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2020 CAD 10



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, "J" Division

Conduct Authority

and

Civilian Member Mark Gaudet
Regimental Number C4869

Subject Member

Conduct Board Decision

Josée Thibault

May 19, 2020

Denys Morel and Staff Sergeant Chantal Le Dû, for the Conduct Authority

Sara Novell, for the Subject Member

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SUMMARY OF DECISION

The allegations in this case concern the conduct of Civilian Member Gaudet at the regimental dinner held in November 2018, in Miramichi, New Brunswick, to celebrate the 20th anniversary of the Canadian Firearms Programs. Civilian Member Gaudet was very drunk. In addition to making inappropriate comments, he committed acts that were sexual in nature against two other civilian members attending the dinner.

Civilian Member Gaudet admitted the two allegations made against him. The Conduct Board concluded that they were established on a balance of probabilities. The Committee also accepted the joint proposal on conduct measures submitted by the parties. In summary, the following measures were imposed:

- a. a temporary demotion from a CP-03 to a CP-02 position for one year from the date of the Board's decision;

- b. a reassignment to a group other than the “J” Division Canadian Firearms Centre, but not a physical transfer (move); and
- c. a requirement to continue to get counselling on his heavy drinking or to avail himself of any other service deemed appropriate by the “J” Division Health Services Officer

INTRODUCTION

[1] On September 27, 2019, the “J” Division Commanding Officer requested in a *Notice to Designated Officer* that a conduct hearing be held in this matter. On September 30, 2019, I was appointed to the Conduct Board in accordance with subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*].

[2] The *Notice of Conduct Hearing* (the Notice) was signed by the “J” Division Commanding Officer on October 23, 2019, and served on Civilian Member (CM) Gaudet on November 15, 2019. The Notice contains a total of three allegations of contravention of the RCMP Code of Conduct, which allegedly occurred on November 16, 2018, at a regimental dinner organized to celebrate the 20th anniversary of the Canadian Firearms Program.

[3] In Allegation 1, it is alleged that CM Gaudet made inappropriate comments and committed inappropriate acts of a sexual nature towards a colleague, contrary to section 7.1 of the Code of Conduct. In Allegation 2, it is further alleged that CM Gaudet engaged in inappropriate sexual touching towards a second colleague, also contrary to section 7.1 of the Code of Conduct. Allegation 3 and its particulars were withdrawn by the Conduct Authority in the parties’ joint motion of April 17, 2020.

[4] On December 14, 2019, CM Gaudet submitted his response to the Notice, in accordance with subsection 15(3) of the *Commissioner’s Standing Orders (Conduct)*, SOR/2014-291. He admitted the two allegations, as well as all the particulars describing the nature of the alleged contraventions.

[5] On April 17, 2020, the parties brought a joint motion before the Conduct Board requesting conduct measures other than dismissal.

[6] This decision sets out my findings on the allegations against CM Gaudet and the conduct measures imposed on him.

ALLEGATIONS

[7] The two allegations before the Conduct Board read as follows:

[TRANSLATION]

Allegation 1

On or about November 16, 2018, at or near Miramichi, in the province of New Brunswick, [CM] Mark Gaudet engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct.

Particulars of the allegation

1. At all material times, you were and still are a civilian member of the Royal Canadian Mounted Police (RCMP), assigned to the Informatics Support Unit for the Canadian Firearms Program for the eastern part of the province of New Brunswick, in Miramichi.
2. At the time of the allegation, you were with colleagues at a regimental dinner organized to celebrate the 20th anniversary of the Canadian Firearms Program.
3. You had been drinking alcohol, and you were drunk.
4. During the evening, just before supper, you approached Ms. P.Y., a colleague, who was standing. Mimicking the action with your hands, you told her that you wanted to [TRANSLATION] “squeeze” her breasts. Your behaviour led her to cross her arms in front of her chest and to tell you to stop. You gave her a hug, kissing her on the neck.
5. You kept going back to Ms. P.Y.’s table throughout the evening, and you would lean against her back, occasionally touching her hair and telling her that you loved her.
6. Ms. P.Y. was uncomfortable and bothered by your conduct towards her.
7. You made inappropriate comments and performed actions of a sexual nature towards and on a colleague.

Allegation 2

On or about November 16, 2018, at or near Miramichi, in the province of New Brunswick, [CM] Mark Gaudet engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct.

Particulars of the allegation

1. At all material times, you were and still are a civilian member of the Royal Canadian Mounted Police (RCMP), assigned to the Informatics Support Unit for the Canadian Firearms Program for the eastern part of the province of New Brunswick, in Miramichi.

2. At the time of the allegation, you were with colleagues at a regimental dinner organized to celebrate the 20th anniversary of the Canadian Firearms Program.
3. You had been drinking alcohol, and you were drunk.
4. During the evening, Ms. K.P. was sitting with other colleagues after the meal when you came up behind her. You slid your hand down her right side, from her shoulder down to her lower back and buttocks, brushing against the side of her breast. Ms. K.P. was in a state of shock.
5. You touched Ms. K.P. in a sexual manner without her consent.

[French original quoted verbatim]

DECISION ON ALLEGATIONS

Principle of discreditable conduct – section 7.1 of Code of Conduct

[8] In accordance with section 7.1 of the Code of Conduct, members must behave in a manner that is not likely to discredit the RCMP. To determine whether the two allegations made against CM Gaudet have been established on a balance of probabilities, the Conduct Authority must prove the following four elements:

- a. the acts constituting the alleged behaviour;
- b. the identity of the member alleged to have committed these acts;
- c. the fact that the member's discreditable conduct is likely to discredit the RCMP; and
- d. the fact that the behaviour is sufficiently related to the member's duties and functions to provide the Force with a legitimate interest in disciplining the member.

[9] In light of CM Gaudet's admissions in his response to the allegations of December 14, 2019, I find that the member's identity has been established. Moreover, the acts constituting the alleged misconduct in both allegations have also been established on a balance of probabilities.

[10] Determining whether the conduct was discreditable is a question of law that must be dealt with in light of the context and all the circumstances of the case. Moreover, the word "discreditable" must be understood according to its ordinary, natural meaning with respect to the

special tasks and duties of professionals (see *Hughes v Architects Registration Council of the United Kingdom*, [1957] 2 All ER 436 (QB), 442, for a better understanding of the meaning of “disgraceful”).

[11] According to the evidence on the record, I find that the conduct of CM Gaudet as described in allegations 1 and 2 was completely inappropriate even though he was off duty. Indeed, the fact that he was very drunk at a regimental dinner and that he allegedly cannot remember much of the evening reveals a lack of respect, courtesy and professionalism not only towards the two civilian members who were the victims of his sexual misconduct, but also towards all the colleagues he disturbed through his actions. According to the evidence on the record, a colleague had to repeatedly tell CM Gaudet to leave Ms. P.Y. alone. Another colleague had to remove CM Gaudet’s hand while he was touching parts of Ms. K.P.’s body without Ms. K.P.’s consent. Finally, a number of others had to help in keeping an eye on CM Gaudet because he was very drunk and behaved inappropriately as soon as he arrived at the reception.

[12] This type of conduct is unacceptable in light of the clear guidelines concerning sexual misconduct given by RCMP commissioners in the past few years. According to section 1.1 of the *Conduct Measures Guide (2014)*, the Code of Conduct applies to all members, including civilian members, whether they are on or off-duty. RCMP members are constantly under scrutiny from the Canadian public, which expects them to respect the RCMP’s core values: honesty, integrity, professionalism, compassion, accountability and respect.

[13] Consequently, I conclude that a reasonable person in society with knowledge of all relevant circumstances, including the realities of policing in general, and the RCMP in particular, would find that CM Gaudet’s conduct in both allegations is discreditable and likely to discredit the RCMP. Finally, his behaviour is related to his duties and functions because it involved other RCMP members at an event organized by the RCMP. Consequently, allegations 1 and 2 are established on a balance of probabilities, and conduct measures are required.

CONDUCT MEASURES

[14] The RCMP External Review Committee has established that the Conduct Board's analysis of conduct measures has to be carried out in three stages. First, the Board has to establish the appropriate range of conduct measures. Second, it has to take into account the aggravating and mitigating factors in order to determine the seriousness of the misconduct. Finally, it has to impose a fair and equitable conduct measure proportionate to the seriousness of the misconduct at issue while taking into account the principles of parity of sanction and deterrence.

Range of conduct measures

[15] The parties submit that CM Gaudet's dismissal is not appropriate. They rely on the guiding principles of the RCMP's conduct process, which recommend that conduct measures be proportionate to the nature and circumstances of the contravention and, where appropriate, educative and remedial rather than punitive.

[16] Consequently, the parties recommend that CM Gaudet be temporarily demoted, for one year, from his CP-03 position to a CP-02 one, be reassigned to work in another group than the Canadian Firearms Centre and be required to continue getting counselling for his heavy drinking or to avail himself of any other service deemed appropriate by the "J" Division Health Services Officer.

[17] Moreover, the parties submit that the *Conduct Measures Guide (2014)* is of limited value in this case since neither of the established allegations corresponds to any of the categories set out in this guide. The parties also draw a parallel with four decisions from the RCMP conduct case law,¹ which, in their opinion, are examples of more serious sexual misconduct than in this case. In those cases, the Code of Conduct contraventions also did not correspond to the

¹ *Commanding Officer, "E" Division and Constable Caram*, 2017 RCAD 8; *Commanding Officer, "K" Division and K. Brown*, 2019 RCAD 15; *Commanding Officer, "K" Division and Constable L. Brown*, 2019 RCAD 12; and *Commanding Officer, "E" Division and Constable Little*, 2020 RCAD 1.

categories set out in the *Conduct Measures Guide (2014)*, and the members were not dismissed despite the allegations having been established. In the interest of sanction parity between members, the parties allege that all these decisions are relevant in the Board's review of the joint proposal. Lastly, they establish that an outcome that does not lead to the member's dismissal is reasonable in this case and not contrary to the public interest.

[18] The parties also rely on the decisions in *Pulsifer*² and *Allen*³ to show that the facts in those decisions, in which the members were not dismissed, are similar to those in the matter before the Board.

[19] For example, in *Pulsifer*, the member was extremely drunk at an evening team-building function in a licensed establishment. At the end of the evening, the member put his hands up the shirt of Constable 1 to touch her breasts, and she pushed him away. The member then tried the same thing with Constable 2. After a second attempt, Constable 2 turned around and punched him in the face. Despite these incidents, the member was not dismissed.

[20] In *Allen*, the member was drunk at a Christmas party held after working hours. He slipped his hand down the trousers and underwear of a colleague who was throwing up into a toilet because she had had too much to drink. The member touched her bottom, and the victim swatted his hand away. The member was not dismissed in that decision.

[21] Before going any further, I would like to point out that I am not bound by the jurisprudential authorities issued by other RCMP conduct boards. Despite the importance of these decisions, the Board nonetheless has the discretion to impose more severe conduct measures in situations with similar facts if it sees fit to do so. Moreover, as noted in several previous RCMP conduct decisions, the *Conduct Measures Guide (2014)* are guidelines on what to consider when imposing conduct measures. I am not bound by these guidelines in my decision.

² *Commanding Officer, "H" Division and Constable Pulsifer*, 2019 RCAD 9.

³ *Commanding Officer, "H" Division and Constable Allen*, 2019 RCAD 10.

[22] Following my review of the range of conduct measures found in section 7.1 of the Code of Conduct and the recent case law, I am satisfied that a proportionate measure for the misconduct alleged in the two allegations ranges between a high forfeiture of pay and dismissal.

[23] Having defined the appropriate range of disciplinary measures, the Board must now consider the relevant aggravating and/or mitigating factors.

Aggravating factors

[24] I accept the following aggravating factors submitted by the parties:

- a. The misconduct occurred at an RCMP regimental dinner, which is an extension of the workplace.
- b. Several colleagues and RCMP members witnessed CM Gaudet's misconduct, and it had repercussions for them.
- c. CM Gaudet had previously been given an informal warning about similar behaviour.

[25] Regarding the gravity of the misconduct, I cannot consider this to be an aggravating factor. As the Conduct Board noted in *Commanding Officer, "H" Division and Constable Greene*, 2017 RCAD 5, at paragraph 142:

These are serious contraventions, to be sure, but to characterize the gravity of the misconduct as an aggravating factor is a tautology. Aggravating factors, by definition, are factors external to the misconduct which oblige consideration of a harsher sanction. The gravity of the misconduct is not an aggravating factor.

Mitigating factors

[26] I accept the following mitigating factors submitted by the parties:

- a. CM Gaudet accepts responsibility and recognizes that he is guilty of misconduct.
- b. He regrets his misconduct and has apologized in writing to the Board, Ms. P.Y. and Ms. K.P.

- c. CM Gaudet's career in the RCMP spans 24 years, and his performance appraisals are very positive, describing him as an employee who is devoted to his work and his team. He is well-liked by the computer users he serves as well as by his managers at the RCMP.
- d. He has never been officially disciplined.
- e. Regarding his drinking problem, CM Gaudet uses Employee Assistance Services, as recommended by the "J" Division Health Services Officer. He also sees a psychologist and actively attends Alcoholics Anonymous meetings.
- f. He cooperated with the internal conduct investigation.

[27] The parties submitted that CM Gaudet is not very likely to reoffend given that he has become conscious of his excessive drinking, is committed to Alcoholics Anonymous and has made changes to his lifestyle. I recognize all these efforts and CM Gaudet's commitment to staying sober. However, knowing that he was warned unofficially for similar behaviour in the past and that the parties considered this to be an aggravating factor, I cannot conclude with certainty that his likelihood of reoffending is minimal. I therefore cannot consider this to be a mitigating factor.

[28] Another mitigating factor I cannot accept is that the member had no malicious intent at the time of the incident. The RCMP has sent a clear message about sexual misconduct, and this message is clearly understood by most members. Indeed, according to the parties' joint proposal, [TRANSLATION] "the member admits that the sexual misconduct allegations are very serious and that [his] engagement in such conduct cannot be tolerated by the RCMP". I would add that this is true regardless of the member's initial intention, given that such behaviour generally causes irreparable harm to victims. Members must at all times consider the potential impact of their actions and behaviour in order to protect their credibility and maintain public trust.

[29] Finally, it is important to note that the "J" Division Commanding Officer is no longer asking for CM Gaudet to be dismissed. The Board was informed in the parties' joint proposal

that, following this proceeding, CM Gaudet would be reinstated in accordance with section 23 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

Parity of sanctions

[30] In order to make a fair decision and impose the appropriate penalty, the Conduct Board must consider the fact that the primary purpose of conduct measures imposed under paragraph 36.2(e) of the *RCMP Act* is not necessarily to punish. Rather, the *RCMP Act* recommends that conduct measures be educative and remedial while being proportionate to the nature and circumstances of the contravention.

[31] Even though I might have imposed harsher conduct measures given the gravity of the sexual misconduct, my discretion is limited when the parties submit a joint proposal on conduct measures to the Conduct Board. Generally speaking, when the Conduct Board wishes to reject a proposal, it has to establish that the proposal is contrary to the public interest.

[32] The public interest test is a very high threshold. In *R v Anthony-Cook*, 2016 SCC 43, the Supreme Court of Canada stated at paragraph 34 that a joint proposal should not be rejected too lightly because

[r]ejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

[33] The public interest test was also adopted in the context of professional discipline in *Rault v Law Society (Saskatchewan)*, 2009 SKCA 81 [*Rault*], as well as in the recent RCMP Commissioner's decision in *Constable Coleman and Appropriate Officer "F" Division*, (2018) 18 AD (4th) 270. According to paragraph 13 of *Rault*, when a joint submission is made to the Conduct Board, the latter must

give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to the public interest; and, it should not be departed from unless there are good or cogent reasons for doing so.

Decision on conduct measures

[34] Having examined the evidence on the record, the nature of CM Gaudet's misconduct, the aggravating and mitigating factors and the supporting case law submitted by the parties, I find that the joint proposal is not unfit or unreasonable, or contrary to the public interest.

[35] In fact, the proposed disciplinary measures respect the range of measures imposed for similar misconduct. The proposed penalty also reflects the gravity of the misconduct, deters CM Gaudet, and promotes general and specific deterrence among other members.

[36] Consequently, I accept the joint proposal on conduct measures submitted by the parties and impose the following conduct measures:

- a. a temporary demotion from a CP-03 to a CP-02 position for one year from the date of the Conduct Board's decision, in accordance with paragraph 5(1)(e) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291, and subsection 22(1.1) of the *RCMP Act*. The member will be reinstated in a CP-03 position (or a CS-03 position if civilian members are converted to public servants), at the same rate of pay, in "J" Division, in Miramichi, upon expiry of the one-year period, without having to requalify through a formal process;
- b. a reassignment to a group other than the "J" Division Canadian Firearms Centre, but not a physical transfer (move); and
- c. a requirement to continue to get counselling on his heavy drinking or to avail himself of any other service deemed appropriate by the "J" Division Health Services Officer.

CONCLUSION

[37] As I noted previously, CM Gaudet's sexual misconduct was completely unacceptable. Indeed, I strongly agree with the following observation of the Conduct Authority:

[TRANSLATION]

Subject to the Board's decision on the joint proposal in this matter, the Conduct Authority, the "J" Division Commanding Officer, expects the member to behave in an exemplary fashion in the future. This joint proposal is an opportunity for the Subject Member to pursue his career in accordance with the values of the RCMP and the standards of conduct imposed by the Code of Conduct. Any future contraventions will be treated seriously by the Subject Member's supervisors and disciplinary authorities and may lead to the Subject Member's dismissal.

[French original quoted verbatim]

[38] The parties may appeal this decision before the Commissioner by filing a statement of appeal within 14 days of this decision being served on CM Gaudet (section 45.11 of the *RCMP Act*; section 22 of the *Commissioner's Standing Orders (Conduct)*, SOR /2014-289).

May 19, 2020

Josée Thibault

Date

Conduct Board