Federal Court  Cour fédérale

Date: 20121127

Docket: T-1466-08

Citation: 2012 FC 1370

Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

GREG IRVINE and others;
RICK TURNBULL and others; and
WAYNE KNAPMAN and others

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is a consolidated application pursuant to section 18.1 of the *Federal Courts Act* RSC 1985 c F-7 for judicial review of three Grievance Decisions of the Royal Canadian Mounted Police (RCMP) Grievance Adjudicators rejecting the Applicants' claims for Stand-by Level II compensation for time spent on-call as part of the RCMP Emergency Response Teams (ERTs).

BACKGROUND

[2] The Applicants in this matter are 64 current or former members of the RCMP ERTs, and are part of the "H", "J", or "K" Divisions. The "H" Division represents Nova Scotia, where there is one ERT for the province; the "J" Division represents New Brunswick, where there is one ERT for the province; and the "K" Division represents Alberta, where there are three ERTs for the province: Calgary, Red Deer, and Edmonton. The situation of the ERT members was, for present purposes, the same across the three provinces.

[3] ERT is defined in the RCMP Tactical Operations Manual as "a group of members comprising assaulters and sniper/observers specially trained in the use of various tactical procedures and weapons." ERT may be deployed to provide armed back-up support in emergency situations such as hostage situations, high-risk vehicle take downs or arrests, or emergencies within penitentiaries. ERT is not a first response team; they provide back-up support in extreme situations. The Applicants are members of the RCMP who voluntarily joined ERT by applying, undergoing specialized training, and passing a series of competency tests.

[4] As ERT members, the Applicants are expected to be available to respond to emergency situations whenever they arise. ERT members are precluded from doing things that may impair their ability to respond effectively to an emergency, such as consuming alcohol or visiting remote areas. Upon receiving an ERT call, the Applicants must abandon whatever they are doing to respond to the situation. This includes any activity an ERT member may be engaged in during time off-duty, such as spending time with friends and family.

[5] Upon joining the ERT, each of the Applicants was issued a pager that they were expected to keep on themselves at all times. ERT members are only relieved of their obligation to carry pagers if they have given prior notice that they will be out of the province. The Applicants have received no compensation for maintaining this perpetual state of readiness to respond to life-threatening situations at any time.

[6] The Applicants filed grievances for compensation for time spent on call at Standby Level II, whereby they ought to be paid for 1 hour of work for every 8 hours spent on call. The K Division's grievance was heard on 8 August 2008 by Grievance Adjudicator Supt. J.R.A.J. Héroux (Héroux Decision). The decision to deny stand-by compensation to the H Division Applicants was made by Grievance Adjudicator Insp. J.R.Y. Royer on 15 December 2008 (Royer H Decision), and he also rendered the decision in the J Division on 30 December 2008 (the Royer J Decision). The submissions of the Applicants in the three Decisions were very similar, as were the reasons for the Decisions, which is why they have been consolidated into the present application. The Adjudicators found that, according to RCMP policy, and more specifically the Administration Manual, the time the Applicants spent as members of ERT did not constitute Standby Level II, and thus their request to be compensated for such was denied.

DECISIONS

The Héroux Decision – K Division

[7] Supt. Héroux began his decision by summarizing the roles and responsibilities of ERT members. He also reviewed other submissions of the Applicants, such as the following:

1. Due to the contract between the RCMP and the Provinces, ERT services must be provided – they are a mandatory aspect of policing. As such, ERT must be considered a "mandated necessary service";

2. ERT members are available for call-outs at all times, unless they put their name in a log book indicating they are unavailable. ERT members are due compensation for this, and the only method available is through payment of Standby Level II. Membership in ERT involves a deemed requirement to attend emergent matters on short notice;

3. The "J" Division ERT Leader is being compensated, and Headquarters ("HQ") ERT members in Ottawa have been receiving Standby Level II compensation since about April, 2003;

4. Policies that require prior approval of locations for standby do not make sense in regards to ERT; ERT members are required to respond to emergencies anywhere in the province. Common sense dictates that, in the context of ERT, the "location" requirement must be relative to a unit - since ERT covers the entire province it is unreasonable to assume that approval would be given for individual locations.

[8] Supt. Héroux also summarized the Grievance Respondent's submissions, including the following:

1. The Applicants voluntarily joined ERT. Members are compensated when deployed to an incident, and the requirement to carry a pager does not equate to Standby Level II;

2. The use of pagers is to provide convenience to ERT members so that they do not have to be near a telephone. Members' time off is not restricted, except for the requirement to provide notification if they intend to leave the province;

3. The definition of Standby Level II requires that standby be ordered for an "identified location." ERT members belong to home "units" which, per policy, require identification as standby duty locations. There was no identified standby duty location in this Division;

4. The requirement of an "identified location" is a reference to "front line" services, which ERT is not. The primary responsibility for dealing with critical incidents is not with the ERT. AM II.9.E (see below) is intended for "front line" detachment services;

5. The HQ Division in Ottawa maintains a different role from other ERT Divisions. HQ members' freedoms are specifically impaired by the need to respond to events of international significance. For example, they must maintain strict minimum response times which restrict their ability to take leave;

6. ERT can be called on at any time to deploy, but any member of the RCMP can be called on at any time to return to duty. They cannot all be entitled to Standby Level II compensation;

7. The deciding factors in determining whether Standby Level II ought to be authorized are public expectation, budget realities, policy, and standards.

[9] Supt. Héroux then pointed out the parts of the RCMP Administration Manual (AM) applicable to the Decision as follows:

AM II.4. – PAY AND ALLOWANCES

(…)

I. 8. Standby

(…)

2. A member will be compensated for no less than one hours for each scheduled standby period using the rounding of hours in accordance with II.4.I.1.f.

(…)

I. 8. b. Member

(…)

2. Standby Level II

1. In accordance with division policy, you may be compensated by a combination of payment or time off for accumulated standby level II hours.

2. If requesting payment, complete a separate form 1112 using codes 16 and 0, identify "Standby Level II Payout" and claim these hours at the straight-time rate…

(…)

AM II.9. – WORK SCHEDULES AND SHIFTS

(…)

E. 1. In this chapter, the following terms means:

(…)

E. 1. j. **standby level II**: occurs when a member voluntarily makes himself/herself available for duty on reasonably short notice at identified locations;

(…)

H. **STANDBY**

H. 1. **General**

(…)

H. 1. b. Where all feasible alternatives have been considered and when a need remains to provide coverage by having members readily available to respond to calls during the quiet hours, participating members will accrue standby level II hours.

H. 1. c. Standby level II is accrued at the ratio of one hour for every eight hours at straight time and will be compensated within the framework of options identified in AM.II.4. and as defined in divisional supplements.

(…)

H. 2. **Commander**

H. 2. a. After considering all other alternatives, request authorization to place members on standby from your CO/delegate.

H. 3. **CO/Delegate**

H. 3. a. Whenever possible, avoid using standby.

H. 3. b. Ensure all possible measures are taken to avoid using standby level II, e.g. 24-hour shifts, hubbing detachment, central communications, community approval on level of service.

H. 3. c. Consistent with community-based policing philosophies, inform the appropriate government and community representatives on the level of service that will be available during quiet hours with the resources available.

H. 3. d. Carefully assess alternatives to standby, taking into account the likelihood of an urgent call being received.

H. 3. e. If you believe all other alternatives impractical, authorize standby if an emergency exists, or the requirement is anticipated.

H. 3. f. Do not approve permanent standby.

(…)

TOM 2.1 Organization and Selection (previously found under TOM 5.E. prior to 2005-08-23)

(…)

2. Selection [sic] **Criteria**

2. 1. For job descriptions and job requirements, see CMM App. 5-8 in conjunction with divisional ERT selection criteria.

2. 2. A successful ERT candidate must:

2. 2. 1. be an RM volunteer with a minimum of two years of operational policing experience;

2. 2. 2. be prepared to commit to ERT for three years;

(…)

2. 2. 5. be willing to improve his/her own tactical ability and continue regular training;

(…)

[10] Supt. Héroux then stated that he found as fact the following:

1. The Applicants voluntarily made themselves available to be part of ERT;

2. There was no request by a Commander or Officer Commanding (CO) for the placement of the Applicants on standby, nor was there approval for such a placement;

3. The CO did not identify locations where Standby Level II was authorized for ERTs;

4. There was no indication that the Applicants were led to believe they were entitled to Standby Level II.

[11] In relation to the Applicants' submissions, Supt. Héroux noted that very little information was provided about the allegations of inequitable treatment with regards to the J Division ERT Leader and the HQ Division. The Grievance Respondent simply responded that no similar arrangement existed in the K Division, and the issue was not discussed further.

[12] Supt. Héroux went on to discuss the use of standby as a managerial tool. He stated that use of standby has a significant impact on members' personal lives and the budget of the RCMP. The RCMP's standby policy gives the responsibility to a CO, Director, or other Delegate to identify when ERT members are authorized to receive compensation for Standby Level II. He found "that ERT members fulfill a specialized responsibility, but that they are doing so on a voluntary basis."

[13] Supt. Héroux stated that "carrying a pager or a cellular phone after regular hours as a means to be reached in case of an urgent situation did not equate to standby level II entitlement." He then said that the Applicants were "not ready to accept the voluntary aspect of participation in the ERT function and the existing policies governing its use." Supt. Héroux found that there was no evidence before him that the policy was applied in an unfair way in denying the Applicants Standby Level II compensation for their time spent as ERT members. The Applicants failed to

show that the denial of Standby Level II compensation was not consistent with applicable policies, and Supt. Héroux denied the grievance.

The Royer Decisions – H and J Divisions

[14] The arguments and submissions of the parties, as well as the reasons, were very similar in the Royer H Decision and the Royer J Decision (collectively, the Royer Decisions). The Royer Decisions were made on the same basis as the Héroux Decision, but with some minor differences. Submissions of the Applicants noted by Insp. Royer beyond those discussed in the Héroux Decision included the following:

1. Dispatchers had protocol to contact ERT members through "group paging" when directed by the team leader, and any call was to be treated as an emergency. When an ERT call went out, all members were required to respond immediately. One ERT member could not respond to a call alone; therefore all ERT members were on call. H Division policy said that "there will be 15 members used to make up an ERT." To date, the longest ERT response time was 5 hours;

2. The J Division Leader is paid Standby Level II compensation, as are designated members of Major Crime and Security Engineering;

3. ERT members had to perform tasks outside of their normal duties such as maintaining a higher level of physical fitness and dedicating a minimum of 10 hours a week to physical training. They did not seek additional compensation for this.

Additional submissions of the Grievance Respondent's included the following:

1. These ERT Divisions answer to approximately 30 calls per year but are asking for permanent Standby Level II. ERT members do not respond to each and every call but respond if they are available. A member has the opportunity to decline;

2. Standby Level II is intended to compensate members who volunteer to be available for immediate duty to act as front-line responders to provide emergency services to communities. This is normally limited to General Duty/Municipal Units, and is applicable to units in communities that do not have 24-hour shifts and where a need exists to have members readily available to provide emergency policing services. There is normally only one member on Standby Level II at a given time. Standby Level II compensation is authorized on an as and when required basis, and full-time compensation for these units is ruled out;

3. Major Crime and Security Engineering members were compensated for Standby Level II, but they only had one person on call at a given location. HQ ERT members operate within a specific operational environment that is different than these Divisions;

4. Members joined ERT knowing they would have to make themselves available and carry a pager without further compensation.

[15] In addition, the following excerpts from the RCMP Tactical Operation Manual (TOM) were considered:

TOM 5.F.2.a.	An ERT member is responsible for:
TOM 5.F.2.a.7.	Complying with all established procedures including wearing approved protective equipment.

TOM 5.G.2. A successful ERT candidate must:

TOM 5.G.2.f. Have no serious phobias or personal problems that would adversely affect his or her performance on an ERT.

[16] The following policies of the AM, not discussed in the Héroux Decision, were also considered pertinent:

AM II.9.D.5. Subject to the exigencies of duties and member's responsibilities as an RCMP member, a member's free time will be unfettered.

AM II.9.H.3 CO/Delegate

AM II.9.H.3.e. If you believe all other alternatives impractical, authorize stand-by if:

1. An emergency exists, or

2. The requirement is anticipated

AM-2104 1. There is a requirement to provide 24 hour community access to policing services for our clients.

2. a. Standby Level II is intended to compensate members who volunteer to be available for immediate duty to act as a front line responder to provide emergency policing services to the communities we serve. This is normally limited to General Duty/Municipal Units.

b. Standby Level II will be applicable at units where 24 hour shifts are not provided, and a need exists to have members readily available to provide emergency policing services during quiet hours to the public.

3. Participating members at the following units may be eligible to claim Standby Level II benefits subject to approval from the respective Line Officer/Delegate:

a. All detachments not providing 24 hour coverage;

> b. Operational Specialized/Support Units on an "as and when required" basis;
>
> c. Federal Units on an "as and when required" basis;
>
> Note: Hours of Standby Level II must be approved by the respective Line Officer.

(…)

[17] Insp. Royer identified the key issues before him as being whether the Applicants were ordered to be on standby, and whether their time off was fettered by an expectation to be available to respond to emergencies at all times.

[18] As to the first issue, Insp. Royer noted that the Applicants directed him to the Federal Court of Appeal decision in *Brooke v Canada (Royal Canadian Mounted Police (RCMP) Deputy Commissioner)*, [1993] FCJ No 240 (CA), 152 NR 231 [*Brooke*], at para 7:

> A member is on standby when he is ordered to be on standby; it is not the wellfoundedness of the order but the order itself that puts the member of standby. It was not for Corporals Brooke or Browning or any other member to question the decision, obviously concurred in by their highest ranking superior, to constitute SERT on the basis that one of its teams would be on standby, as defined by paragraph H.8.a.2., at all times. Theirs was to obey their orders.

[19] Insp. Royer did not think that the *Brooke* decision was parallel to the one at hand. He stated that in *Brooke* the order to be on standby was "unambiguous and in writing," was supported by specific SERT policies, and set out specific constraints on off-duty activities. Insp. Royer found that the Applicants had joined ERT on a voluntary basis and so were not ordered to be on standby, and thus the reasoning in *Brooke* did not apply.

[20] As to whether ERT members time off had been inappropriately fettered, Insp. Royer pointed out that unlike members of HQ ERT, the Applicants are first and foremost full-time police officers assigned to their respective units. The commitment of members to ERT is commendable, but the decision to join is clearly a voluntary one. Insp. Royer pointed out that the Applicants admitted that the movement of ERT members is not limited by membership on the team, and that ERT members had been told by superiors that their time off is truly theirs to do with as they wish.

[21] Insp. Royer then examined the Federal Court decision of *Bramall v Royal Canadian Mounted Police Commissioner*, [1999] FCJ No 156 [*Bramall*] where the applicant was required to carry a pager and to bring an RCMP van home with him at night to be ready to respond to calls:

> 6 The applicant grieved the refusal to pay to him standby compensation subsequent to the December 1990 cancellation order. He did not convince the Level II Adjudicator of his position. The decision of the Level II Adjudicator includes the following principal findings (at pp. 19-20 of the applicant's record):
>
> a) I also conclude that when the OIC SERT convened a meeting on December 19, 1990, and gave the order to cancel all standby, it applied to all SERT members and support units. *Supplement 6 ceased effectively to exist* and the requirement to be operationally ready at all times was rescinded. ... I am satisfied that the *Grievor was not required to remain available and able to respond immediately* to a duty requirement after the December 19, 1990 order from the OIC SERT to cease all standby.
>
> b) The Grievor's job description required that the incumbent carry a pager and use a Force owned vehicle to travel home. It also stated that "the incumbent is not compensated with stand-by overtime payment <u>for this responsibility.</u> I interpret this last sentence as meaning that the requirement to carry a pager and use a Force owned vehicle to travel home should specifically not be equated to an order to be on standby. *While both requirements might be indicative of the value of the function*

> *exercised by the incumbent, they are not in any way an implicit order to be on standby. ...*
>
> c) I find that, for a member to be on standby, the order must be sufficiently explicit so that a reasonable person reviewing the order and circumstances would come to the conclusion that this member had no choice but be on standby. *The requirement to carry a pager, cellular phone, tools of the trade or to use a Force's owned vehicle are insufficient by themselves to constitute an order to be on standby.*
>
> [Insp. Royer's emphasis]
>
> (…)
>
> 10 The applicant's counsel argued that the decision is one of mixed law and fact … However, even if this were an application for judicial review where less curial deference was appropriate, I would not intervene. The decision under review is neither "unreasonable" or "clearly wrong" (*Southam* at paragraphs 56 and 60).

[22] Insp. Royer agreed with the *Bramall* decision, and found that the Applicant's personal time was not fettered so as to create an expectation of standby. He stated that a reasonable person viewing these circumstances would not come to the conclusion that the Applicants had no choice but to be on standby.

[23] Insp. Royer determined that the Applicants had not been "ordered to be on standby or that management had placed an expectation, either explicit or implicit, that ERT members' personal time off was to be fettered and they were subsequently expected to voluntarily take calls and be available 24/7." He found that the essence of the Applicants' complaint was that they were not ready to accept the existing policies governing ERT and the use of standby, and Insp. Royer denied the grievance on its merits.

ISSUES

[24] The Applicants formally raise the following issues in this application:

a. Did the Grievance Adjudicators err in their application of RCMP Policy?

b. Did the Grievance Adjudicators base their Decisions on erroneous findings of fact?

c. Were the Grievance Decisions unreasonable?

[25] The Applicants submit that all the issues above ought to be reviewed on a reasonableness standard. Thus, the issues can be condensed into whether the Grievance Decisions were reasonable.

STANDARD OF REVIEW

[26] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[27] In *Millard v Canada (Attorney General)*, [2000] FCJ No 279, the Federal Court of Appeal determined that the RCMP Commissioner's interpretation of the RCMP Administration Manual was subject to the patent unreasonableness standard. Justice Yves de Montigny found the same in *Sinclair v Canada (Attorney General)*, 2006 FC 528 at para 27. The issue at hand deals with factual

disputes and the interpretation of the RCMP of its own internal policies. As stated in *Dunsmuir* at paragraph 51, when dealing with questions of fact, discretion, and policy, deference should apply. The appropriate standard of review in this case is reasonableness.

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[29] The following provisions of the *Royal Canadian Mounted Police Act*, RS, 1985, c R-10 are applicable in this proceeding:

31. (1) Subject to subsections (2) and (3), where any member is aggrieved by any decision, act or omission in the administration of the affairs of the Force in respect of which no other process for redress is provided by this Act, the regulations or the Commissioner's standing orders, the member is entitled to present the grievance in writing at each of the levels, up to and including the final level, in the grievance process	**31.** (1) Sous réserve des paragraphes (2) et (3), un membre à qui une décision, un acte ou une omission liés à la gestion des affaires de la Gendarmerie causent un préjudice peut présenter son grief par écrit à chacun des niveaux que prévoit la procédure applicable aux griefs prévue à la présente partie dans le cas où la présente loi, ses règlements ou les consignes du commissaire ne prévoient aucune autre

provided for by this Part.

procédure pour corriger ce préjudice.

(2) A grievance under this Part must be presented

(2) Un grief visé à la présente partie doit être présenté :

(*a*) at the initial level in the grievance process, within thirty 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; and

a) au premier niveau de la procédure applicable aux griefs, dans les trente jours suivant celui où le membre qui a subi un préjudice a connu ou aurait normalement dû connaître la décision, l'acte ou l'omission donnant lieu au grief;

(*b*) at the second and any succeeding level in the grievance process, within fourteen days after the day the aggrieved member is served with the decision of the immediately preceding level in respect of the grievance.

b) à tous les autres niveaux de la procédure applicable aux griefs, dans les quatorze jours suivant la signification au membre de la décision relative au grief rendue par le niveau inférieur immédiat.

(3) No appointment by the Commissioner to a position prescribed pursuant to subsection (7) may be the subject of a grievance under this Part.

(3) Ne peut faire l'objet d'un grief en vertu de la présente partie une nomination faite par le commissaire à un poste visé au paragraphe (7).

(4) Subject to any limitations prescribed pursuant to paragraph 36(*b*), any member presenting a grievance shall be granted access to such written or documentary information under the control of the Force and relevant to the grievance as the member reasonably requires to properly present it.

(4) Sous réserve des restrictions prescrites conformément à l'alinéa 36b), le membre qui présente un grief peut consulter la documentation pertinente placée sous la responsabilité de la Gendarmerie et dont il a besoin pour bien présenter son grief.

(5) No member shall be disciplined or otherwise penalized in relation to

(5) Le fait qu'un membre présente un grief en vertu de la présente partie ne doit

employment or any term of employment in the Force for exercising the right under this Part to present a grievance.

entraîner aucune peine disciplinaire ni aucune autre sanction relativement à son emploi ou à la durée de son emploi dans la Gendarmerie.

(6) As soon as possible after the presentation and consideration of a grievance at any level in the grievance process, the member constituting the level shall render a decision in writing as to the disposition of the grievance, including reasons for the decision, and serve the member presenting the grievance and, if the grievance has been referred to the Committee pursuant to section 33, the Committee Chairman with a copy of the decision.

(6) Le membre qui constitue un niveau de la procédure applicable aux griefs rend une décision écrite et motivée dans les meilleurs délais possible après la présentation et l'étude du grief, et en signifie copie au membre intéressé, ainsi qu'au président du Comité en cas de renvoi devant le Comité en vertu de l'article 33.

(7) The Governor in Council may make regulations prescribing for the purposes of subsection (3) any position in the Force that reports to the Commissioner either directly or through one other person.

(7) Le gouverneur en conseil peut, par règlement, déterminer, pour l'application du paragraphe (3), les postes dont le titulaire relève du commissaire, directement ou par l'intermédiaire d'une autre personne.

32. (1) The Commissioner constitutes the final level in the grievance process and the Commissioner's decision in respect of any grievance is final and binding and, except for judicial review under the *Federal Courts Act*, is not subject to appeal to or review by any court.

32. (1) Le commissaire constitue le dernier niveau de la procédure applicable aux griefs; sa décision est définitive et exécutoire et, sous réserve du contrôle judiciaire prévu par la Loi sur les Cours fédérales, n'est pas susceptible d'appel ou de révision en justice.

(2) The Commissioner is not bound to act on any findings or recommendations set out in a

(2) Le commissaire n'est pas lié par les conclusions ou les recommandations contenues

report with respect to a grievance referred to the Committee under section 33, but if the Commissioner does not so act, the Commissioner shall include in the decision on the disposition of the grievance the reasons for not so acting.	dans un rapport portant sur un grief renvoyé devant le Comité conformément à l'article 33; s'il choisit de s'en écarter, il doit toutefois motiver son choix dans sa décision.
(3) Notwithstanding subsection (1), the Commissioner may rescind or amend the Commissioner's decision in respect of a grievance under this Part on the presentation to the Commissioner of new facts or where, with respect to the finding of any fact or the interpretation of any law, the Commissioner determines that an error was made in reaching the decision.	(3) Par dérogation au paragraphe (1), le commissaire peut annuler ou modifier sa décision à l'égard d'un grief visé à la présente partie si de nouveaux faits lui sont soumis ou s'il constate avoir fondé sa décision sur une erreur de fait ou de droit.

ARGUMENTS

The Applicants

Interpretation of RCMP Policy - Voluntariness

[30] The Applicants point to the definition of Standby Level II at AM II.9.E.1.i. as follows:

> **Standby level II:** occurs when a member voluntarily makes himself/herself available for duty on reasonably short notice at identified locations (emphasis the Applicants').

The Applicants contrast this to Standby Level I, which is involuntary. The definition of Standby Level I at AM.II.4.I.8.a.2 is:

> **Standby level I:** occurs when a member is ordered to remain available and able to respond immediately to a duty requirement (emphasis the Applicants').

[31] The Applicants submit that both Supt. Héroux and Insp. Royer erred in concluding that the Applicants were not entitled to Standby Level II based on the fact that their membership in the ERT was voluntary. Standby Level II is by definition voluntary.

[32] As for the *Brooke* decision discussed by Insp. Royer, the definition of standby applicable to the Special Emergency Response Team (SERT) members in that case was virtually identical to the AM definition of Standby Level I. The definition said: "A member is on standby when he/she is ordered to remain available and able to respond immediately to a duty requirement." The Federal Court of Appeal's comment that "a member is on standby when he is ordered to be on standby" is not applicable to the voluntary type of standby, that is, Standby Level II.

Interpretation of RCMP Policy – Authorization for Standby Level II

[33] Both Supt. Héroux and Insp. Royer held that the decision to place a member on Standby Level II is a managerial one, to be made in light of policy and budgetary considerations. It was found that there was no request for placement of the Applicants on Standby Level II, nor was there approval of such a placement. The Applicants point to the decision in *Brooke*, and state that the question is not whether placement on standby was authorized, but whether the Applicants were, in fact, on standby. The Applicants point out the following excerpts of the *Brooke* decision:

> 7 As to the second and third elements, they are indeed accurately described as "relating to Standby authority" but they were irrelevant to the question the Respondent had to decide, namely, were the members, in the circumstances, in fact on standby? Prescribed considerations to be taken into account in ordering

> standby are considerations for the officer making the order, not for those to whom it is directed. A member is on standby when he is ordered to be on standby; it is not the wellfoundedness of the order but the order itself that puts the member of standby. It was not for Corporals Brooke or Browning or any other member to question the decision, obviously concurred in by their highest ranking superior, to constitute SERT on the basis that one of its teams would be on standby, as defined by paragraph H.8.a.2., at all times. Theirs was to obey their orders.
>
> (…)
>
> 10 The considerations taken into account by the Respondent that led him to conclude that the Applicant was not on standby because the order putting him on standby was not authorized to be made by the superior officer who made it are entirely irrelevant to whether or not the Applicant had been ordered "to remain available and able to respond immediately to a duty requirement." The Respondent erred in law in basing his decision on those considerations. If the Respondent was correct in concluding that OIC SERT had no authority to order its members to standby - a matter on which we need not express an opinion - the result was not that they had not been ordered to standby but that the order was illegal. The recourse for that is not to deny compensation to those who had obeyed and had no right to question their orders before incurring the disadvantages which entitled them to compensation…

[34] The Applicants were issued pagers to keep on themselves at all times so that they would be constantly ready to respond to an emergency. The Applicants submit that the effect of this was to put them on standby, and Supt. Héroux and Insp. Royer erred in basing their decisions on whether the Applicants' superiors had authorized the Applicants to be on standby.

Fettering of the Applicants' Time Off

[35] The Applicants point to AM.II.9.D.5 which states that "Subject to the demands of duties and responsibilities an RCMP member's free time will be unfettered." The Applicants also summarize the decision in *Brooke* as stating that a member is on standby when he or she is: (1) required to

remain operationally prepared and competent to respond to activation, deployment and commitment at any given hour of the day including weekends and statutory holidays; (2) required to be available for contact at all times by telephone; and (3) required to refrain from any activity the nature of which prevents prompt response to call out, and that the contrary conclusion is an erroneous finding of fact made in a perverse or capricious manner.

[36] The Decisions confirmed that ERT members must carry their pagers at all times and be prepared to respond to an emergency at "the drop of a hat" no matter what they are doing. The Applicants submit that, as in *Brooke*, ERT members are necessarily required to remain operationally prepared and competent to respond to activation at any time, and to refrain from participating in activities the nature or location of which prevent prompt response to call out. They meet the requirement in the definition of Standby Level II of being "available for duty on reasonably short notice."

[37] The Applicants submit that the *Bramall* decision cited by Insp. Royer is distinguishable from the present situation. In that case, there was a verbal order in December, 2001 cancelling the standby status of SERT members. Mr. Bramall argued that the failure of his supervisors to inform his of the cancellation order, combined with his job description requiring him to carry a pager while off duty, meant that he continued to be on standby post December, 2001. The ruling in that case was based on the finding that though Mr. Bramall was required to carry a pager, he was not, in fact, required to respond to a SERT call. By contrast, the Applicants are required to drop what they are doing and respond to any ERT call that comes in. The Applicants submit that their time off was fettered in this way, and it was an error for Supt. Héroux and Insp. Royer to find otherwise.

Identified Locations

[38] Supt. Héroux based his Decision, in part, on the finding that "the CO/delegate did not identify locations where Standby Level II was authorized for ERTs." He found that the definition of Standby Level II (see above) required that there be an identified location authorized for standby.

[39] The Applicants argue that the nature of ERT emergencies is such that the time and precise coordinates of their occurrence are necessarily unknown and unpredictable. However, each ERT belongs to a designated region, and responds to emergencies only within that region: for the J Division that region is New Brunswick; for the H Division it is Nova Scotia. The K Division has three ERTs, each with a defined region of Alberta. Thus, there is an identified location within which an ERT member may be called upon to attend.

[40] It is not possible that the precise coordinates of an ERT emergency be pre-approved, but there must be a necessarily implied approval that ERT members, when called upon, attend the location in the ERT region that requires tactical armed support. The Applicants submit that the lack of an "identified location" was an unreasonable basis upon which Supt. Héroux based his Decision.

[41] In sum, the Applicants submit that the Decisions to deny the Applicants Standby Level II compensation are unreasonable, are based upon erroneous findings of fact, and are outside the range of acceptable outcomes. The Applicants request that the Decisions be set aside and referred back to the Commissioner of the RCMP for determination.

The Respondent

Fettering of the Applicants' Time Off

[42] The Respondent states that the point Insp. Royer was making in pointing to the *Bramall* decision is that carrying a pager alone is not enough to constitute standby. For standby to occur there must be a management decision that actuates the status. Contrary to the Applicants' interpretation of *Bramall*, that case makes clear that the requirements of ERT are not enough to place its members on Standby Level II.

[43] The Respondent points out that in the *Brooke* decision it was found as a fact that there was an order placing ERT members on standby. In the present situation, there are several elements that must be met before Standby Level II exists, one of which is an order identifying a location. This has not occurred. The Adjudicators reasonably concluded that there was no order or approval of Standby Level II, and thus the rationale of *Brooke* can be distinguished.

Identified Locations

[44] The Respondent holds that an approved location is mandatory in order for Standby Level II to occur. There was no evidence of such an approval in this case. Simple membership in ERT cannot serve as a location for the purpose of the policy. When read as a whole, standby policy clearly requires specific action to be taken by a CO/Director/Delegate to identify locations where standby is operationally required. The guidelines are inconsistent with any interpretation that puts ERT members on standby solely by virtue of their membership.

[45] The Respondent also says that although Insp. Royer did not refer specifically to the lack of identified locations as a reason in his Decisions, he referred to it implicitly. Insp. Royer said that ERT did not meet the requirements of A.M.II.4.1.8.a.3., which specifies that there be an identified location approved for standby. Insp. Royer also observed in the Royer J Decision that policy required a decision by management to identify a location before Standby Level II occurred. The Respondent submits that it was reasonable to find that Alberta, Nova Scotia, and New Brunswick do not constitute "locations" for the purpose of Standby Level II policy.

Deference Owed to the Decisions

[46] The Respondent submits that the Decisions in this case ought to be shown deference. The Adjudicators are senior officers of the RCMP who are interpreting policy respecting the deployment of police officers in a context which they understand. Both Adjudicators set out at length the full range of facts and arguments advanced, and discussed both sides of the debate. They set out cogent rationales for finding certain facts and coming to a conclusion, and their decisions ought to be respected.

[47] The Respondent points out that there was no issue taken with the fact that ERT members are volunteers and the nature of their duties require them to be available on short notice. As held in *Chen v Law Society (Manitoba)*, 2000 MBCA 26, even if the reasons given are not perfect the decision being reviewed should not be overturned so long as it can be understood why and how it was reached. The Adjudicators reasonably decided that mere membership in ERT and its trappings were insufficient to actuate Standby Level II. If the Applicants' arguments were accepted, the result would be that every ERT member would receive one hour of pay for each

eight hour period so long as they were members of ERT. This is clearly inconsistent with RCMP policy. The Respondent submits that the Decisions are reasonable, and ought not to be disturbed.

ANALYSIS

[48] In order to defend the Decisions, the Respondent argues that even if ERT members are on *de facto* standby, they are excluded from the applicable Pay and Allowances policy by reasonable inference. The Respondent says that ERT does not fit into the model for the use of standby contained in the policy. This means, argues the Respondent, that there cannot be permanent standby — which is what the Applicants are advocating — and standby only occurs under the policy when management makes a decision to activate it. No activation has occurred for ERT members; there is no authorization to place ERT members on standby by a CO/delegate, and no approval of a location to which ERT members are to be deployed. In other words, the Respondent says the relevant Pay and Allowances policy was never intended to apply to ERT members and a reading of that policy in its entirety makes this clear. Members volunteer for ERT knowing full well what that they will not be paid Level II standby when not on duty. The Respondent says they cannot now engage in a skewed reading of the policy in order to place themselves on permanent standby and collect compensation to which they are not entitled.

[49] The first issue for the Court is whether the justification now offered by the Respondent for denying the ERT members Level II status can be accepted as the rationale for what is found in the Decisions.

The Héroux Decision

[50] The Héroux Decision dealing with "K" Division acknowledges certain arguments advanced by the Grievance Respondent that pertain to the general argument referred to above:

- ERT duties represented a support service to the "frontline" members, consequently, ERT duties were not first call service. The Division recognized the value added of ERT to police services;

- The terms of AM II.9.E did not automatically equate to standby entitlement for ERT members unless they were required to be available on an emergency. The terms of AM II.9.E were intended for "frontline" detachment services;

- ERT services had an "emergency" edge to it and was to be used in "measured approach";

- ERT services was a volunteer duty whose members self-imposed the desire to be part of ERT. The Division clearly identified its expectations and each ERT member was aware of them;

- "K" division did not designate ERT as a standby Level II "location." ERT members received compensation for the time spent on deployments.

[51] When it comes to the Adjudicator's own findings, and the rationale for the Héroux "K" Division Decision, the Adjudicator provided the following reasons:

Third, I determine from my review of the relevant policy and the record that:

- The Grievor did not question the GR's authority to make the impugned decision;
- The Grievor voluntarily made himself available to be part of ERT;
- There is no indication that the Grievor's Commander or Officer Commanding requested placement of the Grievor on standby to his CO/delegate and/or that the latter approved such a placement;
- In "K" Division:
  - the CO/delegate did not identify locations where standby Level II was authorized for ERTs;
  - the means of communications existed to reach ERT members to avoid using standby, as mentioned in the Grievor's Level I submission (i.e. wearing of pagers, protocol for dispatching at the communication centers via "group page" and ERT log book available through CIIDS);
- Carrying a pager or cellular phone after regular hours as a means to be reached in case of an urgent situation did not equate to standby Level II entitlement;
- The Grievor provided very limited information in support of his argument of inequitable treatment, referring to a "J" division ERT leader and Headquarters ERT members who would be receiving compensation for standby Level II, to which the GR counter-argued that no similar arrangements existed in "K" Division;
- The Grievor is contesting the policy requiring the identification of locations by CO/Director/delegate for the approval of standby when he asserted that its application to ERT members made no sense because they did not work "location" *per se*;

- There is no indication that the Grievance Respondent led the Grievor to believe that standby Level II was to apply to his situation.

[52] It is clear that voluntariness is identified as a factor in this decision. However, in this decision voluntariness refers to the members initial decision to become part of ERT: "the Grievor voluntarily made himself available to be part of ERT." The Applicants argue that "standby Level II is by definition voluntary" as made clear in the definition of standby Level II of AM.9.E.1.i. I do not think Supt. Héroux is saying that voluntariness is not part of the definition. He is pointing out that members choose to become part of ERT and, hence, by implication, are also choosing to receive the level of compensation that the policy allows them. There is no contrast here with standby Level I.

[53] Similarly, when Supt. Héroux says that "carrying a pager or a cellular phone after regular hours as a means to be reached in case of an urgent situation did not equate to standby Level II entitlement," I do not think he is commenting upon the "fettered" nature of being an ERT member. Supt. Héroux is not directing his attention to the *de facto* nature of ERT membership. The reasons as a whole reveal that he is focused upon a reading of the policy, which he says was not meant to apply to ERT. This is pretty well the argument that the Respondent makes in this application. Supt. Héroux is clearly aware of the definition of standby Level II because he cites it in the Decision.

[54] When Supt. Héroux moves to his conclusion, he acknowledges that the "standby policy" — so he is clearly focused on the policy as a whole — "constitutes a managerial tool greatly impacting on the budget of the force and on members' personal activities during their time off, as

one may infer from the limits imposed on its activation." So, Supt. Héroux acknowledges the fettering aspect of ERT membership.

[55] As regards voluntariness, Supt. Héroux concludes that "the Grievor is not ready to accept the voluntary aspect of the participation in the ERT function, and the existing policies governing its use."

[56] This is not a failure to recognize that voluntariness is not part of the definition of standby Level II. Supt. Héroux places voluntariness and fettering within the context of the whole policy and concludes that, even though an ERT member voluntarily makes himself/herself available for duty, and is fettered in his or her normal life by the exigencies of the ERT role, standby Level II compensation under the policy has to be activated and authorized in certain ways. In particular, there is no indication that the "Grievor's Commander or Officer Commanding requested placement of the Grievor on standby to his CO/delegate and/or that the latter approved such a placement."

[57] The Applicants argue that their *de facto* standby status is well-known and acknowledged by their Commanding Officer and everyone else involved in the RCMP hierarchy, and so must be taken to have been authorized. However, Supt. Héroux is saying that based upon the policy standby Level II status requires a degree of formality that does not exist in this case. As the policy makes clear, the Commander is directed in AM II.9.H.2.a to "After considering all other alternatives, request authorization to place members on standby from your CO/Delegate." The CO/delegate is also directed in AM II.9.H.3.a to "Whenever possible, avoid using standby" and, in AM II.9.H.3 do "not approve permanent standby."

[58] In the present case, it is clear that the ERT concept does not fit into these policy directives. Members are, in fact, on a form of *de facto* permanent standby, which the policy says cannot be approved. Further, there has been no request for authorization.

[59] This lends credence to the Respondent's arguments that the policy was never meant to encompass the ERT situation, that ERT members knew this when they volunteered and so accepted the level of compensation they would receive, and that the Division "K" grievors are attempting to appropriate the standby Level II definition in AM II.9, without reference to the broader context of the whole policy.

[60] I also think that this is the rationale for the Héroux Division "K" Decision. That decision is not a denial of the realities of the ERT role. When Supt. Héroux talks about voluntariness he is not just saying that the members agree to be on *de facto* standby; he is also saying that they voluntarily accept that their compensation will not be standby Level II because the policy, in its total context, is not meant to apply to the ERT situation and intends that standby Level II will only be used in very limited ways.

[61] The Applicants cite the *Brooke* decision and say that "the proper inquiry in determining whether a member is entitled to standby compensation is not whether their placement was duly authorized, but rather whether the member was, in fact, on standby."

[62] Under the relevant Administrative Manual in *Brooke*, standby could only be authorized when an emergency existed or when the emergent circumstances were so demanding that standby was required, and there could be no permanent and continuous standby. The Court in *Brooke* had the following to say on point at paras 7 and 10 :

> Prescribed considerations to be taken into account in ordering standby are considerations for the officer making the order, not for those to whom it is directed. A member is on standby when he is ordered to be on standby; it is not the wellfoundedness of the order but the order itself that puts the member of standby.
>
> […]
>
> The considerations taken into account by the Respondent that led him to conclude that the Applicant was not on standby because the order putting him on standby was not authorized to be made by the superior officer who made it are entirely irrelevant to whether or not the Applicant had been ordered "to remain available and able to respond immediately to a duty requirement.

[63] In the present case, there was no order (well-founded or not) placing ERT members in Division "K" on standby. Their argument is that they are, *de facto*, on standby, and this fact is well-known, and authorized by anyone whose authorization is required. But this situation is different from *Brooke*. In the present case, the *de facto* reality of what ERT members do and its approval by the RCMP hierarchy is not questioned in the Héroux Decision. The question is whether the AM policy as a whole authorizes standby Level II compensation for ERT members in Division "K." Supt. Héroux's Decision is, in effect, that it does not. ERT members have never been assigned standby Level II status under the policy and when they became members of ERT they were fully aware of this situation and voluntarily accepted it.

[64] In my view, the way that ERT status is intended to fit into the AM policy is not clear. However, given the evidence and arguments before Supt. Héroux, I cannot say that his conclusions were unreasonable. In my view, Supt. Héroux provides sufficient justification, transparency and intelligibility within the decision-making process, and the decision falls within a range of possible, acceptable outcomes which are defensible in the respect of the facts and the law. In other words, the Héroux Decision is reasonable.

The Royer Decisions

[65] Although the Applicants have joinded the Royer Decisions to the Héroux Decision in terms of common issues, I think the Royer Decisions are different in their approach to those issues.

[66] Insp. Royer bases his Decisions upon what he calls "key factors" as follows:

- Were the Grievors ordered to be on standby?
- Was the "H" Division [or "J" Division] ERT members' personal time off fettered by an expectation; either explicit or implicit, by management to take calls and be available 24/7?

[67] On the first issue, Insp. Royer's discussion is fairly short:

> The Grievor referred to the Federal Court of Appeal decision in *Brooke vs Shoemaker* case, where the Federal Court accepted Cpl. Brooke's arguments and explained (*verbatim*):
>
> > A member is on standby when he is **ordered to be on standby**; it is not the well foundedness of the order but the order itself that puts the member [on] standby. It was not for – – – or any member to question the decision… Theirs was to obey their order. (Emphasis is mine)
>
> It is important to note that the "order" in the said *Brooke vs Shoemaker* case was unambiguous and in writing". It was also supported by specific S.E.R.T. policies (Supplement 6) and so pervasive as to explicitly set out constraints to off-duty activities.
>
> It is clear that, in this instance, the Grievor has not demonstrated nor has he implied that ERT members were ordered to be on standby. Therefore, this argument cannot be considered.

[68] As mentioned earlier, the Applicants interpret the *Brooke* case to stand for the proposition that the "proper inquiry in determining whether a member is entitled to standby compensation is not whether their placement on standby was duly authorized, but rather whether the member was, in fact, on standby."

[69] In my view, I do not think that either Insp. Royer or the Applicants state the question appropriately. I think the real issue is, given the realities of ERT membership and the fact that members do in fact make themselves voluntarily available for duty on reasonably short notice at identified locations, whether the AM policy, when read as a whole, and in light of what ERT members knew and accepted when they chose to become ERT members, entitles ERT members to standby Level II compensation. Insp. Royer confines himself to distinguishing *Brooke* on the basis that no orders were issued in the present case. He neglects any consideration of whether *de facto* authorization by the RCMP hierarchy of what ERT members actually do mean that they qualify for standby Level II compensation, or what the lack of an "order" tells us about the general intention of the policy regarding standby Level II compensation for ERT members.

[70] Insp. Royer's consideration of, and conclusions regarding, his second "key factor" are even more problematic. Unlike Supt. Héroux, Insp. Royer does focus on the voluntary nature of the duties assumed and neglects to consider that voluntariness is part of the definition of standby Level II. Insp. Royer has the following to say about voluntariness:

> As noted in TOM 2.2.1, regular members must join the ERT on a 'voluntary basis.' Therefore, by doing so, they agree to undertake additional, but part-time, functions on top of their full-time law enforcement primary duties and this, within the rules of operation and policies in place at the time which were confirmed by the Grievor in his presentation.

[71] It is not entirely clear what Insp. Royer is deciding here. He could be saying that ERT members are not standby Level II because they voluntarily assume the additional duties that come with ERT membership. This would make no sense when the definition of standby Level II is taken into account because voluntariness is part of that definition. Standby Level I is ordered, but standby Level II is voluntary. Alternatively, Insp. Royer could be saying what I think Supt. Héroux was saying in the Division "K" Decision, that when members join ERT they accept the "rules of operation and policies in place at the time" and this will include an acceptance that ERT does not qualify for standby Level II status under the policy, notwithstanding the definition. I am inclined to think that he means the latter or there would be no reason for the words "within the rules of operation and policies in place at the time which were confirmed by the Grievor in his presentation."

[72] However, Insp. Royer appears to overlook the realities of ERT membership in his assessment of fettering and his conclusion that "the Grievor has not demonstrated on a balance of probabilities that the management had placed an expectation, either explicit or implicit, that ERT members' personal time off was to be fettered and they were subsequently expected to voluntarily take calls and be available 24/7." In my view, the evidence supports the opposite conclusion.

[73] It is true that, in his Decisions, Insp. Royer does say that "the decision to place the team on standby is a management's responsibility that must be weighed according to the Division's operational/financial priorities and commitments," thus alluding to the broader policy considerations in the AM. In fact, just as Supt. Héroux, Insp. Royer finds that "ERT members fulfill a specialized responsibility, but that they are doing so on a voluntary basis. This leads me

to recognize that the Grievor is not ready to accept the voluntary aspect of the participation in the ERT function and the existing policies governing its use." However, it is his analysis that is the problem. Insp. Royer tells us that one of his "key factors" is whether "ERT members' personal time off [is] fettered by an expectation, either explicit or implicit, by management to take calls and be available to respond 24/7." It seems to me that his conclusions on this "key factor" are unreasonable and disregard the evidence on point.

[74] That being the case, the Court has to decide whether this error renders the Royer Decisions unreasonable. The Respondent says it does not because I can look at the record and by analogy with the Héroux Decision, find a justification in the overall scheme of the policy for Insp. Royer's final conclusions. I do not think I can do this because it would mean, not that I was finding a justification in the record for Insp. Royer's Decisions, but rather that I was making the Decision myself. Supt. Héroux's Decision was not inevitable, and I have to take into account that Insp. Royer specifically says that a lack of "fettering" is one of two "key factors" upon which his Decisions are based. This means that, had he reasonably dealt with the evidence on fettering, he might well have come to a different conclusion on one of his "key factors," and this means, in turn, that he might have reached a different conclusion in his Decisions as a whole. That being the case, I think the Royer Decisions must be returned for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review of the Héroux Decision is dismissed.

2. The application for judicial review of the Royer Decisions is allowed. The Royer Decisions are quashed and set aside and the matters are referred back for re-determination by the Commissioner of the RCMP in accordance with my Reasons.

3. The Respondent shall have costs in relation to the Héroux Decision.

4. The Applicants shall have costs in relation to the Royer Decisions.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-1466-08
STYLE OF CAUSE:	**GREG IRVINE and others; RICK TURNBULL and others; and WAYNE KNAPMAN and others** - and - **THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	October 18, 2012
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DATED:	November 27, 2012

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