



**ROYAL CANADIAN MOUNTED POLICE**

in the matter of

a conduct hearing pursuant to the

*Royal Canadian Mounted Police Act, RSC, 1985, c R-10*

BETWEEN:

**Commanding Officer, "O" Division**

(Conduct Authority)

and

**Constable Daniel Kohl**

Regimental Number 56299

(Subject Member)

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**RCMP Conduct Board Decision**

Christine Sakiris

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October 18, 2019

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Representatives for the Conduct Authority: Ms. Shahana Khan and Ms. Isabelle Sakkal

Representatives for the Subject Member: Staff Sergeant Peter Hearty and Sergeant Joel Welch

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## SUMMARY

Constable Kohl was alleged to have made false, misleading or inaccurate statements to a superior while he was the subject member of a Code of Conduct investigation. He faced two Allegations under section 8.1 of the Code of Conduct of the RCMP. Both Allegations involved a text message exchange between Constable Kohl and Sergeant Gillies. Allegation 1 was that Constable Kohl omitted part of the text message exchange when he submitted his statement to the investigator, thereby providing an incomplete, false or misleading account to a superior. Allegation 2 was that Constable Kohl submitted a false explanation for this omission, thereby making a false, misleading or inaccurate statement to a superior. Both Allegations were found to be established on a balance of probabilities. Constable Kohl was ordered to resign within 14 days.

## INTRODUCTION

[1] On June 2, 2017, the Conduct Authority issued a *Conduct Investigation Mandate Letter*, requesting an investigation of two allegations involving Constable Kohl (the Original Allegations). The Original Allegations arose out of a March 17, 2017, meeting that Constable Kohl had arranged between Sergeant Gillies and a member of the public, Ms. B.B. Following

that meeting, there was an exchange of text messages between Constable Kohl and Sergeant Gillies. In April 2017, Ms. B.B. filed a complaint with the Civilian Review and Complaints Commission, in which she alleged that Constable Kohl had behaved unprofessionally towards her, and that his suggestions that she join the RCMP and/or her nomination for an award were insincere.

[2] In the course of the initial investigation, Constable Kohl provided a statement to the Professional Standards Unit (PSU) investigator, Staff Sergeant McGreal,<sup>1</sup> on October 23, 2017. This statement addressed, in part, Constable Kohl's interactions with Sergeant Gillies and included screenshots of the text messages between Constable Kohl and Sergeant Gillies.

[3] A *Notice of Conduct Meeting* was served on Constable Kohl on March 27, 2018, containing two allegations: the Original Allegations were merged, amended and appeared as allegation 1; and allegation 2 reflected a new allegation of a contravention of section 8.1 of the RCMP Code of Conduct. The latter alleged that Constable Kohl gave a false, misleading or inaccurate statement to the PSU investigator, Staff Sergeant McGreal, on October 23, 2017. In particular, it was alleged that Constable Kohl omitted a portion of the text message exchange with Sergeant Gillies. The conduct meeting was scheduled for April 5, 2018.

[4] On April 2, 2018, Constable Kohl provided a statement to the then Conduct Authority, Superintendent Leather. That statement constituted his written submission with respect to allegation 2 and included a written statement from Constable Xanthopoulos,<sup>2</sup> in which the latter advised that he sent the text at issue, and then deleted it without Constable Kohl's knowledge. Constable Kohl adopted this explanation in his statement.

[5] A conduct meeting was held on April 5, 2018. Constable Kohl provided oral representations on allegation 1. Superintendent Leather advised at that time that, in light of new

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<sup>1</sup> At the time of the investigation in question, Staff Sergeant McGreal held the rank of Sergeant. His current rank is referenced in this decision.

<sup>2</sup> Constable Xanthopoulos was ordered to resign from the RCMP, pursuant to paragraph 45(4)(b) of the *RCMP Act* in April 2019. I have referred to him as Constable Xanthopoulos within this decision, as his involvement in this matter occurred while he was a serving member of the RCMP.

information, specifically Constable Kohl's statement of April 2, 2018, on allegation 2 would be addressed in a new Code of Conduct investigation.

[6] A second conduct meeting was held on April 11, 2018. Superintendent Leather found allegation 1 to be established and imposed conduct measures. This resolved the allegations arising out of the Civilian Review and Complaints Commission complaint. A second *Conduct Investigation Mandate Letter* was issued on April 11, 2018.

[7] Following this second investigation, two allegations were identified, and are the subject of the current proceedings. The *Notice to the Designated Officer* was issued on December 28, 2018. I was appointed as the Conduct Board in this matter on December 31, 2018, pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*].

[8] The *Notice of Conduct Hearing* sets out two alleged contraventions of section 8.1 of the Code of Conduct of the RCMP. It was signed by the Conduct Authority on February 8, 2019, and was served on Constable Kohl, together with the investigation package, on February 15, 2019. The Particulars of the Allegations describe allegedly false, misleading or inaccurate statements made by Constable Kohl to a superior while being the subject of a Code of Conduct investigation. Allegation 1 involves the alleged omission of a text message in Constable Kohl's statement of October 23, 2017. Allegation 2 alleges that, in providing Constable Xanthopoulos's statement and adopting the explanation contained therein in his statement of April 2, 2018, Constable Kohl provided a false, misleading or inaccurate statement.

[9] On March 29, 2019, Constable Kohl provided his response to the *Notice of Conduct Hearing*, pursuant to subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*].

[10] As is required in this process, I reviewed a copy of the *Notice of Conduct Hearing* and of the investigation package (as received on February 22, 2019), Constable Kohl's response pursuant to subsection 15(3) of the *CSO (Conduct)*, as well as additional documentation admitted over the course of pre-hearing conferences in this matter. These materials shall be referred to collectively as the Record.

[11] The hearing for this matter was held in Toronto, Ontario, from June 25 to 28, 2019. Oral evidence was received from seven witnesses, including Constable Kohl. I delivered my oral decision on the Allegations on June 27, 2019, in which I found both Allegations to be established. On June 28, 2019, I heard the parties' submissions on conduct measures and delivered my oral decision on conduct measures, in which I ordered Constable Kohl to resign within 14 days. This written decision incorporates, clarifies and expands upon those oral decisions.

### **Preliminary motions**

#### *a) Timeliness*

[12] On April 9, 2019, the Member Representative (MR) indicated his intent to bring a motion on timeliness. The MR provided his written submission on April 26, 2019. He sought to have Allegation 1 declared statute-barred by the application of subsection 41(2) of the *RCMP Act*. In the alternative, he sought a stay of proceedings with respect to Allegation 1 as a result of an abuse of process. The Conduct Authority Representative (CAR) submitted her reply on May 9, 2019, and the MR submitted a rebuttal on May 15, 2019. On May 21, 2019, I provided my written decision to the parties, in which I denied the motion.

#### *b) Proposed witness*

[13] At a pre-hearing conference on May 21, 2019, the CAR requested that the Conduct Board summon Constable Xanthopoulos. She advised that he was living overseas. The MR had not previously proposed Constable Xanthopoulos as a witness, but he did not object to the CAR's request. In the course of this discussion, I noted that while I have the authority to summon Constable Xanthopoulos, it would be difficult to enforce the summons. On May 24, 2019, I advised the parties that I did not need to hear oral evidence from Constable Xanthopoulos. I was satisfied with the evidence in the Record.

### **ALLEGATION**

[14] The *Notice of Conduct Hearing* sets out the Allegations and the Particulars as follows:

**Allegation 1**

On October 23, 2017, at or near Toronto, in the province of Ontario, Constable Daniel Kohl failed to provide complete and accurate accounts pertaining to the carrying out of his responsibilities, the performance of his duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force, contrary to section 8.1 of the Code of Conduct of the Royal Canadian Mounted Police.

**Particulars**

1. At all material times you were a member of the RCMP posted to “E” Division, at Surrey detachment, in the province of British Columbia, then “O” Division, at the Toronto Airport Detachment, in the province of Ontario.

2. On February 22, 2017, Ms. [B.B.] contacted RCMP to report an oversized vehicle travelling on a road with size restrictions. Ms. [B.B.] had taken videos of the oversized truck with her “windshield-mounted camera”. Surrey RCMP File GO # 1301 2017-24291 was created, you were the assigned officer.

3. Between February 23, 2017 and March 13, 2017, you exchanged emails with Ms. [B.B.], initially regarding Surrey RCMP File GO# 1301 2017-24291.

i. On March 1, 2017, you sent Ms. [B.B.] an email in which you stated, “I think given the work you’ve done, I’d like to nominate you for an OIC (officer in charge) Award [...] I’m going to talk to my Sergeant if you’re interested and we’ll see about filling out the nomination paperwork.”

ii. On March 13, 2017, you sent Ms. [B.B.] an email in which you stated, “I’ve made an appointment for you to meet with Sergeant Tyner GILLIES on Friday March 17th at 11:00 am at our district office [...] Please bring some of your better dash cam video examples to help convince him that you deserve this OIC award. Good luck!”

4. On March 17, 2017, you were not at the Surrey District 3 office when Ms. [B.B.] arrived to meet with Sergeant Gillies regarding the Officer in Charge award. Sergeant Gillies was unaware of the appointment and had to explain to Ms. [B.B.] that she was not getting an award. Ms. [B.B.] was upset.

5. Following his meeting with Ms. [B.B.] on March 17, 2017, you and Sergeant Gillies exchanged the following text messages:

Sergeant Gillies (11:31): “[B.B.] showed up at D3 today. You’re a fucking jerk off. If you were still here I’d give you a 1004.”

Constable Kohl (11:37): “New phone. Who’s this?”



Sergeant Gillies (11:48): "Is this Dan?"

Constable Kohl (11:49): "No, I just got this number yesterday"

Sergeant Gillies (11:49): "Oh, my bad."

Constable Kohl (11:51): "I got a free phone when I bought this shitty book 'dark resolution'... threw the book away but kept the phone"

Sergeant Gillies (11:51): "Fuck you, Kohl.."

Sergeant Gillies (11:52): "You're such a fucking ass hat."

6. "Dark Resolution" is a reference to a book authored by Sergeant Gillies.
7. On April 19, 2017, Ms. [B.B.] filed a complaint against you with the Civilian Review and Complaints Commission for the RCMP for wasting her time and lying about setting up the meeting with Sergeant Gillies for the Officer in Charge award.
8. On June 2, 2017, in response to Ms. [B.B.]'s complaint, a Code of Conduct investigation was ordered to investigate whether you contravened sections 2.1 and 7.1 of the *Code of Conduct* ("ACMT 2017 336384").
9. On September 6, 2017, [Staff] Sergeant Darren McGreal sent you an email to request your voluntary participation in a Subject Member interview regarding ACMT 2017 336384.
10. [Withdrawn by the CAR.]
11. In addition, as part of your October 23, 2017, written statement to [Staff] Sergeant McGreal regarding ACMT 2017 336384, you provided a screen shot of the text messages you exchanged with Sergeant Gillies on March 17, 2017. The screen shot you submitted omitted the text you sent at 11:51 [a.m.] PST, I got a free phone when I bought this shitty book 'dark resolution'... threw the book away but kept the phone."
12. You therefore submitted incomplete, inaccurate, false and/or misleading accounts to [Staff] Sergeant McGreal in your October 23, 2017, written statement regarding ACMT 2017 336384, as the Subject Member in a Code of Conduct investigation.

## **Allegation 2**

On April 2, 2018, at or near Toronto, in the province of Ontario, Constable Daniel Kohl failed to provide complete and accurate accounts pertaining to the carrying out of his responsibilities, the performance of his duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force, contrary to section 8.1 of the Code of Conduct of the Royal Canadian Mounted Police.

### Particulars

1. At all material times you were a member of the RCMP posted to “E” Division, at Surrey detachment, in the province of British Columbia, then “O” Division, at the Toronto Airport Detachment, in the province of Ontario.

2. Between February 23, 2017, and March 17, 2017, you worked with Constable Konstantinos Xanthopoulos at Surrey Detachment.

3. Between February 23, 2017 and March 13, 2017, you exchanged emails with Ms. [B.B.], initially regarding Surrey RCMP File GO# 1301 2017-24291.

i. On March 1, 2017, you sent Ms. [B.B.] an email in which you stated, “I think given the work you’ve done, I’d like to nominate you for an OIC (officer in charge) Award [...] I’m going to talk to my Sergeant if you’re interested and we’ll see about filling out the nomination paperwork.”

ii. On March 13, 2017, you sent Ms. [B.B.] an email in which you stated, “I’ve made an appointment for you to meet with Sergeant Tyner GILLIES on Friday March 17th at 11:00 am at our district office [...] Please bring some of your better dash cam video examples to help convince him that you deserve this OIC award. Good luck!”

4. On February 24, 2017, and March 2, 2017, you forwarded emails from your email exchange with Ms. [B.B.] to Constable Xanthopoulos. On March 2, 2017, Constable Xanthopoulos’ reply to the forwarded email exchange was, “Just epic”.

5. On March 17, 2017, you were not at the Surrey District 3 office when Ms. [B.B.] arrived to meet with Sergeant Gillies regarding the Officer in Charge award. Sergeant Gillies was unaware of the appointment and had to explain to Ms. [B.B.] that she was not getting an award. Ms. [B.B.] was upset.

6. Following his meeting with Ms. [B.B.] on March 17, 2017, you and Sergeant Gillies exchanged the following text messages:

Sergeant Gillies (11:31):	“[B.B.] showed up at D3 today. You’re a fucking jerk off. If you were still here I’d give you a 1004.”
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Constable Kohl (11:37):	New phone. Who’s this?”
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Sergeant Gillies (11:49):	“Oh, my bad.”
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Constable Kohl (11:51): "I got a free phone when I bought this shitty book 'dark resolution'... threw the book away but kept the phone"

Sergeant Gillies (11:51): "Fuck you, Kohl.."

Sergeant Gillies (11:52): "You're such a fucking ass hat."

7. "Dark Resolution" is a reference to a book authored by Sergeant Gillies.
8. On April 19, 2017, Ms. [B.B.] filed a complaint against you with the Civilian Review and Complaints Commission for the RCMP for wasting her time and lying about setting up the meeting with Sergeant Gillies for the Officer in Charge award.
9. On June 2, 2017, in response to Ms. [B.B.]'s complaint, a Code of Conduct investigation was ordered to investigate whether you contravened sections 2.1 and 7.1 of the *Code of Conduct* ("ACMT 2017 336384").
10. On September 6, 2017, [Staff] Sergeant Darren McGreal sent you an email to request your voluntary participation in a Subject Member interview regarding ACMT 2017 336384.
11. On October 23, 2017, you provided a written statement to [Staff] Sergeant McGreal regarding ACMT 2017 336384. As part of your written statement, you provided a screen shot of the text messages you exchanged with Sergeant Gillies on March 17, 2017. The screen shot you submitted omitted the text you sent at 11:51 [a.m.] PST, I got a free phone when I bought this shitty book 'dark resolution'... threw the book away but kept the phone."
12. On March 27, 2018, you were served with a Notice of Conduct Meeting and a copy of the Code of Conduct Final Report regarding ACMT 2017 336384. In the Notice of Conduct Meeting, the Conduct Authority, [Superintendent] Chris Leather, advised you that there was sufficient information in the investigative materials to make a finding that you had also contravened section 8.1 of the Code of Conduct, "for providing a false, misleading written statement to a superior or person in authority, as a "subject member" in a Code of Conduct investigation" based on discrepancies in your October 23, 2017, written statement regarding ACMT 2017 336384. You were provided with an opportunity to provide written representations and response to the allegations against you.
13. Staff Sergeant Greg Sutherland had been briefed that there were excerpts missing from the screen shot of your text message exchanged with Sergeant Gillies. On March 27, 2018, while serving you the Notice of Conduct Meeting, Staff Sergeant Sutherland asked you if you were aware that there was an issue with the version you had submitted. You told Staff Sergeant Sutherland that you were aware and the reason that your version was

missing some lines was because it was a voluntary statement, and the missing excerpts were embarrassing or unprofessional so you decided to leave them out. In regards to the Code of Conduct proceeding, Staff Sergeant Sutherland told you to be honest with [Superintendent] Leather and not to lie about anything else.

14. About a week before you met with [Superintendent] Leather for your Conduct Meeting, you asked Staff Sergeant Bagi about “what type of individual” or “guy” [Superintendent] Leather was. Staff Sergeant Bagi told you to “say the truth”. In regards to the discrepancy between the versions of text messages submitted by you and Sergeant Gillies, you told Staff Sergeant Bagi that your six-year-old kid saw a bad word in the text and erased it.

15. On April 2, 2018, you sent [Superintendent] Leather an email with the subject line, “response to code of conduct allegations”. On April 5, 2018, at your Conduct Meeting, you were advised that based on the materials you provide on April 2, 2018, the section 8.1 allegation would be addressed in a new Code of Conduct investigation (“ACMT 2018 336257”). A second Conduct Meeting was held on April 11, 2018, which addressed ACMT 2017 336384.

16. In your “response to code of conduct allegations”, emailed to [Superintendent] Leather on April 2, 2018, you denied typing the omitted text message, with the false and/or misleading explanation:

One of my former Surrey co-workers confessed to me that he was the one who sent the message from my phone when I briefly handed it to him at a coffee shop. I have attached a signed statement from my former co-worker, which explains the discrepancy. Ultimately, I have to take responsibility for the text message; although I was not the author, it was still sent from my phone.

17. Your “response to code of conduct allegations” emailed to [Superintendent] Leather on April 2, 2018, included a written statement, signed by Constable Xanthopoulos, on March 30, 2018, which stated that he had sent the omitted text message.

18. Constable Xanthopoulos’ March 30, 2018 statement to [Superintendent] Leather indicated that he was writing “in regards to the code of conduct investigation into Constable Daniel Kohl”.

19. Constable Xanthopoulos’ March 30, 2018, statement to [Superintendent] Leather stated, “If you have any questions, you can contact me at [phone number]”. [Superintendent] Leather attempted to contact Constable Xanthopoulos regarding the statement, but Constable Xanthopoulos never responded to [Superintendent] Leather.

20. Constable Xanthopoulos' March 30, 2018, statement to [Superintendent] Leather was false and/or misleading. Constable Xanthopoulos was not with you at 11:51 [a.m.] PST when the omitted text message, "I got a free phone when I bought this shitty book 'dark resolution' ... threw the book away but kept the phone" was sent from your phone. Specifically, the following statements in Constable Xanthopoulos' March 30, 2018, statement to [Superintendent] Leather were false and/or misleading:

- i. "I was the one who sent that particular text message from [Constable Kohl's] phone".
- ii. "We were having coffee when [Constable Kohl] received text messages from Tyner Gillies".
- iii. "I asked him what was this about and he just mentioned that him and Tyner had a dispute and he was trying to avoid him by saying he got a new number."
- iv. "Constable Kohl handed me the phone to show me the conversation, I found it humorous and I quickly typed a message to Tyner in which I made a joke about one of his books. Then I deleted the message so Constable Kohl would not see it".
- v. "There is no way that Constable Kohl would have any knowledge that the message even existed".

21. RCMP Surrey Building Access Logs and surveillance videos of March 17, 2017, indicate that Constable Xanthopoulos entered the Surrey District 3 office at 10:39 [a.m.] PST and exited the Surrey District 3 office at 12:38 [p.m.] PST. At 11:05:35 [a.m.] PST, at the same time Ms. [B.B.] is waiting in the Surrey District 3 front lobby for Sergeant Gillies, Constable Xanthopoulos can be seen also attending at the front counter. There is no record of you entering the Surrey District 3 office on March 17, 2017. You were transferred to "O" Division and on March 17, 2017, you were on Air Canada flight AC 1182 to Toronto, which departed from the Vancouver International Airport at [1 p.m.] PST. In your October 23, 2017, written statement regarding ACMT 2017 336384, you described your inability to pick up a rental car, and not having enough time to attend the 11:00 [a.m.] PST meeting due to having to take a taxi to the airport in time to check-in for your flight at [1 p.m.] PST.

22. By submitting the false and/misleading explanation that Constable Xanthopoulos "sent the message from [your] phone when [you] briefly handed it to him at a coffee shop", and including Constable Xanthopoulos' written statement, dated March 30, 2018, in your "response to code of conduct allegations", you submitted false and/or misleading accounts to a Conduct Authority, as the Subject Member in a Code of Conduct proceeding.

[*Sic throughout*]

[15] Pursuant to subsection 20(1) of the *CSO (Conduct)*, the aforementioned Allegations and Particulars were read to Constable Kohl at the beginning of the hearing. Constable Kohl denied the Allegations.

**Applicable tests to make a determination on the Allegations**

[16] The burden is on the CAR to establish the Allegations on a balance of probabilities. Practically speaking, this means that I must find that the CAR has established that it is more likely than not that Constable Kohl has contravened section 8.1 of the RCMP Code of Conduct. The parties have properly referenced *F.H. v McDougall*, 2008 SCC 53 [*McDougall*] for the principle that this burden can only be satisfied by sufficiently clear, convincing and cogent evidence.

[17] The Supreme Court of Canada also observed in *McDougall* that there is no objective test of sufficiency. A trier of fact must make a decision on the totality of the evidence before him or her. In the RCMP conduct hearing process, the totality of the evidence before me includes the Record, as well as the oral evidence and exhibits received during the hearing.

[18] In order for each of the Allegations to be established under section 8.1 of the Code of Conduct of the RCMP, the CAR must prove the following on a balance of probabilities: (1) the identity of the member; (2) the statement or account of actions in question; (3) that the statement or account provided was inaccurate; and (4) that the member knew the statement was inaccurate.

[19] In short, the Conduct Authority needs to establish on a balance of probabilities that Constable Kohl not only made a false, misleading or inaccurate oral or written statement, but that he **knew** that this statement was false, misleading or inaccurate, and that he appreciated the possible consequences of making it.

[20] There are a number of behaviours which fall within this section of the Code of Conduct. In this case, we are dealing with verbal or written statements allegedly made by Constable Kohl,

while the subject of a Code of Conduct investigation. The following guidance from the *Conduct Measures Guide* is instructive:

[...] Knowingly providing false information in a verbal or written statement to a member superior in rank or any other person having authority over the member where the information pertains to an operational event or was provided during the course of an internal investigation. **[This] includes voluntarily withholding pertinent information and failure to be forthright.** [...] [Emphasis added]

[21] What is at issue then, is whether the accounts provided were false, misleading, inaccurate or incomplete, and whether Constable Kohl knowingly provided the false, misleading, inaccurate or incomplete accounts in question.

## EVIDENCE

### Facts not in dispute

[22] There are a number of facts found in the Record which were not in dispute at the hearing:

1. At all material times, Constable Kohl was a member of “E” Division, Surrey Detachment, in the province of British Columbia; and then of “O” Division, Toronto Airport Detachment, in the province of Ontario.
2. On February 22, 2017, Ms. B.B. contacted the RCMP to report an overweight vehicle travelling on a road with size restrictions. Ms. B.B. had taken video of the oversized truck with her “windshield-mounted camera”. Constable Kohl was the assigned officer to Surrey RCMP File GO #1301 2017-24291.
3. Between February 23, 2017, and March 17, 2017, Constable Kohl corresponded, via email, with Ms. B.B. about Surrey RCMP File GO #1301 2017-24291.
4. In the course of that email correspondence, Constable Kohl suggested that Ms. B.B. join the RCMP. He then suggested she become an Auxiliary Member, offering to put in a good word for her.

5. On March 9, 2017, Constable Kohl advised Ms. B.B. that he would like to nominate her for an OIC Award. To that end, he arranged a meeting between Ms. B.B. and Sergeant Gillies. On March 13, 2017, Constable Kohl advised Ms. B.B. via email that the meeting would take place on March 17, 2017, at 11 a.m. PST. He asked her to bring some of her “better dash cam video examples to help convince [Sergeant Gillies] that you deserve this OIC award”.
6. Constable Kohl’s last shift with the Surrey Detachment prior to his transfer to “O” Division was a night shift. The shift began on March 12, 2017, and ended in the early morning of March 13, 2017.
7. Ms. B.B. attended the District 3 offices on March 17, 2017. She met with Sergeant Gillies. He advised her that she was not going to be nominated for an OIC Award.
8. Sergeant Gillies and Constable Kohl exchanged text messages following Sergeant Gillies’ meeting with Ms. B.B. The exchange was initiated by Sergeant Gillies.
9. In April 2017, Ms. B.B. filed a complaint with the Civilian Review and Complaints Commission for the RCMP, in which she alleged that Constable Kohl had behaved unprofessionally towards her, and that his suggestions that she join the RCMP and/or a potential nomination for an award were insincere.
10. While the subject of a Code of Conduct investigation, Constable Kohl provided a voluntary statement to Staff Sergeant McGreal on October 23, 2017. In it, he included a screenshot of his March 17, 2017, text message exchange with Sergeant Gillies. The screenshot did not include the text, sent at 11:51 a.m. PST, from Constable Kohl’s phone: “I got a free phone when I bought this shitty book ‘dark resolution’ ... threw the book away but kept the phone”.
11. Constable Kohl provided a written response to Allegation 2 to Superintendent Leather on April 2, 2018. He asserts that the text at 11:51 a.m. PST was sent by Constable Xanthopoulos, without his knowledge. He asserts that he met Constable Xanthopoulos on



the morning of March 17, 2017, and that he left his phone unattended for a few minutes. It was then that Constable Xanthopoulos sent and deleted the text in question. He included a statement from Constable Xanthopoulos, dated March 30, 2018, in support of his response.

[23] The parties agree that the complete text message exchange of March 17, 2017, between Constable Kohl and Sergeant Gillies is as set out in Allegation 1, Particular 5, and Allegation 2, Particular 6. However, they do not agree on how or why Constable Kohl's October 23, 2017, statement to Staff Sergeant McGreal did not include the text, sent at 11:51 a.m. PST, from Constable Kohl's phone.

#### **Applicable legal principles to determine credibility and reliability of oral evidence**

[24] I heard oral evidence from seven witnesses: Staff Sergeant McGreal, Sergeant Gillies, Staff Sergeant Bagi, Public Servant Roger Smith, Staff Sergeant Sutherland, Staff Sergeant Liu and Constable Kohl. The Record contains statements from these witnesses, as well as from Ms. B.B. and Superintendent Leather.

[25] In assessing each witness's evidence, I must consider whether he or she is being truthful as well as whether his or her evidence is reliable (i.e., whether the witness is in a position to accurately perceive and recollect what he or she observed). I may find a witness's evidence to be truthful, but unreliable. However, "a witness whose evidence on a point is not credible cannot give reliable evidence on that point"<sup>3</sup>.

[26] The parties referred to a number of cases, which set out some of the fundamental principles to be applied by a trier of fact when assessing a witness's evidence. Most relevant to the case at hand is the following excerpt from *McDougall*, at paragraph 86:

[...] in civil cases in which there is conflicting testimony, the judge is deciding whether a fact occurred on a balance of probabilities. In such cases, provided the judge has not ignored evidence, **finding the evidence of one**

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<sup>3</sup> *R. v Morrissey*, 1995 CanLII 3498, (1995), 97 CCC (3d) 193 (CA), at page 205

**party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party.** In such cases, believing one party will mean explicitly or implicitly that the other party was not believed on the important issue in the case.<sup>4</sup>

[Emphasis added]

[27] In assessing credibility, I must not look at a witness's evidence in isolation, but rather look at the totality of the evidence. I must also consider the impact of the inconsistencies in that evidence and whether, when taken as a whole in the context of the totality of the evidence, they impact the witness's credibility.<sup>5</sup>

[28] There are several factors to be considered in assessing a witness's evidence. Among these factors, and of particular relevance in this case, are the relationships or friendships between the parties and "the probability of facts sworn to".<sup>6</sup>

[29] In *Faryna v Chorney*, (1952) 2 DLR 354, the Court noted that a witness's evidence cannot be assessed solely on his or her demeanour, i.e., that he or she appears to be telling the truth. Rather, a trier of fact must determine whether the witness's story is consistent with the most probable interpretation of the surrounding facts.

[30] The determination of whether the witness's account has an "air of reality", or "the clearing of truth to it"<sup>7</sup> is subjective, but must be grounded in the totality of the evidence.<sup>8</sup>

### **Evidence of Staff Sergeant McGreal**

[31] Staff Sergeant McGreal is posted to "O" Division and was the lead investigator with PSU for both the Original Allegations (ACMT 2017 336384) and the current matter (ACMT 2018 336257). He enlisted the assistance of Staff Sergeant Liu (PRU, "E" Division) at various times during the investigations.

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<sup>4</sup> This principle has been cited with approval within RCMP Conduct Board decisions. See, for example, *Commanding Officer, "E" Division v Constable Jordan Irvine*, 2019 RCAD 03

<sup>5</sup> *McDougall*, at paragraph 58.

<sup>6</sup> *MacDermid v Rice*, (1939) R. de Jur. 208

<sup>7</sup> *Commanding Officer, "H" Division v Constable Shawn Green*, 2017 RCAD 5

<sup>8</sup> *McDougall*, at paragraph 58

[32] I did not have any concerns with respect to Staff Sergeant McGreal's credibility. He answered questions directly, did not seek to embellish, and acknowledged where his memory was not clear. His evidence was consistent with the evidence in the Record and with that of other witnesses.

[33] I did have some concerns about the reliability of certain narrow aspects of Staff Sergeant McGreal's evidence: (1) Staff Sergeant McGreal could not recall whether the texts in question had been sent from Constable Kohl's personal or work phone; and (2) Staff Sergeant McGreal could not recall all the details of Staff Sergeant Liu's efforts to contact Constable Xanthopoulos.

### **Evidence of Sergeant Gillies**

[34] Constable Kohl was under Sergeant Gillies' command in "E" Division.

[35] Sergeant Gillies has been the subject of a recent conduct proceeding, involving an incident unrelated to the matter before me. He was very forthright about the nature of those contraventions, which included an allegation under section 8.1 of the Code of Conduct of the RCMP. In the context of the incident in question, he acknowledged that he had not made a complete report, in an effort to avoid accountability. Sergeant Gillies also acknowledged that he had behaved unprofessionally towards Constable Kohl in the text message exchange of March 17, 2017, and that he had received a negative performance log (Form 1004) as a result.

[36] Sergeant Gillies' prior conduct is a factor that I weighed in assessing his overall credibility. However, it is not determinative of the issue. I note that while he was prone to florid descriptions, his overall demeanour was neutral. He described Constable Kohl as a competent investigator; someone to whom he would assign complex matters. He did not make any personal observations about Constable Kohl's character.

[37] Overall, he presented as an observant person, who had a reasonably clear recollection of the events in question. His evidence was internally consistent and supported by the evidence in the Record. Having regard to the totality of the evidence, I find that Sergeant Gillies' evidence was both credible and reliable.

**Evidence of Staff Sergeant Bagi**

[38] Staff Sergeant Bagi was the Acting OIC of the Toronto Airport Detachment for a period of time. He was the Conduct Authority who received Staff Sergeant McGreal's Investigation Report of January 15, 2018. He made the decision that he did not have the required authority to appropriately address the matter and referred it to Superintendent Leather. He was not in the role of Acting OIC in March of 2018.

[39] Staff Sergeant Bagi gave evidence of his interactions with Constable Kohl in March of 2018 and in particular of his conversation with Constable Kohl in or about the last week of March 2018. I do not have concerns about his credibility. He was fairly neutral in his demeanour, and responded to questions in a direct manner. He provided his statement to PRU on April 23, 2018, and his oral evidence was consistent with that statement.

[40] I did have some concerns about the reliability of his evidence. In particular, I found that Staff Sergeant Bagi's recollection of the precise wording used by Constable Kohl may not be as exact as he insisted.

**Evidence of Public Servant Roger Smith**

[41] Mr. Roger Smith is a public service employee with the RCMP and is an Information Technology Team Leader, in Surrey, British Columbia. He provided an affidavit dated May 27, 2019, to which he attached a transaction report for March 17, 2017. The report was pulled from the access control management software; it captures the activity on the conference room doors on the North side of the District 3 offices. The report shows that the doors were not opened or closed on March 17, 2017.

[42] Mr. Smith acknowledged that the panel for the conference doors was replaced in 2018. While there were some issues with the panel at that time, he advised that none were present in 2017 and that he had no concerns with the accuracy of the report provided.

[43] Mr. Smith's evidence was very brief. He had no personal interest in the proceedings. He was clear in his responses. I did not have any concerns with respect to his credibility or the reliability of his evidence.

#### **Evidence of Staff Sergeant Sutherland**

[44] Staff Sergeant Sutherland was the Acting OIC of the Toronto Airport Detachment in March and April of 2018. He met with Constable Kohl on March 27, 2018, in order to serve him with the amended *Notice of Conduct Meeting* in ACMT 2017 336384.

[45] Staff Sergeant Sutherland testified at some lengths about his interaction with Constable Kohl. I did not have any concerns about his credibility. He was very forthcoming in his evidence. He did not seek to minimize or to embellish his description of their interaction. His evidence was consistent with his statement to PRU. Notwithstanding the absence of contemporaneous notes, I did not have concerns about Staff Sergeant Sutherland's reliability. He was able to recount the tone, length and details of the conversation with Constable Kohl in considerable detail. He explained his actions and thoughts leading up to, during and after the conversation.

#### **Evidence of Staff Sergeant Liu**

[46] At all material times, Staff Sergeant Liu was working within the PSU in "E" Division (Surrey Detachment, British Columbia). He was assigned to assist Staff Sergeant McGreal with the investigations for ACMT 2017 336384 and ACMT 2018 336257.

[47] I did not have any concerns about Staff Sergeant Liu's credibility. His demeanour was neutral, his responses direct and complete. He did not embellish his evidence and readily acknowledged where his memory was not clear. I also found his evidence to be reliable on the whole. He referenced his investigative log when directed to specific passages by counsel, but he was not otherwise overly reliant on it.

**Evidence of Constable Kohl**

[48] It is not possible, within the confines of this decision, for me to list every inconsistency I identified in Constable Kohl's evidence. These inconsistencies are found within the Record and were compounded over the course of this hearing. The inconsistencies do not only relate to his account or explanation of the discrepancy in the text messages. Rather, they are found in virtually every aspect of Constable Kohl's evidence. I have highlighted below the nature of my concerns and have selected a few examples from various elements of Constable Kohl's evidence in order to illustrate the scope of the issue.

*Contradictions throughout his evidence*

[49] Constable Kohl's accounts changed from one statement to another, his subsection 15(3) response and his oral evidence. For example, Constable Kohl insisted in his statement of October 23, 2017, and in his oral evidence that he was genuine in his email correspondence with Ms. B.B. as it related to the investigation of the traffic violation reported by her. Constable Kohl insisted that he would have reopened the investigation, but that Ms. B.B. was unwilling to provide a statement. However, a review of the emails shows that Ms. B.B. offered multiple times to provide a statement. Constable Kohl did not acknowledge her offer. Moreover, the General Occurrence Report shows that Constable Kohl had concluded that no ticket would be issued within 16 minutes of receiving the call, with a notation that Ms. B.B. is a "chronic caller".

[50] Constable Kohl contradicted himself about his intent to attend the March 17, 2017, meeting with Ms. B.B. at least twice. The Record shows that when Constable Kohl emailed Ms. B.B. on March 13, 2017, to advise her of the date and time of the meeting with Sergeant Gillies, he did not indicate his intention to attend. However, Constable Kohl insisted in his statement of October 23, 2017, that it **was** his intention to attend the meeting between Ms. B.B. and Sergeant Gillies on March 17, 2017. In this statement, he explained that it was only on the morning of March 17, 2017, when he could not secure a rental car, that he decided not to attend out of concern he would not arrive at the airport in time for his flight at 1 p.m. In his oral evidence, he asserted that it was never his intention to attend the meeting, noting that when he sent the

invitation to Ms. B.B. on March 13, 2017, he was scheduled to leave on March 16, 2017. His accounts are irreconcilable.

*Statements unsupported by the evidence*

[51] Constable Kohl testified that after receiving the call for a potential traffic violation reported by Ms. B.B. on February 22, 2017, he attended the scene, but the truck was “long gone”. When cross-examined on this point, with reference to the General Occurrence Report associated with the call, he could not explain how he was able to arrive on scene within 50 seconds of having received the call.

*Often unsupported evidence evolving over the course of his testimony*

[52] The three following examples illustrate this behaviour.

[53] First, when cross-examined as to why he was not surprised when Staff Sergeant Sutherland showed him the discrepancy in the texts, Constable Kohl stated that it was because he had previously read the report. This was a new revelation, unsupported by the evidence in the Record. Constable Kohl could not remember how or when he was able to access the Investigation Report before it was served on him.

[54] Second are Constable Kohl’s accounts of his meetings with Staff Sergeant Sutherland and Staff Sergeant Bagi. In his subsection 15(3) response, Constable Kohl stated that his conversations with Staff Sergeant Sutherland and Staff Sergeant Bagi were “interrogations”, but he did not substantiate that characterization. In his oral evidence, Constable Kohl now described, for the first time, aggressive and confrontational interactions. These accounts were not put to Staff Sergeant Bagi or Staff Sergeant Sutherland during their testimony. Nor did Constable Kohl make any notes of these allegedly troublesome interactions.

[55] Third, Constable Kohl provided a very detailed timeline of his activities on the morning of March 17, 2017, in his subsection 15(3) response. Times were precisely noted, to the minute. And yet, in his oral evidence, this timeline shifted. He now arrived at the coffee shop at 11:15 a.m., not 11:30 a.m. He now reported having met several people, not just Constable

Xanthopoulos, but he had difficulty providing their full names. He no longer sent the email to Relocation Services upon exiting the cab at the airport at 12:20 p.m. Rather, he testified that he arrived at the airport at approximately 12:15 p.m., printed off tags for his luggage, completed a self-serve “bag drop”, made his way to the Canadian Air Transit Security Authority (CATSA) screening before he sent the email to Relocation Services at 12:20 p.m., while he was waiting in line.

*Repeatedly sought to cast others in a negative light*

[56] Constable Kohl made accusations against other members that were inaccurate or exaggerated. For example, his October 23, 2017, statement included references to allegedly false or misleading statements made by Sergeant Gillies in his statement to PSU. A review of the Record, in cross-examination, demonstrated that Sergeant Gillies had not concealed or misrepresented any information. Constable Kohl also suggested that Staff Sergeant Bagi had behaved improperly when reviewing a report. The evidence showed that Constable Kohl’s suggestions of improper behaviour were speculative at best.

[57] Finally, Constable Kohl omitted the text of 11:51 a.m. in his harassment complaint form against Sergeant Gillies. The evidence indicates that it is more likely than not that this was done in order to lend greater credence to Constable Kohl’s position that Sergeant Gillies’ texts were sent without provocation. In particular, Constable Kohl acknowledged during cross-examination that he was aware of the discrepancy in the text messages when he filed that complaint on March 27, 2018. He can reasonably be held to have known of Constable Xanthopoulos’s purported involvement, as the latter’s statement was signed on March 30, 2018. Yet, he did not provide the full text exchange in his complaint. His explanation for the omission, namely that there was limited space to type in the text boxes for the form, strains credulity.

[58] On the whole, I did not find Constable Kohl to be a credible witness. There are many elements, which I will detail in my analysis below, on which I have simply not found Constable Kohl’s evidence to be credible. Consequently, I cannot consider it reliable. Independent of any considerations of credibility, there are also issues with the reliability of Constable Kohl’s



evidence. I have given little weight to new information presented in Constable Kohl's oral evidence, which had not been disclosed in his subsection 15(3) response (as required by paragraph 15(3)(c) of the *CSO (Conduct)*) or been put to other witnesses, and for which there was no supporting evidence.

## **DECISION ON THE ALLEGATIONS**

### **Position of the parties**

[59] Constable Kohl acknowledged that the text at 11:51 a.m. PST was sent from his phone, but he insisted that he was not aware of its existence when he provided his statement on October 23, 2017. He asserted that, in accordance with his response to the Allegations, as provided in his April 2, 2018, email to Superintendent Leather, the text was sent by Constable Xanthopoulos without his knowledge. He asserted that he met Constable Xanthopoulos at a coffee shop on the morning of March 17, 2017, and that he left his phone unattended for a few minutes. It was then that Constable Xanthopoulos sent and deleted the text in question.

[60] The CAR's position was that Constable Kohl deliberately omitted the text of 11:51 a.m. on March 17, 2017, in his statement of October 23, 2017, to Staff Sergeant McGreal. She asserted that Constable Kohl provided two other explanations for the omission. She argued that the first, to Staff Sergeant Sutherland, reflected the true reason why the text was omitted. Namely, that the text was embarrassing and, as it was a voluntary statement, he did not feel that it had to be included. She argued that Constable Kohl "tried out" an alternate explanation to Staff Sergeant Bagi, namely that his son deleted the text because it had a bad word in it. Finally, she argued that the statement from Constable Xanthopoulos was a deliberate fabrication, and that Constable Kohl and Constable Xanthopoulos never met on the morning of March 17, 2017. Rather, Constable Kohl was at the airport when the text exchange took place, and it was he who sent the text at 11:51 a.m. PST.

**Sufficiency of the investigation**

[61] The MR made numerous suggestions, throughout the hearing, that the investigation into this matter was insufficient. However, he did not suggest that it was so flawed as to create an issue of procedural fairness. Rather, he pointed to a number of perceived gaps in the investigative process, which he argued were fatal to the CAR's case: 1) the lack of phone records to prove the location of Constable Kohl's phone; 2) a failure to secure production orders for information from Air Canada; and 3) insufficient efforts to secure a statement from Constable Xanthopoulos.

[62] In the absence of a formal motion with respect to the sufficiency of the investigation, it would be inappropriate for me to critique the investigatory techniques employed in this matter. The question before me is whether the evidence that does exist as a result of the investigations is sufficiently clear, convincing and cogent to allow me to find that the Allegations are established on a balance of probabilities. I do not agree with the MR's assessment of these perceived "gaps". The evidence demonstrates that they were not as significant as the MR argued.

[63] First, the location of Constable Kohl's phone was not relevant until Constable Kohl submitted his statement of April 2, 2018. It is not clear that the cell phone records would have been available more than two years after the fact. At best, the information that could have been garnered would have placed Constable Kohl's phone in a general area. It would not have resolved the question of who sent the message in question.

[64] If in fact the cell phone records could have placed him in the vicinity of the coffee shop in question, one would expect that he would have requested a supplemental investigation, in order to collect this exculpatory information. Constable Kohl knew how to avail himself of this recourse, having requested a supplemental investigation in July 2018. He did not. He did not even provide the location of the coffee shop where he met Constable Xanthopoulos in his statement. When asked why in cross-examination, his response was "I don't know why [...]" In

my mind, this was all getting resolved. That's what Superintendent Leather said. He said everything would be dealt with on that day [...]"<sup>9</sup> In short, he didn't expect anyone to ask.

[65] Second, the evidence of Staff Sergeant Liu confirmed that the only information that could have potentially been received from Air Canada was of Constable Kohl's check-in time at the gate. That information would have been of little assistance in determining when Constable Kohl actually arrived at the airport.

[66] Third, I acknowledge the MR's point that the efforts to contact Constable Xanthopoulos, in the context of other matters, were not documented in this file. I cannot consider what is not properly in evidence before me. However, I disagree with the MR's argument that the fact that the documented attempts to attend Constable Xanthopoulos's residence occurred during the week, and during working hours, was highly problematic. One must recall that, at the time, Constable Xanthopoulos was suspended and was required to report in on a weekly basis. It was not unreasonable to expect that he would be home during the week.

**Events leading up to the March 17, 2017, meeting between Sergeant Gillies and Ms. B.B.**

[67] Constable Kohl's suggestions that Ms. B.B. seek to join the RCMP or become an Auxiliary Member, and later offer to recommend her for an OIC award do not appear genuine. He testified that, prior to February 22, 2017, he may have heard "she called in once in a while" or seen Ms. B.B.'s name as dispatched calls came up on the mobile computer,<sup>10</sup> but he did not know anything about her. And yet the next day, despite having identified her as a "chronic caller" in the General Occurrence Report, he suggested that she try to join the RCMP.

[68] When Ms. B.B. indicated that she was not interested in shift work, he suggested that she apply as an Auxiliary Member. He provided the email address for the program, told her to mention his name and that he would "be sure to give them a 'head's up'"<sup>11</sup>. Yet the Record

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<sup>9</sup> Transcript, Volume 2, June 26, 2019, page 382, lines 8 to 14

<sup>10</sup> Transcript, Volume 2, June 26, 2019, page 253, lines 23 to 25; and page 254, lines 1 to 4

<sup>11</sup> Combined Investigation Report, page 85

shows that no one responsible for the administration of that program recalled having been contacted by Constable Kohl.

[69] Constable Kohl then forwarded the email chain to Constable Xanthopoulos, against whom Ms. B.B. had previously filed a complaint.<sup>12</sup> I do not find Constable Kohl's explanation for Constable Xanthopoulos's reply, of "Just epic", namely that it may have been a reaction to the attached video, to be credible. The evidence indicates that it is more likely that Constable Xanthopoulos's reply of "Just epic" was in reply to the exchange between Constable Kohl and Ms. B.B. and that all of this was a joke to both Constable Kohl and Constable Xanthopoulos.

[70] While Sergeant Gillies readily admitted that he was busy and that he did not have an infallible memory, he was adamant that Constable Kohl did not advise him of a meeting with Ms. B.B. He denied receiving any note. He testified that he was off-site on the morning of March 17, 2017, and that he had no knowledge of the meeting until he received a call advising him that Ms. B.B. was waiting for him.

[71] Constable Kohl insisted that he had reminded Sergeant Gillies about the meeting with Ms. B.B. He described starting an email, but being interrupted. He asserted that he left Sergeant Gillies a handwritten note. In cross-examination, it was noted that he sent the email invitation to Ms. B.B. in the early hours of March 13, 2017. He was asked why he did not simply forward that email to Sergeant Gillies. Constable Kohl advised that it had not occurred to him to do so, or, alternatively, because it was too difficult to forward emails on a BlackBerry. And yet, later in his evidence, Constable Kohl noted that he was completing the paperwork for his mortgage on his personal cell phone, including providing electronic signatures. Clearly, he had the technical skills to forward an email.

[72] There are several additional factors which lend plausibility to Sergeant Gillies evidence. First, Sergeant Gillies explained his prior interactions with Ms. B.B. in relation to her complaints about traffic infractions, and in particular the warning he had issued her about her own driving.

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<sup>12</sup> Transcript, Volume 1, June 25, 2019, page 96, lines 10 to 20

He clearly did not support her efforts to document traffic violations. It is unlikely that, having a negative view of Ms. B.B.'s conduct, he would have agreed to support her nomination for an OIC award.

[73] Second, the evidence clearly shows that it was Ms. B.B. who copied Sergeant Gillies on her email to Constable Kohl on the morning of March 17, 2017, when she was advised that Sergeant Gillies was not available. There is no evidence of any written communication from Constable Kohl to Sergeant Gillies on this point.

[74] Third, Sergeant Gillies reasonably stated that had he been advised of the meeting and forgotten, it would have "come back to him" when he was told that Ms. B.B. was waiting for him. He would not have responded as angrily if that were the case.

[75] In paragraph 50, I have noted the inconsistent evidence Constable Kohl provided with respect to his intent to attend this meeting. I do not find his evidence on this point to be credible nor reliable. On the totality of the evidence, I find it more plausible that Constable Kohl never intended to attend the meeting and that he did not advise Sergeant Gillies of the meeting. It was a prank. I find that it is more likely than not that it was this prank that Sergeant Gillies was reacting to in his text messages to Constable Kohl.

#### **Constable Kohl's October 23, 2017, written statement to Staff Sergeant McGreal**

[76] Staff Sergeant McGreal testified that he was assigned as the lead investigator of the Original Allegations. In the course of that investigation, Staff Sergeant McGreal made several attempts to secure a voluntary statement from Constable Kohl. Constable Kohl provided him with a written statement on October 23, 2017. This statement included a screenshot of the March 17, 2017, text message exchange between Constable Kohl and Sergeant Gillies. The screenshot did not include the text of 11:51 a.m. PST. Staff Sergeant McGreal noted this discrepancy in his report of January 15, 2018. A second Mandate Letter was issued on April 11, 2018. Staff Sergeant McGreal was assigned as the lead investigator in this matter and conducted the supplemental investigation requested on July 31, 2018.

[77] Constable Kohl has maintained that he did not know of the discrepancy when he provided his statement of October 23, 2017. However, his interactions with Staff Sergeant Sutherland suggest otherwise.

**March 27, 2017, meeting with Staff Sergeant Sutherland**

[78] Staff Sergeant Sutherland was tasked with serving the *Notice of Conduct Meeting* (ACMT 2017 336384) and the Investigation Report on Constable Kohl. Staff Sergeant Sutherland reported that he had reviewed the report prior to serving it on Constable Kohl, as he wanted to familiarize himself with what he was serving. At that time, he did not know Constable Kohl and had only a cursory knowledge of the nature of the Allegations, having been briefed by Staff Sergeant Bagi when he took on the role of Acting OIC.

[79] On March 27, 2018, he sent Constable Kohl an email, requesting that Constable Kohl come by his office. Constable Kohl did so within ten to fifteen minutes of that email being sent. Staff Sergeant Sutherland testified that he invited Constable Kohl to close the door, for privacy, and to sit down. He had the Investigation Report open to the page with the discrepancies in the text messages, as he did not know if Constable Kohl was aware. Having served as a Staff Relations Representative for five years, Staff Sergeant Sutherland wished to ensure that Constable Kohl would not be caught by surprise at the conduct meeting, which was to take place on April 5, 2018.

[80] Staff Sergeant Sutherland testified that he asked Constable Kohl if he knew why he was there. Constable Kohl replied “Yes, I know why I’m here” and was not at all surprised by the discrepancy in the text messages. Staff Sergeant Sutherland testified that he did not ask any further questions, but that Constable Kohl then volunteered the following explanation for the discrepancy:

And, he says, “The reason why the screenshots were the way they were,” he said, “I was told it was completely voluntary whether I provided a statement. And under the belief that it was voluntary I believe those,” I assumed the text in question, he says, “They were unprofessional or

embarrassing,” I – words to that effect. I believe it was one or the other.  
“And so,” he says, “that’s why I didn’t include the full accounting.”<sup>13</sup>

[81] Staff Sergeant Sutherland testified that he did not ask any further questions about this explanation. He acknowledged in cross-examination that he could not remember the exact wording, and that he was not seeking to represent it as such. Rather, he remembered the explanation because he found it odd. He did not take notes as it was a general conversation, and he had no reason to. He confirmed service of the materials via an email after their conversation and by affidavit.

[82] Staff Sergeant Sutherland advised that, as a result of his experience as a Staff Relations Representative, he knew that members get very stressed out when facing a Code of Conduct investigation. Therefore, he wanted to ensure that Constable Kohl was aware that he was not facing dismissal. He reported that he asked Constable Kohl if he was worried about losing his job and that Constable Kohl advised that he was not, as Staff Sergeant Bagi had advised him that he was looking at one to two days.<sup>14</sup>

[83] Staff Sergeant Sutherland testified that he advised Constable Kohl, as he did for any member in his situation, to tell the truth, not to lie as it would only make things worse. He then asked Constable Kohl if he had any questions, and he asked him if he had been in touch with his Member Workplace Advisor. He did not recall Constable Kohl having any questions. He recalled that Constable Kohl had been in touch with a Member Workplace Advisor, but he was not certain on this point.

[84] Constable Kohl’s subsection 15(3) response characterized this meeting as a formal interrogation. In his oral evidence, Constable Kohl now described a confrontational interaction, in which he was **ordered** to close the door and to sit, and in which he felt threatened. He did not dispute that he provided the explanation for the discrepancy, as recalled by Staff Sergeant Sutherland. However, he asserted that Staff Sergeant Sutherland coerced him into offering this explanation under threat of losing his job. In cross-examination, Constable Kohl stated that he

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<sup>13</sup> Transcript, Volume 1, page 167 at lines 8 to 16.

<sup>14</sup> Transcript, Volume 1, page 169, lines 3 to 6

sent himself an email following this interaction. However, it only referenced Staff Sergeant Sutherland's reference to measures in the range of two to three days. When asked, in cross-examination, why he did not make any notation of the intimidating nature of the interaction, Constable Kohl stated that it was because he had to leave to pick up his children. I find it incredible that Constable Kohl would take the time to document the range of measures mentioned, but not make **any** notation about the nature of such an allegedly intimidating interaction.

[85] In cross-examination, Constable Kohl did not dispute that he did not appear surprised when Staff Sergeant Sutherland showed him the discrepancy in the text messages. He stated that this was because he had previously seen the Investigation Report. This is not an insignificant remark. The Investigation Report is not disclosed to a subject member until he or she is served with the *Notice of Conduct Meeting* or *Notice of Conduct Hearing*. There would have to have been a significant breach in protocol for this to have occurred. When questioned as to how he accessed the Report prior to his meeting with Staff Sergeant Sutherland, Constable Kohl replied "I don't remember. I remember reading it, and...".<sup>15</sup> I find that Constable Kohl's account is not credible. I do not find it plausible that he accessed the Investigation Report prior to meeting with Staff Sergeant Sutherland.

[86] I give very little weight to Constable Kohl's characterization of the meeting, as it was not put to Staff Sergeant Sutherland in cross-examination. Ultimately, I prefer Staff Sergeant Sutherland's evidence to that of Constable Kohl's. It is more plausible, particularly given the purpose of the meeting, Staff Sergeant Sutherland's prior experience as a Staff Relations Representative, my concerns with Constable Kohl's credibility, and the absence of any evidence to support Constable Kohl's version of events.

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<sup>15</sup> Transcript, Volume 2, June 26, 2019, page 308, line 25, and page 309, line 1



**Conversation with Staff Sergeant Bagi**

[87] On or about March 29, 2018, during the lunch hour, Constable Kohl approached Staff Sergeant Bagi to ask him about Superintendent Leather.

[88] Staff Sergeant Bagi described Constable Kohl stopping by his office and asking what type of guy Superintendent Leather is. Staff Sergeant Bagi advised him that Superintendent Leather is a “straight-shooting guy” and that Constable Kohl should tell the truth. He advised him not to “try to pull the wool over his eyes because he has got a PSU background. You know, if you did it, fall on your sword, but whatever you do just be honest. Say the truth.”<sup>16</sup> On this, both Constable Kohl and Staff Sergeant Bagi are agreed. However, this is where their accounts diverge.

[89] Staff Sergeant Bagi stated that he was pressed for time. He described a very brief conversation that started at his office and continued as he and Constable Kohl walked down the hall. They parted ways at a stairway, which led to the restrooms. It was at this point that Staff Sergeant Bagi indicated that Constable Kohl mentioned that his “six-year-old son had erased the text”.<sup>17</sup> Staff Sergeant Bagi did not recall what precipitated Constable Kohl’s comment. However, he was clear that the explanation surprised him, and that was why he remembered it. It surprised him enough that he asked “Really?” Constable Kohl then explained that his son erased the text because it contained a bad word. Staff Sergeant Bagi testified that he then asked “he can do that?”, to which Constable Kohl responded in the affirmative.<sup>18</sup>

[90] In his oral evidence, Constable Kohl described a very different interaction, in which he refused to answer Staff Sergeant Bagi’s questions about the text messages. Constable Kohl alleged that, after he refused to answer Staff Sergeant Bagi’s questions, Staff Sergeant Bagi pursued him into the hall and demanded to know how the text message got deleted. He stated that he only responded that his son **may** have deleted the text.

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<sup>16</sup> Transcript, Volume 1, page 127, lines 10 to 21

<sup>17</sup> Transcript, Volume 1, page 128, lines 19 to 24

<sup>18</sup> Transcript, Volume 1, June 25, 2019, page 128, lines 20 to 24

[91] In cross-examination, Constable Kohl was at a loss to explain why Staff Sergeant Bagi would have felt it necessary to engage in such a “forceful interaction”. He stated: “I think he was asking because he – I don’t think he knew how messages got deleted from [sic] phone or how it was possible. I don’t know if he’s very tech savvy.”<sup>19</sup> I find it unlikely that Staff Sergeant Bagi would have pursued Constable Kohl from his office into the hall, during the lunch hour in a busy office, repeatedly demanding to know something simply to satisfy a banal curiosity.

[92] As with Constable Kohl’s interaction with Staff Sergeant Sutherland, simply calling something an “interrogation” does not make it so. I do not find Constable Kohl’s description of their interaction to be credible. I find that the conversation took place, on the whole, as described by Staff Sergeant Bagi.

[93] I do have some concerns with the reliability of Staff Sergeant Bagi’s recollection of the precise wording Constable Kohl used. I do not find that he unequivocally stated that his son had deleted the message. However, it is highly implausible that Staff Sergeant Bagi would, as stated in Constable Kohl’s subsection 15(3) response, have simply “guessed” that his son may have deleted the text, without any suggestion to that effect from Constable Kohl. I find that it is more likely than not that, in the course of this conversation, Constable Kohl told Staff Sergeant Bagi that his young son may have deleted the text, and that this information was offered as an explanation of the discrepancy in his October 23, 2017, statement.

### **Statement of April 2, 2018**

[94] The first conduct meeting was scheduled for April 5, 2018. On April 2, 2018, Constable Kohl sent a written statement, via email, to Superintendent Leather. In this statement, Constable Kohl stated that his actions towards Ms. B.B. were genuine. He also sought to impugn Sergeant Gillies’ credibility. As noted in paragraph 56, the reproaches were unfounded.

[95] With respect to the discrepancy in the text messages, Constable Kohl wrote:

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<sup>19</sup> Transcript, Volume 1, June 26, 2019, page 128, lines 20 to 24

[...]

In response to Allegation 2, I would like to assure you that I did not intentionally provide a false, misleading written statement to [Staff] Sergeant McGreal. After I was served the notice of conduct meeting and I reviewed the investigation report, I could not explain the text message discrepancy; I only know that I did not type the message in question and when I checked my phone, that message was not there. I was forced to question my family, friends, co-workers, anyone I could recall having contact with on March 17, 2017, which is now over one year ago. One of my former Surrey co-workers confessed to me that he was the one who sent the message from my phone when I briefly handed it to him at a coffee shop. I have attached the signed statement from my former co-worker, which explains the discrepancy. Ultimately, I have to take responsibility for the text message; although I was not the author, it was still sent from my phone.

I hope that you will take the time to verify the information I have provided as I believe these are mitigating factors that support the fact that I did not conduct myself in an unprofessional and disrespectful manner.

[...]

[96] A statement from Constable Xanthopoulos, signed March 30, 2018, was attached. Constable Xanthopoulos described a recent conversation with Constable Kohl, in which the latter inquired whether Constable Xanthopoulos had anything to do with the text in question. Constable Xanthopoulos wrote, in part:

[...] I informed Constable Kohl that I was the one who sent that particular text message from his phone, however it was so long ago that I had not thought about it in some time. I recall that on the day Constable Kohl flew back to Toronto, we were having coffee when he received text messages from Tyner Gillies, who I worked with in the past and consider my friend. I asked him what was this about and he just mentioned that he and Tyner had a dispute and he was trying to avoid him by saying he got a new number. Constable Kohl handed me the phone to show me the conversation, I found it humorous and I quickly typed a message to Tyner in which I made a joke about one of his books. Then I deleted the message so Constable Kohl would not see it. [...]

[97] The investigation that followed examined the location of both Constable Xanthopoulos and Constable Kohl on the morning of March 17, 2017.

*a) Location of Constable Xanthopoulos at 11:51 a.m., on March 17, 2018*

[98] Footage from the Main Detachment security cameras, as well as from the District 3 offices are found in the Record. An analytical timeline is also found, which is based on this footage as well as the access control data. Staff Sergeant Liu testified that, on March 17, 2017, Constable Xanthopoulos was assigned to “Detachment Services”, an administrative duties unit for non- operational members or those on restricted duties. He was assigned to the Main Detachment, and not to the District 3 offices.

[99] In his oral evidence, Staff Sergeant Liu described the layout of the security cameras at the District 3 offices. Staff Sergeant Liu testified that there are four possible entrances/exits to the District 3 offices: 1) the west door; 2) the north door, within the conference room; 3) the main door at the north-east corner, through which the public enters and exists; and 4) a door at the south-east corner, within what is now an office. There are five cameras within the District 3 offices. One is found on the outside of the building, and is aimed at the west door. The remaining cameras are located inside the building. Collectively, they capture all foot traffic coming from/to the west door, a hallway leading from/to the conference room (secondary access is possible through the bull pen area), the hallway leading from/to the south-east door. There is a camera which covers the front desk area, including the latch door through which members can access the bull pen area. However, there is no camera view of the main door at the north-east corner.

[100] According to the analytical timeline and the security footage, Constable Xanthopoulos entered the Main Detachment vehicle gate at 9:46:59 a.m. He entered the Detachment wearing a coat, and carrying a coffee cup and black binder. He left the Main Detachment at 10:28:06 a.m. and entered the District 3 offices’ west door, carrying a cell phone and coffee cup at 10:39 a.m. He proceeded to the general duty and front desk area.

[101] Constable Xanthopoulos is seen at the front counter at 11:05:55 a.m. and he appeared to be looking at his phone while a regular member was speaking with Ms. B.B. Constable Xanthopoulos is next seen at 12:37:05 p.m. as he walked towards the west door from which he entered carrying only a cell phone. He then turned around and returned with his jacket. He exited

the District 3 offices at 12:38:07 p.m. He entered the Main Detachment vehicle gate at 12:55:20 p.m. and entered the Main Detachment building at 12:57 p.m.

[102] Staff Sergeant Liu testified that, following a review of the security footage, he believed that Constable Xanthopoulos was in the District 3 offices at 11:51 a.m. He noted that this conclusion was due to the times at which Constable Xanthopoulos entered and left the District 3 offices, as well as the fact that he was seen on camera at the front desk area at approximately 11 a.m.

[103] I agree with Staff Sergeant Liu's assessment. While the MR noted that there were possible paths to both the north and north-east doors that were technically not within the range of the cameras, these paths would require a member to cross through offices or a conference room. The evidence showed that the west door was the most common access point for members and that, if members exited from the front door, they would usually exit the regular duty area through a hinged door at the side of the front counter. This area was within camera range. Moreover, I note that the conference room door was not accessible from the outside. Given my overall assessment of Constable Kohl's credibility, I do not find Constable Kohl's assertion that this door was often left unlocked to be credible. Most telling is the fact that the access report showed that the conference room door was not opened or closed on March 17, 2017.

*b) Location of Constable Kohl at 11:51 a.m., on March 17, 2018*

[104] Constable Kohl testified that he was originally scheduled to fly to Toronto on March 16, 2017, but that the movers had not finished packing his house. On March 15, 2017, he changed his flight to 1 p.m. on March 17, 2017. He had been staying at a hotel near his home during that week. He checked out of the hotel at 10:46 a.m., on March 17, 2017. He testified that check-out time was at 11 a.m. and that he had planned to meet Constable Xanthopoulos at a coffee shop beside the District 3 offices. The Google map submitted by the parties confirms that the distance from the hotel to the coffee shop was approximately 10 kilometres.

[105] The first time the name and location of the coffee shop where Constable Kohl is to have met Constable Xanthopoulos is mentioned is in Constable Kohl's subsection 15(3) response. He

provided a timeline of his activities that morning. I do not find the timeline proposed to be credible or reliable.

[106] Both Constable Kohl's activities and the timeline changed over the course of Constable Kohl's oral evidence. Some of the changes are noted in paragraph 55 of the present decision.

[107] After a few iterations, Constable Kohl asserted that he checked out of the hotel at 10:46 a.m., and arrived at the coffee shop at 11:15 a.m. Constable Kohl did not explain how he arrived, with his luggage, at the coffee shop. Only one taxi receipt is found in the Record, which Constable Kohl insisted was the only receipt he submitted. He testified that this receipt, described in his Lost Receipt Declaration as "Surrey to Vancouver airport", was for the trip from the coffee shop to the airport. Therefore, in order for Constable Kohl's timeline to be accurate, he would have had to walk the 10 kilometres from the hotel to the coffee shop, with luggage in tow, in approximately 30 minutes. This is not realistic.

[108] Constable Kohl testified that he had met not just Constable Xanthopoulos, but also other members whose names he had difficulty remembering. The time at which he alternatively left his phone at the table or handed it to Constable Xanthopoulos varied, as did the length of time he was away from his phone.

[109] Staff Sergeant Liu confirmed that, as part of the investigation, they verified the distance between the District 3 offices and the Vancouver International Airport. Using Google Maps, they estimated a driving time of approximately 36 minutes. Staff Sergeant Liu acknowledged that it was impossible to recreate the exact weather and traffic conditions of March 17, 2017. He emphasized that this step was taken only to obtain an estimate of the required travel time.

[110] Constable Kohl asserted that he left the coffee shop at approximately 11:53 a.m. and that he arrived at the airport, via taxi, at 12:15 p.m. A 22-minute drive. He asserted that he was in the CATSA line when he emailed Relocation Services about the missing receipt at 12:20 p.m. In order to be feasible, Constable Kohl would have had to pay the taxi driver, exit the taxi, collect his luggage, enter the airport, proceed to the self-serve kiosks where he printed his luggage tags

and deposited his bag, and be standing in the CATSA line up within five minutes of arriving at the airport. I do not find this to be a realistic timeline.

[111] On the one hand, Constable Kohl asserted that he did not attend the meeting at 11:00 a.m. because he was worried about missing his flight. On the other hand, when seeking to justify such a late departure from the coffee shop, he testified that it was not his practice to arrive early and that, in any event, there were plenty of flights available later that afternoon. Ultimately, when considered in the context of all of the evidence, including the inconsistencies in Constable Kohl's evidence, the assertions of "new" information and the absence of supporting evidence, I do not find his account of his activities on the morning of March 17, 2017, to be credible or reliable.

*c) Attempts to contact Constable Xanthopoulos*

[112] Much of Staff Sergeant Liu's evidence referenced his investigative log and, in particular, the extent of the efforts made to contact Constable Xanthopoulos. The log includes a notation on April 25, 2018, in which Staff Sergeant Liu documented numerous efforts to call and email Constable Xanthopoulos. Also documented are two visits to Constable Xanthopoulos's residence: on May 22, 2018, at 12:15 p.m., and on May 24, 2018, at 11:25 a.m. These efforts to contact Constable Xanthopoulos were unsuccessful, as were further visits to his residence on December 17, 19 and 20, 2018, and on January 17 and 18, 2019.

[113] Staff Sergeant Liu also testified that PSU sought to contact Constable Xanthopoulos on a number of matters and that their extensive efforts to contact him by email, phone, mail and in person had been unsuccessful. The MR argued that Staff Sergeant Liu testified to additional steps that were not documented in the investigative log. He argued that this impacted the reliability of the evidence. I agree. I have accordingly ascribed less weight to these observations.

[114] The extensive efforts that are documented in Staff Sergeant Liu's log, as well as the other evidence in the Record, including the Investigation Report, establish that Constable Xanthopoulos sought to cut off ties with the RCMP as of April 26, 2018, and that he remained uncooperative with attempts to contact him or serve him with documents. He did not reply to

email requests for a statement. He could not be reached at the number he provided in his statement of March 30, 2018. Nor was there a voicemail associated with that number. Therefore, I do not agree with the MR that a negative inference should be drawn from the inability of the PSU to secure a statement from Constable Xanthopoulos.

[115] Nor do I draw a negative inference from the fact that Constable Xanthopoulos did not give oral evidence at this hearing. I must simply assess the evidence before me. The CAR noted that Constable Xanthopoulos was found not to be credible at his own conduct hearing.<sup>20</sup> I agree with the MR that prior dishonesty is not determinative of future honesty. Therefore, I have given this factor little weight.

### **Finding on the Allegations**

[116] The elements that must be established by the CAR are as follows: 1) the identity of the subject member; 2) the subject member provided an account of his actions on file; 3) the account was false, misleading, inaccurate or incomplete; and 4) the subject member knew that the account was false, misleading, inaccurate or incomplete. Note that I include the word incomplete. This is to reflect the interpretation of section 8.1, as set out in paragraph 20 of the present decision, which includes voluntarily withholding pertinent information and a failure to be forthright.

#### *a) Allegation 1*

[117] Allegation 1 is essentially that Constable Kohl omitted and/or deleted a text sent from his phone at 11:51 a.m., when he submitted his statement on October 23, 2017, and, in so doing, submitted incomplete, inaccurate, false and/or misleading accounts to Staff Sergeant McGreal, as the subject member in a Code of Conduct investigation.

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<sup>20</sup> *Commanding Officer, "E" Division v Constable Konstantinos Xanthopoulos*, 2019 RCAD 05 [Xanthopoulos]



[118] In the present case, the identity of Constable Kohl, the fact that he provided the account of the texts in his October 23, 2017 statement and subsequently the explanation of discrepancies in the texts in his April 2, 2018 response are not contested. Nor is it contested that these accounts were made to a superior officer in the context of a Code of Conduct investigation, in which Constable Kohl was the subject member.

[119] What is at issue is whether the accounts provided were false, misleading, inaccurate or incomplete, and whether Constable Kohl knowingly provided the false, misleading, inaccurate or incomplete accounts in question. I will go through each of the Particulars at issue.

[120] Particulars 1, 2, 3, 6, 7, 8, and 9 are admitted to and are accordingly established. Particular 10 was withdrawn by the CAR.

[121] With respect to Particular 4, I prefer the evidence of Sergeant Gillies to that of Constable Kohl. Therefore, Particular 4 is established.

[122] With respect to Particular 5, I prefer the evidence of Staff Sergeant Sutherland to that of Constable Kohl and find that Constable Kohl was aware of the discrepancies in the text messages when he was served with the *Notice of Conduct Meeting* and the Investigation report. Constable Kohl's assertion on cross-examination of having seen the Report before that date is not just implausible, it is simply unsupported by the evidence. Therefore, Particular 5 is established.

[123] With respect to Particular 11, I find that Constable Kohl's interaction with Superintendent Leather establishes on a balance of probabilities that he deliberately omitted the text sent at 11:51 a.m. when he provided his October 23, 2017, statement to Staff Sergeant McGreal. I prefer the evidence of Staff Sergeant Sutherland and find that Constable Kohl provided Staff Sergeant Sutherland with a spontaneous explanation for the discrepancies, in which he admitted to omitting the text in question, ostensibly because he didn't feel it was necessary to include it in a voluntary statement. Therefore, Particular 11 is established.

[124] I find that in deliberately omitting the text of 11:51 a.m. PST from his October 23, 2017, statement to Staff Sergeant McGreal, Constable Kohl knowingly submitted a false, misleading,

inaccurate or incomplete account as the subject member in a Code of Conduct investigation. Therefore, Particular 12 is established.

[125] Accordingly, Allegation 1 is established.

*b) Allegation 2*

[126] The CAR's theory with respect to this Allegation was that Constable Kohl set out to prank Sergeant Gillies, at the expense of Ms. B.B., and that Constable Xanthopoulos was in on the joke. She further submitted that the evidence demonstrated that Constable Xanthopoulos and Constable Kohl did not meet at the coffee shop near the District 3 offices. As a result, Constable Xanthopoulos could not have sent the text message from Constable Kohl's phone.

[127] The MR rightly submitted that positive proved facts were required at the foundation of inferences drawn by the trier of fact. He argues that relevant information was not collected in the course of the investigation, and that the only evidence to support the CAR's theory are the statements of Staff Sergeant Sutherland and Staff Sergeant Bagi. I disagree.

[128] I find that the video and card log evidence establishes that Constable Xanthopolous entered the District 3 offices at approximately 10:40 a.m., on March 17, 2017. He was seen at the front counter at 11:05 a.m., at the same time that Ms. B.B. was waiting for Sergeant Gillies. He is not seen leaving again until 12:38 p.m. The reliability of this evidence is not in question.

[129] The positive proved facts of Constable Kohl's activities on the morning of March 17, 2017, are that he checked out of his hotel at 10:46 a.m. and that he took a **single** taxi ride from "Surrey to Vancouver airport". Constable Kohl's evidence of his activities on the morning of March 17, 2017, is rife with inconsistencies. I do not find Constable Kohl's evidence of his activities on the morning of March 17, 2017, to be credible or reliable.

[130] These are the positive proved facts on which I can reasonably infer that Constable Kohl and Constable Xanthopoulos did not meet on the morning of March 17, 2017. Therefore, the explanation provided by Constable Kohl and the statement signed by Constable Xanthopoulos are necessarily false.

[131] With respect to the individual Particulars for Allegation 2, Particulars 1, 2, 3, 7, 8, 9, 10, 12, 17 and 18 are admitted to and are established accordingly.

[132] I have already determined that I do not find Constable Kohl's starting proposition that he was genuine in his interactions with Ms. B.B. and in his motives for setting up a meeting between Ms. B.B. and Sergeant Gillies to be credible or reliable. Based on the totality of the evidence, including Constable Kohl's oral evidence on this point, I find that it is more likely than not that the meeting was a prank on Sergeant Gillies, at the expense of Ms. B.B. I find that the timing of the email exchange between Constable Xanthopoulos and Constable Kohl, as well as the content of the emails forwarded, makes it more likely than not that Constable Xanthopoulos was in on the prank. Therefore, Particular 4 is established.

[133] Particular 5 is established for the same reasons as Allegation 1, Particular 4.

[134] Particular 6 is established for the same reasons as Allegation 1, Particular 5.

[135] Particular 11 is established for the same reasons as Allegation 1, Particular 11.

[136] Earlier in this decision, I set out the reasons why I prefer Staff Sergeant Sutherland's account of his meeting with Constable Kohl. Therefore, Particular 13 is established.

[137] With respect to Particular 14, I find that Staff Sergeant Bagi was a credible witness and that his recollection of the overall tone and scope of his conversation with Constable Kohl was reliable. Ultimately, in finding Staff Sergeant Bagi's version to be more credible and reliable, the issue is determined. Therefore, Particular 14 is established.

[138] The MR's clarification that he is the one who requested the supplemental investigation is noted. Particular 15 is established.

[139] In light of my finding that Constable Xanthopoulos and Constable Kohl did not meet on March 17, 2017, Particular 16 is consequently established.

[140] Notwithstanding the Constable Kohl's explanation in his subsection 15(3) response, the factual assertions in Particular 19 are not contested in the evidence. Therefore, Particular 19 is established.

[141] In light of my finding that Constable Xanthopoulos and Constable Kohl did not meet on March 17, 2017, Particulars 20, 21 and 22 are also established.

[142] Consequently, Allegation 2 is established.

## **CONDUCT MEASURES**

### **Position of the parties**

[143] The Conduct Authority requested that Constable Kohl be ordered to resign within 14 days. The CAR argued that the nature of the contraventions did not support an educative or remedial response. Constable Kohl had been found to have provided false accounts during a Code of Conduct investigation, in which he was the subject member. He involved another member in his deceit, for the purposes of concealing misconduct. She argued that Constable Kohl had so significantly breached the core values of honesty and integrity for personal gain and that, in accordance with the rationale in *Commanding Officer, "J" Division v Constable Jonathan Cormier*, C- 017 [Cormier], his employment was no longer tenable.

[144] The MR suggested that the appropriate range of conduct measures in this case is from 21 days' financial penalty to dismissal. While he agreed that Constable Kohl's actions fell within the aggravated range, he argued that they fell short of requiring dismissal. He sought to distinguish the cases presented by the CAR, and argued that dismissal was a disproportionate response.

[145] The MR argued that Constable Kohl's letters of support, performance and length of service support an educative or remedial response. He urged me to avail myself of the flexibility under the *CSO (Conduct)* to impose conduct measures short of dismissal, which he argued were appropriate and proportionate in this case.

[146] In her rebuttal, the CAR questioned the weight to be ascribed to the letters of support and argued that Constable Kohl's work record was not without blemish. She argued that average performance is not a mitigating factor.

### **Decision on conduct measures**

[147] In arriving at my decision on measures, I am guided by section 36.2 of the *RCMP Act*, which sets out the purpose of the conduct process. These include at paragraph e):

[...] to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to the nature and circumstances of the contravention and, where appropriate, that are educative and remedial rather than punitive.

[148] In determining the appropriate sanction, I must first determine the possible range of conduct measures. Then, I must consider the aggravating and mitigating factors. I must also apply the appropriate legal principles, including the principle of proportionality, which necessarily requires me to consider the public interest as well as parity. While I may be guided by prior conduct board decisions, I am not bound by these decisions. I must make my own determination on the facts of this case.

[149] In considering the appropriateness of educative and remedial rather than punitive measures, I must determine if Constable Kohl's actions have rendered his continued employment untenable.

[150] I have carefully reviewed the material provided to me by both parties and have considered their submissions.

[151] On my review of the *Conduct Measures Guide* and the cases provided by both parties, I find that the appropriate range of conduct measures for each of the contraventions at issue is between 21 days' financial penalty and dismissal.

[152] Having determined the appropriate range, I will now consider the aggravating and mitigating factors.

[153] I find the following to be aggravating factors in this case:

1. The misconduct arose in the context of a Code of Conduct investigation in which Constable Kohl was the subject member.
2. This was not an isolated incident. There are two related incidents of misconduct, which involve ongoing and prolonged deception.
3. The misconduct was not the result of a spontaneous decision. Both incidents, and particularly the second, involved deliberation and planning.
4. The misconduct was for personal gain. As set out in *Cormier*, and cited with approval in several subsequent decisions, personal gain includes seeking to avoid responsibility or accountability for one's prior actions and/or to thwart an investigation into those actions.
5. I accept that, in principle, the obligations arising out of *R. v McNeil*, 2009 SCC 3, do impose an organizational burden on the RCMP. The relative weight of this burden depends on the facts of each case. I find that the nature of the contravention in this case, namely of dishonesty in the context of an investigation, results in a significant burden on the RCMP.

[154] I do not consider the fact that the genesis for this matter may be traced back to a public complaint to be an aggravating factor. That public complaint was addressed in the initial and amended allegations, for which Superintendent Leather imposed measures on April 11, 2018.

[155] I do not consider the fact that Constable Kohl did not heed the advice he received from Staff Sergeant Sutherland and Staff Sergeant Bagi to be a separate aggravating factor. Rather, I have considered this in the context of the prolonged period over which the misconduct took place.

[156] I find the following to be mitigating factors in this case:

1. Constable Kohl has 11 years of service. He has been identified as a strong performer on more than one occasion. The positive nature of these assessments is tempered by

instances in which poor attitude or an unprofessional style of communication were identified.

2. Constable Kohl has provided letters of support. The authors do not demonstrate any awareness of the nature of the contraventions. Therefore, I have assigned them little weight.
3. Constable Kohl has, over the course of his career, demonstrated efforts to support the communities in which he lives, be it through proactive policing initiatives or volunteer activities.“

[157] I agree with the MR that, as set out in *Commanding Officer, “E” Division v Constable Ashley Goodyer*, 2018 RCAD 13, cases of dishonesty do not automatically result in dismissal. Here, I am faced with misconduct undertaken for personal gain, as set out in *Cormier*. Dismissal is deemed to be an appropriate measure in such instances, unless there are significant mitigating factors. I do not find that the mitigating factors identified outweigh the serious aggravating features of Constable Kohl’s misconduct.

[158] While I am very mindful that rehabilitation is a primary objective in the discipline process, as noted in *Commanding Officer, “E” Division v Constable Fareez Vellani*, 2017 RCAD 03, the rehabilitative objectives of the conduct process cannot override dismissal where the employment relationship is fundamentally breached.

[159] In order for the employment relationship to be breached, I must find that Constable Kohl’s misconduct is incompatible with the essential elements of that relationship. Several of the cases cited by the CAR, including *Xanthopoulos*, note that the essential elements of a member’s employment relationship are the core values of honesty, integrity, professionalism, compassion, accountability and respect.

[160] Constable Kohl’s misconduct is, at its core, lying in the course of a Code of Conduct investigation, in which he was the subject member, in order to avoid accountability for his actions. The importance of the conduct process as a means to maintain public confidence in the

RCMP is set out in a number of the decisions cited by the parties. The conduct process serves as a check and balance on the vast powers conferred on police officers. Constable Kohl's misconduct demonstrates a lack of honesty, integrity, professionalism and accountability. Whether by omission or by submitting a false statement, Constable Kohl purposely set out to undermine the conduct process. The prolonged nature and the deliberate planning involved in Constable Kohl's deceptive behaviour are particularly troubling to me. His actions demonstrate a lack of respect, if not contempt for, the conduct process.

[161] Throughout these proceedings, I listened for, but did not hear, any evidence that Constable Kohl is self-aware, recognizes the seriousness of his actions, or takes any personal responsibility in any aspect of the circumstances leading up to this hearing. To the contrary, he perpetuated his deceptive behaviour during the hearing by asserting new facts, not previously received, which I have found to be unsupported by the evidence. I am left without any assurance that Constable Kohl will learn from this experience and that it will not be repeated.

[162] Under these circumstances, I cannot justify retaining Constable Kohl as a member of the RCMP. Therefore, I order him to resign from the Force within 14 days. If he fails to do so, I direct his dismissal.

[163] Either party may appeal this decision by filing a statement of appeal with the Commissioner within the limitation period set out in subsection 45.11 of the *RCMP Act*, and in accordance with the rules contained in the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014- 289.

October 18, 2019

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Christine Sakiris

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Date

RCMP Conduct Board