Protected A

File 20193355 (C-047)

2021 CAD 22

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

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

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

Part 2 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291

BETWEEN:

Constable Andrew Hedderson
Regimental Number 61436

(Appellant)

and

Commanding Officer, "E" Division
Royal Canadian Mounted Police

(Respondent)

(the Parties)

Protected A

File 20193355 (C-047)

CONDUCT APPEAL DECISION

ADJUDICATOR: Steven Dunn

DATE: September 8, 2021

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INTRODUCTION

[1] Constable Andrew Hedderson, Regimental Number 61436 (Appellant), challenges, pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC 1985, c. R-10, as amended (*RCMP Act*), the decision rendered by a conduct board (Board), dated December 17, 2018, finding that one allegation of discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct (a schedule to the *Royal Canadian Mounted Police Regulations, 2014*,

SOR/2014-281) (Code of Conduct) and a second allegation of failing to perform duties and take appropriate action contrary to section 4.2 were established. A third allegation concerning a conflict of interest under section 6.1 was not established. The Board ordered the Appellant to be dismissed for the discreditable conduct and added a forfeiture of 15 days' pay for the failure to perform duties.

[2] In his statement of appeal, the Appellant maintained that the conduct measures imposed were overly punitive, and indicated that the decision was reached in a manner that contravened the applicable principles of procedural fairness, was based on an error of law, and is clearly unreasonable.

[3] In accordance with subsection 45.15(1) of the *RCMP Act*, the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report containing findings and recommendations issued on June 4, 2021 (ERC file no. C-2020-012 (C-047)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be allowed and a new hearing be ordered.

[4] In rendering this decision, I have considered the material that was before the Board (Material), the impugned decision, the Appeal Record, including the submissions of the Parties, and the Report. Unless otherwise stated, I will refer to the documents in the Material, and Appeal Record by page and the Report by paragraph.

[5] For the reasons that follow, the appeal is allowed and I direct the matter to proceed to a new hearing before a differently constituted conduct board.

BACKGROUND

[6] Ms. W was the victim of domestic violence by her boyfriend. The local RCMP attended and arrested him. The following day, Ms. W's boyfriend was released on conditions, one of which was to not communicate with her.

[7] The day following his release, Ms. W's boyfriend texted her. She contacted the local RCMP detachment and reported the breach and unwanted communication. The Appellant was

dispatched to the call. Upon arrival, Ms. W showed the Appellant pictures of her injuries, wherein her naked breasts were unknowingly exposed. Upon realizing this, Ms. W expressed her shame and embarrassment to the Appellant, which did not dissuade him from showing her a "revealing" picture of himself from his cell phone.

[8] The following days, both Ms. W and the Appellant engaged in communication through text messaging the nature of which was sexual. After two days, the Appellant advised Ms. W that communication between them should cease at it may jeopardize his career and the breach of conditions charge against her boyfriend. Ms. W was not happy with this decision and texted the Appellant repeatedly expressing her frustration. She texted the Appellant again advising him that her boyfriend had breached his conditions, that she feared his return, and requested the Appellant attend her residence. Off-duty at the time, the Appellant told her to leave her residence, seek refuge in a safe location, and contact the police from there. Ms. W persisted in seeking the Appellant's assistance. Unbeknownst to her, the Appellant had blocked her number shortly after the last message.

[9] When Ms. W attended her ex-boyfriend's court hearing she advised Crown Counsel that the Appellant showed her sexually explicit pictures of himself and corresponded with her via texts of a sexual nature. Crown Counsel advised the Appellant's line officer, and the situation led to the breach of release conditions charge against Ms. W's ex-boyfriend being withdrawn.

CONDUCT PROCEEDINGS

Notice to Designated Officer

[10] On December 8, 2017, a Notice to the Designated Officer was issued by the Commanding Officer, "E" Division (Respondent), pursuant to subsection 41(1) of the *RCMP Act*, requesting a conduct board be appointed (Material, pp 118-119) for three allegations (Material, p 5):

1. Engaging in discreditable conduct by showing Ms. W a revealing picture of himself and exchanging inappropriate sexual and personal text messages contrary to section 7.1 of the Code of Conduct;

2. Creating actual, apparent or potential conflicts of interest between his professional responsibilities and private interests based on inappropriate sexual and personal communications with Ms. W contrary to section 6.1 of the Code of Conduct; and

3. Failing to diligently perform duties and take appropriate action to aid Ms. W contrary to section 4.2 of the Code of Conduct.

Notice of Conduct Hearing

[11] The Board was appointed on December 21, 2017 (Material, p 117). The Notice of Conduct Hearing along with the investigation materials were served on the Appellant on January 9, 2018 (Material, pp 102-114). The same materials were provided to the Board on January 10, 2018 (Material, p 120).

Proceedings before the Board

a) Pre-Hearing Conferences

[12] At the first pre-hearing conference held on January 29, 2018, the Board determined that it would not require any supplemental information and that the timeframe for the provision of witness lists of both Parties was suspended (Material, p 1400).

[13] On February 22, 2018, the Appellant provided a response to the Allegations. He admitted Allegation 1 and most of the particulars, but denied Allegation 3. Regarding Allegation 2, the Appellant felt he was being accused twice of the same offence and requested the opportunity to provide submissions on the merits (Material, pp 2072-2074).

[14] A second pre-hearing conference was held on March 8, 2018, during which some particulars were clarified (Material, p 1392). At this time, the Board requested that the Respondent present submissions on whether Ms. W was a “vulnerable person” and compelled to

testify. The Respondent provided a submission on the vulnerable person issue on March 19, 2018 (Material, pp 1386-1391). The Appellant presented reply submissions taking the position that Ms. W was not a "vulnerable person" (Material, pp 1383-1385).

[15] The Respondent maintained the position that Ms. W be called as a witness. On March 29, 2018, the Board advised the Parties of the following (Material, p 1383):

> If there are no further submissions, I will consider the submissions that have been provided and proceed accordingly in determining what witnesses the Board may require and/or if testimony will be required in order to make determinations in respect of the Allegations.

b) Decision

[16] On April 26, 2018, the Board issued by email to the representatives a decision on the merits of the allegations in addition to a ruling on the vulnerable person question and whether Ms. W would be compelled to testify (Material, pp 3-30, 1382). The Board found Allegations 1 and 3 established, but held that Allegation 2 was a reiteration of Allegation 1 and therefore not established. The Board viewed Ms. W to be a vulnerable person and concluded that she was not required to testify because there was no conflicting evidence (Material, pp 25, 27-28).

[17] The Respondent informed the Board on May 1, 2018, that she had not expected a decision to be rendered on the merits since they had been awaiting a ruling on whether Ms. W would be compelled to testify and whether she was a vulnerable person at law. The Respondent made it clear that she had expected to have the opportunity to make comprehensive submissions on the allegations before the release of a decision on the merits (Material, pp 1381-1382). On May 2, 2018, the Board acknowledged receipt of the Respondent's email, and indicated that Ms. W was not required to testify at the conduct measures phase, but that this ruling could be revisited if the Appellant was to testify in regard to conduct measures. The Board then proceeded to direct the presentation of written submissions on conduct measures, first from the Respondent (received: May 29, 2018), and next from the Appellant (received: June 18, 2018).

[18] The Board issued the final decision on December 17, 2018. With respect to Allegation 1, the Board ordered the Appellant to be dismissed, and for Allegation 3, imposed a pay forfeiture of 15 days (Appeal Record, p 75).

[19] In describing the April 26, 2018, email decision and ruling as a "written-oral" decision, the Board explained (Appeal Record, pp 37-38):

> [151] The purpose of providing a written-oral decision is to furnish the Representatives with a written record of the findings of the Board, which would better inform them in preparing submissions on measures, which is not always the case when an oral decision is made on merit and representatives are put to making submissions on measures without a written record and/or within a very short time frame, sometimes the same or next day.
>
> [152] Subject to comments of the Representatives, the Board raised several procedural issues, and proposed that the CAR [Conduct Authority Representative] provides a submission on measures, followed by a reply from the MR [Member Representative], and if required, a rebuttal from the CAR, and the Board provided a preliminary view that there did not appear to be a requirement for any witnesses at the measures stage.

APPEAL

[20] On December 26, 2018, the Appellant presented his Statement of Appeal (Form 6437) to the Office for the Coordination of Grievances and Appeals (OCGA), contending that the conduct measures imposed were unreasonable and overly punitive, that the Board was biased in the decision-making process, and that the Board did not allow the merits of the allegations to be argued (Appeal Record, pp 5-6). As redress, the Appellant also seeks, *inter alia*, conduct measures less than dismissal on Allegation 1, and a forfeiture of less than 15 days pay for Allegation 3 (Appeal Record, p 6).

[21] The Appellant raises several grounds of appeal (Appeal Record, pp 333-342; Report, para 18):

1. The Board breached the Appellant's right to procedural fairness by not holding an in-person hearing and by prematurely rendering a decision on the merits;

2. The Board erred in determining that Ms. W was a vulnerable person;

3. The Board improperly considered evidence related to Allegation 2 in determining that Allegation 1 was established; and

4. Dismissal was too harsh a conduct measure.

[22] Given that I am prepared to allow the appeal on procedural fairness alone, I will not pronounce on the other arguments.

PRELIMINARY MATTERS

Applicable standard of review

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

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

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

[25] 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).

ANALYSIS

[26] Before turning to the crux of this appeal, I will examine several relevant questions raised in the submissions.

1. Who has the responsibility of providing the record to the OCGA?

[27] The Parties engaged in lengthy submissions about the disclosure of the record relied on by the Board in rendering the final decision. Particularly, the question of who is responsible for providing the Appellant a copy of the record.

[28] This issue was addressed by the Board in the December 17, 2018, decision in addition to the September 26, 2019, collateral appeal decision on disclosure (Material, pp 228-261).

[29] The Board claimed that the responsibility for producing a copy of the record relied on by the Board falls on the Respondent. The Board noted that while there are provisions that require conduct authorities to produce the record they relied on for decisions they render, these provisions do not refer to Boards. In stating its position, the Board referred to the RCMP Administration Manual (AM) which states that a respondent (the conduct authority) is responsible for producing a copy of the material that a conduct board relied on for an appeal unless the respondent is the subject member. As noted in AM II.3.5.4:

> **5.4. Management of Appeal - Conduct Board Decision**
>
> 5.4.1. In the case of an appeal of a conduct board decision, the following applies:
>
> 5.4.1.1. The OCGA will provide the respondent with a copy of the appeal as soon as feasible.
>
> 5.4.1.2. When notified of an appeal, the respondent, other than the subject member of the conduct board's decision, will forward to the OCGA a copy of the material that the conduct board relied upon in reaching the appealed decision, and the OCGA will provide the conduct board's material to the appellant.

> 5.4.1.3. The appellant will be given the first opportunity to present submissions, followed by the respondent.
>
> 5.4.1.4. The appellant will be given an opportunity to rebut the respondent's submission.
>
> 5.4.1.5. The rebuttal may not raise new facts or grounds.
>
> EXCEPTION: When permission is obtained from the adjudicator.
>
> 5.4.1.6. If the adjudicator permits new facts or grounds to be raised, the appellant or respondent may reply to the new facts or grounds as soon as feasible after they are raised.

[30] I agree with the adjudicator's position stated in the September 26, 2019, direction on the collateral issue of disclosure of the record (Appeal Record, p 255):

> [48] The Board's position is not without merit; however I believe procedural fairness considerations require a broader interpretation of the policy referred to by the Board for disclosure of the record which was relied on by the Board.
>
> [49] Specifically, while I agree that it is the Respondent's responsibility to produce a copy of the record relied on by the Board I find that procedural fairness requires the Respondent to obtain this copy from the Registrar instead of from the Respondent's own file.

[31] Furthermore, the adjudicator explained that one of the reasons for obtaining a copy of the materials relied on by a conduct board from the Registrar, is to confirm that they are the same as the materials which the parties already have. Consequently, this can only be done if both parties are provided a copy of the documents relied on by the conduct board, which are maintained by the Registrar (Appeal Record, p 255).

[32] The ERC emphasized that a conduct board is likely to have a more complete record than the parties which is a responsibility outlined rather clearly in section 26 of the *CSO (Conduct)*:

> **Record of conduct proceedings**
>
> 26 The conduct board must compile a record after the hearing, including
>
> (a) the notice of hearing referred to in subsection 43(2) of the Act;
>
> (b) the notice served on the subject member of the place, date and time of the hearing;
>
> (c) a copy of any other information provided to the board;

> (d) a list of any exhibits entered at the hearing;
>
> (e) the directions, decisions, agreements and undertakings, if any, referred to in subsection 16(2);
>
> (f) the recording and the transcript, if any, of the hearing; and
>
> (g) a copy of all written decisions of the board.

[33] The ERC considered the practicality of having a conduct board provide the record to the OCGA, noting that there are circumstances and cases where disclosure by a conduct board caused confusion that resulted in an incomplete record (Report, para 28). Consequently, the ERC determined that for practical reasons and in order to avoid unnecessary delays, it would be best to have the Registrar remit the record to the OCGA, which seems to be the most common practice. I agree with the ERC and confirm that records should continue to be disclosed by the Registrar to the OCGA.

2. Did the Board breach the Appellant's right to procedural fairness by not holding a public hearing?

[34] The Appellant insists the Board breached subsection 45.1(2) of the *RCMP Act* and his right to procedural fairness by not holding a public hearing and that this is significant given that conduct hearings must be accorded a high degree of procedural fairness (citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*)) (Appeal Record, p 336). Subsection 45.1(2) of the *RCMP Act* states:

> Hearing in public
>
> (2) The hearing shall be held in public but the conduct board, on its own initiative or at the request of any party, may order that the hearing or any part of it is to be held in camera if it is of the opinion:
>
> (a) that information, the disclosure of which could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or to the detection, prevention or suppression of subversive or hostile activities, will likely be disclosed during the course of the hearing;
>
> (b) that information, the disclosure of which could reasonably be expected to be injurious to law enforcement, will likely be disclosed during the course of the hearing;

> (c) that information respecting a person's financial or personal affairs, if that person's interest or security outweighs the public's interest in the information, will likely be disclosed during the course of the hearing; or
>
> (d) that it is otherwise required by the circumstances of the case.

[35] It is well established in law that a party who believes they have been denied procedural fairness must raise the issue at the earliest opportunity. I agree with the ERC that although it was the Respondent who raised the issue of procedural fairness after receiving the decision on the merits, the appeal was the first opportunity to raise the procedural issue (Report, para 37). The Appellant had no option given that he could not have foreseen that there would be no submission on the merits before the decision was rendered. In that respect, I adopt the ERC's rationale, "If the Board had advised the parties that they should expect a decision on the merits at the same time as a decision on the witness issue, the Appellant could have raised it then and would have been precluded from doing so on appeal had he failed to raise the issue." (Report, para 37)

[36] I realize that the Respondent raised the issue with the Board on May 1, 2018, and the Board replied on May 2, 2018, that it had already rendered a decision and was expecting submissions on conduct measures within seven days (Material, p 1381). However, I agree with the ERC's conclusion that Appellant could not be deemed to have waived his right to argue procedural fairness by simply not reiterating the assertions made by the Respondent especially after the Board's definitive response (Report, para 37).

3. Public hearing versus in-person hearing

[37] I agree with the ERC that a hearing does not have to be "in-person" to be public and there may have been some confusion around the conceptualization of what is a "public" hearing, and what is an "oral" hearing (Report, para 38).

[38] Subsection 45.1(2) of the *RCMP Act* reflects the open court principle. In *Southam Inc v Canada (Attorney General)*, (1997), 36 OR 721 (ON SC), which deemed a provision of the former *RCMP Act* requiring disciplinary hearings to be held in private to be unconstitutional, the court explained:

> Because of the public nature of a peace officer's duties and the broad powers given by law to a peace officer in the execution of those duties, and because formal adjudication board proceedings can affect an RCMP member's rights so significantly, the public has a very strong interest in such a hearing. The role of the adjudication board is clearly a judicial one. The provision excluding the public would prevent the media from being able to gather information about the proceedings. A conclusion that s. 2(b) is engaged is inescapable. The absolute privacy requirement in s. 45.1(14) cannot pass the test under s. 1 because it is totally arbitrary and restricts the gathering of information in the hearing absolutely. It is more restrictive than necessary to protect legitimate privacy or secrecy interests and therefore fails the rational connection, minimal impairment and overall proportionality aspects of the Oakes test.

[39] As explained by the ERC, the term "public" expressed in subsection 45.1(2) of the *RCMP Act* is broad, but in this context does not refer to the parties, and a hearing does not have to be in-person to be accessible to the public (Report, paras 38-39). The ERC went on to further clarify:

> [40] Lastly, according to Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals*, Thomson Reuters, it does not appear that a party has the right to claim a public hearing as an element of natural justice (chapter 1 6.1 (b)). Where the issue of natural justice is raised, the body of judicial decisions respecting the authority of an agency to hold its proceedings in private or in public direct that the decision is very much in the discretion of the, agency rather than a right for the individual to claim (*R. v. Edmonton School District No. 7*, 1974 CarswellAlta 89).

4. Is an oral hearing necessary to adhere to natural justice and fairness?

[40] I also adopt the explanation by the ERC concerning the distinction between the concept of "hearing" and "oral hearing":

> [42] "Hearing" does not mean "oral hearing". Natural justice and fairness do not require an oral hearing in all cases. There may be instances where written proceedings are quite sufficient to allow the individual to adequately present the case necessary to protect his or her interest at stake. In *Baker*, the Supreme Court of Canada (SCC) found that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The SCC found, in *Baker*, that the opportunity, which was accorded, for the appellant to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights

required by the duty of fairness in this case. As summarized by Guy Régimbald, *Canadian Administrative Law*, 2nd ed. (LexisNexis, 2015), at page 298 (underline added):

> There are many forms of hearings, some may be oral with court-like procedures, while others may be written only. It all depends on the statutory prerequisites, the statutory mandate, the principles of fundamental justice, and the rules of procedural fairness. As long as the hearing allows parties to communicate their positions in a fair manner and allows the parties to collect the necessary information, the hearing will be adequate.

[43] In *Behnke v. Canada (Department of External Affairs)*, [2000] F.C.J. No. 1166 (*Behnke*), the FC noted that in determining whether an oral hearing is required in any given instance, one considers factors such as: the complexity of the matter; whether the issues raise questions of public interest that are novel so that oral argument would be of great assistance to the court; whether an assessment of the credibility of witnesses and full legal argument is required; whether the parties cannot adequately present their cases in writing; the urgency of the matter and which form of hearing may be more expedient; and the procedural ability of the format being considered to operate efficiently in light of the number of parties.

[44] The SCC also confirmed that "a legitimate expectation may result from an official practice or assurance that certain procedures will be followed as part of the decision-making process" and that "the practice or conduct said to give rise to the reasonable expectation must be clear, unambiguous and unqualified" (*Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 S.C.J. No. 36, at para. 95 (*Agraira*)).

[…]

[45] Lastly, in *Singh et al. v. Minister of Employment and Immigration*, [1985] 1 SCR 177 (*Singh*), the SCC emphasized that when the credibility of the person affected is a central issue, an oral hearing is generally required, noting at pages 213-214:

> I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing […] I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[46] This being said, it has been recognized that a high degree of procedural fairness is required in administrative proceedings when the member's employment is at stake (*Knight v. Indian Head School Division No. 19*, [1990] 1 SCR 653; *Kane v. Board of Governors of the University of British*

> *Columbia*, [1980] 1 S.C.R. 1105; NC-2016-010 (NC-007)). The degree of procedural fairness owed to members facing dismissal in conduct proceedings was canvassed by the ERC in ERC 2700-11-002 (D-127).

[41] In short, the conduct hearing process does not require an oral hearing in every case and this conclusion is reflected in the *CSO (Conduct)*:

> **Conduct hearing**
>
> 13 (1) Proceedings before a conduct board must be dealt with by the board as informally and expeditiously as the principles of procedural fairness permit.
>
> **Adaptation of rules**
>
> (2) The conduct board may adapt these rules of procedure if the principles of procedural fairness permit.
>
> […]
>
> **Documents to be provided by member**
>
> 15(3) Within 30 days after the day on which the subject member is served with the notice or within another period as directed by the conduct board, the subject member must provide to the conduct authority and the conduct board
>
> […]
>
> (a) an admission or denial, in writing, of each alleged contravention of the Code of Conduct;
>
> (b) any written submissions that the member wishes to make; and
>
> (c) any evidence, document or report, other than the investigation report, that the member intends to introduce or rely on at the hearing.
>
> […]
>
> **Recording of proceedings**
>
> 22 A hearing before a conduct board must be recorded and, at the request of a party who is appealing a decision of the board, a transcript of the recording must be prepared and given to them.
>
> **Decision without further evidence**
>
> 23 (1) If no testimony is heard in respect of an allegation, the conduct board may render decision in respect of the allegation based solely on the record.

[42] However, there will be instances that absolutely require an oral hearing, especially where *viva voce* evidence is essential to addressing questions of credibility and reliability.

MERITS

Did the Board breach the principles of procedural fairness?

[43] A high degree of procedural fairness must be accorded to members who are subject to conduct hearings, particularly when it comes to the right to make full submissions on the merits of the allegation(s) (see, for example, *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653; *Kane v Board of Governors of the University of British Columbia*, [1980] 1 SCR 1105). Even so, provided that procedural fairness obligations are met, I acknowledge that conduct boards have wide latitude in managing hearings.

[44] First off, I am struck by the fact that the Board knew the CAR was adamant that Ms. W should testify and the justification for taking this position (Material, p 18):

> [76] […] the CAR asserts Ms. W must testify because there are contradictions and inconsistencies between her evidence and that of the Subject Member, which goes to credibility, and the Board must hear oral evidence to appreciate the credibility of the witness, as well as her emotional state and demeanour, which "could enhance" her credibility, as oral testimony can weigh more heavily than words on the page (citing 2017 RCAD 8).
>
> [77] The CAR then provides five examples of differences in the evidence of Ms. W and the Subject Member as it pertains to what pictures were shown of her and him and at whose insistence, whether photos were exchanged on snapchat, and whether there was any physical contact at the residence.
>
> [78] It is asserted that testimony of Ms. W will enhance her credibility, which will diminish the Subject Member's and the conduct described by Ms. W would attract a harsher penalty than that described by the Subject Member.

The Board's problematic ruling on this issue would be a precursor of things to come.

[45] Moreover, I am satisfied that in the circumstances of this case, the Board ought to have also afforded the Appellant the opportunity to test assertions through cross-examination and make fulsome submissions on the merits of the allegations. As clarified by the Appellant (Appeal Record, p 338):

> Ms. W's credibility and personal circumstances were vital to both merit and sanction issues. The Appellant agrees with the CAR who said in her submissions that the conduct of the Subject Member as described by Ms. W attracts a much harsher sanction than the conduct described by the Subject member himself (Emails, p. 20). The Appellant reasonably expected that untested and contested assertions of fact would not be considered by the Board; however, the Board went on to find that Ms. W was a vulnerable person based on unsupported information which the Appellant was not able to test.

[46] In his submissions, the Appellant presents ERC 2700-11-002 (D-127), a report mirroring the central issue here. In summary, the ERC held that the member's right to procedural fairness had been breached by the adjudication board's failure to afford her the opportunity to make submissions in relation to the merits of the allegation. The then Commissioner agreed, declaring the adjudication board's decision invalid. The Appellant explains (Appeal Record, p 337):

> In D-127, the ERC reviewed the Baker factors to find that "...members who are subject to [RCMP disciplinary] hearings must be accorded a high degree of procedural fairness, including the right to make full closing submissions on the merits of the allegations in issue" (para 102). The ERC found that the board in D-127 had failed to provide the appellant with the high level of procedural fairness required by not sufficiently advising the parties about its intended procedure:
>
> > [104] It was incumbent on the Board to advise the parties it intended to render a decision on the allegation immediately after hearing the non-suit motion in order to ensure that the Appellant understood the extent of submissions required while arguing the motion [...] The critical issue is that the parties must be informed that they would have only one opportunity to make those submissions.
> >
> > [105] As a result of the foregoing analysis, I find that the Board did not provide to the Appellant an opportunity to make comprehensive submissions regarding the merits of the allegation and the quality, reliability and probative value of the evidence adduced. In failing to explain and follow a clear process for the receipt of submissions, the Board breached the Appellant's right to procedural fairness and, in particular, her right to be heard as part of a fair hearing and to provide representations pursuant to subsection 45.1(8) of the *RCMP Act*.

[47] The Appellant insists that by rendering a decision prematurely on the merits, without submissions from the Appellant or Respondent, let alone advising them before hand, the Board breached his right to procedural fairness (Appeal Record, p 337). I agree.

[48] The ERC provided a succinct outline of the chronology of events leading to the breach of procedural fairness (Report, para 53):

> **March 8, 2018**: second pre-hearing conference where the Board requested submissions from the CAR on whether Ms. W should testify;
>
> **March 19, 2018**: CAR's submission on whether Ms. W should testify and whether she was a "vulnerable person";
>
> **March 27, 2018**: MR's reply submission on Ms. W;
>
> **March 29, 2018**: Board indicates that it would consider the submissions and "proceed accordingly in determining what witnesses the Board may require and/or if testimony will be required in order to make determinations in respect of the allegations";
>
> **March 29, 2018**: MR confirms that she has no other witnesses, but that if Ms. W testifies, the member would also testify; and
>
> **April 26, 2018**: Board renders its decision on the witnesses issue and merits.

[49] Ultimately, this case does not involve a *de minimus* or technical error on the part of the Board, rather, the decision strikes directly at the Appellant's right to be heard.

[50] In my view, the Board's *ex post facto* attempt to justify rendering the decision on the merits without advising the Parties of its intention (Appeal Record, pp 40-42) is entirely unpersuasive.

[51] Like the ERC, I find the Board breached the principles of procedural fairness by: not informing the Parties that it intended to render a decision on the merits without an oral hearing or further written submissions (Report, para 47); not allowing the Parties to test the credibility of Ms. W in direct testimony and cross-examination (Report, para 47); and, not providing the Appellant an opportunity to make comprehensive submissions on the allegations and the evidence (Report, para 56).

[52] As a result, the Board's decision must be quashed.

DISPOSITION

[53] I allow the appeal and order a new hearing before a differently constituted conduct board pursuant to paragraph 45.16(1)(b) of the *RCMP Act*.

[54] In the meantime, the Appellant is to be reappointed as a member of the RCMP from the dismissal date, December 17, 2018, with retroactive pay and allowances. I also direct the Respondent to restore the order of suspension under section 12 of the *RCMP Act*, in accordance with AM XII.1.5.4.1.3.

Steven Dunn, Adjudicator | Date