

Protected A

File 2019 RCAD 01

ACMT 2017-3390



**ROYAL CANADIAN MOUNTED POLICE**

IN THE MATTER OF

a conduct hearing pursuant to the

*Royal Canadian Mounted Police Act*, RSC, 1985, c R-10

BETWEEN:

**Commanding Officer, "D" Division**

(Conduct Authority)

and

**Constable Trevor Ens**  
Regimental Number 47713

(Subject Member)

---

**Conduct Board Decision**

---

Protected A

File 2019 RCAD 01

ACMT 2017-3390

---

Inspector Al Ramey, Conduct Board

January 11, 2019

---

Representative for the Conduct Authority:

Staff Sergeant Jonathon Hart

Representative for the Subject Member:

Corporal Joel Welch

## TABLE OF CONTENTS

SUMMARY .....	3
INTRODUCTION .....	4
ALLEGATION .....	4
Analysis of the allegation .....	10
Decision on the allegation .....	15
SANCTION .....	19
Range of sanctions .....	19
Aggravating factors .....	20
Mitigating factors .....	22
Comments on the allegation .....	24
Decision on sanction .....	25

## SUMMARY

*A Notice of Conduct Hearing*, pursuant to Part IV of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, was issued on March 29, 2017, by the Commanding Officer and Conduct Authority for “D” Division (Manitoba). The Notice contained a single allegation of discreditable conduct. A conduct hearing was held in Winnipeg, Manitoba, from July 3 to 6, 2018, inclusively. The allegation was established and the Conduct Board ordered the Subject Member be reprimanded and pay a financial penalty of 20 days’ salary.

## INTRODUCTION

[1] On March 13, 2017, a *Notice to the Designated Officer* was signed by the Commanding Officer of “D” Division (Manitoba), who is also the Conduct Authority (CA) in the present matter, in relation to the Subject Member. On March 21, 2017, I was appointed as the Conduct Board for this matter. On March 29, 2017, the *Notice of Conduct Hearing* was issued by the CA and it was served on the Subject Member on April 5, 2017.

[2] Prior to the issuance of the *Notice to the Designated Officer*, a *Notice of Conduct Meeting* was served upon the Subject Member on May 20, 2016, by his line officer. She and the Subject Member met some time afterwards at the conduct meeting. When the line officer became aware of new information, she realized that the potential sanctions were beyond her scope and she properly referred the matter to a higher level conduct authority.

[3] On July 7, 2017, the Board considered a motion by the Member Representative (MR) for abuse of process wherein he suggested that this matter had already been decided at the conduct meeting in 2016. A response and rebuttal were received and the motion was discussed at a pre-hearing conference. A written decision was served on the parties by way of an email on July 26, 2017. In my decision, I found that the line officer had not arrived at a decision on the allegation. No Record of Decision was issued to the Subject Member by the line officer, thus the matter was not concluded.

## ALLEGATION

[4] On July 28, 2017, the MR filed the Subject Member’s response to the allegation in which he admitted to particular 1 only. For convenience, I copied the Subject Member’s response in bold following each of the particulars of the allegation (the comment in bold in square brackets was a footnote within the Subject Member’s response):

### **Allegation 1**

On or between July 10, 2015 and April 13, 2016, at or near [locations redacted] in the Province of Manitoba, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

**The Subject Members denies allegation 1. He admits to using his personal Co-op loyalty card when making legitimate fuel purchases with the Automobile Resource International (ARI) credit card, but denies that his conduct was contrary to section 7.1 of the RCMP Code of Conduct (discreditable).**

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police ("RCMP") and posted at the [H.] RCMP traffic services unit.

**The Subject Member admits to particular 1.**

2. You did by deceit, falsehood or other fraudulent means defraud the Government of Canada. Your fraudulent actions constitute both a breach of trust and also a theft from your employer.

**The Subject Member denies particular 2.**

**Submission:**

**According to the principles articulated by the Federal Court of Canada in the case of Gill v. The Attorney General of Canada (2006} FC 1106, the allegation must contain sufficient particulars to enable the police officer to properly prepare a defense. [The Subject Member] must receive adequate notice of the case he has to meet.**

**These principles are reflected in section 43(4) of the [Royal Canadian Mounted Police Act, RSC, 1985, c R-10 [RCMP Act]]:**

**"The statement of particulars contained in the notice is to contain sufficient details, including, if practicable, the place and date of each contravention alleged in the notice, to enable the member who is served with the notice to identify each contravention in order that the member may prepare a response and direct it to the occasion and events indicated in the notice."**

**Based on the particulars articulated in the Notice of Conduct Hearing, [the Subject Member] knows the allegation he is facing is with respect to the alleged misuse of his personal loyalty Co-op card when purchasing fuel for police vehicles with the ARI card. However, the [CA] has not sufficiently explained how [the Subject Member's] actions**

**were deceitful or fraudulent, nor sufficiently explained how his actions constitute a breach of trust and theft from his employer.**

3. You were entrusted with the use of a vehicle specific Automobile Resource International (“ARI”) gas card for the purchase of fuel (gasoline) for the police vehicle that you were operating while on-duty. You legitimately purchased fuel (gasoline) for the police vehicle that you were operating while on-duty. However, you deliberately purchased fuel (gasoline) from Co-op gas stations that were not familiar with the specific rebate member number issued to the [H.] RCMP traffic services unit by Co-op. You purchased fuel (gasoline) from various Co-op locations so as to obtain a personal benefit or financial gain by providing the gas attendant with your own personal Co-op gas rebate member number. You personally received a financial benefit as a direct result of your deceitful activities. You also purposefully altered and/or modified various Co-op gas receipts in an attempt to conceal your actions from the [H.] RCMP staff assigned to review all fuel (gasoline) purchases.

**The Subject Member can neither admit nor deny particular 3.**

**Submission:**

**[The Subject Member] agrees that he legitimately purchased fuel for the police vehicles he operated while on-duty. Hence, has not misused the ARI card.**

**As previously submitted in response to particular 2 above, the [CA] has not sufficiently explained [the Subject Member’s] “deceitful activities”.**

**The Co-op gas station located at [location redacted] in [H.] is the only one that kept the RCMP Traffic Services Unit (“Traffic Unit”) member number on file. However, there was no requirement for the RCMP members to attend that Co-op gas station to fuel police vehicles. On this issue, [public servant M. B.] stated:**

**“ ... it’s not a big thing because members are not told that they have to buy gas at Co-op, they can go to Shell. They can go to Doma and get the plates, I mean we’re not keeping track ... ” (Page 3 of her statement transcript).**

**“But like, like I said I had a discussion and this is ah, with [Sergeant (Sgt.) D. L] [footnote: the Subject Member is assuming that M. B. is talking about Sgt. D. L.] where there is no direction to the members that they have to get gas at the Co-op. If they go anywhere else no one’s looking at it and we don’t care. [...] when they get to go to Esso or they get to go to Domo or wherever they please to go, then no one**

cares what um, freebee they get then, so I'm not sure if this is, you know, how bad this is." (Page 12 of her statement transcript).

Furthermore, there was no requirement for RCMP members to use the Traffic Unit member number at other Co-op gas station locations. [The Subject Member] could not reasonably commit this number to memory. Loyalty cards with the Traffic Unit member number were not provided to RCMP members nor were they available for use in the police vehicles.

[The Subject Member] did not deliberately purchase fuel from Co-op gas stations that were not familiar with the member number issued to the Traffic Unit. The Co-op gas stations that [the Subject Member] attended were located within his service area and depended on his location at the time his police vehicle needed gas. For this same reason, he would also purchase fuel at other gas stations such as Husky and Shell. [The Subject Member] did not use a personal loyalty card at these other gas stations.

[The Subject Member] often purchased fuel for his police vehicle from the Co-op gas station located at [location redacted] where they had the Traffic Unit member number on file. He never attempted to use his personal loyalty card at this gas station instead of applying the rewards to the Traffic Unit account.

[The Subject Member] did tear off a portion of the gas station receipts where his personal Co-op loyalty number and name appeared. He did so because he suspected that it wasn't appropriate, but he didn't have clear knowledge at the time that it was against RCMP Policy. At most, he had a suspicion. Besides, tearing off that portion of the receipts is not a modification or alteration that affects the legitimate nature of his fuel purchases or use and accountability of the ARI card.

4. Your actions were also a breach of RCMP policy. Transport Management Manual - ch. 2.7 Information Management and Fleet Cards, subsection 6.1 Loyalty Cards states: "An employee is not permitted to accumulate rewards or points on his/her personal loyalty card, i.e. Air miles, Petrol-Points, or other types of reward points, or cash-back for purchases made using the fleet card. Any discount offered by a service station or maintenance facility must be applied directly to the purchase invoice."

**Submission:**

[The Subject Member] agrees that the use of his personal Co-op loyalty card for fuel purchases made with the ARI card is contrary to that RCMP Policy. However, a breach of policy is not necessarily the basis

**for a contravention of the Code of Conduct. Policy is not law. To be enforceable, proof of notice to the subject member of the policy must be established, accompanied by a lawful order to follow it. The evidence in this case lacks any reasonable finding of either notice, or a lawful order that wasn't followed by [the Subject Member].**

**The evidence on the record shows that [the Subject Member] had no knowledge of this RCMP Policy until April 12, 2016, when he was notified by [Staff Sergeant S. F.]. From that moment, [the Subject Member] no longer used his personal Co-op loyalty card when purchasing fuel for police vehicles with the ARI card. Therefore, there is no cause for a conduct proceeding based on a violation of policy.**

**5. Despite being informed by your supervisor Corporal [(Cpl.) R. M.] that you must adhere to the RCMP policy with respect to the proper use of ARI cards, you continued to actively commit fraud against the Government of Canada so as to receive a personal financial benefit**

**The Subject Member denies particular 5.**

**Submission:**

**As previously submitted by the [CA] in particular 3 above, the fuel purchases made by [the Subject Member] with the ARI card were legitimate. Consequently, there was no misuse of the ARI card.**

**Cpl. [R. M.] did not advise [the Subject Member] that he must adhere to the RCMP Policy with respect to the proper use of loyalty cards. Cpl. [R. M.] confirmed that he never approached [the Subject Member] directly about this issue:**

**“I didn't specifically take [the Subject Member] aside and advise him about the incident so, and ah, there was nothing said.” (Page 2 of his transcribed statement).**

**[The Subject Member] has no recollection that Cpl. [R. M.] addressed the issue during a [W]atch meeting and there is no evidence on the record to corroborate that Cpl. [R. M.] did.**

**As previously submitted in response to particular 2 above, the [CA] has not sufficiently explained how [the Subject Member] committed “fraud”. Furthermore, there is no evidence on the record showing that loyalty rewards are or can become Crown assets or property. Without such evidence, it cannot be established that the Crown can possibly be defrauded or have anything stolen in relation to the loyalty rewards.**



6. On September 14, 2016, you provided a voluntary statement against interest. In your statement you admitted that you sought to take advantage of the Co-op cash back rebate member program for your own financial gain. You admitted that you ripped off the tops of Co-op fuel (gasoline) receipts so as to hide your activities because you “ ... knew it was wrong.” You volunteered that the underlying reason for your actions is that you are: “ ... just greedy” and that “I saw this was an opportunity to ah, to ah, to line my own pockets.”

**The Subject Member can neither admit nor deny particular 6.**

**Submission:**

**As previously submitted in response to particular 3 above, [the Subject Member] ripped off a portion of the gas station receipts where his personal Co-op loyalty number and name appeared because he suspected that it wasn't appropriate. He didn't have clear knowledge at the time that it was against RCMP Policy. At most, he had a suspicion. What's more, tearing off that portion of the receipts doesn't render his fuel purchases unlawful or make it a misuse of the ARI card.**

**[The Subject Member] used his personal Co-op loyalty card on occasion to obtain rewards, but his intention in doing so was not to deprive the RCMP or steal from his employer. As submitted previously, there is no evidence on the record that the Crown has a right to the loyalty rewards or their benefits.**

**[The Subject Member's] admissions during his statement cannot be used as the basis for speculation with respect to allegations of fraud, breach of trust and theft.**

**Conclusion:**

**The [CA] has not sufficiently explained or shown how [the Subject Member] committed deceitful or fraudulent acts, breach of trust and theft against his employer.**

**[The Subject Member] had no actual knowledge of the RCMP Policy at the time he used his personal Co-op loyalty card.**

**The use of a personal loyalty card while legitimately purchasing fuel with the ARI card is not a contravention of the Code of Conduct in the circumstances.**

*[Sic throughout]*

### **Analysis of the allegation**

[5] I reviewed and assessed the information in the Record prior to the hearing. The Subject Member's identity was admitted.

[6] In June of 2015, the Subject Member returned to full operational duties as a traffic member in H. Traffic Services after a period of time away. H. Traffic Services members patrol the perimeter highway around the City of Winnipeg and the adjacent rural regions seven days per week, attending motor vehicle incidents, enforcing the *Highway Traffic Act*, CCSM c H60, detecting impaired drivers, etc. The H. Traffic Services are divided into two Watches, each led by a corporal with a sergeant as the Non-Commissioned Officer (NCO) in Charge. There is an inspector Officer in Charge of "D" Division Traffic Services and a staff sergeant who is in charge of the operations.

[7] The traffic members are given a degree of freedom in their patrols. Most are senior members of the RCMP and know their jobs. Traffic enforcement is necessarily road work, where members spend the majority of their shifts in police vehicles. One of their responsibilities is to fuel up the police vehicles as and when necessary. Each police vehicle is assigned a specific credit card for fuel purchases and maintenance, known as an ARI card. There was a Red River Co-op gas station just across the highway from the H. Traffic Services office. The H. Traffic Services had a Co-op membership card bearing their membership number with the Red River Co-op. In essence, this was a loyalty card and when the Co-op membership card or number was presented at the time of purchase, the membership card holder's name and his Co-op number were printed on the top of the gas receipt. The Co-op gas station employees in H. had the RCMP Co-op membership number available to them and automatically attributed fuel purchases to the H. Traffic Services.

[8] There was no directive or unit supplement put into evidence in which members were directed where to purchase fuel. Nor was there any evidence that members were required to provide the H. Traffic Services Co-op number when purchasing fuel. Copies of the H. Traffic

Services Co-op cards were not available in the police cars, so members would have to have either written the Co-op number down or committed the number to memory in order to provide it when making fuel purchases at Co-op stations other than in H.

[9] Once a year, the Co-op would tally up the purchases attributed to membership card holders and rebate cheques were issued. The amount of the rebate varied, but it was in the order of 3% of the purchases made the previous year. Many members did provide the H. Traffic Services Co-op membership number and this resulted in an annual rebate cheque issued to the RCMP in the thousands of dollars. When the rebate cheque was received at H. Traffic Services, it was sent to the Receiver General via the normal accounting practises and was credited to the H. Traffic Services' budget.

[10] The Subject Member and his spouse had a personal Co-op membership number, just as other members did. From almost his first day back on operational duties in June of 2015, the Subject Member admitted to using his personal Co-op membership number when purchasing fuel at Co-op stations, while using the ARI card. The Subject Member removed the top half of most of the Co-op gas receipts—the part where his and his spouse's name and personal Co-op number were printed. Some receipts were left intact; there was a total of almost 60 torn and un-torn receipts.

[11] As an active traffic member, the Subject Member fuelled his car up at least once and occasionally twice per shift. The Code of Conduct investigation showed torn ARI credit card receipts with the Subject Member's personal Co-op number corresponding to days that he was scheduled to work. There were a number of days when the Subject Member worked where no Co-op gas receipt was found. I conclude that, on those days, the Subject Member either did not proffer his Co-op card, purchased fuel at a non-Co-op station, or was office-bound and did not purchase fuel. The Subject Member's practise of attributing his personal Co-op number to ARI credit card purchases is clearly against RCMP policy (see *Transportation Management Manual*, section 2.7.6.1):

6. 1. An employee is not permitted to accumulate rewards or points on his/her personal loyalty card, i.e. AirMiles, Petrol-Points, or other types of reward points, or cash-back for purchases made using the fleet card. Any discount offered by a service station or maintenance facility must be applied directly to the purchase invoice.

The ARI credit card is a “fleet card”.

[12] Ms. M. B. was a public servant and clerk at H. Traffic Services during the salient time. One of her functions was to reconcile the police vehicle fuel and maintenance receipts to the statements received from vendors. Around the end of July 2015, she was reconciling the previous month’s gas purchases and noticed three Co-op gas receipts bearing the name of the Subject Member and his spouse. The receipts were for the police vehicle that the Subject Member solely operated, “2 Bravo 12”. She ripped the tops of the receipts off, containing the Subject Member’s name, and placed them in the Subject Member’s office mail box. She concluded that the Subject Member was using his personal co-op membership card and felt this was wrong. She brought the receipts to the attention of the Subject Member’s direct supervisor, Cpl. R. M. Her recollection of his response was: “What are we talking about, 31 cents?” I find that Cpl. R. M. did not recognize or chose not to recognize the gravity of the situation. He instead made light of the issue, suggesting that the Co-op rebate was a matter of pennies.

[13] Cpl. R. M. testified that he brought the matter up with his team at an informal meeting soon thereafter. Cpl. R. M.’s memory of what he might have said was fuzzy and it was never clear to the Board what he may have cautioned his members about. He wasn’t sure who was at the meeting other than Ms. M. B. and the Subject Member. The Board heard from Ms. M. B., the Subject Member, as well as Watch members Constable (Cst.) H. and Cst. B. None of them had any memory of Cpl. R. M. bringing the Co-op number matter up. As such, the Board finds that Cpl. R. M. did not bring up the matter at an informal meeting and he certainly did not bring it up directly with the Subject Member.

[14] Cpl. R. M. testified that he thought he might have sent an email to his Watch regarding the personal Co-op number issue. Such an email was never presented as an exhibit. The Board

knows that RCMP emails are archived and if Cst. R. M.'s email existed, the Professional Standards investigators would have located it. No witness, other than Cpl. R. M., recalled the email. The Board finds that no such email was ever sent. Cpl. R. M. took no further steps to deal with the matter and the Subject Member continued working and using his personal Co-op number when he fuelled up his police vehicle.

[15] Several months later, Ms. M. B. noted that the Subject Member continued using his personal Co-op loyalty card for "2 Bravo 12" fuel purchases as several receipts had the tops ripped off where the Co-op member's name and number would have appeared. Ms. M. B. raised the matter again with Cpl. R. M. In her statement, Ms. M. B. recalled Cpl. R. M. saying: "What am I going to do about it?" In her oral testimony in front of the Board, Ms. M. B. reported Cpl. R. M. saying: "It's not worth very much, why make such a big deal about it." In his statement, Cpl. R. M. had no recollection of a second meeting with Ms. M. B. In his oral testimony in front of the Board, Cpl. R. M. did recall the second meeting and said that he did not raise the issue with the Subject Member nor did he direct Ms. M. B. to senior management. Therefore, I find that, after the second approach from Ms. M. B., Cpl. R. M. took no action.

[16] The Subject Member continued working and using his personal Co-op number when he fuelled up his police vehicle. Finally, around March of 2016, Ms. M. B. approached the Subject Member's new corporal supervisor about her concerns. Not satisfied with that, she next approached Sgt. L., the NCO in Charge of the Traffic Services, advising him of the Subject Member's Co-op card shenanigans.

[17] Sgt. L. was the Unit Commander of H. Traffic Services during the salient period. The Unit at that time was made up of two Watches consisting of a corporal and five constables per team. Sgt. L. testified that if members purchased their fuel at the H. Co-op station, that the H. Traffic Services' Co-op number would automatically be attributed to the purchase. However, he indicated that other Co-op stations did not possess the H. number and no such automatic

attribution was done. He testified that members were not directed where to purchase their fuel; they could purchase their fuel wherever they needed to.

[18] Faced with Ms. M. B.'s concerns, Sgt. L. knew that this practice "wasn't something we do", but he had to reach out to a senior NCO in a "D" Division policy centre to confirm it was contrary to policy. Sgt. L. then began an investigation and senior management was notified. The Subject Member was advised by the staff sergeant second in charge of "D" Division Traffic Services to cease using his personal Co-op membership card and the Subject Member immediately complied.

[19] In total, the Subject Member reimbursed \$102.78 to the RCMP. This was the amount of Co-op rebates that, had he provided the H. Traffic Services Co-op number, would have gone to the RCMP.

[20] Was the Subject Member aware of the RCMP's policy in the *Transport Management Manual* prohibiting the use of personal loyalty cards when using an ARI card to purchase fuel? Cpl. R. M. certainly did not bring it to his attention. The Subject Member was aware of how Co-op cards worked. He was aware that H. Traffic Services had a Co-op card, but he felt it was too difficult to commit it to memory. From his warned statement, he said he wasn't aware of the details of the policy, but he knew what he was doing was wrong. For him to have this feeling that it was wrong means that he'd either heard of the policy, heard talk that it wasn't appropriate to do this, or had figured out on his own that it might be wrong to receive a rebate of monies that you had never personally paid in the first place. The Board heard evidence that Cst. H. circulated an email detailing the loyalty card policy in 2014. While the Subject Member wasn't in the Unit at the time, his workmates were. It was common knowledge among his workmates that you don't use your personal Co-op number with the ARI card. No one else in the Unit did what the Subject Member did.

[21] Cst. H. worked at the H. Traffic Services with the Subject Member. Cpl. R. M. was his supervisor. He didn't find Cpl. R. M. to be strong administratively, didn't give a lot of feedback,

nor call regular meetings; but he did give them the freedom to do their jobs. Cst. H. did not remember any email or meeting in which Cpl. R. M. discussed a prohibition on the use of personal Co-op loyalty cards.

[22] Cst. B. worked at the H. Traffic Services with the Subject Member. Cpl. R. M. was his supervisor. Cst. B. didn't recall any meeting where Cpl. R. M. discussed the policy on loyalty cards for fuel purchases.

[23] Retired Cst. K. was the court liaison employee at H. Traffic Services. He testified that he was not aware of any standing order of where to fuel the police vehicles. He possessed a personal Co-op loyalty card but, like most other employees, he refrained from using it when purchasing fuel for police vehicles, knowing that H. Traffic Services had its own Co-op number and received the reimbursement.

[24] Ms. P. is a public servant employed at H. Traffic Services. She provided clerical support for the Subject Member's team. She testified that Cpl. R. M. would occasionally have informal meetings with the Team and these occurred either in the Traffic Services board room, but more often than not in their workspace, colloquially known as the "bull-pit". Her desk was in the bull-pit, so she could hear and see everything that went on there. She did not recall Cpl. R. M. ever discussing the practice of members collecting loyalty points on their police car fuel credit cards, nor does she recall seeing an email addressing this. She was never asked by Cpl. R. M. to take minutes of any meeting.

### **Decision on the allegation**

[25] The Board had asked the representatives to address the defence of condonation as it was a concern; were the Subject Member's actions condoned by his immediate supervisor's inaction? Cpl. R. M. was a junior NCO with no financial authority in the Unit. He certainly was not in a position to condone the flouting of policy regarding the use of the ARI card. The CA cannot be held to have condoned the Subject Member's actions by proxy of Cpl. R. M. The Subject

Member did not know that Ms. M. B. and Cpl. R. M. were aware of his activities; therefore, he cannot say that he was lulled into a false sense of security. I do not accept that there is a defence of condonation with respect to this allegation.

[26] Cpl. R. M., by his own admission and the evidence I've heard from the other witnesses, had little concern for administrative policies in the RCMP. Sgt. L. testified that Cpl. R. M., though a traffic subject-matter expert, was lax when dealing with discipline matters and his supervisory skills could be improved. Cpl. R. M.'s lack of sophistication in this regard is disconcerting for a member with his experience, years of service, and his responsibility to his subordinates.

[27] The representatives provided the Board with several cases to assist in the deliberations on the allegation. These cases include:

- a. *R. v Boulanger*, 2006 SCC 32
- b. *R. v Krdzalic*, 2011 ONCJ 793
- c. *R. v Read*, 2016 BCCA 111
- d. *R. v Theroux*, [1993] 2 SCR 5
- e. *R. v Tiller*, 2016 BCSC 187
- f. *R. v Whitney*, 2015 BCJ No. 327
- g. *R. v Zlatic*, [1993] 2 SCR 29
- h. *R.W.D.S.U., Local 414 v Dominion Stores Ltd.*, 1961 CarswellOnt 307, Ontario Arbitration
- i. *Lumber & Sawmill Workers' Union, Local 2537 v KVP Co.*, 1965 CarswellOnt 618, Ontario Arbitration



j. *Irving Pulp & Paper Ltd. v CEP*, Local 30, 2013 SCC 34

k. *Association of Justice Counsel v Canada (Attorney General)*, 2017 SCC 55

[28] The RCMP has an abundance of policies. Most members haven't read them all, but they all must abide by them. If a member is in doubt about some policy, then he looks it up or consults an NCO. Clearly, the Subject Member had some doubts about the Co-op loyalty card policy, because he felt that what he was doing was wrong. He has shown the Board that he is smarter than that; he could have looked the policy up. He was fully capable of doing that. One cannot feel that something is wrong, shut their eyes to it, then rely on that wilful blindness when caught. I find that the Subject Member used his personal loyalty card when purchasing gas at Co-op stations other than H., either knowing that it was contrary to policy or willfully blind to the policy, and that he did so to obtain a benefit and did obtain a benefit.

[29] The Board is further informed by the Subject Member's action of removing the tops of the receipts. The Board put little weight on the Subject Member's evidence that there was a competition in his office for who could get the most equity from Co-op or that he removed the tops of receipts to avoid jealousy and office drama. The Board finds that the Subject Member ripped the tops of the receipts off in a sloppy attempt to conceal his actions from detection.

[30] I have assessed the evidence, the exhibits and information in the Record, including all submissions and the Subject Member's admissions. To establish the allegation against the Subject Member, the Conduct Authority Representative (CAR) must prove most, but is not required to prove all, the particulars:

- Particular 1: **Identity** was admitted to by the member.
- Particular 2: **Fraudulent action constituting a breach of trust and theft from employer.** In effect, the Subject Member did breach the employer's trust, but the circumstances discussed below mitigated this breach. The attempt at concealing his actions by removing the tops of some receipts constitute an element of theft, but it was

never shown to me that the RCMP had an active interest in receiving the rebate. I had no clear evidence on what if any “ownership right” the RCMP had in a potential rebate. Had more care been taken by H. Traffic Services to disseminate the Co-op number to its members, and publish or circulate a policy, my opinion might be different.

- Particular 3: **Deliberately purchasing fuel where the Unit Co-op number was not known and altering gas receipts to obtain a personal benefit.** Most of this particular has been proven, except for “deliberately purchasing fuel from gas stations not familiar with the [U]nit’s Co-op number card”. It was not established that the Subject Member chose gas station locations with this specific purpose in mind. However, the CAR does not need to establish the entirety of the particular.
- Particular 4: **Breach of RCMP policy.** Clearly, the Subject Member breached the loyalty card policy and I took this into consideration when judging his actions on the whole.
- Particular 5: **Failure to adhere to policy despite warning.** I find that this particular was not established given Cpl. R. M.’s inaction.
- Particular 6: **Admissions against interest during warned statement.** While I find that this particular was established, it did not hold much sway in my deliberations. The Subject Member was contrite and apologetic when confronted with the allegation. The gravamen of the allegation is the doing of the act. The Subject Member’s grasping at why he did the act did not provide me with much insight.

[31] The Subject Member admitted to using his personal Co-op client card for purchases of police vehicle fuel, thereby receiving a benefit to which he was not entitled. The Subject Member’s actions were a breach of the RCMP *Transport Management Manual* policy. I find sufficient, clear, cogent and convincing evidence exists to establish all but particular 5 of the allegation.

[32] The Board must now determine if the Subject Member's conduct was discreditable. His conduct was outside the norm for the membership at H. Traffic Services. He was the only member using his personal Co-op number. He should have recognized that what he was doing was wrong as well as the risk he was taking. Any police officer with his service should be sufficiently able to recognize the impropriety of his conduct; but that is not the test. Due to the status police officers enjoy in society, we are held to a higher standard of conduct than the normal citizenry. The public would clearly not abide such behaviour from their police officers. Following the RCMP External Review Committee's test, I find that a reasonable person, with knowledge of all the circumstances of this matter, as well as knowledge not only of policing in general but policing in the RCMP in particular, would consider the Subject Member's conduct to be discreditable.

[33] Therefore, I find on a balance of probabilities that the Subject Member engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct. The Subject Member's conduct occurred while on duty and, as such, the RCMP has an interest in the imposition of conduct measures against him.

## **SANCTION**

[34] The RCMP External Review Committee has articulated the definitive test for the imposition of conduct measures. This test has withstood the scrutiny of higher courts and holds that the first consideration must be the appropriate range of conduct measures applicable to the misconduct at issue. Then, the aggravating and mitigating factors must be considered. Finally, conduct measures which accurately and fairly reflect the gravity of the misconduct at issue, keeping in mind the principle of the parity of sanctions.

### **Range of sanctions**

[35] The CA is seeking a sanction of dismissal. Without suggesting a particular penalty, the MR suggests that a serious sanction less than dismissal would be appropriate. No cases were put

to me to suggest a range of sanctions that were directly relevant to this type of misconduct. Indeed, the MR suggested that this might be the first case where a board has had to consider the misuse of a loyalty card. Given this, I appreciate that there is a wide range of sanctions available to me, up to and including dismissal.

[36] In the new conduct system, and especially when faced with a novel fact pattern such as this, I referred to the RCMP *Conduct Measures Guide*. While an instructive and very useful document, it is my understanding that the *Conduct Measures Guide* is a guide and I am not bound by it. The allegation here is a section 7.1 “discreditable conduct” and the Guide suggests that it is primarily for off-duty criminal and off-duty non-criminal conduct, as well as sexual misconduct. That is not the case here.

[37] Subsection 7.1.23 (theft / fraud) drew my interest, but I found that there was no defrauding of or theft from the employer. I looked at the suggested sanctions and commentaries under subsection 4.14 (the misuse of Amex card and misuse of ARI cards). I also looked at the sanctions and commentaries under subsection 8.32 (lying to a supervisor on a non-operational incident) and subsection 8.34 (false claims).

[38] From my review of the aforementioned, I feel that the appropriate range of sanctions is between 20 days’ forfeiture of pay and dismissal.

### **Aggravating factors**

[39] The CAR did not specifically lay out aggravating factors for my consideration, but he did provide me with comments on deception and dishonesty; suggesting some moral turpitude on the part of the Subject Member. The CAR pointed out:

- a. The lack of honesty and integrity (deceitfulness); as evidenced by the Subject Member’s attempt to hide his conduct via the removal of the tops of the receipts.

- b. Civilians were necessarily involved at the Federated and Red River Co-ops for assistance in the investigation of this matter.
- c. This was a deliberate action as there was planning and premeditation involved on the Subject Member's part.
- d. The conduct, by its nature, was repetitive over an extended period of time. However, I believe that the core misconduct was the Subject Member's decision to use his loyalty card at the outset.
- e. The Subject Member acted out of personal gain.
- f. The CAR suggested that misconduct related to honesty and integrity will trigger a McNeil disclosure requirement should the Subject Member be retained. Members of the RCMP who have received formal or informal discipline under the Code of Conduct must declare that fact in the prescribed form and provide it to Crown counsel when preparing to provide evidence in criminal matters. Members with a serious discipline history may have their credibility challenged by the defence. The disclosure is at the discretion of the Crown and will be reviewed by a court as to its relevance, magnitude and impact. In this case, the misinformation provided by the Subject Member was regarding an administrative matter. The extent of the anticipated impact of a McNeil disclosure requirement here is unknown and I have no evidence from the CAR and the MR on this. I have no information on the long- term effects of a McNeil disclosure on a member's viability in court, nor any possible remediation, be it by the passage of time, rigorous testing in court, or proaction taken by a future RCMP member's union, etc. It would likely not preclude the Subject Member from criminal investigative work.
- g. Finally, probably the most serious aggravating factor would be the Subject Member's discipline record, which includes two formal and one informal discipline cases:

- i. In 2007, he took a police car to a baseball game over a weekend. The car was hit in a parking lot presumably and incurred \$3,600 damage. He then lied about the incident to a post garage clerk and his inspector. A bad decision on the Subject Member's part, which cost him a number of days' pay.
- ii. In 2008, he kept a police car to attend a party in a neighbouring detachment. The car was needed for operational duties as five on-duty members had only three cars. Again, a bad decision on the Subject Member's part. It cost him eight days' pay and a warning from the conduct board that future misconduct would not be treated as lightly.
- iii. In 2012, the Subject Member failed to obtain permission to take a week of leave during his suspension on the criminal matter which was overturned on appeal. This cost the Subject Member a reprimand.

[40] I see a common thread in the two formal discipline cases and the present matter; which was pointed out by the Subject Member himself: his penny-pinching / frugal nature. The CAR has suggested that I should take this past discipline into account and consider the accumulation of the Subject Member's misconduct over time; that the present matter is a final, culminating incident that should result in his dismissal. Despite the passage of approximately 10 years, I take the CAR's point into consideration.

### **Mitigating factors**

[41] While not clearly listed by the MR, I have noted the following:

- a. The Subject Member immediately and unreservedly accepted responsibility for his misconduct. In his letter of apology, he did not seek to blame anyone or anything for his actions.

- b. Again in his letter to me, he apologized and expressed remorse. I did not detect much remorse in his oral testimony before me, but the Subject Member appears to be a stoic individual, so I drew no adverse inference from his presentation.
- c. The Subject Member's performance evaluations are good, but that is what we would expect from any member of the RCMP. His work ethic was well reported on by Sgt. L. However, I don't consider his reported performance to have reached such a standard for it to be a significant mitigating factor.
- d. The MR alluded to some issues of post-traumatic stress disorder, etc., but I have no medical evidence before me to suggest that any of the misconduct could be attributed to it.
- e. While some personal stressors in the Subject Member's life were pointed out to the Board, at the risk of sounding unsympathetic, these were challenges that many members face through the course of their careers. I appreciate that the Subject Member went through a multi-year suspension for a criminal matter for which he was eventually cleared. To his credit, he bounced back and hit the ground running in H. Traffic Services.
- f. I also appreciate that the Subject Member has sought and continues getting counselling. I encourage him to avail himself of these services.
- g. What did impress me was his letters of reference from peers, supervisors, and members of the community. This gave me some insight into the character of the Subject Member. I conclude that the misconduct was not a result of some character flaw, but was instead poor judgment and frugality.
- h. There was a Form 1004 – *Performance Log*, dated June 30, 2016, from Inspector E. M., Officer in Charge of "D" Division Traffic Services. The Subject Member was congratulated for his running and successful conclusion of a hazardous pursuit.

- i. The Subject Member cooperated with the investigation.

**Comments on the allegation**

[42] I must turn my mind to the Subject Member's attempt to conceal his actions by the tearing off of the tops of the receipts. Had he not done this, I might have concluded that he was not morally blameworthy. Had all and not most of the tops been ripped off, this would have weighed more heavily against the Subject Member. Had the Subject Member's immediate supervisor cautioned him about his actions, I would have seriously considered dismissal.

[43] There is one matter that I did not find on the lists of mitigating factors considered by past conduct boards that I wish to bring up. This wasn't mentioned by the representatives but it is in the Record: the actions of the Subject Member's immediate supervisor, Cpl. R. M. By his own admission and the evidence I've heard from the other witnesses, Cpl. R. M. had little concern for administrative policies in the RCMP. Sgt. L. testified that Cpl. R. M., though a traffic subject-matter expert, was lax when dealing with discipline matters and his supervisory skills could be improved. Cpl. R. M.'s lack of sophistication in this regard is disconcerting for a member with his experience, years of service, and his responsibility to his subordinates.

[44] Ms. M. B. brought the matter of the Subject Member's personal Co-op card to Cpl. R. M.'s attention within weeks of the Subject Member's arrival on the team. At the time, there were a handful of receipts—perhaps eight, some with the tops present and others with tops ripped off. All were from the Subject Member's police vehicle. Cpl. R. M.'s response was to make light of the discovery, stating that it was just a matter of pennies. Ms. M. B. left it with him to handle. Cpl. R. M. had several options: a) find the policy on it if he was unclear; b) speak with the Subject Member directly; c) serve the Subject Member a Form 1004; d) speak with his team as a group; e) send a group email to his team; or f) consult with his senior management. Instead, Cpl. R. M. chose to do nothing.



[45] Frustrated that the Subject Member continued using his personal Co-op number, Ms. M. B. approached Cpl. R.M. a second time. This time, he may have been the acting sergeant / NCO in Charge for the Unit. His response to her was “What am I going to do about it?” and “It’s not worth very much, why make such a big deal about it?” I found that after the second approach to Cpl. R. M, he still took no action. By doing nothing, he was: a) disrespectful to Ms. M. B. in that he did not take her concerns seriously; b) he failed in his duty of providing reasonable advice, guidance and supervision to one of his subordinates who had placed himself in a precarious position; and c) he failed to do the job that the RCMP expects of its front-line supervisors. The Board was disappointed and taken aback that an experienced investigator and supervisor, with the years of service that Cpl. R. M had, would fail to recognize the mine field that he allowed the Subject Member to walk into. Cpl. R. M said that he assumed Ms. M. B. would have gone to see the sergeant in Charge of the Unit. In fact, that is what **he** should have done. Cpl. R. M effectively abdicated his role as the Subject Member’s supervisor. Cpl. R. M. could have stopped the Subject Member’s misconduct early on with a tap on the shoulder and a two-minute talk.

[46] Cpl. R. M. also had a duty imposed on him by paragraph 37(e) of the *RCMP Act*, which reads as follows: “It is the responsibility of every member [...] (e) to ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue; [...]” Cpl. R. M. had an obligation, in light of paragraph 37(e) of the *RCMP Act*, to do something to address the situation. This obligation is further heightened by the fact that he was in a supervisory role. The Subject Member was let down by his supervisor. While the Board does not blame Cpl. R. M. for the Subject Member’s misconduct, we would not be here had Cpl. R. M. taken an interest in this matter.

### **Decision on sanction**

[47] General principles inform us that if a police officer is to be dismissed, then it must be for misconduct that establishes that the officer is not fit to remain a member of the Force. Corrective discipline should take precedence over punitive where appropriate. The lowest sanction possible

should be considered; it starts at a reprimand and goes all the way to dismissal. The sanction should bolster the public confidence in the Force by the fact that the Board dealt with the matter with an appropriate sanction. I must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct.

[48] The Subject Member is an experienced member of the RCMP and cannot blame anyone for the actions he took. Given the inadequacy of the Subject Member's front-line supervision, I am hard-pressed to acquiesce to the CA's request to dismiss the Subject Member. The combined effects of the facts of this matter and the 2007 and 2008 formal discipline cases tell me that the Subject Member needs to deal with his frugality problem and his disdain for RCMP policy. Having considered all of the circumstances, the evidence, the jurisprudence and the submissions of the representatives, the aggravating and mitigating factors as well as the inertia of the Subject Member's supervisor, I direct the Subject Member to be reprimanded and forfeit 20 days' pay.

[49] I trust that this sanction will serve as a deterrent to other members considering using personal loyalty cards where prohibited by policy. I suggest that if it has not been done so already, the Division Administrator ensure that this policy is disseminated to the membership.

[50] The Subject Member has been sanctioned for a serious breach of the Code of Conduct. If he appears before a conduct board again, then I suggest that the sanction be less lenient.

[51] Either party may appeal this decision by filing a statement of appeal with the Commissioner within the limitation period set out in subsection 45.11 of the *RCMP Act*.

January XX, 2019

---

Inspector A.O. Ramey

---

Date

Conduct Board