Royal Canadian Mounted Police
External Review Committee

Annual Report
2005–2006

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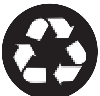
External Review Committee

Annual Report
2005–2006

Canada



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Cat. Number PS20-2006E-PDF
ISBN 0-662-43193-6

Royal Canadian Mounted Police
External Review Committee

Comité externe d'examen
de la Gendarmerie royale du Canada

Chair/Présidente

June 13, 2006

The Honourable Stockwell Day, P.C., M.P.
Minister of Public Safety
Sir Wilfrid Laurier Building
340 Laurier Avenue West
Ottawa, Ontario
K1A 0P8

Dear Minister:

In accordance with Section 30 of the *Royal Canadian Mounted Police Act*, I am pleased to submit to you the annual report of the RCMP External Review Committee for fiscal year 2005-2006, so that it may be tabled in the House of Commons and in the Senate.

Yours very truly,

Catherine Ebbs
Chair

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Table of Contents

PART I: Message from the Chair....1

PART II: This Year in Review....3

A. Mandate, Role and Responsibilities of the RCMP External Review Committee....3

A.1 The Impartial, Arms Length Review of Cases....3

A.2 Exchange of Information and Outreach....5

A.3. Other Activities....6

A.4. Statistics....6

PART III: Issues of Particular Interest....9

A. Grievance Issues....9

A.1. Review of Level I Decisions on Standing and Time Limits....9

A.2. Harassment....13

A.3 Travel and Relocation....15

A.4. Continued issues regarding suspension without pay....20

B. Disciplinary Issues....23

B.1 Misuse of Information Technology....23

C. Discharge and Demotion....26

PART IV: Federal Court 27

A. Decisions rendered 27

B. Applications for Judicial Review filed before the 2005-2006 year....................30

C. Matters Pending from Federal Court Decisions 30

PART V: Appendices....................31

Appendix 1: About the Committee 31

Appendix 2: The Committee and its staff in 2005-2006 32

PART I: Message from the Chair

The 2005-2006 fiscal year has been an exciting one for the RCMP External Review Committee. It has been marked by changes to the organization, as well as changes in the way in which the Committee does its work. In November 2005 I was appointed Chair of the Committee, a position that I filled as acting Chair from April 2005.

The focus of the Committee's work is always on making impartial and independent reviews of RCMP labour relations cases referred to it and issuing recommendations to the Commissioner that are timely and of high quality.

The Committee had a near record number of cases referred to it this year. The numbers indicate a continued trust in the Committee's work, but also require that it respond to the increased demand. In this past year, the Committee started to change the way it does its reviews to ensure that the recommendations can be issued as expeditiously as possible. The Committee will also explore the possibility of additional resources to ensure it can meet the rising referral of cases.

The Committee provides outreach through its quarterly *Communiqué* and web site. As well, staff have met with a variety of stakeholders throughout the year. The Committee has found such exchanges extremely helpful as part of its ongoing understanding of labour relations issues within the RCMP. In addition, in the Fall 2005 the Committee made a submission related to a question concerning amalgamation of the Committee with another agency, to the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*. The submission addressed a number of issues: the need to understand the distinct mandate of our work; concerns about conflict of interest or perceived conflict of interest through mergers; the role the Committee plays in civilian review of disciplinary matters; and the potential greater role that it could play in that sphere.

Last, but certainly not least, the Committee has taken many steps this year to meeting federal wide objectives, and becoming an organization that is more robust in the corporate sphere. These steps are key to the government objective of accountability. For example, in the past year, the Committee met the essential requirements of the new *Public Service Modernization Act*. The Small Agency Transition Support Team, through the auspices of the Public Service Human Resources Management Agency of Canada and the Canada School of Public Service, provided invaluable support to this project. The Committee also updated many of its human resources policies in a collaborative process with staff. The Committee drafted an evaluation plan, engaged in a comprehensive risk management exercise and developed its corporate risk profile. To work towards all these objectives, the Committee has found the small agencies administrators network (SAAN) and its ancillary networks invaluable.

This year's annual report provides a detailed overview of our activities throughout the 2005-2006 year and is available on our web site, along with our *Communiqués*, case summaries and other government reports (www.erc-cee.gc.ca).

Catherine Ebbs
Chair

PART II: This Year in Review

A. Mandate, Role and Responsibilities of the RCMP External Review Committee

The RCMP External Review Committee (the "Committee") was created under the *RCMP Act*, (R.S.C. 1986). Part II of the *Act* establishes its duties and authority to make rules. Part III discusses the grievance procedure and the Committee's role in reviewing grievances. Part IV and Part V address disciplinary and discharge and demotion appeals respectively and the Committee's role in the appeal process.

The overall strategic objective of the Committee is to positively influence labour relations within the RCMP. It carries out two program activities to meet this objective. The primary activity of the Committee is the impartial, arms length review of cases. Its second activity is to promote exchanges of information and outreach.

A.1 The Impartial, Arms Length Review of Cases

The Committee's statutory mandate is to provide an independent review mechanism with regard to labour relations issues that affect members of the RCMP. The Committee reviews certain grievances as well as all disciplinary and discharge and demotion appeals.

In all cases, the Committee reviews the entire record before it: the original documents, the decision made, and the submissions of the parties. Where the review involves the appeal of a disciplinary or discharge and demotion decision, the transcript of the Board hearing is also before the Committee, as well as any exhibits entered at the hearing. The Chair reviews all the evidence, legal issues, relevant legislation and case law in coming to a determination on the matter. In certain cases, the Chair may request that the parties provide additional information or submissions. If this is done, the other party is given the chance to respond. The Chair also has authority to hold a hearing if it is considered necessary. Use of this option is rare.

After consideration of all the issues, the Chair of the Committee provides findings and recommendations to the RCMP Commissioner, who is the final decision-maker. If the RCMP Commissioner decides not to follow the Committee recommendations, the law requires that he give an explanation for not doing so in his reasons[1].

Grievances

The principal component of the Committee's work is the review of RCMP grievances. Initially these are reviewed by an RCMP officer designated as a Level I Adjudicator, and the decision is based on written submissions. If a member is dissatisfied with the decision, then the member files a Level II grievance.

Not every Level II grievance comes before the Committee. The *RCMP Act* and its *Regulations* provide that five categories of

[1]The RCMP Commissioner's acceptance rate of Committee recommendations overall is in the range of approximately 85%. In the area of grievances, the acceptance rate has been 89%. In the area of disciplinary matters, the acceptance rate is 71%. In the area of discharge, where a total of four recommendations have been issued by the Committee, the acceptance rate is 75%.

grievances must be referred to it for review: interpretation and application of government wide policies that apply to members of the RCMP; stoppage of pay and allowances during suspension of a member; interpretation and application of the *Isolated Posts Directive* (IPD); interpretation and application of the *Relocation Directive* (RD); administrative discharge on grounds of physical or mental disability, abandonment of post, or irregular appointment. The member can request that the matter not be referred to the Committee, and the Commissioner may determine that it ought not to be. However, this does not happen often. In the grievance area of its mandate, the Committee examines a variety of human resources related issues that come into dispute. For example, areas such as harassment, travel entitlements, relocation, foreign service travel, suspension without pay, entitlement to force housing, and isolated posts were raised in cases under review before the Committee in the last year.

Disciplinary Appeals

The Committee's mandate in the area of discipline pertains to the review of formal disciplinary matters. These are typically cases that arise from allegations of more serious violations of the RCMP *Code of Conduct* (the "*Code*"). Part IV of the *Act* describes disciplinary processes and sanctions for members of the RCMP who are found to be in violation of the *Code*. In cases of formal discipline, the matter is referred to an adjudication board (the "Board"), comprised of three senior officers of the RCMP. A hearing is held and the Board determines if the member has violated the *Code*. If so, another hearing by the same board is held to determine the appropriate sanction to be imposed. The Board's decision can be appealed to the Commissioner of the RCMP. The appeal is then referred to the Committee, unless the member requests that the matter proceed directly to the RCMP Commissioner. This rarely happens.

The member who was the subject of the proceedings can appeal both a finding that the Code was violated and the sanction imposed for that violation. The Commanding Officer of the relevant Division who instituted the proceeding may also appeal a finding that the member did not violate the *Code*. It is only in limited circumstances however, that the Commanding Officer can appeal a sanction imposed by the Board. Most appeals before the Committee involve matters where the Board ordered the member to resign from the Force. This year, the Committee addressed disciplinary appeals in the areas of inappropriate use of email and theft, and incidents involving a minor female.

Discharge and Demotion Appeals

A member may be subject to discharge or demotion proceedings for failing to perform his or her duties in a satisfactory manner, after having been given "*reasonable assistance, guidance and supervision in an attempt to improve the performance of those duties*". These proceedings are initiated by the Commanding Officer serving the member with a *Notice of Intention* to recommend discharge or demotion. The member has the right to examine the material in support of the *Notice of Intention* and to request that a discharge and demotion board, consisting of three senior officers of the Force, be convened.

Either the member or the Commanding Officer may appeal the decision of an RCMP discharge and demotion board. Appeal submissions are made in writing and the appeal is then referred to the Committee. In this last year, the Commissioner issued his decision on the fourth discharge case that had been before the Committee.

A.2 Exchange of Information and Outreach

The Committee's communication role with its stakeholders is essential to meeting its mandate. As part of its outreach function, the Committee distributes a quarterly *Communiqué* which is also posted on its website (www.erc-cee.gc.ca). The Committee website is also regularly updated to include the most recently issued cases and other publications.

Royal Canadian Mounted Police
External Review Committee

communiqué

JANUARY MARCH 2006

IN THIS ISSUE

Recommendations
1 D-097
2 G-363
3 G-364
4 G-365
5 G-366
5 G-367
6 G-368
6 G-369
7 G-370
8 G-371
8 G-372
9 G-373

Decisions
10 D-092
11 D-094
11 G-340
12 G-341
12 G-344
12 G-345
13 G-359

Article
14 Update: Decision of the Federal Court of Appeal in the *Thériault* case

16 **Quick Reference Index**

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Between January and March 2006, the Committee issued the following recommendations:

D-097 An RCMP member had arrested the Complainant, a minor female, on a criminal matter. The member spent considerable time trying to mediate the Complainant's disputes with her mother and had also tried to involve the Complainant in a Force approved sports program. Later, as a result of her complaint, the member faced two allegations related to abusing his position and authority and his attempt to negotiate sexual favours with the Complainant for money. The Complainant, her two girlfriends, her mother and brother testified and in part, they corroborated segments of her testimony. The Respondent denied all the allegations and the particulars except that he had given the Complainant one cigarette.

The RCMP Adjudication Board (the "Board") that heard the matter concluded that neither allegation had been established. While the Board described the provision of one cigarette to a minor as inappropriate, it found that it was not disgraceful. The Board had created a time line for the month in which the Complainant and Respondent had communicated that was based on the witnesses' testimony and documentation submitted. Based on that time line and other evidence, the Board noted that there were significant discrepancies and factual errors in the Complainant's testimony and that of the other Appellant witnesses. The Board noted that the Respondent gave credible evidence which provided a reasonable explanation.

Committee's Findings
As this is an Appropriate Officer's appeal, the Commissioner may only choose to confirm the decision under appeal or order a new hearing before a different adjudication board. The Appropriate Officer's request that the Commissioner "*correct what is submitted to be flawed reasoning by the board*" is not an available remedy under the *Act*.

The Board's comments about the standard of proof were somewhat confusing. However, when the Board's reasons were examined in their entirety, it was clear that they had assessed the evidence using the balance of probabilities standard with a high evidentiary threshold. While the Board was wrong when it suggested that the standard of proof was dependent on the sanction sought, the Committee believed that in light of the cases cited in their decision, the Board was trying to express that the standard of proof rises to the higher end of the balance of probabilities because of the seriousness of the allegations faced by the Respondent.

This year, Committee staff also responded to 108 requests for information. While some of these requests are straightforward, others may involve complex questions on the interpretation of labour relations matters pertaining to the RCMP. As well, staff of the Committee attend training and conferences throughout the year to ensure currency in a variety of areas including administrative, labour relations, discipline and human rights law.

This year, the Committee met with the Staff Relations Representatives (SRR) Program, which is made up of regular and civilian members of the RCMP. This program is designed to provide members of the RCMP with a formal system of elected representation. The Committee also provided an orientation to new SRRs on the work that it does and on a number of substantive and procedural legal issues in the area of grievances.

Committee staff visited RCMP detachments in Surrey, Calgary and Ottawa. They also visited two offices for the coordination of grievances, one in Vancouver, and one in Regina to exchange information on operations and processes. Representatives of the Committee met regularly with the RCMP Professional Standards and External Review Directorate of the RCMP, which plays a key role in the administration of the grievance and disciplinary and discharge and demotion processes. Furthermore, the Chair met with the RCMP Commissioner.

A.3. Other Activities

Submission to the Arar Commission

In November of 2005, the Committee made a submission to the *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar*. The submission addressed a question before the Inquiry Commissioner regarding potential amalgamation of the Committee with another agency involved in civilian review of RCMP activities. The Committee provided a description of its unique mandate, and observed that there may be compelling reasons for keeping the labour relations mechanisms separate and apart from civilian review of public complaints, given the distinct difference in mandates and the potential for conflict of interest or perceived conflict of interest.

Corporate Requirements

Given the high priority that the Committee places on accountability, it has done its utmost to meet key reporting requirements in the last fiscal year.

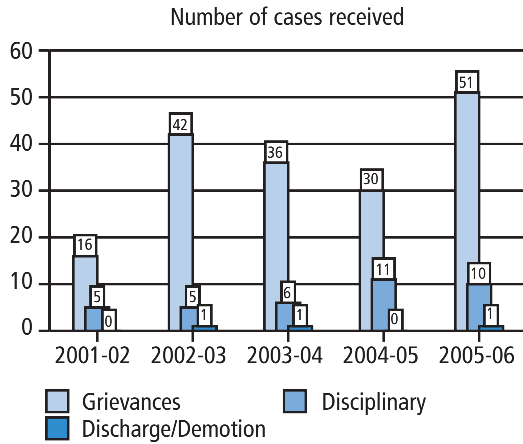
For example, within a network of other small agencies, and in conjunction with the Public Service Human Resources Agency of Canada and the Canadian School of Public Service, the Committee met the requirements of the new *Public Service Modernization Act*. This was a collaborative and very successful effort. It resulted in the development of a number of new human resources policies that apply to the Committee as a whole, as well as some changes in its operational environment as it relates to human resources issues. The Committee ensured that all staff were trained on the general principles of the new legislation, and that specific training was provided on new delegated authorities pertaining to hiring in the Act.

Committee staff worked together on a risk management exercise, culminating in a corporate risk profile, an important aspect of the federal wide Management Accountability Framework. The Committee also developed an Evaluation Plan to assess the ways in which it measures its performance; and a report on its internet security systems, as required by Treasury Board policy. It also compiled an electronic file of all its logistical, human resources and operational guidelines for staff use.

A.4. Statistics

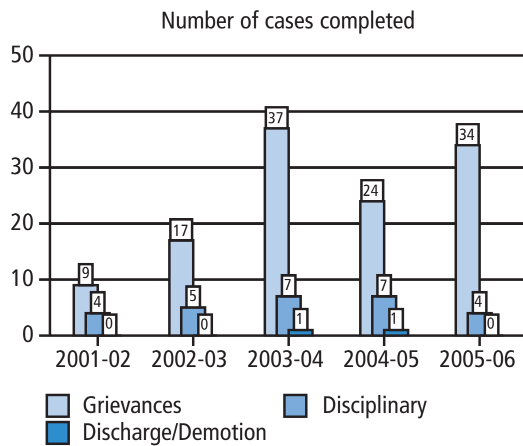
Referrals

The number of cases referred to the Committee in this fiscal year represents a near record. A total of 51 grievances were referred to the Committee, compared to 30 in the previous year and 36 in 2003-04. Ten disciplinary appeals and one discharge appeal were referred to the Committee during the 2005-06 year, which is consistent with the number of discipline cases referred in 2004-05.

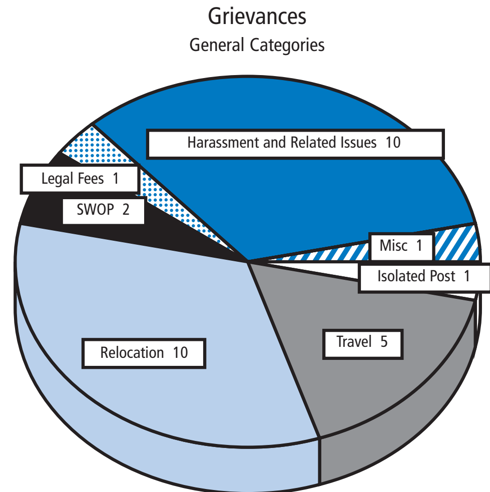


Recommendations

This year, the Committee issued 30 grievance recommendations, compared to 23 in 2004-05 and 37 in 2003-04. Four grievances were withdrawn by the member. In 2005-2006, the Committee issued four recommendations on disciplinary appeals.



The subject matter of this year's grievance recommendations fell into the following general categories:



With regard to grievances, the Committee has observed that an increasing number of Level II reviews by members involve cases where the Level I Adjudicator had dismissed the case on the basis of preliminary matters such as time limits or standing. In eighteen of the thirty such grievances reviewed this year (60% of those cases reviewed), the Level I Adjudicator has dismissed the matter on preliminary issues and the Committee recommended that the decision be overturned in 14 of these cases. In many of these cases, the Committee is also in a position where it will be ruling on the merits for the first time. The Committee has also noticed that a number of cases referred to it fail to include the applicable policy. The inclusion of these policies is essential in many instances to resolving the merits of the grievance and if absent, the process can be delayed further.

This year, three of the disciplinary appeals were initiated by the member and one involved an appeal by the Commanding Officer. Of the four disciplinary cases appealed, three involved a sanction of an order to resign within 14 days, failing which the member would be dismissed. The Committee did not issue a recommendation on an appeal of a decision from an RCMP discharge and demotion board.

The number of cases completed by the Committee from year to year may vary depending on the complexity of issues raised. For grievances, the objective of the Committee is to have issued its recommendation within three months of the case being referred to it. For discipline and discharge and demotion cases, the standard that the Committee strives for is six months.

There are a number of reasons that these service standards have not been met for all cases before the Committee. In some cases, the issues involve complex questions that require a longer period of time to review. In addition, in certain cases, the need to request further information, provide disclosure to the parties, or to ensure that the record is complete, can delay the time within which a case will be completed.

Perhaps most important is the fact that the Committee has experienced a marked increase in cases without a corresponding increase in resources. There is now a waiting period before the cases can be reviewed. In response to the growing backlog the Committee has undertaken a number of changes to its internal processes. These include the introduction of a pre-screening process to determine and address preliminary matters in a grievance.

In conclusion, a total of 62 cases were referred to the Committee this year, and 38 cases were completed including several outstanding cases from previous years. At year end, 70 active cases remained before the Committee, including 56 grievances. Several interesting recommendations, both in the area of grievances and in the area of discipline were issued by the Chair of the Committee in the last year and a number of these touched either directly or indirectly on issues of transparency and fairness. These are discussed below.

PART III: Issues of Particular Interest

A. Grievance Issues

A.1. Review of Level I Decisions on Standing and Time Limits

Under subsection 31(1) of the *RCMP Act*, to present a grievance, a member must be "*aggrieved*" by any "*decision, act or omission*" made "*in the administration of the affairs of the Force*", in respect of which no other process for redress is provided by the *Act*, the regulations or the Commissioner's standing orders. These criteria define what is referred to as "*standing*" to grieve.

There are also time limits which members must respect when presenting grievances. Section 31(2) of the *Act* requires that a grievance be presented at Level I within 30 days *after the day on which the aggrieved member knew or reasonably ought to have known of the decision, act or omission giving rise to the grievance*. At Level II, a member has 14 days, after the day on which he or she is served with the Level I decision, to present the grievance. Although these time limits are mandatory, the Commissioner has the authority, under s. 47.4 of the *Act*, to extend them in extraordinary circumstances.

Of the thirty grievances completed by the Committee in the past year, eighteen were denied by Level I Adjudicators for either lack of standing or failure to meet time limits. In fourteen of those cases, the Committee disagreed with the Level I Adjudicators on these preliminary issues. Specifically, there were seven instances in which the Committee disagreed with the Level I Adjudicator's decision that the member did not have standing. As for time limits, the Committee disagreed seven times with the Level I Adjudicator's decision that the Level I time limit had not been met. As well, although the Committee recommended that extensions be granted pursuant to s. 47.4 in four cases where time limits had not been met, Level I Adjudicators had either been silent on the issue or in one case had decided that an extension already granted be set aside. A number of the issues pertaining to standing and time limits are discussed below.

Confusion regarding Standing vs. Merits

To establish the "aggrieved" requirement merely requires that the decision, act or omission have an effect on the member personally. Whether a member's particular right actually exists in a given situation, and should be upheld, is a question of the merits, not a preliminary question of standing. The Committee observed that Level I Adjudicators still deny standing to Grievors because of confusion between an assessment of the merits of the case, and a review of the threshold issue of whether a member is aggrieved.

In G-351 to G-353, a Grievor alleged he had been harassed due to the way that comments about him were obtained, and how they were circulated following a workplace mediation exercise. All three grievances were denied at Level I on the basis of the Grievor not having standing to grieve. In all three cases, reference was made to the Grievor's failure to show that he had been aggrieved. The Committee concluded that the Grievor did have standing in all three grievances. The Committee observed that the alleged acts, described by the Grievor as harassing and discriminatory, had a direct effect on the Grievor, and could have had a negative personal impact on him.

The Committee took the same approach in G-361, a grievance arising out of the Force's decision to deny the Grievor accommodation in a Crown-owned house. The Grievor alleged that the decision circumvented policy and discriminated against her. The Level I Adjudicator found that the Grievor was not aggrieved by the decision, given that it had been made before her arrival at the posting and because the decision had been based on operational criteria. The Committee disagreed. In its view, the decision to deny her the housing had an effect on the Grievor personally, and it was not necessary for her arguments to be accepted on the merits for her to be found to have standing. These were two separate issues.

The Discretion to Extend Time Limits Pursuant to s. 47.4 of the *Act*

Section 47.4 of the RCMP Act allows the Commissioner to extend time limits in extraordinary circumstances. The Commissioner's authority to extend these time limits has been delegated to certain members of the Force who administer the grievance process. In several cases, the Committee has turned its mind to the issue of whether it should recommend to the Commissioner that time limits be extended. In G-347 and G-372, the Committee agreed with the Level I Adjudicator that time limits had not been met, and it went on to recommend that no extension pursuant to s.47.4 be applied. Although both cases reveal significantly different lengths of delay, (nearly a year in G-347 and only one day in G-372) both Grievors had failed to explain why it was that the grievance had been presented beyond the allowable time limit.

This can be contrasted with other cases over the past year where the Committee has recommended that the Commissioner should extend the time limit so that the merits of the grievance could be considered.

In G-363, the Committee concluded that where a Staff Relations Manager had allowed the time limit at Level I to be extended for a Grievor, it was not open to the Level I Adjudicator to then conclude that such an extension ought not to have been granted in the circumstances. According to the Committee, where the Commissioner, through his delegate, had agreed to extend the time limit, this decision could not be reversed by the Level I Adjudicator.

In G-348, the member had been denied full reimbursement of the expenses he had claimed to bring members of his family overseas for a family reunion during his tour abroad. The member subsequently received additional information which supported his argument that he was entitled to more than what had been reimbursed. He used this information to seek further explanations from the Respondent regarding the denial. The Respondent maintained the view that the member was not entitled to the full amount he was claiming. The member grieved this subsequent decision. The Level I Adjudicator concluded that the member had presented his grievance beyond the allowable thirty day period which had been triggered by the initial partial reimbursement. The Committee disagreed, finding the matter had been presented on time (this aspect of the Committee's recommendation is discussed further

below). However, the Committee recommended that, even if the Commissioner concluded that the grievance had not been presented on time, an extension should be granted: the monetary sum involved was considerable; the member was overseas and could not expedite his grievance or access relevant information; and the member had intended to present a grievance from the outset.

In G-371, the Committee recommended that time limits be extended at Level I even though the Grievors had failed to present their grievance within thirty days. Although the Grievors had been advised at an earlier date by a supervisor that their meal claims would not be reimbursed, that same supervisor had asked them to delay presenting a grievance so that other avenues could be pursued. The Committee found that although the grievances had been presented beyond the allowable time, an extension was warranted. The Grievors had indicated an intention to grieve well before the end of the thirty day period, and had acted in good faith in delaying the presentation of the grievance at their supervisor's request.

An extension was also recommended by the Committee in G-362. The member had presented an harassment complaint to a supervisor. It had taken one year for the supervisor to decide the complaint, and a further year to reconsider the matter at the Grievor's request. It took more than thirty days after this latter decision for the member to present his grievance, and the Committee agreed with the Level I Adjudicator that the limitation period had not been respected. Given the length of time it had taken the Respondent to answer each of the Grievor's complaints, and in light of the three year period it had taken for a Level I decision to be issued, the Committee recommended that the time limit be extended.

Time Limits and Whether a Decision was Re-opened

The Committee has also addressed situations where a series of Force communications caused confusion over the proper starting point for the thirty day time limit. Where a member has filed a grievance more than thirty days after an original decision, but within thirty days of some later confirmation or reopening of that original decision, the grievance may still be considered on time depending on the circumstances. This situation was raised in several cases before the Committee in the past year.

In G-366 a member attended a mandatory health assessment and was only reimbursed in part for the travel claimed. Although the member had not presented a grievance upon being advised of the partial denial, he had forwarded new documents to the Respondent in support of his claim for the full amount. The Respondent maintained the partial denial. The Committee disagreed with the Level I Adjudicator's finding that the time limit began after the initial denial. The second decision can be seen as putting the matter in a whole new light. The member had submitted new information and arguments after that original decision, making the more recent response to his claim a new, grievable matter.

The Committee adopted this approach in G-348 and G-362, discussed previously. In both those cases, the member had provided new information to the Respondent after initially unfavourable decisions. Failure to grieve after the initial decisions did not determine the issue of timeliness, because

the new information subsequently submitted put the matters in a whole new light, and the members could reasonably expect that the original decision would be re-examined.

In G-357, the member claimed that he had been told that he would be entitled to certain relocation benefits upon moving to a new posting. After he moved, he was advised that this was not the case. Although the member did not grieve the matter at that time, a relocation coordinator from the member's division wrote to the Respondent and provided him with new information concerning the member's circumstances, which led to the Respondent issuing a further decision. The Level I Adjudicator found that this did not lead to a new grievable decision. The Committee disagreed, finding that the new information provided by the relocation coordinator had put the matter in a whole new light.

Time Limits and Personal Aggrievement Required for the Clock to Start

Three Committee recommendations in the past year have addressed whether members have to grieve force policy that can *potentially aggrieve them*, even before the policy is actually applied to them.

In G-349, a member transferred to a new posting and elected to sell his house under the provisions of a Force policy which, at the time, reimbursed him for up to 90% of the loss incurred in the sale. When he chose this option, there was discussion within the Force that a new transitional policy might be put into place, but there was no evidence that the member was aware of any advantage he would have had in opting for this new policy instead of the one he chose. After the sale of his home, the member found out that the transitional policy would compensate up to 100% of home equity loss. He asked to be reimbursed 100% of his loss, as the transitional policy had taken effect before he moved. After consulting with Treasury Board, the Respondent denied the member's request. The member grieved that decision within 30 days. The Level I Adjudicator found the grievance was out of time, as information about the transitional policy had been distributed shortly after the member moved. The member ought to have known about the transitional policy at that time. The Committee disagreed, finding that there was insufficient evidence to conclude that the Grievor ought to have known of the transitional policy at that time. The Committee also found that the member had become aware of the transitional policy more than thirty days before presenting his grievance, but that this knowledge did not trigger the 30 day time limit. He was aggrieved only once he had made enquiries to the Respondent and his request had been denied. As a result, his grievance was timely.

In G-365 and G-368, the Committee examined grievances pertaining to a vacation a member and his family had taken from his isolated post. Personnel in the member's division had been advised of certain criteria that would be applied to calculate entitlements for reimbursement for travel from isolated posts. The member later requested an advance for an upcoming trip with his family, using airline transportation. The amount of the advance was less than what he had requested, based on an interpretation of the criteria recently put in place in the Division. In separate grievances, the member grieved the amounts which had been reimbursed according to these criteria. In both cases, the Level I Adjudicators found that the member was out of time. Although he was within 30 days of the Respondent's decision regarding his claims, at the time of presenting his grievances he had known for

over 30 days of the existence of the criteria which restricted his entitlements. The Committee took a different view, pointing out that if the member had presented his grievances before being denied the amount he had claimed, he would not have had standing because there was not yet any decision, act or omission of the Force that aggrieved him directly.

Conclusion

In some cases this year, the Committee agreed with Level I Adjudicators that time limits had not been met, but in many more cases it disagreed. Recurring areas of disagreement are (i) circumstances in which it is appropriate for the Commissioner to extend time-limits; (ii) situations in which a decision issued by the Force was re-opened, putting the matter in a whole new light, and; (iii) the point at which the Grievor is personally prejudiced by a decision, and the clock begins to run. In the area of standing, the Committee discussed the problem of confusing standing with merits, harassment and standing, amongst other areas.

A.2. Harassment

The prevention and resolution of workplace harassment is one of the most challenging issues faced by human resources management today. It is a workplace issue that has gained much media attention as well as increased adjudication in the courts. In this past year, the Committee issued ten harassment related recommendations to the Commissioner, which represents a marked increase over the previous fiscal year. In six of those grievances, the Committee did not find that the allegation of harassment had been made out. Nonetheless, the Committee raised concerns about procedural issues in these cases, as well as in two of the cases where it recommended the grievances be allowed. The remaining two cases were dismissed due to technicalities. The notion of administrative fairness was an important aspect of the Committee's review of the harassment grievances before it this year. Its recommendations spanned a number of issues such as disclosure, failure to investigate, standing and remedies.

Disclosure

In G-350, G-351 and G-352, the Committee found that the Grievor should not have been referred to the ATIP (Access to Information and Privacy) process as a means to obtain information to prepare his grievance. Rather the Respondent should have sent all relevant and necessary documentation to the Grievor that was under the RCMP control.

Failure to Investigate a Harassment Complaint

The failure to investigate harassment complaints was specifically highlighted in two recommendations this year. In G-367, the member made four allegations of harassment regarding four separate incidents, two of which were of a more serious nature. The Committee found that the RCMP did not deal with some of the allegations in accordance with the relevant Treasury Board or RCMP policies. In one instance, the RCMP did not handle the allegation in a timely manner or at least, they did not keep the Grievor appraised. The Committee also noted that there was no indication that the RCMP had even reviewed the complaint and gave no reasons as to why there was no investigation. With respect to another allegation, the Committee found that the investigator had not addressed the entire incident.

With respect to two of the allegations, the identity of the perpetrator was not known and the policy did not provide any assistance as to how the investigation should be continued in light of that fact. For example, when the investigator did not receive any voluntary admissions of responsibility in response to his written inquiry, he did not take any further steps to ascertain the responsible person's identity. The Committee expressed concern about whether further steps should have been taken, especially when the incidents leading to the two latter allegations took place close in time and after a warning to the staff that harassment would not be tolerated.

In G-362, the Grievor complained that between 1996 to 1998, he was harassed by his direct supervisor in various incidents, such as the denial of overtime or meal and travel expenses. After the receipt of the complaint, the Respondent decided not to investigate on the basis of insufficient information to prove the allegation and that the matter had been resolved by the transfer of both the Grievor and the direct supervisor. The Respondent also indicated that he had already dealt with and dismissed a harassment complaint made by the supervisor against the Grievor. Given the wording of the 1998 TB policy that was in effect, the Committee was critical of the failure of the Respondent to conduct a preliminary investigation, before deciding not to order a full investigation. In addition, the Respondent had relied at least in part, on evidence arising from his discussions with Health Services and Staffing and Human Resources of which the parties were unaware. The Committee found the consideration of those discussions to be highly problematic. Given the passage of time, an investigation was not recommended. Rather the Committee recommended an apology by the RCMP for the failure to comply with the RCMP and TB policy requirements.

Standing and Harassment Grievances

In G-354 to 356, the member had alleged that several superiors had harassed him. Shortly before the Level I decisions were made on his grievances, the member presented harassment complaints. The Level I Adjudicator concluded that the member's grievance was premature, as the issues had not yet been addressed under the Treasury Board's policy process for harassment complaints and no decision had been issued. The Committee disagreed, emphasizing, as it has in the past, that members may allege harassment directly through the Part III grievance process without having first made a complaint or before a complaint process is concluded. The Treasury Board policy indicated that where a complaint and a grievance were concurrent, the complaint was to be put aside. The Committee observed that it would have been open to the Force to refuse to investigate a complaint under Treasury Board policy while a harassment grievance on the same issue was pending. It was not open to the Level I Adjudicator, however, to defer consideration of the grievance pending the completion of a concurrent complaint process.

Review of Merits when Procedural Errors Found

The prevailing view of the Committee is that the parties should reach a resolution of the grievance as expeditiously as possible. In *Girouard vs. Canada (Attorney Canada)* 2005 FC 915[2], the Federal Court recognized that, in some cases, administrative fairness requires that a decision on the merits be made as quickly as possible when a number of years have passed. In G-350, G-351, G-352 and G-354, G-355 and G- 356 (discussed above) the Committee relied upon the *Girouard* case and proceeded to make a determination on the merits given that the evidence was available and that the parties had already had an opportunity to be heard, rather than return the cases to the RCMP for further processing.

Remedies

In 2005 the Supreme Court of British Columbia granted a significant monetary award to a former RCMP member with respect to harassment by her superior[3]. While that case is currently under appeal, it shed light on to the issue of redress for victims of harassment. In cases before it this year where the Committee thought that a significant error in the process had occurred and too long a period of time had passed to proceed with the complaint of harassment, it recommended an apology to the Grievor as redress. For example, in G-362, the Committee recommended that the RCMP apologize to the Grievor for the failure to comply with the provisions of its own policy as well as that of Treasury Board due to the passage of time. In G-367, the Committee also recommended an apology to the Grievor for the same type of failure and due to the passage of time.

A.3 Travel and Relocation

Every year the Committee examines a variety of grievances related to relocation and travel. For example, the issue of entitlement to interim lodging, meals and incidentals was before the Committee on several occasions this year and relocation benefits on retirement continued to be a live issue. The Committee also reviewed grievances related to isolated post and family reunion travel and considered the issue of the effect of misleading or incorrect advice when such advice is followed by the member.

Interim Lodging, Meals and Incidentals

In general, the Committee has held that members have a responsibility to know the contents of the relocation policy and meet the obligations under it. In addition, the Committee has stated that Grievors must establish the facts necessary to support their entitlement to benefits claimed. Even when the Force has discretion in awarding a benefit however, that discretion must not be arbitrarily or unfairly exercised. In addition, the Force's interpretation of an entitlement to a benefit cannot change or unreasonably narrow access to the benefit.

In G-360, the Grievor received a transfer which required that he relocate. When he submitted his expense claim, four days of interim accommodation and one day's meal and incidental expenses were denied on the

[2] Now under appeal.

[3] Nancy Sulz (Wilson) vs. Attorney General of Canada et al, 2006 BCSC 99.

basis that the Grievor had failed to seek prior approval of the expenses and that he and his family had access to their beds during these days. The Committee found that the policy provided for interim accommodation when members were necessarily separated from their household goods. The test applied by the Respondent, that interim accommodation would be provided only when beds were disassembled, was a change to the policy requirement. The policy provided the Force with a departmental prerogative on the duration and type of interim accommodation used, but this discretion could not be exercised in an unfair or arbitrary matter. The Committee recommended to the Commissioner that the grievance be allowed. The policy was in no way clear about what prior approval was needed before items were reimbursed and it was reasonable for the Grievor to think that he was entitled to the benefit claimed.

In G-364, the Grievor was transferred, but was unable to find suitable housing during his house hunting trip. He reported back to the Respondent, a relocation specialist, that he anticipated moving into rental housing on a Canadian Forces base in December. The Respondent gave approval for the Grievor to proceed to Ottawa and to be reimbursed for interim lodging meals and incidentals for 21 days. After the Grievor had been in a hotel for a number of days, the Respondent learned from Base Housing personnel that the Grievor had not filed an application to occupy base housing even though it had been available since the date of his transfer. Because a house was available, the Respondent discontinued the interim lodging, meals and incidentals and advised the Grievor that because a door-to-door move had been possible from the beginning, he would only be entitled to the standard five days of interim lodging, meals and incidental for packing loading and cleaning and unloading and unpacking, and not the 21 days initially approved.

The Committee found that the Grievor did not meet his obligations under the relocation policy to seek out and occupy self-contained accommodation as soon as possible. Nonetheless, the Committee found that the only reason for revoking an approval for reimbursement after expenses had been incurred would be where the approval was obtained through intentional misrepresentation or fraud. While the Grievor was vague and inconsistent in his dealings with the Respondent and was less than diligent in ensuring that he minimized the costs of the move, the evidence did not establish an intention to mislead or defraud. The Committee concluded that the full 21 days of interim lodging, meals and incidentals should not have been revoked. Rather, the Grievor should have been reimbursed for the interim lodging, meals and incidentals expenses that he had incurred prior to the date on which it was established that a base house was available, plus the additional three days for the notice required for the movers to deliver his household goods and effects. The Committee recommended to the Commissioner of the RCMP that the grievance be allowed, in part.

In G-372, in the course of a transfer, the Grievor was separated from his household goods and effects for 24 days. During this time, the Grievor and his family resided in a hotel. The Grievor sought to be reimbursed for interim lodgings, meals and incidentals for the full 24 days, 3 days beyond the normal 21 day period provided for under the relocation policy. His entitlement to be reimbursed for accommodation was not in issue, but a dispute arose over his entitlement to the meal allowance.

The relocation policy provided that there was a discretion to authorize meal entitlement past 21 days, subject to one of two conditions: Either (i) there was no suitable accommodation with adequate cooking facilities located within 16 km (one-way) of the transferee's place of work; or (ii) the transferee was unable to secure adequate accommodation with cooking facilities on or before the 22nd day of interim accommodation although such accommodation exists within 16 km of the place of work. On the basis that the Grievor's accommodation included full cooking facilities, the meal claim for the extra three days was denied.

While agreeing with the Level I Adjudicator that the grievance was out of time, the Committee also found that it failed on the merits. The Grievor was in the best position to explain how the kitchen, if less than full, failed to meet the criteria of accommodation with "*adequate cooking facilities*". In addition, the Grievor would have had to establish that no other suitable accommodation within 16 km of his place of work contained adequate cooking facilities, or alternatively, that such accommodations existed but could not been obtainable in the first twenty-one days of his stay. The Committee recommended that the grievance be denied.

Relocation on Retirement

In G-369, the Grievor, who had been serving at an isolated post, was about to retire from the Force. He believed that he should be entitled to both a relocation to his last normal place of residence occupied before his isolated posting, pursuant to the *Isolated Posts Directive* (IPD) and a subsequent relocation within two years to a location of his choice within Canada pursuant to the *RCMP Relocation Directive* (RD). The Grievor was advised that he was only entitled to one move upon retiring.

The Committee found that the Grievor should have been entitled to both benefits. The purpose of each policy was distinct. The IPD was to provide an additional benefit to a member at an isolated post who was leaving the Force by allowing for limited reimbursement of the costs of moving back to the normal place of residence. The RD entitlement provided members eligible for a pension with a two year opportunity to move to a retirement location after discharge. As a result, the Grievor was entitled to a relocation from his isolated post to his normal place of residence, and then to a subsequent RD relocation to a retirement destination within two years. The Grievor had not shown that the Force's error caused him to incur any additional expenses and so the Committee did not recommend that the Grievor be entitled to monetary compensation or to a further move. The Committee recommended that the Commissioner apologize for the error, and that current policy be reviewed to be specific in regards to entitlements when members retire at isolated posts.

In G-373, the Grievor began experiencing significant health problems and was diagnosed with a rare and serious lung disease. The Grievor was scheduled to retire and requested a Force paid retirement relocation to a new place of residence within 40 km of his current residence. Ordinarily a retirement move must be a minimum distance of 40 km but his request was based on the "*exceptional circumstances*" provision found in the Force

policy on retirement moves. The Grievor argued his health made it impossible for him to maintain his home, that it was necessary that he have access to public transportation and that he needed to be closer to medical care. His need to move was supported by his doctors and an RCMP Health Services Officer, who also stated that the Grievor was seeking a lower pollution environment.

The Committee found that exceptional circumstances that would justify the Force paying for a retirement move of less than 40 km would be those that showed that, for reasons outside of his or her control, the member could not stay in the residence of his last posting, even though his desired retirement location was within 40 km. The Committee concluded that the Grievor had demonstrated exceptional reasons. Because of a serious respiratory medical condition for which the cause was unknown, the Grievor was required to move to another part of the same community in order to have access to public transportation and to be closer to his medical specialist and the hospital. This move would allow him to relocate to a residence that would be easier to maintain, given his physical limitations. Further, the Committee stated that the Level I Adjudicator erred in rejecting the Health Services Officer's statement that the proposed move would help as it would be to a location with less pollution. Finally, the requested move would not result in personal gain, and did not appear to be an extravagance. The Committee recommended that the grievance be allowed.

Isolated Post and Family Reunion Travel

In G-365, the Grievor requested an advance for a vacation trip for his dependants pursuant to the *Isolated Post Directive* (IPD), based on a maximum entitlement that would have included the full economy airfare for his three dependent children. He made that request after the distribution of a Bulletin which stated that when calculating maximum entitlements for reimbursement for travel from isolated posts, the fares for any children would be the discounted airfares instead of the full economy fares. The Grievor made it clear that he was not asking for a personal gain and that he would be accountable for the moneys spent including any overpayment.

The Committee observed that there is no guidance on how an advance is to be calculated in the IPD, and there is nothing to suggest that the Force acted unfairly or inappropriately. The Committee also found that the calculation of the maximum amount to be reimbursed for vacation travel from an isolated post should be based on actual costs and the evidence was that children fares were discounted by the airline. The Committee recommended that the grievance be denied.

In G-368 the Grievor requested an advance under the Vacation Travel Assistance policy pursuant to the IPD for a vacation for himself and his dependants from headquarters to a point of departure. The Grievor's request for an airfare advance was based on the "*return economy class airfare*" without any restrictions. The Respondent reduced the Grievor's

requested advance by utilizing a lower rate for the "*return economy class airfare*". The Committee found that the Respondent had correctly calculated the maximum entitlement for the Vacation Travel Assistance under the *IPD*. It was appropriate to use the lower rate for "*return economy class airfare*" as it met the requirement of being effectively a ticket without restrictions. The Committee recommended that the grievance be denied on its merits.

The Effect of Misleading or Incorrect Advice

This year, the Committee reviewed several grievances where the Grievor alleged a loss due to having followed incorrect or misleading advice. Where a member has relied on incorrect or misleading advice to his or her detriment, there are circumstances where it may not be open to the Force to deny the claim on the basis of the policy.

In G-345, the Grievor's transfer required that he relocate. He sold his home, but later claimed that the relocation specialist advised him to accept the offer he had received for his house, even though it was less than the original purchase price plus capital improvements. The Grievor stated that the relocation specialist failed to inform him that the capital improvements losses were to be paid from the "*Customized envelope*", provided for under the *Integrated Relocation Policy* (IRP). As this envelope was mostly funded from his transfer allowance, he objected to what he characterized as paying a relocation expense from his own money. He stated that he would not have accepted the offer on his home had he been told that the capital improvement losses were to be paid from that envelope.

The Committee found that the Grievor's argument was based on the assumption that he would have been able to receive an offer on his house that would have covered the purchase price and the full amount of capital improvements, leaving him with no losses. This was speculative. As well, the Grievor had not proven on the balance of probabilities that the relocation specialist gave him advice that was contrary to the relocation policy. The Grievor gave different versions of what he was told, and it was not clear what the relocation specialist did or did not say. Furthermore, the relocation policy required that the Grievor ask for clarification. The Committee recommended that the grievance be denied.

In G-357, the Grievor was transferred to a new location. He went on a house hunting trip, which lasted seven days. Three and a half days were spent on travel to and from his new location and the remaining time was spent at the location looking for a home. Prior to his house hunting trip, the Grievor had spoken to a relocation specialist, who had told him that his travel time to and from the location would not be counted as part of his house hunting trip. The Grievor concluded that his house hunting trip was only three and a half days as opposed to the five he was entitled to take. The relocation policy allowed for a credit up to a maximum of $250.00 to be given to the member for a shortened house hunting trip. The Grievor applied for this credit and was refused because he had taken a total of seven days for his trip, inclusive of travel.

The Committee found that the relocation policy section which provided for the shortened house hunting trip credit applied only where the member had used less than the normal length of time for a house

hunting trip, which was identified as 7 days (5 days plus 2 days of travel). The Grievor's house hunting trip was of the normal length and he could not therefore qualify for the credit. As well, the credit was only available where the travel was 650 km or less one way, and the Grievor had exceeded this distance. Finally, there was no evidence that the Grievor was misled by the relocation specialist on whether or not the house hunting trip credit section applied to him. Even if the relocation specialist had specifically told him that he would have been entitled to the credit, the Committee concluded that this should have led the Grievor to verify the information, because the statement was contrary to the relocation policy. The Committee recommended that the grievance be denied.

In G-348, the Grievor was assigned to the United Nations civil police on mission to Kosovo. He was to join his family for a vacation in Greece. Before making airline reservations for the family reunion, the Grievor's wife talked to an RCMP representative, who informed her that the RCMP would cover the full cost of the airline tickets. When the Grievor submitted his claim, he only received partial reimbursement because the directive in effect did not allow for reimbursement of the full amount. The Committee concluded that the Force should not be allowed to deny the benefit when the Grievor had been previously advised that he was entitled to full reimbursement and he had relied upon that advice. The Committee recommended that the grievance be allowed.

In G-366, the Grievor was required to travel for a mandatory periodic health assessment and audiogram. The expense claim he submitted for mileage and meals was partially denied on the basis that he had not attended the closest available facility. The Grievor argued that the documentation received from Health Services regarding the periodic health assessment only identified the farther location, but the partial denial was confirmed. The Committee found that the Grievor had made a mistake in choosing the location of the health assessment and audiogram because the information he received from Health Services was confusing and unclear. The Committee recommended that the grievance be allowed and that the Grievor's claim be paid in full.

A.4. Continued Issues Regarding Suspension Without Pay

Stoppage of the pay and allowances of a member may be ordered by the Force when a member is suspended, and where it would be inappropriate, considering the integrity of the RCMP, to continue to pay the member. Force policy requires, among other things, that stoppage of pay and allowances only be invoked where the member was "*clearly involved in the commission of an offence that contravenes an act of Parliament or the Code of Conduct, and is so outrageous as to significantly affect the proper performance of his/her duties under the RCMP Act*". Issues examined by the Committee included the interpretation of the terms "*clearly involved*" and of the notion of "*outrageous conduct*". The Committee also clarified that grievances which pertain only to suspension, and not to stoppage of pay and benefits, are not referable to it. The Commissioner issued decisions in two matters relating to stoppage of pay and

allowances. In one of these, the Commissioner addressed the validity of the *RCMP Stoppage of Pay and Allowances Regulations*, a subject of significant discussion by the Committee in several cases.

Review of *RCMP Stoppage of Pay and Allowances Regulations* Ordered by the Commissioner

In G-342, the Force ordered that a member stop receiving his pay and allowances as a result of an allegation of misconduct. The member grieved the decision, and the Level I Adjudicator denied the grievance. The Committee concluded, as it had done before, that Treasury Board engaged in an unlawful sub-delegation of regulation-making authority by leaving it up to the RCMP to establish the criteria under which stoppage of pay and allowances may be ordered. The Committee also expressed the view that the Commissioner had the authority to pronounce on the validity of the regulation in question. It also disagreed with the Force's decision to stop the member's pay and allowances in the circumstances, and found that the order violated the Force's criteria.

In his decision this year, the Commissioner commented that only a court of competent jurisdiction has authority to declare the *RCMP Stoppage of Pay and Allowances Regulations* invalid and of no force or effect. He agreed with the Committee, however, that in a particular case, he has authority to consider the issue, although the regulations would continue in effect despite a finding of invalidity. In the Commissioner's view, the question of whether the regulations are valid is more properly debated outside the context of the grievance process, and to this end, he ordered a complete review of the regulations and related policy. The Commissioner reviewed the matter of the case and concluded that the grievance should be allowed because the circumstances of this case were not so extreme as to justify the decision to stop the member's pay and allowances.

Clear Involvement and Outrageous Conduct

Grievances pertaining to stoppage of pay and allowances often raise the difficult issue of assessing whether there is clear involvement of conduct alleged against a member. As this is a criteria in the RCMP stoppage of pay policy, the Force must establish that this element is met where the drastic measure of stopping a member's pay is to be taken.

In G-353, the member was suspended with pay for suspected involvement in weapon offences with two accomplices. He was charged with thirteen *Criminal Code* offences ranging from transferring ammunition with no authority or authorization to do so, to possessing prohibited devices without a licence. An Order to Stop Pay and Allowances was issued.

The Committee found that the matter was moot because the member had already been reinstated with pay and allowances to be repaid from the date of the original stoppage order. Nevertheless, the Committee recommended to the Commissioner that he consider the grievance, given that the member had raised several issues of importance. On the question of "*clear involvement*", the Committee was of the view that the *Order to Stop Pay and Allowances* should not have been issued. At the time that the order was made, it was not clear that the

member was involved in the thirteen *Criminal Code* charges which led to the stoppage order. The member had plausible explanations which needed to be weighed before clear involvement could be determined. The Committee recommended that the grievance be allowed.

The issue of clear involvement was also at the forefront in G-359, where an investigation was initiated against the member after he allegedly stole a one hundred dollar bill from the complainant during an arrest. The member stated that he had the money, but that he had not stolen it from the suspect. The Force ordered the stoppage of the member's pay and allowances. The Committee found that there was no clear involvement. The fact that the member had the complainant's money did not show clear involvement in the offence of taking it without lawful justification. There were also conflicting versions of the circumstances and a lack of clarity surrounding certain facts. Furthermore, the Committee emphasized that stoppage of pay and allowances is to be used only in extreme circumstances when it would be inappropriate, considering the integrity of the RCMP, to pay a member while the matter is being determined. The allegations against the member, including that of theft, were not outrageous in a relative sense. The Committee highlighted the applicable RCMP policy which states that such a measure shall not apply to summary convictions, provincial statutes or minor *Criminal Code* offences. There was no need for the Commissioner to consider a remedy because the order to stop the member's pay and allowances had already been rescinded.

No Jurisdiction to Review a Grievance Which Pertains only to Suspension

This year, the Committee also clarified that grievances involving suspension, but which do not pertain to the stoppage of pay and allowances, cannot be referred to the Committee. In G-344, a member was suspended with pay, and his grievance of the matter was eventually referred to the Committee. The grievance pertained to the interpretation and application of the RCMP policy on suspension (Administration Manual, chapter XII.5), a policy that only applies to the RCMP and by law was not referable to the Committee. The Committee added that, even if the matter had been referable, it would have considered the matter moot, because the member had been reinstated in his position retroactively to the date of the original suspension.

B. Disciplinary Issues

B.1 Misuse of Information Technology

The use of information technology is integral to policing today, whether for information storage, retrieval or for communication. The improper use of information technology has been considered by the Committee in two disciplinary recommendations made in the past year and two decisions from the Commissioner on previous Committee's recommendations. Those recommendations pertained to the wrongful disclosure of information from the Canadian Police Information Centre (CPIC), a computerized data retrieval system (D-092); the illegal downloading of information (D-093); and the inappropriate use of mobile work stations by two members (D-095 and D-096).

Wrongful Disclosure from CPIC

In D-092, the Committee disagreed with the Board's sanction ordering the member to resign failing which he would be dismissed. In allowing the appeal, it recommended that the sanction of dismissal be replaced with the forfeiture of 10 days' pay and a reprimand. An RCMP member provided information from CPIC about vehicle registrations and license plate numbers to a private investigation firm (a former policing colleague), an action for which he later expressed remorse. While the member had also agreed to seize two vehicles for cash, he later declined to do so. The Board's decision on sanction was based largely on the evidence of a 6 year old reprimand for similar misconduct and a finding that the member had been motivated by personal gain. Although the Board also heard evidence from former supervisors and colleagues about the member's trustworthiness, it found that there was a high risk of reoccurrence of the misconduct due to the inability to say "*no*" to others. The member's psychotherapist testified that, through treatment, the member had become more assertive and therefore, a recurrence of misconduct was unlikely to reoccur.

The Committee found that the evidence did not support the Board's assessment that a risk of recurrence was high, given the length of time since the prior discipline and its informal nature with a sanction of a reprimand. It also found that the misconduct was primarily an error of judgment and not that the member was corruptible. The Commissioner did not follow the Committee's recommendation and denied the appeal. He concluded that the evidence supported the Board's reasoning on a rational basis sufficient to justify the sanction imposed.

Improper Downloading

In D-093, peer-to-peer file sharing programs for non-RCMP purposes had been installed on the member's computer and he consented to installation of the same on the computers of his two subordinates. As a result, the amount of data transmitted across the Internet increased significantly and the Force was billed an additional $12,000 for Internet services. When his supervisor asked about the bill, the member did not tell him about the use of the file sharing programs and took steps to conceal it. A Force investigation later uncovered the improper use and disciplinary

proceedings were initiated. At the Adjudication Board hearing, the member apologized for his misconduct but stated that he had not known that the activity would have resulted in additional costs. He also claimed that he only used those programs minimally and that most of the cost was attributable to his subordinates' use. That claim could not be substantiated by the investigation due to faulty equipment and a lack of a firewall. While the member claimed that he was in a state of shock when initially trying to conceal his activities, the Board concluded that he had been deceptive and that it was one of its reasons for ordering him to resign. He was expected to display a high degree of integrity and propriety on matters such as protection of copyright due to his expertise in information technology. His actions showed that he could not be trusted to do so. While acknowledging that it was not possible to ascertain to what extent the member had contributed to the increase in Internet traffic, the Board indicated that he was at least partly responsible given that he had himself downloaded files using these programs, including a graphics software package.

The Committee recommended that the appeal be dismissed. It noted that the member was the manager of an information technology section, in a position of trust which had been broken beyond repair by his actions. Previous cases with more lenient sanctions for similar misconduct were distinguishable as those other members were not managers of information technology sections. Here the member turned a blind eye to inappropriate activities and it was immaterial whether he realized the financial consequences. The breach of trust was made worse by his attempt to conceal. His concerns at the time about potential job loss and financial reimbursement did not outweigh his responsibility as a manager to display leadership and accountability. The supervisor's failure to install a firewall and repair a defective router are irrelevant considerations when deciding the appropriate sanction. The gravity of the member's misconduct remains constant whether his subordinates or he, himself, contributed to an increase in data transmission across the Internet and therefore, the increased costs. In December 2005, the Commissioner issued his decision and followed the recommendation of the Committee.

Inappropriate Use of Mobile Work Stations

In D-095-and D-096, the Committee recommended the dismissal of two members' appeals where they were alleged to have inappropriately used their mobile work stations. At the hearing, both members admitted that they sent numerous communications that were derogatory towards colleagues and the public and that contained profanities and obscenities. Communications also included one instance of racial insensitivity and comments expressing a desire to use improper force, and to work less. Evidence of previous discipline measures taken against both members was presented, as well as evidence from the members' Officer in Charge (OIC) that he had lost confidence in both members was presented. Counsel for the members suggested that the members had been treated more severely than others, and that the OIC's personal dislike of one of them may have influenced his decision to proceed with formal discipline. The Board also considered psychological reports which concluded that the communications were out of character for the members and were the result of each

member trying to show himself as the most brazen and unorthodox. The psychologist believed that their careers were salvageable, and he encouraged the Board to apply corrective measures. The Board determined that both should be dismissed in light of the previous discipline for similar misconduct and that their conduct disregarded the RCMP Core Values, repudiating the employment relationship.

The members appealed and submitted new evidence on the appeal. They also argued that 1) there was a reasonable apprehension of bias on the part of the Adjudication Board with respect to the higher ranking Appropriate Officer; 2) there was a breach of procedural fairness, as the Appropriate Officer's Representative offered negative evidence in his submission even though the evidence had not been tendered at the hearing; and 3) the sanction imposed was disproportionately high.

The Committee found that the new information submitted on appeal should not be considered, as it reiterated factors that were known to the Board, or it consisted of information that could have been made available to the Board with due diligence. The Appellants' claim of institutional bias could not succeed, as a reasonable person fully informed and having thought the matter through, would not find an appearance of bias based solely on the fact that the Adjudication Board members were of a lower rank and had lower visibility in the organization than the Respondent. No other evidence suggested an appearance of bias on the part of the members. The Committee noted however that there was a breach of fairness in having the Respondent's representative include facts that had not been introduced as evidence through witnesses in his closing submissions. Nevertheless, that breach could not have affected the outcome of the case. The Committee also noted that although the Board was not obligated to follow the expert opinion, it would have been helpful if it had given more explanation for its conclusions in this regard. The Committee stated however, that the Board made no errors in its findings of fact, and properly assessed the relevant factors. It concluded that, given the mitigating and aggravating factors identified, it was appropriate for the Board to order the Appellants to resign.

C. Discharge and Demotion

The Commissioner issued his decision this year in R-004, concerning an Appropriate Officer's appeal from the decision of a Discharge and Demotion Board (the "Board"). The Board had concluded that the member was not provided with reasonable assistance and could therefore not be discharged from the Force. It also suggested that the member's supervisor should have adopted a more hands-on approach to the management of the member's performance. The Board further indicated that in the circumstances, the member should have been transferred.

The Committee recommended that the Appropriate Officer's appeal be dismissed. In its view, the evidence indicated that the supervisor was far more interested in laying the groundwork for eventual discharge proceedings than in helping the member to improve her performance. It is for that reason that the member should have been provided with a different supervisor. The evidence indicated that the working environment was not conducive to the member improving her job performance because of the hostility she faced from several of her colleagues. Given that the member performed well during a five-month period that she was posted to another detachment, a transfer should have been considered. The evidence also indicated that the member's performance problems could be attributed to very serious family and health issues that she was confronting at the time. Other factors suggested that she had the basic skills to carry out policing work.

The Commissioner followed the Committee's recommendation. The Commissioner highlighted that the member's supervisors were not genuinely interested in providing her with the tools to learn and do a better job. The management styles of these supervisors fell short of what is expected of managers in the RCMP who are there not only to assist, guide and supervise the members of their teams, but also to develop the potential of these members to perform as competent police officers. The supervisors in this case appeared more focussed on building a justification to eventually support a case for discharge. Although the Commissioner emphasized that a transfer should never be used as an easy way out of a difficult situation, the circumstances of the present case warranted such a measure. A different detachment would have provided the member with a better work environment. The Commissioner ordered that the member be transferred to a new detachment and that a thorough assessment of her training needs to be completed to provide her with every opportunity to meet required performance standards.

PART IV: Federal Court and Federal Court of Appeal

A. Decisions rendered

Two decisions were issued by the Federal Court in 2005-2006. In addition, one decision was issued during this fiscal year by the Federal Court of Appeal.

On June 2, 2005 the Federal Court of Canada issued its decision in *Read v. Canada* ([2005] FC 798).

Corporal Read became convinced that senior Immigration Department officials in Hong Kong had, aided and abetted by members of the RCMP, covered up flaws in the visa issuance system and potentially allowed criminals into Canada. Cpl. Read gave media interviews in which he discussed the Hong Kong investigation, despite being previously ordered not to speak to the media.

Cpl. Read was accused of disobeying a lawful order and conducting himself in a disgraceful manner which brought discredit on the Force, in violation of the *RCMP Code of Conduct*. The public comment was alleged to be a breach of the duty of loyalty Cpl. Read owed to his employer. His defence was that the public disclosure was permitted under the "*whistle-blower*" exception to the duty of loyalty. If he was entitled to speak on the basis of the "*whistle-blower*" defence, the Force would be prevented from imposing discipline.

The Adjudication Board found the conduct violated the *Code of Conduct* and ordered the member to resign within 14 days or face dismissal. The member appealed to the Commissioner, who referred the file to the Committee for its findings and recommendations. The Committee disagreed with the Board's finding that RCMP members should be held to a higher standard regarding loyalty and the duty of non-disclosure than civil servants. In the Committee's view, the "*whistle-blower*" defence was not limited to matters of public health and safety alone. It was also available where the information disclosed involved a matter of "*legitimate public concern*". The Committee recommended to the Commissioner that he allow the appeal.

The Commissioner's delegate, who made the decision, agreed with the Board that RCMP members owed a higher duty of loyalty to their employer. He further stated that the "*public concern*" standard used by the Committee regarding the whistle-blower defence was overly broad, and that, in any event, the matters disclosed did not involve genuine public concern. The sanction of the Board was upheld. The member sought judicial review.

The Federal Court found that Cpl. Read's criticism bore directly on his duties and responsibilities as a member of the RCMP. The Court held that, while there was a possibility that criminals might have entered Canada on forged documentation, this risk was too remote to trigger an exception to the duty of loyalty based on public health or safety. Further, it concluded that, while Cpl. Read honestly believed the accusations, honest belief was not enough. There had to be a rational basis for the allegations. Even if the speech was otherwise justified, Cpl. Read was precluded from going public as he had not exhausted the internal recourse process. The Court concluded that the "*whistle-blower*" defence had not been made out and, therefore, it was not

necessary to consider whether police officers and public servants have different duties of loyalty. Cpl. Read appealed to the Federal Court of Appeal. The hearing was held May 3, 2006 and the decision is pending.

On June 29th, 2005 the Federal Court of Canada issued its decision in *Girouard v. Canada* ([2005] FC 915).

In 1994, the RCMP created a classification committee to determine whether the merger of administrative services at "A" Division with those at headquarters would have an impact on the position classification of the administrative services officer. The classification committee concluded that the classification was not affected and this decision was grieved by the member occupying the position at the time. The grievance was rejected at Level I and then presented at Level II. The Committee recommended that the grievance be allowed but the RCMP Commissioner did not accept this recommendation. The decision was overturned by the Federal Court, which ordered a new evaluation in 2001 (*Girouard v. Canada* [2001] 201 F.T.R. 219). This evaluation was conducted by a new classification committee, which arrived at the same conclusions as the first committee had seven years earlier.

The Committee again recommended that the grievance be allowed. The Committee recognized the classification committee members' expertise, but found that they were still required to balance the classification of the Grievor's position with other positions within the Force classified at the same level or a higher level. The Committee found that the explanations provided by the classification committee in support of its evaluation did not inspire confidence that it properly understood the essential competencies of the position and how they differ from those required for other RCMP positions. The Commissioner did not agree with the recommendation of the Committee, finding that the classification committee's expertise warranted that greater weight be given to its conclusion than to the Committee's recommendation.

The Federal Court concluded that the Commissioner's role, as Level II decision-maker in a classification grievance, was limited to reviewing errors of fact or of process. This limitation also applied to the Committee when making its findings and recommendations. Although additional analysis by the classification committee might have been useful, its absence was insufficient to call into question the entire review. Superintendent Girouard filed an appeal with the Federal Court of Appeal.

On February 10, 2006, the Federal Court of Appeal issued its decision in *Thériault v. Canada* ([2006] FCA 61) and provided guidance as to how section 43(8) of the *RCMP Act* should be interpreted. Section 43(8) of the RCMP Act, states that disciplinary proceedings must be initiated within twelve months from the time the Appropriate Officer, who is the CO, has learned of the alleged contravention and the identity of the member.

In *Thériault* the divisional Criminal Operations Officer became aware of allegations of misconduct involving the member. After becoming aware of these allegations, this same officer served as acting Commanding Officer (CO) of the Division. No action was taken against the member until some time later, after the actual Commanding Officer was informed of the allegations. This was well in excess of 12 months after the Criminal Operations Officer had knowledge of the allegations.

Thériault argued the time limits should have begun to run when the Criminal Operations Officer first acted as CO.

The Adjudication Board rejected this claim because the Criminal Operations Officer was not acting as CO of the division when he learned of the allegations. The Board ordered that the member resign within fourteen days, failing which he would be dismissed. The member appealed the Adjudication Board's decision, and the Committee recommended that the appeal be dismissed. It found that the Criminal Operations Officer had only served as CO on an acting basis and his knowledge of the allegations could not be attributed to the actual CO. The Commissioner dismissed the appeal, adopting the Board's analysis.

The member made an application for judicial review to the Federal Court. The Court stated that whether an officer holds the position of CO of the division on an acting or permanent basis is irrelevant in determining if the time limit was respected. The Court stated that the limitation period in section 43(8) commences when the CO of the division acquires the requisite level of knowledge about the results of an internal investigation. The Court stated that the Criminal Operations Officer did not have this level of knowledge when he was acting as CO of the division, and it was the actual CO of the division who acquired sufficient knowledge, via the investigation report, at a later date. The member appealed.

The Federal Court of Appeal allowed the appeal. It stated that the Appropriate Officer acquires the knowledge referred to in section 43(8) of the *Act* when he is in possession of reliable and persuasive information about the alleged contravention and the identity of the member. The degree of knowledge required for the time period to begin to run does not need to be confirmed through an investigation, and it is not necessary to have all the evidence to trigger the running of the time limits. The Court also concluded that an officer's knowledge follows him when he assumes the position of Appropriate Officer, even if it is only on an acting basis. The proceedings initiated against the member were therefore statute barred, and the Court of Appeal overturned the Commissioner's decision ordering the member's dismissal.

B. Applications for Judicial Review filed before the 2005-2006 year

D-083 involved four allegations of misconduct, all relating to incidents that the member had allegedly abused his authority when interacting with the public. The Committee recommended that the appeal of the Board's finding on the allegations of misconduct be allowed for two allegations and that the Board's decision on sanction for a third allegation be replaced with a forfeiture of pay and a reprimand. The Commissioner dismissed the appeal on all allegations and the appeal regarding sanction. The Appellant filed an application for judicial review on June 30, 2004. The Federal Court held a hearing on March 21-22, 2006. The decision is pending.

R-003 involved the appeal of the decision of a Discharge and Demotion Board which directed that the member be discharged from the Force for repeatedly failing to meet the requirements of his position, despite having been provided with reasonable assistance, guidance and supervision. The Committee recommended that the appeal be dismissed and the Commissioner agreed. A subsequent reconsideration under subsection 45.26(7) of the *RCMP Act* resulted in the Commissioner confirming the dismissal of the appeal. The Appellant filed an application for judicial review on June 18, 2004. The Federal Court held a hearing on February 9, 2006. As of the end of the fiscal year, the decision is pending.

C. Matters Pending from Federal Court Decisions

In *Stenhouse v. Canada* [2004] FC 375, the Federal Court allowed an application for judicial review by Staff Sergeant Robert Stenhouse. The Court referred the matter of sanction back to the Committee to hold a hearing to consider certain evidence that had not been disclosed as well as any relevant viva voce evidence with respect to that evidence, and further representations from the parties. The Chair of the Committee issued a recommendation to the parties on preliminary matters concerning the scope of evidence to be heard and the order in which witnesses would be heard. As of the end of the fiscal year, this matter is still pending.

PART V: Appendices

Appendix 1: About the Committee

Established in early 1987, the Committee was one of two entities created as civilian oversight agencies for the RCMP, the other being the Commission for Public Complaints Against the RCMP. The first Chair of the Committee was the Honourable Mr. Justice René Marin, who from 1974 to 1976 had chaired the Commission of Inquiry relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police. In 1992, the Vice-Chair, F. Jennifer Lynch, Q.C., became Acting Chair of the Committee a position which she held until 1998. Philippe Rabot then assumed the position on an acting basis and, on July 16, 2001, he was appointed Chair of the Committee. Upon Philippe Rabot's departure in April 2005, Catherine Ebbs assumed the role of Acting Chair of the Committee. A lawyer of the Bar of Saskatchewan, Catherine Ebbs spent sixteen years as Board member for the National Parole Board, the last ten as Vice-Chair in charge of the Appeal Division of the Board. Ms Ebbs joined the Committee in 2003 and prior to becoming Acting Chair, served as Legal Counsel and Executive Director and Senior Counsel. Ms Ebbs has been appointed full-time Chair on November 1, 2005 for a three year term.

Appendix 2: The Committee and its Staff in 2005-2006

Catherine Ebbs
Chair

Virginia Adamson
Executive Director and Senior Counsel (Acting)

Lorraine Grandmaitre
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