Protected A

2017 RCAD 9

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF A CONDUCT HEARING PURSUANT TO THE

ROYAL CANADIAN MOUNTED POLICE ACT

BETWEEN:

Commanding Officer, "E" Division

(Conduct Authority)

and

Constable Stephen O'Brien

Regimental Number 58109

(Subject Member)

Conduct Board Decision

John A. McKinlay

November 27, 2017

Staff Sergeant Jonathan Hart, for the Conduct Authority,

Ms. Hélene Desgranges, for the Subject Member

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SUMMARY

This summary does not form part of this decision.

The Subject Member initially faced seven allegations, all concerning matters respecting Constable A. He initially made a number of factual admissions, but generally he denied that his actions amounted to misconduct. He did make admissions respecting two allegations. The Conduct Board determined that it was necessary to cross-examine Constable A pertaining to numerous contested material facts. However, the Health Services Officer accepted the opinion of Constable A's treating health professional that she could not testify on the scheduled hearing date and that this inability to testify was permanent. Citing ethical obligations, the Conduct Authority Representative withdrew five allegations where Constable A's cross-examination was clearly required for hearing fairness. The parties then negotiated and a further allegation was withdrawn as part of a joint resolution proposal. A single contravention under section 9.1 of the Code of Conduct was admitted and a joint submission for a reprimand and the loss of two days' pay was accepted and imposed.

REASONS FOR DECISION

INTRODUCTION

[1] The Designated Officer appointed this Conduct Board on June 30, 2016. The Subject Member was served with the *Notice of Conduct Hearing* and the accompanying investigative materials on September 2, 2016.

[2] On September 20, 2016, the Member Representative (MR) advised that she had been retained as the MR for the Subject Member. On September 28, 2016, citing receipt of 264 pages of additional material, the MR sought an extension to file the Subject Member's responses under sections 15 and 18 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*]. A filing extension was granted to November 2, 2016.

[3] On September 29, 2016, the MR and Conduct Authority Representative (CAR) made a joint request for the first package of investigative materials, filed with the Conduct Board, not to be reviewed further and for a second package be filed to replace it. By October 14, 2016, the CAR had filed a revised investigation package, with a suitable version of the 264 pages of additional material. On October 28, 2016, the MR was granted a further filing extension to December 16, 2016, for the Subject Member's responses under the *CSO (Conduct).* The MR filed a response under subsection 15(3) of the *CSO (Conduct)*, together with various documentary, photographic and video materials, late on the night of December 16, 2016.

[4] A pre-hearing conference took place on January 19, 2017, and a hearing was set for the week of June 26, 2017. The original CAR was obliged to take some medical leave, and a successor CAR identified himself on March 14, 2017. Further materials were to be sent to the MR and filed with the Conduct Board. The CAR indicated that there were also outstanding requests for materials from the MR, for which the CAR sought involvement by the Conduct Board. The MR was directed to identify all outstanding issues concerning further materials by April 13, 2017, with the following guidance:

> […] I require the MR to provide a comprehensive list of her disclosure requests, and any supporting arguments she wishes to make to justify her

> disclosure requests. I am not asking for the exchange of disclosure emails between the parties, but a concise list of the materials for which the MR seeks disclosure, and the MR's submissions on those requests.

The representatives were also directed to have meaningful discussions concerning the specific particulars for each allegation, and to identify the factual and legal-issue disputes that existed between the parties. As part of these discussions, the parties were to identify witnesses whose testimony was required, and the nature or scope of the proposed testimony. This direction was never addressed, as the CAR asked the Conduct Board to first identify the evidence that would be accepted as "uncontested" and the MR objected to this request, citing the need for resolution of her outstanding requests for materials.

[5] After receiving an extension to April 19, 2017, the MR filed a 34-page submission seeking ordered production of materials and information by the Conduct Board, accompanied by 22 attachments involving email communications mainly between the MR and the CAR.

[6] At a pre-hearing conference on April 25, 2016, the Conduct Board made decisions and issued directions concerning the MR's requests for production of further information and materials. The minutes for this pre-hearing conference were issued on May 1, 2017, confirming that the vast majority of the MR's requests were denied. For one MR request, a decision was reserved, pending receipt of any further written response from the MR under subsection 15(3) of the *CSO (Conduct*), for which the Conduct Board set a filing date of May 26, 2017.

[7] The rationale for this approach was to permit the Subject Member another opportunity to make reference to the material now in the record, including the materials filed in his initial subsection 15(3) response, supporting his denial of allegations and particulars, and to identify points in dispute where testimony from specific witnesses, including the Subject Member, was considered necessary by him. Given the scarcity of detailed submissions in the initial subsection 15(3) response, the Conduct Board indicated that it was otherwise open to the Board to deny the Subject Member's basic requests for approval of certain witnesses, and that the Board was left to speculate about what certain materials filed with the response were intended to establish or disprove.

[8] At the April 25, 2016, pre-hearing conference, I also directed the CAR to obtain certain materials, as it was possible that they would be ordered produced when I made my reserved decision after May 26, 2017. By May 17, 2017, the CAR had received some 1000 pages of additional material from an internal investigator, some of which might have pertained to an item still in issue, and provided it to the MR for her consideration in any further subsection 15(3) response to be filed by May 26, 2017. The CAR did not view this material as relevant and he did not intend to rely on it. Accordingly, it was not filed with the Conduct Board.

[9] On May 25, 2017, the MR filed expert reports concerning opinions to be relied upon in any conduct measures phase of the hearing, after the Conduct Board denied the MR's objection to filing. The Conduct Board confirmed the plain requirement of subsection 19(1) of the CSO (Conduct) that any expert report must be provided to not only the CAR, but also the Conduct Board, with filing 30 days in advance of the start of the conduct hearing, not simply in advance of any conduct measures phase of the hearing.

[10] The MR sought an extension to June 2, 2017, to file a further subsection 15(3) response, which was denied. An extension was granted only to respond to the 1000 pages of new material.

[11] On May 26, 2017, the MR filed an amended response under section 15(3) of the *CSO (Conduct)*, including an additional 13 appendices, in which the Subject Member ultimately made a number of factual admissions, made qualified admissions respecting certain misconduct under Allegation 3, admitted to Allegation 7, but otherwise denied that his actions amounted to misconduct. It was apparent that determinative issues of credibility existed, and that the cross-examination of Cst. A, pertaining to numerous contested facts, was considered necessary by the Conduct Board. On May 31, 2017, the MR advised of required medical leave until June 12, 2017; therefore, an extension for any further response referencing the 1000 pages was granted to June 12, 2017. An additional submission with attached case law was filed on that date.

[12] On June 13, 2017, the CAR requested an immediate pre-hearing conference. On June 14, 2017, the CAR advised that he had significant witness management issues and that he would not be able to "call evidence on a number of allegations – period". A pre-hearing conference took

place on June 15, 2017, with the CAR confirming by email his request to withdraw certain allegations and the basis for his request.

[13] After following up on an unsolicited message from a health professional treating Cst. A, the CAR had been recently advised that Cst. A "would be unable to attend to any RCMP Adjudication Hearing either during the week of June 26, 2017, or thereafter, on a permanent basis". The CAR advised his client and sought an assessment by the Health Services Officer (HSO) of this diagnosis.The CAR was then advised that the HSO accepted the position articulated by Cst. A's health professional. The Conduct Authority and the CAR both viewed advancing to a hearing, where Cst. A would never be available for necessary cross-examination as unethical and unfair. Accordingly, the CAR requested the withdrawal of five allegations. At that time, the CAR advised that the two remaining allegations could "potentially stand on their own".

[14] After further communication between the parties after the pre-hearing conference on June 15, 2017, the CAR advised that he was requesting the withdrawal of a further allegation. The parties would provide a joint proposal on the one remaining allegation with appropriate conduct measures.

[15] By email, later on June 15, 2017, I accepted the CAR's withdrawal of all allegations except Allegation 7, on the following basis:

> ACCEPTANCE OF PROGNOSIS TO TESTIFY
>
> A medical opinion has been provided on behalf of Cst. [A] to the effect that she ".... would be unable to attend to any RCMP Adjudication Hearing either during the week of June 26, 2017, or thereafter, on a permanent basis". I accept this medical opinion on the basis that it has been adequately reviewed by an appropriate RCMP medical official (HSO, "E" Division), and determined to be valid by that official.
>
> **DENIAL OF NECESSARY CROSS-EXAMINATION**
>
> Accordingly, I am satisfied cross-examination by the MR of Cst. [A] will not be available in this matter. After my review of this matter, in particular the most recent responses filed by the Subject Member, I find this cross-examination (including possible confrontation with prior inconsistent statements and contradictory documents, photos, and audio recordings)

> necessary in order for disputed aspects of Allegations 1, 2, 4, 5 and 6 to be addressed, and for [the Subject Member] to be afforded hearing fairness with respect to important elements of each of these allegations. The availability of other witnesses cannot address these interests.
>
> **ACCEPTANCE OF CAR WITHDRAWAL REQUEST (Allegations 1, 2, 4, 5 and 6)**
>
> Therefore, on the basis of the representations and submissions from the CAR […], I hereby grant the Conduct Authority's request to withdraw Allegations 1, 2, 4, 5, and 6. Accordingly, these specific allegations are no longer before me for adjudication, and are deemed concluded.
>
> **ACCEPTANCE OF CAR WITHDRAWAL REQUEST (Allegation 3)**
>
> Notwithstanding my appointment as conduct board to adjudicate the allegations against [the Subject Member], discretion remains with the Conduct Authority to withdraw allegations contained in the *Notice of Conduct Hearing*. Also, it is widely recognized that a resolution agreement concerning allegations submitted by the parties should be afforded a high degree of deference unless the proposal exceeds standards of reasonableness or otherwise gives insufficient consideration to the public interest. I hereby grant the Conduct Authority's request to withdraw Allegation 3. Allegation 3 is no longer before me for adjudication, and is deemed concluded.
>
> **REMAINING ALLEGATION 7**
>
> Allegation 3 is withdrawn on the understanding that the parties will now present a joint submission concerning the remaining Allegation 7, and proportionate conduct measures for Allegation 7.

[16] A further pre-hearing conference was scheduled for June 22, 2017, in advance of the conduct hearing, now to be conducted using RCMP video-link facilities on June 27, 2017, with the MR and CAR located in Ottawa, the Subject Member attending in "E" Division, and the Conduct Board appearing from "H" Division.

ALLEGATION

[17] At the video hearing on June 27, 2017, the Subject Member admitted the following allegation (Exh. CAR-1):

> **Allegation 7**
>
> On or about May 9, 2014, at or near Coquitlam, in the province of British Columbia, [the Subject Member], accessed information that was outside of his proper course of duties and also failed to abide by all oaths by which he

> is bound as a member, contrary to section 9.1 of the *Code of Conduct of the Royal Canadian Mounted Police.*
>
> **Particulars**
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") andpostedto "E"Division,CoquitlamdetachmentinBritish Columbia.
>
> 2. On May 9, 2014, youqueriedthenameof [Cst. A.] on PRIME.
>
> 3. You had nolegitimate operational reason to conduct this query.

[18] The parties submitted a *Summary of Facts* (Exh. CAR-2), which provided:

> l. At all material times [the Subject Member] ("Member") was a member of the Royal Canadian Mounted Police ("RCMP") and posted to "E" Division, Coquitlam detachment in British Columbia.
>
> 2. In May 2014, the Member and Constable [A] were in an intimate relationship. [Cst. A] was separated from her husband, [Sgt. B].
>
> 3. Pursuant to the Member's version of the facts, [Cst. A] told him that she was concerned that her file on PRIME with her husband [Sgt. B] could be readable by others.
>
> 4. On May 9, 2014, the Member queried the name of [Cst. A] (DOB 19XX-XX-XX) on PRIME at 10:19 am.
>
> 5. The user can conduct "query" or "browse" checks on PRIME. The Member used the browse's [*sic*] function when he conducted his query on May 9, 2014.
>
> 6. The query (browse) conducted by the Member showed what files [Cst. A] was listed as an entity. In other words somehow involved in the file i.e. a complainant, witness, victim, etc. That was the extent of the Member's query.
>
> 7. The Member had no legitimate operational reason to conduct this query (browse).

[19] In order to demonstrate the limited information the Subject Member would have viewed when he conducted the unauthorized "browse" query of Cst. A, the MR filed a document capturing the results of a search performed on a "fake person" by an RCMP system administrator familiar with the PRIME system. Based on this information, the MR submitted an additional paragraph and screenshot for the Conduct Board's consideration (Exh. M-1):

> 8. For comparative purposes, a screen-shot of what the results of a "browse" and "query" from the RMS (Office Computer) look like including a Private file for entity John TESTRECORD is produced into evidence. The third box includes an example of results of a browse search. When a file is privatised, the mention "Private Information" appears and the file is not available for viewing.
>
> [*Sic throughout*]

[20] To expedite the video hearing, the MR also submitted two "will-say" documents for the Subject Member, one for the allegation phase, the other for the conduct measures phase. These were intended to stand in for testimony from the Subject Member.

[21] The Subject Member's allegation phase "will-say" (Exh. M-2) stated:

> 1. On May 9, 2014, the Member wanted to know if [Cst. A]'s file on PRIME with her husband […] was privatised, he did not review the files and the mention "Private Information" appears when a file is privatised.
>
> 2. Before he queried (browse) the name of [Cst. A] on May 9, 2014, he was already aware that [Sgt. B] had been subject to internal and statutory investigations following [Cst. A]'s complaint as she had told him. Furthermore, on September 26, 2013, the Member had given a statement to [Staff Sergeant C] of "E" Division Criminal Operations Core Policing in [Sgt. B]'s internal investigation file.
>
> 3. On May 9, 2014, when he queried (browse) the name of [Cst. A], he had the intention to do the query, but his actions were without malicious intent and he had nothing personal to gain.
>
> [*Sic throughout*]

[22] The CAR did not oppose the Conduct Board treating these "will-say" documents as the direct testimony of the Subject Member in order to expedite the video hearing. However, he indicated that, while he did not object to the manner in which the Subject Member's evidence was presented to the Conduct Board, he did not accept their content as true and left it to the Conduct Board to assess and apply due weight.

Finding on the Allegation

[23] Allegation 7 alleges a contravention of section 9.1 of the Code of Conduct, which states: "Members access, use and disclose information obtained in their capacity as members only in the proper course of their duties and abide by all oaths by which they are bound as members."

[24] After considering the information relevant to Allegation 7 contained within the record, I am required to decide whether or not the contravention is established on a balance of probabilities. After review of the record, including the parties' *Summary of Facts* and the Subject Member's admitted contravention of section 9.1 of the Code of Conduct, I find that the Subject Member conducted a query on PRIME respecting Cst. A on May 9, 2014. Furthermore, I find that, when this query was made, the Subject Member sought information that was outside of his proper duties, while he had no legitimate operational reason to conduct the query. Accordingly, I find that the Subject Member contravened section 9.1 of the Code of Conduct and that Allegation 7 is established. I accept that the Subject Member's purpose in making the unauthorized query was to determine if the file in question was "privatized" in the sense that only specific personnel, and not members with day-to-day access to the PRIME system, could access its content.

CONDUCT MEASURE

[25] According to the RCMP *Conduct Measures Guide* (November 2014), at pages 30 - 32, conduct measures for unauthorized accessing of an RCMP electronic file system (necessarily including access gained outside the proper course of a member's duties) range from a reprimand, for an isolated incident, up to the loss of 20 days' pay. The highest forfeiture applies when personal gain, stalking behaviour or investigative compromise is present. Loss of employment may be proportionate when the accessing of information involves "nefarious" or criminal behaviour. The three adjudication board decisions filed by the MR indicate that a formal reprimand and minimal pay forfeitures, at the low end on the former 10-day range, have been accepted. In these cases, the unauthorized access involved few if any aggravating features.

[26] The parties made a joint proposal that the following conduct measures be imposed for the Subject Member's contravention under Allegation 7: the loss of two days' pay (16 hours). Implicit in this joint proposal was the imposition of a reprimand from the Conduct Board.

[27] The Subject Member's further "will-say" (Exh. M-6), to be considered at the conduct measures phase of the hearing, succinctly stated:

1. [The Subject Member] has been a member of the Royal Canadian Police since August 11, 2009. He has been posted to Coquitlam RCMP Drugs and Organised Crime for approximately 4 years.

2. He is taking full responsibility for his actions, he regrets that he did the query, is remorseful and apologises to the Royal Canadian Mounted Police.

3. He is a good performer.

[*Sic throughout*]

[28] In support of the parties' joint conduct measures submission, the MR referenced pages 7 and 15 of the RCMP *Summary Conduct Measures Guide* and filed three RCMP adjudication board decisions:

- *Appropriate Officer for "C" Division and Constable [C]* (2000), 7 A.D. (3d) 144
- *Appropriate Officer for "C" Division and Constable [S]* (2003), 19 A.D. (3d) 86
- *Appropriate Officer for "E" Division and Civilian Member [R]* (2004), 23 A.D. (3d) 98

[29] The MR also filed three cases concerning the significant level of deference to be applied to a joint submission concerning conduct measures:

- *Rault v Law Society (Saskatchewan)*, 2009 SKCA 81
- *R. v Anthony-Cook*, 2016 SCC 43

- *Appropriate Officer for "E" Division and Constable [B]* (2017), 17 A.D. (4th) 88 (Bd.)

[30] While it was not available for the Subject Member's video hearing, and was in fact only issued on October 26, 2017, I adopt the public interest test for joint submissions on conduct measures as articulated in *Commanding Officer, "F" Division and Sergeant [W]*, 2017 RCAD 6, at paras 30 to 32, citing *R. v Anthony-Cook*, at para 34. A joint submission must not bring the administration of justice into disrepute or be otherwise contrary to the public interest. To be rejected, a joint submission must be:

> […] [S]o unhinged from the circumstances of the [contravention and the Subject Member] that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the [RCMP conduct hearing process] had broken down.

[31] The CAR did not identify any aggravating factors, as he considered the parties' joint proposal reasonable in the circumstances and worthy of acceptance, given the level of deference described in the decision in *R. v Anthony-Cook*.

[32] In support of the joint proposal, the MR argued that a number of mitigating factors should be accepted by the Conduct Board. Given that these submissions were in aid of a joint proposal, I will not review them in great detail. I accept the following as mitigating factors: the Subject Member's acceptance of responsibility, his admission of facts, and the resulting economical resolution of this matter; the misconduct arose in a context where Cst. A was concerned about accessing of the file by others, prompting the Subject Member's actions to determine the extent of the availability of the file; the Subject Member's query yielded no PRIME investigation information of any substance, and he was previously aware that investigations concerning Cst. A's husband existed; given the withdrawal of all other allegations, the isolated nature of the admitted misconduct; by the joint proposal there remains significant confidence in the Subject Member (including the support articulated by a non- commissioned officer and two co-workers in Exh. M-3, M-4 and M-5); and, while given limited weight as a mitigating factor, the Subject Member's competent, solid performance of his duties.

[33] While offered as mitigating factors, I also note the absence of certain aggravating factors: the Subject Member did not seek to hide his identity in order to determine the availability of the PRIME file in question; the information was not released to any third party or to obtain personal gain; and, the misconduct did not compromise any investigation.

CONCLUSION

[34] After considering the nature and circumstances of the Subject Member's contravention, including the aggravating and mitigating factors, and finding that the parties' joint submission does not bring the administration of justice into disrepute, or otherwise operate contrary to the public interest, I impose the following conduct measures: a reprimand (which this final written decision shall constitute) and the loss of two days' pay (16 hours) pursuant to paragraph 5(g) of the *CSO (Conduct)*.

[35] With the benefit of reviewing the entire record for this matter, I consider it appropriate to direct certain observations directly to the Subject Member. I wish to emphasize that, notwithstanding the relatively low loss of pay imposed in this matter, if in the future you ever commit misconduct involving the misuse of an RCMP database or system and breach of privacy, then you could well face a much more severe outcome. Also, going forward, if there is any suggestion that you have engaged in inappropriate interactions involving Cst. A, established misconduct of this nature could have severe consequences for your employment in the RCMP.

[36] While your health status has not been raised by the parties in support of the joint proposal, I wish to commend you on the efforts you have made to resume a healthy lifestyle, which may support not only the successful performance of your professional duties, but a rewarding off-duty private life.

November 27, 2017

John A. McKinlay

Conduct Board, Inspector