



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, "H" Division

Conduct Authority

and

Constable Troy Allen, Regimental Number 54534

Subject Member

Conduct Board Decision

John A. McKinlay

May 15, 2019

Mr. Denys Morel (Conduct Authority Representative) and Corporal Chantal Le Dû

Ms. Nicole Jedlinski (Member Representative) and Ms. Sara Novell

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SUMMARY

[This summary is not part of the written decision.]

In December 2011, at an off-duty Christmas party where alcohol was consumed, the Subject Member patted the back of a female co-worker while she was vomiting into a toilet, brought on by her drinking too much alcohol. He then slipped his hand down the back of the co-worker's pants, under her underwear, touching her buttocks. The victim swatted his hand away, and it was immediately removed from her pants.

The Subject Member neither admitted nor denied the allegation of discreditable conduct, given that he had no recollection of the alleged interaction with the victim. The allegation was found to

be established, primarily on the basis of the victim's recollection as captured in her only recorded interview conducted by Nova Scotia Serious Incident Response Team.

The Conduct Board imposed the following conduct measures: a reprimand, the forfeiture of 30 days of pay, ineligibility for promotion for a period of 2 years from the date of the written decision, and a direction to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer.

INTRODUCTION

[1] I was appointed as Conduct Board for this matter on July 13, 2018. The *Notice of Conduct Hearing* (NOCH) for this matter was signed by the Conduct Authority on October 5, 2018. The Subject Member received the NOCH and the associated investigative package on November 7, 2018. I received the NOCH and package on November 9, 2018. There was a fire at the RCMP facility where both the Member Representative (MR) and Conduct Authority Representative (CAR) offices are located in Ottawa, which disrupted their work for a short period of time.

[2] The Subject Member filed his signed responses under subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], on December 14, 2018.

[3] In this decision, I will refer to the member who is first identified in the NOCH at Particular 3, as Constable (Cst.) N.

[4] The interaction between the Subject Member and Cst. N in December 2011, is the essential feature of this case. Cst. N first mentioned the Subject Member's behaviour to a female co-worker, Cst. Langevine, but otherwise kept the matter to herself. The incident was eventually raised by Cst. N with the Subject Member after she completed remedial training with him around April 2016. At that time, the Subject Member indicated that he had no recollection of the incident given his own degree of inebriation, but he deeply apologized to Cst. N. Their interaction before and after the incident was purely professional, and nothing in their interaction was ever flirtatious.

[5] Around July 2017, in the course of broader discussions, Cst. N mentioned in passing to a co-worker, then acting supervisor Cst. Smith, that she had been sexually assaulted in the RCMP. This disclosure resulted in Cst. N's permanent supervisor, Cpl. O'Halloran, obtaining confirmation from her of the incident, and a criminal investigation by the Nova Scotia Serious Incident Response Team took place. Cst. N stated that she only wanted the incident addressed as

an internal RCMP matter; no criminal charge against the Subject Member resulted. A Code of Conduct investigation followed.

[6] A pre-hearing conference took place on January 21, 2019. After the discussions, the parties agreed that adjudication of the allegation would be based on the materials filed with the Conduct Board and the written submissions of each representative. For the allegation phase of this hearing, the parties did not request testimony from any witness.

[7] The CAR and the MR filed their submissions on February 2 and 13, 2019, respectively. A brief rebuttal by the CAR was filed on February 20, 2019. On March 4, 2019, I gave my oral decision on the merit of the allegation. This decision was made by audio recorded teleconference, and was later transcribed. I relied on the caveat that this abbreviated oral decision might be expanded upon, and reserved the right to clarify and explain my reasons and findings in greater detail in this final written decision.

[8] Before my oral decision was delivered, some procedural requirements were addressed. Subsection 20(1) of the *CSO (Conduct)* required that the allegation be read to the Subject Member, and the Subject Member then admit or deny the allegation. The Subject Member waived the reading of the allegation. The Subject Member was represented throughout this conduct process by his MR, and he had filed written responses under subsection 15(3) of the *CSO (Conduct)*, in which he neither admitted nor denied the allegation as he had no recollection of the specific interaction described in the allegation.

[9] Subsection 20(2) of the *CSO (Conduct)* states: “If a member does not admit or deny an allegation, the member is deemed to have denied the allegation.” Given the position that the Subject Member found himself in, he was deemed to have denied the allegation.

[10] With respect to the Allegation, I reviewed the materials in the investigative package that accompanied the NOCH, the further recording and transcription materials filed by the CAR without objection by the MR, the Subject Member’s responses under subsection 15(3) of the *CSO (Conduct)*, and the written submissions of the parties.

ALLEGATION

[11] The NOCH contains a single allegation, which states:

Between the 1st day of January, 2011, and the 31st day of December, 2011, at or near New Minas, in the Province of Nova Scotia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “H” Division, New Minas Detachment, in Nova Scotia.
2. Sometime in December 2011, you attended a Christmas party at Corporal Al Philpot’s residence.
3. At some point during the evening, Cst. [N] felt sick and went to the bathroom located in the basement of the residence and closed the door. While Cst [N] was vomiting into the toilet, you entered the bathroom.
4. As Cst. [N] was hunched over and vomiting into the toilet, you started rubbing her back and then proceeded to put your hand down her back into her pants, touching and groping her buttocks under her underwear.
5. Cst. [N] did not consent to you touching her and used one of her hands to push your hand out of her pants.
6. You engaged in inappropriate sexual touching of Cst. [N].

Findings on the Allegation

[12] Subsection 40(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [RCMP Act], requires the application of the “balance of probabilities” standard of proof when adjudicating alleged contraventions of the RCMP Code of Conduct. This burden of proof rests with the Conduct Authority.

[13] The Supreme Court of Canada’s decision in *F.H. v McDougall*, [2008] 3 SCR 41, directly addresses this standard of proof. I am guided by the Court’s commentary at paragraphs 44 to 46, with paragraph 46 providing:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency.

[14] My interpretation of section 7.1 of the Code of Conduct, the section relied upon for the allegation, is guided by the commentary provided by the RCMP External Review Committee in recommendation C-008, in particular 93:

[...] [D]iscreditable behaviour is based on a test that considers how the reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general, and the RCMP in particular, would view the behaviour. [...]

[15] The investigation of this matter involved the interviewing of Cst. N, Corporal (Cpl.) Philpott (retired); Cst. Smith; Cpl. O'Halloran, Cst. Langevine, and the offer of an investigative interview, which was declined, by the Subject Member.

[16] In addition, statements were obtained from a host of additional RCMP members, Detachment assistants, and other persons respecting a social event at the Philpott residence in December 2011.

[17] I have carefully considered the parties' written submissions. With respect to the MR's submissions in particular, it is true that there is no independent corroboration of what transpired between Cst. N and the Subject Member in a downstairs bathroom at the Philpott residence. I confirm that, in law, there is no requirement that there be independent corroboration simply because the nature of the alleged misconduct relates to sexual touching.

[18] Moreover, there is no information or evidence provided by the Subject Member himself that directly undermines or contradicts the account that Cst. N provided in her recorded statement of August 21, 2017. His responses under subsection 15(3) of the *CSO (Conduct)* include the following:

[The Subject Member] neither admits nor denies Allegation 1. The [Subject Member] submits that he does not have a full recollection of the events.

The [Subject Member] does not recall the allegation as particularized. The Subject Member does recall attending the party described, but he has little recollection of the party. The [Subject Member] does not recall how or when he arrived at the party, and does not recall leaving the party. The [Subject Member] recalls that there was a lot of alcohol at the party. The

[Subject Member] Cst.[N] being at the party, but does not recall having any interaction with Cst. [N] at the party.

The [Subject Member] was experiencing a lot of stress in and around the time of this allegation due to personal health, family and financial issues. The [Subject Member] was binge drinking on the weekends/on days off. The [Subject Member] is aware of at least 3 instances in and around this time where he blacked out when drinking. [*Sic throughout*]

[19] The absence of any exculpatory information from the Subject Member is, in effect, the net result of his responses under subsection 15(3) of the *CSO (Conduct)*.

[20] In terms of a narrative, I am satisfied that a social gathering took place involving RCMP employees associated with a specific detachment in “H” Division in December 2011. While nothing turns on this fact, it appears that, as was tradition, a number of the Non-Commissioned Officers bought and arranged for delivery of various alcoholic beverages in advance of this event; food was prepared by Cpl. Philpott and his spouse, whose private residence hosted the gathering. Arrangements were made to ensure that sober drivers were available to convey participants home at the end of the evening.

[21] From the interviews that were completed, it is apparent that there were varying amounts of alcohol consumed by a number of attendees. Both Cst. N and the Subject Member were present and consumed alcohol.

[22] I have carefully considered the specific arguments made by the MR, that the evidence of Cst. N should not be considered reliable, given her admitted and, in my view, clearly established level of significant alcohol inebriation at the party.

[23] I have also considered the significant passage of time from December 2011 until the internal investigation of this matter was completed, and its potential effect on the accuracy of witness recollections.

[24] I have examined and compared the comments attributed to Cst. N concerning her interaction with the Subject Member that may be found in the statements of Cst. Smith, Cpl. O’Halloran, and Cst. Langevine, and the recorded interview obtained from Cst. N.

[25] Given the hearsay nature of the comments attributed to Cst. N by Cst. Smith, Cpl. O'Halloran and Cst. Langevine, I give their recorded statements negligible weight in my adjudication of the merit of the Allegation.

[26] While the contemporaneous notes made by Cpl. O'Halloran of his discussion on July 20, 2017, at 2 a.m. with Cst. N are commendable, there is no circumstance akin to necessity or any other consideration that obliges me to consider the truth of the contents (or other use) of Cpl. O'Halloran's handwritten notes, given the taking of Cst. N's verbatim recorded statement on August 21, 2017.

[27] A significant passage of time has elapsed since the informal, undocumented "girl talk" discussion Cst. N recalls having with Cst. Langevine. According to Cst. N, this discussion is when she first disclosed the basement bathroom interaction with the Subject Member. I find the passage of time very severely limits the weight to be attributed to Cst. Langevine's recollection of the contents of this discussion.

[28] The fact that Cst. Langevine could not readily remember being told about the incident by Cst. N does not, in my view, detract from Cst. N's credibility, nor the reliability of Cst. N's account as captured in her recorded statement. Instead, I entirely discount as inaccurate and unreliable anything that Cst. Langevine recollects that might suggest the Subject Member's pants were around his ankles, and that he asked for sex or oral sex while in the bathroom with Cst. N. Moreover, the Particulars for the Allegation do not include this purported behaviour, and it is simply not part of the Allegation to which the Subject Member must answer.

[29] Therefore, of the potential sources of information, my task primarily involves assessing the reliability and weight to be given Cst. N's own recorded statement of August 21, 2017. I have scrutinized the statement (including the aspects of it at pages 5, 6 and 10 identified by the MR) that pertain to Cst. N's admitted intoxication, leading to her incomplete recollection of the event, including a lack of recollection concerning her times of arrival and departure, and the amount she had to drink.

[30] Addressing these arguments by the MR, respectfully, I do not consider Cst. N's inability to provide these specifics to be surprising, nor do I find these missing details to detract, to any meaningful degree, from the reliability of her account of events in the bathroom involving the Subject Member.

[31] I have also scrutinized the portion of Cst. N's statement at page 7, where Cst. N cannot recall how long she was in the bathroom before the Subject Member entered; and also, the apparent contradiction between Cst. N's suggestion that the Subject Member urinated after touching her, and her statement that she did not "back up" from the toilet.

[32] I do not consider any lack of clarity as to whether the Subject Member urinated in her presence in the same toilet where Cst. N had been vomiting, or only urinated after her departure from the bathroom, to detract in any meaningful degree from the reliability of Cst. N's primary account of the Subject Member's non-consensual touching of her buttocks.

[33] I have also considered the effect, if any, on the reliability of Cst. N's account as captured in her recorded statement, given the lack of a specific description of her physical position while vomiting, and her purported lack of specific descriptions of her clothing and the Subject Member's clothing on the night in question. Again, any lack of specifics on these points does not detract significantly from the overall cogency of her primary account of the misconduct. Cst. N does, in fact, generally describe the nature of her own jeans and underpants.

[34] I have also considered Cst. N's recollection that, because she needed to go to the toilet to again vomit, she slammed the bathroom door in the face of either Cpl. Philpott or his spouse. This event is plainly not recalled by Cpl. Philpott. I do not view Cpl. Philpott's firm evidence on this point to be sufficient to invalidate Cst. N's clear recall that she was vomiting and that the Subject Member was rubbing her back outside her clothing in an apparently comforting and not objectionable fashion. I find that he then slipped his hand down her stretchy jeans, under her nondescript (meaning not thong-style) underpants, and touched her buttocks with his hand very briefly before she reached with her hand, and, in effect, pushed his hand away, causing his hand to emerge from her jeans and to no longer be in contact with her buttocks.

[35] Collectively, I do not find the noted deficiencies or missing details of Cst. N's account as identified by the MR, which involve primarily collateral matters where there is apparent inconsistency or lack of specificity or detail, to undermine the reliability of Cst. N's overall evidence.

[36] The reluctance of Cst. N to report and advance this matter does not, in my view, suggest any unreliability or uncertainty in her recollection of the main features of the sexual touching that took place.

[37] Instead, I find her recorded statement to capture a balanced account in which Cst. N plainly admits to the limits of her recollection on certain details, and presents a sequence of events that is plausible and somewhat physically unremarkable as it progresses from a simple, comforting back rub or back patting, to a non-consensual, fleeting intrusion by the Subject Member's palm inside her underpants and jeans.

[38] I am satisfied on a balance of probabilities that Cst. N's identification of the Subject Member as the person who committed the non-consensual buttocks touching is reliable, as I do not believe she would have confronted the Subject Member after the remedial firearms training session she completed with him if she was at all unsure about the perpetrator. She knew the Subject Member from work, and little, if any, effort would have been required for her to determine he was the person who was in the bathroom with her.

[39] I find that Cst. N was plainly inebriated when she was in the bathroom. She unreservedly admits as much, but her identification of the Subject Member and her account of his primary act of misconduct, as identified in the latter portion of Particular 4, are sufficiently clear and convincing to meet the applicable standard of proof.

[40] On a balance of probabilities, the account provided by Cst. N constitutes sufficient evidence to establish the Particulars for the Allegation. A 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 Subject Member's behaviour as likely to bring discredit to the Force. Accordingly, I find the Allegation to be established.

[41] I note that Particular 4 talks about “touching and groping”. That combination of words likely comes from Cst. N’s recorded statement. In my view, there is a certain amount of duplicity in the use of “touching and groping” as it would be hard to grope somebody without touching them.

[42] With respect to the overall context of that touching and groping, the period of time during which the Subject Member’s hand was in contact with Cst. N’s buttocks appears to have been fleeting. A formal definition of groping might include more of an action of squeezing, or a more deliberate cupping of one’s hand. Whether it was touching or groping, I wish to emphasize that, from Cst. N’s statement, it is clear that this was a fleeting physical event; Cst. N reacted immediately, and that, by her hand coming into contact with presumably the Subject Member’s wrist or arm, his hand was removed immediately.

[43] I note that there is reference to “inappropriate sexual touching” under Particular 6. From Cst. N’s statement, I do not consider anything up to the second half of Particular 4 to be referencing any act of misconduct. I consider the Subject Member being present in the bathroom and touching Cst. N’s back to be more in the nature of narrative. While the Allegation is made under section 7.1, I do not consider the Subject Member simply entering the bathroom where Cst. N was present supports a finding of discreditable conduct, nor does the Subject Member then rubbing Cst. N’s back. I take this view because it is reasonable, from a review of Cst. N’s statement, to understand that the back rubbing or patting was perceived by her as being comforting and relatively innocuous.

[44] The fact that the Subject Member’s hand then moved under Cst. N’s belt line at the back of her jeans does not turn what was perceived by her as some form of comforting or sympathetic back patting or rubbing into misconduct. To be clear, in my view, it is the Subject Member putting his hand down the back of Cst. N’s pants that is the onset of the misconduct, as it constituted inappropriate sexual touching.

[45] With the allegation deemed established, the conduct measures phase was scheduled for hearing by video conference on March 26, 2019. It was agreed that written submissions would be filed in advance.

CONDUCT MEASURES

Parties' positions

[46] The CAR seeks a direction that the Subject Member resign within 14 days, or be dismissed, pursuant to paragraph 45(4)(b) of the *RCMP Act*. In the alternative, should the Subject Member's loss of employment not be obtained, the CAR requests:

- a financial penalty in the range of 30 to 45 days of pay [paragraph 5(1)(g) of the *CSO (Conduct)*]
- ineligibility from promotion for a period of three years [paragraph 5(1)(b) of the *CSO (Conduct)*];
- a reprimand [paragraph 3(1)(i) of the *CSO (Conduct)*]; and
- a direction to attend counselling.

[47] The MR argues for the following conduct measures:

- a forfeiture of a total of 10 to 15 days of pay and/or leave;
- a direction to undergo any treatment, including continued counselling, specified by the Health Services Officer for "H" Division; and
- a reprimand.

Materials filed

[48] On March 4, 2019, the MR filed a number of documents for the conduct measures phase of the hearing:

- The Subject Member's letter to the Conduct Board;
- Health Services Office documents;
- Letter from a psychologist respecting the Subject Member, and her résumé;
- Letter from a health professional concerning the Subject Member's child;
- Performance assessment documents (9);
- Awards and recognitions;
- Letters of reference (6); and
- The Subject Member's letter of apology to Cst. N.

[49] The MR also requested a publication ban with respect to the Subject Member's medical and psychological records, and any reference to the condition of his child. At the video hearing on March 26, 2019, and with the CAR not opposing the request, the Conduct Board made an order for a publication ban respecting three specific documents, identified as "HSO docs", "Lang letter", and "psych letter_cv", as well as any reference captured in the transcript concerning the child's condition.

[50] On March 13, 2019, I received the CAR's submissions for the conduct measures phase, including copies of the following cases:

- *Conduct Authority for "E" Division and Cst. Caram, 2017 RCAD 8 Corrected [Caram]*
- *Conduct Authority for "NHQ" Division and Civilian Member Calandrini, 2018 RCAD10 [Calandrini]*
- *Conduct Authority for "E" Division and Cst. Rasmussen, 2018 RCAD 14 [Rasmussen]*
- *Conduct Authority for "E" Division and Sgt. Turner, 2018 RCAD 16 [Turner]*

[51] At the video hearing on March 26, 2019, the Conduct Board received a brief, unsworn oral address by the Subject Member in which he apologized, and was able to pose questions to the representatives. The Conduct Board reserved its conduct measures decision.

Range of conduct measures

[52] Under the previous RCMP disciplinary system, where a final written decision was issued by an adjudication board, it was an accepted practice, when determining the appropriate sanction for established misconduct, for the adjudication board to begin by identifying the sanction range for similar acts of misconduct. This practice has been continued by conduct boards adjudicating allegations brought under the present conduct management system operating since November 28, 2014.

[53] The CAR submits that the applicable range of measures for cases involving off-duty, inappropriate sexual touching, ranges from 15 to a maximum forfeiture of 45 days of pay, up to the loss of employment. This is consistent with the analysis found in the *Caram* decision, at paragraphs 94 and 95. In the present matter, after a review of the relevant authorities and the RCMP *Conduct Measures Guide*, the range of conduct measures for off-duty acts of non-consensual sexual touching appears to range from significant financial penalties up to the loss of employment, depending on the nature of the specific acts committed and the mitigating and aggravating factors.

Proportionality

[54] Subsection 24(2) of the *CSO (Conduct)* states: “A Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct.” The RCMP *Administration Manual*, Chapter XII.I “Conduct”, section 11.15, indicates that aggravating and mitigating circumstances must be considered in determining the appropriate conduct measures in relation to a subject member’s contravention of the Code of Conduct.

[55] The *Administration Manual* includes Appendix XII.1.20, which provides a fairly exhaustive list of potential aggravating and mitigating factors or circumstances, and a definition for each:

Mitigating Circumstances: “A fact or situation that does not bear on the question of a defendant’s guilt but that is considered by the court in imposing punishment and especially in lessening the severity of a sentence” (*Black’s Law Dictionary, 8th ed.*). Mitigating circumstances do not constitute a justification or an excuse for the offence, but in fairness, these factors may be taken into consideration to reduce the severity of the sanction to be imposed, in order to appropriately deal with the misconduct.

Aggravation: “Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself” (*Black’s Law Dictionary, 6th ed.*)

Aggravating circumstances

[56] I consider the following to be aggravating circumstances:

- The seriousness of this type of misconduct, which is plain and obvious. Based primarily on Cst. N’s view that the misconduct should only be dealt with under the internal conduct process, it appears that the Subject Member’s actions did not attract a criminal prosecution. Nevertheless, the misconduct involved a fleeting, but still invasive sexual touching of a vulnerable victim. The CAR describes the misconduct as very serious, as it involved “uninvited sexual touching, on a female member in a very vulnerable position”. I find that, at the time of the Subject Member’s misconduct, Cst. N was in a vulnerable position, both in terms of her physical positioning (poised near or over a toilet, likely on her hands and knees, with the Subject Member positioned to her side or behind her) and her physical state (involving a significant degree of intoxication and overconsumption of alcohol causing her to vomit).
- Excessive alcohol consumption was involved, given that the Subject Member admits to having “blackout” episodes, including this episode, where he was unable to recall events that took place while intoxicated.

- There has been some emotional impact on Cst. N. The CAR argues that the Subject Member's misconduct had a very serious impact on Cst. N, "both on a personal and professional level, for a significant period of time". Respectfully, I find that this is a somewhat exaggerated assessment of the impact of the sexual touching. It is true that, in her statement, Cst. N states that, by her taking no immediate action to address the event, it "consumed her life". But I must also be mindful of how Cst. N described the lack of importance she attached to her initial, generic reference to being touched, made in passing to Cst. Smith:

[...] [I]t was so minor or nonchalant, it was a piece of a conversation that when [her permanent supervisor] brought it up as far as somebody coming to him concerned about a topic or an incident that had happened with me or with something that I had said, I wasn't sure what [the permanent supervisor] was referring to, that's how minor of a comment it was or how unimportant it was in that conversation to me. (Statement, August 21, 2017, page 2)

Starting in December 2011, I cannot identify any serious impact on Cst. N, on any professional level. There is insufficient information on which to find that the misconduct had a "lasting detrimental impact" on Cst. N. Moreover, while Cst. N does indicate in her statement that she has encountered depression, there is nothing in the materials before me that establishes that the Subject Member's misconduct caused or exacerbated her depression. Cst. N's statement reveals a person with a high degree of common sense and practicality, an ability to accurately assess and recount matters without exaggeration, and a sense of proportion about challenging life events.

- The Force's now long-standing and clear notice to all employees that harassment, including sexual harassment and misconduct, is unacceptable and will attract serious employment consequences.

Mitigating circumstances

[57] I consider the following to be mitigating circumstances:

- The Subject Member, with the benefit of advice from his MR, did not outright admit to the contravention in his written responses to the Allegation. Instead, he neither admitted nor denied the Allegation, and pointed out aspects of Cst. N's account, and other peripheral aspects from other statements, that could undermine the reliability of her recollection of the sexual touching. However, the Subject Member did exhibit the desire to resolve the matter quickly (making no request for any witness to testify), and to complete the conduct measures phase at the earliest opportunity.
- The Subject Member, without any recollection of the incident, nevertheless deeply apologized to Cst. N when she first raised it with him after the remedial training session around April 2016. In this conduct process, he has submitted a letter of apology to be provided to Cst. N that it is now appropriate for her to receive. The Subject Member's oral address at the video hearing included a genuine apology. I consider the Subject Member to be deeply remorseful for his misconduct in December 2011.
- The Subject Member has no prior discipline. Given the lengthy lapse of time that has occurred, it can be said with confidence that this misconduct is an isolated incident as he has not misconducted himself since the events of December 2011.
- The Subject Member has an above-average work record.
- The Subject Member maintains the support of his senior non-commissioned supervisor, and of supervisors and co-workers past and present. The letters of reference establish that the misconduct was clearly out of character; they also confirm the community and youth activities to which the Subject Member contributes significant time.
- Stressors existed in the Subject Member's personal life around the time of his misconduct in December 2011. The CAR acknowledges, and I accept, that at the time of the misconduct, the Subject Member had stressors in his life and would drink alcohol to the point of blacking out, but that he has since recognized that his alcohol consumption was a problem and no longer uses alcohol as a coping mechanism.

- In 2008, the Subject Member was diagnosed with a serious disease that required intensive treatment and an extended period of health-related leave. A family relocation was required to be closer to his caregivers, and an unexpected financial strain arose respecting their residence. I do not find this financial strain created any individual stressor that might have contributed to the Subject Member's behaviour in December 2011.

In August 2009, the Subject Member returned to duty. From 2009 to 2014, I accept that the Subject Member was periodically assessed for a recurrence of his disease, and he experienced great stress at times. A positive prognosis (giving the Subject Member a clean bill of health) was only received in 2014.

In addition, issues that affected one of the Subject Member's children were diagnosed early in the child's life, although they have since been formally addressed.

- The Subject Member has sought and received counselling. The psychological treatment began shortly after his suspension on July 25, 2018, which demonstrates a willingness to seek counselling, and to address any underlying, unhealthy dependence on or periodic abuse of alcohol. I am satisfied that the Subject Member has gained insight into his past alcohol abuse, based primarily on this passage from his letter to the Conduct Board dated March 4, 2019:

Looking back at my life at the time of my misconduct, I realize that [my spouse] and I had some significant sources of stress in our life and I sometimes used alcohol inappropriately to help manage this stress. During this time in my life I would sometimes binge drink and as a result there were a few occasions where I was intoxicated to the point of blacking out, the night of my misconduct being one of those occasions. As time went on and those stresses lessened, my inappropriate use of alcohol also lessened and I have not been intoxicated to the point of blacking out since approximately 2012. I have learned that binge drinking is not any way to deal with stress and I no longer use alcohol in this manner. Since July 2018, I have sought counselling due to the stress of my misconduct and subsequent conduct proceedings in an attempt to ensure that I manage this stress in a healthy manner and to try to be a better person.

- I consider there to be a minimal likelihood of recidivism in terms of the Subject Member ever repeating the inappropriate sexual touching at the heart of this matter. Moreover, given the Subject Member's willingness to participate in therapy, I believe his responsible consumption of alcohol can be monitored and supported through counselling considered appropriate by health experts. I view the Subject Member as a solid candidate for complete rehabilitation.

[58] The CAR argues that the Subject Member's circumstances lack certain significant mitigating circumstances that were present in the *Caram* case, a case where the member was retained by the board. In *Caram*, the member suffered from an untreated social anxiety disorder, which directly and meaningfully contributed to his overconsumption of alcohol; therefore, his descent into extreme intoxication was clearly related to his psychological condition at the time.

[59] Also, the CAR submits that the member in *Caram* provided impressive testimony before the board, whereas the Subject Member has only filed a letter dated March 4, 2019, on which he was not subject to cross-examination. Respectfully, this argument by the CAR is not considered persuasive. The CAR did not object to the Subject Member addressing the Conduct Board without any oath or affirmation being administered first, he did not object to the filing of the Subject Member's letter nor its contents, and he did not ask to examine the Subject Member at the conduct measures phase of the hearing.

[60] Also, the CAR underlines that, in *Caram*, the touching was outside the clothing covering the victim's breast, whereas the Subject Member's hand directly touched Cst. N's buttocks under her clothes. Therefore, the CAR argues that the Subject Member's case therefore lacks significant elements present in the *Caram* case, or contains additional aggravating circumstances, warranting the most severe conduct measure for the Subject Member.

[61] I agree that the touching perpetrated by the Subject Member constitutes serious misconduct, and may be viewed as more invasive than any of the three individual sexual touching incidents that were established in *Caram*. But having considered the parties' submissions, the materials filed for the conduct measures phase of the hearing, and the nature

and circumstances of the contravention, including the aggravating and mitigating circumstances, I do not find that the loss of employment is a proportionate response to the Subject Member's single act of misconduct. Here, very severe measures short of dismissal can adequately denounce, punish and correct the Subject Member's misconduct, as well as identify and monitor any necessary rehabilitative therapy. Moreover, measures short of dismissal can also adequately address the respectful workplace and public trust interests that were eloquently discussed in *Turner* at paragraphs 308 and 314.

[62] In *Calandrini*, at paragraph 182, the board carefully differentiated circumstances where there are a series of repeated incidents directed at the same person (*Calandrini*), and circumstances where there are transgressions of a drunken party-goer involving a number of unfortunate recipients (*Caram*). Notwithstanding the emphasis that is properly placed on general deterrence in *Calandrini* to address continuing workplace harassment in the RCMP, I believe one must not lose sight of the fact that the circumstances of the Subject Member are fundamentally those of an off-duty drunken party-goer, and not of a persistent and deliberate office workplace harasser.

Conduct measures imposed

[63] With respect to an immediate financial penalty, the MR proposes the Subject Member's forfeiture of 10 to 15 days, whether of pay or annual leave, or a combination of both. If the loss of employment were rejected, the CAR urges the loss of 30 to 45 days. Notwithstanding the mitigating circumstances that are present, I view the contravention as deserving of a financial penalty of 30 days forfeiture of pay, as this measure adequately reflects primary aggravating features—the invasive nature of the sexual touching, the vulnerability of the victim at the time of the touching, and the Force's messaging, as far back as December 2011, that sexual misconduct was unacceptable and would not be tolerated.

[64] I believe that it is proportionate to impose, as an additional punitive and serious measure, a period of ineligibility for promotion of 2 years, to start from the date of this written decision. Given that the Subject Member is an experienced investigator, has consistently received positive

performance evaluations, and appears capable of successfully assuming a supervisory role, I recognize that promotion in the near term may have been a real possibility for the Subject Member. But to emphasize to the Subject Member the abject unacceptability of his behaviour, and to make it equally clear to members of the public and employees of the Force just how seriously this type of misconduct is treated by Canada's national police service, both financial penalty and ineligibility for promotion are justified proportionate measures. I acknowledge that the conduct measures I am imposing now are directed to misconduct that took place in December 2011, but the Subject Member's off-duty misconduct involved a co-worker, and an unbroken eligibility for promotion would not, in my view, be a proportionate response.

[65] Overall, I view the selected aforementioned conduct measures as sufficient to achieve both specific deterrence for the Subject Member, and general deterrence for all members whose behaviour (on- and off-duty) is subject to the provisions of the *RCMP Act*.

[66] In addition, it is appropriate to direct the Subject Member to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer. There is no suggestion that the Subject Member abstained from alcohol once he was confronted by Cst. N around April 2016, nor since the allegation was first formally investigated. The Subject Member has indicated that the last episode where his excessive consumption of alcohol resulted in a blackout was in 2012. Despite the passage of time since December 2011, I view a direction for appropriate counselling to be necessary to support the Subject Member's successful rehabilitation.

CONCLUSION

[67] The Conduct Board imposes the following conduct measures:

- a reprimand (which this written decision constitutes);
- the forfeiture of 30 days (240 hours) of pay;
- ineligibility for promotion for a period of 2 years from the Board's date of decision; and

- a direction to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer for “H” Division, or their delegate.

[68] The parties may each file an appeal of this decision to the Commissioner, as provided for under the RCMP Act.

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John A. McKinlay	May 15, 2019
	Date

Conduct Board