Protected A

File 2017335221 (C-037)

2020 CAD 19

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

an appeal of a conduct board decision pursuant to subsection 45.11(1) of the

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

BETWEEN:

Commanding Officer, "E" Division

Conduct Authority

(Appellant)

and

Constable Curtis Genest

Regimental Number 58600

(Respondent)

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File 2017335221 (C-037)

Decision of the Commissioner

Royal Canadian Mounted Police

September 9, 2020

SUMMARY

The Commanding Officer, "E" Division, Conduct Authority (Appellant), presented an appeal challenging the conduct measures imposed by an RCMP conduct board following its finding that three allegations of discreditable conduct were established against the subject member (Respondent). These allegations stem from the Respondent's unauthorized use of equipment and information and the unauthorized sharing of this information. The conduct board imposed, for each allegation, a reprimand as well as a forfeiture of five days' pay and five days' annual leave. The Appellant appeals the Board's decision on the grounds that it is based on an error of law and is clearly unreasonable.

Finding no manifest or determinative error in the conduct board's decision, the ERC recommended the appeal be dismissed.

The Commissioner accepted the ERC recommendation. The Appellant did not establish that the conduct board made any reviewable errors. The Commissioner dismissed the appeal and confirmed the conduct measures imposed by the conduct board.

INTRODUCTION

[1] The Commanding Officer, "E" Division, Conduct Authority (Appellant), presents an appeal pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10, as amended [*RCMP Act*], challenging the conduct measures imposed by an RCMP conduct board (Board) on Constable Curtis Genest, regimental number 58600 (Respondent). These conduct measures were imposed following the Board's finding that three allegations of discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct (a schedule to the *Royal Canadian Mounted Police Regulations*, 2014, SOR/2014-281) against the Respondent were established.

[2] The Appellant appeals the Board's decision on the grounds that it is based on an error of law and is clearly unreasonable.

[3] In accordance with subsection 45.15(1) of the *RCMP Act*, the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report containing findings and

recommendations issued on June 23, 2020 (ERC file no. C-2017-006 (C-037)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the Commissioner dismiss the appeal and confirm the imposed conduct measures pursuant to paragraph 45.16(3)(a) of the *RCMP Act*.

[4] In rendering this decision, I have considered the material that was before the Board (Material), the appeal record (Appeal), as well as the Report. Unless otherwise stated, I will refer to the documents in the Material and the Appeal by page number.

[5] For the reasons to follow, the appeal is dismissed.

BACKGROUND

[6] The ERC succinctly described the facts surrounding this case (Report, paras 5-13):

> [5] The factual history of this case involves two other individuals: 1) AA, a former RCMP member and the Respondent's troop mate, and 2) AC, a civilian. AA, at the time of the events, was working at a bank as a financial manager. In June 2012, AC went to his bank to withdraw funds to pay for legal fees as he had been charged with impaired driving. The financial advisor introduced him to AA thinking that the latter might be of some help to AC as a former RCMP member. AA told AC to bring all of his paperwork regarding his impaired driving charge from the RCMP the next day and that he would review it. Accordingly, the next day, AA reviewed the paperwork provided by AC, allegedly made some calls, and told him that it would cost him $5,000 to "make it go away". AC negotiated the price to $3,500. He explained that in his home country, you could bribe a police officer for this sort of charge and the charge would not go forth (Material, pages 17-18). AC agreed to pay AA in three instalments with the first instalment on June 18, 2012 (Material, pages 18, 20, 402). The record indicates that AC made all three payments in the summer of 2012.
>
> [6] On or about June 28, 2012, AA and AC met at a shopping centre. AA called the Respondent, who was on duty that day and was parked near the shopping centre, and asked whether he could meet with AC. AA had indicated that he had a friend who was arrested and was willing to pay to make it go away (Material, pages 202, 255-256). The Respondent agreed to meet. When they arrived, AA sat in the passenger seat of the Respondent's police vehicle (Material, pages 123, 198-199). AA asked the Respondent to "run the guy and see if we can get some money" (Material, pages 199, 213). The Respondent queried AC in CPIC and PRIME on his mobile workstation (Material, pages 183, 198-199). The results showed that AC was arrested for impaired driving.

The Respondent told AA that there was nothing he could do and further told AC, who had come up to the police vehicle, to hire a lawyer for the impaired driving charges (Material, pages 183, 198-199, 211, 214, 223, 237).

[7] On an undisclosed date afterwards, the Respondent texted AA asking "what's up with the money?" (Material, page 215).

[8] In November 2012, AC pled guilty in criminal proceedings to a lesser included charge and received a year's probation. Namely, AC could not consume alcohol and could only use his vehicle to drive to and from work.

[9] In March 2013, AA again contacted AC and asked whether they could meet. Upon meeting in AA's vehicle, AA told AC that the police would be arresting him any day now as they had evidence that he was not respecting his court-imposed conditions. AA demanded $7,000 from AC so that he wouldn't be arrested. This time, AC was skeptical and contacted two RCMP members whom he knew from his neighborhood. These officers explained to AC that what AA was doing was illegal and in turn informed their respective supervisors of the situation, which prompted a criminal investigation against AA by the RCMP's anti-corruption unit (ACU).

[10] Part of the investigation was to engage AC as a police agent and execute undercover scenarios. The first scenario included AC introducing a friend of his (an undercover police officer) who needed help taking care of a contravention to AA. AA refused to help AC's friend and advised him to seek legal advice. In the next scenario, a telephone conversation, AC informed AA that his friend had told a neighbour, a police officer, that AA had helped AC in the past in exchange for money. AC then told AA that, as a result, investigators wished to speak to him and he did not know what to say (Material, pages 434-435, 450-454, 873). AA mentioned the Respondent during this conversation as the individual who received the money and who was responsible for helping AC. AA indicated that he had nothing to do with the exchange of the money.

[11] On July 29, 2014, during one of the covert operations in which AC was again a police agent, AA and AC met in a parking lot where AA reimbursed the $3,500 he had taken from AC. AA indicated that, in fact, the money came from his friend "Curtis", referring to the Respondent, whom he reminded AC he had met in June 2012. He further implicated the Respondent by repeating that the latter had received the entirety of the money and that AA had "nothing to do with this" (Material, pages 402, 460-461, 464, 873-880).

[12] On November 15, 2014, AA was arrested for fraud, extortion and personating a police officer (Material, page 404). A last scenario was put in place on the same day, where an undercover police officer met with the Respondent as "AC" (Material, pages 1145-1149). "AC" told the Respondent that investigators wanted to speak to him regarding their meeting in the summer of 2012. "AC" asked the Respondent "what about the money". The

> Respondent explained that he did not know anything about the arrangement "AC" had with AA regarding an exchange of money and that he never received any amount of money. The Respondent told "AC" that AA had asked him to simply scare him by getting mad at AC for having driven impaired so that he would deal with his charges and keep out of trouble. He reminded "AC" that he had told him to hire a lawyer to deal with his impaired driving charge. He advised "AC" to meet with the investigators as soon as possible and answer their questions.
>
> [13] Later that day, the Respondent was arrested for fraud and breach of trust (Material, page 404). Upon his arrest, the Respondent provided a voluntary warned statement in which he admitted making the queries regarding AC on his mobile workstation, but denied receiving money for doing so, nor knowing that AC had already paid AA when the Respondent got involved (Material, pages 183, 198-199, 210, 235). The Respondent's statement will be examined in more detail below.

CONDUCT PROCEEDINGS

Code of Conduct Investigation

[7] On November 24, 2014, a Code of Conduct investigation was initiated in relation to the Respondent's alleged conduct (Material, pp 12-13). Though the first investigation mandate contained four allegations, an Order of Suspension was issued on December 3, 2014, indicating the following three allegations (Material, pp 1603-1605):

1. That between the 28th day of June 2012 and the 31st day of May, 2013, inclusive, at or near [*city redacted*], in the Province of British Columbia, during the course of your duties, you inappropriately accessed RCMP electronic databases for a non-duty related purpose, contrary to Section 4.6 of the Code of Conduct.

2. That between the 28th day of June 2012 and the 31st day of May, 2013, inclusive, at or near [*city redacted*], in the Province of British Columbia, during the course of your duties, you inappropriately utilized a police vehicle for a non-duty related purpose, contrary to Section 4.6 of the Code of Conduct.

3. That between the 28th day of June 2012 and the 31st day of May, 2013, inclusive, at or near [*city redacted*], in the Province of British Columbia, during the course of your duties, you

disclosed RCMP information to an unauthorized, non-police individual, contrary to Section 9.1 of the Code of Conduct.

[8] On December 16, 2014, "E" Division Enhanced Traffic Services Program submitted an investigation report (Investigation Report) into the Respondent's alleged conduct. This Investigation Report, reviewed by Professional Standards Unit, is based on the information and evidence contained in the disclosure documents provided by the ACU's investigative file.

Notice of Conduct Hearing

[9] A Notice of Conduct Hearing (Notice) was issued on August 13, 2015, informing the Respondent that a Board had been appointed to determine whether he had contravened the Code of Conduct. As noted by the ERC, the Conduct Authority amended the second allegation from a contravention of section 4.6 (unauthorized use of government-issued equipment) to section 7.1 (discreditable conduct). The Notice set out the following allegations and particulars as follows (Material, pp 1779-1782):

> **Allegation 1** On or between the 1st day of June, 2012 and the 31st day of May, 2013 at or near [*city redacted*], in the province of British Columbia, [the Respondent] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.
>
> *Particulars of the contravention:*
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. Between May 15th, 2012 and June 28th, 2012, you were contacted by [AA] who informed you of an individual who was charged criminally who wanted to know if there was anything you could do for him, or something to that effect. [AA] informed you that the individual was "willing to pay".
>
> 3. On June 28th, 2012, while on duty, you met with [AA] and [AC] in the area of [*location redacted*], in [*city redacted*], British Columbia. You were driving a police vehicle and you were in full uniform.
>
> 4. [AA] sat in your police vehicle and required that you queried [AC] on your Work Mobile Station. [AA] told you "run him and we'll see if we can get some money".

5. You queried and accessed information about [AC] on RCMP electronic information systems available from your police vehicle for a non-duty related purpose.

Allegation 2 On or between the 1st day of June, 2012 and the 31st day of May, 2013 at or near [*city redacted*] in the province of British Columbia, [the Respondent] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.

2. Between May 1st, 2012 and June 28th, 2012, you were contacted by [AA] who informed you of an individual who was charged criminally who wanted to know if there was anything you could do for him, or something to that effect. [AA] informed you that the individual was "willing to pay".

3. On June 28th, 2012, while on duty, you met with [AA] and [AC] in the area of [*location redacted*], in [*city redacted*], British Columbia. You were driving a police vehicle and were in full uniform.

4. [AA] sat in your police vehicle and requested that you queried [AC] on your Work Mobile Station. [AA] told you "run him and we'll see if we can get some money" off [AC], or something to that effect.

5. You queried [AC] on your Mobile Work Station and accessed information regarding [AC].

6. You made available the information retrieved from RCMP electronic information systems with an unauthorized individual, namely [AA] for a non-duty related purpose.

7. After obtaining the information from your Mobile Work Station [AA] advised you that he would talk to [AC] and "see if he could get money off him" or something to that effect.

8. You later contacted [AA] and inquired about what had "happened to the money".

Allegation 3 On or between the 1st day of June, 2012 and the 31st day of May, 2013 at or near [*city redacted*], in the province of British Columbia, [the Respondent] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of the contravention:

> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. On June 28th, 2012, while on duty, you used a police vehicle to attend a meeting with [AA] and [AC] in the area of [*location redacted*], in [*city redacted*], British Columbia.
>
> 3. During the meeting you provided personal information about [AC] to [AA]. You were informed of [AA]'s intention to unlawfully obtaining money from [AC].
>
> 4. You utilized a police vehicle for a non-duty related purpose.

Proceedings before the Board

a) Decision on the allegations

[10] On July 6, 2016, the Board rendered an oral decision on the allegations following a pre-hearing conference, and issued a written decision on July 8, 2016 (Appeal, pp 17-19). The Board applied the reasonable person test and found, on the basis of the clear, convincing and cogent evidence contained in the Respondent's admissions to the allegations, that the three allegations were established on the balance of probabilities. The Board noted, however, the absence of the terms "conspiracy", "extortion" or "blackmail" in both the allegations and the Respondent's admissions. According to the Board, although there was concern that the Respondent might have been involved in a money exchange, it was never alleged nor proven, and a finding on this aspect of the case would be mere speculation and morally wrong. As a result, the Board indicated that it was deliberately limiting its findings of misconduct to the unauthorized use of equipment and information and the unauthorized sharing of such information, all in the context of the Respondent's knowledge of AA's intention to use this information to attempt to obtain money from AC.

b) The Conduct Authority Representative's submission on conduct measures

[11] On December 6, 2016, a hearing was held on conduct measures (Appeal, p 19). During this hearing, the Conduct Authority Representative (CAR) argued that the circumstances of the case warranted a sanction of dismissal (Appeal, pp 515-357). In support of dismissal, the CAR entered into evidence an instance of informal discipline from 2013 in which the Respondent knowingly

provided a false, misleading or inaccurate statement concerning a form completed by his doctor to his superior, and then made reference to nine RCMP conduct cases arguing that dismissal had been imposed on members having committed a similar deliberate breach of trust. Further, anticipating that good character and performance would be relied on by the Respondent as mitigating factors, the CAR advanced that good character includes the ability to withstand life's difficulties, and that the Respondent's performance evaluation indicated that he was, in fact, a poor performer. The CAR presented the following aggravating factors:

1. The involvement of another police department.
2. The lack of confidence of the Commanding Officer.
3. The incident resulting in the imposition of informal discipline, which indicates a lack of good character.
4. The Respondent's motivation, namely, loyalty to his friend rather than loyalty to the Force.
5. The repeated queries (this was not an isolated act).
6. The Respondent having knowingly assisted AA in committing a fraud on AC.

[12] Regarding the last aggravating factor, the Board mentioned that this was not particularized in the Notice, and that the imposition of conduct measures for misconduct not alleged would be contrary to the principle elaborated by the Federal Court in *Gill v Canada (Attorney General)*, 2006 FC 1106 [*Gill*], according to which an adjudication board must remain within the scope of the allegations contained in the notice of hearing with regard to its findings regarding facts. In response to this, the CAR expressed his disagreement with this decision, and stated that regardless, the Respondent had full knowledge of the case he had to meet and admitted to knowing that the information he would be giving AA would be used to acquire money from AC.

c) The Member Representative's submission on conduct measures

[13] The Member Representative (MR) raised several arguments with respect to the aggravating factors put forward by the CAR (Appeal, pp 358-406). The MR first addressed the last aggravating

factor regarding the Respondent's knowledge in assisting the committal of a fraud, and maintained that the unauthorized disclosure of database information was more of an error in judgement than a breach of trust, that the decision on the allegations clearly limits the misconduct at issue, and that underlying criminality such as fraud, extortion or blackmail was never alleged and therefore could not form the basis for the imposition of conduct measures. The MR then argued that the involvement of another police department was minimal, that the record of informal discipline occurred after the allegations that are the subject of these proceedings, and that the loss of confidence of a Commanding Officer could not be considered as an aggravating factor under the new conduct regime since this is already implied when dismissal is sought.

[14] The MR then addressed the RCMP cases submitted by the CAR and pointed out that almost all of these cases were outdated and involved much more serious misconduct than that alleged against the Respondent.

[15] Next, while acknowledging the Respondent's average performance, the MR emphasized his potential to succeed and indicated that his performance evaluation was a result of an early return to work despite a serious debilitating work-related injury.

[16] Turning to the conduct measures, the MR suggested that despite the Board's findings that the Respondent engaged in discreditable conduct contrary to section 7.1 of the Code of Conduct, the conduct measures applicable to a contravention under section 4.6 (unauthorized use of police equipment) were more suitable to the present circumstances. While the aggravated range of conduct measures for the unauthorized use of a police vehicle was a forfeiture of pay between one and ten days, the range of conduct measures for the unauthorized use of police databases was very wide, calling for a forfeiture of pay if the queries were not done for an illegal purpose. The MR proceeded to an analysis of RCMP cases involving members who made unauthorized database queries and disclosed the results of these searches to individuals unconnected to the RCMP, but whose misconduct did not result in dismissal from the Force. The MR emphasized that dismissal typically only occurs in cases where personal gain has been sought or obtained. While the MR stressed that no personal gain was sought or obtained by the Respondent, she argued that the following significant mitigating factors deserved consideration by the Board:

1. The Respondent's psychological state at the time of the events caused by his work-related motor vehicle accident and separation from his wife.

2. The Respondent's degree of cooperation during the investigation and conduct proceedings, shown by his admission at the first opportunity.

3. The absence of prior discipline in the Respondent's record.

4. The Respondent sought and received treatment for his condition.

5. The letter of reference emphasizing the Respondent's desire to help others, confirming that he is a valuable member of the community.

6. The misconduct was out of character and his chances of reoccurrence were very unlikely.

[17] The MR reasoned that the quantum of conduct measures should consist of a reprimand as well as a forfeiture of fifteen days of pay and a forfeiture of fifteen days of annual leave. The MR explained that the suggestion for the annual leave portion of the conduct measure was intended to minimize the financial impact on the Respondent who was required to pay monthly child support.

d) The CAR's rebuttal on conduct measures

[18] In his rebuttal, the CAR explained that although the cases he had presented involved more serious misconduct than that alleged against the Respondent, they were nonetheless relevant as they show how a loss of trust from the Commanding Officer causes a repudiation of the employment contract (Appeal, pp 407-413). Further, the CAR stated that although the cases are dated, the principles they contain are still valid. Following an exchange with the MR about the involvement of another police service in the case, the CAR conceded that he was mistaken about the degree of its involvement.

[19] The CAR also raised several arguments countering the MR's submissions on conduct measures. First, the CAR argued that little weight should be given to the cases she presented since the conduct measures were the result of a joint submission on sanction. Second, the CAR contended that contrary to the MR's assertion, personal gain was sought by the Respondent in the

form of a continued friendship with AA. Third, the CAR raised an issue with the Respondent's medical report advancing a lack of explanation or supporting evidence on his noted improvement. According to the CAR, the information in the medical report is self-serving, benefitting the Respondent in attempting to justify the nature of his behaviour.

e) Decision on conduct measures

[20] In a written decision issued on February 27, 2017 (Appeal, pp 13-32), the Board first reviewed the applicable framework for the analysis of appropriate conduct measures requiring that first, the range of measures be determined, second, aggravating and mitigating factors be considered, and third, the selection of conduct measures are fair and appropriate to the gravity of the misconduct. The Board examined the differences between the former disciplinary and current conduct regimes, and noted that the current regime grants conduct boards greater authority and flexibility to impose more significant financial consequences. However, the Board also noted that the *Conduct Measures Guide* provides that if a forfeiture of pay of forty-five days' pay is considered, dismissal should also be contemplated.

[21] The Board then reviewed previous case law submitted by both Parties and remarked that, whereas the cases submitted by the CAR were significantly outdated and did not shed meaningful light on current institutional sensitivity of privacy interests, the cases submitted by the MR involved a joint submission on sanction in which dismissal was evidently not sought. Accordingly, the Board questioned the precedential weight of these cases. Even so, in reviewing the cases, the Board found that dismissal seemed to be an option only in the most extreme and egregious cases. While the Board acknowledged that the Respondent's actions were reckless and careless, amounting to serious misconduct, it found that given the absence of allegations pertaining to blackmail, fraud and extortion, as well as the lack of personal gain sought or obtained by the Respondent, the applicable range of sanction for this kind of misconduct falls short of dismissal.

[22] In considering the aggravating and mitigating factors present in the case, the Board found that the most significant aggravating factor was that more than one query was made by the Respondent. However, the Board held that the other aggravating factors put forward by the CAR

were not as impactful for several reasons. The Board first explained that the involvement of another police department was very limited as it was only peripherally aware of the presence of an internal investigation in the RCMP. Therefore, according to the Board, this factor alone was not sufficient to conclude that the Respondent tarnished the RCMP's reputation. Next, the Board found that the aggravating factor relating to the Commanding Officer's loss of confidence was a tautology since this was already implied by the conduct proceedings before a Board, which only occur under the current conduct regime when dismissal is sought. Lastly, the Board determined that the Respondent's informal discipline could only be considered as a rebuttal to his good character but not as an aggravating factor as the incident took place after the events here. The Board found that the following mitigating factors were significant:

1. The circumstances underlying the Respondent's behaviour at the time of the events: the Respondent's serious motor-vehicle accident during his first year of service with the Force, causing him severe psychological and physiological damage, and the dissolution of his marriage and loss of his home.

2. Although the Respondent made several queries, this was not a pattern of activity.

3. The Respondent accepted responsibility for his actions and cooperated with internal investigators allowing the expediency of the conduct process.

4. The Respondent was remorseful and apologetic.

5. The Respondent sought and received treatment for the conditions which contributed to his lack of judgement.

[23] Following consideration of the established contraventions, the materials and submissions, the relevant cases, the aggravating and mitigating factors, as well as the *Conduct Measures Guide*, the Board explained in closing that much has changed in the attitudes towards discipline within the Force since disciplinary matters were tried in Service Court. The Board emphasized that the Force is indeed an institution of rehabilitation, and that in cases where members accept responsibility for misconduct that is not so serious as to warrant dismissal, "the Force will go a

considerable distance in assisting them in their ongoing efforts towards rehabilitation" (Appeal, p 31). That said, the Board imposed the following conduct measures:

1. For each allegation, a reprimand.

2. For each allegation, a forfeiture of five days' pay and five days' annual leave.

APPEAL

[24] On March 7, 2017, the Appellant presented a *Statement of Appeal* (Form 6437e) to the Office for the Coordination of Grievances and Appeals (OCGA), claiming that the Board's decision on sanction was reached in a manner that contravened the principles of procedural fairness, was based on an error of law and is clearly unreasonable (Appeal, pp 3-4). The Appellant seeks the Respondent's dismissal or a direction to the Respondent to resign from the Force within 14 days.

[25] The Appellant raises three grounds of appeal (Appeal, pp 10-12):

1. The Board failed to properly assess the egregious nature of the allegations given that the Respondent knew the purpose that AA had in mind when asking for the information;

2. The Board contradicted itself within the decision and clearly failed to accept its own findings on the allegations; and

3. The Board failed to take into consideration the opinion of a reasonable person knowledgeable of all the relevant circumstances, including the realities of policing in general and the RCMP in particular.

EXTERNAL REVIEW COMMITTEE

[26] For the first ground of appeal challenging the Board's failure to properly assess the egregious nature of the allegations with regard to the Respondent's knowledge of AA's intention when asking for the information, the ERC found no manifest or determinative error. The ERC held that the Board clearly considered the egregious nature of the misconduct and indicated that

although it was serious, the lack of evidence presented on the extent of the Respondent's knowledge of AA's intention and of any allegation relating to conspiracy, limited its ability to make a finding outside of the scope of the allegations described in the Notice. In applying the appropriate standard of review, the ERC found that the Appellant's disagreement with the Board's conclusion was not sufficient to demonstrate the existence of a palpable or overriding error.

[27] With respect to the Appellant's second ground of appeal regarding the Board's application of its finding on the allegations to its decision on conduct measures, the ERC determined that contrary to the Appellant's position, the Board did not contradict itself. According to the ERC, while the Board found, during the allegation phase, that the Respondent knew that AA wanted to obtain money from AC, the extent of that knowledge was never detailed. The ERC therefore found that the Board's conclusion, at the conduct measures phase, that the Respondent had no knowledge of AA's plan with the information obtained is not incompatible with the finding that the Respondent knew that AA wanted to obtain money from AC.

[28] As for the Appellant's third ground of appeal regarding the Board's determination of conduct measures, the ERC agreed with the Respondent that the legal framework put forward by the Appellant is the one utilized for deciding whether an allegation under section 7.1 of the Code of Conduct is established and is not applicable to the determination of conduct measures. The ERC found that the Board applied the correct three-part process in considering conduct measures.

PRELIMINARY MATTERS

Applicable standard of review

[29] In order to properly address the grounds of appeal raised by the Appellant, it is first necessary to identify the standard(s) against which they must be assessed.

[30] Subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [*CSO (Grievances and Appeals)*] provides the guiding principles to be followed in conduct appeals:

> 33(1) The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[31] This case concerns an appeal of the conduct measures imposed on the Appellant by the Board. I accept that a decision on sanction is to be accorded significant deference given a conduct board's advantageous position to assess all the evidence as the tribunal of first instance. A previous Commissioner under the former disciplinary regime stated that he would only vary a sanction on appeal if it ((2011), 8 AD (4th); D-115):

> [44] […] fails to consider all relevant matters (including important mitigating factors), considers irrelevant aggravating factors, demonstrates a manifest error in principle, is clearly disproportionate with the conduct and the sanction in other previous similar cases, or would amount to an injustice.

[32] The issue here turns on whether the Board, in its consideration of the appropriate conduct measures, erred in assessing the egregious nature of the allegations, failed to apply its own findings on the allegations, or applied the wrong legal framework. I agree with the ERC that the first two grounds of appeal involve findings of fact or of mixed fact and law, and that the third ground relates to an error of law. I also note that the Appellant did not ultimately present arguments concerning the issue of procedural fairness as initially indicated in Form 6437e (Appeal, p 3). Given the lack of arguments in addition to the absence, in my view, of any element in the record suggesting that the Board's decision was reached in a manner that contravened the applicable principles of procedural fairness, I will focus my analysis on the arguments advanced by the Appellant.

[33] The Supreme Court of Canada renewed an examination of the standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*). For present purposes, I note that the Court confirmed that legislated standards of review should be respected (*Vavilov*, paras 34-35), and the majority distinguished the approaches to be taken between statutory appeals and judicial reviews of administrative decisions (*Vavilov*, paras 36-45).

[34] The term "clearly unreasonable" in subsection 33(1) of the *CSO (Grievances and Appeals)* describes the standard to be applied in a review of questions of fact and of mixed fact and law. In

Kalkat v Canada (Attorney General), 2017 FC 794, the Federal Court considered the term "clearly unreasonable":

> [62] Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term, I conclude that the Delegate did not err. Interpreting the "clearly unreasonable" standard as being equivalent to the "patently unreasonable" standard is reasonable in the context of the legislative and policy scheme. This means that the Delegate must defer to a finding of the Conduct Authority where he finds the evidence merely to be insufficient to support the finding *(British Columbia Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25).

[35] In *Canada (Director of Investigation and Research) v Southam Inc*., [1997] 1 SCR 748, at para 57, the Supreme Court explained that the difference between unreasonable and patently unreasonable lies in the "immediacy or obviousness of the defect", and that while a decision is patently unreasonable if the "defect is apparent on the face of the tribunal's reasons", "some significant searching or testing" may be required to find a defect in a decision that is unreasonable. Therefore, I owe significant deference when considering the Appellant's first two grounds of appeal, and only a manifest or determinative error would allow me to interfere with the Board's decision.

[36] In the context of the RCMP conduct appeal regime, I accept that an error of law is reviewed against a standard of correctness, requiring no deference (*Vavilov*, para 37; *Housen v Nikolaisen*, [2002] 2 SCR 235, para 8).

ANALYSIS

1. Did the Board fail to properly assess the egregious nature of the allegations?

[37] The Appellant argues that the Board failed to give sufficient emphasis to the fact that the Respondent was aware of AA's intentions to unlawfully extort AC (Appeal, p 10). The Appellant insists that the circumstances of the interaction between the Respondent and AA, and particularly AA's clear instruction to the Respondent to query AC to see if they could get some money from him should have alerted the Respondent, an experienced police officer, that he was contributing to the extortion of AC. According to the Appellant, the consideration of personal gain from the

Respondent is irrelevant seeing that despite his knowledge of the purpose of the query, he proceeded to obtain and share information he was obliged to protect (Appeal, p 11). On this point, the Appellant identifies the sworn oaths and documents signed by the Respondent upon becoming a member of the Force.

[38] The Respondent maintains that the Appellant is attempting to reiterate arguments that were made during the conduct hearing, and that since the appeal is not a *de novo* hearing, these should be disregarded (Appeal, p 93). According to the Respondent, the Board did consider the egregious nature of the alleged misconduct, but found that though serious, it did not warrant dismissal (Appeal, p 94). The Respondent further argues that the Appellant's contention about his knowledge of AA's intention to unlawfully extort AC was not corroborated by testimonial evidence and therefore remains speculative (Appeal, p 95). The Respondent stresses that the allegations are disciplinary in nature and are neither illegal nor unlawful.

[39] In assessing the allegations, the Board appropriately set out the test applicable to finding a contravention under section 7.1 of the Code of Conduct comprising of first, ascertaining the member's identity, second, determining whether the alleged facts took place by way of sufficient, clear, convincing and cogent evidence on the balance of probabilities, and lastly, applying the reasonable person test that considers how a reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the behaviour. With respect to this latter element, the Board concluded that the reasonable person would find the unauthorized use of police information databases and police vehicles to be discreditable conduct (Appeal, p 18).

[40] Turning to the reason behind the Respondent's misuse of information, the Board acknowledged that each of the three allegations referred to a certain degree of knowledge by the Respondent about the purpose of the queried information, and that there was some concern that he might have been involved in a conspiracy with AA to blackmail or extort AC. However, the Board specified that "there was no indication as to how AA was planning to go about extracting money from AC or how the [Respondent] came to know this" (Appeal, p 18). Likewise, the Board noted that "conspiracy", "extortion" or "blackmail" were never alleged, proven or admitted, and that the

allusions contained in the allegations in addition to the Respondent's admissions could not be used as the basis of speculation (Appeal, p 19). Although the Board recognized the seriousness of the misconduct, the finding was limited to the allegations as they were formulated, namely the unauthorized use of equipment and information and the unauthorized sharing of such information, "all in the context of the [Respondent's] knowledge of AA's intention to use this information to obtain money from AC" (Appeal, p 19).

[41] During the conduct measures phase, the Board questioned the CAR about the aggravating factor presented relating to the Respondent having knowingly assisted AA in committing a fraud on AC despite the lack of particularization about this unlawful purpose (Appeal, p 23, 349). Like the ERC, I note that in response to this, the CAR highlighted that the Respondent gave allegiance to his friend rather than the Force by giving him information he knew would be used to obtain money (Appeal, p 356) (*sic* throughout):

> Go to a lawyer, [the Respondent] says. Get yourself a good lawyer. But he still knew that the money was going to his friend. Whether it was unlawfully or whether his friend was going to be a paralegal and go to court and help him out, the point is he should not have been giving allegiance to his friend, AA, who was a troupe mate, notwithstanding the fact that he helped him out through some hard times, through what I understand may have been difficult times and needing support to live with somebody.

[42] In his appeal submission, the Appellant maintains that the Board failed to give sufficient importance to the fact that the Respondent was aware of AA's intentions to unlawfully extort AC. In my view, it is clear from the Board's decision and hearing transcript that this issue was carefully examined, assessed and even clarified with the CAR. The Board found that it would be unlawful and contrary to the principles articulated by the Federal Court in *Gill* to impose conduct measures for misconduct that was not alleged nor proven. The Board also indicated that only the most extreme and egregious cases suggest dismissal as an option, and that given the absence of clear, convincing and cogent evidence establishing a conspiracy to commit blackmail, fraud or extortion, the present case did not fall in this category (Appeal, p 29). After reviewing the information on which the Board based its decision, I am satisfied that the record supports the Board's conclusion that the extent of the Respondent's knowledge of AA's attempt to obtain money from AC was

simply not established. I therefore agree with the ERC that the Board committed no manifest or determinative error in making this finding.

2. Did the Board contradict itself within the decision and clearly fail to accept its own findings on the allegations when deliberating on the sanction?

[43] The Appellant insists that the Board contradicted itself during the conduct measures phase by failing to accept its own findings made on the allegations to support a lesser sanction (Appeal, pp 11-12). The Appellant explains that although the Board concluded, with respect to the allegations, that the Respondent was knowingly involved in an unlawful activity with AA, it then found during the conduct measures phase that there was no evidence of the Respondent's knowledge about what AA would do with the information he provided. The contested excerpts of the Board's decision are the following:

> *Allegation phase:*
>
> [15] In fact, the true reason underlying this misuse of equipment and information is alluded to in all three allegations: in Allegation 1, "run him and we see if we can get some money", in Allegation 2, "what happened to the money" and in allegation 3, the [Respondent] admits he knew of AA's intention to unlawfully obtain money from AC, but there is no indication as to how AA was planning to go about extracting money from AC, or how the [Respondent] came to know about this. Still, the reasonable person would have no difficulty in finding the underlying context for the [Respondent]'s unauthorized use of vehicles and databases to be disgraceful, and to discredit the RCMP.
>
> [19] I am deliberately limiting my findings of misconduct to the unauthorized use of equipment and information and the unauthorized sharing of such information, all in the context of the [Respondent]'s knowledge of AA's intention to use this information to attempt to obtain money from AC.
>
> *Conduct measures phase:*
>
> [75] The [Respondent], throughout the course of the investigation and these conduct proceedings, was consistent in claiming no knowledge of what AA was planning to do with the information the [Respondent] provided him with. No evidence to the contrary was forthcoming. At worst, then, I find the [Respondent] was reckless or careless with the database information, which still makes this a serious form of misconduct. There is increasing awareness and sensitivity surrounding privacy issues, and it is in the best interests of the

> Force to take a firm stand on its stewardship of the information contained in its databases.

[44] The Respondent argues that the Appellant is again attempting to reiterate arguments that were presented to the Board (Appeal, p 95). The Respondent disagrees with the Appellant's interpretation, maintaining that there is no contradiction between the Board's finding on the Respondent's knowledge of AA's intention to use the information to attempt to obtain money from AC, and its inability to find that the Respondent was knowingly involved in an unlawful activity (Appeal, p 96).

[45] I agree with the ERC that the two findings made by the Board are not irreconcilable (Report, para 91). During the allegations phase, the Board acknowledged that each of the three allegations alluded to "the true reason underlying this misuse of equipment and information", specifically, the Respondent's knowledge of AA's intention to use the information provided to attempt to obtain money from AC (Appeal, pp 18-19). However, the Board also pointed out the clear limits of the established misconduct in the imposition of conduct measures. The Board explained that although there was concern about the Respondent's involvement in some sort of conspiracy with AA to blackmail or extort AC with the information provided, the allegations lacked the particularization to this effect necessary for such a finding to be made (Appeal, p 19):

> [18] It is crucial that the words "conspiracy", "extortion" or "blackmail" do not appear anywhere in the allegations. Nor do they appear in the [Respondent]'s admissions. The details of AA's interactions with AC are never articulated, nor is the extent of the [Respondent]'s knowledge of those details. The admissions provided by the [Respondent] cannot be used as the basis for speculation. If extremely serious misconduct is being alleged, the precise nature of this misconduct must be clearly articulated in the Notice. A member named in a Notice must be made aware of the case he has to meet. It would be morally wrong, and wrong in law, to sanction misconduct which has never been alleged.

[46] In the conduct measures phase, the Board reiterated this absence of particularization and confirmed that it would be contrary to *Gill* to impose conduct measures for misconduct not alleged nor proven (Appeal, p 23). The Board recognized that the Respondent was consistent in claiming no knowledge of what AA was planning to do with the information and that no evidence to the contrary was forthcoming. I accept that there is a significant difference between knowing that the

information will be used to obtain money, and knowing the details of how this money will be obtained. No evidence was presented corroborating the last of these two degrees of knowledge. Recognizing the significant deference owed on review, I find that the Board committed no manifest or determinative error in applying its finding on the allegations to its reasoning on the imposition of the conduct measures.

3. Was the Board obligated to take into consideration the opinion of the reasonable person when considering conduct measures?

[47] The Appellant argues that the opinion of a reasonable person, knowledgeable of all the relevant circumstances, including the realities of policing in general and the RCMP in particular, would be of the opinion that the Respondent's conduct is not that expected from a member of the Force (Appeal, p 12). The Appellant contends the Board failed to maintain the higher professional standard that members are expected to hold themselves to, and that since it was found that the Respondent's integrity was lacking, he is not fit to remain a member.

[48] In reply, the Respondent maintains that the reasonable person test put forward by the Appellant is the applicable standard for establishing an allegation under section 7.1 of the Code of Conduct, but is not the standard for determining appropriate conduct measures (Appeal, p 96). According to the Respondent, if the argument pertains to the allegations, it is inconsequential since the allegations have already been established. The Respondent states, however, that if the argument relates to the imposition of conduct measures, there is nothing supporting the Appellant's assertion that the Respondent's "integrity has been found to be lacking and he is not fit to remain a member" (Appeal, p 96).

[49] I agree with the ERC that it is not clear whether the Appellant is arguing that the Board failed to consider the reasonable person's opinion as an aggravating factor or that the Board did not apply the correct framework in its consideration of the appropriate conduct measures (Report, para 96). Given that this is an appeal on conduct measures and that no explicit mention is made by the Appellant that this ground of appeal relates to the Board's assessment of the aggravating factors, I will assume, like the ERC, that this argument concerns the conduct measures.

[50] The Board explained the appropriate three-part process for determining conduct measures as follows: first, establish the range of appropriate measures that must be considered; second, identify the aggravating and mitigating factors; and third, choose conduct measures that are fair, just and appropriate to the gravity of the misconduct (Appeal, p 27). After setting out the correct legal framework, the Board compared the former *RCMP Act* to the current legislation, and examined the *Conduct Measures Guide*. The Board acknowledged that, while the maximum forfeiture possible under a single notice in the previous disciplinary system was 10 days' pay, there is no longer such a restriction on the total amount of forfeiture that may be imposed by a conduct board. Next, the Board considered the case law submitted by the Parties and found that dismissal seemed to be an option only in the most extreme and egregious cases (Appeal, p 29). The Board then identified the aggravating and mitigating factors, and imposed the conduct measures it deemed appropriate for each allegation. I find that the Board applied the correct legal framework.

[51] I also agree with the Respondent and the ERC that the reasonable person test, as described by the Appellant, is the applicable test to determine whether an allegation under section 7.1 of the Code of Conduct is established. As explained by the ERC, this test requires that the conduct, not the conduct measure, be measured against the reasonable expectations of the community (Report, para 97). The Board applied this test in considering whether the allegations were established (Appeal, pp 17-18).

[52] In sum, the Board did not err in law by not applying the reasonable person test when considering appropriate conduct measures.

DISPOSITION

[53] The Appellant has not established that the Board made any reviewable errors related to the imposition of conduct measures in this case.

[54] The appeal is dismissed and the Board's decision confirmed.

September 9, 2020

Brenda Lucki — Date

Commissioner