

Federal Court



Cour fédérale

**Date: 20130705**

**Docket: T-40-13**

**Citation: 2013 FC 755**

**Ottawa, Ontario, July 5, 2013**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**BARRY GEORGE RUSSELL**

**Applicant**

**and**

**COMMISSIONER OF THE ROYAL  
CANADIAN MOUNTED POLICE AS  
REPRESENTED HIS DESIGNATE  
ADJUDICATOR RCMP SUPERINTENDENT  
MARK MCGOWAN**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] This judicial review turns on two fighting words: “cheat” and “bias”; neither of which should have been used. Corporal Kent MacKay was accused of cheating while vying with Sergeant Barry Russell for a promotion within the Royal Canadian Mounted Police. He was allowed to continue in the competition by Superintendent Dan Nugent, notwithstanding that he was of the view that one of the examples in his application could be construed as misleading. Superintendent Nugent did not pass on that information to the validation committee, which he himself appointed. The

validation committee found that both candidates were qualified. The selection committee determined that they were equally qualified. Corporal MacKay was recommended for the promotion on the basis of seniority. That recommendation was accepted by Superintendent Nugent. The superintendent was accused of conflict of interest and bias.

[2] Sergeant Russell complained that Corporal MacKay should not have been allowed back into the competition and, in any event, should not have been appointed.

[3] These complaints were dismissed by Superintendent Mark McGowan, adjudicator, Atlantic region, RCMP. This is the judicial review of that decision. Although there may have been some hard feelings on Sergeant Russell's part at the outset, he himself has now been promoted and is not interested in Corporal MacKay's job. In fact, he now plays a role in the RCMP's promotion process himself. He considers it flawed, at least as applied in this case. Nevertheless, the matter has not become moot. There is some potential gain to Sergeant Russell in that if judicial review is granted and the matter is referred back to another adjudicator, he might benefit from some retroactive pay and pension adjustments.

[4] I shall:

- a. discuss the RCMP's promotion process;
- b. set out the facts leading up to the complaint;
- c. analyze superintendent McGowan's decision; and
- d. render my own decision.

## **THE RCMP PROMOTION PROCESS**

[5] The promotion process within the RCMP is complex. It is designed to ensure fair play and to minimize favouritism so that the best qualified person gets the job. Candidates are assessed at different stages by different members of the RCMP, who act independently from each other. The process need not be described in great length as it was clearly explained by Madam Justice Bédard in *Rehill v Canada (Attorney General)*, 2011 FC 1348, 209 ACWS (3d) 210, 2011 FCJ No 1647 (QL) at paras 19-30.

[6] This particular competition was within non-commissioned officer ranks. The framework is set out in the *Career Management Manual*, bulletin CMM-783, issued in June 2006. As the promotion was for a decentralized position, the authority to promote lay with Superintendent Dan Nugent, the Human Resources Officer Designate, Atlantic region, who was also the Officer in Charge, Atlantic Region, Career Development Resources Office.

- [7] There are five stages to the process:
- a. qualifying list based on Job Simulation Exercises;
  - b. supervisor/line officer support;
  - c. advertisement;
  - d. competency validation; and
  - e. selection.

[8] At the competency validation stage, applicants were required to “identify two verifiable examples describing how you best demonstrate each required competency...” One field of competency was concern for safety. The candidate’s signature is his “verification that the examples provided are true and accurately describes your behaviour...” His supervisor must also sign. His signature serves as verification of the behavioural examples provided by the candidate. The controversy relates to one of Corporal MacKay’s examples of his concern for safety.

### **THE FACTS**

[9] The advertised position was for a “Detachment/District Policing Supervisor/Investigator/Analyst” with the rank of Sergeant in West Prince (Alberton), PEI in the “L” division.

[10] One of Corporal MacKay’s résumés with respect to the concern for the safety aspect of his competency related to the “take-down” of a high risk offender in Charlottetown. Corporal MacKay wrote:

I ensured all our members were properly equipped with a variety of intervention options including, but not limited to their service pistol CFW, OC spray, hand cuffs, Vests and police identity jackets.

[11] The suspect was apprehended in a parking lot of a restaurant. “Result: this violent offender was safely taken into custody and is presently on remand facing a number of charges.”

[12] It came to Superintendent Nugent’s attention that Sergeant Baillie, one of the three members of the validation committee, was part of a team investigating that incident. It was reported to Superintendent Nugent, not by Sergeant Baillie, that the findings of Sergeant Baillie during the

administrative review were that none of the officers was wearing his police jacket at the time of the take down and only two of the officers had their police jackets with them at all. One member did not have his baton or OC spray. There was also no mention in Corporal MacKay's description of the event that one of the RCMP members was slightly injured as the result of the suspect's vehicle ramming the police vehicle, or that the local police were given no advance warning.

[13] As a result, Corporal MacKay was either removed from or suspended from the competition. The language is none-too crisp.

[14] He was then given an opportunity to explain himself. He pointed out that the rules provide that the examples be limited to 23 lines, that one cannot use a font size smaller than 8 and that no appendices are allowed.

[15] He said that in his first draft he had included the information which some thought should have formed part of his example, but the résumé was too long. He had to cut something out, and in fact only 10 character spaces were left in the example he submitted.

[16] Having thought the matter through, this is what Superintendent Nugent wrote to Corporal Mackay:

I have reviewed the documentation that first brought your Example (2) in the competency Concern for Safety into question. I am satisfied that a prima facie case was established to demonstrate that your Example (2) was misleading. I have carefully reviewed the documentation that you presented to Sgt. Clifford on 2009-10-06. I have concluded that the statements I cited from your competency résumé, while sufficiently misleading to raise a duty to account, did not amount to cheating as envisaged in the relevant policy. Your

application in the promotional process cited above will therefore be re-inserted at the point where it was suspended.

[17] Superintendent Nugent then struck a different validation committee to review Corporal MacKay's competency. He did not pass on Sergeant's Baillie's administrative report.

[18] The function of the validation committee is to determine whether candidates meet the minimum requirements for the job. It does not compare candidates. Thus, there is no issue because Sergeant Russell and Corporal Mackay were assessed by different committees. It is noteworthy that Corporal MacKay had never complained about the presence of Sergeant Baillie on his validation committee as originally struck.

[19] The selection committee found both candidates equally qualified. Corporal MacKay was recommended on the basis of the traditional tie-breaker: seniority. It does not appear that the selection committee had copy of Sergeant Baillie's report. Superintendent Nugent who, of course, had knowledge of Sergeant Baillie's report, endorsed the selection committee's recommendation.

[20] Shortly after the appointment was announced, Sergeant Russell came to learn of Corporal MacKay's situation. He filed complaints in accordance with RCMP procedures.

**SUPERINTENDENT McGOWAN'S DECISION**

[21] The coversheet of the decision states it deals with the “removal and re-insertion of candidate in process” and failure on the part of the CDRO (Career Development Resources Office) “to consider relevant information” and that the CDRO was in conflict of interest.

[22] One fact, which I have not recited above, is that a member of the RCMP had telephoned Superintendent Nugent to support Corporal MacKay's candidacy. He later emailed to apologize and stated he knew better than to think that he might have been able to influence the decision.

[23] Superintendent McGowan broke down the case into five issues.

[24] The first complaint submitted by Sergeant Russell was that the decision of Superintendent Nugent, as Acting Human Resources Officer (Acting HRO), to allow Corporal MacKay back into the promotion process was contrary to policy and established process. Superintendent McGowan disagreed, as informal resolution of contentious matters was an established procedure which happened every day.

[25] The second complaint was the Acting HRO's decision to allow Corporal MacKay to submit additional documentation to clarify his example for competency evaluation. Superintendent McGowan was of the view that this documentation related to the potential exclusion of Corporal MacKay in the promotion process. This information did not form part of the validation package considered by the validation committee. There was no deviation from policy.

[26] The third complaint was that the Acting HRO failed to seek out and consider all available relevant information prior to making his decision to allow Corporal MacKay back into the process. This complaint was dismissed on the grounds that it was not the adjudicator's function to second guess Superintendent Nugent's decision.

[27] The fourth complaint was that the Acting HRO made a policy error in changing the rationale submitted by the line officer. It was found that this point was itself raised in error, and is not one that I shall consider further.

[28] Finally, it was submitted that the Acting HRO was in a conflict of interest. It was held that he was not. Again, the role of the adjudicator was not to second guess Superintendent Nugent "but to review the process used by the decision maker, in reaching the decision and to consider if the decision process was flawed. In this instance it was not." Consequently, the complaints were denied.

### **ANALYSIS**

[29] It matters not whether Corporal MacKay was eliminated from or simply temporarily suspended from the competition. If he was struck from the competition, such a decision would clearly be in breach of natural justice, as he was not given an opportunity to explain himself. As stated by Lord Reid in the seminal case of *Ridge v Baldwin*, 1964 AC 40, [1963] 2 All ER 66 at p 79:

I do not doubt that if an officer or body realizes that it has acted harshly and reconsiders the whole matter afresh, after affording to



the person affected a proper opportunity to present his case, then its later decision will be valid.

[30] Although Superintendent McGowan's language is somewhat loose in not drawing a clear distinction between "bias" and a "reasonable apprehension of bias", the unsolicited telephone call in support of Corporal MacKay does not give rise to a reasonable apprehension of bias. A similar situation was encountered in *Rehill*, above.

[31] It is not necessary to consider the conflict of interest allegation arising from the fact that Superintendent Nugent played two roles in this process. In my opinion, the process was not flawed because he held two different positions, but rather because he was privy to some information in his role as Acting HRO, which he did not use in his decision as Officer in Charge, Atlantic Region, Career Development Resources Office, to promote Corporal MacKay.

[32] Although as an outsider I certainly owe deference to the dedicated officers of the RCMP who were doing their best to carry out their duties, there was far too much focus on the individual steps of the promotion process, and not enough focus on the reasonableness of the final result.

[33] It is unfortunate that within the RCMP misrepresentation seems to be equated with cheating. Cheating carries with it a *mens rea*. A misrepresentation may be innocent, negligent or fraudulent. There is no basis to quarrel with Superintendent Nugent's decision that Corporal MacKay's résumé was not fraudulent, but that it may have been misleading.

[34] Another aspect of this “cheating” issue is that one’s word is one’s bond. Naturally, Corporal MacKay, supported by his supervisor, vigorously denied that he cheated. Indeed, if so found there would have been serious consequences for him.

[35] For reasons I cannot quite understand, although the examples given must be “verifiable” it seems that the verification is limited to the candidate, and his supervisor. In this case, there was information easily ascertainable that put into question whether Corporal MacKay’s example was completely accurate.

[36] Like Superintendent McGowan, I agree that there is no basis for finding bias, “real” or “apprehended”, on the part of Superintendent Nugent. However, it was both wrong in law and unreasonable for Superintendent McGowan not to second guess Superintendent Nugent. It was not simply his function to consider if the process was followed. He had to decide if the decision was reasonable. This was a “decision on the merits” within the meaning of the RCMP Administrative Manual. Section 22 thereof provides that the adjudicator either dismiss the application or shall if he “determines that a decision [...] is erroneous and has prejudiced the complainant, order appropriate corrective action.”

[37] The validation and selection committees should have had a copy of Sergeant Baillie’s administrative report. If they had the report, we simply do not know whether the validation committee would have been satisfied that Corporal MacKay met the minimum requirements and that the selection committee would have found both candidates equally qualified.

[38] I can understand Superintendent Nugent's concern that the validation committee's role was to review the material submitted by Corporal MacKay. It is well known that outside knowledge may give rise to a reasonable apprehension of bias which would disqualify someone from making a decision (*Committee for Justice and Liberty et al v National Energy Board et al*, [1978] 1 SCR 369).

[39] On the other hand, a decision should be made on a complete record. In this case, that record should have included Sergeant Baillie's report as it may well have had a bearing on the deliberations of the validation and selection committees. See *Oakwood Developments Ltd v Saint-François-Xavier (Rural Municipality)*, [1985] 2 SCR 164, [1985] SCJ No 49 (QL).

[40] The issue as to whether there was a misrepresentation at all, or whether it was relevant, did not rest with the opinions of Corporal MacKay, his supervisor or Superintendent Nugent. It rested with the validation and selection committees. They were deprived of relevant information which may have had a bearing on their decisions.

[41] For this reason, the judicial review shall be granted.

[42] Counsel for the Minister suggested lump sum costs of \$2,500, irrespective of the outcome of the case. I consider this to be a fair and reasonable suggestion.

**ORDER**

**FOR REASONS GIVEN;**

**THIS COURT ORDERS that:**

1. This application for judicial review is granted.
2. The matter is referred back to another adjudicator for reconsideration.
3. The applicant shall have his costs fixed in the amount of \$2,500, all inclusive.

“Sean Harrington”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-40-13

**STYLE OF CAUSE:** BARRY GEORGE RUSSELL v  
CANADIAN MOUNTED POLICE (AS  
REPRESENTED HIS DESIGNATE) (ADJUDICATOR  
RCMP SUPERINTENDENT MARK MCGOWAN)

**PLACE OF HEARING:** FREDERICTON, NEW BRUNSWICK

**DATE OF HEARING:** JUNE 10, 2013

**REASONS FOR ORDER  
AND ORDER:** HARRINGTON J.

**DATED:** JULY 5, 2013

**APPEARANCES:**

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