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2019 RCAD 05



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, "E" Division

Conduct Authority

and

Constable Konstantinos Xanthopoulos
Regimental Number 60852

Subject Member

Conduct Board Decision

Gerald Annetts

April 9, 2019

Shahana Khan, for the Conduct Authority

Barry Carter, for the Subject Member

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SYNOPSIS

The Subject Member brought two separate preliminary motions to dismiss the first allegation on the basis that it was brought out of time. The first, presented prior to the hearing, was unsuccessful. The second, which was based on new disclosure originating from the first preliminary motion application, was presented on the first day of the scheduled hearing. It was successful; as a result, the first allegation was dismissed by the Board for lack of jurisdiction.

In relation to the second allegation, the Subject Member was notified that he was going to be the subject of a Code of Conduct investigation and was aware that he would soon be ordered not to have contact with the main witness to the allegation he was facing. Despite that knowledge, he contacted her and made it clear that he didn't want her to cooperate with the investigation, thereby attempting to interfere with a Code of Conduct investigation.

The third allegation concerned an earlier Code of Conduct investigation involving the Subject Member. In the course of providing a written statement to the investigator in that investigation, he lied about not being in possession of a working RCMP-issued cellphone during the time in question. He repeated that lie in his written submission to the Conduct Authority prior to the Conduct Meeting.

The Conduct Board ordered the Subject Member to resign within 14 days.

INTRODUCTION

[1] A *Notice to the Designated Officer* was issued by the Commanding Officer of “E” Division on September 20, 2017, containing three Allegations against the Subject Member. I was appointed on September 22, 2017, as the Conduct Board to hear the matter. The hearing was delayed due to disclosure shortcomings and a preliminary motion brought by the Subject Member seeking the dismissal of all three Allegations. I issued a written decision dismissing that motion on October 23, 2018.

[2] However, as a result of further disclosure received by the Subject Member in the course of making that motion, a second preliminary motion was made seeking the dismissal of Allegation 1 due to the limitation period not being respected. The Conduct Hearing convened from March 19 to 21, 2019, in Vancouver, British Columbia. I heard evidence and submissions first in respect of the preliminary motion on Allegation 1. After ruling on the preliminary motion, I subsequently heard evidence in respect of Allegations 2 and 3. An oral decision was issued on March 21, 2019. This is the written decision.

ALLEGATIONS

[3] Following a Code of Conduct investigation, the Subject Member faced the following Allegations and Particulars:

Allegation 1

On or between July 23, 2016, and September 23, 2016, at or near [S.], in the province of British Columbia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On July 22, 2016, [S.] RCMP received a report from Ms. [M. M.] that her ex-boyfriend, Mr. [G. B.], had possibly abducted their 19 month old son. [S.] File 2016-104985 was created and members were dispatched. You were not involved in this incident, which resulted in the arrest of Mr. [G. B.]

3. On July 23, 2016, Mr. [G. B.] contacted the [S.] RCMP and requested assistance in retrieving his personal belongings from [Ms. M. M.]'s residence. [S.] File 2016-105620 was created and you were the assigned lead investigator. Ms. [M. M.], who was not present at her residence, had left Mr. [G. B.]'s belongings outside, but had forgot to include Mr. [G. B.]'s welder log, which he needed for work. You attempted to contact Ms. [M. M.], but were unable to reach her.

4. Later on that night, you attended Ms. [M. M.]'s residence to follow up on [S.] File 2016-105620. You stayed at her residence for approximately 20 minutes and gave her an RCMP business card with your personal cell phone number handwritten on it. The written number was [number redacted].

5. Over the next two weeks, while on duty, you attended or drove by Ms. [M. M.]'s residence in a marked RCMP vehicle, on several occasions. Specifically, you attended or drove past the residence at:

- a. [12 p.m.] on July 28, 2016;
- b. [5:34 p.m.] on July 30, 2016;
- c. [9:11 p.m.] on July 30, 2016;
- d. [7:02 p.m.] on July 31, 2016;
- e. [9:39 p.m.] on August 8, 2016.

There was no operational reason for you to attend Ms. [M. M.]'s residence on these occasions.

6. During one of your visits, you asked Ms. [M. M.] the reason why she had not called you. You also advised her that the number on the RCMP business card you provided her was your personal number.

7. You began to exchange personal text messages with Ms. [M. M.]. While off duty, you met with her, returned to her residence and engaged in consensual sexual activities with her.

8. You knew or ought to have known that Ms. [M. M.] was the victim of domestic abuse and that she called the RCMP, the day before you met her, reporting her son was being abducted by her ex-boyfriend, Mr. [G. B.]

9. While you were in a position of trust and authority you met Ms. [M. M.], a vulnerable person and complainant in [S.] File 2016-104985, and you engaged in a sexual relationship with her.

Allegation 2

On or between September 20, 2016, and April 5, 2017, at or near [S.], in the province of British Columbia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On August 12, 2016, Ms. [M. M.] attended the [F. N.] detachment to make a complaint of breach of recognizance against her ex-boyfriend Mr. [G. B.], [F. N.] File 2016-1856. During the interview, Ms. [M. M.] revealed to the investigator that she had been in a relationship with a [S.] RCMP officer who responded to a call for service at her residence. She did not disclose the name of the officer.
3. On August 23, 2016, [S.] Professional Standards Unit was made aware of Ms. [M. M.]’s disclosure and conducted some inquiries in an attempt to identify the member referred to by Ms. [M. M.]
4. On September 22, 2016, you were advised that you were being investigated for a contravention of the RCMP Code of Conduct, you contacted Ms. [M. M.] and asked if she had talked to anyone about your relationship.
5. You further questioned Ms. [M. M.] about the information she provided because you wanted to ensure both stories would match. Your actions caused Ms. [M. M.] to feel that you didn’t want her to talk to the investigator about your relationship.
6. You therefore tried to interfere with a Code of Conduct investigation.

Allegation 3

On or between July 21, 2016, and December 21, 2016, at or near [S.], in the province of British Columbia, [the Subject Member] did not provide complete and accurate accounts pertaining to the carrying out of his responsibilities and the performance of his duties and the operation and administration of the Force, contrary to section 8.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, in the province of British Columbia.
2. On December 13, 2016, you were served with a copy of a “Notice of Conduct Meeting” to be convened on December 20, 2016, with your line officer [Superintendent (Supt.) M. L.] ACMT file 2016-336373. The Notice included two allegations, s. 3.2, and s. 7.1, both for conducting a traffic stop of a female without cause, to provide her with your personal cell phone number.
3. The conduct meeting was being held with respect to allegations that occurred on January 16, 2016. The Record of Decision (ROD) noted the s.

3.2 allegation was established, and it was noted the conduct alleged in the s. 7.1 allegation was already dealt with by the first allegation, therefore it was not established.

4. On January 3, 2017, you filed a Statement of Appeal of this ROD to the Office of Coordination of Grievances and Appeals (OCGA). Your submission included a document you prepared for the conduct meeting, which was also submitted to your line officer for his consideration during the conduct meeting. The document was titled "Written Submission in Response to Final Report – File No. 2016-336373".

5. As a result of the investigation in relation to your claims made in your appeal of this matter it was discovered information included in your Conduct Meeting written submission was false and/or misleading. Specifically the following two statements:

a. "As set out in my written statement [dated July 21, 2016], the reason that the card had my personal cell phone number was that I did not have a phone issued by the RCMP at the time."

b. "As set out in my written statement [dated July 21, 2016], in October I submitted the appropriate form (ED12) for phone replacement, which was signed by Inspector [M.] and forwarded to Central Helpdesk Service. I was informed by [G. T.] sometime in February or March that my replacement phone had arrived, so I went to [G. T.] and picked it up. During the interim period I mostly used my personal cell phone while on duty, as have many officer at various times."

6. Your RCMP cell phone records for phone number [number redacted], indicate that during December 2015 and January 2016, you were issued an RCMP BlackBerry, it was functional, and you used it to make and receive calls.

7. Central Helpdesk records indicate that you were provided a new BlackBerry device and you activated it on October 22, 2015.

8. Your PRIME sign-on comments data from October 2015 to February 2016, which you manually entered, listed your RCMP issued phone number [number redacted]. When you did not enter your work Blackberry phone number, the space was either left blank, or you were listed as the second officer signed in to the vehicle. Your personal cell phone [number redacted] was not listed in your PRIME sign-on comments data during this time.

9. You therefore provided misleading information in your July 21, 2016 written statement to the Conduct Investigator, and you lied to Supt. [M. L.], your line officer, during a Code of Conduct process in your written submission.

[Sic throughout]

EVIDENCE AND FINDINGS ON THE PRELIMINARY MOTION

[4] The Subject Member brought a preliminary motion seeking a dismissal of Allegation 1 on the basis that when it was initiated on September 20, 2017, the limitation period had already expired. In order to determine if that was the case, I will first review the statutory provisions dealing with the responsibility to deal with conduct matters. That review must start with section 40 of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], which states:

40 (1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct, the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary to enable the conduct authority to determine whether the member has contravened or is contravening the provision.

[5] Therefore, it is the responsibility of a conduct authority to cause to be made any investigation that he or she considers necessary to enable him or her to determine whether a member has contravened or is contravening a provision of the Code of Conduct.

[6] Under the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], the Commissioner has designated the following positions as conduct authorities:

2 (1) The following persons, subject to any requirements that may be established by the Commissioner under subsection (2), are designated as conduct authorities in respect of the members who are under their command:

- (a) members who are in command of a detachment and persons who report directly to an officer or to a person who holds an equivalent managerial position;
- (b) officers, or persons who hold equivalent managerial positions; and
- (c) officers who are in command of a Division.

[7] There are no provisions within the *RCMP Act*, the *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281, or the *Commissioner's Standing Orders* that allow for any further delegation of those designations to other members of the RCMP. Nor can any such delegation be done in policy (national, divisional or detachment) to override the provisions of the statutory instruments. The power to delegate has been recognized by the courts since the beginning of confederation, *Hodge v The Queen* (1883-84), 9 AC 117, but it may only be

delegated by enabling statutes. Therefore, it is the responsibility of the various conduct authorities to investigate allegations against members of the RCMP in order to determine whether the member subject to an allegation has contravened the Code of Conduct.

[8] In reality, this investigative function is carried out by the Professional Standards Units (PSUs) across the RCMP on behalf of the conduct authorities, for the simple reason that the conduct authorities do not have the capacity to do so themselves. Normally, PSU commences such an investigation upon receipt of a mandate letter from a conduct authority, providing them with the necessary direction. The ability to direct someone else to carry out the actual investigation comes from subsection 31(2) of the *Interpretation Act*, RSC, 1985, c I-21 [*Interpretation Act*]:

31(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act

[9] However, that doesn't change the fact that legally, it is the conduct authority who holds the responsibility and the authority. "E" Division PSU has no authority on its own to conduct a Code of Conduct investigation under the *RCMP Act*. Their authority is that of the various conduct authorities in the Division. In my view, they act as the agent of the Conduct Authority; and in that respect, every action undertaken by the PSU in respect to an allegation that a member has contravened the Code of Conduct is undertaken on behalf of a conduct authority.

[10] What is the effect then when:

- a. the PSU receives a complaint and conducts a "preliminary investigation" in order to determine if there is a basis upon which to warrant an actual Code of Conduct investigation directed by a conduct authority? and
- b. the PSU delays the notification to the conduct authority until such time as the PSU is satisfied that the grounds exist to warrant the Code of Conduct investigation?

[11] Under the law of agency in those circumstances, the knowledge of the PSU investigator/manager is deemed to be the knowledge of the Conduct Authority. The limitation or

thing are deemed to be also given. period must then be triggered the moment that information known to the PSU is sufficient to reasonably believe that a member has contravened the Code of Conduct for the purpose of initiating an investigation (paragraphs 204 and 208 of RCMP Conduct Board decision 2018 RCAD 20183382 [*Phillips*]). The level of knowledge required is the information necessary to initiate an investigation, not all the verified details of the alleged misconduct. It is during the one-year limitation period that the necessary investigation is conducted to learn or confirm those details and to determine whether the imposition of conduct measures is appropriate or to initiate a Conduct Hearing (*Theriault v The Appropriate Officer of C Division of the Royal Canadian Mounted Police*, 2006 FCA 61 (CanLii) [*Theriault*]).

[12] I am mindful of the conduct board's comments at paragraph 190 of *Phillips* with respect to it being the knowledge of the applicable conduct authority that causes the limitation period to begin to run, not that of third parties within the RCMP or subordinates. However, I don't consider PSU investigators to be "third parties" to the conduct authorities when they have been entrusted and mandated by the conduct authorities to investigate and manage conduct matters on their behalf. What they learn in the course of managing and investigating conduct matters is therefore deemed to be known by the conduct authority on whose behalf they are acting. It is that knowledge that will trigger the start of the limitation period for the purposes of subsection 41(2) of the *RCMP Act*.

[13] This is also implied in policy at section 4.1.1 of the *Administration Manual*, Chapter XII.1 "Conduct":

4.1.1. When information is received that a member has allegedly contravened a provision of the Code of Conduct, the conduct authority at the level that is the most appropriate to the subject member must consider the information to determine the best means of addressing the situation, which may include referring it to the next level of conduct authority where it is clear, if established, the alleged contravention could not be adequately dealt with by the receiving level of conduct authority.

[14] A conduct authority cannot perform those functions until he or she has been notified that the information has been received that a member has allegedly contravened a provision of the Code of Conduct. The policy does not require that information be received by the conduct

authority, it simply says where information has been received, implying that regardless of who receives the information (the PSU), it must either be immediately passed along to the conduct authority or it will be deemed that it has been received by the conduct authority.

[15] In response to the second question, it makes little difference if the PSU delays the notification to the conduct authority until such time as the PSU is satisfied that the grounds exist to warrant the Code of Conduct investigation. If the knowledge of the PSU is deemed to be the knowledge of the Conduct Authority, then when the PSU gains sufficient knowledge to trigger the limitation period (under the test in *Theriault*), then the limitation period begins to run. It therefore makes little difference when or even if they pass it along to a conduct authority.

[16] The relevant section of the *RCMP Act* is subsection 41(2), which states:

41 (2) A hearing shall not be initiated by a conduct authority in respect of an alleged contravention of a provision of the Code of Conduct by a member after the expiry of one year from the time the contravention and the identity of that member as the one who is alleged to have committed the contravention became known to the conduct authority that investigated the contravention or caused it to be investigated.

[17] From the affidavit evidence tendered prior to the hearing and the *viva voce* evidence heard on this issue, I make the following findings of fact. On August 5, 2016, an email was received by the S. PSU from a member of S. Detachment alleging that a member of S. Detachment had inappropriately made some advances towards a complainant on a file. By August 9, 2016, (then) Corporal P. and Corporal G. of the S. PSU had conducted sufficient investigation to determine that the allegation was serious in that it involved a member taking advantage of a potentially vulnerable indigenous victim of reported domestic violence. The likely member involved had also been identified at that time as the Subject Member, because a review of his PRIME CAD log showed that he had attended Ms. M. M.'s residence at least five times in the days following the original call for service.

[18] What wasn't known at that time was the alleged nature of the contact between the Subject Member and Ms. M. M. However, that changed on August 23, 2016, when the Officer in Charge of the S. PSU, Inspector L., heard from Constable S. of F. N. Detachment. He was told on that

day that Ms. M. M. had lodged a complaint at F. N. Detachment in relation to her ex-boyfriend. At that time, she also told Constable S. the following:

- a member did standby and keep the peace at her residence in S.;
- the member later left a card with his name on it, but she did not call him;
- the member came back another day, knocked on the door and asked her why she did not call him, and asked her on a date;
- they went on a date in W. R.; and
- they are no longer together.

[19] When that information is combined with what was already known on August 9, 2019, there was, according to any objective standard, enough information to trigger the start of the limitation period under subsection 41(2) of the *RCMP Act*. I find further support for this conclusion in the fact that there was no additional evidence obtained between August 23, 2016, and September 22, 2016, when Supt. M. L. was “officially” briefed and the Code of Conduct mandate letter issued. My conclusion then is that the limitation period was triggered on August 23, 2016, and that the initiation of a Conduct Hearing on September 20, 2017, was out of time.

[20] If I am wrong in my interpretation and application of the law of agency under these circumstances, then I also find that two different properly designated conduct authorities had sufficient knowledge on September 7, 2016, to trigger the limitation period. Inspector T. testified that, as a result of a conversation he had with Supt. M. L. on that day, he was aware that the Subject Member was going to be the subject of another Code of Conduct investigation, which was related to an ongoing one, in that it involved him inappropriately pursuing a female he met in the course of his duties for the purpose of pursuing a personal relationship. In his mind, it was serious enough that he was concerned that the Subject Member would be removed from duty.

[21] I find some support for that finding in Supt. M. L.’s testimony that he met on a biweekly basis with the management of the S. PSU for a briefing/update of ongoing Code of Conduct

matters. Whether or not the specific details of the file were discussed, there is little doubt in my mind that Supt. M. L. was advised of the identity of the Subject Member and of sufficient information to reasonably believe that he had contravened the Code of Conduct. There would be little reason for such meetings if that were not the case.

[22] One other issue requires comment in terms of the application of the limitation period. I received both affidavit and *viva voce* evidence to the effect that there was a policy in place in S. Detachment that limited the “management” of conduct matters to the Officer in Charge of the Detachment and the Superintendent level. However, Detachment Management should be aware that, no matter their intent, such policies cannot override the relevant legislation. Subsection 40(1) of the *RCMP Act* requires a conduct authority to act on information received of a potential Code of Conduct contravention. That provision is imperative and not permissive. In addition, subsection 31(3) of the *Interpretation Act* states:

31(3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

[23] When subsection 40(1) of the *RCMP Act* and subsection 31(3) of the *Interpretation Act* are combined, it is clear that a conduct authority who becomes aware of such information must act. Deferring to a higher rank conduct authority in compliance with Detachment policy does not absolve him or her from the responsibility of a properly designated conduct authority and does not delay triggering the limitation period.

[24] I find that Allegation 1 was initiated out of time and I have no jurisdiction to hear it. Therefore, Allegation 1 against the Subject Member is dismissed.

EVIDENCE AND FINDINGS ON THE ALLEGATIONS

Allegation 2

[25] Allegation 2 is one of discreditable conduct under section 7.1 of the Code of Conduct. In order to prove discreditable conduct, the Conduct Authority must first prove on a balance of

probabilities that it was the Subject Member who committed the acts in question. Identity is not in issue in this case.

[26] The second stage involves a determination on a balance of probabilities, *F.H. v McDougall*, 2008 SCC 53 (*CanLii*), of whether the facts alleged actually took place. In that regard, and as a result of the admissions made by the Subject Member, the evidence contained in the materials, and the *viva voce* evidence heard, I make the following findings of fact.

[27] The Subject Member met Ms. M. M. on July 23, 2016, when he responded to her residence for a call for service to assist her ex-boyfriend, Mr. G. B., retrieve some personal belongings from her residence. His assistance was required because Mr. G. B. was prohibited from attending there himself. Before leaving her residence, the Subject Member provided Ms. M. M. with a basic RCMP business card on which he wrote his nickname and his personal cellphone number.

[28] Over the next two weeks and while on duty, the Subject Member attended her residence on at least five additional occasions, his explanation being that he was following up on whether Mr. G. B. had picked up his belongings that had been hidden outside of the residence in order to allow him to do so. The Conduct Authority's theory was that he was attempting to pursue a personal relationship with Ms. M. M.

[29] A personal relationship did develop between the two of them, which the Subject Member acknowledges, although he denies that it was sexual. While not the subject of this Allegation, the nature of that relationship is relevant to motives, credibility on other matters in issue, and to my findings in relation to some of the Particulars, so I will deal with it here. I find that, as Ms. M. M. testified, she and the Subject Member did in fact have sexual relations on one occasion on or about August 2, 2016, after going for dinner together in W. R.

[30] Some of Ms. M. M.'s evidence was hesitant and uncertain, which she acknowledged due to the passage of time. However, she was quite explicit on that point, a detail with respect to which it understandably would be clearer in her mind than the number of telephone conversations between the two of them or the specific dates involved. It is also unlikely in my

view that she would make up that detail, given her reluctance to become involved in these proceedings in the first place. If she was intent on lying, the easier and less embarrassing route would be to say that the two of them did not have sex.

[31] Ms. M. M.'s demeanour on the witness stand reflected someone who was put in the uncomfortable position of having to testify in a proceeding in which she wanted no part of. Her testimony was internally consistent with respect to the important details of the recorded statement that she provided to the S. PSU and it was externally consistent with the other evidence, such as the number of occasions that the Subject Member attended her residence, why he attended, how the relationship began, and why it ended. Her evidence on the elements in issue was not shaken in cross-examination.

[32] Ms. M. M. was also fair to the Subject Member in terms of her testimony as to the appropriateness of their relationship. She testified that she didn't feel that he did anything wrong and that her involvement with him was entirely consensual. Ms. M. M. did not present as a witness who had an axe to grind with the Subject Member, nor did she come across as untruthful in any way. I found her to be a credible witness and her evidence to be reliable.

[33] I did not make the same findings with respect to the Subject Member's testimony, which I would describe generally as evasive and overly defensive. I will provide more detail on that as I continue with the findings of fact.

[34] There was a series of text messages between the Subject Member and Ms. M. M. starting on July 31, 2016, and ending (except for one more) on August 5, 2016. The texting stopped just days before Ms. M. M. travelled back to F. N. to attend a funeral and the Subject Member left for a holiday.

[35] The Subject Member returned from holiday on September 21, 2016, and returned to work the next day. On that day, he was called to return to the Detachment and meet with Inspector T. He was informed then that there was another Code of Conduct investigation "in the works". I say "another" because he was already subject to an ongoing Code of Conduct investigation at the time involving an allegation that he conducted a non-operational traffic stop in order to provide

his business card to a female driver. After meeting with Inspector T., he was allowed to go home for the rest of the day.

[36] There was no evidence as to what time that may have been, but at 2:31 p.m., he contacted Ms. M. M. and the two of them had a 22-minute telephone conversation. He admittedly contacted her knowing that, by the next day when the Code of Conduct order was served on him, he would be ordered not to speak to her or any other witnesses while the investigation was being carried out.

[37] As a police officer and specifically an RCMP officer already subject to a previous Code of Conduct investigation, the Subject Member was well aware of the reason for that impending order: to protect the integrity of evidence to come from that witness and to prevent any interference in the course of the investigation. Yet he contacted Ms. M. M. anyway, after having nothing to do with her since August 5, 2016, and while he was away on holiday and, according to his version of events, after only having been recent acquaintances who only went out for dinner on one occasion. I find it difficult to understand why his call, only looking for answers, according to him, as to why a Code of Conduct investigation was pending, would have been to her, especially given his testimony that he believed cultivating a personal relationship with someone under the circumstances in which he met her is perfectly acceptable. His claim and his actions are inconsistent. Had he truly believed that he had done nothing wrong in his dealings with Ms. M. M., there would have been no reason to contact her.

[38] The Subject Member testified that he contacted her in order to ask if she knew anything about the Code of Conduct investigation order that was coming against him. He testified that he was under the impression that the investigation was about him harassing her. Again, I have difficulty understanding how he would have gained that impression given his testimony that no one else he talked to had any information for him as to what it was about. I find the most likely reason for contacting Ms. M. M. is because he knew he had engaged in an inappropriate sexual relationship with a client he knew to be in a potentially vulnerable state.

[39] Where the evidence of the Subject Member differs with that of Ms. M. M., I prefer the testimony of Ms. M. M. In cases such as this, where there is conflicting testimony, it is necessary to assess that evidence under the guidance of the Supreme Court of Canada's decision in *F.H. v McDougall*, [2008] 3 SCR 41 [*McDougall*], in which the Court said:

[86] However, in civil cases in which there is conflicting testimony, the trial judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party. In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case. That may be especially true where a plaintiff makes allegations that are altogether denied by the defendant as in this case. W.(D.) is not an appropriate tool for evaluating evidence on the balance of probabilities in civil cases

[40] The Ontario Court of Appeal followed up on those statements in *Law Society of Upper Canada v Neinstein*, 2010 ONCA 193:

[21] The appellant's argument that the three-step approach in W.(D.), or its purposive equivalent, must be used in assessing conflicting evidence in non-criminal cases was put to rest in *McDougall*, a decision rendered after the Divisional Court released its reasons in this case. [...] In the Supreme Court of Canada, the court unanimously concluded that a W.(D.) type analysis was inappropriate in a civil case. [...]

[22] *McDougall* has direct application to this case. The Hearing Panel was required to determine whether the allegations were made out on the balance of probabilities. In doing so, the Hearing Panel was required to consider the totality of the evidence and to make credibility assessments in the context of the totality of the evidence. As in *McDougall*, a finding by the Hearing Panel that the complainants were credible could be determinative of the outcome. In light of *McDougall*, the Hearing Panel's application of a modified W.(D.) analysis was inappropriate to the inquiry it was required to make. [...]

[41] The authorities are clear that in proceedings of this type, no W.(D.) analysis is required and that a finding that Ms. M. M. was credible, her evidence reliable and consistent with the other related evidence, is determinative of those issues.

[42] Furthermore, the conversation with Ms. M. M. was 22 minutes long, during which the Subject Member acknowledged that he was angry and upset about what was happening. Given the length of the telephone call, the conversation also obviously didn't end with him asking whether she knew anything about the pending Code of Conduct investigation. At a minimum, he discussed with her, with someone he knew to be a witness in a pending Code of Conduct investigation against him, whether she had gone to the RCMP to complain, how the complaint originated, the fact that she had spoken to the RCMP, and that the RCMP were being persistent in an attempt to obtain a statement from her. Those are only the conversation topics that he admitted to on the witness stand. There may have been additional discussion, but it is not necessary to go into it for our purposes.

Finding

[43] In applying those findings of fact to the Particulars of Allegation 2, I find:

- a. Particular 1 was admitted to and is established.
- b. Particular 2 is established.
- c. Particular 3 was withdrawn by the Conduct Authority.
- d. Particular 4 was admitted to by the Subject Member in his testimony and is established.
- e. Particular 5 is established. Given the nature of his relationship with Ms. M. M., given the circumstances under which he contacted her and the nature of the conversation, I have no hesitation in finding that he wanted to know what she had shared with other members in order to shape his version of events. There would be little other reason to make contact with her. I also find that asking the questions he asked would reasonably leave her to feel that he didn't want her to talk to the investigator about their relationship.
- f. Particular 6 is established based on my findings above. The Subject Member did try to interfere with a Code of Conduct investigation.

[44] The Conduct Authority need not establish each of the particulars, just enough such that those that are established meet the threshold of discreditable conduct for the Allegation as a whole. The withdrawal of Particular 3 by the Conduct Authority has no effect on that finding in this case.

[45] The determination that a behaviour is discreditable is based on a test that considers how the reasonable person in society, with knowledge of all the relevant circumstances including the realities of policing in general, and the RCMP in particular, would view the behaviour. The threshold is met when that reasonable person would see the actions of the Subject Member as likely to discredit the Force. In my view, such a reasonable person would find that to be the case in these circumstances. Given the Subject Member's position as an RCMP officer sworn to uphold the law, a reasonable person would see his actions in attempting to interfere with a Code of Conduct investigation as likely to discredit the Force. Therefore, I find that Allegation 2 is established.

Allegation 3

[46] The third allegation against the Subject Member is that he contravened section 8.1 of the Code of Conduct by failing to provide complete and accurate accounts pertaining to the carrying out of his responsibilities and the performance of his duties in the operation and administration of the Force.

[47] Given his admission to each of Particulars 1, 2, 3, 4, 7, 8, and his partial admission to Particular 6, my findings of fact in relation to this Allegation will be relatively brief.

[48] I find that, on January 16, 2016, and at least in the month preceding and following that date, the Subject Member had in his possession a fully functional, RCMP-issued BlackBerry. That much is clear from the phone records provided in the materials and relied upon by the Conduct Authority in the Hearing. He used that phone on a daily basis in the course of his duties, including on January 16, 2016, the date on which he conducted a traffic stop of Ms. F. and gave her an RCMP business card with his personal cellphone number on it. He also provided the

number of his RCMP-issued BlackBerry when he signed on shift, and that phone number is the one by which other members would have contacted him had they needed to do so by phone.

[49] The Subject Member testified that he trusted total strangers, like Ms. F. and Ms. M. M. with his personal cellphone number, but not the members with whom he worked. That was his explanation in cross-examination for why he provided his personal cellphone number to these women. I don't believe it. I find that testimony to be a nonsensical attempt to explain away yet another inconsistency between his actions and the dictates of common sense.

[50] I also do not believe his explanation that he simply made a mistake with respect to the period of time that he was without an RCMP-issued cellphone. It is hard to imagine a police officer, who is the subject of an ongoing Code of Conduct investigation, not realizing the importance of verifying the facts he is putting forward as his defence in that proceeding. Therefore, I find that the information included in his Conduct Meeting written submissions to Supt. M. L. was false and misleading and I find Particular 5 to be established.

[51] In relation to Particular 6, the phone records relied upon by the Conduct Authority show that, during the months of December 2015 and January 2016, he was in possession of an RCMP-issued BlackBerry, it was fully functional, and he used it regularly in the course of his duties. Therefore, this Particular is also established.

[52] In relation to Particular 9, I find that the Subject Member provided misleading information in his July 21, 2016, written statement to the conduct investigator, and that he lied to Supt. M. L., his line officer, in his written submission during a Code of Conduct process. Therefore, this Particular is also established. The Subject Member was under no obligation to provide a statement. However, when he made the decision to do so, he was obliged to ensure those statements were accurate. They were not in either case.

[53] The Subject Member argued that this matter was previously dealt with by Supt. M. L. as part of the Conduct Meeting process and the subsequent appeal. Therefore, he stated that Allegation 3 should be dismissed. He argued that the recourse open to Supt. M. L. was to make

submissions to the OCGA within the appeal process if he felt that the submissions made by the Subject Member were false or inaccurate.

[54] I do not accept that argument. The issue before Supt. M. L. in the December 20/21, 2016, Conduct Meeting was whether the Subject Member abused his authority by conducting a traffic stop of a vehicle operated by Ms. F., without cause, in order to provide her with his personal cellphone number. There were two allegations framed around that misconduct, one of which Supt. M. L. found to be established. The subject of that investigation and Conduct Meeting was confined to that misconduct. No allegation yet existed that he lied to the Code of Conduct investigator in the course of that investigation or to Supt. M. L. in the Conduct Meeting. It didn't exist, because no one was aware of the false statement until subsequent preparations were being made in response to the Subject Member's appeal of Supt. M. L.'s decision in that matter.

[55] When the false statements were discovered, that allegation was included in the initiation of this Conduct Hearing. The present Allegation has not previously been dealt with by Supt. M. L. or anyone else; it is rightfully before me as the Conduct Board in these proceedings. Having jurisdiction to deal with Allegation 3 and for the reasons discussed above, I find that it has been established.

CONDUCT MEASURES

[56] Having found that the Subject Member contravened the RCMP Code of Conduct in relation to two different incidents, I'm required by subsection 45(4) of the *RCMP Act* to impose an appropriate conduct measure or measures. The Conduct Authority seeks the Subject Member's forced resignation, while the Subject Member argues that a forfeiture of pay is more appropriate for each of the Allegations.

Range

[57] In making my determination of the appropriate penalty, I must first consider the appropriate range of measures and then take into account the aggravating and mitigating factors present in this case. I'm not bound by the decisions of other conduct boards, but previously

decided cases of a similar nature do help to establish the range of conduct measures applicable. The principle of parity of sanction seeks to ensure fairness, so that similar forms of misconduct are treated in similar fashion. This lends predictability to conduct matters. In addition, the *Conduct Measures Guide* is available for guidance on considerations around the imposition of conduct measures. However, it is neither binding nor determinative.

[58] The Allegations found to be established against the Subject Member are related in that they both involve misconduct intended to avoid responsibility for earlier misconduct on his part. The actions captured by the Allegations also took place close in time. On July 21, 2016, he provided a written statement to the conduct investigator in an ongoing Code of Conduct investigation. In that statement, he lied about not having an RCMP cellphone in his possession at the relevant time, when clearly he did. On September 22, 2016, he contacted Ms. M. M. in an attempt to interfere with a second Code of Conduct investigation. Sometime between December 13 and 20, 2016, he authored and submitted to Supt. M. L. a submission for the upcoming Conduct Meeting in relation to the first Code of Conduct investigation. In that submission, he referred to and relied on his lie in his original statement of July 21, 2016, and he further stated that he mostly used his personal cellphone while on duty. That was also false. Given the similar nature of the misconduct and their close proximity in time, I find it appropriate to impose conduct measures that are global in nature.

[59] The established contraventions of the Code of Conduct are very serious and, in my view, can be characterized as involving dishonesty. Having reviewed the appropriate cases, when it comes to misconduct of this sort, the range of sanction is fairly narrow, extending from a substantial forfeiture of pay to dismissal. This is because a police officer who does not conduct himself with the utmost integrity through the police discipline process, seriously undermines its effectiveness and erodes public confidence in the police service. The *Conduct Measures Guide* similarly suggests a range from substantial forfeiture of pay to dismissal. It indicates that dismissal comes into play when there has been an attempt like this to avoid responsibility.

Mitigating factors

[60] In terms of mitigating factors in this case, I accept that the Subject Member has no prior discipline. I also accept that, from the date he graduated from Depot on May 20, 2014, until December 21, 2016, when Supt. M. L. issued his record of decision in relation to the first proceeding, the Subject Member was a productive member, especially as it related to proactive work. I have no evidence on his performance between that date and the date on which he was suspended from duty in relation to this matter.

Aggravating factors

[61] The mitigating factors of having no previous discipline and being a productive member for at least two and a half years have to be balanced against what is very serious misconduct. On three different occasions, he misconducted himself in an effort to avoid responsibility for previous poor choices on his part. As is frequently the case, his actions in attempting to avoid responsibility are much more serious than the initial misconduct. That speaks to a serious lack of good judgment on his part.

[62] There are also significant aggravating factors present that must be considered in this case. First, his misconduct in relation to Allegation 2 involved interactions with members of the public, which has the potential to seriously lessen the reputation of the RCMP in the eyes of the community.

[63] Second, his actions cannot be considered isolated behaviour on his part. The three similar incidents that make up the Allegations took place over a total of six months. This was not a one-time lapse in judgment for the Subject Member, rather it shows a propensity to lie and manipulate in order to avoid responsibility for his own mistakes. In addition, providing the false statements in relation to Allegation 3 can be categorized as planned and deliberate. The circumstances relating to his contact with Ms. M. M. do not reflect similar planning and deliberation. However, at the same time, it cannot be said to be a spur of the moment reaction without any thought to the consequences in that he testified that he knew an order was coming that would prohibit him from contacting her, yet he went ahead and did it anyway.

[64] Third, as a result of the contraventions that have now been established against him, demonstrating a propensity to lie and to avoid taking responsibility for his own actions, he will have a *McNeil* record that must be proactively disclosed to the accused in any criminal case in which he is involved as an investigator. The burden of that record is borne not only by him, but by the Force and by the Crown. Given the nature of his misconduct, his credibility as a witness has the potential to be a live issue in every case in which he is a Crown witness from this point forward.

[65] That reality necessarily results in a potential administrative burden on the Force in considering any future deployments. He was hired to be a police officer and his limited experience to date has been as a general duty investigator. Given that limited experience, I doubt he is yet qualified to perform many other duties. Were I to retain him as a member of the RCMP, the Force would be placed in the position of having to attempt to accommodate someone whose testimony in any future court proceedings is going to be potentially compromised by this display of dishonesty and poor judgment.

[66] The Conduct Authority asked me to consider as an aggravating factor the fact that Ms. M. M. was a young, vulnerable, indigenous victim of domestic violence. However, I'm not imposing conduct measures for the inappropriate relationship that was the subject of Allegation 1. That Allegation was dismissed and is no longer before me. Ms. M. M's state of vulnerability is substantially less relevant in terms of Allegation 2 and I decline to consider it as an aggravating factor.

Finding

[67] It is a well-established principle in employment law that dismissal is only to be considered in the most extreme cases and that rehabilitation is the primary purpose of the imposition of conduct measures. That principle is reflected in the case of *Ennis v the Canadian Imperial Bank of Commerce*, (1986) BCJ 1742, in which the Court said in relation to dismissing an employee:

Real misconduct or incompetence must be demonstrated. The employee's conduct and the character it reveals must be such as to undermine or seriously impair the essential trust and confidence the employer is entitled to place in an employee in the circumstances of their particular relationship. The employer's behaviour must show that he is repudiating the contract of employment or one of its essential ingredients.

Two of the many previous cases that discuss good character and rehabilitative potential are *The Commanding Officer "E" Division v. Constable Vellani*, 2017 RCAD 3 and 28 AD (2d) 213(ERC). They confirm that rehabilitative potential is an important consideration, but it does not overcome the right to terminate employment when the breach goes to the heart of the employer-employee relationship. In this case, I have heard no evidence of rehabilitative potential, nor is any evident to me. In my view, the Subject Member's misconduct goes to the heart of the employer-employee relationship. It is inconsistent with the terms of his service and incompatible with the due and faithful discharge of his duties. I believe his conduct reveals character flaws of dishonesty, extremely poor judgment and a determination to avoid accountability for his actions. I have no confidence that his character has been rehabilitated or can be rehabilitated as he has thus far refused to accept any responsibility for his actions.

[68] I find that in misconducting himself as he has, the Subject Member has repudiated several of the essential ingredients of his contract of employment with the RCMP, the core values of honesty, integrity and accountability. The police discipline system plays a vital role in maintaining the public's confidence in their police. Police officers are given extraordinary powers over citizens and the discipline process in many ways provides a check and balance on the powers afforded to police officers. If an officer misconducts themselves in the course of their duties, members of the public are entitled to lodge a complaint. If the investigation of the complaint determines that charges and a hearing are warranted, the officer is called upon to account for his or her conduct. An officer who lies in a statement to an investigator and attempts to interfere in an investigation undermines the discipline process and thwarts the check and balance, which is integral to the public's trust. To maintain the public's confidence, an officer who is found not to undertake the police disciplinary process with utmost integrity should absolutely face a sanction in the most serious range.

[69] I believe that dismissal has not been imposed in some similar cases because the respective conduct boards found that there were sufficient mitigating circumstances to warrant a less severe conduct measure or a joint submission called for a less severe penalty. As already canvassed, there are few mitigating factors present in this case.

[70] Glaringly absent as a mitigating factor is any indication that the Subject Member has learned anything from his mistakes and any reassurance that this type of misconduct will not be repeated in the future. He chose not to take the stand in the conduct measures phase of the Hearing. However, during his testimony in the allegations phase of the Hearing, I was left with the distinct impression that he sees himself as a victim of mistreatment by the RCMP, as opposed to the perpetrator of misconduct. I saw nothing in the evidence before me that would indicate he was mistreated in any fashion during the course of this investigation or in these proceedings. I see a significant lack of self-awareness under the circumstances, which greatly concerns me given his position as a police officer.

[71] Also absent as a mitigating factor is any sort of medical explanation for his actions, an explanation that is present in many cases where similar behaviour has not resulted in dismissal. In addition, it should be noted that the Subject Member is very junior in service and he does not have any real amount of good service in the bank to draw upon in times of trouble like this.

[72] Under these circumstances, given the position of responsibility and trust held by him as a police officer sworn to enforce the law, I simply cannot justify retaining him as a member of the RCMP. That would not be in the best interests of the public or of the Force. As a result, I direct him to resign from the Force. If he fails to do so within 14 days, then I direct his dismissal.

[73] The parties are reminded that section 45.11 of the *RCMP Act* sets out the provisions to appeal this decision and the rules governing such an appeal are contained in the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289

April XX, 2019

Gerald Annetts

Date

Conduct Board