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2019 RCAD 22

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### **Order Restricting Publication**

**Pursuant to subsection 45.1(7) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 and subsection 13(4) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291, the Board orders that any information in this matter that could identify the Young Person, or any family members of the Young Person, shall not be published, broadcast or transmitted in any way and that this order be attached to the Registrar's file.**

IN THE MATTER OF A CONDUCT PROCEEDING

PURSUANT TO

THE *ROYAL CANADIAN MOUNTED POLICE ACT*

Between:

Commanding Officer "K" Division

("Conduct Authority")

and

Constable D. Greenlaw Regimental Number 54987

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**Record of Decision Conduct Board**

Craig S. MacMillan

December 24, 2019

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Mr. Brad Smallwood, Conduct Authority Representative (“CAR”)

Ms. Sabine Georges, Member Representative (“MR”)

(collectively, the “Representatives”)

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## Summary

The Board found the Subject Member committed three contraventions of the *Code of Conduct* by failing to properly investigate information reported by Child and Family Services (“CFS”), failing to comply with direction by a supervisor in relation to investigating the information reported by CFS, and filing an inaccurate or misleading report about the information reported by CFS. The Board imposed a reprimand, direction to work under close supervision for one year, and a 25 day forfeiture of pay for failing to properly investigate, a reprimand and five day forfeiture of pay for failing to following direction of a supervisor, and a reprimand, ineligibility to act in a supervisory role or position for one year, ineligibility for promotion for one year, and a 30 day forfeiture of pay for submitting an inaccurate or misleading report.

## Record of Decision

### 1. Introduction<sup>1</sup>

[1] This decision arises from a conduct proceeding involving the Subject Member in which the Conduct Board (“Board”) rendered an oral decision on merit on October 7, 2019, without hearing any testimony, which was followed by a written decision that was subject to final editing, formatting, corrections and transitional requirements to deal with measures and complete the final decision.

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<sup>1</sup> Unless otherwise stated, page number citations or references relate to the enumeration found in the Code of Conduct Investigation Report (dated September 6, 2018) (“Conduct Report”) and supplemental information contained in a binder (dated September 6, 2018) or the pertinent submission, legal decision, authority, or document submitted by the Representatives and being referred to at that point in the decision. For clarity, the citation for the Conduct Report will be the page number and the binder as “B” followed by the page number.

[2] The Subject Member, at his request, was given an opportunity to address the Board on December 3, 2019, and the Representatives subsequently provided written submissions regarding measures. No witnesses were heard as part of the measures phase.

[3] The following is the final written decision in this conduct proceeding.

## **2. Allegations**

[4] Between June 2, 2017 and July 27, 2017, while posted to the Royal Canadian Mounted Police (“RCMP”) Detachment in Morinville, Alberta (“Detachment”), the Subject Member’s handling of matters relating to a report by Child and Family Services (“CFS”) of inappropriate actions/offences by an uncle (“Uncle”) towards a 14 year-old female family member (“Young Person”) have led to him facing five allegations outlined in the Notice of Conduct Hearing and particulars (dated December 13, 2018) (“Notice”) of contravening the *Code of Conduct*, which the Board summarizes as:

1. failing to open a file or report regarding the alleged offences reported by CFS contrary to section 8.1 (“Allegation 1”);
2. failing to properly investigate the alleged offences reported by CFS contrary to section 4.2<sup>2</sup> (“Allegation 2”);
3. disobeying a lawful order or direction by a supervisor in relation to investigating the alleged offences reported by CFS contrary to section 3.3 (“Allegation 3”);
4. filing a false report about the alleged offences reported by CFS contrary to section 8.1 (“Allegation 4”); and

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<sup>2</sup> Allegation 2 of the Notice initially cited section 4.1 (reporting for duty), but the MR consented to an amendment of Allegation 2 by substituting section 4.2 (neglect).

5. engaging in discreditable conduct by not opening a file, not investigating, and making a false report about the alleged offences reported by CFS contrary to section 7.1 (“Allegation 5”) (collectively, the “Allegations”).

[5] For the reasons outlined below, the Board finds Allegation 1 is not established, and that Allegation 2, Allegation 3, and Allegation 4 are established. Allegation 5 has been withdrawn.

[6] In terms of measures, the Board has imposed a reprimand, direction to work under close supervision for one year, and a 25 day forfeiture of pay for Allegation 2, a reprimand and five day forfeiture of pay for Allegation 3, and a reprimand, ineligibility to act in a supervisory role or position for one year, ineligibility for promotion for one year, and a 30 day forfeiture of pay for Allegation 4.

### **3. Background**

[7] On or about May 31, 2017, CFS received information that the Uncle of the Young Person had given her cocaine and alcohol and, while watching pornography, he put his hand on her thigh, all of which occurred in the context of the Uncle having sexualized conversations with her for a number of months (B61).

[8] CFS undertook immediate steps to protect the safety of the Young Person and a further assessment was undertaken on June 1, 2017 (B61-2).

[9] Ms. Sutherland, an employee of CFS, in accordance with protocol, subsequently phoned the Detachment on June 2, 2017, to report the information about the Uncle and the Young Person to determine if the RCMP wanted to participate in an interview of the Young Person, and her call was forwarded to the Subject Member (“Call 1”) (B45).

[10] Ms. Sutherland indicates that during Call 1 the Subject Member told her to go ahead with the interview and let him know if anything came out of the interview (B45).

[11] When interviewed, the Subject Member essentially corroborated the information of Ms. Sutherland about Call 1, although he did not recall any discussion about a joint interview (B99), stating (B98):

Sure. Um like I said we were on dayshift that day um there was a couple of us in the office maybe, and I remember one of the ladies from up front just going over the phone intercom, just asking someone to grab line one. I picked up the phone spoke with a lady from CFS who advised that she was going to be conducting some interview with a young girl, who had been possibly inappropriately touched by her uncle. And um, was giving cocaine I believe it was and making her watch porn. Uh the phone conversation wasn't very long I just recall her saying that and indicating that she was going to be getting a[n] interview done on this young girl. Um, once the interview was done I provided her or I provided her my name and my...the phone number which you already, obviously had. Um, advised her I would be on dayshift all weekend, and yeah just to update and let me know what she had learned. So, that went wayside in my head, because obviously whenever that phone call was um, she would...like I said, I told her to phone back and let me know what was going on [sic throughout and ellipsis original].

[12] According to the Subject Member, he “assumed” that CFS was going to interview the Young Person and if an assault had taken place, would let the RCMP know (B99).

[13] On Monday, June 5, 2017, the Young Person was interviewed by CFS, and the next day, Tuesday, June 6, 2017, Ms. Sutherland called the Detachment.

[14] As recorded in the CFS Preview Contact Log Details and Safety Assessment Report (“CFS Report”), and confirmed by Ms. Sutherland in an interview, she determined that the Subject Member was not returning to work until Friday, and so she left a voice message for him to call her back (B46, 58, 61).

[15] The Conduct Report and subsequent interviews of both Ms. Sutherland and the Subject Member do not specifically address whether the Subject Member received this voicemail or called Ms. Sutherland in response.

[16] A few minutes later, Ms. Sutherland called the Detachment again and spoke with Corporal Gulash and indicated the inappropriate actions of the Uncle had been confirmed, and Corporal Gulash indicated he would pass this information to the Subject Member (B46, 58).

[17] Corporal Gulash confirms receipt of the phone call from Ms. Sutherland outlining that the inappropriate actions of the Uncle had been confirmed, and that she was calling the Detachment with an update as requested, which, in the circumstances, he considered “odd”, and it prompted him to ask a lot of questions of Ms. Sutherland, which included identifying the name of the Young Person and who Ms. Sutherland spoke with at the Detachment previously (i.e., during Call 1) (B69).

[18] Subsequent to his conversation with Ms. Sutherland, Corporal Gulash conducted a Police Reporting and Occurrence System (“PROS”) file search, and he could not locate a corresponding file, which he felt was inappropriate given the nature of the conduct described, and he sent an email to the Subject Member’s supervisor, Corporal Robb (B69):

I took a call from ...[Ms.] Sutherland from CFS today. She advised she called on the weekend and spoke to [Subject Member] regarding a 3rd party complaint involving a 14 yr old girl named .... CFS advised they called to see if the RCMP would take part in joint interview / investigation regarding the allegation that her uncle, ..., gave her cocaine and then gave her \$100.00 to watch porn with him.

According to CFS, [Subject Member] advised there was no need for RCMP to take part in this and asked CFS to interview the girl for him and let him know if there was anything to these allegations. As a result CFS attended and spoke to the 14 yr old who advised that her uncle had in fact provided her cocaine and then watched porn with her. However she advised she was not paid or received money for doing so. She also advised that he had his hand on her thigh while watching porn. [original in green font] [“Email”.]

[19] The information contained in the Email outlining the inappropriate actions of the Uncle corresponds almost exactly with the entry in the CFS Report about what Ms. Sutherland reported to Corporal Gulash (B58).



[20] Corporal Robb confirms that he received the Email, and believes he would have told the Subject Member to treat the matter “as a priority”, because it involved a minor and there were sexual connotations (B83).

[21] However, Corporal Robb did not recall questioning or asking the Subject Member why a PROS file was not generated in the first instance, instead he focussed on getting one opened (B85).

[22] When interviewed, the Subject Member stated, in essence, that it was not his responsibility to open a PROS file, or alternatively, he forgot about it (B98):

Um, never made a PROS file at that time because it wasn't something that I actually, it was a phone call and it just kind of went wayside, like I say. Normally the girls would make files and stuff anyway and then they would be in our task queue. Um clearly just forgot about it until I received an email uh probably a week later I'm assuming, and I got this email from Corporal GULASH indicating that he had started a PROS file on this uh young girl and to do some more follow-up. I don't really remember the email to be honest. I have no recollection in my head of what was said in the email.  
[emphasis added]

[23] On June 13, 2017, a PROS file was, it appears, opened by the Subject Member (B29) (“File”), although he did not specifically recall doing so or thought someone else may have opened the File (B99). It does not appear that anything turns on who, exactly, opened the File, as the Subject Member acknowledges there was a request to do so and it was ultimately opened.

[24] In the narrative of the File the Subject Member's first entry is that (B29):

2017-06-02 Writer was in office when P/S advised CFS wanted to talk to a member. Writer spoke with CFS who advised she was going to try and attend a home in Sturgeon County as she had a call from a parent who's daughter got some drugs from another family relative. Writer advised CFS that she could call us after she did her statements this day or another day if there was any proof of evidence. Writer advised that we could conduct a criminal investigation if she deemed something was worthy. CFS conduct investigations every day that we aren't aware of till after they find out something criminal. Writer advised CFS that writer was on days all weekend if she was able to make it out and take statements. CFS asked for

writer's name so she could call back if she had anything for Police to look into. [sic throughout, emphasis added] ["First Entry"].]

[25] When interviewed, and shown the First Entry, the Subject Member confirmed it was his writing, and that CFS had indicated the Young Person had possibly received cocaine from her Uncle and been assaulted (B100).

[26] In basic terms, the Subject Member indicates he advised Ms. Sutherland that the RCMP "could conduct the criminal investigation if she deemed something worthy" (B100).

[27] The second entry in the File narrative by the Subject Member is that (B29):

2017-06-12 23:45 Writer learned from Cpl. ROBB this night shift that CFS had called on June 6 and spoke with Cpl. GULASH. It is unsure what that conversation was as there was no file started to read. When writer spoke with CFS she was only inquiring information to see if Police needed to be included, as writer indicated if she deemed a criminal offence took place then we certainly would look into it. Cpl. GULASH advised in the email to Cpl. ROBB that the 14 year old niece was given Cocaine and was in attendance for watching porn with the Uncle. Writer also learned that the Uncle had his hand on her thigh.

When writer comes back to day shift on June 19th, writer will call CFS to get the information the 14 year old and parents of the youth to add to file. Writer will then obtain a statement from the parents and youth to see if there was a criminal offence to investigate.

SUI [Still Under Investigation]:

- Statements
- Youth's particulars
- Parents particulars
- Investigation [emphasis added] ["Second Entry"].

[28] It is important to recognize that, although they describe things that happened approximately 10 days apart, the First Entry and Second Entry likely would have both been made on the date that the File was opened, June 13, 2017, but even if not, the Second Entry confirms that on June 12, 2017, the Subject Member knew (based on the Email) that the Uncle had given the Young Person cocaine, and while watching porn had his hand on her thigh.

[29] Indeed, based on his comments when interviewed, the Subject Member acknowledges he knew on June 2, 2017, based on Call 1, that the Uncle allegedly touched the Young Person on the thigh while watching pornography with her, and had also given her cocaine, but if there is any doubt on this point it was confirmed in the Email.

[30] Further, based on the Second Entry, it is clear the Subject Member had determined that further investigation was required based on the SUI list outlining various tasks, such as calling CFS to get information on the Young Person and her parents, taking statements, and conducting an investigation (“SUI Tasks”).

[31] On July 2, 2017, Corporal Robb took two steps that are documented in the File in the form of supplementary reports.

[32] First, Corporal Robb cut and paste an excerpt of the Email (as quoted above) from Corporal Gulash into the File (B30), which confirmed the advice of CFS that inappropriate actions of the Uncle had been established, as already known and recorded by the Subject Member in the Second Entry.

[33] Second, Corporal Robb indicated to the Subject Member that (B30-1):

File reviewed. [Subject Member] in review of this file I do not think we can put this one to conclusion.

This may just be a child welfare act concern, but it may involve [sic] trafficking of drugs, corrupting morals of a child, and sexual assault.

Who [sic] had this as your SUI list, which you should still do: .... [emphasis added, cut and paste narrative of Subject Member’s Second Entry SUI Tasks not repeated here. SUI Tasks will alternatively be referred to as the “Direction” where appropriate]

[34] When interviewed, Corporal Robb recalled that the Subject Member actually wanted to put the File in for conclusion on July 2, 2017, without any apparent action, but he demurred, saying the SUI Tasks had to be completed, as stated in Corporal Robb’s second supplemental submission quoted immediately above, constituting the Direction (B85).

[35] A third entry on the File by the Subject Member indicates that (B29):

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2017-07-27 12:00 Writer spoke with Angela SUTHERLAND from CFS who advised that she was closing her case with the family, writer learned that there was no Assaults or anything in that manner. She also advised that the matter was resolved by her and is just waiting for the paperwork and will send an email to Cst. HAWKINS to add to this file.

This file can be concluded as no need for Police to investigate. [emphasis added] [“Third Entry”.]

[36] This concluding trajectory of the Subject Member was also captured in his summary on the File, stating (B27):

Received a call from CFS advising they were going to interview a child for Drugs, if she found something that we needed to investigate she would call us back, she never called back. Names provided by Email from Cpl GULASH who spoke with CFS a couple days/ No complaint ever came of this. Spoke with CFS in regards to this matter, they have nothing further to investigate and advised nothing further for Police to deal with as all was dealt with. NFAR/DG [No Further Action Required]. File reviewed. Follow up with CFS indicateds no police involvement needed and nothing criminal to inveastigate. CH [Concluded Here]. [sic throughout, emphasis added] [“Summary”.]

[37] The Summary does not form part of Allegation 4 or the particulars in terms of providing false information, but does provide important insight into the Subject Member’s later claims about his understanding of the circumstances.

[38] On any reading, the Third Entry and Summary present apparent inconsistencies with what the Subject Member knew based on the Second Entry and Email, in that the Young Person had been provided cocaine by the Uncle, and while watching pornography he had his hand on her thigh.

[39] When interviewed, and in reviewing the Third Entry on the File, the Subject Member confirms he did not speak to Ms. Sutherland for quite a while after Call 1 (June 2, 2017), but they did speak again by phone on July 27, 2017 (“Call 2”) (B101):

...and when I spoke with that...this was the end of July 27th. Um Angela SUTHERLAND from CFS, now I don’t know if I even got her name that day and that’s who I...probably had asked for and I’m assuming that too I was speaking with that day, about her wanting to close, like cause there was no assault or whatever that I learned that day. So for me to write something

on this matter at the end of July was um, either a misunderstanding from myself or from someone here. Um, I recall the conversation I had with Constable HAWKINS who was sitting alongside me. Um indicating that there would some paperwork or something and if there was paperwork to be followed up with, then Constable HAWKINS would be, he was notified by myself because obviously I had written that. [sic throughout]

[40] When pressed on where the information about there being no assault came from, the Subject Member responded (B102):

Well is what I remember, I can honestly say on, when there were no assault, so in my head I'm thinking there was no sexual assault that had occurred. So, for us to investigate any further in my head I'm thinking well okay well there's nothing left but I'm just waiting for the report. I don't recall the exact details of this phone conversation. Um but for me to write something like this in looking at it right now, I can say that's what I would be thinking.

[41] Ultimately, the Subject Member was unable to explain fully during his interview when or how he learned there was no assault, given the content of the Email, and he did not speak with Ms. Sutherland further until the end of July in Call 2, and he did not recall receiving any information about the actual interview of the Young Person (B102-3).

[42] In reviewing the Conduct Report and related materials, it seems that Ms. Sutherland may have made Call 2 to the Subject Member (B48, lines 190-93), but it is not actually clear whether Ms. Sutherland called the Subject Member or the Subject Member called Ms. Sutherland, although it does not appear that anything definitive turns on who initiated Call 2, as it is the content of Call 2 that is more at issue.

[43] Noting the content of the Email from Corporal Gulash was on the File about the result of the interview of the Young Person, when asked about whether the comments about the Uncle giving her cocaine and make sexual comments where a concern or followed up on by the Subject Member, he stated (B103):

Uh, I didn't and not that I can remember anyways. Um, I don't remember speaking to any of the aunts or uncles. It's very concerning to me and that was ...basically what I was expecting from CFS was that report. [ellipsis original]

[44] When asked about his expectation that some form of report was coming from CFS, and whether he asked for that report, the Subject Member replied “Um. I don’t recall” (B103).

[45] When queried about why the File was concluded given the outstanding SUI Tasks, the Subject Member reiterated that it was because of his conversation during Call 2 with Ms. Sutherland (on July 27, 2017) (B106):

Correct and that to me was obviously where I’m...my misunderstanding of what had had learned on that 27th of July um that there was no assaults, um maybe in my...and I mean I can only speculate what my head was thinking at that day but there was no um, nothing that I could gain by saying...stating that there was no um further investigation for us. Knowing that someone else would be able to continue to investigate that so I think if anything my understanding from what I’m reading here um, it was just my....my misunder...understanding of what she was indicating to me. [ellipsis original]

[46] Ms. Sutherland is quite categorical that she did not tell the Subject Member during Call 2 that nothing had occurred (B48, 51, 55) (among things because the Young Person had been drug tested and cocaine was found in her system) (B51), and she would be “shocked” if there was no follow up with the family of the Young Person (B53).

[47] When asked, Ms. Sutherland repeated several times that when she spoke to the Subject Member during Call 2, he told her no criminal charges were pending at the time, but he was going to follow up with the family (B47, 49, B51), which is also recorded in the CFS Report completed by Ms. Sutherland (B62):

This writer provided information to RCMP detachment in Morinville.  
[Subject Member] has been assigned the file. He will be following up with the family. No charges pending at this time.

[48] The Subject Member does not recall having any conversation with Ms. Sutherland that no charges would be recommended or were pending (B106).

[49] On or about August 3, 2017, the CFS file was closed as the protection and safety issues of the Young Person had been addressed (B64-65).

[50] On August 19, 2017, Corporal Robb reviewed and concluded the File based on the information recorded by the Subject Member (B2).

[51] When interviewed, Corporal Robb confirmed he monitored the File (B85, Line 86), and although the Subject Member was supposed to take steps when he returned to work on June 19, 2017 as outlined in the SUI Tasks/Direction, states he had no reason to disbelieve the Subject Member's subsequent claim that nothing had occurred and the File could be concluded (B86), even in spite of the earlier content of the Email.

[52] Even after the fact, Corporal Robb states he had no conversation with the Subject Member about his actions and how the File was concluded, given the subsequent investigation that resulted in charges against the Uncle (B87, 90) a year or so later.

[53] The Subject Member, who was preparing for a transfer during the material timeframe, subsequently transferred to another detachment in southern Alberta in mid-August, 2017, not long after making the Third Entry and Summary (B104) on the File.

[54] Sometime later, on or about May 3 or 4, 2018, the Young Person was being interviewed in relation to another matter and disclosed the previous incident involving the Uncle (B31), which, when recounted to Corporal Gulash, prompted him to remember the File previously handled by the Subject Member (B2).

[55] Upon consulting with CFS, and reviewing the CFS Report and speaking with Ms. Sutherland, it was learned that CFS had not indicated there was no assault or anything else that occurred, which led to a briefing of the commander of the Detachment on May 25, 2018, and ultimately led to the initiation of a *Code of Conduct* investigation and suspension of the Subject Member on July 12, 2018 (B4, 8), and the investigation was completed on September 6, 2018 (B2-3, 4, 12)

[56] In the interim, the actions of the Uncle relative to the Young Person were investigated by the Detachment, which resulted in the arrest and charging of the Uncle for sexual interference,

making sexually explicit material available to a child, trafficking of drugs, and driving while disqualified (B27-36).

[57] It is unnecessary to recount the details of the information provided by the Young Person about the actions of the Uncle, other than to state it involved the consumption of cocaine and alcohol facilitated by her Uncle, as well as highly sexualized and inappropriate comments by him.

[58] The Notice to the Designated Officer was signed by the Conduct Authority on November 8, 2018, and the Board was appointed on November 19, 2018.

[59] The Subject Member was served with the Notice on January 7, 2019, and the Notice and Conduct Report were provided to the Board on or about January 11, 2019, and the MR was retained by the Subject Member on or about the same date.

## **Response**

[60] On January 15, 2019, the Board received a request for an extension of time to provide the Subject Member's response to the Allegations pursuant to sections 15 and 18 of the *Commissioner's Standing Orders (Conduct)* ("*CSO (Conduct)*").

[61] The Board emailed the Representatives on January 16, 2019, outlining general expectations relating to procedures, and the requirements for furnishing a response, and associated witness and expert issues lists under the *CSO (Conduct)*.

[62] The Board provided the MR with an extension of time to provide a response until February 22, 2019, and proposed a pre-meeting for February 4, 2019, which was ultimately scheduled for February 11, 2019 ("Meeting 1"), based on availability of the Representatives.

[63] After the completion of Meeting 1, the Board confirmed a number of items that were dealt with in an email to the Representatives, including that:



- the MR confirmed on behalf of the Subject Member that the proceeding would be in English;
- the CAR would facilitate the Subject Member's access to RCMP facilities in order to review his notes, if any;
- the CAR would determine if the notes referred to by Ms. Sutherland were the same as those contained in the CFS Report;
- whether Allegation 2 incorrectly cites section 4.1 of the Code of Conduct rather than 4.2;
- the MR may provide a submission in the response on whether Allegation 5 is duplicitous;
- the identity of the Young Person should be protected and the CAR will provide draft wording to the Board in that regard; and
- the Board agreed to the MR having until March 15, 2019 to provide a Response, in part due to the requirement to contact and interview potential witnesses.

[64] The response of the Subject Member was subsequently provided, comprised of the written submission of the Subject Member, and accompanying email submission of the MR on certain legal points, along with four statements from various witnesses who performed administrative functions in the Detachment ("Response").

### *Allegations*

[65] A number of particulars in the Notice are exactly the same, and the Board intends to deal with them here collectively.

[66] The Subject Member admits particular 1 of the Allegations, and the Board finds that he was a member of the RCMP and posted to the Detachment during the material times.

[67] Relative to particular 2, the Subject Member admits that he took Call 1 from Ms. Sutherland on June 2, 2017, in relation to a matter involving an underage female possibly being

given drugs, exposed to pornography, and touched in a sexual manner by her uncle, but does not recall Ms. Sutherland mentioning the name of the underage female, a truck, or anything relating to a sexualized comment (p. 2<sup>3</sup>).

[68] Concerning particular 3, the Subject Member denies that he informed Ms. Sutherland during Call 1 that there was no need for the RCMP to be involved, and recalls that she advised she was going to conduct interviews into the matter, and the Subject Member indicated to her to let him know about any findings from the interviews and share the upcoming statements with him.

[69] Particulars 5, 6 and 7 of Allegation 1, particulars 6, 7 and 8 of Allegation 2, particulars 10, 11, and 12 of Allegation 3, particulars 11, 12, and 13 of Allegation 4, and particulars 8, 9, and 10 of Allegation 5 allege the same facts about matters relating to the subsequent investigation and charges against the Uncle by the Detachment after the File was closed, and as noted in the Response, are not relevant to determining whether alleged misconduct stated in the Allegations occurred, and may be considered aggravating factors, if required. As such, they will not be considered or addressed further under merit.

[70] Finally, the Subject Member states particular 5 of Allegation 3 and particular 5 of Allegation 4 are not within his personal knowledge, but for purposes of merit, it is not in doubt that Corporal Gulash received a phone call from Ms. Sutherland on June 6, 2017, and finding no relevant PROS file, sent the Email to Corporal Robb, which is a contextual fact and not necessarily material to finding misconduct.

#### *Allegation 1*

[71] The Subject Member denies Allegation 1 (failing to open file or report), asserting that the conduct it deals with constitutes a performance issue rather than a breach of the *Code of Conduct*.

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<sup>3</sup> Page numbers are references to the Subject Member's written Response.

[72] Further, or in the alternative, the Subject Member denies particular 4, which states that he failed to create a PROS file within 24 hours of receiving the information from CFS about the actions of the Uncle contrary to Operational Manual (“OM”) 47.2 (PROS/SPROS General Occurrences) and section 8.1 of the *Code of Conduct*.

[73] While the Subject Member recalls being asked by support staff to take Call 1, and concedes that section 1.4 of OM 47.2 requires that an occurrence be created within 24 hours of the information coming to the attention of the police, it does not specify which employee is responsible for creation of the PROS file.

[74] As known to the Subject Member, the practice in the Detachment “...is that support staff is mainly responsible for the creation of the PROS file and for assigning the file to the member”, which is supported by statements of former and current staff provided in the Response.

[75] First, Corporal Robb confirmed in an email statement to the MR (dated March 4, 2019) that “PROS files are generally created the following way: 1) A call comes into the OCC [Operational Communications Centre] and they create the file and assign accordingly 2) A file can be started from a counter complaint where support staff or a regular member creates the file 3) A member or support staff takes a call or email and the file is generated” (emphasis added).

[76] Second, Ms. McLaughlin (a former support staff clerk at the Detachment for 25 years who retired in March 2016, over a year before the Allegations) confirmed in an email to the MR (dated March 6, 2019), among other things that:

- Detachment support staff are supposed to create PROS files, they will take information over the telephone and pass it over to a member;
- Sometimes, the person calling would ask for a member specifically considering it is a small detachment and this would occur frequently;
- In this scenario, the support staff will not ask for any information and pass the call to the member. The support staff should be asking if this is for an existing file or to create a

new file if needed. However, the support staff are busy and sometimes this protocol is not followed;

- The person who answers the telephone is the one responsible to create the PROS file;
- At the Detachment, day shifts are crazy as members are very busy. Sometimes, the member would take a call without knowing if a file is created or not. It is very easy to forget some administrative tasks; ....

[77] Third, Ms. Senechal (an administrative assistant at the Detachment between August, 2010, and October, 2016, who transferred from the Detachment eight months before the Allegations) confirmed in an email to the MR (dated February 22, 2019), among other things that:

....

- When taking information from the front counter or over the phone, you would get as much information as possible from the complainant and then determine what to do;
- When it was clear a file should be created, you would create the file and do the PROS entry and then dispatch a member to it;
- When it wasn't clear if a file should be created, you would talk to a member to get their opinion on it, or hand the complainant over to a member if they were willing to take it. This would include members in the office; ....

[78] Fourth, Ms. Pomerleau (administrative support at the Detachment since 1997) confirmed in an email to the MR (dated February 27, 2019), among other things that:

....

- When a call comes into the detachment, the call would be answered by a support staff and the support staff would ask all appropriate questions to determine if it is a police matter. If it is a police matter, the PROS file would be created by the support staff and a

member would be identified by calling over the radio and asking is someone is willing to take the file. The file would then be assigned to that member,...;

- Most calls that come in are documented on a file, even if for information only;
- If it is more serious, the support staff asks a member to take the call, but support staff would still get enough information to create the PROS file and then assign it to the member who took the call;
- The Support staff take all calls and take as much information as possible and document the information on PROS;
- This process has been ongoing since 2005 when the detachment moved from PIRS to PROS;
- The files would be opened by support staff or OCC, there would be times when the member would ask support staff to open a file, an example of this type of file would be information only, if the support staff were working, they would open the file;
- She cannot remember a time where members created a file themselves if the support staff is present, if they did it was done quickly; .....

[79] According to the Subject Member, he took Call 1 from CFS while standing over a cubicle and assumed that support staff would open a PROS file, which did not happen, and he simply forgot about the File until he received the Email from Corporal Gulash (p. 2).

### *Allegation 2*

[80] The Subject Member denies Allegation 2 based on the fact that it incorrectly cites section 4.1 of the *Code of Conduct* (which deals with failure to report for duty), but consents to the amendment of Allegation 2 to substitute section 4.2 (neglect), and in so doing, has indicated he will admit to neglect of duty.

[81] The Subject Member reiterates his denial that he stated to Ms. Sutherland during Call 1 there was no need for the RCMP to be involved, but rather he advised her to let him know about any findings from the interviews and share upcoming statements (p. 4).

[82] Particular 4 asserts that the Subject Member took no investigation action regarding the information provided by CFS, which he admits with explanation, by stating:

[Subject Member] admits taking no investigative action as he was expecting feedbacks [sic] from Ms. Sutherland following the interview she planned to conduct. [Subject Member] was of the understanding that Ms. Sutherland was going to share her report with the RCMP so he can establish the most appropriate course of action to take.

[Subject Member's] intention is not to make any excuses for his inaction but rather to provide some explanation of his mindset at the time. He further recognizes that he should have been more proactive in handling this matter.  
[p. 4]

[83] According to the Subject Member, particular 5, which alleges that he failed to investigate the information involving the Uncle contrary to OM 2.1. (Sexual Offences) and OM 2.6. (Child Abuse/Crimes Against Young Persons), is too "...vague as it does not refer to a specific section in the mentioned policies" and further, or in the alternative, relies on the explanation to particular 4, that he was expecting Ms. Sutherland to share her report so he could determine the appropriate course of action (p. 6).

### *Allegation 3*

[84] The Subject Member denies Allegation 3, asserting that, like Allegation 1, the conduct it deals with constitutes a performance issue rather than a breach of the *Code of Conduct*.

[85] The Subject Member admits that Corporal Robb ordered him to create the File, which he did on June 13, 2017 (particular 6), and admits that Corporal Robb ordered him to call CFS to get information regarding the Young Person and her parents and to obtain statements from the parents and Young Person to determine if there were criminal offences to investigate (particular 7) (i.e., SUI Tasks/Direction) (p. 7).

[86] However, in relation to particular 8 and particular 9, the Subject Member denies that he did not call CFS to get information or failed to follow the Direction in that regard as he called CFS on July 27, 2017 (i.e., Call 2), explaining that he was waiting for Ms. Sutherland's report.

[87] As noted above, the Conduct Report and interviews of Ms. Sutherland and Subject Member are not entirely clear about who initiated Call 2, and the Response is the first time the Subject Member asserts he made Call 2, although during his interview he did not remember much about Call 2.

[88] The Subject Member admits that he did not follow the Direction as he did not obtain statement from the parents or Young Person, explaining, again, that he was waiting for Ms. Sutherland's report (p. 7).

#### *Allegation 4*

[89] Although the Subject Member admits that he wrote in the Third Entry that the File could be concluded because there was no assaults or anything in that manner (particular 9), he denies that the Third Entry was false (particular 10):

From what he remembers, [Subject Member] had a telephone conversation with Ms. Surtherland on July 27, 2017 [i.e., Call 2] and she advised that she was closing her file. He cannot remember the details she provided on why she was closing her file. To his understanding, if she was closing her file then it meant that the allegations were not substantiated by her investigation.

[Subject Member] also advised her that he was in the process of being transferred to another detachment and asked her to send her report to Constable Derek Hawkins instead and she agreed as the RCMP file cannot be closed without her report on the record.

As stated, [Subject Member] does not remember the specific details of that conversation [i.e., Call 2] but is assuming what he would have understood at that time for him to draft this PROS entry. [Subject Member] misinterpreted Ms. Sutherland's true meaning of "closing the file".

[Subject Member] takes responsibility for not clarifying this issue and for not seeking further information in order to prevent such a misunderstanding as there was in fact a concern of safety for this young person.

[Subject Member] agrees the information he stated in his PROS entry ended up being inaccurate. However, at the time he drafted this entry, [Subject Member] honestly thought the allegations were not substantiated as she was closing her file.

[Subject Member] also would like to mention that he wouldn't have any reason or motive and has nothing to gain into making such statement knowing it to be false. [Subject Member] takes these allegations seriously as he is himself a victim of sexual abuse and has successfully investigated sexual assault cases in the past. [pp. 10-11]

*Allegation 5*

[90] The Subject Member denies Allegation 5 and asserts that it is duplicitous to Allegation 1, Allegation 2, and Allegation 4.

[91] As a result, in reply to particulars 4, 5, 6 and 7, the Subject Member reiterates his comments as articulated under the applicable particulars in Allegation 1, Allegation 2, and Allegation 4 in that, in summary:

- he took no investigation action as he was expecting feedback from Ms. Sutherland and a copy of a report so he could determine a course of action;
- The Third Entry was not false because he honestly understood that in closing the CFS file by Ms. Sutherland it meant the allegations against the Uncle were not substantiated; and
- While the information in Third Entry may have ended up being inaccurate, he did not have any reason, motive, or anything to gain by making a false statement.

[92] Relying on *R. v. Kienapple*, [1975] 1 S.C.R. 729 (“Kienapple”), as well *Macdonald v. Institute of Chartered Accountants of British Columbia*, 2010 BCCA 492 (CanLII) (“MacDonald”), *K. C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253, *Carruthers v. College of Nurses of Ontario*, 1996 CanLII 11803 (ON SC), and *Danyluik v Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee)*, 2014 ABCA 78 (“Danyluik”) in the administrative and professional conduct context, the MR asserts that there is both a factual and legal nexus between Allegation 1, Allegation 2, Allegation 4, and Allegation 5, which results in duplicity.



[93] In terms of factual nexus, the MR points out that particular 4 (failure to create PROS file), particular 5 (failure to investigate), and particulars 6 and 7 (false statement) of Allegation 5 (discreditable conduct) and particular 4 (failure to create PROS file) of Allegation 1, particular 5 (failure to investigate) of Allegation 2 and particulars 6 and 7 (false statement) of Allegation 4 are identical in wording and relate to the same alleged misconduct.

[94] Relative to the legal nexus, the MR asserts that nothing substantial distinguishes the essential particulars of the Allegation 1, Allegation 2, and Allegation 4, and that particular 11 of Allegation 5 is not distinctive, as reference to the damaged relationship between the RCMP and CFS is not an element of discreditable conduct, but rather a contextual fact delineating the outcome of the alleged misconduct, although it can be considered as an aggravating factor.

[95] In terms of remedy and timing, the MR posits that a stay of proceedings is required if Allegation 1, Allegation 2, and Allegation 4 are established, and it should occur during merit and before measures.

[96] Further, according to the MR, if one of the foregoing allegations were not substantiated but others were established, those remaining allegations that are established would make Allegation 5 duplicitous because it would still be relying on the same particulars as articulated and substantiated in the earlier allegations.

[97] Finally, or in the apparent alternative, the Subject Member denies that his conduct in the handling of the information from CFS damaged an important relationship between the RCMP and CFS or that it brought discredit to the RCMP.

[98] After reviewing the Response, the Board and Representatives held a further meeting on April 3, 2019 (“Meeting 2”), and the Board confirmed a number of items that were in dealt with in an email (dated April 4, 2019), including that:

1. Both the CAR and MR have now confirmed in writing that their respective clients waive personal service of any decision or documents and that service may be effected electronically on their respect representative (concluding item 4 from Meeting 1).

....

6. There was agreement to amend Allegation 2 and Particular 5 of Allegation 2 by substituting 4.1 with 4.2 based on consent by the MR and based on the Response (concluding item 10 from Meeting 1).

7. There was agreement that if Allegations 1, 2 and 4 are substantiated that Allegation 5 would be duplicitous, and that any such determination ought to be made during the merit phase and before the measures phase (concluding item 11 from Meeting 1).

...

18. The Representatives indicated that they were satisfied that the Board could rely on the Conduct Report and Response to make determinations on the merit of the Allegations, and testimony from witnesses was not required, and there was agreement to proceed on that basis.

[99] In addition, during Meeting 2 it was agreed that the Representatives would provide submissions to the Board on a number of issues relating to the Notice and particulars, which are unnecessary to recount here, but they are recorded in detail in the email from the Board, as are matters relating to expert or medical evidence.

### **CAR Submission**

[100] After several extensions of time approved by the Board, the CAR provided a submission on the merit of the Allegations on May 17, 2019 (“Submission”).

[101] As general comment, the Submission asserts that although the Subject Member denies the Allegations, the substance of the Response constitutes an admission to the Allegations, which is supported by the content of the Conduct Report and the Subject Member’s statement provided during the conduct investigation.

[102] The Submission further notes that particular 2 of the Allegations deals with the Call 1 from Ms. Sutherland and the Subject Member admits in the Response that he was informed about a matter “involving an underage girl who was possibly given drugs, exposed to pornography and touched her in a sexual manner by her uncle,” yet the Subject Member in effect delegated his responsibility to deal with the criminal aspect of these allegations to CFS.

[103] Based on the Response and Conduct Report, the Submission asserts that the Allegations have been established, and the Board has an obligation to not only to address each of the Allegations individually, “but to examine the conduct as a whole to determine whether not the subject member has brought discredit to the Force”, which also arises out of Allegation 5.

[104] The above suggests that each of the Allegations, even when it does not specifically allege a contravention involving discreditable conduct contrary to the *Code of Conduct*, must include the additional element of discrediting the RCMP. This cannot have been the intent of the Submission, as it appears to constitute a clear mis-statement of the law and other requirements, but it is unnecessary to resolve this issue for purposes of merit.

[105] The Submission further asserts that Allegations 1-3 are not performance issues based on the context of the Allegations and their seriousness, the seriousness of the alleged criminal conduct by the Uncle, and the potential to bring discredit to the RCMP based on the inaction of the Subject Member.

[106] By way of example, the Submission states that if the Subject Member had received a call about a stolen bike and then conduct himself as outlined in Allegation 1, Allegation 2, and Allegation 3, it would likely be a performance issue.

[107] However, in this instance, the Submission states the Subject Member had an obligation to investigate the information provided by CFS, given it dealt with the vulnerable Young Person, who, due to the inaction of the Subject Member, was unnecessarily exposed to further risk, all of which justifies bringing Allegation 1, Allegation 2 and Allegation 3 before the Board as conduct, and not performance, matters.

[108] The Submission does not address or outline the legal or analytical framework for examining and judging whether the actions of a subject member raise matters of performance versus misconduct.

[109] Turning to the individual Allegations, the submission observes that the Subject Member does not deny Allegation 1, but instead explains in the Response that support staff normally create or open files and he assumed it was done and he simply forgot about the file.

[110] The Submission contends that section 8.1 of the *Code of Conduct* imposes an obligation on the Subject Member to provide complete and timely accounts, and as such, the Subject Member had a duty to report Call 1 from CFS, which did not occur.

[111] More specifically, the Submission continues that Allegation 1 asserts that the Subject Member failed to report alleged offences by the Uncle, and while particular 4 mentions the failure to create a PROS file, it is simply a tool through which members fulfill their reporting duties and whether support staff create or open PROS files, it did not absolve the Subject Member of the responsibility to report on the content of Call 1 from CFS, and had he not failed in his duty to report the lack of a PROS file would have been noted and corrected.

[112] Given that the Subject Member did not deny failing to report the criminal allegations against the Uncle that he received during Call 1, the Submission states Allegation 1 has been established.

[113] Turning to Allegation 2, which was previously amended to allege a contravention of section 4.2. (diligence) rather than 4.1 (reporting for duty) based on the consent of the MR, the Submission cites and quotes specific provisions of O.M. 2.1 and 2.6. as support for the assertion that the Subject Member had specific duties and obligations to investigate the criminal allegations against the Uncle (as sexual and other offences involving crimes against the Young Person) promptly and thoroughly, which included taking statements, gathering information, and determining risk.

[114] Based on the Response and Conduct Report (e.g., Subject Member's statement), the Submission states that the Subject Member has admitted he took no investigative action and Allegation 2 is established, and any explanation the Subject Member has for this circumstance would be more appropriately considered at the measures phase.

[115] With respect to Allegation 3, and whether the Subject Member followed the Direction outlined in the File (in the form of the SUI Tasks) by Corporal Robb, the Submission notes that individually and combined, they required the Subject Member undertake certain investigative steps which were not contingent upon any alleged report to be provided by CFS.

[116] The Submission notes that the Subject Member's explanation for not complying with the Direction is that he was waiting for a report from CFS, which expressly or tacitly amounts to acknowledgement that he did not comply with the unambiguous Direction, and it demonstrated a "laissez-faire approach" by the Subject Member, which failed to meet his obligations and put the Young Person at risk.

[117] Regarding Allegation 4, the Submission states that in the Response the Subject Member "tacitly admitted" to the "gravamen" of the contravention when he conceded that the information provided in the File ended up being inaccurate, although at the time the Subject Member "honestly" thought the allegations against the Uncle were not substantiated as CFS was closing its file.

[118] The Submission claims that:

...section 8.1 of the Code of Conduct does not require the [S]ubject [M]ember to have knowledge that he is providing false information. The mere providing of false information is enough to trigger action under section 8.1. [emphasis added]

[119] The Submission does not provide any authority for this interpretation, and as will be observed below, it may conflict with the basic legal framework that is commonly applied to allegations of providing false and misleading information in police conduct cases.

[120] Alternatively, the Submission asserts that the Subject Member "ought to have known" that the information provided in the File was false.

[121] The Submission relies upon the statements of Ms. Sutherland that she only informed the Subject Member that the CFS file was being closed as the protection issues within its mandate had been addressed, which is distinct from the policing and criminal components arising from

the alleged actions of the Uncle and formed part of the police responsibility of the Subject Member to address.

[122] According to the Submission, it is simply not reasonable for the Subject Member to assume that the closing of the CFS file meant that no criminal behaviour had taken place.

[123] Further, the Submission also notes that it was unreasonable for Subject Member to assert that Ms. Sutherland communicated that no assault had taken place as recorded in the File, as the original information also alleged giving cocaine, an invitation to sexual touching, and watching pornography with the Young Person.

[124] In other words, even if the Subject Member believed that no assault occurred, “he ought to have known that there were multiple allegations of other criminal conduct that needed to be investigated,” which is reinforced by the nature of the Direction and comments on the File from Corporal Robb.

[125] In summary, the Submission asserts that with respect to Allegation 4 the Subject Member provided a false report recommending the File be closed when “he knew” the criminal aspects of the allegations against the Uncle had not been investigated and “ought to have known” that the criminal allegations against the Uncle were not resolved.

[126] The Submission concludes by requesting that Allegation 5 be withdrawn, as the CAR intends to argue the substance of Allegation 5 as aggravating factors at the measures phase, although it not clear how, given the particulars of Allegation 5 are basically repetitions of Allegation 1, Allegation 2, Allegation 3, and Allegation 4, and the sole distinction is the assertion in Allegation 5 that they amount to discreditable conduct.

## **MR Reply**

[127] The MR written reply to the Submission was provided on or about June 7, 2019, supported by several cases (“Reply”).

[128] Citing *F.H. v. McDougall*, 2008 SCC 53, the Reply commences with the proposition that the Conduct Authority has the obligation to establish the Allegations on a balance of probabilities based on evidence that is clear, convincing and cogent.

[129] After providing a brief factual and procedural background, the Reply turns to Allegation 1 and states the Subject Member denies the “essence” but admits to some particulars, and relies on the statements provided by various individuals as part of the Response, and who worked at the Detachment, to assert that the practice is for support staff to open PROS files.

[130] In particular, Corporal Robb states that when a call comes from the front counter, the support staff or member creates the PROS file, while Ms. Pomerleau suggests that even when the member takes the call the support staff would still get enough information to create a PROS file.

[131] The Reply submits that the Subject Member relied on this practice and it was reasonable for him to assume that the support staff at the Detachment would have created a PROS file, and in this instance when a PROS file did not appear in his task que he forgot about this matter until he received the Email from Corporal Gulash a few days later.

[132] It is further noted that the Submission stated in relation to particular 4 of Allegation 1 that PROS was simply a tool through which members fulfill their reporting duties and the essence of Allegation 1 is a failure to report.

[133] As such, the Reply understands that the Submission is now stating that the creation of a PROS file is not material to Allegation 1, yet in providing the Response, which is compelled, the Subject Member was responding to the case presented in the particulars.

[134] Relying on *Appropriate Officer “E” Division and Constable Ward*, 15 A.D. (4<sup>th</sup>) 70 (“*Ward*”) and paragraph 43(2)(b) of the *RCMP Act*, the Reply states Allegation 1 in the Notice is, in essence, about failing to create a PROS file as articulated in particular 4, and based on the further information provided in the Response about practices around the opening of PROS files the Conduct Authority has failed to meet the burden and/or standard of proof.

[135] Additionally, the Reply submits that failure to create a PROS file involves a performance issues that was, in fact, already addressed and resolved at the supervisory level based on the actions of Corporal Gulash and Corporal Robb which led to the creation of the File after it was learned a PROS file had not been opened.

[136] Noting the Submission asserts that Allegation 1 relates to serious criminal allegations involving the Uncle (rather than, for example, a stolen bike), and that is the reason that failure to open a PROS file cannot be considered a performance issue, the Reply states such factors more properly constitute aggravating factors if Allegation 1 is established and are not relevant to substantiation.

[137] In conclusion on Allegation 1, the Reply states that if failure to create a PROS file was meant to be treated as a conduct matter it should have been treated that way at the time, and instead, Corporals Gulash and Robb treated it as a performance issue and addressed it at their supervisory level, although the Reply does not furnish any cases or legal analysis around this point.

[138] The Reply states that the Subject Member “admits to the essence” of Allegation 2 and has offered a “contextual explanation” in the Response about waiting for a report from CFS, which “is not meant to serve as exculpatory evidence but rather to explain his mindset at the time.”

[139] Curiously, the Reply asserts that the genesis of this contextual explanation arises from the fact that, given “oral hearings are not guaranteed, there would not be any other occasion for [the Subject Member] to fully explain his actions or inactions at the merit phase”, and as such, admitting to Allegation 1 and providing an additional explanation is appropriate.

[140] Unfortunately, the Reply has clearly misapprehended that the lack of a “guaranteed” oral hearing is somehow responsible for the requirement for the Subject Member to provide an explanation about his actions.

[141] In fact, it is subsection 15(3) of the *CSO (Conduct)* that requires a subject member provide a conduct board with a response containing an admission or denial of each allegation,



any written submissions that the subject member wishes to make, and any evidence, document or report that will be relied upon. The basis for providing a response containing such detailed information is to ensure that subject members are promptly identifying relevant evidence and issues in order to focus the conduct proceeding process.

[142] The Reply concludes that Allegation 2 is established on a balance of probabilities based on the admission of the Subject Member (based on the content of the Response and the statement he provided during the conduct investigation).

[143] The Reply reiterates that the Subject Member denies Allegation 3 but admits some of the particulars, noting that particulars 8 and 9 are “nearly identical” in alleging that the Subject Member did not undertake the SUI Tasks as directed by Corporal Robb.

[144] The Subject Member denies that he disregarded the Direction of Corporal Robb to contact CFS to get further information, as he did contact CFS in Call 2 on July 27, 2017, which is confirmed by the File and Ms. Sutherland.

[145] The Reply disagrees with the suggestion in the Submission that the Subject Member “tacitly” admitted to not contacting CFS as the Subject Member is clear in the Response that he did contact CFS (i.e., Call 2), and therefore did comply with that aspect of the Direction.

[146] As a result, the Reply states that the alleged failure to contact CFS as required by the Direction is not established on a balance of probabilities, although the Board observes that it is not as clear as it is claimed that the Subject Member initiated Call 2, but nevertheless, it is clear that he and Ms. Sutherland did speak during Call 2.

[147] However, in relation to the second aspect of the Direction by Corporal Robb (i.e., obtaining statements from the parents and the Young Person), the Reply admits that the Subject Member did not comply with this component, but relies on the explanation in Allegation 2, which although not outlined, appears to be that he was waiting for a report from CFS.

[148] The Reply concedes that, factually, it has been established on a balance of probabilities that the Subject Member failed to comply with the Direction to take statements, but contends that whether omitting to fulfill a specific task amounts to misconduct is “up for debate.”

[149] It is posited by the Reply that inaction on one specific aspect of the Direction (i.e., take statements) should be treated as a performance matter at the supervisory level, as it cannot be considered a “recurrent performance issue” that can “only” be addressed under conduct, although no cases or legal analysis are provided on this point.

[150] Further, the Reply states the “alleged insubordination” of the Subject Member requires “specific intent of disobeying his supervisor for it to be outside the realm of performance”, and as noted in the Response, he was waiting for a report from CFS before taking further action, which may be a judgement issue, but does not demonstrate specific intent to disobey the Direction of Corporal Robb.

[151] The Reply does not provide any supporting legal analysis, decisions, or other documentation about whether “specific intent” is a requirement to establish failure to follow direction by a supervisor.

[152] In the alternative, the Reply asserts the failure to take statements under Allegation 3 can also be considered an essential element of Allegation 2 as part of failing to investigate, given that failure to take statements is included in the contravention of failing to conduct an investigation.

[153] Relying upon the principle of *Kienapple*, and citing *Garreton v. Complete Innovations Inc.*, 2016 ONSC 1178 (“*Garreton*”) at paragraph 32, the Reply contends that the Subject Member cannot be disciplined twice for the same offence.

[154] With respect to Allegation 4, the Reply states the Subject Member “denies knowingly making a false report”, and regarding particular 9 (i.e., Third Entry), the Subject Member admits writing that he had spoken with Ms. Sutherland from CFS during Call 2 and learned she was closing her file, that there had been no assaults, and that the matter was resolved by her, and she was waiting for paperwork that would be provided to Constable Hawkins.

[155] The Reply then states that “Speaking of Cst. Hawkins, it is fair to note he was not interviewed for the code of conduct process; I submit he would have relevant information to provide.”

[156] The Board notes that if the Subject Member or MR thought there was relevant information missing it was incumbent upon them to either take steps to obtain that information or bring this concern to the attention of the Board and request further investigation, not sit by and then apparently suggest during the Reply that an adverse inference or some other adverse conclusion ought to be formed by the Board.

[157] Particular 10 alleges that the Third Entry on the File is false, but the Reply states that the Subject Member explained in his statement and Response that Ms. Sutherland was closing her file and as a result his understanding was that the allegations against the Uncle were unsubstantiated.

[158] However, the Reply goes further and states that the Subject Member advised Ms. Sutherland that he could not close the File without her final report, and considering his upcoming transfer, he requested that that any CFS report be sent to Constable Hawkins for “continuation”, and the fact that he “honestly believed that no assaults had taken place” informed how he wrote the Third Entry on the File.

[159] The Board notes that the above claim appears to be overstated based on the wording of the Third Entry, and there is no evidence from the Subject Member to the effect that the File could not be concluded without a report from CFS and/or that it was to be continued by Constable Hawkins.

[160] The Reply concedes that the information included in the Third Entry in the File “ended up being inaccurate”, but notes that Ms. Sutherland confirmed in her statement that she advised the Subject Member her file was being closed, but it was only after a series of leading questions by the conduct investigator during her interview that it was identified that the CFS file only dealt with protection concerns and does not imply there was no criminal element, and Ms. Sutherland was uncertain if this latter explanation was given to the Subject Member.

[161] Based on the foregoing, the Reply asserts it is “reasonable to conclude there was a misunderstanding” between the Subject Member and Ms. Sutherland, and in the Response the Subject Member “takes responsibility for not clarifying further.”

[162] The Reply then assigns fault to CFS because it subsequently “failed to share the report with the RCMP” as requested by the Subject Member and the File was ultimately concluded by Corporal Robb without a CFS report (which was ultimately only provided much later at the request of Corporal Gulash when further investigation was undertaken against the Uncle after a second disclosure by the Young Person).

[163] According to the Reply, if CFS had shared its report it would have assisted with the matter, given it referred to the Young Person testing positive for cocaine “yet CFS checked the ‘no need for intervention’ box and ‘close’ box as to the action taken” which was confirmed by both Ms. Sutherland and her supervisor as part of the CFS Report.

[164] The Board pauses briefly to note that in the face of the Subject Member declining to participate in a joint interview with the Young Person, delegating the responsibility to CFS to determine if there is any criminal aspect, and taking no proactive steps to investigate the allegations against the Uncle, it is not appropriate to be casting blame on CFS for what transpired here.

[165] The Reply contests the assertion in the Submission that section 8.1 of the *Code of Conduct* does not require that the Subject Member have knowledge that he is providing false information, and that simply providing false information is sufficient for a contravention to be established.

[166] Referring to the Annotated RCMP Code of Conduct (page 23) (“Annotated Code”), the Reply notes that under section 8.1 there are examples provided, including that a member does “not knowingly” provide false, misleading or inaccurate information, and as such, an intent to falsely report must be established (which may be vestigial language from the older version of the *Code of Conduct*).

[167] The Reply also cites and relies upon *Commanding Officer of “K” Division and Constable Werboweski*, 2019 RCAD 06 at paragraph 57 (“*Werboweski*”) and the Conduct Measures Guide (“Measures Guide”) at page 62 for the proposition that a false report requires an intention to mislead, which is distinct from an inaccurate report based on third party information or a member’s incorrect or faulty understanding or perception.

[168] Based on the foregoing authorities, the Reply states that the Conduct Authority must prove an intention to deceive to establish an allegation of false reporting, and the apparent assertion in the Submission that the Subject Member ought to have known the information he reported was false is unreasonable and arbitrary, and “would mean that any honest mistake” would lead to a contravention regardless of intention.

[169] In summary, the Reply states that the Conduct Authority has failed to provide clear and convincing evidence on a balance of probabilities that the Subject Member “knowingly” provided a false statement and Allegation 4 must fail.

[170] Given that Allegation 5 was withdrawn, the Reply does not address it further.

[171] In closing, the Reply provides several further observations, and commences with an objection to the assertion in the Submission that the Board has an obligation to examine the conduct of the Subject Member as whole to determine whether it was discreditable, given: (1) Allegation 5 was withdrawn (which was the only allegation relying upon section 7.1 of the *Code of Conduct* (i.e., discreditable conduct)), and “the Board does not have jurisdiction to examine questions outside of the parameters of the Notice...”; and (2) an allegation must be established on specific facts and evidence with respect to that allegation, and not some overall judgment of the case on substance, although the approach proposed in the Submission may be adopted when determining the appropriate measures, such as in global sanctioning.

[172] The Reply also objects to the repeated assertions in the Submission that the conduct of the Subject Member put the Young Person at further risk of danger, asserting this claim is not supported by the evidence, and in fact the evidence demonstrates that CFS closed its file because

it considered that the Young Person was no longer in danger, which is confirmed in the CFS Report.

[173] Last, the Reply asks that the Board not consider two items in the materials: first, the opinion of Southern Alberta District that the Subject Member “deliberately lied” in the File to avoid conducting an investigation; and second, the comments attributed to a non-commissioned officer regarding the Subject Member at his new detachment which alleges there have been ongoing “issues” with the Subject Member and he is “quick to make things disappear”.

[174] The Reply asserts the foregoing comments are prejudicial, reflect prejudgement, are not supported by direct evidence, and/or were improperly included in the investigative stage and Conduct Report.

### **CAR Rebuttal**

[175] In response to the Reply, the CAR requested permission to provide a further written submission that would respect the principles applicable in such instances as outlined in *R. v. Krause*, 2 S.C.R. 466, and which was provided on June 19, 2019 (“Rebuttal”).

[176] The Rebuttal first addresses the assertion in the Reply that particular 4 (i.e., did not create a PROS file) is the central point of Allegation 1, and indicates Allegation 1 unambiguously states that it alleged the Subject Member failed to provide a complete, accurate and timely account, and the particulars simply provide the further detail.

[177] In this case, according to the Rebuttal, particular 4 provides a specific example of how section 8.1 of the *Code of Conduct* was contravened but “is not intended to form the entirety of the allegation” and to find otherwise would unduly narrow the scope of Allegation 1 which refers to failing to report.

[178] In addressing the assertion in the Reply that it has not been established that the Subject Member did not call CFS, the Rebuttal points out that the Direction was not simply to call CFS but was directed at obtaining specific information upon which to conduct a criminal investigation, which the Subject Member admitted was not done.

[179] Further, the Rebuttal states that Allegation 2 and the second aspect of the SUI Tasks outlined in Allegation 3 are separate and distinct and are not subject to the *Kienapple* principle, because Allegation 2 relates to neglect of duty (failure to investigate and report) and Allegation 3 relates to a failure to follow the Direction.

[180] In regards to Allegation 4, the Rebuttal asserts that the conduct board decision in *Werboweski* is distinguishable as it dealt with an allegation of providing false information in a signed affidavit which closely mirrored the criminal allegation of perjury and the consequent requirement to prove knowledge reflected a higher standard given the nature of the specific allegation, and therefore this decision is specific to its facts and not applicable in the present case.

[181] The Rebuttal further states that page 62 of the Measures Guide cited in the Reply applies to the measures phase and not the merit phase.

[182] Finally, the Rebuttal disputes the claim in the Reply that there was no risk to the Young Person due to the Subject Member's failure to investigate, as even although there was a safety plan in place to protect the Young Person as noted by CFS, there was a responsibility to investigate the criminal allegations against the Uncle to ensure the safety of the Young Person, and community more generally, and in this case the Young Person was still potentially exposed to the Uncle who had exhibited predatory behaviour.

#### **4. Merit**

##### **Context**

[183] Before addressing the merit of the Allegations, the Board notes that the purpose, objectives and intent of the new conduct regime, and in particular reforms to formal proceedings, have been articulated in the Principles section of the *Conduct Board Guidebook* (2017):

## 2. Principles

2.1 The Legislative Reform Initiative (LRI) was tasked with developing a modernized conduct process and engaged in broad-based consultations with a wide range of stakeholders and examined various internal and external reports and studies regarding the RCMP, as well as other police agencies, relative to dealing with instances of alleged misconduct by police officers.

2.2 The reforms adopted under the LRI were expressly based upon certain principles arising from a broad consensus and understanding among stakeholders that conduct proceedings, including hearings before a conduct board, are to be timely and not overly formalistic, legalistic, or adversarial.

2.3 As such, proceedings before a conduct board are not to be interpreted or understood as requiring highly formalized and legalistic practices and procedures akin to a formal court-like process, but rather will be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

2.4 In most respects, a conduct hearing will unfold much like a conduct meeting, except that a conduct board has certain authorities to compel evidence and give direction, when it considers it necessary, given it is dealing with a dismissal case. A conduct hearing is administrative in nature and will be led by the conduct board (and not the parties), and it has broad discretion to control its own process and give direction.

2.5 In support of this approach, the former right of parties to be afforded a full and ample opportunity to present evidence, cross-examine witnesses, and to make representations at a hearing were expressly removed from the *Royal Canadian Mounted Police Act*, R.S.C 1985, c. R-10 (as amended) (*Act*) (former subsection 45.1(8)).

2.6 Further, a conduct board will expressly rely upon an investigative report and supporting material in making findings and determinations. At the sole discretion of the conduct board, a witness will generally only be summoned to testify where the conduct board considers there to be a serious or significant unresolved conflict in the evidence and the testimony of the witness would be material and necessary in resolving that conflict.

2.7 The responsibility for determining whether the information in the investigative report and supporting material is sufficient to permit a determination of whether an allegation is established resides with the conduct board.

2.8 The conduct board may issue a direction for further investigation or order the production of further information or documents only where it determines that the additional investigation or information is material and necessary to resolving an outstanding issue in the conduct proceeding.



2.8 Finally, subject members are now required to admit or deny an allegation as early in the proceedings as possible and to identify any defences or evidence which they seek to rely upon, in order that the conduct board can effectively complete a conduct proceeding.

[184] More recently, responding to an assertion by the External Review Committee (“ERC”) in report C-017 (dated June 28, 2017), that the role of conduct boards in the new regime does not differ materially from the former or legacy discipline and adjudicative process, the Level II (appeal) Adjudicator in *Commanding Officer “J” Division v. Constable Cormier*, (dated November 20, 2017) (file 2016-33572) (“*Cormier Appeal*”) stated:

[132] .... With respect, this is a point of view I do not share. The amendments to the *RCMP Act* and the creation of the new conduct regime changed the nature of the role of conduct boards by enhancing their ability to actively manage proceedings and make conclusive determinations in a more informal and expeditious setting. In short, a conduct board is no longer reliant on the traditional to and fro presentation of evidence by the parties.

[133] A comparative analysis of a conduct board's knowledge of the case prior to the hearing, the form and presentation of evidence, and the management of witnesses provides a useful illustration.

[134] First, conduct boards now have comprehensive knowledge of the case before the hearing. In accordance with subsection 45.1(4) of the former *RCMP Act* (in effect prior to November 28, 2014), the only document provided to adjudication boards in the normal course was a bare notice of hearing containing the allegations and the particulars against the subject member. Now, conduct boards are provided with the notice of hearing, the investigation report, including witness statements and exhibits, an admission or denial of each alleged contravention of the Code of Conduct, the subject member's written submissions, any evidence, document or report the subject member intends to rely on at the hearing, as well as a list of witnesses submitted by the parties for consideration. The applicable provisions under the current process are the following:

*RCMP Act*

43(2) As soon as feasible after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.

*CSO (Conduct)*

15(2) As soon as feasible after the members of the conduct board have been appointed, the conduct authority must provide a copy of the notice referred to in subsection 43(2) of the Act and the investigation report to the conduct board and must cause a copy of the investigation report to be served on the subject member.

15(3) Within 30 days after the day on which the member is served with the notice or within another period as directed by the conduct board, the subject member must provide to the conduct authority and the conduct board

- a) an admission or denial, in writing, of each alleged contravention of the Code of Conduct[;]
- b) any written submissions that the member wishes to make; and
- c) c) any evidence, document or report, other than the investigation report, that the member intends to introduce or rely on at the hearing.

18(1) Within 30 days after the day on which the notice of hearing is served, the parties must submit to the conduct board a list of the witnesses that they want to have summoned before the board and a list of the issues in respect of which they may want to rely on expert testimony.

[135] In fact, under the former *RCMP Act*, in the absence of an admission by the subject member or evidence presented by the Appropriate Officer at the hearing, a finding of misconduct could not be established by an adjudication board. Conversely, in the current regime, by virtue of subsection 23(1) of the *CSO (Conduct)*, a conduct board can render a decision based entirely on the documentary record provided before the hearing should the parties choose not to make further submissions:

23(1) If no testimony is heard in respect of an allegation, the conduct board may render a decision in respect of the allegation based solely on the record.

[136] Second, the rules surrounding the presentation of evidence before conduct boards have changed. Previously, evidence was presented during the hearing:

[Repealed, 2013, c 18, s 29]

45.12(1) After considering the evidence submitted **at the hearing**, the adjudication board shall decide whether or not each allegation of contravention of the Code of Conduct contained in the notice of hearing is established on a balance of probabilities.

[Repealed, 2013, c 18, s 29]

45.13(1) An adjudication board shall compile a record of the hearing before it, which record shall include

- a) the notice of the hearing under subsection 43(4);
  - b) the notice of the place, date and time of the hearing under subsection 45.1(2);
  - c) a copy of all written or documentary evidence **produced at the hearing;**
  - d) a list of any exhibits **entered at the hearing;** and
  - e) the recording and the transcript, if any, of the hearing.
- [Emphasis added.]

[137] Under the current regime, in accordance with subsection 15(3) of the *CSO (Conduct)*, extensive information is filed with the conduct board prior to the hearing. Section 26 of the *CSO (Conduct)* reflects this change. While evidence and exhibits were previously produced at the hearing; now, available information and exhibits are produced beforehand and may be treated as evidence as a conduct board sees fit (see also, the long-standing powers granted by subsection 45(2) of the *RCMP Act*; and previously, section 45 of the former *RCMP Act*). This reality is demonstrated by the replacement of a specific reference to evidence produced at the hearing in former paragraph 45.13(1)(c) by a more general reference to any information provided to the conduct board in paragraph 26(c) of the *CSO (Conduct)*:

*CSO (Conduct)*

26 The conduct board must compile a record after the hearing, including

- a) the notice of hearing referred to in subsection 43(2) of the Act;
- b) the notice served on the subject member of the place, date and time of the hearing;
- c) a copy of **any other information provided to the board;**
- d) a list of any exhibits entered at the hearing;
- e) the directions, decisions, agreements and undertakings, if any, referred to in subsection 16(2);
- f) the recording and the transcript, if any, of the hearing; and
- g) a copy of all written decisions of the board.

[Emphasis added.]

[138] Lastly, the management of witnesses has also changed. While the adjudication registrar was previously obligated to issue a summons at the request of a party, pursuant to subsection 6(1) of the *Commissioner's*

*Standing Orders (Practice and Procedure)*, SOR/88-367 [*CSO (Practice and Procedure)*], conduct boards, in accordance with subsections 18(3) and 18(4) of the *CSO (Conduct)*, must provide the parties a list of witnesses they intend to summon. In addition, conduct boards must give reasons for accepting or refusing any witness that is requested by the parties. The applicable provisions in both the repealed and current regimes are the following:

*CSO (Practice and Procedure)* [Repealed, SOR/2014-293]

6(1) Any party requiring the attendance of a witness at a hearing shall forward the name of the proposed witness to the registrar who **shall** issue a summons on behalf of the board.

*CSO (Conduct)*

18(3) The board **must** establish a list of the witnesses that it intends to summon, including any expert in respect of whom a party has indicated an intention under subsection 19(3) to question, and may seek further submissions from the parties.

18(4) The board **must** provide the parties with a list of witnesses that it will hear and its reasons for accepting or refusing any witness on the list submitted by the parties.

[Emphasis added.]

[139] In all, the amendments to the *RCMP Act*, the repeal of the *CSO (Practice and Procedure)*, and the enactment of the *CSO (Conduct)* have meaningfully changed the nature of the role of conduct boards and, in particular, their authority to manage proceedings.

[185] The foregoing quotations, while somewhat lengthy, provide a clear indication of the new context in which conduct boards are intended to operate, which requires a conduct authority and subject member, and in particular representatives, to critically examine the evidence and circumstances as early as possible, as the default or mindset that most matters will simply, or must be, litigated in a formal hearing before a Conduct Board is no longer extant.

[186] In this case, the Representatives are to be commended for their proactive approach to proceeding without the requirement for witnesses and resolving a number of issues without requiring the intervention of the Board.

**Analysis**

[187] The Board reviewed the Conduct Report and supporting material, Response, as well as the Submission, Reply and Rebuttal in reaching a decision on merit on the Allegations.

[188] It is commonly understood that members of the RCMP, by the terms of their engagement, have voluntarily agreed to abide by a higher standard of conduct than that of the ordinary citizen, although this standard does not call for perfection (*The Queen v. White*, [1956] S.C.R. 154 at 158 (“*White*”). Furthermore, this agreement to abide by a higher standard of conduct covers both off, as well as on-duty behaviour.

*Allegation 1*

[189] Allegation 1 is framed around the Subject Member failing to provide complete, accurate and timely accounting as it pertains to the carrying out of his responsibilities by failing to “report alleged offences” brought to his attention by CFS, which is further particularized in two key paragraphs.

[190] Particular 2 notes that the Subject Member received Call 1 from Ms. Sutherland that contained information about the Young Person receiving cocaine and alcohol from her Uncle while watching pornography, and that the Uncle touched her in a sexual manner while making a sexualized comment.

[191] Particular 4 states that the Subject Member failed to create a PROS file contrary to 47.2 of the OM and section 8.1 of the *Code of Conduct*.

[192] Section 1.4. of OM 47.2 states that “An occurrence must be created within 24 hours of the information coming to the attention of the police.”

[193] The Subject Member denies Allegation 1.

[194] First, the Response and Reply both note that while a PROS file is to be created as described, it does not specify who is to responsible for creating the file.

[195] The Response and Reply further state that the experience of the Subject Member at the Detachment is that support staff create a file, and Corporal Robb confirms that PROS files can be generated by the Operational Communications Centre, or by support staff or a member in the Detachment who takes a phone call or counter complaint (i.e., someone attends the front counter of the Detachment).

[196] The other statements provided by present or former support staff at the Detachment support variations of the theme that they are responsible for creating PROS files, but ultimately, it is not the case that every PROS file is solely generated by support staff as seemingly suggested in the Response and Reply

[197] In this case, the Subject Member states he relied on the above practice or experience, and simply forgot about Call 1 from CFS when support staff did not generate a PROS file, until such time as he received the Email from Corporal Gulash.

[198] The Submission relies on section 8.1 of the *Code of Conduct* and OM 47.2. to assert that the Subject Member had an obligation to complete and submit timely accounts of his activities, such as the initial call from CFS.

[199] Further, according to the Submission, while PROS is the tool through which occurrences are documented and members fulfill their reporting duties, whether or not a PROS file was generated did not absolve the Subject Member from reporting Call 1 from CFS.

[200] In other words, the Submission is indicating that it was not the failure to open a PROS file as outlined in particular 4 that constituted the alleged misconduct, but rather the failure to report the alleged offences of the Uncle, but it is not explained how the Subject Member would otherwise do that without opening an occurrence file in PROS.

[201] In the Reply, the MR asserts that by adopting the foregoing position, the Submission has resiled from failure to create a PROS file (particular 4) as the essence of Allegation 1, and is now contending that failure to report is the essence of the misconduct, and relying on *Ward* and

paragraph 43(2)(b) of the *RCMP Act*, states the Response replied to the case-to-meet as set forth in the particulars.

[202] In other words, according to the Reply, the Response of the Subject Member addressed the misconduct articulated in particular 4, and based on the further information provided in the Response, the Conduct Authority has failed to establish a contravention based on a balance of probabilities.

[203] The Rebuttal of the CAR does not address *Ward*, and states that particular 4 is not intended to form the entirety of Allegation 1 and simply provides an example of how section 8.1 of the *Code of Conduct* was contravened, otherwise the scope of Allegation 1 would be unduly narrowed as it refers to failing to report.

[204] Second, the Response and Reply assert that the conduct outlined constitutes a performance issue rather than a breach of the *Code of Conduct*, which was already identified, addressed and resolved at the supervisory level by Corporal Robb, who dealt with the situation by having the Subject Member create the File, rather than proceeding on the basis of conduct.

[205] The Submission of the CAR states that Allegation 1 does not involve a performance issue due to the seriousness of the alleged criminal conduct by the Uncle.

[206] The Reply notes that the seriousness of the alleged misconduct of the Uncle is something to be addressed as an aggravating factor if Allegation 1 were established, and it is not a factor that determines whether Allegation 1 has been proven.

[207] The Rebuttal of the CAR does not address the argument of the Reply that Corporal Robb dealt with the failure to create the PROS file as a performance matter.

[208] The Response, Submission, Reply and Rebuttal do not address or provide any meaningful legal or analytical framework in determining whether behaviour involves performance versus conduct.

[209] The Board finds that the Subject Member was made aware by CFS during Call 1 of information that constituted potential criminal conduct by the Uncle that required documenting, but ultimately, Allegation 1 particularized the alleged misconduct of the Subject Member as failing to open a PROS file, and the Conduct Authority has failed to establish on a balance of probabilities that the Subject Member contravened OM 47.2 or section 8.1 of the *Code of Conduct* given the practices at the Detachment surrounding the opening of PROS files, and the fact that policy does not state who is responsible for opening an occurrence.

[210] In essence, Allegation 1 states that the Subject Member contravened section 8.1. of the *Code of Conduct* by failing to report the alleged offences of the Uncle, and particular 4 states this occurred by the failure of the Subject Member to open a file contrary to applicable O.M. policy.

[211] However, the wording of Allegation 1, by itself, does not provide sufficient detail to permit the Subject Member to know the case-to-meet, and in this case, particular 4 specifies that it was the failure to open a file, and it cannot be something more generic as postulated by the CAR.

[212] The very purpose of particulars is to provide details to a subject member in order that they can respond to what are often broadly stated allegations, and in this case, particular 4 focussed on the failure to open a PROS file, and the other particulars while noting Call 1 and other things that transpired, are not cast as elements of the Allegation 1 amounting to misconduct.

[213] While the Board has some reservations about the claim of the Subject Member that it was not his responsibility to open the PROS file, in this case, the obligation is one the Conduct Authority to establish on a balance of probabilities not just that a PROS file was not opened, but that it was the responsibility of the Subject Member to do so, and in light of the statements provided by Corporal Robb and other administrative staff, files are opened in more than one manner and by different individuals. And O.M. 47.1 does not, in fact, state who has the responsibility for opening an occurrence on PROS (unlike O.M. 2.6. and 4.1. which are explicit on who has what obligations).



[214] Moreover, the Conduct Authority has not addressed the argument in the Response and Reply that Corporal Robb, knowing that a PROS file was not opened, did not pursue conduct, but rather apparently addressed this failure as a performance matter.

[215] Based on the foregoing, the Conduct Authority has not established Allegation 1 on a balance of probabilities.

*Allegation 2*

[216] The Subject Member admits in the Response that he took “no investigative action” regarding the allegations against the Uncle, but claims he was “expecting feedback from Ms. Sutherland following the interviews she planned to conduct,” which later is amplified to him expecting a report from CFS.

[217] The Response admits that the Subject Member received Call 1 from Ms. Sutherland (particular 2), but denies stating there was no need for police involvement (particular 3).

[218] Whether or not the Subject Member did or did not decline to participate in a joint interview of the Young Person, it is clear that, he effectively delegated the responsibility to CFS to determine whether there was any criminality, which was inappropriate and a basic investigative failure.

[219] The statement in the First Entry that CFS conduct investigations every day and the police do not find out until after CFS finds something criminal, and that the Subject Member advised Ms. Sutherland that the police would “...conduct a criminal investigation if she deemed something worthy” (or as stated in the Second Entry if Ms. Sutherland “deemed a criminal offence took place...”) reveals a troubling approach to such investigations, which surprisingly did not result in any recorded censure from a supervisor in the File at the time.

[220] While the Response admits that the Subject Member took no investigative action, and asserts the justification or explanation that he was waiting for “feedback” or a “report” from CFS so he could determine the most appropriate course of action, the evidence and unfolding of events does not support that contention.

[221] The Board does not accept the explanation of the Subject Member that his course of action or ability to investigate the allegations against the Uncle was somehow contingent on the receipt of feedback or a report from CFS, particularly given the Email that was provided to the Subject Member after Call 1 advising that the actions of the Uncle had been confirmed.

[222] In other words, the Subject Member had the feedback he was expecting from Ms. Sutherland as communicated by the Email of Corporal Gulash, so there was no basis to the claim that the Subject Member had to wait for further information to determinate a course of action.

[223] While the Subject Member *may* not have had sufficient information to launch an investigation based on Call 1, he mostly certainly had that knowledge and obligation based on the Email reporting the information from Ms. Sutherland after interviewing the Young Person.

[224] This state of affairs is confirmed by the Second Entry, and most particularly the SUI Tasks, which makes no mention or reference to having to wait for feedback or a report from CFS, and proactively states that investigate steps and action are required (consistent with applicable policies).

[225] While during Call 1 the Subject Member may have asked for feedback or an update from CFS, that update was provided in the form of the Email, and any suggestion that the Subject Member was somehow waiting for a report from CFS when he opened the File, and made the First Entry and Second Entry, including the SUI Tasks, is not supported by the evidence, and contradicted by the Subject Member's own Second Entry on what was required.

[226] The simple fact is that despite receiving the Email, the express wording of the Second Entry and SUI Tasks, and receiving the Direction from Corporal Robb, the Subject Member took no investigative steps on the File in approximately 45 days, which given the alleged actions of the Uncle was a serious dereliction of duties, and complete failure to comply with the obligations outlined in O.M. 2.1. and 2.6 to promptly and thoroughly investigate such allegations.

[227] Any notion that the Subject Member was waiting for a “report” from CFS is not supported by the documentary evidence, and indeed, any suggestion of a report only arose after Call 2.

[228] In other words, the “waiting for a report” explanation by the Subject Member only seemed to manifest itself as the conduct investigation proceeded, and is inconsistent with the evidence, makes no sense given the wording of the SUI Tasks outlined in the File and/or reinforced by the Direction of Corporal Robb.

[229] The relevant policy provisions are absolutely clear on the priority and timeliness required when addressing allegations of sexual misconduct and other offences against young persons.

[230] In reading the Conduct Report, Response, Submission, Reply, and Rebuttal it is apparent to any reasonable person that the Subject Member failed to promptly investigate the serious offences alleged against the Uncle, and the Subject Member simply exploited the information conveyed by Ms. Sutherland in Call 2 that the CFS file was being closed as a basis to conclude the File without taking any investigative action.

[231] That this is so, is amply demonstrated by the fact that the Subject Member, in the face of what he knew in the Email that confirmed the offences alleged against the Uncle, took no apparent steps to reconcile the findings provided in the Email with the Subject Member’s reported interpretation and understanding of what Ms. Sutherland said in Call 2.

[232] Given the content of the CFS Report, and activities of CFS and Ms. Sutherland, it is inconceivable that she told the Subject Member during Call 2 that “...there was no Assaults or anything in that manner.”

[233] Even if the Board accepted, which it does not, the explanation of the Subject Member that he somehow misinterpreted what Ms. Sutherland stated or meant during Call 2, it is also inconceivable that a trained police investigator would not have a number of questions around how the allegations against the Uncle went from being sustained as elaborated in the Email to there being no assaults or anything in that manner and that no police action was required.

[234] The Board finds that the Subject Member was not waiting for any report from CFS during the timeframe he was obligated to conduct an investigation, and being charitable, such a claim is a mis-recollection, if not a fabrication.

[235] It has been established on a balance of probabilities that the Subject Member failed to investigate the offences alleged against the Uncle by the Young Person and as reported by CFS, and in so doing was negligent in the performance of duties.

### *Allegation 3*

[236] The essence of Allegation 3 is that the Subject Member disobeyed the Direction (in the form of the SUI Tasks), which the Subject Member denies, but then, somewhat contradictorily asserts Allegation 3 and its related particulars represent a performance issue.

[237] The Subject Member acknowledges he took no investigate action (as dealt with in Allegation 2), but it is the Subject Member's further explanation in the Response and Reply in relation to the Direction that: (1) he did communicate with CFS in the form of Call 2 and therefore met the first part of the Direction; and (2) while he did not take statements and conduct other investigative steps that formed the second aspect of the Direction, his explanation is that he was waiting for a "report" from Ms. Sutherland.

[238] The Board has already rejected the suggestion that the Subject Member was waiting for a report from CFS, and relies on that analysis here to find that it does not provide any explanation for his failure to take statements and take other investigative steps contrary to the Direction.

[239] The Board has closely scrutinized the documentary evidence, and there is no indication at any point that the Subject Member was waiting for any report from CFS to undertake the investigation and/or follow the Direction, and in fact, the File reports the opposite, indicating that based on the Email, which prompted the Direction and creation of the File, that there was a clear basis to undertake an investigation.

[240] Also of concern, is the Subject Member's claim that he met the first aspect of the Direction because he had in fact contacted CFS, and therefore met the requirements of this aspect.

[241] The Subject Member has attempted to parse the Direction into two aspects, and in so doing, while acknowledging he did not obtain statements or investigate, claims that he met the obligation to contact CFS, but the exact wording is that "When the [Subject Member] comes back to day shift on June 19th, [Subject Member] will call CFS to get the information [on] the [Young Person] and parents of the youth to add to file."

[242] First, it must be recalled that on June 12, 2017, the Subject Member had been possessed with the knowledge, through the Email, that the allegations against the Uncle had been confirmed by CFS, and in making the Second Entry on that date, the Subject Member further postpones getting information about the Young Person and parents for a further seven days until he is back on day shift.

[243] In other words, the File should have been assigned to another investigator during the Subject Member's absence in order that it could be handled in accordance with expectations outlined in the O.M.

[244] Second, the Subject Member, based on the Conduct Report, and his own interview, did not actually contact CFS on June 19, 2017, and in fact there was no apparent contact with CFS until Call 2, 38 days later.

[245] Third, while the Subject Member may have technically been in contact with CFS when Call 2 occurred, as pointed out by the Submission and Rebuttal, that was not in keeping with the Direction and concurrent requirements of applicable O.M. policy to undertake a prompt, timely, and thorough investigation.

[246] The Board has considered the assertion in the Response and Reply that the failure to follow Direction is, in effect, an element of failing to investigate under Allegation 2, or is duplicitous, but there is technically a legal and factual distinction between failing to investigate

and failing to follow the Direction, although the Board is mindful of the argument that, for purposes of measures, the Conduct Authority has somewhat artificially attempted to distinguish the conduct here as being distinct from the broader failure to investigate under Allegation 2.

[247] It has been established on a balance of probabilities that the Subject Member failed to follow the Direction of Corporal Robb and Allegation 3 has been proven.

#### *Allegation 4*

[248] The Subject Member denies Allegation 4, and that the Third Entry, while ultimately inaccurate, constituted his understanding at that time, and that he honestly believed when he drafted the Third Entry that Ms. Sutherland indicated "...that there was no Assaults or anything in that manner."

[249] According the Subject Member, as stated in the Response, that when Ms. Sutherland advised him during Call 2 that "she was closing her file", and although he "cannot remember the details she provided on why she was closing her file", he understood it to mean that the allegations against the Uncle were not substantiated.

[250] Setting aside, for the moment, that it was the responsibility of the Subject Member to investigate and determine whether the *criminal* allegations/offences were substantiated, and not CFS, it defies logic that the Subject Member could conclude as he did, based on Call 2, that because CFS was closing its file there was no assaults or anything in the manner, given the express content of the Email indicating that the allegations involving the Uncle were confirmed, which included the provision of drugs.

[251] However, the Third Entry goes further than just stating that CFS was closing its file, it specifically states that during Call 2 the Subject Member "learned that there was no Assaults [sic] or anything in that manner", which goes much further than a potential misunderstanding about what closing the CFS file meant to the Subject Member.

[252] Ultimately, the Board prefers the statement of Ms. Sutherland that she would never have said there was no assault or anything (B51, Lines 299-300) during Call 2, given the Subject

Member cannot recall the exact detail what was discussed in Call 2 (B102, Line 261), and it flies in the face of what was recorded in the Email, but most certainly would have prompted any reasonable person, much less a trained police investigator, to clarify what would have constituted a fundamental change in circumstances.

[253] Although the Subject Member accepts responsibility for not clarifying the information to prevent such a misunderstanding, the reality is that a competent investigator would have been impelled to clarify matters given the fundamental change in facts.

[254] The Reply asserts that, based on the Annotated Code, Measures Guide, and *Werboweski*, that section 8.1 of the *Code of Conduct* requires the Conduct Authority establish on a balance of probabilities that the Subject Member not only made a false, misleading or inaccurate statement in the Third Entry, but that he also “knew” that it was false or misleading and “appreciated the possible consequences of making it”, and it is not a question of what the Subject Member “ought to have known” (*Werboweski*, para. 56).

[255] The Rebuttal states that *Werboweski* is distinguishable because it dealt with allegations about false and misleading statements in an affidavit which closely mirrored a criminal allegation of perjury, which placed a higher standard on the conduct authority to prove knowledge.

[256] Unlike most provisions dealing with deceit in other jurisdictions, the wording of section 8.1 of the *Code of Conduct* does not make any reference to the knowledge of the member, and the adjudicator in *Werboweski* appeared to conclude that “knowingly” should be relied upon to narrowly construe such allegations, however, no authority, precedent or supporting analysis is cited for this interpretation, which appears to be influenced by the wording of section 45 of the former *Code of Conduct* in the repealed *RCMP Regulations*, SOR/88-361 which stated that “A member shall not knowingly or wilfully make a false, misleading or inaccurate statement...”

[257] On a plain reading, section 8.1 of the *Code of Conduct* does not contain a mental element such as intentionally, knowingly, or willfully, and it is not clear in *Werboweski* how the

adjudicator came to find that “knowingly” is included as an element or requirement in the analysis of section 8.1 of the *Code of Conduct*.

[258] It is generally known in police conduct matters that instances of false, misleading, or inaccurate statements (at least where the applicable conduct regime and code expressly state knowledge or intent requirements) are understood to capture more than just an intention to deceive, and there are generally three categories: (1) where the police officer knew the statements were false, misleading or inaccurate; (2) where the police officer was negligent, reckless or careless as to the validity of the statements being purveyed; and (3) where the police officer makes an honest but mistaken statement that ultimately turns out to be false, misleading, or inaccurate.

[259] The first two categories can ground a finding of misconduct, while the third generally will not result in a finding of misconduct, and it is the latter that the Response and Reply, explicitly or implicitly, reply upon to exonerate the Subject Member based on his “misinterpretation” of Call 2.

[260] It is also generally the case, and it is a requirement in this instance based on the expressing wording of s. 8.1 of the *Code of Conduct*, that the impugned statements must pertain to the performance of official duties, and it is not in doubt here that the Third Entry related to the Subject Member’s performance of duties and responsibilities and the conduct of an investigation, which satisfies the workplace responsibilities and reporting nexus.

[261] Section 8.1 of the *Code of Conduct* also requires that the statements be incomplete or inaccurate, and it is not in doubt that the Third Entry was incomplete or inaccurate, which the Subject Member has admitted.

[262] This, however, brings matters back to whether, as suggested by the MR, there is a requirement to establish an intention on the part of the Subject Member to be inaccurate in the Third Entry, or as posited by the CAR, there is no requirement to establish intent, or at most, that the Subject Member ought to have known the Third Entry was inaccurate.



[263] Although more robust submissions on this issue would have been preferred, in the end, it is unnecessary for the Board to resolve the question of the knowledge requirement of section 8.1 in the present case, because in the circumstances, it can be argued that there is evidence that the Subject Member either knew the Third Entry was inaccurate, or was grossly negligent, reckless or careless in making the claims he did in the Third Entry.

[264] Ultimately, it is a question of whether the Conduct Authority has established either scenario on a balance of probabilities.

[265] While the Reply points to various uncertainties of Ms. Sutherland about what was discussed during Call 2, the Subject Member's recollection is equally, if not more, uncertain about Call 2, and ultimately, the Board prefers Ms. Sutherland's statement that she never would have told the Subject Member there was no assault or anything of that manner, which is consistent with the CFS Report.

[266] While it does not appear in doubt that the Subject Member learned during Call 2 that CFS was closing its file, it is not reasonable for the Subject Member to maintain that this meant there were no assaults or anything else to investigate, given the different mandates of CFS and the RCMP in such matters.

[267] Further, even accepting that the Subject Member understood that there was no assault from Call 2, it did not address the other potential criminal actions of the Uncle such as supplying drugs to the Young Person.

[268] While the Summary does not form part of the particulars in Allegation 4, it does constitute evidence of the broader context in which to understand the Third Entry and the Subject Member's frame of mind, and in the Summary the Subject Member goes even further saying CFS "advised" there was "nothing further for the Police [sic] to deal with as all was dealt with" and that CFS indicated "no police involvement needed and there was nothing criminal to investigate."

[269] Ultimately, the Board finds that the Subject Member knew that the Third Entry was inaccurate or misleading, but even if the Board is wrong in this finding and/or accepted that the Subject Member did not knowingly make a misleading representation based on a misinterpretation of Call 2, he was grossly negligent, reckless or careless in making the Third Entry, as he took no apparent steps to clarify his understanding, which given the existence of the Email, is a step any reasonable person, much less a trained police officer, would have taken to reconcile information that the alleged inappropriate actions of the Uncle went from having occurred to involving “no Assaults [sic] or anything in that manner” and “no need for Police [sic] to investigate.”

[270] In finding Allegation 4 established, the Board is mindful that, like Allegation 3, this contravention is closely related to the overall circumstances of Allegation 2 regarding the failure to investigate.

#### *Allegation 5*

[271] The CAR withdrew Allegation 5 and the Board will not consider it further, other than to note that it has been properly withdrawn given that the particulars are essentially the same as those outlined in Allegation 1, Allegation 2, Allegation 3, and Allegation 4.

### **Conclusion**

[272] For the reasons outlined, the Board finds Allegation 1 is not established, and that Allegation 2, Allegation 3 and Allegation 4 are established. Allegation 5 has been withdrawn.

### **5. Measures**

[273] On October 7, 2019, a short phone conference hearing was held involving the Representatives and Subject Member.

[274] During the hearing, the Board confirmed the official language of choice was English for the Subject Member, that the Subject Member waived formal reading of the Allegations, and that the Subject Member and Conduct Authority had waived the requirement for personal service of

any decision or documents and would accept electronic service through their respect Representatives.

[275] Given the file involved personal circumstances and information relating to the Young Person, the Representatives agreed to the Board issuing an order restricting publication, which was read into the transcript and has been outlined on the first page of this decision.

[276] After providing a brief background, the Board then delivered an oral decision limited to the disposition of each of the Allegations, which was followed by a written decision (dated October 7, 2019), but not sent to the Representatives until October 14, 2019, as the Board was unexpectedly delayed in returning to Ottawa.

[277] The written decision was issued in order to provide the Representatives with the specific findings of the Board so that they could prepare written submissions on measures, and it was subject to the Board's discretion to make final editing, formatting, corrections and transitional requirements to deal with measures and complete the final decision.

[278] In concluding remarks, the Board noted that Allegation 2, Allegation 3 and Allegation 4 were closely linked in terms of time and circumstances, and the Representatives should take that into consideration when preparing submissions, and in addition to any relevant cases dealing with dismissal or financial penalties, should also consider providing the Board with decisions dealing with reductions to a lower rate of pay or other measures in similar circumstances.

[279] The Subject Member subsequently requested an opportunity to address the Board, and a further brief hearing was held on December 3, 2019, for that purpose, with agreement of the Representatives, and their agreement that the Subject Member was doing so without taking an oath or affirmation.

[280] The Subject Member apologized for his actions, and outlined a number of professional and personal circumstances for the Board, and expressed the desire for an opportunity to remain a police officer and prove himself ("Apology").

[281] The Apology was sincere, acknowledged that the Subject Member failed the Young Person, Detachment, the RCMP, and public, and his actions constituted a serious failure.

[282] The Board reaffirmed its earlier request that the Representatives provide any relevant decisions dealing with dismissal and financial penalties, and that they should also consider providing the Board with any decisions or information relative to dealing with reductions to a lower rate of pay or other measures in similar circumstances.

[283] A timeline for providing written submissions on measures was outlined by the Representatives in written communications, which was accepted by the Board, with submissions being completed on December 10, 2019.

### **Submissions**

#### *CAR Submission 2*

[284] On December 4, 2019, the CAR provided a written submission on measures (“Submission 2”).

[285] Submission 2 commences by seeking dismissal of the Subject Member pursuant to paragraph 45(4)(b) of the *RCMP Act* in the form of a direction to resign from the RCMP, and in default of the Subject Member resigning in 14 days, “a recommendation for dismissal” (emphasis added) from the RCMP (para. 1).

[286] Two observations arise from the foregoing, and the first is that a conduct board does not “recommend” the dismissal of a constable under paragraph (b), which is reserved for a Deputy Commissioner, rather a conduct board dismisses a regular member below the rank of Deputy Commissioner in default of resignation.

[287] The second is that it unclear why the Conduct Authority Representative Directorate (“CARD”) continues the practice of seeking a direction to resign under paragraph (b) rather than dismissal under paragraph (a), as a reasonably informed person would wonder why, as a matter of public policy, the RCMP would not seek dismissal (rather than a direction to resign) where it

considers the misconduct of a subject member to be so serious as to require a conduct board process which is reserved for dismissal cases.

[288] Submission 2 asserts that Allegation 2, Allegation 3, and Allegation 4 all pertain to the Subject Member's failure to investigate information received from CFS about conduct of the Uncle that constituted potentially serious criminal breaches against the Young Person, who was vulnerable, and it was the Subject Member's duty to protect the Young Person, and failure to do so risked "serious damage" to the reputation of the RCMP, requiring the "utmost repudiation."

[289] Citing the *Commanding Officer "H" Division and Constable Green*, 2017 RCAD 5 ("*Greene*") on the requirements for imposing conduct measures, Submission 2 asserts that educative or remedial measures are not appropriate in the present circumstances, and pursuant to the principles of *Ennis v. The Canadian Imperial Bank of Commerce* (1986) BCJ No. 1742 (Q.L.) (B.C.S.C.) ("*Ennis*"), approved by the Commissioner (as the Level II) in *Inspector Lemoine and The Appropriate Officer "C" Division*, 12 A.D. (4th) 192 ("*Lemoine*"), the Subject Member has repudiated his contract of employment and the presence of good character or rehabilitative potential are not sufficient to overcome the need to terminate employment in the present circumstances given the violation of trust and confidence by the Subject Member.

[290] Submission 2 proceeds next to address, at some length, the application of the *Kienapple* principle, noting this issue had been raised by the Board and MR "throughout the proceedings."

[291] It is not clear to the Board why Submission 2 would raise *Kienapple* at the measures phase, as Allegation 5 was withdrawn by the CAR after this issue was discussed, and the decision on merit already addresses these points.

[292] However, if Submission 2 was responding to the observation of the Board that Allegation 2, Allegation 3 and Allegation 4 deal with conduct that is closely related in time, and in the context of the single File, based on the Allegations presented in this proceeding, and others before this Board, it is fair to say that aside from technical arguments about distinct delicts or "evil[s]" (as quoted by Submission 2), it is not unfair to observe there is a tendency by CARD to

specify multiple allegations to artificially separate out specific acts rather than handling the acts as part of the particulars in more a practical and single allegation.

[293] Based on the Measures Guide (p. 23), Submission 2 states that, based on the findings of the Board, Allegation 2 falls within the aggravated range (“ineptitude, laziness, or contempt causes the loss of serious criminal charges against an accused...or puts the organization at risk”) of nine to 30 days.

[294] Submission 2 states that the Subject Member’s neglect put the vulnerable Young Person at further risk and discredited the RCMP with CFS and the public.

[295] Although the *Adjudication Board in Appropriate Officer “K” Division and Constable Swain*, (2007) 1 AD (4<sup>th</sup>) 77 (“Swain”) imposed a reprimand and seven day financial penalty for failing to investigate a complaint of unwanted sexual touching of a 17 year old female, Submission 2 asserts the penalty does not apply here because: (1) it arose out of a joint submission under the old discipline process, (2) it does not represent an appropriate sanction, (3) the Young Person here is younger, and (4) it involves touching and drugs, making the neglect of duty much more severe.

[296] Submission 2 also cites *Commanding Officer “E” Division and Constable Hedderson*, 2018 RCAD 19 (“Hedderson”) (incorrectly cited as “K” Division) as support for an aggravated range based on the fact the conduct board found, in part, that vulnerability was an aggravating factor in that case.

[297] With respect to Allegation 3 (failing to follow direction), Submission 2 relies on the Measures Guide for measures in the aggravated range (11 days to dismissal) because the conduct of the Subject Member compromised an investigation into serious criminal allegations against the Uncle and/or placed the Young Person at risk of being re-victimized.

[298] Although the conduct board in *Commanding Officer “T” Division and Corporal Jenkins*, 2018 RCAD 4 (“Jenkins”) found that a contravention of s. 3.3 of the *Conduct of Conduct* only

merited measures in the normal range, it noted that compromising an investigation or placing individuals at risk merited the aggravated range (para. 20).

[299] *Commanding Officer “E” Division and Constable Goodyer*, 2018 RCAD 13 (“*Goodyer*”) (incorrectly cited as 2018 RCAD 19) is also cited in Submission 2 as support for an aggravated range of measures, as the conduct board found failure to follow direction twice was aggravating, even although it did not place individuals at risk or compromise an investigation.

[300] Submission 2 asserts that Allegation 4 (misleading report) warrants measures in the normal range of sanction (30 days at the low end and includes dismissal) (para. 27), noting such contraventions are extremely serious, and distinguishes the example provided in the Measures Guide which states that falsely stating a member attended a scene she or he did not may present mitigating factors that justify a financial penalty rather than dismissal, depending on the circumstances (p. 67).

[301] The distinction in the present case, according to Submission 2, is that the CFS reported potential criminal misconduct, the vulnerability of the Young Person, and the “consequences of the conduct (closing the file when criminal charges are warranted)”, which elevate the Subject Member’s misconduct.

[302] Submission 2 notes that in *Commanding Officer “E” Division and Constable Rasmussen*, 2018 RCAD 14 (“*Rasmussen*”) the conduct board emphasized the importance of accurate accounting by police officers in order to ensure efficient and effective operations, and compromise or loss of confidence in a member’s reputation for telling the truth seriously undermines police effectiveness, which in that case resulted in dismissal.

[303] In terms of aggravating circumstances, Submission 2 argues first that the findings of the Board reveal a lack of honesty and integrity on the part of the Subject Member, noting that in *Appropriate Officer “H” Division and Constable Edwards*, (2015) 15 A.D. (4<sup>th</sup>) 331 (“*Edwards*”) the adjudication board found honesty and integrity, core values of the RCMP, were contravened when the member lied to supervisor on two occasions, which spread to other lies to

cover other matters, although dismissal was not imposed for the six allegations that were substantiated, based on the joint submission on sanction.

[304] Second, in aggravation, Submission 2 reiterates that the Young Person was vulnerable and that she was exposed to “the risk of future criminal acts while the complaint [of CFS] went uninvestigated” (para. 38), and contrary to clear policy on investigating sexual offences, the Subject Member took no investigative action, which was “inexcusable”.

[305] Third, Submission 2 states that the misconduct involved an extended period, in that it took place over 45 days, although it is conceded that it “deals largely with one set of facts” (emphasis added), and the Subject Member had multiple opportunities to correct his approach, but instead filed a false report to close the File, all of which violated the RCMP’s trust.

[306] Fourth, although the CAR acknowledges being aware that no evidence regarding the real or potential damage to the RCMP’s reputation with CFS has been brought forward, Submission 2 asks the Board to take notice of the fact that the breaches of the *Code of Conduct* “have an obvious negative impact.”

[307] In this regard, Submission 2 points to the statement of Corporal Gulash in the Conduct Report about the good, and ongoing, working relationship with CFS.

[308] Fifth, Submission 2 indicates “[i]t is not controversial that the public relies on the RCMP members to keep the most vulnerable persons in society safe from exploitation”, and in this case, the Subject Member has breached the public trust, and that the public would have great “shock and dismay” if the facts of this case were to come to the attention of the public, thereby putting the RCMP’s “reputation at significant risk”.

[309] In addition, Submission 2 states the reputation of the RCMP was put at further risk or embarrassment by the possibility of the Subject Member “potentially” being involved in the criminal proceeding against the Uncle, as this “could have led to the [S]ubject [M]ember being called as a witness to explain the delay” (para. 48).



[310] Sixth, although the Subject Member “hinted” at past trauma and work stress during the Apology before the Board, Submission 2 notes that no expert medical testimony or evidence has been introduced to “suggest his judgment was compromised by a medical condition.”

[311] Finally, Submission 2 posits that the requirements of reporting a disciplinary record to Crown Counsel under *R. v. McNeil*, 2009 SCC 3 (“*McNeil*”) is an aggravating factor given the administrative requirements and burdens it imposes on the RCMP.

[312] In conclusion, Submission 2 posits that the appropriate range of measures “includes dismissal”, which is supported by the Conduct Authority, the Measures Guide, and existing decisions.

#### *MR Reply 2*

[313] On December 6, 2019, the MR furnished a reply to Submission 2, along with supporting documents and information, which, at the request of the Board, was further supplemented with applicable decisions on December 9, 2019 (collectively, “Reply 2”).

[314] Citing the Measures Guide, Reply 2 commences by noting that the imposition of measures is meant to be rehabilitative rather than punitive, and dismissal is reserved for the most “serious and egregious cases where there is a certainty that the subject member cannot be rehabilitated or the misconduct makes it untenable for the subject member to continue employment”, and that proportionality to the nature and circumstances of a contravention is emphasized in paragraph 36.2(e) of the *RCMP Act*.

[315] Reply 2 deals with the application of the *Kienapple* principle in a cursory fashion by making three points: first, noting it was raised by the MR with respect to Allegation 5, and subsequently the CAR withdrew Allegation 5; second, the Board in the decision on merit did not accept that Allegation 3 derived from Allegation 2, but did note the artificiality around distinguishing between the conduct of disobeying direction to investigate (comprising Allegation 3) and the broader failure to investigate (under Allegation 2); and third, the Board orally and in

the decision on merit requested that the Representatives consider the fact that Allegation 2, Allegation 3 and Allegation 4 were closely related in time and circumstances.

[316] Reply 2 states that the foregoing was not interpreted as invitation to re-examine *Kienapple* with respect to the Allegations, but rather a direction by the Board to consider the foregoing in determining the most appropriate measures for Allegation 2, Allegation 3 and Allegation 4, given the context.

[317] As a consequence, Reply 2 submits that Allegation 2, Allegation 3 and Allegation 4 derive from the same circumstances which should be assessed as neglect of duty, and should attract a global sanction.

[318] Referring to the definition of “integrity” contained in Black’s Law Dictionary (1979, p. 727), Reply 2 disagrees with the assertion that the Subject Member actions lacked honesty and integrity, as they were the result of negligence rather than wilful deceit (i.e., the misconduct occurred due to negligence not questionable moral principles or a character flaw).

[319] Reply 2 also disagrees with the assertion that the reputation of the RCMP with CFS has been damaged, given: (1) Submission 2 concedes there no evidence of reputational damage; (2) “there is absolutely no holding of any evidence that supports this claim”; and (3) the comments of Corporal Gulash indicate there continues to be a good working relationship with CFS not that it was damaged due to the misconduct of the Subject Member.

[320] Although no medical evidence has been presented to explain the Subject Member’s actions, contrary to the suggestion of Submission 2, Reply 2 states that is not an aggravating factor for purposes of measures, but rather absence of a mitigating factor.

[321] In relation to *McNeil*, while Reply 2 accepts it will impose an administrative burden on the RCMP, this factor should be given limited weight as expressed by the Board in *Goodyer* (at para. 427).

[322] Reply 2 does not contest that the Young Person was vulnerable, that the conduct took place over a 45 day period, and that the RCMP’s reputation to the public is at risk are

aggravating factors, but counters that the imposition of appropriate conduct measures short of dismissal can preserve or restore the public trust.

[323] Although Reply 2 proposes a global sanction for Allegation 2, Allegation 3, and Allegation 4, guidance can be provided by determining the range of measures for each of the substantiated Allegations.

[324] Given the Subject Member's neglect of duty was serious, and had serious implications, for which he has taken full responsibility, Reply 2 submits that the aggravated range (nine to 30 days) is appropriate, given dismissal is not identified as a measure under aggravated and past decisions have accepted that a significant financial penalty can serve as a deterrent.

[325] In *Commanding Officer "E" Division and Constable Cull*, 2018 RCAD 7 ("*Cull*"), Reply 2 notes the subject member received a penalty of 50 days of loss of pay for mishandling eight files over a period of four months, which included failing to properly document files, concealing the failure to properly document PROS occurrences, failing to take necessary steps to ensure accuracy of the information entered on PROS, approving his own tasks, failing to respond to calls for service and not investigating those calls, failing to follow up on files, and failing to take statements from witnesses.

[326] Notably, Reply 2 points out one of the files in *Cull* involved the failure to investigate and take statements in a sexual assault complaint, a file which the subject member concluded himself.

[327] Reply 2 asserts there are "striking resemblances" between the circumstances in *Cull* and the Subject Member's circumstances, except that the Subject Member only neglected one file over 45 days, not multiple files over a longer period.

[328] In *Hedderson*, the Board imposed a forfeiture of 15 days of pay where the subject member failed to diligently perform his duties and take appropriate action to aid a vulnerable person involved in a violence in relationship file and had expressed concern for her safety, however Reply 2 notes the Board indicated that the penalty would have been more significant

had it not been for the order for dismissal of the subject member, which is interpreted to mean a higher financial penalty, but not dismissal.

[329] In *Commanding Officer "D" Division and Constable Poapst*, (2013) 13 AD (4<sup>th</sup>) 183 (*"Poapst"*), the adjudication board found in a contested hearing under the old discipline process that three days of pay addressed the failure of the member to properly investigate a complaint of domestic violence, which included failing to attend the scene and failing to obtain statements or gather evidence (a complaint which was subsequently investigated properly and led to criminal charges against the suspect).

[330] Addressing *Swain* (reprimand and seven days loss of pay for failing to investigate a complaint of unwanted sexual touching), Reply 2 concedes that joint proposals are given limited weight, but rejects the suggestion in Submission 2 that the negative impact in the present proceeding is greater, arguing that both cases involve equally serious misconduct.

[331] Similarly, Reply 2 notes in *Commanding Officer "H" and Constable Caldwell*, (2007) 1 A.D. (4<sup>th</sup>) 123, an adjudication board accepted a joint proposal of a reprimand and forfeiture of seven days' pay where the member failed to investigate a sexual assault complaint.

[332] In *Commanding Officer "J" Division and Constable Lawless*, (2007) 32 A.D. (3d) 292 (Cmr.), Reply 2 notes the Commissioner allowed an appeal in a file involving neglect of duty and making a false statement and reduced the sanction from an ordered resignation to 18 days loss of pay, stress management training, and consideration for a transfer, finding that member would benefit from an opportunity to succeed.

[333] With respect to Allegation 3, Reply 2 agrees that because an investigation was impacted, the Subject Member's actions fall within the aggravated range (11 days to dismissal), but notes there is a wide range of possible outcomes below dismissal.

[334] Adverting to *Goodyer*, Reply 2 notes that it involved "blatantly disobeying orders on two occasions", and in the present case, the Subject Member did not follow the "one general direction to investigate."

[335] Noting that Submission 2 cited *Jenkins*, Reply 2 states that the conduct board imposed a 10 day loss of pay for failing to respect a directive in a letter of expectation and 10 days loss of pay for making a false and misleading statement, and in doing so, reaffirmed that a member must be unfit to remain a police officer to support dismissal, and that measures must be proportionate.

[336] Although noting that the Board found the Subject Member knew that the Third Entry was inaccurate and misleading, Reply 2 submits “the contravention occurred in a context of gross negligence...where he was not attempting to mislead or trying to conceal a conduct or mistake” (para. 18), which is a distinction of import based on *Commanding Officer “K” Division and Constable MacNeil*, 2016 RCAD 5 (“*MacNeil*”), where the conduct board found that although the subject member “modified his official version of the somewhat minor event” to avoid showing he did anything wrong, the supervisor was already aware of the circumstances being addressed in the report.

[337] Reply 2 notes the conduct board in *MacNeil* accepted a joint proposal and imposed a sanction of 10 days loss of pay under the mitigated range, which may make the decision of limited weight, but argues that the principles remain relevant.

[338] Reiterating that the Third Entry resulted from negligence rather than deceit, Reply 2 asserts it should be in the mitigated range, and although the Board “finds that there is no requirement for intent in order to establish the allegation”, further submits “that the lack of malicious intent, to mislead or to deceive, in this case, may be considered as a distinguishable element to the other conduct board decisions referenced” in Submission 2 (para. 21).

[339] The Board pauses briefly to note that Reply 2 may have mis-interpreted the Board’s comments, as it did not indicate there is “no requirement for intent” to establish Allegation 4, but rather highlighted that this element may need to be addressed at some point, but intent did not have to be resolved in the present case because the Subject Member knew the Third Entry was inaccurate or was grossly reckless or negligent about the content of the Third Entry.

[340] While Reply 2 concedes that the Subject Member's actions were serious in nature as it compromised police operations, it distinguishes *Rasmussen* based on the fact it involved two false reports in order to conceal misconduct of taking firearms for personal benefit.

[341] Reply 2 considers *Edwards* to be "irrelevant" as it involved a member lying to supervisors on multiple occasions, misusing an RCMP vehicle, lying about the circumstances surrounding a motor vehicle accident, and other false claims.

[342] Turning to mitigating factors, Reply 2, citing the Measures Guide, acknowledges that while not a justification or excuse meriting absolution for misconduct, such factors can help explain or lessen the gravity of a contravention.

[343] First, it is noted that the Subject Member cooperated with the investigation and willingly provided a statement of his version of events.

[344] Second, the Subject Member admitted Allegation 2 in the Response, which provided some expedition (a factor recognized in *Goodyer*), and Allegation 3 and Allegation 4 are part of the broader negligence exhibited by the Subject Member.

[345] Third, the Subject Member offered "a sincere and heartfelt apology" to the Board, he is "genuinely remorseful" for his conduct, "took responsibility for his actions", did not blame anyone else, and recognizes that he let everyone down.

[346] Fourth, the Subject Member has acknowledged learning from this experience, which shows he understands the gravity of his misconduct, and an indicator of a minimal likelihood of recidivism, especially given the paucity of evidence that he cannot be rehabilitated.

[347] Fifth, the Subject Member had no record of prior discipline or misconduct.

[348] Sixth, the Subject Member has 12 years service, is an asset to the RCMP, and between 2007-17, has worked in multiple small detachments in both "D" Division and "K" Division.

[349] Seventh, nine Performance Reports between 2007-08 to 2017-18 (collectively, “Performance Reports”), particularly 2013-14 and 2015-16, reflect that the Subject Member is a hard worker, well respected, a valuable asset, and has no issues with honesty or integrity.

[350] Eighth, Allegation 2, Allegation 3, and Allegation 4 arise from the same circumstances, which is an isolated incident and not reflective of a character flaw, something that is supported by a Performance Report from 2007-08 that notes his investigations are well documented and thorough, among other positive features, which is further confirmed in Performance Reports from 2010-11, 2012-13, and 2015-16, and Performance Report 2017-18 (completed *after* the events comprising the present matter and his transfer to Raymond Detachment) documents the Subject Members good investigate practices, including a sexual assault investigation.

[351] Ninth, Reply 2 relies upon nine reference letters from members (who were aware of the Allegations and/or findings of the Board), who were former co-workers, and one supervisor, which attest to the Subject Member’s strong work ethic, positive attitude, commitment, support (in difficult personal and/or professional circumstances), leadership, and trust (“Reference Letters”).

[352] Tenth, the Subject Member has drafted an apology letter (included in Reply 2) to the Young Person and her family (“Draft Apology”), which is meant to be provided with the Board’s permission, because he is prohibited from making contact with anyone involved in this matter (likely as part of the suspension).

[353] Eleventh, Reply 2 asserts the Detachment at the material time was understaffed with a high volume of calls causing “the members to work under tremendous pressure”, which is a mitigating factor as it can lead to mistakes or poor decision making.

[354] Finally, it is submitted by Reply 2 that the Subject Member had no malicious intent.

[355] In conclusion, Reply 2 states dismissal is not appropriate as the mitigating factors far outweigh the aggravating factors in this case, and that a global sanction of: (1) a reprimand, (2)

35 day financial penalty, (3) one year working under close supervision, and (4) two years of ineligibility for promotion is appropriate.

*CAR Rebuttal 2*

[356] On December 10, 2019, the CAR provided a rebuttal to Reply 2 (along with supporting cases on December 11, 2019) (collectively, “Rebuttal 2”).

[357] Rebuttal 2 reaffirms its view that dismissal is the more appropriate measure, but notes “the Conduct Authority is also aware that conduct measures short of dismissal are within the ranged to be considered by the Conduct Board...”, and if the Board determines dismissal is not appropriate suggests the Subject Member’s conduct “is deserving of a strong message of repudiation and requires [a] significant penalty.”

[358] Whether or not there is a misapprehension about the application of *Kienapple* to the measures phase, Rebuttal 2 asserts Allegation 2, Allegation 3, and Allegation 4 address specific breaches of the *Code of Conduct* and require “repudiation”, and as such, the Board should apply measures for “each individual breach” and not global measures.

[359] Although Reply 2 asserts there is no evidence of damage to the RCMP’s relationship with CFS, Rebuttal 2 requests that the “Board take notice of the obvious impact that the conduct of the [S]ubject [M]ember would have on such a relationship”, as it is “an obvious consequence”, and posits that Reply 2 (citing para. 19) does not contest that the RCMP’s reputation to the public is at risk in this matter (which more specifically is para. 19 of part B of Reply 2 (as it restarts the paragraph numbering at 1 under part C, which is somewhat confusing)).

[360] Rebuttal 2 confirms agreement with Reply 2 that the aggravated range of measures is appropriate for Allegation 2 and Allegation 3, but there is disagreement regarding the appropriate range of measures for Allegation 4 (Reply 2 asserts the mitigated range (11 days to 29 days) and Rebuttal 2 the normal range (30 days to dismissal)).

[361] Rebuttal 2 argues that Reply 2 is incorrect in asserting that the Board did not find an intent to mislead or deceive by the Subject Member and that he was simply negligent, noting at



para. 265 of the decision on merit the Board found the Subject Member “knew” that the Third Entry was inaccurate or misleading, which at the very least puts the matter at the normal range of measures according to Rebuttal 2.

[362] Rebuttal 2 distinguishes *Cull*, *Hedderson*, and *MacNeil*, stating that the level of vulnerability of the Young Person, criminality alleged, involvement of CFS, and the degree of risk to the RCMP’s reputation are more significant in the present case.

[363] More particularly, Rebuttal 2 states that *Cull* is clearly distinguishable, as the criminal allegations were unfounded in that case, and the measure addressed in Reply 2 was one that occurred in the context of multiple measures for many different allegations, and finding that dismissal was not appropriate, the conduct board was faced with applying measures which would “fall short of a threshold where dismissal is required.”

[364] Rebuttal 2 also asserts that decisions from the old discipline system do “not reflect the seriousness with which crimes of a sexual nature are dealt with in the present day RCMP”, and they do not reflect the substantial risk that such negligence poses for the RCMP.

[365] With respect to mitigation, while Reply 2 asserts contrition and admission of fault, which Rebuttal 2 accepts to a certain limit, it is pointed out that the Board noted the Subject Member did attempt to cast some blame on CFS (at para. 160), which does not reflect an acceptance of full responsibility by the Subject Member.

[366] Rebuttal 2 dismisses the Draft Apology as “hypothetical, self-serving and in no way mitigates against the misconduct...”, and although the CAR does not represent the RCMP in civil litigation matters, recommends that the Board remove the Draft Apology from the record.

[367] Although Rebuttal 2 is critical of the *Cull* decision, it adopts it as helpful in providing a framework for applying measures for multiple instances of serious misconduct where dismissal is not adopted, in particular the application of the maximum three year ineligibility for promotion.

[368] In closing, if the Board chooses not to impose dismissal, Rebuttal 2 poses the following measures based on the substance of Allegation 2, Allegation 3 and Allegation 4, the aggravating and mitigating factors, the Measures Guide, and relevant decisions: Allegation 2 (20 days based on *Hedderson* plus five days); Allegation 3 (15 days plus five days based on *Jenkins* and minus five days based on *Goodyer*); and Allegation 4 (30 days which is the lowest end of the aggravated range based on the mitigation outlined in Reply 2); and an additional measure of ineligibility for promotion for three years.

### **Analysis**

[369] The Board has given careful consideration to Submission 2, Reply 2, and Rebuttal 2, and related supporting documentation, decisions, and authorities, and as these materials outline, there are several guiding considerations relating to the imposition of measures for misconduct in policing, and the RCMP in particular.

[370] First, having established Allegation 2, Allegation 3, and Allegation 4, the Board is obliged pursuant to paragraph 36.2(e) of the *RCMP Act* and subsection 24(2) of the *CSO (Conduct)* to impose measures that are proportionate to the nature and circumstances of the contraventions of the *Code of Conduct*, and where appropriate, that are educative and remedial rather than punitive.

[371] Second, the framework for determining the appropriate measures in a specific case requires a conduct board to first consider the range of measures that may apply to the misconduct that has been established, and second, aggravating and mitigating factors must then be taken into account, at which point the measures to be imposed are determined in the specific case before the conduct board.

[372] Third, a conduct board is not bound by previous decisions of other adjudication or conduct boards, but if similar in nature, they do help to establish the range of measures applicable to established misconduct, as the principle of consistency in imposing measures is to ensure fairness and that similar forms of misconduct are treated similarly.

[373] Fourth, the Measures Guide is available to provide guidance on considerations around the imposition of measures, but it is just that, a guide, and not binding or determinative, nor does it necessarily address every conceivable form or category of misconduct, or subsets thereof.

[374] Fifth, generally speaking, aggravating factors are those that exist above or beyond the essential constituents of the misconduct itself (normally found in the allegation or accompanying particulars or as determined by a conduct board) (*Commanding Officer "J" Division and Constable Cormier*, 2016 RCAD 2 at para. 89).

[375] Sixth, police officers hold positions of trust, and are held to higher standards of behavior (*White*).

[376] In reviewing Submission 2, Reply 2, and Rebuttal 2, the Board felt in some instances more meaningful analysis on the application of the decisions in the context of the present circumstances should have been provided.

[377] Submission 2 appears to request the global sanction of dismissal, and Reply 2 articulates the view that certain global measures, short of dismissal are sufficient to address Allegation 2, Allegation 3, and Allegation 4.

[378] Rebuttal 2 continues to reflect a global request for dismissal, but ultimately concludes with alternative proposed measures for Allegation 2, Allegation 3 and Allegation 4, if dismissal is not imposed.

[379] There is an apparent consensus as between Rebuttal 2 and Reply 2 that the range of measures, based on the Measures Guide, for Allegation 2 (neglect) is in the aggravated range (nine to 30 days penalty), and that the range of measures for Allegation 3 (failure to follow direction) is also in the aggravated range (11 days to dismissal).

[380] As briefly noted above, in the experience of the Board, there has been a tendency within CARD to attempt to dissect situations involving alleged misconduct of a member into as many potential discrete or technical contraventions as possible, which translates into multiple allegations in a Notice of Conduct Hearing that are beset by repetitive particulars that only

distinguish the alleged contravention from another contravention by means of a single paragraph or turn of phrase, and the Allegations in the Notice here are, to a large degree, reflective of that approach.

[381] Indeed, Allegation 5, before it was withdrawn, was simply a compilation of the same language and particulars contained in Allegation 1, Allegation 2, Allegation 3, and Allegation 4, being distinguished as discreditable conduct.

[382] Further, Allegation 1, although not established, was simply one element of the ongoing neglect of investigation of the Subject Member that was further dissected in Allegation 2 and Allegation 3, albeit technically phrased to justify distinct delicts, and these really ought to have been treated as the constituent elements or particulars of neglect under one allegation rather than three.

[383] In the criminal realm, this is commonly referred to as “over-charging”, and rather than focussing on making technical or artificial distinctions to justify multiple allegations, the CARD ought to look at the broader nature and circumstances of the misconduct, and where it forms part of a basically singular event or matter, formulate contraventions as such.

[384] Simply put, in the context of the neglect presented by the circumstances of this case, the CARD would have been better served by proceeding with one allegation that particularized the elements of failing to open a file, not conducting an investigation, and not following direction, which would have accorded more closely with obligation to see that justice is done, rather than pursuing the substantiation of multiple allegations relating to the same circumstances as part of, presumably, amplifying the case for seeking dismissal.

[385] While, for purely technical reasons, the Board did not find a contravention of the rule against multiple allegations for the same misconduct as part of determining merit, for purposes of measures, the Board considers Allegation 2 and Allegation 3 to form part of the ongoing circumstances involving the File and do not justify individually imposing measures at the highest range as if they occurred in complete isolation.

[386] Allegation 2 forms the heart of the misconduct relating to the failure to investigate the information provided by CFS, and Allegation 3, for purposes of determining the appropriate measures, as pointed out by Reply 2, is interconnected and forms part of the same timeframe and circumstances of the overall neglect in the File.

[387] In terms of aggravating factors, the Young Person is appropriately considered vulnerable, and the failure to investigate by the Subject Member is serious.

[388] However, Submission 2 and Rebuttal 2 did not address the fact that CFS was actively involved in taking steps to protect the Young Person, and did, in fact, put a framework in place to ensure that protection, which lessens to some degree the aggravating element in this specific circumstance, a feature not present in some of the decisions relied upon by Submission 2 that involved the failure to investigate.

[389] The fact that the information reported by CFS related to potential criminal offences by the Uncle is also an aggravating factor, as is the fact that the Subject Member took no real steps over 45 days.

[390] While Reply 2 is correct that there is no direct evidence the reputation of the RCMP generally, or in relation to CFS in particular, has been tarnished or adversely impacted, the simple fact that the circumstances are not known to the public at large, does not negate the fact that a reasonable person would find that the actions of the Subject Member adversely impacted the reputation of the RCMP, sufficiently so, at least, to be considered a factor in aggravation.

[391] Indeed, when interviewed, Ms. Sutherland, an employee of CFS, stated she would be “shocked” if there had been no follow up with the Young Person or family by the RCMP (B53).

[392] While *McNeil* is an aggravating consideration, in the present case, as the Board noted in *Goodyer* (at para. 428), it is not one of significant weight, as the reality is that there is some administrative burden that attends the legal obligation that the Subject Member and RCMP now have to disclose the misconduct and attendant measures, and it may limit somewhat potential transfers or positions for some period of time.

[393] In terms of mitigation, based on the Reference Letters and Performance Reports, it is clear that the Subject Member has been a positive influence and productive member during his service (of approximately 11 years at the time of suspension), and has no prior disciplinary sanctions or conduct measures.

[394] While to some degree the Subject Member has taken responsibility for what transpired, it is somewhat conditional in that, even as late as Apology, he believes it was more of a misunderstanding or failure on his part to ask the right or sufficient questions, which does not fully correlate with the findings of the Board.

[395] In other words, while the Apology to the Board, which was sincere, is a mitigating factor, the Board felt there was some degree of lack of awareness or recognition by the Subject Member that the Board do not fully accept the Subject Member's explanation(s).

[396] However, it is not in doubt that the Subject Member is remorseful and recognizes his failings with respect to this file, and truly wants an opportunity to continue contributing to the RCMP and public.

[397] One aspect that the Board does not accept as mitigation is the assertion in Reply 2 that the Detachment was understaffed and subject to a high volume of calls causing "tremendous pressure" which, explicitly or implicitly, contributed to the Subject Member making poor decisions or mistakes.

[398] While one supervisor made passing reference to staffing levels at the Detachment in one of the Performance Reports, it was not sufficient for purposes of finding it was a mitigating factor in the specific circumstances of the Subject Member and the Allegations.

[399] It is not in doubt that understaffing and call load may be mitigating factors, and while these elements may have been present, it is not sufficient for Reply 2 to simply make these assertions without some form of evidence, which need not be overly formal, and link it in some reasonable fashion to the conduct of the Subject Member.

[400] On the other hand, although not addressed by the submissions, the Board found that the supervision of the File in this case was anything but robust, and the Board is hard pressed to understand how Corporal Robb, knowing that there had been issues in a PROS file being opened in the first instance, and that the Subject Member had apparently attempted to initially conclude the File without any investigation, did not take a more active interest in what the Subject Member was doing over the period of 45 days he had the File (perhaps in the form of short diary dates or requests for updates), and accepted, without question, the representations of the Subject Member in the Third Entry (and Summary), in the face of the explicit information in the Email.

[401] While not a significant mitigating factor in the present case, the lack of supervision is something that has been considered, albeit to a limited degree, by the Board.

[402] In terms of the Draft Apology, the Board has taken note of its existence in terms of some mitigation, and does not accept that it should have no weight or be struck from the record as suggested by Rebuttal 2, as the Subject Member should not be penalized, or alternatively not given any credit, for trying to making amends, but is prohibited from doing so by conditions imposed as part of his suspension or otherwise.

[403] In *Swain*, although the member had *prior* discipline for the same misconduct, the adjudication board accepted a joint proposal and imposed a reprimand and seven day financial penalty where, after taking an initial taped statement from the complainant, the member failed to investigate a complaint of sexual touching of a 17 year old female by a co-worker at a local business, which included failing to open a file. The file was subsequently investigated and criminal charges were laid, but later withdrawn when the accused entered into a peace bond.

[404] On closer examination, the adjudication board in *Swain* actually had some concern whether the conduct actually constituted disgraceful misconduct rather than poor performance, and after some analysis, ultimately concluded the conduct was serious enough to warrant disciplinary consideration.

[405] Albeit the product of a joint proposal, *Swain* arguably deals with conduct that is more serious given there was no involvement of an external agency (such as CFS) to protect the

complainant, the level of vulnerability is somewhat mitigated by the fact that the accused was a co-worker in a workplace (and not a family member), and this was the second contravention against the member for the same form of misconduct.

[406] In *Poapst*, after a contested hearing and submissions on sanction, the adjudication board imposed a reprimand and three day financial penalty where the member failed to properly investigate a complaint of domestic violence (which arguably had an element of sexual assault based on the forcible undressing of the complainant and pushing her out of the house naked), and was subsequently investigated by another member and led to criminal charges against the suspect.

[407] The appeal decision of the Commissioner in *Lawless* confirmed the substantiation of seven allegations against the member involving multiple incidents of knowingly neglecting or giving insufficient attention to files or duties (including the investigation of a serious injury accident) and knowingly or wilfully making false statements, and one incident of improper use of a computer.

[408] However, in ultimately imposing an 18 day financial penalty and other measures, the Commissioner was heavily influenced by the significant evidence of personal stressors in the specific circumstances of the member to find that there was reason to believe the member could be rehabilitated.

[409] As in the present case, *Lawless*, *Swain* and *Poapst* involved investigations that were guided by policy that was clear on the obligations of members in terms of investigational obligations and requirements, but none of them resulted in dismissal.

[410] Submission 2 also relied on *Hedderson* to advance the vulnerability factor, but it is distinguishable for a number of reasons, including that the victim: (1) was the subject of violence in a relationship in the form of an assault in a public parking lot; (2) was concerned for her safety, which was reported; (3) knew the accused was violent and involved in drug trafficking; (4) was living on her own, had modest means, and was recovering from a drug addiction; and (5)



the accused engaged in threatening behaviour towards the victim immediately upon his release from custody despite various court imposed conditions to protect the victim.

[411] *Cull*, on the other hand, deals with a member who, in addition to having misconducted himself by making certain threats, also failed, over a number of months, to properly investigate multiple files or incidents, including a medical emergency, a medical file theft, a pedestrian motor vehicle accident, two 9-1-1 hang-up calls, threats involving a taxi driver, a sexual assault complaint, and two domestic assault complaints, for which the conduct board assigned various financial penalties ranging from one to 21 days, which amounted to 50 days total.

[412] Although the eight or so files were dealt with under one allegation, and the presence of a multitude of aggravating and mitigating factors, the conduct board in *Cull* imposed a 21 day loss of pay in relation to the failure to properly handle a sexual assault complaint, comprised of 15 days for failing to take a statement from the suspect, one day for extending his own diary date, and five days for approving his own tasks and concluding the file himself, although the member did complete an initial interview of the complainant.

[413] Based on the circumstances, aggravating and mitigating factors, as well as Measures Guide, and prior decisions, the Board has concluded that the Subject Member's conduct falls within the aggravated range for Allegation 2, and imposes a reprimand, direction to work under close supervision for one year, and a financial penalty of 25 days forfeiture of pay.

[414] In terms of Allegation 3, Submission 2 and Rebuttal 2 rely on essentially the same aggravating factors in terms of the Young Person being vulnerable and at risk, compromising an investigation, and the decisions of *Goodyer* and *Jenkins*.

[415] The conduct board imposed a 20 day financial penalty (and dismissal for another allegation) in *Goodyer*, and it is distinguishable based on the fact that the member disobeyed a direct order to not have contact with a certain person on two separate occasions, and in so doing engaged in considerable and extensive subterfuge and lying to cover-up his contravention of that order.

[416] The conduct board in *Jenkins*, after finding four allegations involving discreditable conduct by an instructor in Depot (i.e., failing to respect a direction; actual, apparent or potential conflict of interest; and making a false statement) established, imposed a number of financial and other measures, including a 10 day financial penalty for failing to respect a direction in a letter of expectation to not engage in personal relationships with cadets.

[417] The conduct board in *Jenkins* ultimately found that it was not established that the member was unfit to remain as a member of the RCMP, noting correction and remediation supersede punishment, where appropriate.

[418] In the present case, while there was direction in the form of the SUI Tasks, the supervisor was aware that the Subject Member had not completed any of those tasks over an approximate 45 day period prior to the File being concluded, and when it was concluded, took no apparent or active interest in critically examining how the Email indicating the Uncle had acted inappropriately towards the Young Person was no longer accurate, and the Subject Member was now reporting there was nothing inappropriate without any investigation based on a reported phone call with CFS that did not address the change in circumstances.

[419] A minimally interested supervisor, given the paucity of information in the File, and in particular the Third Entry (along with the initial failure to open a PROS File, and premature attempt of the Subject Member to conclude the file without any investigation, which in part led to Direction and SUI Tasks), would have questioned this purported new state affairs, and not just conclude the File without question, especially given the circumstances.

[420] There is consensus in the submissions that the aggravated range (11 days to dismissal) applies to Allegation 3, but the Board is also inclined to consider the normal range (two to ten days), primarily because the same aggravating and mitigating factors apply here as were considered under Allegation 2, and it seems disproportionate to increase or impose higher measures based on the same reasons or factor as were already addressed under Allegation 2 (which only further highlights the difficulties with proceeding on multiple allegations arising out of the same circumstances).

[421] In this regard, the Board has considered that the Subject Member's conduct, albeit a clear disregard of the Direction, involved a single incident, was not repeated or part of a pattern, and did not necessarily arise to the level of contempt (as in *Goodyer*).

[422] The Board has also placed considerable weight on the positive performance and contributions of the Subject Member as outlined in the Reference Letters and Performance Reports, which affirm the Subject Member's positive contributions, and investigative successes, over the past 10 years or so, and that Allegation 2 and Allegation 3 are not part of an ongoing problem of performance and conduct issues involving the Subject Member.

[423] The Board finds that the range of sanctions for Allegation 3, based on the Measures Guide and prior decisions, is two a day financial penalty to dismissal, and the present case, in light of the measures imposed for Allegation 2, warrants a reprimand and forfeiture of five days of pay.

[424] While Allegation 4 also forms part of the factual context of the ongoing neglect of investigation that the Board has already discussed, it is properly the subject of a separate allegation because it deals with providing false or misleading information, which brings to bear distinguishable elements and considerations beyond purely neglect of investigation, but is contextually part of the same overall circumstances involving the one File.

[425] As noted by Submission 2, the Board found that the Subject Member knew the Third Entry was inaccurate or misleading, or alternatively, that the Subject Member was grossly negligent, reckless, or careless in making the Third Entry.

[426] Submission 2 asserts the normal range of measures (30 days to dismissal) is appropriate, while Reply 2 asserts the mitigate range (11 to 28 days) is appropriate.

[427] According to Submission 2, the normal range is appropriate based on the seriousness of the alleged conduct of the Uncle, vulnerability of the Young Person, and closing of the File when criminal charges were warranted, which elevates the measures required.

[428] In relying upon *Rasmussen* to assert dismissal is justified, the Board is somewhat troubled by the lack of analysis provided in Submission 2 with respect to the circumstances in the case, simply relying upon a quote about proper accounting by police officers and the aggravating application of loss of confidence or trust by the public.

[429] On closer examination, *Rasmussen* involved seven allegations being established, which included, among others, that the member failed to process a gun under an amnesty program (which he kept for himself), and providing a misleading police report to conceal his actions, which also constituted a contravention of the *Criminal Code* of possessing a prohibited firearm without a valid registration which was also the subject of a conviction in provincial court.

[430] There was also a second incident of keeping a firearm for personal use and false reporting in *Rasmussen*.

[431] As the conduct board noted in *Rasmussen*, the conduct of the subject member was not isolated, or a lapse of judgment that was out of character, but rather a pattern of behaviour that involved using the position of police officer to advantage the subject member, and concealing improper professional and criminal conduct through false and misleading reporting.

[432] The Board finds that *MacNeil* does not have significant application, contrary to the suggestion of Reply 2, because Corporal Robb was not in fact aware that the information provided by the Subject Member in the Third Entry was inaccurate or misleading, and although it might be asserted that the inaccuracy of Third Entry was based on gross negligence, the supervisor was still not aware of the inaccurate portrayal of the circumstances.

[433] In *MacNeil*, one contravention of improperly disclosing information and a second contravention of providing inaccurate information were established, and the subject member had previously received a sanction in 2013 for two incidents of neglect of duty, and the conduct board accepted the joint proposal of reprimand, 11 day financial penalty (one day for disclosing information and 10 days for inaccurate information) and a transfer.

[434] Submission 2 exhorts the Board to consider dismissal because of the lack of honesty and integrity of the Subject Member, and the primary decision relied upon to support this aggravating factor is *Edwards*, a case in which the adjudication board found four allegations of disgraceful conduct and two allegation of making false or misleading statements that involved multiple incidents of lying or misrepresenting information to various supervisors and police officers, and in official documents or reports (including about the operation of an RCMP vehicle for personal reasons and without authorization that was involved in an accident) were established and accepted and imposed a joint proposal consisting of, among other things, reprimands and financial penalties (totalling 44 days).

[435] Ultimately, based on the information provided in Reply 2, the Board does not find that the Subject Member repudiated the contract of employment (*Ennis*), nor that the essential trust and confidence of the RCMP has been so seriously undermined as to justify dismissal (*Lemoine*).

[436] Although close to the proverbial edge, in the present case the Board has determined that dismissal is not an appropriate measure, and that the Subject Member ought to be given a second chance based on his consistent good record of performance over the last 10-12 years, which correlates with a remedial approach and is proportionate, and also protects and balances organizational and public interests.

[437] Based on the foregoing considerations, in relation to Allegation 4, the Board imposes a reprimand, 30 day forfeiture of pay, ineligibility to act in a supervisory role or position for one year, and ineligibility for promotion for one year.

[438] While Rebuttal 2 proposed a three year period of ineligibility for promotion, and Reply 2 proposed two years, the Board is cognizant of the fact that the Subject Member has been suspended since on or about July 12, 2018, during which time he would have been ineligible for promotion, and taking into account that approximately 18 month timeframe, a 12 month ineligibility period is appropriate, as it also accords with the 12 month close supervision period imposed under Allegation 2 and the ineligibility to act in a supervisory role or position for one year.

[439] In this case, two things have ultimately preserved the Subject Member's employment: first, that he has a significant and positive work history; and second, that CFS was involved and protected the Young Person. Absent one of these factors, the Board would have dismissed the Subject Member.

[440] It is not clear if the Conduct Authority was aware of the work history of the Subject Member, in particular the Performance Reports, as they would have provided valuable insight to determining whether this matter should have been referred to a Board, given the positive performance of the Subject Member in two Divisions and three detachments over the last 10-12 years, which should have been given some weight in disposing of this case, particularly given the wide array of measures that have been provided to conduct authorities pursuant to the *CSO (Conduct)* to deal with misconduct.

## **6. Conclusion**

[441] In summary, the Board imposes the following measures:

Allegation 2	A reprimand, direction to work under close supervision for one year, and a 25 day forfeiture of pay
Allegation 3	A reprimand and five day forfeiture of pay
Allegation 4	A reprimand, ineligibility to act in supervisory role or position for one year, ineligibility for promotion for one year, and a 30 day forfeiture of pay.

[442] The Conduct Authority is to take the necessary steps to execute the measures imposed by the Board, including but not limited to notifying the Compensation Section of "K" Division and/or the Benefit Trust Fund.

[443] In terms of the Draft Apology, the Board is not prepared to direct that it be provided to the Young Person or her family, as such a direction would require a clear understanding of the potential implications of doing so for the Young Person, and as a result, the Board directs that the Conduct Authority, through the CAR, in consultation with the MR, engage with the Detachment to determine if providing the Draft Apology to the Young Person and her family would be appropriate, and if so, the Draft Apology be furnished.

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

[445] Pursuant to subsection 25(2) of the *CSO (Conduct)*, this decision takes effect as soon as a copy is served on the Subject Member and Conduct Authority, which will be when an electronic copy is received by the MR and CAR, respectively (as each has waived personal service and agreed that the Representatives may accept service electronically).

[446] This record of decision constitutes the final decision of the Board and the Subject Member or Conduct Authority may appeal this decision as provided for in the *RCMP Act*.



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Craig S. MacMillan Assistant Commissioner

December 24, 2019

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Date

Conduct Board