Protected A

File: 20173351284 (C-045)

2021 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, R.S.C. 1985, c. R-10

BETWEEN:

Constable Brian Eden

Regimental Number 56773

(Appellant)

and

Commanding Officer, "E" Division

Royal Canadian Mounted Police

(Respondent)

Protected A

File: 20173351284 (C-045)

(Parties)

CONDUCT APPEAL DECISION

ADJUDICATOR: Steven Dunn

DATE: August 3, 2021

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SYNOPSIS

The Appellant faced two allegations under section 4.6 (misuse of RCMP information management/information technology systems) and two allegations under section 7.1 (discreditable conduct) of the RCMP *Code of Conduct* for unauthorized access of RCMP databases to obtain the phone number of two female members of the public for non-duty related

reasons. The Appellant subsequently used this information to initiate contact with the two women, including one who was underage and a complainant in a sexual assault investigation.

The Appellant admitted to three of the four allegations. A Conduct Board (Board) found all four allegations established and ordered the Appellant to resign within 14 days or be dismissed from Force. The Appellant appealed this decision.

On appeal, the Appellant argued Conduct Authority and Board breached the relevant principles of procedural fairness by failing to follow policy, and that the Board's decision was clearly unreasonable as it mischaracterized certain conduct and failed to consider relevant facts when finding that the allegations were established. The Appellant also challenged an earlier decision by the Board denying his motion for a stay of proceedings for abuse of process. With regard to conduct measures, the Appellant argued that the decision was clearly unreasonable by discounting certain mitigating factors, placing too much weight on certain aggravating factors, failing to consider non-dismissal measures, and that dismissal was ultimately not the appropriate conduct measure.

The appeal was referred to the RCMP External Review Committee (ERC) for review. The ERC found that Conduct Authority and Board did not breach the relevant principles of procedural fairness, and that the Board's decision is not clearly unreasonable.

An Adjudicator found that the Board's decision was supported by the record and that the Board did not make a manifest and determinative error in denying the motion for a stay of proceedings, its finding on the allegations, and ultimately determining dismissal was a proportionate conduct measure. The appeal was dismissed.

INTRODUCTION

[1] Constable (Cst.) Brian Eden, regimental number 56773 (Appellant), appeals the conduct measures imposed by an RCMP Conduct Board (Board). After finding that two contraventions under section 4.6 (misuse of RCMP information management/information technology systems) and two allegations under section 7.1 (discreditable conduct) of the RCMP *Code of Conduct*

[*Code*] (set out in the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281) were established, the Board ordered the Appellant to resign from the Force within 14 days or be dismissed pursuant to paragraph 45(4)(b) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10 (*Act*). The Appellant argues that the Board's decision was reached in a manner that contravened the applicable principles of procedural fairness and that findings on the allegations and appropriate conduct measures were clearly unreasonable.

[2] The appeal process for this type of decision is governed by section 45.11(1) of the *Act* which allows for the appeal of a decision by a conduct board to the Commissioner (or her delegate). Pursuant subsection 45.15(1) of the *Act*, the appeal was referred to the RCMP External Review Committee (ERC) for review. In Findings and Recommendations (ERC file C-2018-006) (C-045)), dated January 6, 2021 (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

[3] The Commissioner has the authority, under subsection 45.16(11) of the *Act* to delegate her power to make final and binding decisions in conduct appeals. I have received such a delegation.

[4] In rendering this decision, I have considered the entire record consisting of the material before the Board (Material) and the appeal materials (Appeal) prepared by the Office for the Coordination of Grievances and Appeals (OCGA). References to the Material and the Appeal relate to the electronic page numbers of the corresponding document. References to the Report are indicated by paragraph number.

[5] For the reasons that follow, I agree with the ERC and dismiss the appeal.

BACKGROUND

[6] The ERC succinctly described the background facts (Report, para 5):

> [5] The Appellant accessed RCMP electronic file information to obtain the cell phone number of Ms. A, a 17-year-old complainant of sexual assault. He initiated a number of text message and photograph exchanges with her and suggested meeting with her. The exchange ended when Ms. A's texts

indicated suicidal thoughts and the Appellant called for assistance for her. In a separate series of events, the Appellant accessed RCMP electronic file information to obtain Ms. B's personal phone number after issuing Ms. B a speeding ticket. He sent her a text message to invite her for coffee and he expressed his interest in obtaining acupuncture from her husband as this was mentioned at the roadside stop.

CONDUCT PROCEEDINGS

[7] The ERC summarized the conduct proceedings (Report, paras 6-73):

> [6] The Appellant was suspended with pay on February 25, 2015 (Material, pages 1090-1092). On April 8, 2015, the Appellant's RCMP Reliability Status was suspended, thereby prohibiting the Appellant from unescorted access within RCMP facilities and restricting him from accessing RCMP Information Management/Information Technology (IM/IT) systems (Material, page 1094).
>
> [7] The Appellant was arrested on a suspicion of child luring, related to Ms. A, on March 4, 2015 and apparently released on that date. The Professional Standards Unit for the Appellant's RCMP Detachment submitted a report to the Crown on April 1, 2015 seeking criminal charges. In June 2015, the Deputy Regional Crown advised they would not be proceeding with criminal charges (Material, page 2364).
>
> [8] The Board was appointed on February 4, 2016 (Material, page 1111). The Appellant was served a Notice of Conduct Hearing, signed by the Conduct Authority on July 28, 2016, together with related investigative materials on August 9, 2016 (Material, pages 1119-1124). The Notice of Conduct Hearing identified four allegations, the details of which I will explain later this report.
>
> [9] On September 18, 2016, the CAR filed his list of witnesses under section 18 of the *Commissioner's Standing Orders (Conduct),* SOR/2014-291 (*CSO (Conduct)*). After receiving two filing extensions, the Appellant submitted a written response to the allegations on October 19, 2016, as required by subsection 15(3) of the *CSO (Conduct)* (Material, pages 1161-1164). The Appellant denied all of the allegations.
>
> **1. Appellant's Motion for a Stay of Proceedings and Board Decision on the Motion**
>
> **A. Motion and Parties' Submissions**
>
> [10] On December 5, 2016, the Appellant's Representative filed a motion for a stay of proceedings based on an abuse of process arising from an alleged excessive lapse of time between the appointment of the Board and the service of the Notice of Conduct Hearing (Material, pages 1132-1153).

The CAR filed a written submission in response to the motion on December 13, 2016 (Material, pages 1169-1189). The Appellant's Representative filed a rebuttal submission on December 16, 2016 (Material, pages 2313-2322).

[11] The Appellant's arguments were as follows:

- The Conduct Authority did not comply with subsection 43(2) of the *RCMP Act* when he failed to serve the Appellant with the Notice of the Conduct Hearing "as soon as feasible". In his rebuttal submission, the Appellant asserted that non-compliance with subsection 43(2) by the Conduct Authority resulted in a loss of jurisdiction over the matter;
- The delay in time between the appointment of the Board and the service of the Notice of Conduct Hearing on the Appellant was presumptively unreasonable and the Conduct Authority had not justified the delay;
- The Appellant suffered prejudice caused by the stigma of child luring investigations and has suffered mentally, physically, emotionally and psychologically;
- The delay caused irreparable prejudice to the integrity of the RCMP conduct system; and
- The Conduct Authority's untimely actions were an abuse of process that warranted a stay of proceedings.

[12] The CAR's arguments were as follows:

- Subsection 43(2) of the *RCMP Act* was complied with and the delay was reasonable given the circumstances;
- The Appellant did not suffer prejudice from the delay because there was an absence of evidence linking the impugned delay with the claimed prejudice;
- The impugned delay did not harm the overall integrity of the RCMP's conduct process; and
- The impugned delay was not an abuse of process that warranted a stay of proceedings.

B. Board's Decision on the Motion

[13] In a corrected decision, dated January 3, 2017, the Board denied the Appellant's motion (Material, pages 2362-2381).

[14] The Board identified that significant amendments to the *RCMP Act* came into effect on November 28, 2014 and that the new conduct management system enacted under the *RCMP Act* contains a specific direction on how quickly a member should be served with a notice of conduct hearing and the related investigation report once a conduct board

has been appointed to adjudicate the matter (Material, page 2368). Section 43 of the *RCMP Act* states (my emphasis):

> *(1) On being notified under subsection 41(1) of an alleged contravention of a provision of the Code of Conduct by a member, the officer designated for the purpose of that subsection shall, subject to the regulations, appoint one or more persons as members of a conduct board to decide whether the member contravened the provision.*
>
> *(2)* ***As soon as feasible*** *after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.*

[15] The Board considered the arguments presented by both parties about the interpretation of "as soon as feasible" in subsection 43(2) of the *RCMP Act.* The Board adopted an interpretation of "as soon as feasible" in subsection 43(2) that demanded "reasonably quick action by the Conduct Authority" but also took into account surrounding circumstances (Material, page 2370).

[16] After addressing some additional arguments presented by the parties, the Board applied the test articulated in *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 SCR 307 (*Blencoe)* to determine if a stay of proceedings was warranted. Applying the *Blencoe* approach, the Board considered various contextual factors such as the complexity of the Appellant's file and the staffing shortages at the Conduct Authority Representative Directorate (CARD) at the time in order to determine if the delay was acceptable. The Board found that the six-month delay had little to do with the nature of the Appellant's file, but more to do with the shortfall in CARD human resources in 2015. The CARD was insufficiently staffed for the volume of files it was required to handle in its first year under the new conduct system. The Board acknowledged that the six-month delay was longer than any subject member should experience, but found that because of the particular circumstances, where the delay arose during the first year of CARD operations under the new conduct system, this was not the type of unacceptable delay contemplated in the *Blencoe* approach (Material, page 2377). Next, the Board examined whether there was an irreparable hearing unfairness or significant personal prejudice to the Appellant that arose because of the delay. The Board found that the psychological harm suffered and health issues identified by the Appellant, in an affidavit filed in support of the Motion, could not be directly related to the delay. The Board found that the psychological issues identified by the Appellant were not significant enough to meet the threshold of "significant psychological harm" described in *Blencoe*. The Board also found that the delay had not caused irreparable prejudice to the integrity of the RCMP conduct system. In fact, the Board

found that the integrity of the RCMP conduct process would be better protected by allowing this matter to proceed to a conduct hearing. Finally, the Board applied *R. v. O'Connor,* [1995] 4 SCR 411 to the case and concluded that a stay of proceedings was not warranted because it was not the clearest of cases where a stay of proceedings was required to address the prejudice to the Appellant or to the RCMP conduct system.

2. Other Events Preceding the Board Hearing

[17] The Conduct Hearing was originally scheduled for January 24-26, 2017. On December 23, 2016, the Appellant's Representative advised that he would no longer be representing the Appellant. A private legal counsel confirmed that he was the Member's Representative (MR) representing the Appellant and requested an adjournment of the hearing. At a prehearing conference on January 16, 2017, an adjournment of the hearing to March 28, 2017 was granted (Material, page 2401).

[18] On February 28, 2017, the MR filed a revised response under subsection 15(3) of the *CSO (Conduct)* (Material, pages 1579-1583). The Appellant continued to deny Allegations 1 and 4, but admitted to Allegations 2 and 3.

[19] On March 22, 2017, the MR filed the report and the curriculum vitae (CV) of a psychologist expressing expert opinions in support of the Appellant, to be used during the conduct measures phase of the hearing. The Board accepted the expert report notwithstanding that it was not filed in compliance with the 30-day advance filing requirement (Material, page 2635). The CAR requested time to prepare a response to the expert report and the Board offered an adjournment of the hearing to May 24, 2017 with the MR's consent.

[20] At a pre-hearing conference on April 6, 2017, the hearing date was rescheduled to September 11, 2017, because the CAR indicated that he expected to receive his expert report by the end of July 2017 (Material, pages 2654, 2675). On August 3, 2017, the CAR office filed its expert psychologist report.

[21] At a pre-hearing conference on July 5, 2017, both parties agreed to making written submissions regarding the establishment of the allegations in advance of the hearing (Material, page 2752). At that time, the MR asked that, before the allegations were adjudicated, the Appellant be permitted to testify. The Appellant would testify again at the conduct measures phase. However, on September 6, 2017, the MR advised that it was not necessary for the Appellant to testify before the conduct measures phase of the hearing (Material, page 2831).

[22] The CAR's submissions on the allegations were filed on August 25, 2017 (Material, pages 2805-2814), the MR's response was filed on

September 1, 2017 (Material, pages 2828-2830), and the CAR's brief reply was filed on September 6, 2017 (Material, pages 2845-2846). Both parties filed an Agreed Statement of Facts (ASF) with the Board on September 7, 2017 (Material, pages 2857-2861). I observe that in the ASF, the Appellant now admitted to Allegations 1, 2 and 3.

3. Allegations and Agreed Summary of Facts

[23] The Appellant faced two allegations of using government-issued equipment and property for unauthorized purposes and activities, contrary to section 4.6 of the *Code of Conduct* and two allegations of discreditable conduct, contrary to section 7.1 of the *Code of Conduct* (Material, pages 1121-1124). Allegations 1 and 2 pertain to the actions of the Appellant in relation to Ms. A and Allegations 3 and 4 pertain to the actions of the Appellant in relation to Ms. B. The allegations are as follows (Material, pages 1121-1124):

> ***Allegation 1***
>
> *On or between January 8th, 2015 and February 11th, 2015, inclusive, at or near Richmond, in the Province of British Columbia, [the Appellant] used government-issued equipment and property for unauthorized purposes and activities, contrary to section 4.6 of the Code of Conduct of the Royal Canadian Mounted Police.*
>
> ***Allegation 2***
>
> *On or between February 1st, 2015 and February 11th, 2015, inclusive, at or near Richmond, in the Province of British Columbia, [the Appellant] 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.*
>
> ***Allegation 3***
>
> *On or about February 3rd, 2015, at or near Richmond, in the province of British Columbia, [the Appellant] used government-issued equipment and property for unauthorized purposes and activities, contrary to section 4.6 of the Code of Conduct of the Royal Canadian Mounted Police.*
>
> ***Allegation 4***
>
> *On or about February 3rd, 2015, at or near Richmond, in the Province of British Columbia, [the Appellant] 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.*

[24] The parties agreed to proceed by way of the ASF (Material, pages 2857-2861). For the purposes of this report, I will be referring to a version of the ASF that has been redacted to remove any identifying information

pertaining to Ms. A and Ms. B (Material, pages 2857-2861) [*sic* throughout]:

ALLEGATION 1 [...] [The Appellant] admits this allegation.

ALLEGATION 2 [...] [The Appellant] admits this allegation.

1. At all material times, the Appellant was posted to "E" Division at the [X] Detachment.

2. On January 8th, 2015:

a) the Appellant was on duty scheduled to work from [6:00 a.m.] to [6:00 p.m.];

b) the Appellant was tasked to contact [Ms. A's brother] in order to schedule an appointment time for an audio/video statement pertaining to file number 2015-[XXX]. The lead investigator in file number 2015-[XXX], a sexual assault investigation, was Constable [K.L.]. [Brother's name] was the brother of the victim in this file, Ms. [A];

c) between 6:29 am and 6:37 am, the Appellant accessed the general occurrence report and all text pages associated to file number 2015-[XXX]. This access allowed him to view personal information associated to Ms. [A], including the details associated to the sexual assault investigation, her date of birth and personal cellular number;

d) between 1:57 pm and 2:07 pm, the Appellant accessed file number 2015-[XXX];

e) at approximately 4:34 pm, the victim, Ms. [A], called Detachment [X] and her call was transferred to the Appellant. Ms. [A] provided information about the males involved in her file. The Appellant documented the file and wrote that Ms. [A] appeared upset and was offered Victim's Services;

f) between 4:42 pm and 4:56 pm, the Appellant accessed file number 2015-[XXX] and shortly after, the Appellant sent a text message to Ms. [A]'s cellular number saying something along the lines of "stay safe and be careful".

g) Ms. [A] never provided the Appellant with her personal cellular number.

3. The Appellant was not assign[ed] any other task pertaining to file number 2015-[XXX].

4. On January 18th and 24th, 2015, the Appellant accessed file number 2015-[XXX] and queried the general occurrence. As such, the Appellant had access to personal information associated to Ms. [A].

5. The Appellant had knowledge that Ms. [A] was 17 years old.

6. On February 1st, 2015, the Appellant, using his personal cellular number [604-XXX-XXXX], initiated and exchanged a series of inappropriate text messages and photographs with Ms. [A]. Attached as Appendix "A" to this Summary of Facts is a Summary of the Text Message Activity between the Appellant and Ms. [A] which includes:

"Are you working tomorrow?"

"I hope things are good ... we should meet for coffee." "U still work at Sears?"

"sorry to bug ... keep smiling ... send a pic."

"Luv the smile pic btw ... mm"

"share sweet pic lol."

"Nice enjoy... I like to see pic of you too."

"I like your look."

The Member sent a generic photograph of a male (waist down) in boxer

shorts and accompanied the image with "Shhhh."

"You like to swim or go to gym?"

"Awesome ... im a fan of yoga pants ... hint lol."

"or whats under that ... all shapes."

"Ok nite ... what wear to bed? Pj's."

7. On February 2nd, 2015, Ms. [A] communicated with her brother, [Brother's name] asking for advice, writing, in part, that "one of the cops investigating my case has been flirty texting me and asking for pics, he sent a shirtless pic of him. What should I do?". In the exchange of text messages with her brother, Ms. [A] mentions "Idk just weird, he said we should go for coffee. I assumed to talk about the case, then he asked for a picture. I sent one of me smiling, then he's like 'I like your look" and sent a shirtless pic of himself. Like I said it's just weird."

8. Also on February 2nd, 2015, the Appellant exchanged a series of text messages with Ms. [A], confirming that he wanted to meet for personal reasons. After being asked by Ms. [A] "Um.. [Appellant]. When did you want to meet?" the Appellant replied "Hmmm want to meet to meet not biz related lol." And followed by saying "Prob bad timing for u", "I assume you don't need to meet anyone", "Ok hang in there .... maybe in 2-3 days we can grab a coffee... I wont bug u.", "Thx for pic ... u are nice lookin woman", "Unless u distract me somehow lol'".

9. Between February 1st, and February 11th, 2015, the Appellant exchanged approximately 219 text messages and photographs with Ms.

[A], including texts with sexual connotations, a photo of himself as well as a generic photo of a male lying in bed with a blanket which covered an erection, and such as:

-On February 9th, 2015, when Ms. [A] said she was going downtown, the Appellant wrote "No drinkin lol", "Have a good time" and Ms. [A] answered that it was too late, to which the Appellant replied "Saucey little thing ... shoot a cool pic then", "Don't tell anyone but u have nice lips and nose lol", "K cheers ... next time bring your suit ... or pretend and take pic lol."

-On February 11th, 2015, "What is your Ethnic background?", "Nice lips and eyes btw."

ALLEGATION 3

[...] [The Appellant] admits this allegation.

ALLEGATION 4

[...] [The Appellant] denies that his conduct breached s. 7.1 of the Code of Conduct.

10. On February 3rd, 2015, the Appellant was on duty scheduled to work from [4 p.m.] to [3 a.m.]. At approximately 0:53 am, patrolling with Constable [M.T.], the Appellant stopped a vehicle for speeding and issued a traffic violation ticket to Ms. [B].

11. During the traffic stop, which lasted approximately 27 minutes, Ms. [B] argued the merits of the traffic ticket and at some point, she asked the Appellant to go for coffee, which he refused. The Appellant asked Ms. [B] about her husband's occupation to which she replied that he was an acupuncturist. The Appellant mentioned to Ms. [B] that he was having some kind of back problems.

12. Ms. [B] did not provide her personal cellular number to the Appellant or Constable [M.T.].

13. At approximately 01:59 am, the Appellant signed off on the MDT (from his vehicle) and at approximately 02:03 am, using RMS (from the office desk), the Appellant queried the general occurrence for file number 2012-[XXXX] and 2009-[XXXXX] associated to Ms. [B].

14. The Appellant had access to personal information pertaining to Ms. [B], including:

- The subject of the complaint;

- The telephone numbers associated to Ms. [B];

- The personal information associated to Ms. [B]'s husband, including the contact information about his employment as an acupuncturist.

15. On February 3rd, 2015, while off duty, and sometime after 12:30 pm, the Appellant called the residence of Ms. [B] and her employee, Ms. [C], answered the phone. The Appellant identified himself as being from the RCMP, looking for Ms. [B]. Ms. [C] provided the Appellant with Ms. [B]'s cellular number.

16. At approximately 1:31 pm, Ms. [B] received a text message from the Appellant saying "Hi [Ms. B's given name] ... it's [Appellant's name] ... with police... i wanted to contact you."

17. At approximately 2:37 pm and shortly after, Ms. [B] and the Appellant exchanged the following text messages:

-Who is this? (Ms.[B])

-The speeding ticket last night? (Appellant)

-What is it about? (Ms. [B])

-You want to meet for tea? (Appellant)

-Hey how did u get my number? (Ms. [B])

-I phoned your place to talk to you ... was provided your number from mom? Sorry to have bothered you i just like to meet u again sorry ... I was thinkin about the acupuncture and that u wanted to go to coffee (Appellant)

Sorry I don't think it's appropriate to meet for coffee but thank you for asking. (Ms. [B])

[25] Attached to the ASF was a summary of the text message activity and photos exchanged between the Appellant and Ms. A (Material, pages 2863-2866).

4. Board Hearing

[26] The Board held a two day in-person hearing on September 11 and 12, 2017. With the consent of the MR, the Board granted the CAR's request for a publication ban concerning the identity of Ms. A (Material, page 3014). The Board ordered that the identity of Ms. A and any information arising from the conduct process that would serve to identify Ms. A is subject to a publication ban and shall not be published, distributed or disseminated.

A. Allegations Phase of the Board Hearing

[27] In the allegations phase of the hearing, the Board first asked for clarity regarding the Appellant's position on the allegations. The Board noted that in the Appellant's revised subsection 15(3) response filed on February 28, 2017, he denied Allegations 1 and 4, but admitted to Allegations 2 and 3. However, the Board observed that in the MR's submission on the Allegations filed on September 1, 2017, the Appellant admitted to

Allegations 1 and 3. The MR confirmed that the Appellant was admitting to Allegation 1 (Material, page 3009). I observe that the MR did not deny the Appellant's prior admission to Allegations 2 and 3.

[28] No evidence was adduced by the parties during the allegations phase. Only the ASF reproduced above was considered by the Board in deciding whether the allegations were established.

B. Board's Oral Decision on Allegations

[29] The Board found that all four allegations were established (Material, page 3023). The Board indicated that while this decision was final, he reserved the right to provide more reasons for his findings in addition to the justifications provided orally at the hearing, in a written Record of Decision (ROD) by the Board (Material, page 3010). I will discuss the Board's reasons for finding each allegation established in my summary of the ROD.

C. Conduct Measures Phase of the Board Hearing

[30] The Board received evidence and heard submissions from both parties with respect to which conduct measures should be imposed against the Appellant.

Documentary Evidence Relevant to Conduct Measures

[31] The MR submitted a number of documents to the Board:

- Documentation of Appellant's shoulder injury (MR Exhibit-1) (Material, pages 1402-1423);
- Supervisory commentary and character-reference information regarding the Appellant (MR Exhibit-2) (Material, pages 1424-1430);
- Volume of selected documents contained within the record (MR Exhibit-3) (Material, pages 1432-1780); and
- Report and CV of Dr. H, Psychologist Expert for the Appellant (MR Exhibit-4) (Material, pages 1781-1860).

[32] The CAR submitted a number of documents to the Board:

- Report and CV of Dr. S, Psychologist Expert for the CAR (CAR Exhibit-4) (Material, pages 1264-1320);
- Performance documents of the Appellant (CAR Exhibit-5) (Material, pages 1321-1344); and
- Appellant's Informal Reprimand for the Use of Excessive Force against his ex-spouse, dated April 17, 2012 (CAR Exhibit-6) (Material, pages 2905-2918).

Testimony of the Appellant

[33] The MR called the Appellant to testify (Material, pages 3037-3130). The Appellant provided testimony explaining his actions for Allegations 2 and 4, as well as more general testimony regarding his personal situation.

Testimony on Allegation 2

[34] The Appellant stated that on January 8, 2015, the day he first spoke to Ms. A on the telephone, he had read Ms. A's investigative file and knew that she was 17 and a victim or complainant of a sexual assault (Material, page 3043). The Appellant admitted to being 40 years of age when he had contacted Ms. A, but he stated that he was not pursuing a relationship with her (Material, page 3095). The Appellant explained that his original purpose for initiating the text messages to Ms. A was to follow-up and to check on her well-being (Material, page 3047). The Appellant admitted to initiating the discussion about having coffee with Ms. A, but he stated that it was a "friendly gesture" and that he had "no intention of meeting her" (Material, page 3095).

[35] However, the Appellant admitted that the texting with Ms. A became inappropriate and that he was ashamed of his behaviour (Material, page 3047). The Appellant stated that he was "disgusted and embarrassed" by the content of the texts exchanged between February 1 and 11, 2015 with Ms. A (Material, pages 3045, 3046). The Appellant admitted that he could have stopped texting with Ms. A (Material, page 3046) during the time frame because he recognized that the texts were inappropriate but he continued to text Ms. A because he was "excited" by the exchange (Material, page 3047).

Testimony on Allegation 4

[36] The Appellant stated that he contacted Ms. B on her personal cell phone after her traffic stop because he was interested in meeting for a "friendly coffee" with her (Material, pages 3041-3042). During the traffic stop, Ms. B had told the Appellant that her husband was an acupuncturist and the Appellant had shoulder pain at the time. The Appellant stated that he did not have any romantic interest in Ms. B and that his interest in acupuncture was his primary reason for contacting Ms. B (Material, page 3109).

[37] The Appellant stated that he did not meet Ms. B for coffee because she said it was inappropriate. The Appellant admitted that it was inappropriate because there was no work-related reason for him to meet with her. The Appellant admitted that it was wrong of him to access the RCMP database in order to obtain Ms. B's phone number and contact her for personal reasons (Material, page 3043).

Testimony Regarding Appellant's Personal Situation

[38] The Appellant described the events that were taking place in his personal life in January and February 2015, at the time of the misconduct

(Material, pages 3037-3041). He was experiencing financial and emotional strain and was suffering from low self-esteem following his 2011 separation from his prior spouse. He was experiencing pain from a shoulder injury that took place in January 2014. The Appellant was having difficulties in his relationship with his current spouse, Ms. G, at the time. The Appellant stated that he was depressed because of his personal problems and also because he was put on restricted duties in January 2015 after he had reported his shoulder injury (Material, pages 3040, 3041, 3080).

[39] The Appellant explained how he came to be Dr. H's patient. In 2010, the Appellant was under investigation for the spousal assault of his prior spouse. The internal investigation resulted in a written reprimand for the Appellant. The Appellant sought out the psychological services of Dr. A (Material, page 3078). In March 2015, when the Appellant was under investigation for the present matter and had been suspended, he sought out the services of Dr. H, a psychologist who was a partner in Dr. A's practise (Material, pages 3085, 3124).

[40] The Appellant was asked about his involvement in an incident which had resulted in Ms. G's loss of employment further to inappropriate use of RCMP Information Technology (IT) systems. Ms. G, the Appellant's current spouse, was an RCMP dispatcher before that incident. Both the Appellant and Ms. G had engaged in personal communications using an RCMP "open message board" that other RCMP employees could view (Material, page 3121). As a result of this inappropriate use of RCMP IT systems, Ms. G lost her employment and the Appellant was warned by his supervisor about the misuse of RCMP IT systems (Material, pages 3113-3114).

[41] The Appellant testified that he became an RCMP member in 2008 and that he enjoyed his work. He referred to MR Exhibit-2, a document that he had prepared with statements from co-workers, supervisors and a member of the public thanking and commending the Appellant for his work (Material, pages 3061-3066). The Appellant spoke about his involvement in volunteering, both at schools and in other settings (Material, pages 3059-3061). The Appellant stated that if he were to receive treatment for his behaviour so that he does not "cross boundaries", he would then be able to serve his community as an RCMP member again (Material, pages 3058-3059).

Testimony by Dr. H, Expert for the Appellant

[42] Dr. H was the expert psychologist for the Appellant. In advance of the hearing, the Board determined that Dr. H's report would be treated as his direct expert testimony, upon which he would be cross-examined by the CAR (Appeal, page 26). The parties agreed to the Board qualifying Dr. H as

an expert in psychology. Dr. H was provided with the report of the CAR's expert in advance of his testimony.

[43] Dr. H had been the Appellant's therapist when he was requested by the MR to conduct a psychological assessment on the Appellant for the purposes of the hearing (Material, pages 3136-3138). The Appellant saw Dr. H six times in 2015, once in 2016 and then, finally on March 7, 2017 (Material, pages 1792-1797). Dr. H testified that he was initially hesitant to do the assessment of the Appellant's psychological condition from January to February 2015 because he was also the Appellant's therapist (Material, page 3136). Dr. H explained that a therapist should not be performing psychological assessments of his/her patient because of the risk that the therapist would have a positive bias about the patient which could then be reflected in the assessment. Dr. H was concerned that his role as the Appellant's therapist could lead to a reduced objectivity in evaluating the Appellant (Material, pages 3138, 3139). Despite the conflict of interest, Dr. H agreed to be the Appellant's assessor.

[44] Dr. H explained that despite having been the Appellant's therapist since March 2015, he had only received a copy of the text messages and photo exchanges between the Appellant and Ms. A, on March 3, 2017, from the MR further to the request to conduct a psychological assessment of the Appellant (Material, page 1797). After reading the text messages and viewing the photo exchanges, Dr. H indicated that he was concerned that the Appellant might be a "serial predator" (Material, page 3157). Dr. H confirmed to the Board that, despite his concern about a conflict of interest, he agreed to write the Appellant's psychological report because he wanted to "assist the Court" in the present matter (Material, page 3157).

[45] Dr. H testified that in January and February 2015, the Appellant was suffering from Persistent Depressive Disorder (PDD), a low-grade depression, which impacted his moral judgment at the time of the misconduct (Material, page 3166). Dr. H testified that the Appellant may have been suffering from PDD as early as 2006. The Board asked Dr. H for his views about whether PDD had caused the Appellant's misconduct. Dr. H explained that the Appellant's PDD had a major impact in reducing his stress tolerance and that the Appellant's method of dealing with stress was to seek out female company. Dr. H was of the view that if the Appellant had not been stressed at the time of the misconduct, he would not have acted out "in such a serious vein" (Material, pages 3171-3172). Dr. H was of the opinion that the Appellant had the potential for rehabilitation and that therapy would help the Appellant (Material, page 3167).

Testimony of Dr. S, Expert for CAR

[46] In advance of the hearing the Board determined that Dr. S's report, dated July 30, 2017, would be treated as direct expert testimony, upon

which he would be cross-examined by the MR. The parties agreed to the Board qualifying Dr. S as an expert in psychology.

[47] Dr. S interviewed the Appellant on June 23, 2017 in order to perform a retroactive assessment of the Appellant's psychological status in January and February 2015. Dr. S was of the view that at the time of the misconduct, the Appellant may have experienced a low mood but he was not suffering from PDD (Material, pages 3181, 3205, 3206). The Appellant's circumstances in early 2015, such as his shoulder injury and spousal problems, likely contributed to the Appellant's transitory low mood.

[48] Dr. S stated that even if one accepted that the Appellant did have PDD at the time of the misconduct, there were limited reasons to believe that the symptoms were so severe to have caused or contributed to the Appellant's misconduct. Dr. S did not consider PDD to be a condition that necessarily impaired judgment (Material, page 3201). Dr. S did not consider the Appellant's judgment to be impaired from January to February 2015, because during the same period, the Appellant was performing well at work and was able to make sound judgments. Dr. S was also of the view that the Appellant did not have any other diagnosable psychological conditions in early 2015 that contributed to the misconduct.

[49] Dr. S explained that the Appellant's long-standing personality traits were a better explanation for his misconduct (Material, pages 3199-3200). While Dr. S agreed with Dr. H's recommendation that the Appellant would benefit from therapy, he was less optimistic than Dr. H about the Appellant's potential to change his behaviour through therapy (Material, page 3189).

CAR's Closing Submissions

[50] In his oral submission, the CAR commented on the nature and the circumstances of the misconduct. The CAR argued that the following aggravating factors were present (Material, pages 3100-3101, 3243-3269):

- The discreditable conduct was a breach of trust because the Appellant used information he gained as a result of his position as a police officer to pursue two personal relationships;
- The misconduct was not spontaneous and did not involve a single lapse of judgment. It involved two different persons and there were a number of opportunities for the Appellant to stop his misconduct;
- The Appellant received informal discipline in 2011 for a different type of misconduct, the use of excessive force towards his former spouse during a domestic dispute;

- The texting exchanges with Ms. A only ended when Ms. A began expressing suicidal thoughts and the Appellant was forced to call the RCMP for assistance and provide his name;
- The misconduct occurred after the Appellant's current spouse lost her civilian employment with the RCMP as a result of her inappropriate use of an internal RCMP communication system to exchange messages with the Appellant;
- In his testimony, the Appellant failed to acknowledge the serious potential impact his misconduct might have had on Ms. A, minimized the nature of his actions by suggesting some initial texts were out of concern for Ms. A, and denied that he was pursuing a personal relationship despite the reasonable inference to be drawn from the text messages; and
- The text messages sent by the Appellant to Ms. A were sexually suggestive and exploitative.

[51] The CAR then addressed why certain factors did not mitigate the misconduct:

- While it was mitigating that the Appellant made admissions, he did not cooperate with the investigation from the outset and he did not immediately accept responsibility; and
- While the Appellant provided references attesting to his good work record and examples of volunteer work, the references were not informed of the Appellant's misconduct allegations.

[52] The CAR also observed that the Appellant did not seek immediate treatment for the psychological issues he may have been experiencing when the misconduct occurred (Material, page 3256).

[53] The CAR referred to the test for dismissal in *Ennis v. Canadian Imperial Bank of Commerce,* 1986 CanLII 1208 (*Ennis*) to explain that dismissal was warranted where the employee's behaviour demonstrates that he is repudiating the employment contract, or one its essential conditions. The CAR explained that as a police officer, the Appellant was in a position of trust and he breached that trust when he accessed the RCMP database for non-duty related reasons. More egregiously, he breached trust by pursuing a relationship with both Ms. A, a vulnerable person, and Ms. B.

[54] The CAR referred to the Conduct Board Decision in *Commanding Officer, "E" Division v. Cst.* [*FV*], 2017 RCAD 3 (*FV*) (Material, pages 2974-2998) to explain the importance of establishing a causal link when considering the impact of a member's psychological state on misconduct. In *FV* the Board found that a causal link between the Member's psychological state and the misconduct was not established and as a result, the Board did not accept the Member's psychological state as a mitigating factor. The

CAR stated that based on the evidence of both Dr. S and Dr. H regarding causation, a causal link between the Appellant's psychological condition and the misconduct was not established (Material, page 3260).

[55] The CAR concluded that, based on the essential features of the misconduct, the breach of trust and the sexually exploitative language used in communications with a minor, retaining the Appellant's employment with the RCMP would shock the public conscience (Material, page 3269).

MR's Closing Submissions

[56] The MR's closing submissions were supplemented by a written submission on sanction that reflected the content of the oral submissions (Material, pages 2194-2209, 3273-3337). The MR argued that the following mitigating factors were present in this case (Material, page 3276):

The existence of personal circumstances and disability at the time of the misconduct which influenced the Appellant's deficient moral judgment;

- The likelihood of rehabilitation and the low risk of repeated conduct if the Appellant commits himself to the recommended psychological treatment (I describe this recommended treatment proposed by the MR below);
- The short period of time over which the misconduct took place;
- The Appellant's positive work history and devotion to his job;
- The Appellant's recognition of the seriousness of the misconduct and his expression of a willingness to rehabilitate; and
- The significant delay by the Conduct Authority in proceeding with the allegations and the corresponding two and a half years during which the Appellant has been off duty.

[57] The MR argued that the appropriate sanction for Allegations 1, 3, and 4 was a reprimand. The MR noted that he was unable to find any RCMP conduct cases with similar circumstances to those in Allegation 2 (Material, page 2198). The MR raised professional discipline decisions for teachers and physicians that involved inappropriate behaviour of a sexual nature towards a minor or member of the public by a professional (Material, pages 2198-2199). In the MR's view, the cases he raised involved misconduct that was more egregious than in the present case. However, the sanctions imposed by the professional disciplinary bodies were suspensions combined with professional counselling (Material, page 2199).

[58] The MR proposed the following sanction for Allegation 2 (Material, pages 2200, 3297-3298). The Appellant's duties would be restricted for a 12-month period. During the 12-month period, the Appellant would obtain psychological treatment and at the end of the period, the Appellant would

provide two expert reports to the Board, one from his treating psychologist and the other from an independent medical assessor. If, after considering both reports, the Board determined that it was not appropriate for the Appellant to return to work, the Board would then hear further submissions from the Appellant and the CAR as to the appropriate conduct measure at that stage.

[59] The MR acknowledged the test for dismissal referred to in *Ennis,* but argued that *Ennis* was "not good law" because of the suggestion in the decision that certain types of misconduct, specifically, dishonesty, warranted automatic dismissal (Material, page 3326). The MR stated that *Ennis* has been superseded by *McKinley v. BCTel* 2001 SCC 38 (CanLII) which stands for the proposition that a contextual approach must be taken in determining if the conduct warrants dismissal (Material, pages 3326, 3327). The MR argued that the present case could be distinguished from *FV* because, in *FV,* the Board did not find that factors, such as depression and anxiety, were present nor did they affect the member's ability to deal with stress. The MR was of the view that in the present case, certain stress factors did exist and they impaired the Appellant's judgment at the time of the misconduct.

CAR's Rebuttal

[60] The CAR stated that the objective of the conduct process is the fair and expeditious resolution of misconduct matters and that the MR's proposed sanction is not consistent with this objective. The CAR acknowledged that the MR raised disability as a mitigating factor, but observed that the Appellant did not notify the Force about his psychological issues nor did he ask the Force for help. Because the Force was not made aware of the Appellant's disability, the CAR explained that the duty to accommodate in this case did not arise (Material, page 3343). Finally, the CAR observed that the cases put forth by the MR regarding various breaches of trust in other professional disciplines could be distinguished from the present one because they involved doctors and teachers, who do not have the same power and authority over members of the public as police officers do.

5. Record of Decision by the Board

[61] The Board issued its written decision on November 8, 2017 (Appeal, pages 8-38).

A. Board's Findings on the Allegations

[62] The Board found that all the allegations were established.

Allegation 1

[63] The Board found that section 4.6 of the *Code of Conduct* was breached by the Appellant's accessing of electronic files for an unauthorized purpose

on January 8, 18 and 24, 2015 (Appeal, pages 20-21). The initial unauthorized access on January 8, 2015 allowed the Appellant to view personal information related to Ms. A, including details of her sexual assault investigation, her date of birth, and her personal cell phone number. The multiple accesses of electronic files by the Appellant on January 18 and 24, 2015 were unauthorized because the Appellant had no investigational tasks assigned to him in Ms. A's file, further to the sole task, assigned on January 8, 2015, which was to contact Ms. A's brother and schedule an appointment for a witness statement.

Allegation 3

[64] The Board found that section 4.6 of the *Code of Conduct* was breached when the Appellant obtained Ms. B's phone number by accessing an unrelated general occurrence file that pertained to Ms. B, the motorist he pulled over for a traffic violation. The Appellant then used this number to place a telephone call that was answered by Ms. B's employee, who in turn provided the Appellant with Ms. B's cell phone number (Appeal, page 21). Section 4.6 was contravened because the Appellant's accessing of the general occurrence file was unauthorized given that the queries made by the Appellant did not have a duty-related or authorized purpose.

Allegation 4

[65] The Board found that section 7.1 of the *Code of Conduct* was breached when the Appellant used the phone number he had obtained from his unauthorized search in order to contact Ms. B's residence. The Board found that the Appellant's conduct, when considered by a reasonable person with knowledge of all relevant circumstances, including the realities of policing in general, and the RCMP in particular, would discredit the RCMP (Appeal, pages 22-23). The Board found that it was discreditable behaviour for the Appellant "to identify himself as [a member of the RCMP] to Ms. B's employee in order to gain access to Ms. B's cellular number" (Appeal, page 22). Although the Appellant argued at the hearing that he was "taking Ms. B up on her offer to go for coffee" the Board found that this did not justify the Appellant seeking to contact Ms. B using a phone number that was gained in an unauthorized manner (Appeal, page 22).

Allegation 2

[66] The Board found that section 7.1 of the *Code of Conduct* was breached and Allegation 2 was established because the Appellant pursued a personal relationship with Ms. A knowing that "she was 17 years old and the victim in a sexual assault investigation" and because this knowledge was gained in the Appellant's capacity as a police officer (Appeal, page 23). The Board's finding that the Appellant pursued a personal relationship with Ms. A was based on the requests and suggestions by the Appellant that he and Ms. A meet, as well as the content of the text messages and attached photographs

that "clearly contained sexual connotations and images" (Appeal, page 23). The Board applied the "discreditable conduct" test to the facts of Allegation 2 and found that the Appellant's repeated participation in the text message correspondence with Ms. A clearly brought discredit to the Force (Appeal, pages 23-24).

B. Board's Findings on Conduct Measures

[67] I will now briefly summarize the Board's findings on conduct measures. The details of the Board's findings will be further discussed in the analysis of the grounds of appeal which relate to the conduct measure imposed later in this report.

[68] The Board preferred the explanation of Dr. S, the CAR expert, that the Appellant's misconduct was likely influenced by long-standing personality features, including the need for admiration. The Board explained how it assessed the testimony of both expert psychologists and its reasons for preferring Dr. S's testimony over that of Dr. H, the Appellant's expert.

[69] The Board then explained how it considered the mitigating factors put forth by the MR (Appeal, page 34). The Board did not accept that the existence of personal circumstances and disability, PDD, influenced the Appellant's deficient moral judgment at the time of the misconduct. While the Board accepted that the misconduct took place over a short period of time, it involved the Appellant inappropriately obtaining information about two unrelated persons, on separate occasions, where the Appellant had an opportunity to reconsider continuing the misconduct. The Board accepted as a mitigating factor the Appellant's positive work history and devotion to his job but also noted that the mitigating factor was diminished by the informal discipline received by the Appellant in 2011. The Board accepted as a mitigating factor, to a limited extent, the Appellant's acceptance of responsibility and accountability for his actions. The Board's reasons for the limited acceptance of this mitigating factor was that it did not observe that the Appellant fully, and without reservation, acknowledged the serious nature of his misconduct. The Board considered that the Appellant's expression of willingness to rehabilitate was a mitigating factor but its acceptance of this factor was tempered by the Appellant's past abandonment of treatment. Finally, the Board noted that the Appellant's arguments about delay could not operate as a mitigating factor because it observed that the MR's proposal on sanction would delay a decision on conduct measures even further. The Board also explained that the delay in conduct proceedings was in part attributable to the late expert report filed by the Appellant.

[70] The Board found the following aggravating factors to be present (Appeal, page 35):

- Two different citizens were improperly contacted using unauthorized information;
- The Appellant's knowledge of Ms. A's vulnerable personal circumstances being experienced at the time of the misconduct;
- The Appellant's knowledge of Ms. A's under-age status, who was immediately troubled by "flirty" communications from a forty-year old male;
- The Appellant's knowledge of Ms. A's status as a complainant in a sexual assault complaint, and the acutely inappropriate nature of the text correspondence involving sexual images and connotations;
- The Appellant's status as a person in authority when he engaged in communications with both Ms. A and Ms. B;
- The Appellant's repeated requests for images of Ms. A, including potentially in yoga pants and in a bathing suit;
- The element of breach of trust was present because the Appellant exploited his position as a police officer to gain Ms. B's cell phone number, and used information gathered for legitimate investigative purposes to further his discreditable conduct with both Ms. A and Ms. B;
- Prior informal discipline imposed in 2011 for a different type of misconduct that involved the Appellant's ex-spouse; and
- Although no discipline was imposed on the Appellant, limited aggravating weight was attributed to the Appellant's participation in the misuse of internal RCMP messaging systems with his current spouse which had resulted in her loss of employment with the RCMP.

[71] The Board considered the range of conduct measures available for contraventions under section 4.6 and section 7.1 of the *Code of Conduct* and explained how the extraordinarily inappropriate communications with a complainant would result in a conduct measure within a range of severe forfeiture of pay to loss of employment (Appeal, page 36).

[72] The Board provided reasons why he declined to pursue the sanction proposed by the MR at the hearing (Appeal, page 37). The Board explained that the proposed sanction did not "accord with the expeditious resolution" of the conduct matter and that the Appellant did not obtain psychological treatment when the misconduct took place (Appeal, page 37).

[73] The Board stated that he had considered the disciplinary decisions that were submitted by the MR in order to argue that the severity of misconduct in those decisions exceeded the present misconduct but did not result in the loss of employment. The Board explained that "the loss of employment may be proportionate even where a case does not involve the worst type of

> employee or an employee committing the worst type of misconduct" (Appeal, page 37). The Board further clarified that there is a public expectation that RCMP members observe the highest ethical and professional standards and this includes "a bedrock expectation that members shall only act to protect the health and safety of Canada's youth and shall never deliberately and repeatedly exploit any vulnerable young person" (Appeal, page 37). The Board found that the retention of the Appellant would "clearly imperil the public's confidence in the Force" (Appeal, page 37). As a global measure for the four allegations, the Board ordered the Appellant to resign within 14 days or be dismissed (Appeal, page 37).

APPEAL PROCEEDINGS

[8] On November 21, 2017, the Appellant filed his Statement of Appeal. He claims that the Board's decision (Decision) was reached in a manner that contravened the applicable principles of procedural fairness, and is clearly unreasonable. He requests that the Board's imposed conduct measure be substituted for something less severe (Appeal, pp 3-7).

Appellant's Appeal Submission

[9] On March 1, 2018, the Appellant filed his appeal submission. In support of his position he argues (Appeal, pp 69-79):

- The Decision represents "some misled facts" that do not accurately summarize what transpired. The Appellant clarifies and makes the following assertions:
    - The Appellant was an assisting investigator when he accessed Ms. A's file and was not randomly looking for phone numbers in the RCMP database. The RCMP accessed this system to obtain Ms. A's number as part of "his duties to check the wellbeing and maintain the RCMP core value of Compassion". He notes that all personnel with access to the system have the same access to police reports and they all use this system to review files "for personal knowledge or work related data collecting". With regard to Ms. B, he argues that there is no evidence to support how or when the Appellant obtained her number and that the Board just made an assumption as there were no facts (Appeal, pp 70, 74);

- The text messages exchanged between him and Ms. A were mutual. After the Appellant stopped texting Ms. A, she initiated contact and reached out to him. Similarly, they both requested and exchanged photos of themselves, and both made requests to meet in person for coffee. The Appellant explains that conversations were of a "friendly goofy nature and non sexual content". Further he notes that conversations with Ms. A lasted only five days and an averaged about 55 messages a day. He explains that this is not "heaps of texts" but rather "normal to low". He also states that he did not pursue or meet Ms. A, despite several joint requests (Appeal, pp 71, 74-75);

- Ms. B initially asked the Appellant to go for coffee and a phone call to her residence was "not a intentional misuse of power as a police officer". He explains that he only referenced his identity as a police officer so that Ms. B would recognize who he was. The Appellant made a request to go for coffee and discuss acupuncturist details (Appeal, p 71);

- Dr. S and Dr. H provided conflicting opinions on persistent depressive disorder (PDD). Dr. H obtained psych tests from the Appellant in 2015 while Dr. S only did so two months before the conduct hearing. Further, Dr. S was deceitful as he advised the Appellant's spouse that what she disclosed to him would not be used as evidence, yet it was used at the hearing and considered as an aggravating factor (Appeal, pp 71, 78);

- The Appellant did not exploit Ms. A or Ms. B. The statements of both of them show that they were unaffected by the Appellant's behaviour and that they did not wish to make a formal complaint, "but rather were enticed by officers" (Appeal, pp 71-72);

- Ms. A may have been a complainant in a sexual assault case, but was not a victim. Based on her statement, she admitted to being on a dating site, drinking, and having consensual sex numerous times with multiple individuals. He adds that she

"never told the males to stop having sex and she remained at the same location overnight" and that there were no charges laid as a result of this occurrence (Appeal, p 75);

- The Board "diverted" the procedural errors that occurred in the manner that the text messages between Ms. A and the Appellant were retrieved. The Appellant explains that officers seized Ms. A's phone without a proper warrant, and that Ms. A was pressured to provide consent for a warrantless search (Appeal, pp 75-76);

- The Appellant did not suffer a shoulder injury due to a motor vehicle incident, but rather due to a skiing accident. He suffered damaged to his right bicep in the motor vehicle accident (Appeal, p 76);

- The Board and Conduct Authority engaged in "procedural unfairness" by failing to comply with the RCMP *Administration Manual*, Chapter XII.1 "Conduct" [AM XII.1]. Specifically, the Appellant argues that Conduct Authority and/or the Board (Appeal, pp 72-73):

    - failed to complete the *Code* investigation "for a serious or integrity matter" within 14 days of the service of the Conduct Investigation Mandate Letter to the Appellant;

    - failed to give priority to an investigation involving a suspended member;

    - failed to to update the Appellant every 30 days as per the Conduct Authority Memo;

    - failed to make every reasonable effort to hold the conduct hearing within 90 days of the Board being appointed;

    - failed to properly notify the Appellant of his right to file an appeal of the Order of Suspension within 14 days;

- The Appellant was unlawfully arrested for luring a child on "nothing but suspicion" in an effort to "illegally obtain evidence through a warrantless vehicle search" contrary to section 8 of the *Charter of Rights and Freedoms* and section 495 of the *Criminal Code* (Appeal, p 73).

- The Board's decision to deny his motion for a stay of proceedings for abuse of process (Motion) was unreasonable given the mitigating determinations in the decision (Appeal, p 73).

- The Board failed to give appropriate weight to a number of mitigating factors, but deemed numerous submissions as aggravating factors. For example (Appeal, pp 76-78):

    - The Appellant provided eight pages of positive comments from supervisors, co-workers, and a police client, yet the Board declared the Appellant a "non outstanding member". The Appellant has little to no means of contacting past co-workers or supervisors while being suspended. However, the Appellant attaches photos of him with members of the community as evidence of his positive impact as an officer;

    - The Board did not consider the Appellant's positive performance;

    - The Board engaged in favoritism as it sided with Dr. S's opinion over Dr. H's findings. The Appellant argues that Dr. S was "paid by the RCMP and would undoubtedly receive future referrals";

    - The Appellant stopped communicating with Ms. A, yet she was the one that reached out to him a week later;

    - There were no sexual images exchanged, rather there were "goofy immature suggestions" such as a photo of "an unknown male laying on a bunk bed with the center of his pants propped up";

- The text messages ended as the Appellant felt "his communication would be restricted and unnecessary given [Ms. A's] state of mind and mental health apprehension;

- The misconduct occurred more than three years following the Appellant's spouse's termination from the RCMP for using the internal messaging system inappropriately. The Appellant did not make the same mistake again;

- The unfair admission of the absence of support from RCMP peers and supervisors concerning appropriate conduct measures for the Appellant. The Appellant explains that he made efforts to reach out to fellow members but received no replies;

- The Board unfairly found that the Appellant failed to seek immediate treatment for mental issues he was experiencing when his conduct occurred. The Appellant details that he was going through ongoing depression, stress, ended his lengthy relationship, struggled financial, was unable to see his child for years and was unhappy at work. He used work and online resources to cope with his mental depression.

- The Appellant was a victim of workplace harassment in June 2014 that went on for months. A fellow member made "sexual disgusting comments" towards him on a daily/weekly basis which made it difficult to work shifts and caused the Appellant to feel isolated (Appeal, p 78).

- The Board ignored the non-dismissal conduct measures raised by the MR at the hearing such as psychological therapy (Appeal, pp 77-79).

- The Appellant adds information from a CBC article dated May 2, 2013, pertaining to fair discipline, the 2011-2012 Annual Report Management of the RCMP Disciplinary Regime, and his personal search of data pertaining to members that contravened the *Code* and faced lesser consequences (Appeal, p 79).

As redress, the Appellant proposes the following (Appeal, p 79):

- A re-instatement of duties and a direction to continue counselling sessions and a rehabilitative program for his right shoulder injury outside of work;
- A reprimand and a 60-day suspension from duty without pay or forfeiture of pay;
- An ineligibility for promotion for a period of no more than two years;
- A reassignment to another position or transfer for modified duties; and
- An opportunity to teach and make members attentive of wrongdoing in the workplace.

Respondent's Appeal Submission

[10] On April 16, 2018, the Respondent filed her written submission. The Respondent opposes all of the Appellant's grounds of appeal, argues that the Board made no reviewable error in its decision, and requests that the appeal be dismissed. The Respondent insists that the Appellant fails to explain "how the Board committed a manifest or determinative error in its appreciation of the evidence or how any breaches of procedural fairness were committed by the Board" (Appeal, p 181). Specifically, the Respondent makes the following arguments:

- The Appellant claims he was treated unfairly for a "normal practice" yet admitted that the system was "used improperly for a non-duty related purpose" (Appeal, p 182);
- The Appellant admitted in the Agreed Summary of Facts (ASF) that he initiated and exchanged a series of inappropriate text messages and photographs with Ms. A. (Appeal, p 182);
- The Appellant admitted that he exchanged texts with Ms. A that had "sexual connotations" including a generic of a photo of a male lying in bed with a blanket covering an erection (Appeal, pp 182);

- The Appellant was "cherry picking" isolated statements from the Board's decision on the Motion to provide a "distorted view of the substance of the Board's decision" and that when read in complete form, the Board correctly applied the principles arising out of relevant case law. Nevertheless, the Respondent argues that the Appellant failed to demonstrate that the Board made any manifest and determinative error in denying the motion (Appeal, p 184);

- The Appellant admitted to querying files pertaining to Ms. B in which her personal phone number was available. The Board drew a proper conclusion to support a finding that the Appellant's unauthorized use of the police database (Appeal, p 184);

- The error pertaining to the categorization of the Appellant's bicep injury likely had little bearing on the consideration of the Appellant's medical condition. Rather, it was considered by the Board "as being part of the Appellant's greater right shoulder injury". In the alternative, if viewed as an error, "it is not so serious as to amount to a manifest and determinative error" that affected the manner in which the Board reached its decision to dismiss the Appellant (Appeal, p 186);

- The Board considered mitigating and aggravating factors and took into consideration the Appellant's positive performance such as his "positive work history and devotion to his job" but also noted that this was "somewhat diminished by the informal disciplinary action the Subject Member received in June 2011". The Respondent contends that the Appellant is trying to "bolster arguments that were previously presented or could have been presented during the conduct hearing" (Appeal, pp 186-187);

- The Appellant's submission pertaining to favoritism "is based on pure speculation" and that the Board "embarked in a careful assessment of evidence provided by both experts and provided intelligible reasons as to why it preferred [Dr. S's] opinion over [Dr. H's]. Further, the Respondent notes that Dr. S was not "an RCMP forensic doctor as the Appellant suggested but rather a psychologist that was retained to provide an independent assessment" (Appeal, pp 186-188).

[11] For a number of the Appellant's arguments, the Respondent submits that they should have been raised during the conduct hearing and since they were not, they should not be admissible on Appeal. These include:

- The Appellant's argument that Dr. S's report was favoured over Dr. H's because he was a "paid forensic investigator/ doctor on behalf of the RCMP", conducted tests only two months before the hearings, and was deceitful towards evidence obtained from the Appellant's spouse (Appeal, pp 182-183, 186);

- The Appellant's argument that the statements of Ms. A and Ms. B were improperly enticed by the investigators (Appeal, p 183);

- The Appellant's submission that the Board and Conduct Authority failed to follow *AM XII.1*. In addition to failing to raise these at the hearing, the Appellant has failed to explain how the failure to follow policy affected the fairness of the proceedings (Appeal, p 183);

- The Appellant's submission pertaining to his unlawful arrest, requirements of a search warrant, extraction of text messages, etc. (Appeal, pp 184-186);

- The particular details of Ms. A's sexual assault. The Respondent submits that the Appellant is "appallingly trying to discredit [Ms. A] in order to lessen the gravity of his own misconduct". The Respondent adds that the Appellant already admitted in the ASF that he called Ms. A to offer victim services, and that she was vulnerable (Appeal, p 185);

- The additional images submitted by the Appellant. The Respondent argues that the images "constitute nothing more than speculation as to the good nature of the Appellant" (Appeal, p 186);

- Arguments and evidence pertaining to workplace harassment (Appeal, p 187);

- The CBC article dated May 2, 2013, the 2011-2012 Annual Report Management of the RCMP Disciplinary Regime, and the Appellant's personal search of data pertaining to members that contravened the *Code* (Appeal, pp 188-189).

[12] With regard to the conduct measure, the Respondent submits that the Board:

- carefully considered all ranges of measures before reaching the decision to dismiss the Appellant;
- directed itself to impose appropriate and proportionate conduct measures; and
- appropriately considered aggravating and mitigating factors.

Accordingly, the Respondent states that the appeal should be dismissed and the conduct measures imposed by the Board be confirmed (Appeal, pp 188-189).

Appellant's Rebuttal Submission

[13] On April 30, 2018, the Appellant provided his rebuttal submission (Appeal, pp 389-397). He maintains that the Board's Decision is biased and does not represent "true facts of what happened". He also argues that the Respondent's submissions are based "on opinion and not on facts" (Appeal, p 392). In addition to largely reiterating arguments made in his original appeal submission, the Appellant adds:

- Certain arguments were not made during the hearing because the Appellant was suspended for more than two years and "relying on the professionalism of his lawyer, not all evidence was brought forward but took place in the process and was written in the final report (Appeal, p 394);
- Another member in "E" Division, Constable FV, went through the conduct process, but did not face the same delays the Appellant did. His proceedings pertained to providing a false statement and misleading fellow members while off duty (Appeal, p 394).

EXTERNAL REVIEW COMMITTEE

[14] The ERC found no issues pertaining to the timeliness of the hearing or the presentation of the appeal (Report, paras 79-80).

[15] With regard to new information presented by the Appellant for the first time on appeal, the ERC found that the Appellant had the opportunity to raise most of the arguments at the hearing but failed to do so. Except for the argument that Ms. B was enticed by police officers to make a complaint, the ERC noted that new information presented for the first time on appeal would not be considered (Report, paras 83-99).

[16] On the merits, the ERC addressed the Appellant's argument that the Board unreasonably denied his motion for a stay of proceedings and found that the Board made no errors in its interpretation of "as soon as feasible" in subsection 43(2) of the *Act* or in denying the motion. The ERC explained that the Board properly considered the Appellant's submission but ultimately found that the delay did not cause significant prejudice to the Appellant, irreparable prejudice to the integrity of the RCMP conduct system, and did not amount to an abuse of process warranting a stay of proceedings (Report, paras 110-119).

[17] The ERC found that neither the Conduct Authority nor the Board committed any breach of the principles of procedural fairness as the Appellant was kept up to date with the status of the investigation, should have been aware of the relevant provisions of policy which applied to him that clearly contemplated a right to appeal the suspension order, and that the Board's reasons explaining how it made all reasonable efforts to hold a conduct meeting within 90 days are supported by the Record (Report, paras 121-134).

[18] The ERC noted that despite admitting to Allegations 1, 2, and 3, the Appellant framed his ground of appeals in a way that challenge these findings by the Board. The ERC gave no merit to the Appellant's arguments given the previous admissions at the hearing or in the ASF. The ERC also explained that the Board's findings were thoroughly supported by evidence in the record (Report, paras 135-149).

[19] With regard to the conduct measure imposed by the Board, the ERC found that the Board correctly determined the appropriate range of conduct measures, identified both mitigating and aggravating factors supported by the record, and imposed a conduct measure that reflected the severity of the misconduct that were supported by the RCMP *Conduct Measures Guide* [*Guide*] (Report, para 153).

[20] Specifically, the ERC explained that the Board provided sufficient reasons as to why it preferred Dr. S's opinion over that of Dr. H and why it rejected the Appellant's argument that PDD and personal circumstances were mitigating factors that compromised his mental judgement at the time of the misconduct (Report, paras 164-166, 168-171). The ERC also pointed out that the Board gave proper consideration to the Appellant's positive work history as a mitigating factor, but also observed that certain positive comments about the Appellant's work performance were made by individuals who were unaware of the Appellant's misconduct (Report, paras 174-175).

[21] The ERC found that the Board properly considered the Appellant's initiation of contact with Ms. A, nature of the communications, inappropriate sexual images and connotations, exploitive behaviour by initiating contact with two police clients, and previous misuse of an internal RCMP messaging system for personal reasons as aggravating factors (Report, paras 176-189).

[22] The ERC also noted that the Board considered non-dismissal measures but provided justified reasons as to why dismissal was the proportionate conduct measure (Report, paras 190-208). Accordingly, the ERC recommended that the appeal be dismissed and the imposed conduct measure be confirmed (Report, para 212).

ANALYSIS

Preliminary issues

Timeliness

Pursuant to section 22 of the *Commissioner's Standing Orders (Grievances and Appeals),* SOR/2014-289 [*CSO (Grievances and Appeals)*], an appeal must be filed within 14 days after the member is served a copy of the decision. The Appellant indicates that he was served with the Board's written decision on November 11, 2017 (Appeal, p 6). The Appellant subsequently filed his appeal with the OCGA on November 21, 2017 (Appeal, p 3). The appeal was filed in a timely manner.

Admissibility of new materials filed on appeal

[23] On appeal, the Appellant raised several arguments and provided evidence which had not been made or filed at the conduct hearing. The ERC summarized some of these the new arguments as follows (Report, para 83):

- The Appellant was arrested unlawfully and his vehicle was searched without a warrant;
- Ms. A's cell phone was seized without a warrant or her consent in order to gather evidence in the Appellant's investigation;
- Ms. A was not a victim in the sexual assault investigation;
- Ms. A was enticed by police officers to make a complaint against the Appellant;
- Dr. S was a biased expert who used improper interviewing techniques and was deceitful towards the Appellant's spouse;
- The Appellant was a victim of workplace harassment in June 2014;

- The Conduct Authority contravened the *AM XII.1* by failing to complete the investigation within 14 days of the service of the Mandate Letter; and

- The Conduct Authority contravened the *AM XII.1* by failing to give priority to an investigation involving the suspended member.

In addition to these arguments the Appellant also attempted to introduce for the first time on Appeal the following evidence that predates the conduct hearing:

- Photos of himself with members of the community to establish his positive impact as an officer;

- A CBC article dated May 2, 2013 pertaining to fair discipline and the 2011-2012 Annual Report Management of the RCMP Disciplinary Regime (Annual Report) to establish non-dismissal conduct measures.

[24] Pursuant to subsection 25(1) of the *CSO (Grievances and Appeals)*, the OCGA "must provide the appellant with an opportunity to file written submissions and other documents in support of their appeal". This opportunity, however, is subject to limitations. Specifically, subsection 25(2) explains that:

> The appellant is not entitled to
>
> (a) file any document that was not provided to the person who rendered the decision that is subject of the appeal if it was available to the appellant when the decision was rendered; or
>
> (b) include in their written submissions any new information that was known or could reasonable have been known by the appellant when the decision was rendered.

[25] In *Palmer v The Queen*, [1980] 1 SCR 759 (*Palmer*), the Supreme Court of Canada (Court) found that it "would not serve the interests of justice to permit any witness by simply repudiating or changing his trial evidence to reopen trials at will to the general detriment of the administration of justice" (p 775). The Court identified the following considerations when making a determination if evidence should be admitted at an appellate level (p 775):

1. The evidence should generally not be admitted, if by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases […].

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

3. The evidence must be credible in the sense that it is reasonably capable of belief, and

4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[26] Similarly, in *Carten v Canada,* 2010 FC 857, the Federal Court explained that new evidence may be admissible in exceptional circumstances where "it could not have been made available earlier; it will serve the interests of justice; it will assist the Court; and it will not seriously prejudice the other side" (para 23).

[27] For the following arguments and evidence, I find that the Appellant would have been reasonably aware of them prior to or at the time of the hearing:

- The Appellant was arrested unlawfully and his vehicle was searched without a warrant;

- Ms. A's cell phone was seized without a warrant or her consent in order to gather evidence in the Appellant's investigation;

- Ms. A was enticed by police officers to make a complaint against the Appellant;

- The Appellant was a victim of workplace harassment in June 2014;

- The Conduct Authority contravened the *AM XII.1* by failing to complete the investigation within 14 days of the service of the Mandate Letter; and

- The Conduct Authority contravened the *AM XII.1* by failing to give priority to an investigation involving the suspended member.

- Photos of himself with members of the community to establish his positive impact as an officer.

- A CBC article dated May 2, 2013 pertaining to fair discipline

The circumstances, details, and particulars of these events, arguments, and documents were known or could reasonably have been known and available to the Appellant. Even so, the Appellant failed to avail himself of the opportunity to raise these issues at the hearing.

[28] As it pertains to the Appellant's argument that Ms. A was not a victim in the sexual assault investigation, the Appellant explains that he did not receive information about the particulars of the investigation until he received a copy of the Material that was before the Board from the OCGA and that the original investigation report had vetted those pages (Appeal, p 395). The ERC dismissed this argument, however, as it found that the Appellant admitted to having knowledge of the details of Ms. A's sexual assault investigation when he accessed her file on January 18, 2015 (Material, p 2858; Report, para 91). Thus, given that the Appellant would have been aware of any vetted details from the original investigation report, the Appellant could have raised this argument at the hearing. He failed to do so. I also question the Appellant's purpose of introducing this information on appeal and note the Respondent's contention that the Appellant is "trying to discredit [Ms. A] in order to lessen the gravity of his own misconduct" (Appeal, p 185).

[29] With regard to Dr. S's alleged bias and use of improper techniques, the Appellant agreed to the qualification of Dr. S as an expert at the hearing, and did not raise the concern in his appeal submission. Further, in the Board's assessment of Dr. S's opinion, the Board excised and did not consider any references to information received from the Appellant's spouse because the information came from a collateral source who was not produced for cross-examination (Appeal, pp 27-28). Accordingly, as the Appellant did not avail himself of the opportunity to raise the issue at the time of the hearing, it is inadmissible on appeal. I note that although the Board did consider the Appellant's involvement in his spouse's loss of employment as a limited aggravating factor, it was based on details the Appellant provided during the hearing (Material,

pp 3111-3123). In this context, I will address the issue further when dealing with the substantive grounds of appeal.

[30] Regarding the Annual Report, although it predates the hearing and current legislative regime, and could have been introduced at the hearing, I accept that it offers insight on the proportionality of how certain cases were treated. Accordingly, I will consider the Annual Report in a limited manner on appeal.

[31] For the remaining arguments, the Appellant has not presented any exceptional circumstances that would warrant admitting them on appeal. The Appellant argues that he was relying on his counsel to act in his best interests as it pertained to presenting arguments and evidence, however, it was the Appellant's ultimate responsibility to ensure that any arguments and evidence that would bolster his position be made for consideration. Accordingly, I am not persuaded that the Appellant has met the criteria set out in *Palmer* that would warrant admitting the new information.

Legislative Framework and Standard of Review

[32] This appeal is governed by Part IV of the *Act*. Subsection 45.11(1) states:

> A member who is the subject of a conduct board's decision or the conduct authority who initiated the hearing by the conduct board that made the decision may, within the time provided for in the rules, appeal the decision to the Commissioner in respect of
>
> (a) any finding that an allegation of a contravention of a provision of the Code of Conduct by the member is established or not established; or
>
> (b) any conduct measure imposed in consequence of a finding referred to in paragraph (a).

[33] The *CSO (Grievances and Appeals)* sets out the considerations of the Commissioner (or her delegate) when rendering a decision:

> 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.

[34] Upon review of the Appellant's submissions, his position on appeal can be summarized as requiring me to determine:

a. whether the Board's decision to deny the Motion was clearly unreasonable;

b. whether the Board and Conduct Authority breached the relevant principles of procedural fairness;

c. whether the Board's findings on the Allegations were clearly unreasonable; and

d. whether the conduct measure imposed by the Board was clearly unreasonable.

[35] The term clearly unreasonable 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" as it is set out in subsection 33(1) of the CSO (Grievances and Appeals):

> [62] Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term [*manifestement déraisonnable*], 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).

[36] In *Smith v Canada (Attorney General)*, 2019 FC 770, a similar finding was considered and adopted:

> [38] The Adjudicator undertook an extensive analysis in order to arrive at the conclusion that the standard of patent unreasonableness applies to the Conduct Authority Decision. This analysis included a review of relevant case law, the meaning of the word "clearly", and the French text of subsection 33(1). The Adjudicator's conclusion that the applicable standard of review was patent unreasonableness is justifiable, transparent, and intelligible. The Court agrees that this was a reasonable conclusion.

[37] More recently, the Federal Court of Appeal reached the same conclusion in the ensuing *Smith* appeal, 2021 FCA 73.

[38] In *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at para 57, the Supreme Court of Canada (Court) explained that a decision is patently unreasonable if the "defect is apparent on the face of the tribunal's reasons", in other words, it is "openly, evidently, clearly" wrong. Later, the Court stated in *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at para 52, that a patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand."

[39] In *R v Lacasse*, 2015 SCC 64, the Court expanded on the deference owed with regard to a review of sanction measures (paras 43-44):

> I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges.
>
> […]
>
> In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

[40] As a result, questions of fact or mixed fact and law in this appeal are entitled to significant deference and only the presence of a manifest and determinative error would lead to a conclusion that the decision made by the Board is clearly unreasonable.

[41] A breach of procedural fairness is reviewed on the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24, at para 79). This means, either the decision maker did or did not follow a principle of procedural fairness (*Kinsey v Canada (Attorney General)*, 2007 FC 543, at para 60). If a principle of procedural fairness was breached, the decision under review will be

set aside and a new decision will be rendered, except if the result would be nonetheless inevitable (*Mobil Oil Canada v Canada Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at p 228).

[42] The Court re-examined the standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, and confirmed that legislated standards of review should be respected (paras 34-35).

Merits

a) Was the Board's decision to deny the Motion clearly unreasonable?

[43] The Appellant argues that the Board made a number of mitigating determinations in its decision in favour of the Appellant, but still denied his Motion. The Appellant referred to the following statements from the Board's decision on the Motion to support his position (Appeal, pp 73-74; Material, pp 2356-2357):

> It is equally apparent that the [Appellant's] matter […] did not rise to the top of [the CAR's] priorities until July 2016.
>
> […] this was not a complicated or particularly voluminous matter in terms of the CAR's work. […] The six month period could not possibly have been used exclusively by [the CAR] to get the [Appellant's] notice and investigative materials finalized and served on him.
>
> I conclude that the six month delay had little to do with the nature of the [Appellant's] CARD file […] and more to do with the shortfall in CARD human resources […].
>
> If a subject member were to experience the same six month delay in the future, where their matter was similar in complexity and size to that of the [Appellant's], then such a delay could well, in my view, be deemed utterly unacceptable.
>
> […] the delay of approximately six months in serving the [Appellant] with the Notice of Conduct Hearing was, taking a humane perspective, certainly longer than any subject member should experience.

The Appellant adds that the Board misinterpreted the *Act* as a guide rather than binding when making the determination that the "'as soon as feasible' obligation identified in section 43(2) of the *RCMP Act* [was] 'directory' and not 'mandatory'" (Appeal, p 74; Material, p 2352).

[44] The Respondent contends that the Appellant's submissions "amount to nothing more than the cherry picking of isolated statements from the Board's decision" and that it creates "a distorted view of the substance of the Board's decision" on the Motion. The Respondent insists that the Board correctly applied the principles arising out of relevant case law, including *Blencoe v British Columbia (Human Rights Commission),* [2000] 2 SCR 307 (*Blencoe*), and that the Appellant has failed to demonstrate that the Board made a manifest and determinative error in denying the Motion (Appeal, p 184).

[45] I find the Board did not make an error in its interpretation of "as soon as feasible" in subsection 43(2) of the *Act*. Subsection 43(2) of the *Act* explains that:

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

To better understand the urgency of "as soon as feasible", the Board referred to principles of legislative interpretation set out in the Court's decision in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 (*Rizzo*). For example, the Court explained that "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo*, at para 21). The Board also looked to a recommendation document from the Department of Justice entitled "Legistics-Describing Time Periods" which explained that the term "as soon as feasible" may be interpreted as "something must be done soon – taking the circumstances into account" and found this interpretation to be "harmonious with the conduct process 'scheme'" established under the *Act* (Material, pp 2370-2371).

[46] The Board determined that the "as soon as feasible" obligation in subsection 43(2) of the *Act* was "'directory' and not 'mandatory'" in the context of whether failure to adhere to this provision would lead to loss of jurisdiction of the Board. The Board compared this to the mandatory nature of subsection 41(2) of the *Act* where the Board noted that a "hearing shall not be initiated […] after the expiry of one year from the time the contravention and the identity of the member […] became known". The Board explained that subsection 43(2) of the *Act* does not

create a "comparable prohibition" and found that it retained jurisdiction of the matter "even if the Respondent's service of the Notice of Conduct Hearing and investigative materials was not 'as soon as feasible'" after the Board's appointment (Material, pp 2371-2373). I note that the Conduct Authority acted consistently with subsection 41(2) of the *Act* having requested that a conduct hearing be initiated within one year (Material, pp 1088-1093, 1109-1110).

[47] In determining whether the delay was unacceptable, the Board applied the test set out in *Blencoe*, at para 122:

> The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

The Board duly considered the Appellant's submissions on the issue, and acknowledged that the six-month delay "was much longer than [the Appellant] should have been required to wait" and explained that it "had little to do with the nature of [the Appellant's] CARD file" but rather the significant challenges the Conduct Authority Representative Directorate was facing "due to inadequate human resources, file reassignments, staff departures and the unexpected volume of files". The Board also acknowledged that if another member were to experience a similar delay in the future, such a delay could be deemed unacceptable. Nevertheless, the Board explained that there was no bad faith on the part of the Respondent or the CAR, and while longer than one should have to experience, it was "not so inordinate as to be an unacceptabe delay as contemplated by the analysis found in *Blencoe*" (Material, pp 2375-2377).

[48] The Board also addressed the Appellant's affidavit regarding the psychological harm he suffered and considered whether the delay caused him significant prejudice and psychological harm. The Board referred to the applicable threshold set out by the Court in *Blencoe*, at para 115:

> […] Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. […] It must, however, be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. […]

The Board acknowledged that while the Appellant experienced "symptoms" sufficient to seek out a psychologist in March 2015, the sessions with this health professional ceased in the spring of 2016. The Board also recognized that the Appellant was diagnosed with depression and anxiety, underwent surgery, had trouble with his digestive system, was experiencing loss of memory, suffering from headaches, and undoubtedly underwent significant stress and worry as a result of his arrest, ending of a personal romantic relationship, and the situation of the matter in general. While sympathetic to these issues, the Board found no corroborating evidence that linked these issues to the impugned delay. Even if it accepted all issues "as proven", the Board explained that they do not meet the "exacting standard of 'significant psychological harm' described in *Blencoe*" (Material, pp 2378-2379).

[49] Accordingly, while the Board agreed that the impugned period of delay did "not accord with the performance standard established under RCMP policy", it did not find that it caused irreparable prejudice to the integrity of the RCMP conduct system. The Board was also confident that given the human resources demands of the conduct system were now known, "no similarly situated member should experience the delay that was experienced by the [Appellant] (Material, pp 2379-2380).

[50] I am satisfied that the Board referred to appropriate authorities when considering the Appellant's Motion and provided sound reasons as to why it was denied. In the result, I do not find that it made a manifest and determinative error.

[51] In his rebuttal, the Appellant made reference to the *FV* conduct matter indicating that there was no delay in the conduct process for that matter. The Appellant noted that *FV* was served with a hearing notice nine days after it was issued, yet the Appellant was served six

months after issuance (Appeal, p 394). Like the ERC, I find that the *FV* matter has no bearing on the Board's assessment of the Appellant's Motion. The *FV* matter is unrelated to the Appellant's case and is based on a different set of facts and circumstances. I am not persuaded of its relevance to the Appellant's case and the Board's consideration of the *Blencoe* tests (Report, para 120).

b) Did the Board and Conduct Authority breach the relevant principles of procedural fairness?

[52] The Appellant argues that the Board and Conduct Authority engaged in procedural unfairness by failing to follow *AM XII.1* as it pertained to (Appeal, pp 72-73):

- updating the Appellant every 30 days;
- making every reasonable effort to hold the conduct hearing within 90 days;
- properly notifying the Appellant of his right to appeal the Order of Suspension within 14 days.

The Respondent contends that the Appellant fails to explain how the Board erred in its findings or how the Board failed to follow policy in a manner that affected the procedural fairness of the proceedings (Appeal, p 183).

[53] I acknowledge that a Part IV disciplinary process must provide a high level of procedural fairness to the subject member considering the risk to their continued employment in the RCMP. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*), the Court explained that the legitimate expectations of an individual challenging a decision may determine what procedures the duty of fairness requires in given circumstances. The Court elaborated that the doctrine of legitimate expectations is based on the principle that "the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights". That is to say, "[i]f the claimant has a legitimate

expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness" (*Baker*, at para 26). I will address the Appellant's claims in turn.

i) Did the Conduct Authority fail to update the Appellant every 30 days?

[54] The Appellant explains that he was a provided a memo from the Conduct Authority on April 15, 2015, outlining that the conduct investigation had been completed and that he would be kept informed regarding the status of his file "at intervals not greater than 30 days". The Appellant argues that the Conduct Authority breached section 6.8.1.7 of the *AM XII.1* as he was not kept up to date with the status of his file (Appeal, pp 73, 82). The Respondent emphasizes that the Appellant failed to raise this issue during the proceedings and should not be permitted to do so on appeal (Appeal, pp 183-184).

[55] Given that the Appellant's employment is at stake and the high level of procedural fairness that is required, I agree with the ERC that although the Appellant did not raise this issue at the hearing, because it was raised in Appellant's submission for the Motion, it can be addressed on appeal (Material, pp 1129-1131, 1134-1135; Report, para 125). Section 6.8.1.7 of *AM XII.1* states that the Conduct Authority is responsible for advising the subject member, every 30 days in writing, the status of the investigation. As the Appellant noted in his submission, he was provided with a memo by the Conduct Authority on April 15, 2015, indicating that the conduct investigation had been completed.

[56] I recognize that the Conduct Authority advised the Appellant that he would be kept informed of the status of his file "at intervals not greater than 30 days" following completion of the investigation. The Conduct Authority provided monthly updates between August 2015 and December 2015 with the exception of June and October 2015 (Appeal, p 82). Section 6.8.1.7 does not mandate that updates be provided beyond the status of the investigation. Therefore, I am satisfied that the Conduct Authority acted in accordance with *AM XII.1*.

ii) Did the Board make every reasonable effort to hold the conduct hearing within 90 days of being appointed?

[57] The Appellant argues that the Board did not follow *AM XII.1* as it failed to make every reasonable effort to hold a conduct hearing within ninety days of being appointed by the designated officer. The hearing was held approximately 570 days after the Board was appointed (Appeal, p 72).

[58] Section 3.8 of the *AM XII.1* states that conduct boards "will make every reasonable effort to hold a conduct hearing within 90 days of being appointed by the designated officer." In both the Motion decision and the impugned Decision, the Board detailed why a hearing was not held within 90 days, despite all efforts to do so. The Board explained in the Motion decision that there were staffing shortages, staff changes, redistribution of files, and an abnormally large amount of files the CARD had to deal with in its first year under the new conduct system. None of this, however, was bad faith on the part of the Respondent, nor on the part of the CAR (Material, pp 2375-2377).

[59] In its Decision, the Board explained that the hearing was further postponed due to the late filing of an expert report by the Appellant. The Board explained that while the conduct management system should operate in an expeditious manner, "it must respect the principles of procedural fairness, which may sometimes include acceptance of a later expert report submitted by recently retained counsel and the granting of suitable adjournments to permit the other party to respond to that report" (Material, p 3387). Section 3.6 of *AM XII.1* states that contraventions of the *Code* "will be dealt with in a timely and flexible manner". Accordingly, I am satisfied that although the Board was unable to convene the hearing within 90 days, it made reasonable efforts to advance the case as expeditiously as possible and provide detailed reasons explaining why it was unable to do so.

iii) Was the Appellant properly notified of his right to Appeal the Order of Suspension?

[60] The Appellant states that his Order of Suspension dated February 25, 2015, did not contain a notice indicating his right to file an appeal of the suspension order within 14 days. However, on February 5, 2016, he was served with an amended suspension order which was the same as the original but included a paragraph on the right indicating his right to appeal (Material, pp 1090-1092; 1113-1115). The Appellant argues that he should have been notified of the 14 days to appeal when he was served with the original suspension order on February 25, 2015, and that the Board "erred to view this" (Appeal, pp 72-73). The Respondent maintains that the Appellant did not raise this issue at the proceedings and should not be permitted to raise it on appeal (Appeal, p 183).

[61] Although the Appellant did not raise this lacuna at the hearing, he did raise the issue in an affidavit supporting his Motion, and I will therefore consider this argument (Appeal, pp 1129-1136). I agree with the ERC that this argument can be dismissed because the Appellant could have pursued the process to appeal the suspension when he received the amended suspension (Report, para 129). Further, there is no policy mandating a "right to appeal" paragraph in a suspension order. Both the *CSO (Conduct)* and *CSO (Grievances and Appeals)* indicate the right and the process to appeal a suspension order. Paragraph 32(1)(b) of the *CSO (Conduct)* indicates that a member facing suspension under section 12 of the *Act* may seek redress by means of an appeal. Paragraph 37(e) of the *CSO (Grievances and Appeals)* sets out the process for filing the appeal. The Commissioner has consistently held that members have a duty to inform themselves of relevant policy that is applicable to them, including the *Act*, and the *CSO*. I am simply not convinced that the Order of Suspension failed to conform to policy requirements or that the Appellant was deprived of his right to appeal.

[62] In sum, I am satisfied that the Board and the Conduct Authority acted in a manner consistent with policy and that there was no breach of procedural fairness.

c) Were the Board's findings on the Allegations clearly unreasonable?

[63] Although the Appellant previously admitted to Allegations 1, 2, and 3 at the hearing, he takes issue with certain findings of fact and the way in which the Board characterized his conduct in the Decision. These assertions challenge the Board's findings on all the Allegations. Specifically, the Appellant's position can be summarized as follows:

i. The Appellant accessed Ms. A's file as part of his duties;

ii. The text messages between the Appellant and Ms. A were mutual and he was not pursuing a personal relationship with her;

iii. The Appellant did not exploit Ms. B and only referenced his identity as a police officer so she would recognize who he was. The Board erred in finding that he improperly accessed the RCMP database to obtain her phone number.

i) The Appellant accessed Ms. A's file as part of his duties

[64] The Appellant argues that he looked up Ms. A's number as part of "his duties to check the wellbeing and maintain the RCMP core value of Compassion" and not because he was looking up phone numbers for an unauthorized purpose. He explains that he was an assisting investigator on the file at the time and called Ms. A because she was upset. Although he admits that he should have used different means to follow up with her, he argues that all staff use the RCMP database to access files for personal knowledge or work related use and that his treatment was "unfair for a normal practice despite the breach of policy" (Appeal, p 70, 74).

[65] This ground of appeal challenges the Board's finding that Allegation 1 was established as the Appellant used government-issued equipment and property for unauthorized purposes and activities, contrary to section 4.6 of the *Code*. The Board found that the Appellant had legitimately accessed Ms. A's file when he was tasked to contact Ms. A's brother. However, by continuing to access her file thereafter, obtaining her number, and using his personal phone to message Ms. A, the Appellant contravened section 4.6 (Material, p 3372).

[66] There is sufficient evidence to support the Board's finding. In the ASF, the Appellant admitted to Allegation 1 (Material, p 2857). At the hearing, the Appellant "unquestionably admit[s…] that the information that was gleaned from that database was used improperly for a non-duty related purpose" (Material, p 3009). Based on this admission and evidence in the record, the Board made the following finding at the hearing (Material, p 3016):

> It's my view that the member had only one task on the file, as accurately set out in section 2(b) of the parties' summary. Having had phone contact on January 8, 2015 that was handled appropriately, and having sent a text message later on that date that was, in my view, odd to have sent. Even if [Ms.A] was upset in the telephone call that preceded it, a text message [Ms. A] never replied to, I must assess whether the member's admitting access of the electronic file on January 18 and 24, whether these acts of accessing constitute use of the RCMP electronic file system for an unauthorized purpose. It is my finding that these acts of accessing the system were a contravention of section 4.6 simply because the member had no further tasks assigned to him with respect to [Ms. A's] sexual assault file.

[67] Accordingly, I reject the Appellant's argument that he was in the role of an assisting investigator when he accessed Ms. A's file and that he was treated unfairly for partaking in normal practice. The crux of the issue is not whether the Appellant used a database that other staff normally use for duty related purposes, but rather, whether his use was for an unauthorized purpose or activity. The Appellant already conceded that the database was used improperly for an unauthorized purpose, and further admits on appeal that his use was a "breach of policy". I am satisfied that the Board did not make a manifest and determinative error in its finding on this issue.

ii) The text messages between the Appellant and Ms. A were mutual and he was not pursuing a personal relationship with her;

[68] The Appellant claims that the Board mischaracterized his communication with Ms. A. While he admits his "inappropriate off duty actions", he argues that the "279 text messages with [Ms. A] were over a period of five (5) days/nights only" and that averaging 55 text messages per day "is not heaps of texts, but in fact normal to low". He also argues that he and Ms. A had

mutually engaged in the conversations and that he did not pursue a personal relationship with Ms. A nor did he meet her despite "several joint requests" (Appeal, p 74).

[69] This ground of appeal challenges the Board's finding that Allegation 2 was established as the Appellant engaged in behaviour in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code* by pursuing a personal relationship with Ms. A. The Board explained in its Decision that there were two components to the finding of discreditable conduct: first, the Appellant's act of engaging in the text messages, and second, the Appellant's knowledge of Ms. A's circumstances and his status as a person in authority when he committed those acts. Specifically, the Board found that the Appellant's pursuit of a personal relationship was done with the knowledge that Ms. A was 17 years old and a victim in a sexual assault investigation (Material, pp 3375-3376).

[70] Here again, the Appellant admitted to the particulars of Allegation 2 (Material, p 2857). On appeal, the Appellant also admits that his off duty actions were "inappropriate". While the Appellant states that the Board mischaracterized his communication with Ms. A, the evidence in the record reflects otherwise. I note the following:

- The Appellant was aware that Ms. A was a victim of sexual assault, and that she was 17 years old (Material, pp 2858, 3043);

- The Appellant asked to meet with Ms. A multiple times and exchanged messages that were of a flirtatious and personal nature. I reproduce some of these texts (Material, pp 373-375):

  "Are you working tomorrow? … I hope things are good we should meet for coffee";

  "Enjoy friend time… I even sent shirtless pic of me haaaa kidding…. That's a bug"

  "I like your look";

  After being told she was at the gym, he told Ms. A, "…im a fan of yoga pants…hint lol… Or whats under that…all shapes";

"…maybe in 2-3 days we can grab a coffee";

After sending a shirtless picture of himself, he stated "Ha was old summer pic…shirt off lol…hint kiddin";

After requesting a picture from her he replied "Don't tell anyone but u have nice lips and nose lol";

The Appellant asked Ms. A whether she drives, and when she asked why he asked, he replied "Meet up";

The Appellant sent further photos of a shirtless man in underwear, and a man sleeping in bed with a blanket covering an erection stating "Sleepy but awake…too funny lol".

- The Appellant acknowledged that he was "disgusted", "embarrassed", and "bothered" by the text messages he exchanged with Ms. A, that police officers should not engage in such activities, and that he "certainly could have stopped and controlled that" (Material, pp 3045-3046);

- The Appellant acknowledges that the conversations "became inappropriate pretty quick", that he was "kind of excited", and that he is now ashamed of those messages (Material, p 3047).

[71] Whether or not the Appellant actually met Ms. A does not take away from the discreditable conduct exhibited in his conversations with Ms. A. Similarly, the finding of discreditable conduct is not based on the number of text messages the Appellant sent Ms. A, but rather based on his act of initiating contact with Ms. A, in his capacity as a police officer and with knowledge of her age and that she was a victim of sexual assault, and the inappropriate nature of the conversations. From sending her shirtless and sexually suggestive photos to commenting on her physical appearance and sending sexual innuendos in his messages, the conversations clearly display an attempt at a pursuit of a personal relationship with Ms. A. The mutuality of the conversations does not have a bearing on whether the Appellant's conduct was

discreditable. I am satisfied that the Board did not make a manifest and determinative error in its findings pertaining to Allegation 2.

iii) The Appellant did not exploit Ms. B and only referenced his identity as a police officer so she would recognize who he was. The Board erred in finding that he improperly accessed the RCMP database to obtain her phone number.

[72] The Appellant argues that "there is no evidence to support how or when [he] obtained [Ms. B's] personal phone number. He explains that using the police database "to query" Ms. B was not a serious contravention, but it was his obtaining of Ms. B's number "to call for personal reasons". He adds that he only referenced his identity as a police officer so that Ms. B would remember him. He states that she initially asked him to go for coffee, and he made the call to follow up on the request for coffee and obtaining details about her husband's acupuncture. The Appellant maintains that the Board made assumptions and "did not pay attention to the details" (Appeal, pp 71-74).

[73] This ground of appeal challenges the Board's findings that Allegations 3 and 4 were established as he used government-issued equipment and property for unauthorized purposes and activities, contrary to section 4.6 of the *Code* and engaged in behaviour in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code*. In finding Allegation 3 established, the Board explained that the "agreed contravention of section 4.6 [of the *Code*] is not simply gaining a phone number used to seek a meeting with [Ms. B]. It is the completely unauthorized accessing of the actual files by [the Appellant] (Material, p 3017). At the hearing, the Appellant admitted to "making inquiries" and completing an "unauthorized search" of Ms. B's telephone number. He also admitted to Allegation 3 in the ASF (Material, pp 2861, 3105-3106). Further, the text messages between the Appellant and Ms. B clearly indicate how the Appellant obtained Ms. B's personal cellular number. After obtaining Ms. B's personal telephone number from the unauthorized use of the database, the Appellant called her residence and spoke to an individual who he thought was Ms. B's mother (later established that it was her employee). When he

engaged in text communication with Ms. B, the Appellant told her that he obtained her personal cellular number from this individual (Material, pp 471, 3110).

[74] The Board found that it was unacceptable for the Appellant to identify himself to Ms. B's employee in order to gain access to her cellular number, noting, that in itself constitutes discreditable behaviour contrary to section 7.1 of the *Code*. The Board also acknowledged that Ms. B made the initial offer for coffee/tea, but explained that when she was in her vehicle about to receive a speeding ticket from the Appellant, this offer could have been "an effort on her part to avoid receiving a ticket or otherwise receive favourable treatment" (Material, p 3374). The Board noted that seeking to meet socially with Ms. B, shortly after the ticket was issued, presented her with the opportunity to challenge the ticket through whatever appropriate process existed and compromised the Appellant's role as the investigator on that traffic infraction matter (Material, p 3375).

[75] The Board reviewed the text messages between the Appellant and Ms. B and found that the Appellant only mentioned the request for acupuncture after Ms. B questioned how he obtained her cellular phone number. The relevant messages state the following (Material, pp 2861, 3370):

> Appellant: Hi [Ms. B]… it's [Appellant] … with police … I wanted to contact you
>
> Ms. B: Who is this?
>
> Appellant: The speeding ticket last night?
>
> Ms. B: What is it about?
>
> Appellant: You want to meet for tea?
>
> Ms. B: Hey how did u get my number?
>
> Appellant: I phoned your place to talk to you … was provided your number from mom? Sorry to have bothered you I just like to meet u gain sorry … I was thinking about the acupuncture and that u wanted to go to coffee

Ms. B: Sorry I don't think it's appropriate to meet for coffee but thank you for asking.

The Board explained that if the need for acupuncture was the real motive for contacting Ms. B, then it would have been the first thing mentioned in the Subject Member's text messaging. The Board also suggests that if the Appellant was in true need of an acupuncturist, he could have "located a suitable acupuncturist by searching the web or opening the Yellow Pages (Material, p 3385).

[76] I am satisfied that the Board's findings with respect to Allegations 3 and 4 are supported by the Record and that it did not make a manifest and determinative error in its consideration of the evidence.

d) Was the imposed conduct measure clearly unreasonable?

[77] The Appellant challenges the Board's finding that dismissal was the appropriate conduct measure. He argues that the Board improperly assessed the mitigating and aggravating factors and that it failed to consider a non-dismissal sanction. The Respondent maintains that the Board carefully considered all ranges of measures before deciding to dismiss the Appellant, that it considered aggravating and mitigating factors, and that it ultimately made an appropriate decision by deciding on dismissal as the conduct measure.

[78] For the reasons that follow, I accept the ERC finding that the conduct measure imposed by the Board does not warrant intervention on appeal (Report, para 153).

[79] Subsection 45(4) of the *Act* directs that if a conduct board decides that an allegation of a contravention of a provision of the *Code* is established, the conduct board shall impose one or more of the following conduct measures on the member:

> (a) recommendation for dismissal from the Force, if the member is a Deputy Commissioner, or dismissal from the Force, if the member is not a Deputy Commissioner,
>
> (b) direction to resign from the Force and, in default of resigning within 14 days after being directed to do so, recommendation for dismissal from the

> Force, if the member is a Deputy Commissioner, or dismissal from the Force, if the member is not a Deputy Commissioner, or
>
> (c) one or more of the conduct measures provided for in the rules.

Paragraph 36.2(e) of the *Act* requires 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".

[80] Subsection 24(2) of the *CSO (Conduct)* requires a conduct board to impose conduct measures "that are proportionate to the nature of the contravention of the Code of Conduct". Section 11.15 of *AM XII.1* states that "[a]ggravating and mitigating circumstances must be considered in determining the appropriate conduct measures in relation to the subject member contravention of the Code of Conduct".

i. Did the Board give appropriate weight to certain aggravating and mitigating factors?

[81] The Appellant submits that the Board unfairly represented mitigating factors and attributed too much weight to certain aggravating factors. The Appellant's arguments can be summarized as follows:

1. The Board improperly determined that the Appellant exploited a police client;
2. The Board did not give proper consideration to the Appellant's positive work history;
3. The Board erred in rejecting Dr. H's opinion about personal circumstances and medical conditions that contributed to the Appellant's impaired moral judgment at the time of the misconduct;
4. The Board improperly characterized the nature of the text messages between the Appellant and Ms. A;
5. The Board's failed to consider that the Appellant's involvement in using the internal RCMP messaging system for personal reasons occurred three years before the present misconduct;

The Respondent argues that the Board appropriately considered both mitigating and aggravating factors and that the Appellant was trying to "bolster arguments that were previously presented or could have been presented during the conduct hearing" (Appeal, pp 186-187). For the reasons I will explain, I find that the Board appropriately considered the aggravating and mitigating factors and did not make a manifest and determinative error.

1) Did the Board improperly determine that the Appellant exploited a police client?

[82] The Board considered as an aggravating factor the element of breach of trust as the Appellant exploited his position as a police officer to gain the phone numbers of Ms. A and Ms. B and "used information gathered for legitimate investigative purposes to further his discreditable conduct with both Ms. A and Ms. B" (Material, p 3388).

[83] The Appellant submits that the Board improperly considered as an aggravating factor that he exploited a police client. The Appellant cites Oxford Dictionary's definition of exploitation and argues that he did not take advantage of Ms. A or Ms. B. The Appellant explains that neither Ms. A nor Ms. B were affected by the Appellant's behaviour, that Ms. B did not think what happened was a big deal and only complained because an off-duty officer encouraged her to, and that Ms. A "was not uncomfortable and there was no fear of the Appellant" (Appeal, pp 71-72).

[84] In my view, the Board's finding is supported by the record. As previously established, the Appellant admitted to using the police database for the unauthorized purpose of getting the contact information of Ms. A and Ms. B. By virtue of his position as a police officer, the Appellant obtained this information with the aim of pursuing personal relationships with members of the public. The Appellant wanted to meet with both Ms. A and Ms. B for personal reasons, and with both individuals, the initial contact referred to his identity as a police officer. When the Appellant pursued a personal relationship with Ms. A, he was aware of her vulnerable status given her age and that she was a complainant in a sexual assault investigation (Material, p 3368).

[85] Additionally, I do not accept the Appellant's contention that neither Ms. A nor Ms. B were affected by his behaviour. Ms. A sought her brother's advice on the situation telling him

that the Appellant "has been flirty texting me and asking for pics, he sent a shirtless pic of him". She explained to her brother that she was "a little freaked out" and that the situation was "just weird". She added "[] he said we should go for coffee. I assumed to talk about the case, then he asked for a picture. I sent one of me smiling, then he's like 'i like your look' and sent a shirtless pic of himself. Like I said it's just weird". Her brother responded that that was "fucked" that they "need to go to police station" and that she "know dam right it's not just weird. U know what he is trying o do. Don't fall into that trap" (Material, pp 348-349) (*sic* throughout).

[86] Similarly, Ms. B initially explained that she did not think it was a big deal because she was older and "an experienced woman", however, after considering the situation further, she decided to file a complaint because she did not want this to happen to younger or other women given "[the Appellant] may take more advantage or do something worse than what he did to me" (Material, pp 396-397).

[87] I note that RCMP members are expected to keep their communities safe and conduct themselves in a manner that uphold the Core Values of the Force. Situations where members of the public are involved and that cause a loss of public trust and confidence in the community are all aggravating circumstances set out in *AM XII.1 (Appendix 1-20).* By exploiting his role as a police officer to engage in discreditable conduct, the Appellant failed to adhere to Core Values and caused a loss of confidence in the community as evidenced by statements of Ms. A, her brother, and Ms. B. I am satisfied with the Board's consideration of this as an aggravating factor.

2) Did the Board give proper consideration to the Appellant's positive work history?

[88] The Appellant argues that the Board did not give enough consideration to his positive work history and the eight pages of positive comments from his superiors, peers, and a police client. The Appellant also insists that it was unfair for Board to consider the absence of support from his supervisors and peers concerning appropriate conduct measures as an aggravating factor (Appeal, pp 76-77).

[89] First off, the Board did not consider the absence of support from his peers as an aggravating factor. The Board referred to this only in its summary of the CAR's arguments

pertaining to aggravating factors, but did not consider this as an aggravating factor in its Decision (Material, pp 3383, 3387-3388).

[90] Further, I am not persuaded that the Board committed a manifest and determinative error in its consideration of the Appellant's work history when reviewing aggravating and mitigating factors. The Board acknowledged the "positive supervisory commentary and character-reference type information" filed by the Appellant, and noted that those materials offered "specific examples of positive work performance or personal acts of kindness". The Board also found that these materials "establish that the Subject Member was publicly recognized for his enforcement of impaired driving laws over the period of 2010 to 2014, and that he participated in various off-duty volunteer activities, including laudable activities with youth" (Material, pp 3376-3377).

[91] The Board observed, however, that the sources of commentary for the information were not aware of the Appellant's misconduct and found that the materials filed "did not in themselves establish the Subject Member as an outstanding employee" (Material, pp 3376). Nevertheless, the Board accepted the Appellant's "positive work history and devotion to his job" as a mitigating factor, but noted that this was "somewhat diminished by the informal disciplinary action the Subject Member received in June 2011, which was, generously, treated as an episode involving excessive use of force during a domestic dispute" (Material, p 3386).

[92] I am satisfied that the Board appropriately considered the Appellant's positive work performance as a mitigating factor and provided sufficient reasons as to why it gave this factor limited weight.

3) Did the Board err in rejecting Dr. H's opinion about personal circumstances and medical conditions that contributed to the Appellant's impaired moral judgment at the time of the misconduct?

[93] The Appellant argues that the Board engaged in favouritism by accepting the opinion of Dr. S over Dr. H. The Appellant states that Dr. S completed his evaluation less than two months prior to the conduct hearing, while Dr. H had conducted assessments since 2015. By accepting Dr. S's opinion, the Board unfairly rejected as a mitigating factor the Appellant's personal circumstances and PDD and how they impacted him during the time of the misconduct. The

Appellant also contends the Board inaccurately stated that the Appellant suffered from a right shoulder injury in a motor vehicle accident when it was his right bicep that suffered damage (Appeal, pp 71, 76-78).

[94] I find that the Appellant has failed to demonstrate that the Board made a manifest and determinative error in its consideration of the expert evidence. In *Pizarro v Canada (Attorney General)*, 2010 FC 20 (*Pizarro)*, the Federal Court explained that it is well settled law that "a decision maker is not compelled to accept the conclusions of an expert where there is no contradictory evidence. However, when a decision maker does so, there must be good reasons, generally outside the specific area of expertise, to do so" (*Pizarro*, at para 56). Additionally, a "decision maker does not necessarily have to confront an expert with every concern he or she may have but the failure to elicit an answer may undermine the reasonableness of the decision-maker's adverse conclusions" (*Pizarro*, at para 63).

[95] In my view, the Board did not commit a reviewable error in its consideration of the expert opinions of Dr. S and Dr. H.

[96] First, the Board clarified that the two experts conducted their assessments at different points in time due to the Appellant's untimely filing of an expert report. Although the Board accepted the late filing, this required offering an adjournment to the CAR to give time to prepare a response (Material, p 3364).

[97] What's more, after qualifying both Dr. S and Dr. H as experts in psychology, the Board questioned them both about whether the Appellant suffered from PDD or any other mental conditions or disorders during the time of the misconduct and to what degree they contributed to his misconduct (Material, pp 3171, 3205). Dr. H found that the Appellant's depression had a major impact on reducing his stress tolerance and that "if he wasn't stressed he probably wouldn't act out in a such a serious vein" (Material, pp 3171-3172). On the other hand, Dr. S was of the view that there was no "persuasive evidence that at the time of the misconduct that he was suffering at that point from impaired mood, low mood or persistent depressive disorder". He explained that the Appellant "has certainly experienced of low mood" but that the criteria for

persistent depressive disorder is that it must be "present for two years and the person is not without the symptoms for longer than two months" (Material, pp 3205-3206).

[98] In finding Dr. S's opinions more persuasive, the Board explained that Dr. S's finding was based "on a detailed review of a number [of] factual points that show that the Subject Member may at times have experienced low mood after the break-up of his marriage and the investigation for domestic assault, but his low mood was transitory" (Material, pp 2790-2795, 3379). The Board found little factual or clinical support in Dr. H's report for his opinion that the Appellant began suffering from a depressive disorder in 2010 "that was still not adequately treated at the time of his misconduct in 2015". As an example, the Board found "particularly powerful" that the "distinctly upbeat and playful tone" in the Appellant's text messages to Ms. A to be inconsistent with a depressed mood (Material, p 3379).

[99] I am satisfied that the Board acted in a manner consistent with the principles set out in *Pizarro* by taking steps to ask the same question to both experts as it pertained to the issue, and provided sufficient reasons as to why it chose the opinion of Dr. S over Dr. H. For example, although Dr. H acted in a dual role as the Appellant's therapist and assessor, the Board still accepted his report, all the while treating his findings pertaining to the Appellant's mental condition from January 8 to February 11, 2015, with a degree of caution because of the patient-psychologist therapeutic relationship. The Board also found that Dr. S's analysis was bolstered by the fact that it considered the Appellant's conduct with both Ms. A and Ms. B, while Dr. H focused only on Ms. A (Material, p 3385). Although the Appellant suggests that the Board engaged in favoritism, I agree with the ERC that there is no such indication of this in the Record (Report, para 165). For example, despite preferring the opinion of Dr. S, the Board found certain contentious information from untested collateral sources in his opinion inadmissible and excised references to this information (Material, p 3379).

[100] I am also satisfied that the Board did not commit any reviewable errors in rejecting the PDD and the Appellant's personal circumstances as mitigating factors. The Board acknowledged that the Appellant was dealing with several personal circumstances during the time of the misconduct such as the not living in the same residence as his present partner, financial strain

due to the breakdown of his previous relationship, and physical discomfort due to an injury to his shoulder. However, the Board found that these factors did not impose "such significant stress upon the Subject Member that he experienced mental impairment involving compromised moral judgment, as he continued to perform his duties satisfactorily despite these factors" (Material, p 3384).

[101] Similarly, the Board explained that even if the Appellant's initial communications were "significantly influenced by some sort of depressive mental state and personal stressors. [...] the Subject Member admitted in his testimony that, during the period of the text exchanges, he knew what he was doing was inappropriate and should not continue". The Board also noted that it considered the testimony of Dr. H with regard to workaholism masking underlying depression, but found no independent observations that would make this case for the Appellant. The Board highlighted that the Appellant advised Dr. H that he was functioning extremely well at work, received positive performance appraisals, and worked plenty of overtime. Accordingly, the Board found that the Appellant had capacity "for critical thought, sound decision-making and sound judgment during the period of his acts of misconduct" (Material, p 3384). Further, the Board explained that even if it accepted that the Appellant was experiencing PDD, Dr. S provided extensive reasons for why there were limited reasons to believe that its symptoms "were so severe that they caused or contributed to" the Appellant's misconduct (Material, p 3380).

[102] Moreover, I acknowledge that the Board inaccurately referred to an injury the Appellant suffered on November 6, 2012, as an off-duty shoulder injury when it was in fact an injury to the Appellant's right bicep. I find, however, that this mistake did not lead to a manifest and determinative error in the Board's overall decision as a more accurate description would not have led to a different conclusion in the finding that the injury did not contribute to a compromised moral judgment at the time of the misconduct.

4) Did the Board improperly characterize the nature of the text messages between the Appellant and Ms. A?

[103] The Appellant maintains that the Board improperly characterized and considered as aggravating factors multiple aspects of the Appellant's communication with Ms. A. Specifically, the Appellant argues that:

- The text messages and photos exchanged between him and Ms. A were mutual. Both of them reached out to each other, and both made requests to meet in person. In fact, there was a period of seven days after February 2, 2015, where the Appellant did not contact Ms. A until she sent him a text (Appeal, pp 71, 77);

- He did not exchange sexual images with Ms. A, but rather "goofy immature suggestions that included the Appellant sending a photo of an unknown male laying on a bunk bed with the center of his pants propped up followed by the text message, '*sleepy but awake…too funny*'" (Appeal, p 77);

- The Board formed an unfair opinion on why the text messages ended. The Appellant ceased communication with Ms. A because he felt "his communication would be restricted and unnecessary given [Ms. A's] state of mind and mental health apprehension (Appeal, p 77).

[104] I note that the Board did not provide an opinion as to why the text exchanges between the Appellant and Ms. A ended. The Board only made reference to the CAR's argument that the text exchanges stopped because Ms. A "began expressing suicidal thoughts and the Subject Member, in essence, was forced to call for a response to her location and provide his name". Although the CAR presented this as an aggravating factor, the Board did not consider it as one in its Decision (Material, pp 3383, 3387-3388).

[105] I am not persuaded by the Appellant's remaining arguments. The Board certainly considered the mutuality of the interaction between the Appellant and Ms. A as it reproduced excerpts from their text exchange where Ms. A was making the requests to meet or initiating conversation. However, the Board found as an aggravating factor the Appellant's repeated

requests for images of Ms. A, including potentially in yoga pants and a bathing suit, and how the exchanges made him "kind of excited". The Board explained that the Appellant acted in a "highly manipulative manner" as he "expressed his willingness to receive a picture of Ms. A while she was wearing a bathing suit" (Material, p 3384).

[106] Further, I find it telling that the Appellant is trying to downplay the nature of the sexually laced images and messages he sent Ms. A. Despite previously admitting the series of 279 text messages and photographs contained "sexual connotations", the Appellant is trying to diminish the seriousness of his misconduct by referring to the conversations as "goofy" and "immature". It is concerning to me that the Appellant describes a photo that is very clearly an image of a man lying in bed with a blanket covering his erection as non sexual and as a photo of a man "with the center of his pants propped up" (Appeal, p 77). The Board appropriately labelled this image as "egregious", especially as the Appellant "knew what he was doing was inappropriate and should not continue" (Material, pp 3103, 3384). The Board explained that the Appellant's decision to send "sexualized text messages […] was so fundamentally at odds with the duties he clearly knew he owed a 17-year-old sexual assault complainant" (Material, p 3384).

[107] *AM XII.1 (Appendix 1-20)* identifies the seriousness of the misconduct as an aggravating circumstance. The Appellant's decision to send "acutely inappropriate […] text correspondence involving sexual images and connotations" to Ms. A despite having knowledge of the vulnerable personal circumstances of Ms. A, her under-age status, and her status as a complainant in a sexual assault complaint are indicative of the seriousness of the misconduct. I am satisfied that the Board did not make a manifest and determinative error in its consideration of the text messages as an aggravating factor.

5) Did the Board fail to consider that the Appellant's involvement in using the internal RCMP messaging system for personal reasons occurred three years before the present misconduct?

[108] The Appellant argues that the misconduct pertaining to his inappropriate use of an RCMP internal messaging system that led to his spouse's termination from the Force occurred three years prior and that he did not make the same mistake again (Appeal, p 77). He insists that this should not have been considered an aggravating factor.

[109] When the Appellant's spouse was working for the RCMP, the two of them engaged in personal communication over an internal messaging system. As a result of the inappropriate personal use of the internal system, his spouse's employment was terminated. Although the Appellant was not disciplined, he was warned by his supervisor not to engage in inappropriate use of RCMP systems, and at the hearing, the Appellant noted that he "never used it ever again after that" and that he had "learned [his] lesson" (Material, pp 3113-3114). The Board found that the misuse of the internal messaging system carried "limited aggravating weight".

[110] Pursuant to *AM XII.1 (Appendix 1-20)*, being "[w]arned in the past about the inappropriateness of the action" is an aggravating factor. I agree with the ERC finding that the "Appellant should have been aware from his previous experience that it was inappropriate to use RCMP resources for personal reasons" (Report, para 187). Despite saying that he did not make the same mistake again, the warning from his supervisor should have been enough for the Appellant to be cognizant that using the RCMP database for personal reasons was unacceptable. Consequently, I find the Board appropriately considered the previous misuse of the internal messaging system as an, albeit limited, aggravating factor.

ii) Was dismissal a proportionate conduct measure?

[111] The Appellant argues that dismissal is not a proportionate conduct measure. He references cases in the Annual Report where the misconduct was greater in severity than his, yet the punishment was minimal. He adds that the Board failed to consider non-dismissal measures. For example, the MR proposed that the Appellant receive psychological therapy for one year followed by a reassessment on conduct measures based on his treatment. The Appellant contends that the Board ignored this suggestion. The Appellant proposes a "more reasonable offering" as punishment which includes a re-instatement of duties, a direction to continue counselling sessions and a rehabilitative program for his shoulder injury, a reprimand and 60-day suspension from duty without pay, an ineligibility for promotion for two years, a reassignment to another position or transfer for modified duties, and an opportunity to teach and make members attentive of wrongdoing in the workplace (Appeal, p 79).

[112] I am not persuaded by the Appellant's argument that the Board failed to impose a proportionate conduct measure. Before choosing dismissal as the appropriate conduct measure, the Board contemplated non-dismissal sanctions. For example, the Board noted that inappropriate personal texting by an investigator with a traffic violator "would ordinarily attract non-dismissal conduct measures" (Material, p 3388). The Board also addressed the MR's proposal that the Appellant undergo one year of psychotherapy "involving frequent treatment sessions and specific therapeutic elements by Dr. H, and canvassed in cross-examination with Dr. S" with a final decision on conduct measures being rendered at the end of the year. The Board explained that it declined to pursue this option as it did not "accord with the expeditious resolution of conduct matters that is one of the central obligations and priorities of the conduct system" (Material, pp 3388-3389).

[113] In rejecting the psychotherapy, the Board considered the Appellant's previous attendance at therapy as a mitigating factor, but found that the Appellant's decision to "abandon regular, unfractured treatment by Dr. H and his willingness to see him again only for Dr. H's present report **are just not consistent with a person genuinely committed to addressing clearly problematic behaviour**" (emphasis added). The Board added that it was "skeptical that the proposed year of intensive psychotherapy [would] be effective in reducing the risk of recidivism to an acceptable level approaching nil, given that the proposed psychotherapy may not correct a probable contributor to the misconduct, the Subject Member's personality traits" (Material, pp 3385-3386, 3389).

[114] The Board also acknowledged that the MR submitted disciplinary decisions that arose in other regulated professions where the misconduct established far exceeded that of the Appellant, yet loss of employment was not the imposed discipline measure. The Board explained that it "carefully considered these cases" but found that "loss of employment may be proportionate even where a case does not involve the worst type of employee or an employee committing the worst type of misconduct" (Material, p 3389). I recognize that the Appellant found cases that shared similarities to his in the Annual Report where less severe conduct measures were imposed. I highlight two of the cases (Appeal, pp 141-142):

> 11 A.D. (4th) 270: Improper use of RCMP resources (repetitive use of resources for the furtherance of a sexual relationship). Disposition was a reprimand, forfeiture of 10 days' pay and recommendation for continued professional counseling.
>
> 11 A.D. (4th) 327: Improper use of RCMP resources (repetitive use of resources for the furtherance of a sexual relationship). Disposition was a reprimand, forfeiture of 7 days' pay and recommendation for continued counseling.

I accept the ERC's finding that "a distinction between these two cases and the one at hand is that the present case involved a vulnerable member of the public, a minor who was a complainant in a sexual assault investigation" and that this detail is "central to the Board's finding on proportionality" (Report, para 204).

[115] In its contemplation of the appropriate conduct measure, the Board considered the nature and circumstances of the four contraventions, as well as the aggravating and mitigating factors. The Board explained that "extraordinarily inappropriate communications with a complainant" require imposition of conduct measures "that sufficiently address public confidence and other important interests" (Material, p 3388). Ultimately, the Board found that dismissal was the appropriate global conduct measure for the four allegations.

[116] The Board's justification for dismissal is consistent with the guidance and values set out in the RCMP *Conduct Measures Guide* (*Guide*). The *Guide* provides insight and direction on appropriate conduct measures for contraventions of the *Code*. Contraventions of section 4.6 of the *Code* are described by section 13 of the *Guide*: "Misuse of CPIC & Police Databases". The *Guide* explains that RCMP databases are repositories of highly confidential information, and their misuse to gain information "seriously compromises the RCMP's reputation and constitutes an egregious violation of a citizen's right to privacy". Aggravated measures, where the misuse was for personal gain, consists of 6-20 of loss of pay (*Guide*, at p 31).

[117] Moreover, contraventions under section 7.1 of the *Code* are described in sections 19-31of the *Guide*. Section 30 of the *Guide*, "Sexual Activity on-Duty – Member of the public", details that "where a member engages in sexual, intimate or romantic activity with a member of the public where a power imbalance exists", dismissal is the appropriate measure in the normal,

mitigated, and aggravated range. The section of the *Guide* also details the following (*Guide*, at pp 59-60):

> On-duty members are expected to remain professional at all times and **not use their position for personal gain**. This includes intimate relationships **stemming from a power imbalance, or pursuing relationships with members of the public that the member knows are vulnerable, based on the member's professional knowledge of investigations etc**.
>
> […] RCMP cases have been clear that **power imbalance exists between a police officer and a member of the public, as a citizen could naturally feel compelled to engage in conversation or follow the directions of an on-duty officer, who then accosts them. This is particularly true in situations where the member of the public is intoxicated or otherwise vulnerable**.
>
> As such, sexual contact with a member of the public, particularly if intoxicated **will result in termination**. There is no reason to deviate from those set precedents.
>
> [Emphasis added.]

[118] I recognize that section 30 refers to activity "on duty" and that the Appellant was off-duty when he contacted both Ms. A and Ms. B. I note, however, that in its discussion of discreditable conduct, the *Guide* explains that "the requirement to abide by a high ethical standard applies to member both on and off-duty" (*Guide*, at p 43). Further, section 30 of the *Guide* places an emphasis on power imbalance and the use of an officer's position for personal gain. As established by the Board, the Appellant exploited his position as a police officer when he obtained the information of and made contact with Ms. A and Ms. B for personal reasons. The Board found as aggravating factors the Appellant's status as a person in authority when he chose to engage in communications with Ms. A and Ms. B and his knowledge of Ms. A's age and vulnerable status as a sexual assault complainant, when sending her "acutely inappropriate […]text correspondence involving sexual images and connotations" (Material, p 3387). Although the Appellant did not meet or engage physically with Ms. A, the Board found that the decision to send her "sexualized text messages [was] so fundamentally at odds with the duties he clearly knew he owed a 17-year-old sexual assault complainant" (Material, p 3384).

[119] In making its decision to dismiss the Appellant, the Board emphasized that (Material, p 3389):

> The powers granted a police officer are considerable; the public justifiably expects members of the RCMP to observe the highest ethical and professional standards. This necessarily includes the bedrock expectation that members shall only act to protect the health and safety of Canada's youth, and shall never deliberately and repeatedly exploit any vulnerable young person. Retention of the Subject Member would clearly imperil the public's confidence in the Force.

I agree. The Board's decision to dismiss the Appellant is consistent with guiding policy, well supported with findings from the Record, and reflects the severity and repetitive nature of the Appellant's misconduct. In short, I am not persuaded that the Board's decision to order the Appellant to resign from the Force within 14 days or be dismissed is clearly unreasonable.

DISPOSITION

[120] Pursuant to paragraph 45.16(3)(a) of the Act, the Appeal is dismissed. I confirm the conduct measure imposed by the Board.

[121] Should the Appellant disagree with my decision, he may seek recourse with the Federal Court pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

Steven Dunn, Adjudicator Date