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2019 RCAD 17

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)

(Respondent)

and

Constable Vernon Pederson, Regimental Number 56253

(Subject Member)

(Applicant)

Conduct Board Decision

Motion for Stay of Proceedings for the excess of the time limitation period pursuant to

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section 17 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291

Inspector Colin Miller, Conduct Board

September 26, 2019

Mr. Denys Morel and Staff Sergeant Chantal Le Du, Conduct Authority Representatives

Ms. Sabine Georges, Member Representative

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INTRODUCTION

[1] The Applicant submitted a motion for a stay of proceedings due to the expiration of the time limitation to initiate the conduct process as set out in subsection 41(2) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*].

[2] Pursuant to the Respondent's request, the Director General of the Workplace Responsibility Branch (DGWRB) granted an extension to the statutorily prescribed time limitation period by adding 120 extra days.

[3] The Applicant is seeking the remedy of a stay of proceedings on all four allegations, asserting that the principles of procedural fairness have been breached and that the DGWRB's decision was clearly unreasonable.

[4] For the reasons to follow, the motion succeeds and I grant a stay of proceedings.

BACKGROUND FACTS

[5] The Applicant faces four alleged contraventions of the RCMP Code of Conduct, particularized in a *Notice of Conduct Hearing* dated April 1, 2019.

[6] The dates of the alleged incidents of misconduct fall between September 19, 2011, and February 5, 2012.

[7] On December 6, 2017, Constable M. disclosed to her supervisor that she had been the victim of historical sexual assaults and harassment. She identified the Applicant as the perpetrator and alleged that these incidents occurred when he was her Cadet Field Trainer in 2011, while she was posted to Wetaskiwin Detachment.

[8] As a result of the disclosure, her supervisor reported the matter up the chain of command, which resulted in Superintendent Talbot, the Applicant's line officer, being advised on December 6, 2017.

[9] On November 27, 2018, the Respondent served the Applicant with a memorandum entitled "Notice of Request for the Extension of Time Limitations, Pursuant to s 47.4(1) RCMP Act", dated November 15, 2018, and signed by the Respondent on November 16, 2018 (the Original Notice). This document informed the Applicant that the Respondent would be seeking a four-month extension of the time limitation prescribed by subsection 42(2) of the *RCMP Act*, and of the Applicant's right to make submissions to the DGWRB, who has the delegated authority from the Commissioner to grant an extension pursuant to subsection 47.4(1) of the *RCMP Act*.

[10] On November 28, 2018, the Respondent filed with the DGWRB a memorandum entitled "Request for the Extension of Time Limitations, Pursuant to s.47.4(1) RCMP Act" (the Original Request), dated and signed by the Respondent on November 27, 2018, along with the Original Notice and an affidavit of service. On November 29, 2018, the Applicant presented his submission objecting to the request of a time extension.

[11] On December 19, 2018, the Respondent served the Applicant with an amended "Notice of Request for the Extension of Time Limitations", dated December 17, 2018, and signed by the

Respondent on December 18, 2018 (the Amended Notice). This notice advised the Applicant that the Respondent would be seeking a four-month extension for the time limitation pursuant to both subsection 41(2) (conduct hearing) and subsection 42(2) (conduct meeting) of the *RCMP Act*. It also informed the Applicant of his right to present a submission to the DGWRB.

[12] On December 21, 2018, the Respondent filed with the DGWRB an amended "Request for Extension", dated and signed by the Respondent on December 20, 2018 (the Amended Request), along with the Amended Notice and an affidavit of service.

[13] On January 4, 2019, the Applicant advised the National Conduct Management Section (NCMS) that he would not be submitting an additional rebuttal.

[14] On January 30, 2019, the DGWRB granted the Respondent's request, extending the time limitation period prescribed by subsections 41(2) and 42(2) of the *RCMP Act* by 120 additional days from December 6, 2018, to April 5, 2019.

[15] On March 22, 2019, the Designated Officer received a *Notice to Designated Officer of Decision to Initiate Conduct Hearing* and appointed the Conduct Board on March 25, 2019.

[16] On April 1, 2019, the Respondent issued a *Notice of Conduct Hearing*.

REASONS FOR DECISION

Does the Conduct Board have the authority to hear this motion?

[17] Although this issue was not canvassed early in either party's submission, I will deal with this issue first, as if the answer to this question is no, anything that followed would be meaningless.

[18] As correctly cited by the Applicant, this issue was addressed in the *Solesme* decision,[1] in which the conduct board found that he did have the authority to review the DGWRB's decision.

[1] *Staff Sergeant Bruno Solesme – Time motion Conduct Board decision* [2019] ACMT 2016-33824

However, the situation in that instance can be distinguished from this matter as the conduct board had already been appointed at the time that the extension was sought.

[19] The Respondent argues that a conduct board does not have the authority to review the DGWRB's decision as it is outside its purview. Citing subsection 13(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], the Respondent argues that a conduct board only has the ability to remedy procedural shortcomings in relation to the *Commissioner's Standing Orders* (rules) and that the time extension was granted pursuant to the *RCMP Act*, not the rules.

[20] However, the Respondent does not take into consideration subsection 13(4) of the *CSO (Conduct)*, which states:

> (4) If any matter arises in the proceedings that is not otherwise provided for in the Act, the Regulations or these Standing Orders, the conduct board may give any direction that it considers appropriate.

[21] As noted by the conduct board in *Solesme*, there is no express provision in the *RCMP Act*, the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, the *Commissioner's Standing Orders* or policy setting out who may review a time extension decision. Therefore, it can be addressed by a conduct board as per subsection 13(4) of the *CSO (Conduct)*.

[22] Furthermore, in 2018 RCAD 10,[2] the conduct board also reviewed the decision of the then DGWRB to grant an extension to the time limitation. Therefore, I am satisfied that I have the required authority to hear this motion.

[23] Finally, it is my view that a conduct board not only has the authority to review the DGWRB's decision, but that it has an obligation to do so when concerns are raised. To not do so, a conduct board would be abdicating its responsibility to ensure the proper administration of the RCMP conduct process.

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[2] *Commanding Officer, "National Headquarters" Division v Civilian Member Marco Calandrini*, 2018 RCAD 10

[24] It is imperative that a conduct board review the process to confirm its jurisdiction and ensure that the principles of procedural fairness are adhered to, as opposed to being willfully blind to issues that have been raised, knowing that they could be raised on appeal. A failure to do so, would result in unnecessary hardship on the parties, a waste of precious human and financial resources and, most notably, bring the administration of the RCMP conduct process into disrepute.

Framework of the time limitation period

[25] Since the parties are in agreement that the limitation period pursuant to subsection 41(2) of the *RCMP Act* commenced on December 6, 2017, and ended on December 6, 2018, I need not engage in an analysis of this issue.

Analysis

[26] The Applicant has argued that the decision to grant a time extension is invalid and unreasonable. It is invalid as the request for an extension was submitted past the allowable time limitation, and the decision is unreasonable as it did not properly apply policy or assess the facts in the circumstances.

[27] The Respondent has suggested that the Applicant has raised three main issues in support of his motion:

a. The Respondent's extension request was submitted after the expiry of the one-year limitation period;

b. The existence of breaches to the duty of fairness owed to the Applicant; and,

c. The unreasonableness of the decision.

[28] After my review of the Applicant's motion, I agree with the Respondent that there are three issues that must be addressed. Thus, I will frame my analysis accordingly.

a) Timeliness of the extension request

[29] In order for the motion to be successful on this ground, the Applicant must demonstrate that that the time limitation prescribed by section 41(2) of the *RCMP Act* expired prior to the initiation of the conduct hearing.

[30] The Original Request was filed with the DGWRB on November 27, 2018, before the end of the limitation period.

[31] The Amended Request was filed with the DGWRB on December 21, 2018, clearly after the expiration of the December 6, 2018, limitation period. Therefore, the Applicant submitted that the Amended Request was statute-barred.

[32] The Respondent asserted that the content of the Amended Request was essentially the same as that of the Original Request. Since the DGWRB took both documents into consideration in making his decision, the request (both requests collectively) was made before the expiration of the limitation period.

[33] In the alternative, the Respondent suggested that even if the Amended Request was made after the extension, the DGWRB still had the legal authority to grant the extension. In support of his position, the Respondent pointed to paragraph 68 of *Calandrini v Canada (Attorney General)*, 2018 FC 52 [*Calandrini*], which states:

> Having given the matter careful consideration, I am satisfied that the limitation period in s 41(2) of the *RCMP Act* can be extended by the Commissioner under s 47.4(1) of the *RCMP Act* after the expiry of the prescribed year.

The Respondent noted that this decision was upheld by the Federal Court of Appeal.[3]

[34] In his rebuttal, the Applicant refuted this notion that both notices were the same, suggesting that there was a marked difference between the two, that being the **purpose** of the

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[3] *Calandrini v Canada (Attorney General)*, 2019 FCA 73

Amended Request, which was to seek an extension so that the Respondent could initiate a conduct hearing.

[35] The Applicant did not contest the findings of the Federal Court's decision in Calandrini. However, the Applicant cautioned me against providing "unlimited clearance" for granting tardy extension requests, observing that the use of the word "can" did not equate to this function being automatic. The Applicant suggested that the broad use of retroactive time extensions would nullify the purpose of a limitation period.

[36] The Applicant further distinguished this situation from that in *Calandrini*, noting that the latter involved an extension being sought by the Review Authority.

[37] I agree with the Applicant, in that the Amended Request did not just cure a typographical or editing error, it changed a fundamental component of the request, which would result in a significant change in jeopardy for the Applicant. For that reason, I find that the Amended Request was made after the expiration of the time limitation.

[38] However, in *Calandrini*, Mosley J. was abundantly clear that the DGWRB did have the authority to grant retroactive extensions (I draw the parties' attention to the continued analysis in paragraphs 78 to 83). He did not qualify his interpretation due to the request being made by the Review Authority; therefore, I accept the Respondent's argument and find that the DGWRB had the legal authority to issue the contested extension.

[39] In light of this, I find that the Respondent was not statue barred from seeking the Amended Request.

[40] In relation to the other arguments raised by the Applicant, they will be more appropriately addressed in the analysis of the reasonableness of the DGWRB's decision.

b) Procedural fairness

[41] The duty of procedural fairness is comprised of the right to be heard and the right to an impartial decision maker. The "right to be heard" requires that the Applicant be informed of the

case against him and be given the opportunity to answer it. For the Applicant's motion to be successful on this ground, he must establish that at least one of these rights has been breached.

[42] In paragraph 79 of *Mission Institution v Khela*, [2014] 1 SCR 502, 2014 SCC 24 (CanLII) [*Khela*], the Supreme Court confirms that the standard of review for procedural fairness is correctness.

[43] Additionally, the Federal Court in *Kinsey v Canada (Attorney General)*, 2007 FC 543 (CanLII), paragraph 60, tells us that the remedy for a breach of procedural fairness will be to invalidate the decision "in all but the most exceptional circumstances".

[44] The ability to seek an extension to the statutorily prescribed time limitation is set out in subsection 47.4(1) of the *RCMP Act*, which states:

> If the Commissioner is satisfied that the circumstances justify an extension, the Commissioner may, on motion by the Commissioner or on application, and after giving due notice to any member affected by the extension, extend the time limited by any of subsections 31(2), 41(2), 42(2) and 44(1), for the doing of any act described in that subsection and specify terms and conditions in connection with the extension.

[45] This requires that the party seeking the extension provides due notice to the affected member and, following such, make application justifying the extension to the DGWRB. As part of the notice, the affected member must be made aware that he or she has an opportunity to object to the extension request.

[46] The Applicant raised the following procedural fairness issues:

a. A third request, dated November 27, 2018, was made to the DGWRB, for which the Applicant was not given notice.

b. The Respondent failed to advise the Applicant of the material changes in the Amended Notice and that the Applicant should have been given an opportunity to respond to it.

c. The DGWRB's decision failed to indicate to which request he was responding.

[47] In *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124 (SCC) [*Baker*], the Supreme Court found that the level of procedural fairness must be assessed on a contextual basis, paying attention to a number of factors, notably the importance of the decision to the individual.

[48] The Applicant suggested that his jeopardy was significantly higher when the Amended Request was sought, as the extension would enable the Respondent to initiate a conduct hearing as opposed to holding a conduct meeting. Hence, the Applicant has argued that a high standard of procedural fairness should be applied, as his career is at stake.

[49] Meanwhile, the Respondent suggested that the level does not rise to that standard because the Applicant's career was not at stake when the extension was granted, it was merely an administrative process that would allow for a hearing to be held, at which time, the Applicant would be afforded a higher level of procedural fairness.

[50] I find that, given the potential jeopardy the Applicant may face with the granting of an extension to the time limitation, he is owed a substantial level of procedural fairness, but this standard does not rise to the level that he may be afforded in the actual hearing process where his employment is at stake.

Right to notice

[51] In his motion, the Applicant raised an issue in relation to the number of requests for an extension filed by the Respondent, suggesting that three had been requested, but he only received notice of two. However, after reviewing the clarification in the Respondent's submission, the Applicant acknowledged in his rebuttal that only two requests were made. Given this, I need not address this question.

[52] The next issue that was raised by the Applicant was the Respondent's failure to adequately explain the difference between the Original Request and the Amended Request.

[53] Given the change in jeopardy and knowing that the Applicant was unrepresented at this stage of the proceedings, the Applicant argued that the Respondent had an obligation to ensure

that he understood the difference. Furthermore, the Applicant argued that he should have been given the opportunity to respond to this new matter.

[54] In support for his assertions, the Applicant referred to *Baker*. The Applicant emphasized the requirement for a heightened level of procedural fairness to be extended to an individual when his or her profession or employment is at stake.

[55] Additionally, the Applicant submitted that the DGWRB did not specifically address which request he was responding to and, in failing to do so, unfairly left too much ambiguity.

[56] The Respondent submitted that there were no breaches of the duty of procedural fairness owed to the Applicant and that the process which ensures procedural fairness was followed. The Respondent suggested that the extension request documentation demonstrated the efforts made to ensure that the procedural fairness requirements were met.

[57] The Respondent also refuted the notion that the Inspector who served the Amended Notice misled the Applicant by using wording that did not precisely reflect the purpose of the second request. The Respondent noted that the Inspector's only role in this process was to serve the Applicant and that his uncertainty of the nature or purpose of the Amended Notice had no bearing on the process, as there was no obligation on him to explain the reasons for the Amended Notice.

[58] The Respondent submitted the following:

a. the Applicant was fully informed of the case against him and the fact that he could be facing a conduct hearing;

b. both the Original Notice and the Amended Notice provided a detailed outline of serious sexual misconduct allegations;

c. the Original Notice set out at page 3 that "no determination has been made as to whether the Conduct Authority will refer the matter to a conduct hearing or will set a conduct meeting";

d. the Amended Notice clearly indicated that an extension was being sought under subsections 41(2) and 42(2) of the *RCMP Act*;

e. although the Amended Notice indicated that a conduct meeting will not be possible without an extension, the very next paragraph at page 3 stated:

> If an extension is not granted, jurisdiction will be lost on this allegation as the one-year prescription date will lapse December 8, 2018, therefore an extension is required in order to complete the ongoing conduct process. [*Sic throughout*]

[59] The Respondent asserted that the plain reading of both Notices would have objectively led to the conclusion that a conduct hearing was a potential outcome.

[60] The Respondent concluded this section by submitting that the administrative error of omitting to indicate an extension pursuant to subsection 41(2) was cured by the service of the Notice and the subsequent submission of the Amended Request.

[61] In his rebuttal, the Applicant explained his rationale for not submitting a second response as not wanting to cause more delay, not wanting to ask for an extension and, furthermore, considered that his arguments in relation to the Original Request were sufficient.

[62] Moreover, the Applicant submitted that he did not fully appreciate the significant difference between the two Notices and that the Respondent failed to fulfill his duty to ensure that the Applicant was fully and correctly informed.

[63] Before I continue in my analysis, I feel that it is important to note the manner in which the Original and the Amended Requests were treated, as the DGWRB and the Respondent referenced both of them. Upon receipt of the Amended Request (and associated documents; i.e., the Amended Notice), the Original Request was no longer of any validity. In general terms, the purpose of an "amended" document is to replace the original, not to augment it.

[64] Therefore, it was improper to place any reliance on the contents of documents that have since been "amended". While I do not find this to be a fatal error given the similarity of the documents, it is worth noting so that this practice can be corrected.

[65] Moreover, an important observation is that while the phrase "no determination has been made as to whether the Conduct Authority will refer the matter to a conduct hearing or will set a conduct meeting" may have been used in the Original Notice, it is not contained in the Amended Notice nor either Request.

[66] It should also be noted that, although the contentious issue in relation to whether any responsibility fell on the Applicant for the investigation delay was included in the Original Notice, it was not actually contained in either Request.

[67] However, more troubling to me is the lack of any articulation in the Amended Notice (or the Amended Request) that identified it as an "amended" notice or an explanation as to why it was necessary to amend the "original" request, i.e. noting that an error was made in the original by the failure to include subsection 41(2). Perhaps there was an email thread or other correspondence in existence which delineated the reasons; however, there is nothing before me to suggest that this was done.

[68] This is particularly relevant as the Applicant has asserted that the Respondent breached the duty of procedural fairness by failing to explain the reason for the Amended Notice, which led to him not appreciating the change in jeopardy and, accordingly, the process he had to follow.

[69] As I noted, it would have been quite helpful to both the Applicant and the DGWRB if the Amended Notice and the Amended Request had contained some wording to explain the amendment; however, I must assess whether what was contained in the Amended Notice was adequate in meeting the Respondent's duty.

[70] The Amended Notice set out the Respondent's intent to pursue an extension of the time limitation under subsections 41(2) and 42(2), pursuant to subsection 47.4(1) of the *RCMP Act*, and, on page 2, provided the relevant legislation with the exception of subsection 47.4(1).

[71] The Amended Notice delineated the misconduct which the Respondent was alleging against the Applicant and provided a summary of the allegations. It also noted the date on which a conduct authority became aware of the incidents in question.

[72] The Respondent then set out the factors on which he was relying to justify the extension and the length of time that was being sought.

[73] Finally, the Respondent explained the process for the Applicant to make submissions in relation to the extension request, including requesting additional time to make submissions and the name and number of an individual for him to contact if he had any questions.

[74] In relation to the change in jeopardy, I disagree with the Respondent's assertion that "the plain reading" of both Notices would lead one to conclude that a conduct hearing was being considered. Although someone familiar with the conduct process may easily detect the variances in each of the Notices, I do not believe that the average person would readily note the differences without a closer examination. However, I do agree that the minimum requisite information was contained within the Amended Notice.

[75] While I have found that there is room for improvement in that Notice, I do not find this to be a determinative deficiency. For the aforementioned reasons, I find the Amended Notice contained sufficient information to enable the Applicant to know the case against him.to be sufficient.

[76] The Applicant made submissions in relation to his difficulty, including his Member Workplace Advisor's (MWA) (misidentified as being part of the Member Employment Assistance Program) difficulty, in understanding the purpose of the Amended Notice and his ability to properly respond.

[77] The Respondent took exception to the Applicant's assertion that he was not given an opportunity to respond to the Amended Notice. He cited an email exchange between the Applicant and the NCMS, referenced in the DGWRB's decision, which provided the Applicant's rationale for not submitting a rebuttal to the Amended Notice.

[78] Included with the Applicant's motion rebuttal was the aforementioned email thread. Within that thread, he raised his concerns about the process and his uncertainty as to whether he should provide a second rebuttal. The NCMS offered to provide guidance in relation to the process, although it could not advise him on whether to submit a second rebuttal. When the Applicant advised that it was too late to provide a second rebuttal due to the timeline imposed, the NCMS assured him that his request for an extension of time would still be accepted since he had made enquiries at an earlier date.

[79] Ultimately, the Applicant elected not to submit a second rebuttal, which he asserted was to prevent any further delays. Then again, he also appeared to be confident that his initial rebuttal would be sufficient to counter the Amended Request as well.

[80] For these reasons, I find that the Applicant's right to be heard was satisfied.

Right to impartial decision maker

[81] Since there has been no argument presented to suggest that the DGWRB was not impartial and/or did not provide reasons for his decision, I will not engage in an in-depth analysis of these elements.

[82] Consequently, I find that there is no breach of the principles of procedural fairness.

c) Reasonableness

[83] The Applicant argued that the DGWRB's decision was unreasonable for the following two reasons:

a. the Respondent did not have to wait until the completion of the statutory investigation by the Alberta Serious Investigation Response Team (ASIRT) to conduct the Code of Conduct investigation; and

b. since the information that the Respondent claimed to be waiting on had still not been received by the time that the Code of Conduct investigation was completed, it was not necessary at the time the extension was sought.

[84] In turn, the Respondent asserted that the Applicant was simply trying to relitigate issues that have already been considered and ruled upon by the DGWRB.

[85] The Respondent submitted that the Conduct Board owes "considerable deference" to the DGWRB's decision. He stated that the DGWRB conducted an analysis of the test for extending time limits[4] and, as a result, he came to a decision that was reasonable and fell within an acceptable range of outcomes.

[86] The Respondent also argued that the Applicant failed to grasp "the operational practicalities" inherent in concurrent investigations and that the actions that he took to ensure the completion of the conduct investigation were reasonable.

[87] In his rebuttal, the Applicant reiterated that the report from ASIRT still has not been received, even though the Respondent cited this as his reason not to proceed with the conduct investigation, and that the Respondent failed to abide by policy by waiting for its completion.

The law

[88] As established in *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*], I must determine whether the DGWRB's decision to grant the time limitation extension prescribed by subsection 41(2) of the *RCMP Act* is justified, transparent, intelligible and falls within a range of possible acceptable outcomes which are defensible in respect of facts and law.

[89] In determining the appropriate standard of review, the Federal Court at paragraph 36 of *Kalkat v Canada (Attorney General)*, 2017 FC 794 (CanLII) [*Kalkat*], stated:

> Regarding the standard of review by this Court, I find that the appropriate standard is that of reasonableness for questions of fact, mixed fact and law, and law when it relates to the interpretation of the Delegate's home or a closely related statute. For any other question of law, the standard is correctness.

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[4] Canada *(Attorney General) v Pentney*, [2008] 4 FCR 265, 2008 FC 96 (CanLII)

[90] Hence, the standard of review will be reasonableness.

ASIRT investigation

[91] I disagree with the Applicant's argument that the Respondent did not have to wait for the completion of the ASIRT investigation before conducting his conduct investigation and that, in doing so, the Respondent failed to follow policy.

[92] The relevant sections of policy cited by the Applicant are found in the *Administration Manual*, Chapter XII.1 "Conduct", as follows:

> […]
>
> 4. 2. 1. 2. When a subject member is believed to have committed a statutory offence, see [*Operational Manual* (OM)] ch. 54.3. For serious incidents, see OM ch. 54.1. When the matter has been referred to, or is in the hands of the police force of jurisdiction, i.e. outside agency or RCMP, continue with the conduct process, **unless there is a justifiable reason not to proceed**.
>
> 4. 2. 1. 2. 1. The existence of statutory proceedings does not prevent you from **initiating** a conduct process, making a finding of misconduct on the balance of probabilities, or imposing conduct measures.
>
> 4. 2. 1. 2. 2. Statutory proceedings and conduct proceedings are separate and distinct systems that base findings on different criteria and operate under legal requirements specific to each system. **The decision as to whether a conduct process should be placed on hold awaiting the outcome of statutory proceedings will be determined on a case-by-case basis**, in consultation with the divisional and national conduct advisors.
>
> […]
>
> [Emphasis added]

[93] The policy clearly states that a conduct investigation will continue unless there is a justifiable reason not to proceed. The Respondent explained that due to the restrictions placed on his ability to garner evidence from ASIRT and the practice of prioritizing criminal investigations, he was waiting on ASIRT to complete its investigation before concluding his.

[94] This situation is unlike that in *Phillips*[5], where the conduct authority waited until a determination had been made in relation to the statutory investigation before **initiating** a conduct investigation. In the present case, the conduct process was initiated immediately upon Constable M.'s disclosure.

[95] Finally, the policy allows discretion in determining whether the conduct process should be placed on hold on a case-by-case basis.

[96] While waiting for the completion of a statutory investigation is not always preferable, in situations where the RCMP is waiting on a third-party investigation, particularly of a sensitive nature, it may be reasonable. Given the situation described by the Respondent, I do not find his decision to pause his investigation until the completion of ASIRT's, clearly unreasonable.

DGWRB's analysis of the test for extending time limits

[97] Upon my review of the DGWRB's decision, I have noted several deficiencies, most notably the absence of any rationale for the granting of an extension to pursue a conduct hearing. However, this is not surprising as the Respondent did not provide any rationale for requesting it.

[98] It is important to note the distinction between my finding that the Applicant was given sufficient notice to know the case against him and the sufficient reasons to allow the DGWRB to provide justified and transparent rationale for granting the extension.

[99] Upon close inspection of the Original Request and the Amended Request, I find the content to be almost identical with one exception. The latter has the one additional "factor" as follows:

> […] To date, we do not have authorization to release current investigative materials; nor the full investigative materials from ASIRT; […]

[5] *Commanding Officer, "K" Division v Constable Michelle Phillips*, 2018 RCAD 10

[100] In the Amended Request, the Respondent referred to the impediments to completing the Code of Conduct investigation, essentially the limitations placed upon the RCMP as a result of the parallel statutory investigation being conducted by ASIRT.

[101] He then proceeded to provide the following three notations:

a. […] ASIRT must provide authorization to disclose the content of their investigation before the [Applicant] can be served with a **Record of Decision**, whether it is on a Prima Facie decision or a Balance of Probabilities […]

b. […] The current timeline will not allow for **the [Respondent] to take the matter to a meeting, impose measures and/or complete the Record of Decision** within the one-year time limit […]

c. […] If an extension is not granted, jurisdiction is lost on this allegation as the one- year prescription date will lapse December 8, 2018, therefore an extension is required in order to complete the ongoing conduct process […]

[*Sic throughout*; emphasis added]

[102] There is no specific mention within the factors provided by the Respondent as to why a conduct hearing was not initiated or that more time was necessary to allow for it. In the first two points of the preceding paragraph, the Respondent made reference to several actions which are consistent with a conduct meeting; the only item that could be argued as being relevant to a conduct hearing, is the lapsing of the prescription date.

[103] However, a lapse of the prescription date is, obviously, equally applicable to a conduct meeting. Simply citing this one phrase and taking it out of the context provided by the preceding points would be unreasonable. This exact phrase, with the exception of the corrected time limitation date (the number 6 was substituted for the number 8), was actually included in the Original Notice when only an extension pursuant to s. 42(2) of the *RCMP Act* was being sought.

[104] I find the lack of a nexus between the rationale provided for seeking an extension and the articulation as to why it should be permitted to allow for the initiation of a conduct hearing to be problematic.

[105] In the DGWRB's analysis, he implemented the *Pentney* test in considering whether an extension should be granted. In relation to the first factor, a continued intention to pursue a proceeding, he asserted that the Respondent intended to exercise his discretion under subsections 41(2) and 42(2) of the *RCMP Act*. However, other than simply adding subsection 41(2) at the beginning of the Amended Request, there is nothing to suggest that a conduct hearing was being contemplated.

[106] In paragraph 29 of the DGWRB's decision, he correctly noted that the burden was on the Respondent to demonstrate that the extension was justified in the circumstances, which is consistent with the intent of subsection 47.4(1) of the *RCMP Act*, which states:

> **If the Commissioner is satisfied that the circumstances justify an extension**, the Commissioner may, on motion by the Commissioner or on application, and after giving due notice to any member affected by the extension, extend the time limited by any of subsections 31(2), 41(2), 42(2) and 44(1), for the doing of any act described in that subsection and specify terms and conditions in connection with the extension. [Emphasis added]

[107] As I remarked in paragraph 97, the Respondent did not provide any explanation as to why an extension was required for the initiation of a conduct hearing, so the DGWRB did not have any circumstances before him on which he could justify an extension. Hence, the DGWRB did not articulate any in his decision.

Was the DGWRB's decision clearly unreasonable?

[108] As noted at paragraph 62 in *Kalkat*, significant deference is owed to the DGWRB in the administration of his process.

> 62 Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term, I conclude that the Delegate did not err. Interpreting the "clearly unreasonable" standard as being equivalent to the "patently unreasonable" standard is reasonable in the

> context of the legislative and policy scheme. This means that the Delegate must defer to a finding of the Conduct Authority where he finds the evidence merely to be insufficient to support the finding (Fraser Health at para 30).

[109] Similarly, I must give considerable deference to the DGWRB. Regardless of whether I would have made the same decision as him, I cannot substitute my own decision unless I find his decision to be "clearly unreasonable".

[110] While the Federal Court refers to insufficient evidence,[6] it does not speak to the absence of evidence, as I have found in the instant matter. While one could reasonably see how the DGWRB arrived at the decision to grant an extension for the purpose of holding a conduct meeting, I find that there is no rationale on which a reasonable person could rely to support the decision to grant an extension for the initiation of a conduct hearing.

[111] In *Kalkat*, at paragraph 53, the Court states:

> The reasonableness standard means that the Court will not set aside the decision of a decision-maker as long as it is in accordance with the principles of justification, transparency, and intelligibility (Dunsmuir v New Brunswick, 2008 SCC 9 (CanLII) at para 47).

[112] After reviewing the Amended Request carefully, I cannot satisfy myself that the decision made by the DGWRB is justified, transparent and intelligible. Nor, do I find that it falls within a range of possible acceptable outcomes which are defensible in respect of facts and law.

[113] Therefore, I find that the DGWRB's decision to grant a time limitation extension pursuant to subsection 47.4(1) of the *RCMP Act* to permit the initiation of a conduct hearing clearly unreasonable.

DECISION

[114] While I do have some concerns in relation to the sufficiency of the Amended Notice, I do not find that the deficiencies amount to a breach of the principles of procedural fairness.

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[6] *Ibid.*

[115] However, given the absence of any rationale for a conduct hearing in both the request for the extension of the time limitation for a conduct hearing and in the DGWRB's decision that granted it, I find his decision to be clearly unreasonable.

[116] I am acutely aware that granting a stay of proceedings will prevent the merit of these very serious allegations from being heard in an open hearing and the inherent public interest in seeing that done; however, I cannot uphold a decision which is clearly unreasonable. To do so would bring the administration of the RCMP conduct process into disrepute.

[117] Given that the I have found the DGWRB's decision to be unreasonable, the extension of time was not properly granted. Therefore, the Respondent failed to initiate the conduct hearing within the prescribed limitation period pursuant to subsection 41(2) of the *RCMP Act*.

[118] As a result, I hereby grant the Applicant's motion and order a stay of proceedings on all allegations.

[119] The Applicant is given notice that decisions rendered by a conduct board are available to the public, and the Applicant will not be notified of any requests for access to this decision.

[120] This record of decision constitutes the final decision of the Conduct Board and either party may appeal this decision as provided for in the *RCMP Act.*

	September 26, 2019
Colin Miller, Inspector	Issued at Ottawa, Ontario

Conduct Board