

Publication ban: Any information that could identify the person referred to as Ms. X in the present decision may not be published, broadcast or transmitted in any way.



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, "K" Division

(Conduct Authority)

and

Constable Lee Brown
Regimental Number 54267

(Subject Member)

Conduct Board Decision

Christine Sakiris

September 6, 2019

Representative for the Conduct Authority:

Mr. Denis Morel

Representative for the Subject Member:

Ms. Nicole Jedlinski

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SUMMARY

The original *Notice of Conduct Hearing*, dated April 12, 2016, contained two allegations of discreditable conduct, arising out of Constable Brown's interactions with an employee of the RCMP. The initial proceedings were subject to a stay of proceedings, which was successfully challenged by the Conduct Authority, on appeal to the Commissioner. Consequently, a new hearing was ordered.

New Conduct Boards were appointed on May 31, 2018, and again on October 10, 2018. The *Notice of Conduct Hearing* was amended on May 27, 2019, to reflect a single allegation of discreditable conduct, contrary to section 7.1 of the RCMP Code of Conduct. An oral decision in this matter was delivered on July 4, 2019. The Conduct Board found the allegation to be established. A joint proposal on measures was accepted by the Conduct Board and the following conduct measures were imposed: a) a financial penalty of 30 days' pay; and b) a transfer to another work location.

INTRODUCTION

[1] The alleged incidents in this matter took place between December 2013 and March 2014. A Code of Conduct investigation was initiated on May 12, 2014. A criminal investigation was conducted by the Alberta Serious Incident Response Team. However, no criminal charges were laid.¹

[2] The original Conduct Board in this matter was appointed on April 8, 2015, pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*]. The original *Notice of Conduct Hearing*, containing two allegations of contraventions of section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police [Code of Conduct], was served on the Subject Member on April 12, 2016.

[3] By written decision of October 19, 2016, the Conduct Board granted the Member Representative's (MR) motion for a stay of proceedings. The Conduct Board found that the delay in issuing the *Notice of Conduct Hearing* was unacceptable and constituted an abuse of process. This stay of proceedings was successfully challenged by the Conduct Authority on appeal to the Commissioner. Thus, on April 9, 2016, a new hearing before a differently constituted conduct board was ordered pursuant to paragraph 45.16(1)(b) of the *RCMP Act*. A new Conduct Board was appointed on May 31, 2018. Following the retirement of that Conduct Board and pursuant to subsection 43(1) of the *RCMP Act*, I was appointed as the Conduct Board in this matter on October 10, 2018.

[4] In June 2018, the MR raised some issues with respect to the scope of a "new hearing" under the *RCMP Act*. At a pre-hearing conference on December 17, 2018, I directed that a new *Notice of Conduct Hearing* and investigation package should be served on the Subject Member. The new *Notice of Conduct Hearing* was served on Constable Brown, together with the Investigation Package, on January 18, 2019.

¹ This fact is noted as background information only. No weight was ascribed to the Crown's decision not to pursue charges in this matter.

[5] This *Notice of Conduct Hearing* contained two allegations of contraventions of section 7.1 of the Code of Conduct, arising out of interactions between Constable Brown and an employee of the RCMP. In accordance with the publication ban imposed at the hearing of July 4, 2019, this employee will be referred to as Ms. X.

[6] Following discussions between the Conduct Authority Representative (CAR) and the MR, a tentative resolution was reached and presented on a without prejudice basis at a pre-hearing conference on April 1, 2019. It was proposed that Allegation 1 be amended, and Allegation 2 be withdrawn.

[7] Another pre-hearing conference was held on May 22, 2019, at which the CAR confirmed that the complainant in this matter had been consulted. At the conclusion of that pre-hearing conference, I provided approval in principle for the proposed amendments.

[8] An amended *Notice of Conduct Hearing*, reflecting the single allegation of discreditable conduct under section 7.1 of the Code of Conduct, was provided to the Conduct Board on May 27, 2019. Service of the amended *Notice of Conduct Hearing* was accepted by the MR, on behalf of Constable Brown.

[9] On June 10, 2019, Constable Brown provided his response to the amended *Notice of Conduct Hearing*, pursuant to section 15 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], in which he admitted to the allegation and particulars.

[10] On July 4, 2019, a hearing was conducted by videoconference. At the hearing, the CAR sought a publication ban on any information that could identify the complainant in this matter. I imposed the following publication ban, pursuant to paragraph 45.1(7)(a) of the *RCMP Act*:

So to that end, if we refer to the complainant as Ms. X, I will order the publication ban as follows: In accordance with paragraph 45.1(7)(a) of the *RCMP Act*, I order that any information that could identify the person referred to as Ms. X may not be published, broadcast or transmitted in any way.

[11] By way of an oral decision, I found Allegation 1, as amended, to be established. I also accepted the parties' joint proposal on conduct measures. This written decision incorporates and expands upon that oral decision.

ALLEGATION

[12] The amended Allegation 1 and particulars are as follows. I have amended the text in order to give effect to the publication ban:

Allegation 1: On or about March 2, 2014, [...] in the Province of Alberta, Constable Lee Brown engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police posted to "K" Division, in the Province of Alberta.
2. In February 2013, Ms. X began working [for the RCMP]. Ms. X met you at work soon after she commenced her employment [with the RCMP]. You developed a workplace friendship and eventually started exchanging text messages with each other, some of which were flirtatious in nature. This friendship did not evolve outside of the work context.
3. On March 2, 2014, at approximately [10:30 p.m.], Ms. X took her lunch break and went to the gym facility in the [...] Detachment. You were aware that she was in the gym facility. While on duty and in uniform, you entered the gym and approached Ms. X who was alone in the gym. You began flirting with her.
4. You proceeded to make inappropriate comments and sexual advances towards Ms. X including:
 - Asking whether it would be bad if you asked her to touch you in an inappropriate place; and
 - Grabbing her hand and placing it on your groin where your pants covered your erect penis.
5. Ms. X told you that you should go because someone could walk in, however, you remained. She moved away from you to another part of the gym to do stretching exercises. You came up behind her and:
 - Grabbed her hips from behind and pushed yourself into her, simulating intercourse;

- Pulled on her ponytail twice simulating intercourse while asking her if it felt good; and
 - Placing your hand on her pubic area outside her clothing and rubbing her.
6. Your actions were unwelcomed and made Ms. X uncomfortable to the point of leaving the gym facility.

Decision on the allegation

[13] Section 7.1 of the RCMP Code of Conduct states: “Members behave in a manner that is not likely to discredit the Force.”

[14] The test for “discreditable conduct” under section 7.1 of the Code of Conduct is as follows. The Conduct Authority must prove the acts that constitute the alleged behaviour, as well as the identity of the member who is alleged to have committed these acts. By virtue of Constable Brown’s admission to the allegation and particulars, I find that these first two elements of the test are met.

[15] I must now determine whether the third and fourth elements of the test are established, namely whether the Subject Member’s behaviour is likely to discredit the Force and that it is sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

[16] The Subject Member’s behaviour, as set out in the particulars, is problematic on two fronts. First, he engaged in behaviour that is inappropriate in any workplace. While the Subject Member did not have a direct supervisory role over Ms. X, he was on duty at the time of the incident. His actions are in direct conflict with his position of trust as a police officer.

[17] Second, the Subject Member’s behaviour involved touching Ms. X in a sexual manner. His actions were unwelcome and made Ms. X uncomfortable. The Subject Member’s actions constitute sexual misconduct.

[18] It is well established that police officers are held to a higher standard than the general public. Members of the RCMP must adhere to the Code of Conduct both on and off duty. I find

that 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 actions as likely to bring discredit to the Force.

[19] Noting that the Force has issued several communications both internally and publicly that sexual misconduct, if founded, has serious consequences, I find that the Subject Member's actions are sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

[20] Allegation 1, as amended, is accordingly established on a balance of probabilities.

CONDUCT MEASURES

[21] Having found that the allegation is established, I am required, in accordance with subsection 45(4) of the *RCMP Act* and the *RCMP Conduct Measures Guide*, to impose "a fair and just measure that is commensurate to the gravity of the contravention, the degree of blameworthiness of the member, and the presence of mitigating and aggravating factors". Pursuant to paragraph 36.2(e) of the *RCMP Act*, conduct measures must be "proportionate to the nature and circumstances of the contravention of the Code of Conduct, and where appropriate, [...] are educative and remedial rather than punitive".

[22] The CAR and the MR provided a joint submission on conduct measures. The proposed conduct measures are a forfeiture of 30 days' pay and a transfer to another work location. These constitute serious conduct measures under section 5 of the *CSO (Conduct)*. It was unclear to me, when the measures were presented at the hearing, whether the parties were seeking a recommendation for a transfer, or whether the transfer was to be an included measure in the joint proposal. Therefore, I confirmed, in the course of the hearing, that it was in fact the latter.

[23] When presented with a joint submission on conduct measures, there are very narrow circumstances in which a conduct board may refuse to accept the proposed conduct measures.

[24] The Supreme Court of Canada has recognized the value of settlement discussions, as well as the strong policy reasons which favour the promotion of certainty to the parties, when a settlement is reached.²

[25] Generally speaking, courts or administrative tribunals will not override a settlement reached by the parties, unless doing so would be against the public interest.

[26] Therefore, I must determine whether accepting the proposed conduct measures would be against the public interest. This is not a question of whether the conduct measures proposed are the same as what I would impose. Rather, the public interest test sets a much higher threshold.

[27] In its 2016 *Cook* decision, the Supreme Court of Canada provided the following guidance, which is applicable to administrative tribunals:

[...] a joint submission should not be rejected lightly [...] Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of [in this case, the conduct process] had broken down.³

[28] In advance of the hearing, the MR provided an undated written statement from Constable Brown, entitled “Background Statement”; a positive *Performance Log* (10-04), dated November 8, 2018; six letters of support; and Constable Brown’s Performance Evaluation and Learning Plans (PELP) for 2012 and 2019. At the hearing, the MR explained that additional Performance Evaluation and Learning Plans were not provided due to a gap in the member’s active service as a result of personal illness as well as in relation to these proceedings.

[29] Constable Brown addressed the Conduct Board at the hearing, and expressed remorse for his actions, as well as an apology to Ms. X, his spouse, family and the RCMP. He noted that, following the incident set out in the founded allegation, he had sought personal counselling. He

² See for example *Rault v Law Society of Saskatchewan*, 2009 SKCA 81 (CanLII) at paragraph 19; and *R. v Anthony-Cook*, 2016 SCC 43 [*Cook*].

³ *Cook*, supra note 1, at paragraph 34.

recognized that he will need to live with the consequences of his actions, but he asked for the opportunity to continue his career with the RCMP.

[30] In order to determine whether the proposed conduct measures are against the public interest, it is helpful to have some sense of what the possible measures may be. The RCMP *Conduct Measures Guide* is a useful reference in this regard. However, it is important to note that the *Conduct Measures Guide* is just that, a guide. It is not meant to be prescriptive.

[31] While the facts of this case do not squarely align with the examples of the impugned behaviour under section 7.1 of the RCMP Code of Conduct, as set out in the RCMP *Conduct Measures Guide*, the CAR proposes that there are some parallels which can be drawn with contraventions involving sexual activity on duty, arising out of a pre-existing relationship. The relationship in this case, being one of friendship and not romantic. The *Conduct Measures Guide* provides for a financial penalty of 16 to 30 days, in the aggravated range, for this category of contraventions.

[32] The MR also notes that the circumstances of this case do not squarely align with the four categories of sexual misconduct outlined in the *Conduct Measures Guide*. Instead, she references two decisions from RCMP conduct boards⁴. Both of these cases involved incidents of unwanted sexual touching and included conduct measures of financial penalties of 35 days in one case and 30 days in the other.

[33] I find that dismissal is a very real possibility in the case of sexual misconduct. It is a behaviour that cannot be tolerated within the RCMP. The RCMP has issued both internal and external communications, which clearly state that sexual misconduct, where established, will result in serious consequences. However, not tolerating the behaviour does not translate to an automatic dismissal in every case of sexual misconduct. The circumstances of each case must be carefully assessed.

⁴ 2019 RCAD 09 [*Pulsifer*]; and 2019 RCAD 10 [*Allen*]

[34] I find that the contravention at issue in this case could result in conduct measures of a financial penalty of 16 days, at the low end, and up to and including dismissal. Therefore, the mitigating and aggravating factors must be considered.

Mitigating and aggravating factors

[35] The parties have outlined several mitigating and aggravating factors in this case. Of these, I accept the following mitigating factors:

- a. Constable Brown's admission of the amended allegation and particulars has avoided a contested hearing. This prevented the necessity of calling Ms. X. as a witness.
- b. Constable Brown has no prior record of formal discipline.
- c. The letters of support for Constable Brown speak to his professionalism while engaging with the public in the performance of his duties.
- d. The authors of these letters demonstrated an awareness of the specific nature of the allegation at issue and described this behaviour as out of character for Constable Brown.
- e. Constable Brown has expressed remorse. He appears to have an appreciation for the seriousness of his actions.

[36] I am also mindful that the Commanding Officer of "K" Division has, via the joint proposal on measures, expressed his support for Constable Brown's continued employment. Constable Brown's recent service does demonstrate some rehabilitative potential.

[37] Of the aggravating factors presented, I have retained the following:

- a. The impugned behaviour arose in the context of a workplace relationship, during working hours, while Constable Brown was on duty.
- b. Ms. X was made to feel unsafe in her place of work.

[38] While I have highlighted only two aggravating factors, these are highly aggravating. Under no circumstances should an employee be made to feel unsafe in their place of work.

Decision on conduct measures

[39] On a balance of all of these factors, I cannot find that the proposed measures of a forfeiture of pay of 30 days and a transfer to another work location are against the public interest. They respect the possible range of financial penalties. The financial penalty is at the higher end of the range (short of dismissal). Both the financial penalty and the transfer to another work location are serious measures. They reflect the highly aggravating factors in this case and will serve as a deterrent to Constable Brown, as well as serve as a warning to other members.

[40] It is my understanding that Ms. X was consulted about the proposed joint conduct measures. The imposition of a transfer to another work location ensures that Ms. X's wish not to work in the same location as Constable Brown is respected.

[41] For all of these reasons, I accept the parties' joint submission on conduct measures.

CONCLUSION

[42] Having found that Allegation 1, as amended, is established, and in accordance with the joint submission presented by the CAR and MR, the following conduct measures are imposed:

- a. pursuant to paragraph 5(1)(j) of the *CSO (Conduct)*, a financial penalty of 30 days' pay, to be deducted from Constable Brown's pay; and
- b. pursuant to paragraph 5(1)(g) of the *CSO (Conduct)*, a transfer to another location. The timing and location of the transfer is within the discretion of the Commanding Officer of "K" Division.

[43] Constable Brown is being permitted to continue his career with the RCMP. However, any future contravention of the Code of Conduct will be seriously reviewed by the appropriate conduct authority and could lead to a dismissal from the Force.

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

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Christine Sakiris	September 6, 2019
	Date

RCMP Conduct Board