrested and charged.

The Adjudication Board concluded that the allegations were established. On sanction, the member led evidence on his otherwise good character and his operational accomplishments. A psychiatrist testified that the member had suffered from a major depression throughout the period of time during which the assaults had been committed. A psychologist, with which the member

had undertaken therapy after his arrest, testified that the member had made excellent progress in his therapy and was unlikely to re-offend.

The Board raised certain concerns about the medical evidence. The Board identified what it considered to be inconsistencies in the facts on which the medical opinions were based and stated that, although it accepted the diagnosis of depression, it questioned the degree to which the opinions were based on a complete historical background. The Board did not, however, elaborate on the effect of this questioning. In the end, the Board recognized that the member was working hard toward complete rehabilitation, but found that the mitigating factors in this case did not lessen the member's responsibility for his actions. The Board felt that the misconduct was serious enough that the member could no longer function as a police officer. The member was ordered to resign on pain of dismissal.

The member appealed this sanction. He first argued that the Board erred in questioning the factual background of the expert medical opinions. The member then argued that the sanction was excessive in light of this error.

The External Review Committee noted that the principal issue in this matter pertained to the mitigating effect to be given to the expert opinions. On that basis, the Committee decided to first examine the member's second argument and determine whether, in supposing that there was no difficulty in terms of weight and reliability to be imputed to the expert evidence, the sanction should have been different from that which was imposed by the Board. The Committee felt that, although the member's responsibility for his actions was diminished, because they were so closely related to his depression and thus became more understandable, it remained that the member bore an important portion of the blame for his misconduct. For the Committee, a specific problem with the member's case was the lack of explanation on file as to why the member had neither recognized his conduct nor sought help when, two months after he had completed the group therapy for abusive men, his violent behaviour erupted again and continued for some seven months until his arrest. In the end, the member had the primary responsibility to ensure that his behaviour stopped.

The evidence also indicated that the member's chances of re-offending were reasonably low. The Committee concluded, however, that this was a case where the overall gravity of the circumstances was such that the fact that the member is rehabilitated was not sufficient to overcome the employer's right to terminate the employment relationship. The Committee was satisfied that a reasonable person with knowledge of all of the circumstances of this matter would view the retention of

the member by the RCMP as endangering the high level of trust and credibility which the RCMP now enjoys. As the above conclusion was based on the premise that there was no difficulty whatsoever, in terms of weight and reliability, to be imputed to the expert evidence, it was not necessary for the Committee to examine the member's argument that the Board erred in questioning the factual basis of the opinions. The Committee thus recommended that the appeal be denied.

The Commissioner accepted the Committee's recommendation and confirmed the Adjudication Board's order to resign.

D-52 A member faced an allegation of disgraceful conduct bringing discredit on the RCMP. He was alleged to have had sex with an informant whom he had supervised and to have disclosed confidential information to her. At the beginning of the disciplinary hearing, the member made a motion in which he pleaded the one-year limitation period set out in subsection 43(8) of the *RCMP Act*. This provision states that no hearing may be initiated by an appropriate officer in respect of a disciplinary contravention by a member after one year has elapsed from the time the contravention becomes known to the appropriate officer. The evidence in this case showed that the notice of disciplinary hearing was issued six months after a final report of the internal investigation had been submitted to the Appropriate Officer, but almost one and a half years after he personally received a briefing on the interrogation of the informant by the head of internal investigations. The Adjudication Board found for the member, and determined that the limitation period had commenced on the date of the meeting between the Appropriate Officer and the head of internal investigations. According to the Adjudication Board, the evidence established that the Appropriate Officer had at that time acquired knowledge of the member's actions that went considerably beyond suspicions. In the Board's opinion, the purpose of the limitation period is to protect the member's right to full answer and defence, and to ensure the public the quick response it is entitled to expect from the RCMP in cases of misconduct.

The Appropriate Officer appealed this decision. The main issue before the External Review Committee was the degree of knowledge an appropriate officer must have in order for the limitation period set out in subsection 43(8) to begin to run. The Committee noted that two points stand out in the *RCMP Act* with regard to the issue of sufficient knowledge: the date sufficient knowledge of the alleged contravention has been acquired to commence an investigation and the date sufficient knowledge has been acquired to initiate a hearing. Each party relied on one of the

two dates in support of his argument. The Appropriate Officer argued that the limitation period begins to run on the date when there is sufficient knowledge to initiate a hearing, and that this knowledge can only be acquired once a final report of the internal investigation has been obtained. The member argued that the limitation period must begin to run from the time sufficient knowledge of the alleged contravention has been acquired to justify commencement of the internal investigation.

The External Review Committee concluded that subsection 43(8) does not directly refer either to the degree of knowledge needed to initiate an investigation or to the degree of knowledge required to initiate a hearing. The Committee found that there will be sufficient knowledge for the limitation period to begin to run when the appropriate officer has been informed of the principal information regarding the alleged contravention. The date on which the limitation period begins to run must be determined according to the circumstances of each case. It may be that this date will be the date the appropriate officer receives the report from the internal investigation, if this is the first time the appropriate officer is apprised of the principal information. It is also possible that it will be the date that an investigation is officially commenced if, in reality, the RCMP already possesses the principal information at this stage and this information is brought to the attention of the appropriate officer at that time. But it is also possible that the date on which the appropriate officer had knowledge of the alleged contravention will be a date other than the date on which the appropriate officer received the report from the internal investigation, and other than the date on which the investigation was officially called. This determination must be made by the adjudication board. Although it may have been more convenient if the subsection 43(8) limitation period were defined more explicitly, such is not the case.

The Committee then considered the evidence in this case and concurred in the Adjudication Board's finding that the Appropriate Officer had material knowledge of the alleged contravention after meeting with the head of internal investigations. At that point, he had the principal information regarding the alleged contravention. The Committee therefore found that the limitation period within which a hearing had to be initiated began to run on the date of that meeting. When he issued the notice of hearing, the Appropriate officer's right to initiate a hearing was accordingly time-barred. The Committee therefore recommended that the Appropriate Officer's appeal be dismissed.

D-53 On two occasions in a thirteen-month period, a member had gone to the home of another member, a co-worker whom he had been assigned to assist with

performance issues. On both occasions, the member entered his co-worker's residence and her bedroom uninvited and found her in bed. On the first occasion, the co-worker was uncomfortable, but did not say anything to the member; they discussed work-related matters and the member left. On the second occasion, after they left the bedroom and were in the kitchen, the member touched his co-worker's neck for a few seconds. When they worked the same shift later that night, the member spoke to his co-worker, found out she had been somewhat offended by his actions, apologized and assured her it would not happen again.

The co-worker told a watch commander about the two occasions of the member's entering her house and bedroom uninvited, but indicated that she did not want a formal investigation, as she had chosen to handle it herself. The matter was later reported. An investigation led to four allegations of disgraceful conduct and a hearing was initiated.

The Adjudication Board found two allegations of disgraceful conduct to have been established. It found that the member had abused a situation for his own advantage. It determined that the co-worker had been the victim of sexual harassment, but declined to make a finding that the *Canadian Human Rights Act* had been violated. The member was ordered to resign. He appealed the Board's decision that his conduct had amounted to disgraceful conduct, and also appealed the sanction imposed.

The Committee first dealt with two preliminary issues. In his appeal submissions, the member noted that the Board had commented in its decision on his complaint of undue influence of witnesses by senior members of the detachment; the Board had asked that the Commanding Officer of the division be informed of the complaint. The member indicated that the Board had ordered a report to be produced regarding the complaint, and asked that the Committee not consider the appeal until this report was received. The Committee found that there had been no report ordered, since the Board had been satisfied that the witnesses had testified truthfully. Therefore, the Committee declined to await such a report. Secondly, the Committee found that a hand-drawn sketch of the co-worker's house was not admissible in the appeal, and recommended that the Commissioner not consider it.

On the merits of the Board's findings of disgraceful conduct, the Committee found that the Board's determination that the member had abused his authority over his co-worker for a "less than pure" purpose was central to its finding of disgraceful conduct. The Committee examined the RCMP Harassment Policy and found that, to constitute sexual harassment, conduct must have a sexual purpose and must give rise to one of two perceptions: (a) it

might reasonably be seen to cause offence or humiliation to an employee, or (b) it might reasonably be perceived as placing a condition of a sexual nature on employment.

The Committee determined that there was no evidence that could support a conclusion that the member had abused his authority for a sexual purpose. It found that the Board had erred in making the determination that the Appellant had abused his position and employment relationship. Nevertheless, the Committee found that the member's conduct could fall within the first category of conduct that amounts to sexual harassment, because a sexual purpose could be inferred, and the unwelcome touching of the co-worker had clearly offended her. The Committee determined that the member's conduct could possibly amount to sexual harassment, but was not of a nature and gravity that engaged the Code of Conduct. The member's actions had clearly been inappropriate, but had not involved an abuse of his position; he had apologized of his own volition after realizing his mistake and there was no reason to think that his action would be repeated. The Board's determination that the conduct was disgraceful was not supportable by the evidence, and the Committee recommended that the appeal be allowed on that basis.

The Committee addressed the sanction appeal, in the event that the Commissioner disagreed on the issue of the establishment of disgraceful conduct. It determined that the sanction imposed, a direction to resign, was clearly unreasonable and was disproportionate to the conduct at issue in this case. The Board had erroneously considered a prior disciplinary record of the member to have been for the same conduct as that of the current matter. Also, the member had been remorseful when he realized his mistake, had apologized and had ceased his behaviour as soon as he had realized its offending nature, and the sanction had not properly taken into account his apology, his remorse or other arbitration board decisions on sanction in the context of sexual harassment. The Board's determination that the member was "beyond rehabilitation" was not founded in the evidence. The Committee recommended that, if the Commissioner denied the appeal on the establishment of disgraceful conduct, he allow the appeal against sanction and impose a reprimand and forfeiture of five days' pay.

D-54 A member was the subject of three allegations of disgraceful conduct relating to an alleged fraud using an Automated Teller Machine (ATM) at a bank. At the hearing, before the allegations were read, the member brought a motion to quash the allegations on the basis that the Appropriate Officer had not complied with the statutory limitation period in subsection 43(8) of the *RCMP Act*, which provides that no disciplinary hearing may be initiated

more than one year after the alleged contravention and the identity of the member became known to the Appropriate Officer. The Board allowed the motion and quashed the allegations.

The Appropriate Officer appealed the decision of the Board. He submitted that the Board had erred in its interpretation of subsection 43(8) and had not given the proper weight to the certificate he had filed pursuant to subsection 43(9) of the *RCMP Act*, which indicates that a certificate filed by the Appropriate Officer as to the time he had knowledge of alleged contraventions was, in the absence of evidence to the contrary, proof of the time certified.

The Committee first examined the member's objection to the appeal. The member argued that the Appropriate Officer had no right to appeal the decision of the Board, because the decision had been on a preliminary matter and there was no right to appeal such a decision, the decision not being a determination of whether the allegations had been established. The Committee found that the Appropriate Officer did have the right to appeal the decision of the Board. The intent of the *RCMP Act* is clearly to allow an appeal from such a decision. A dismissal of an allegation is deemed by the *Act* to be a finding that the allegation is not established; therefore, there was an appeal right.

On the main question in the appeal, whether the limitation period had been violated, the Committee determined that there would be sufficient knowledge for the limitation period in subsection 43(8) to begin to run when the Appropriate Officer had been informed of the principal information regarding the alleged contravention and the identity of the member. This determination would have to be made by an adjudication board on the basis of the record in each case.

In this case, the certificate filed by the Appropriate Officer under subsection 43(9) raised a presumption that the limitation period had been respected. However, the member had filed an affidavit from the former Commanding Officer (CO) of the division, who attested to the fact that, well over a year before the disciplinary hearing was initiated, he had knowledge of the alleged contraventions such that he believed, on reasonable grounds, that the allegations were true. This evidence was contrary to the certificate; the Committee determined that the Board had been correct to find that this displaced the presumption raised by the Appropriate Officer's certificate. The Committee found that the Board's weighing of the evidence had been correct, and that the former CO, as the Appropriate Officer, had knowledge of the alleged contraventions and the identity of the member such that the one-year period had expired before the current CO, as Appropriate Officer, initiated the hearing. The Committee recommended that the Appropriate Officer's appeal be denied.

D-55 A member was the subject of five allegations that he had conducted himself disgracefully by, among other things, touching and squeezing the thighs and buttocks of five female subordinates. Four of the allegations were found to be established and the Adjudication Board imposed an order to resign as the sanction. The member appealed the finding on the first allegation as well as the sanction.

The first allegation was that the Appellant had "grabbed" the upper thigh of an auxiliary constable while she was getting her flashlight out of a patrol car after she and the member had attended at a scene. The member denied that the incident had happened and testified to that effect before the Board. The member's common law spouse also testified before the Board, relating a telephone conversation she had had with the member on the relevant night. She indicated that, while they were on the telephone, the auxiliary constable had come into the member's office to get the keys to the car, and had then returned them; the member's spouse indicated that she had overheard this exchange in the background to the telephone call.

In appealing the Board's decision on the first allegation, the member argued that the Board's findings were unreasonable. He submitted firstly that the Board had ignored evidence corroborative of his version of events. This evidence was comprised of documents that were consistent with the member's and his spouse's testimony; for example, one document showed that there had been a telephone call from the detachment to the member's spouse's workplace shortly before the alleged incident happened.

The Committee first noted that there had been no mention of the documentary evidence in the Board's reasons. However, after canvassing the relevant caselaw, the Committee determined that there was no basis on which to find that the Board had ignored the documentary evidence in coming to its conclusion on the allegation; the documentary evidence was not determinative in any way and there was no obligation on the Board to address it.

The member also attacked the Board's credibility findings with regard to the first allegation. The Committee found that the Board's reasons for its credibility determinations were supportable in the record, and that there had been no error with regard to the Board's appreciation of the evidence of the alleged victim and of the member's spouse. With regard to the member's evidence, however, the Board had simply stated that it found his evidence "self-serving" and gave no further reason for rejecting his testimony. The Committee determined that it was incumbent on boards to make important credibility findings in clear and unmistakable terms. In this case, where there were clear credibility findings with regard to the other evidence, there was no

determinative error arising from the "self-serving" comment which would justify allowing the appeal. However, the Committee noted that, in the future, boards should be careful to make their credibility determinations clear. The Committee recommended that the Commissioner deny the appeal against the finding on the first allegation.

With regard to the sanction imposed, the member submitted that his conduct, while serious, had not been as egregious as had been attested to by one of the complainants. He submitted that the Board had erred in finding this complainant to be credible, and had ignored evidence before it which should have convinced the Board that she had a motive for getting back at the member and had therefore exaggerated the gravity of his conduct. The member submitted that this exaggerated testimony had been what had led the Board, incorrectly, to order him to resign.

The Committee examined the Board's determination on the appropriate sanction. The Board had explicitly rejected the member's argument regarding the complainant's motive, and had provided its reasons for accepting her evidence. The Committee found no determinative error in the Board's appreciation of the évidence or of the seriousness of the member's conduct.

The member also argued that the Board had made an erroneous finding for which there was no evidence when it found that he had a "character flaw" which "targeted female employees". The member submitted that such a determination would require psycho-medical evidence, of which there was none at the hearing. The Committee determined that this statement had simply been a finding regarding the Board's view of the member's strength of character and his potential for rehabilitation, in light of the duration and nature of the conduct; such a finding was within the purview of the Board and there was a sufficient evidentiary basis for it. The Committee found no error on which to recommend that the Board had erred in its appreciation of the severity of the member's conduct, and determined that the Board had been entitled to treat the member's conduct as justifying the RCMP's termination of the employment relationship. The Committee recommended that the Commissioner deny the appeal.

C) DISCHARGE AND DEMOTION - PART V OF THE *RCMP ACT*

There were no referrals made under Part V of the *RCMP Act* during 1997-98.