



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 Steven Burgess, Regimental Number 60862

Subject Member

Conduct Board – Record of Decision

Josée Thibault

September 4, 2019

Sergeant James Rowland, for the Conduct Authority

Ms. Nicole Jedlinski, for the Subject Member

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SUMMARY

The original *Notice of Conduct Hearing* contained six allegations for unauthorized and unsafe use of a conductive energy weapon (Taser X26). The Conduct Authority withdrew Allegations 1, 3 and 5 pertaining to a discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct.

The Subject Member admitted to Allegations 2, 4 and 6, for improper use of government-issued equipment and property contrary to section 4.6 of the RCMP Code of Conduct. The conduct board concluded that the three allegations were established on a balance of probabilities.

A joint proposal on conduct measures was accepted by the conduct board and the following measures were imposed:

- a. Allegation 2: A reprimand and 15 days' forfeiture of pay;

- b. Allegation 4: A reprimand and 5 days' forfeiture of pay;
- c. Allegation 6: A reprimand and additional training with a qualified conductive energy weapon instructor; and
- d. A transfer to another detachment as determined by the Commanding Officer of "K" Division.

INTRODUCTION

[1] On December 10, 2018, the Commanding Officer and Conduct Authority for “K” Division (the Conduct Authority) signed a *Notice to the Designated Officer* requesting a conduct hearing be initiated in relation to this matter. On December 12, 2018, I was appointed as the conduct board pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*].

[2] The original *Notice of Conduct Hearing* (the Notice) contained six allegations of unauthorized and unsafe use of a conductive energy weapon (CEW), Taser X26. Allegations 1, 3 and 5 pertained to a discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct. Allegations 2, 4 and 6 were for an improper use of government-issued equipment and property contrary to section 4.6 of the Code. The Notice was signed by the Conduct Authority on January 25, 2019, and served on the Subject Member, together with the investigation package, on February 22, 2019.

[3] On May 30, 2019, the parties informed the conduct board that they had reached an agreement and would be acquiescent to a non-dismissal resolution with a joint proposal on conduct measures.

[4] On July 5, 2019, the parties provided the conduct board with a Joint Resolution Agreement. The Conduct Authority requested the withdrawal of allegations 1, 3 and 5 for discreditable conduct. The Subject Member admitted to allegations 2, 4 and 6, as well as the amended particulars, for improper use of a CEW.

[5] On July 10, 2019, the parties submitted to the conduct board a written joint proposal on conduct measures requesting the following:

- a. Allegation 2: A reprimand and 15 days’ forfeiture of pay;
- b. Allegation 4: A reprimand and 5 days’ forfeiture of pay;
- c. Allegation 6: A reprimand and additional training with a qualified CEW instructor; and

- d. A transfer to another detachment as determined by the Commanding Officer of “K” Division.

[6] In this decision, the conduct board accepts the amended particulars of allegations 2, 4 and 6 admitted to by the Subject Member as well as the parties’ joint proposal on conduct measures.

ALLEGATIONS

[7] As noted, there are three allegations before the conduct board and they read as follows:

Allegation 2

On or about December 19, 2017 at or near Sherwood Park in the Province of Alberta, while on duty, [the Subject Member] did use government-issued equipment and property for unauthorized purposes contrary to section 4.6 of the RCMP Code of Conduct by manipulating a Conductive Energy Weapon in an unsafe and/or unauthorized manner.

Particulars of the contravention

1. At all material times [the Subject Member] was a member of the Royal Canadian Mounted Police (RCMP) posted to the Strathcona County detachment in the Province of Alberta.
2. On December 19, 2017 [the Subject Member] was on duty, in full uniform, at the Strathcona County RCMP Detachment. [The Subject Member] entered the office space of [Ms. X], a municipal employee working at the Electronic Voice Entry unit at the detachment.
3. [The Subject Member] tossed a couple of sheets of stapled paper on the hands of [Ms. X] while she was typing. This annoyed [Ms. X] who threw the papers back in his direction saying words to the effect of “*Don’t ever do that to me again*”.
4. [The Subject Member] then removed the Taser X26 conductive energy weapon (hereinafter a “CEW”) he was wearing from his holster and pointed it in the general direction of [Ms. X].
5. [Ms. X] said words to the effect of, “*Don’t do that*” and was upset by his misuse of the CEW.
6. [The Subject Member] did not immediately put the CEW back in his holster, in fact he kept it in his hands while continuing to converse with other employees sharing [Ms. X]’s office space.
7. [Ms. Y], another municipal employee who witnessed his actions challenged [the Subject Member] stating the he wouldn’t be pointing a

firearm at someone, even if it were unloaded. [The Subject Member's] reply to [Ms. Y] was that she was comparing "apples to oranges" which was a misguided attempt to lighten the atmosphere.

8. The Taser X26 is a prohibited weapon pursuant to the Regulations Prescribing Certain Firearms and Other Weapons, Components and Parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted, SOR/98-462 (part 1, section 1 and part 3 section 6).

9. There was no valid operational or administrative reason to justify [the Subject Member] removing his CEW from its holster and manipulating it in the manner described above.

10. [The Subject Member's] actions, while intended as a joke, were inappropriate, dangerous and caused [Ms. X] to become angry and upset. She subsequently made a complaint about the incident.

11. [The Subject Member's] use of the CEW was contrary to the RCMP Operational Manual Chapter 17.7 on Conductive Energy Weapons and constitutes a contravention of section 4.6 of the *Code of Conduct* of the RCMP.

12. [The Subject Member] entered a guilty plea to one count of possession of a weapon for a dangerous purpose contrary to section 88(1) of the Criminal Code for which he was sentenced to a conditional discharge which includes conditions to complete 50 hours of community service, write a letter of apology and have no contact with [Ms. X].

Allegation 4

On or about December 9, 2015 at or near Sherwood Park in the Province of Alberta, while on duty, [the Subject Member] did use government-issued equipment and property for unauthorized purposes contrary to section 4.6 of the RCMP Code of Conduct by manipulating a Conductive Energy Weapon in an unsafe and/or unauthorized manner.

Particulars of the contravention

1. At all material times, [the Subject Member] was a member of the Royal Canadian Mounted Police (RCMP) posted to the Strathcona County detachment in the Province of Alberta.

2. On December 9, 2015 [the Subject Member] was on duty, in full uniform, at the Strathcona County RCMP detachment. [The Subject Member] took possession of a CEW as part of his intervention options.

3. At one point during [the Subject Member's] shift [Ms. X], then a watch clerk at Strathcona county detachment, left her workstation to use the washroom.

4. While [Ms. X] was in the washroom, [the Subject Member] took position alongside a wall near the washroom door in such a manner that a person exiting would have their back to him.
5. [The Subject Member] drew his CEW and, with the cartridge removed, turned it on and held it in his hand. A red laser beam projecting from the CEW was visible on the wall, confirming the CEW was turned on, ready to be activated.
6. The CEW is still capable of causing pain with the cartridge removed if a part of a person's body comes into contact with the electric arc.
7. When [Ms. X] exited the washroom, walking with her back towards the member, [the Subject Member] took a step towards her, raised the CEW to be pointed at her back and activated the CEW at a distance of approximately 18 to 36 inches away.
8. The CEW activated by creating an electric arc at its tip. The distinctive crackling sound of the cycling CEW, created by the electric arc sparking between the two prongs at the tip of the device, caused [Ms. X] to startle.
9. [The Subject Member] was not authorized to use the CEW in this manner. There was no valid operational or administrative reason to justify [the Subject Member's] use of the CEW.
10. [The Subject Member] was not engaged in a training activity that would have justified his use of a CEW.
11. The Taser X26 is a prohibited weapon pursuant to the *Regulations Prescribing Certain Firearms and Other Weapons, Components and parts of Weapons, Accessories, Cartridge Magazines, Ammunition and Projectiles as Prohibited, Restricted or Non-Restricted*, SOR/98-462 (part 1, section 1 and part 3, section 6).
12. [The Subject Member's] use of the CEW was contrary to the RCMP Operational Manual Chapter 17.7 on Conductive Energy Weapons.
13. [The Subject Member's] actions constitute a violation of section 4.6 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Allegation 6

Between January 1 and July 1, 2017 at or near Sherwood Park in the Province of Alberta, while on duty, [the Subject Member] did use government-issued equipment and property for unauthorized purposes contrary to section 4.6 of the RCMP Code of Conduct by manipulating a Conductive Energy Weapon in an unsafe and/or unauthorized manner.

Particulars of the contravention

1. At all material times, [the Subject Member] was a member of the Royal Canadian Mounted Police (RCMP) posted to the Strathcona County detachment in the Province of Alberta.
2. At one point in the spring of 2017, [the Subject Member] was on duty, in full uniform, outside the Strathcona County RCMP detachment sitting in a police vehicle.
3. As [Constable (Cst.)] Fair was walking outside the detachment, [the Subject Member] fired a cartridge from his conductive energy weapon that sent the projectiles to the ground near the walkway.
4. Cst. Fair heard the CEW cycling and as he walked closer to [the Subject Member] he saw [the Subject Member] holding the expired cartridge. Cst. Fair was displeased at having a CEW deployed close to him without warning.
5. Members are authorized to dispose of expired CEW cartridges by firing the probes in a safe manner into the ground. However, in this case, [the Subject Member] was in a patrol vehicle and shot the CEW probes out the window onto a pathway near the detachment entrance without properly verifying that no one was in the vicinity.
6. [The Subject Member's] deliberate discharge of the CEW was not conducted in a safe manner in a controlled environment and was done in contravention of section 4.6 of the *Code of Conduct of the Royal Canadian Mounted Police*.

[Sic throughout]

DECISION ON THE ALLEGATIONS

[8] As indicated in section 4.6 of the RCMP Code of Conduct:

Members are entrusted to utilize a wide range of equipment and property in the daily performance of their duties. Accordingly, there is a corresponding responsibility of the [the Member] to use this equipment and property for work purposes and not for personal use or gain.

[9] With regard to Allegations 2, 4 and 6, the Subject Member admitted to improperly using his CEW, a prohibited weapon. Having examined the relevant evidence submitted by the parties in this case, I find that it is clear that the Subject Member contravened section 4.6 of the Code of Conduct when he manipulated his CEW in an unsafe and unauthorized manner as described in the particulars of the Notice.

[10] Therefore, I find that Allegations 2, 4 and 6 are established on a balance of probabilities.

[11] It is well established that RCMP members are, on- and off-duty, held to a higher standard of behaviour to maintain public confidence. I find it disturbing that the misuse of the CEW by the Subject Member was not an isolated incident and continued for a prolonged period of time. In fact, this pattern of misuse started in December 2015, when the Subject Member took possession of the CEW as part of his intervention options, and continued until Ms. X made a complaint in December 2017.

[12] As indicated in the evidence, the Subject Member is known for having a great sense of humour. This can be a positive attribute in the workplace; however, everyone in the workplace has a responsibility to recognize when a joke has gone too far and when the conduct of a colleague has become detrimental to another. Such misconduct must be stopped before it impacts the victim personally and professionally as expressed by Ms. X in her Victim Impact Statement.

CONDUCT MEASURES

[13] The RCMP External Review Committee has established a three-step test for the imposition of conduct measures. At first, the conduct board must consider the appropriate range of conduct measures applicable to the misconduct at issue. Then, it must consider the aggravating and mitigating factors. Finally, the conduct board must impose conduct measures which accurately and fairly reflect the gravity of the misconduct at issue, keeping in mind the principle of parity of sanction.

Range of conduct measures

[14] In accordance with section 4.6, paragraph 16 “Unsafe Use of Firearm or Police Equipment”, of the *Conduct Measures Guide* (the Guide), the parties submit that the aggravated range for manipulating and pointing a CEW in an unsafe manner or contrary to training is a forfeiture of 5 to 15 days’ pay. The parties agree, as indicated in the Guide, that the “aggravated range of sanction should be raised to reflect the severity of voluntarily misusing police equipment, be it out of frustration or as a prank”.

[15] Allegation 2 relates to the December 2017 incident which led Ms. X to file a complaint against the Subject Member. The parties submit that it is the most significant allegation as it resulted in criminal charges against the Subject Member. While the latter subjectively believed that he was joking with Ms. X, he admitted guilt to a criminal offence. Therefore, the parties acquiesce that the conduct is situated at the high end of the aggravated range, which consist of 15 days' forfeiture of pay. They also submit that such a measure reflects the objective gravity of the misuse of the CEW for which the Subject Member was criminally sanctioned and the fact that the device was not drawn in anger or with the intent to threaten.

[16] As for Allegation 4, the December 2015 washroom prank, the parties submit that the misconduct falls within the normal range of sanction, ranging from a reprimand to a forfeiture of 5 days' pay.

[17] Finally, allegation 6 relates to the disposal of expired CEW cartridges. The parties agree that this was the least egregious allegation and recommend a reprimand, which is a measure in the mitigated range. This is recognizing that the Subject Member was authorized by policy to discharge expired cartridges, but he did so in a manner that did not adequately take into account his surroundings and could have been dangerous. Also, as indicated by the parties, the other police officer affected by this allegation told the Conduct Authority Representative that he does not hold any ill-will against the Subject Member following this event, qualifying it only as a "stupid thing to do". In addition, the parties suggest that directing the Subject Member to undergo further training with a qualified CEW instructor would be appropriate in the circumstances.

[18] I agree with the analysis provided by the parties regarding the range of conduct measures.

Aggravating factors

[19] I accept the following aggravating factors presented jointly by the parties:

- a. The Subject Member displayed a pattern of misuse of a CEW, which is a prohibited weapon.

- b. The Subject Member was charged criminally for the actions described in Allegation 2; however, he did plead guilty and received a conditional discharge, which should spare him a criminal record.
- c. The victim was significantly impacted by his behaviour, both personally and professionally.
- d. The Subject Member was relatively junior in service at the time of the alleged misconduct and he does not benefit from years of otherwise exemplary service to support more lenient measures.

Mitigating factors

[20] I accept the following mitigating factors presented jointly by the parties:

- a. The Subject Member admitted to the misconduct, thereby avoiding the need and cost of a hearing and sparing witnesses from providing oral evidence.
- b. The Subject Member has no prior formal discipline.
- c. The Subject Member enjoys the support of his peers, supervisors and managers at the Detachment.
- d. The Subject Member is remorseful for his actions and is unlikely to re-offend, once he returns to active duty.
- e. The Subject Member is a good worker and, aside from these incidents, he is regarded as a high performer.

[21] I would like to add that the Subject Member addressed the conduct board in writing and he also apologized to Ms. X in writing. He recognized his misconduct and said that he deeply regrets his actions and is embarrassed. He further states that being a member of the RCMP means the world to him and that he will do everything that he can to make his family and peers proud again.

Parity of sanction

[22] 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, they must be educative and remedial rather than punitive.

[23] In support of their position, the parties referred to the Guide, as previously indicated, and relied on the following RCMP adjudication board decision *AO “E” Division and Constable Hamlyn*, 11 AD (4th) 407, pertaining to the misuse of a CEW. In that decision, the parties had submitted to the board a joint proposal on sanction. Consequently, the board ordered a reprimand and 10 days’ forfeiture of pay, globally, for three allegations, including two allegations pertaining to the misuse of a CEW. The first one was for allowing a civilian to conduct a “spark test” and the other for cycling the CEW without a cartridge for no valid reason while in close proximity to another person. It must be noted that this case was from the previous discipline regime where the maximum financial penalty was 10 days’ pay, then dismissal.

[24] Despite this previous decision, a conduct board has the discretion to impose higher disciplinary measures for situations involving similar facts. However, this discretion is limited when a joint proposal on disciplinary measures is submitted to the conduct board by the parties, as it was in the present case. As a general rule, in order to reject the proposal, a conduct board must demonstrate that the proposal is contrary to the public interest.

[25] The public interest test has a very high threshold. In 2016, the Supreme Court of Canada in *R. v Anthony-Cooke*, 2016, SCC 43, provided guidance in paragraph 34, which is also applicable to administrative tribunals. More specifically, it indicated that a joint submission should not be rejected lightly as:

[...] 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 the justice system [in this case the conduct process] has broken down. [...]

[26] The public interest test was applied in the context of professional discipline in *Rault v Law Society of Saskatchewan*, 2009 SKCA 81 [*Rault*], and in the Commissioner's decision *Constable Coleman and Appropriate Officer, "F" Division*, (2018) 18 A.D. (4th) 270. According to *Rault*, a conduct board has an obligation to give serious consideration to a joint submission unless it is unfit, unreasonable or contrary to the public interest. In addition, when departing from a joint submission, a conduct board must also give good or cogent reasons as to why it is inappropriate.

Decision on conduct measures

[27] Having considered the record before me, the nature of the misconduct, the mitigating and aggravating factors, the case submitted and the Guide, I cannot find that the joint submission is unfit, unreasonable or contrary to the public interest. The conduct measures proposed by the parties respect the range of sanction imposed for this type of misconduct. Not only will they serve as a deterrent to the Subject Member, they will also serve as a warning to other members.

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

CONCLUSION

[29] Having found that Allegations 2, 4 and 6 are established and in accordance with the joint submission presented by the parties, the following conduct measures are imposed:

- a. Allegation 2: A reprimand and 15 days' forfeiture of pay;
- b. Allegation 4: A reprimand and 5 days' forfeiture of pay;
- c. Allegation 6: A reprimand and additional training with a qualified CEW instructor; and
- d. A transfer to another detachment as determined by the Commanding Officer of "K" Division.

[30] The main objective of disciplinary action is not necessarily punitive, it is also rehabilitative. The parties drew to my attention that the Subject Member is willing to speak to

new members about his experience as a teaching and training tool. I find that, should it be feasible, this would be a great educational opportunity for all members. It would also allow for the Subject Member to “rebuild his reputation as a dedicated police officer and respectful co-worker”, as indicated in his apology letter to the conduct board.

[31] Either party may appeal this decision by filing a statement of appeal with the Commissioner within the 14 days of the service of this decision on the Subject Member, as set out section 45.11 of the *RCMP Act* and section 22 of the *Commissioner’s Standing Order (Grievances and Appeals)*, SOR/2014-293.

	Date
_____ Josée Thibault	_____ September 4, 2019

RCMP Conduct Board