Protected A

File: 2015-3386

Citation: 2017 RCAD #1

Restriction on publication: Medical documentation submitted by the Subject Member during the conduct hearing and medical documentation contained in the record before the Conduct Board shall not be published in any document, or broadcast or transmitted in any way.

IN THE MATTER OF A CONDUCT HEARING

PURSUANT TO

THE *ROYAL CANADIAN MOUNTED POLICE ACT*

BETWEEN:

Commanding Officer, "E" Division

Conduct Authority

- and -

Constable Sarah Brown, Regimental Number 53709

Subject Member

Conduct Board Decision

Protected A

File: 2015-3386

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John A. McKinlay

March 28, 2017

Mr. John Reid, Conduct Authority Representative (CAR)

Ms. Nicole Jedlinski, Subject Member Representative (MR)

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SUMMARY

The Subject Member faced three allegations of discreditable conduct. The allegations involved saying she dreamed two co-workers would be shot attending a call, expressing a general mistrust about non-commissioned officers, making oral and written comments about two co-workers engaging in an affair, failing to consult with Crown Counsel when directed by her supervisor and misleading a subsequent supervisor, and conducting computer queries for a non-duty related purpose.

All allegations were not established, except the utterance concerning two co-workers being shot attending a call. This utterance was made when the Subject Member was at her mental breaking point, but it constituted discreditable conduct.

A joint proposal of one day's loss of pay and a reprimand was made. The Conduct Board imposed these conduct measures, but also ordered that the Subject Member receive treatment as directed by the Health Services Officer, and reassignment or transfer as the Conduct Authority deemed appropriate.

INTRODUCTION

[1] The Conduct Authority initiated this conduct hearing process on September 14, 2015, and I was appointed as Conduct Board on September 17, 2015.

[2] The Subject Member was served with the *Notice of Conduct Hearing* (Notice) and investigative materials on November 4, 2015.

[3] On December 20, 2016, the lawyer then acting as Conduct Authority Representative (CAR) advised that she was leaving the RCMP, and her file would be taken up by a new CAR. On January 8, 2016, the new CAR was confirmed to the Conduct Board. The CAR then sought to address the reasonable disclosure requests of the Member Representative (MR) by seeking, for example, additional materials identified in but missing from the original investigative report materials.

[4] Pre-hearing conferences took place on March 1, April 29, July 6, August 3, August 26, and September 7, 2016. The record includes the minutes issued for these pre-hearing conferences. To assist the MR in obtaining the Subject Member's RCMP medical records, production orders were issued to the Health Services Officer for "E" Division and the Officer in Charge of *Privacy Act* requests.

[5] On June 13, 2016, the MR filed the Subject Member's responses as contemplated by sections 15(3) and 18 of the *Commissioner's Standing Orders (Conduct)*, SOR/2017-291 [*CSO (Conduct)*], including exculpatory information concerning Allegation 2 of the Notice.

[6] On September 7, 2016, the CAR sought an adjournment of the hearing in order to complete a further internal investigation of the Subject Member. The Subject Member's written response contained information the Conduct Authority viewed as potential evidence of a new, but related contravention of the RCMP Code of Conduct. I issued a written decision denying this adjournment request.

[7] On September 12, 2016, the MR filed a written abuse of process motion with attachments. The motion did not seek a stay of proceedings and provided arguments respecting both the allegations and any conduct measures to be imposed.

[8] On that same date, the MR advised that she wished to file a letter and the *curriculum vita*e of a psychiatrist, Dr. P. The CAR opposed the Conduct Board's acceptance of the letter, as it was not filed in compliance with the 30-day time limit prescribed by the *CSO (Conduct)*. I indicated that I would receive the letter, but that I would hear submissions at the start of the hearing concerning its use and any remedies sought by the CAR to address its late filing.

[9] The Subject Member's conduct hearing was held in Richmond, British Columbia, from September 19 to 22, 2016.

PRELIMINARY MOTIONS

Publication ban on medical information

[10] Upon the oral motion of the MR made on September 19, 2016, without opposition by the CAR and pursuant to section 45.1(7) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R- 10 [*RCMP Act*], I ordered as follows:

> All medical documentation submitted by the Subject Member during the conduct hearing and contained in the Record before the Conduct Board shall not be published in any document, or broadcast or transmitted in any way.

Exclusion of witnesses

[11] Also made on September 19, 2016, the MR's oral motion was granted to exclude witnesses until the completion of their testimony.

Admission and use of expert medical report

[12] The issue of the Conduct Board's acceptance into evidence of the letter and *curriculum vitae* of Dr. P was addressed on September 19, 2016. The Conduct Board indicated that the issue

should be viewed as an application by the MR for an exception to the requirement of tendering expert materials 30 days before the hearing. The MR advised that she did not intend Dr. P to appear before the Conduct Board as a witness and that it might be appropriate to hear other evidence before addressing the Conduct Board's treatment of the letter. Dr. P could be cross-examined by telephone if required by the CAR. The MR did not intend to raise the report with the CAR's witnesses. It was submitted that some of the Subject Member's written responses were corroborated by the letter; thus, excluding it from the allegation phase of the hearing would be prejudicial to her case. Even if excluded from the allegation phase, the MR asked that it be accepted for any conduct measures phase and that arguments concerning its weight permitted.

[13] In terms of an explanation for the late production of the letter, the MR stated that, for a number of reasons, she was unable to quickly reach the doctor, who then was off work and had to reschedule some things due to a family emergency. The MR did provide the letter to the CAR as soon as she received it and she raised its filing with the Conduct Board.

[14] The CAR repeated the position articulated in email communications when the filing of Dr. P's letter first arose. The letter was not filed within the requisite 30 days and should not be allowed into evidence. The Conduct Board then asked whether the CAR would require cross-examination, or the opportunity to consult before cross-examining Dr. P, or the calling of the CAR's own contrary report or expert if the letter was accepted into evidence. It was the CAR's view that it might be necessary to call a multitude of witnesses to counter the Subject Member's perception of how her actions were perceived each day she went to work, but acknowledged that it was more incumbent upon him to consider calling an expert witness. The CAR indicated that he should be permitted to pursue a contrary expert after listening to Dr. P's evidence.

[15] The Conduct Board considered portions of Dr. P's letter to be an historical overview or "reportage" of the Subject Member's clinical meetings, the comments noted in those meetings, and her ultimate diagnosis based on the symptoms identified.

[16] It was necessary to observe two important principles when determining whether Dr. P's letter should be accepted into evidence: a) the search for the truth; and b) fairness to the parties.

[17] Given that Dr. P expressed opinions that appeared to mitigate the Subject Member's behaviour, I ruled that it would be arbitrary to ignore those opinions.

[18] However, to afford hearing fairness, the CAR would be provided with an adjournment, if requested, before any conduct measures phase began, to prepare for any cross-examination of Dr. P, and to retain a contrary expert witness to provide a report or testimony. Moreover, if the argument was made that the questioning of witnesses in the allegations phase should have been done differently in order to support psychiatric opinions in the conduct measures phase, then the Conduct Board would consider witnesses being recalled or written interrogatories or other means being used to address points which any conduct measures the CAR expert considered relevant.

ALLEGATIONS

[19] Following an RCMP Code of Conduct investigation, the Subject Member faced four allegations. The Notice containing these allegations was marked as an exhibit (CAR-1), and is reproduced below, with initials replacing full names, and amendments indicated by the use of brackets:

> **Allegation 1**
>
> On or between August 6th, 2013, and September 19th, 2014, at or near Coquitlam, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> Particulars of the contravention:
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. Between August 6th, 2013 and September 19th, 2014, while on duty, you made the following inappropriate and discreditable comments:

a. During the month of August 2014, you told Constable [E L] that you "dreamed of the day when [R] (referring to Sergeant [M-M]) and [C] (referring to Corporal [C S]) go to a file and get shot" or word[s] to that effect.

b. You expressed your general distrust for RCMP Non-Commissioned officers to Corporal [C S], Corporal [N B], Sergeant [R M-M] and [T D]; and

c. You made slanderous remarks about an affair between Sergeant [R M-M] and Corporal [C P] to Corporal [N B], Corporal [E L] and in writing in a response to a performance Log authored by Sergeant [R M-M] on July 9th, 2014.

Allegation 2 – withdrawn

Allegation 3

Between May 21st, 2014, and July 31st, 2014, at or near Coquitlam, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars of the contravention:

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

2. On May 21st, 2014, while on-duty, you investigated a domestic disturbance/assault (PRIME file # 2014-13564).

3. On May 28th, 2014, while on-duty, Corporal [C S] directed you to consult with Crown Counsel and get their opinion regarding PRIME file # 2014-13564.

4. Between May 28th, 2014 and July 31st, 2014, you advised Corporal [N B] that Corporal [C S] agreed that there was no substance to the complaint in relation to PRIME file # 2014-13564 and it was not necessary to follow-up with Crown Counsel.

5. Your statement to Corporal [N B] contained misleading and/or false information.

Allegation 4

On [August 11th and 12th], 2014, at or near Coquitlam, in the province of British Columbia, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

> Particulars of the contravention:
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.
>
> 2. On [August 11th and 12th], 2014, you queried [S P] on [an] RCMP electronic information system for a non-duty related purpose.

[20] The four original allegations were read to the Subject Member at the outset of the hearing. They were deemed to be denied given the Subject Member's written responses filed on June 13, 2016, pursuant to the *CSO (Conduct)*. The CAR then made an oral motion, consented to by the MR, to withdraw Allegation 2. The motion was granted.

REASONS FOR DECISION

[21] These reasons are a much more detailed and expanded version of my oral decisions, finding that one allegation of contravention of the RCMP Code of Conduct is established and imposing conduct measures after receiving a joint proposal from the Parties.

Standard of proof

[22] Section 45(1) of the *RCMP Act* requires that the "balance of probabilities" standard of proof be applied in adjudicating alleged contraventions of the RCMP Code of Conduct. This requires a determination on whether it is more likely than not that the alleged acts or omissions occurred.

Assessment of credibility

[23] In assessing issues of credibility, I have applied the considerations contained in a number of frequently cited judicial authorities. These authorities include *Faryna v Chorny*, [1952] 2 DLR 354, at pages 357‑358, which indicates:

> Witness credibility must be assessed against its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

I acknowledge that one is not to gauge credibility solely by personal demeanour of witnesses. Also, in the Supreme Court of Canada's decision *F.H. v McDougall*, [2008] 3 SCR 41, at paragraph 86, it is acknowledged that in finding one party credible, it may well be conclusive of a certain result.

Test for "discreditable conduct"

[24] All of the allegations rely on contravention of section 7.1 of the RCMP Code of Conduct. This section provides that "Members behave in a manner that is not likely to discredit the Force".

[25] The interpretation of section 7.1 has been considered by the RCMP External Review Committee in the recommendation issued on February 22, 2016, and cited as *ERC C-2015-001 (C-008)*, at paragraphs 92-93:

> What is the Test for Discreditable Conduct?
>
> [92] Section 7 of the *Code of Conduct* requires that *"*[m]*embers behave in a manner that is not likely to discredit the Force"*. Section 7 differs from its predecessor provision, found in subsection 39(1) of the prior *Code of Conduct*. Subsection 39(1) required that members not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force. The [External Review Committee (ERC)] and the Commissioner have stated that the test under subsection 39(1) asked whether a reasonable person with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would be of the opinion that the conduct was a) disgraceful, and b) sufficiently related to the employment situation so as to warrant discipline against the member (ERC 2900-08-006 (D-123), para. 125; ERC 2400-09-002 (D-121), Commissioner, para. 100).
>
> [93] Section 7 of the *Code of Conduct* does not import the requirement of disgraceful or disorderly conduct in order to discredit the Force. However, the Force's *Code of Conduct Annotated Version (2014)* largely adopts the test under the prior *Code of Conduct* for discreditable conduct under the new section 7, noting that *"discreditable behaviour is based on a test that considers how the reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the behaviour"* (p. 21). The language used in the *Code of Conduct Annotated Version (2014)* is consistent with the tests established in other police jurisdictions to establish that misconduct is

> "*likely*" to discredit a police force. As pointed out in P. Ceyssens, *Legal Aspects of Policing*, Vol 2 (Toronto: Earlscourt, 2002, pp. 6-17, 6-18), where statutory language governing discreditable conduct addresses acting in a manner "*likely*" to discredit the reputation of a police force, actual discredit need not be established. Rather, the extent of the potential damage to the reputation and image of the service should the action become public knowledge is the measure used to assess the misconduct. In conducting this assessment, the conduct must be considered against the reasonable expectations of the community.

Demand for amendment, or withdrawal, of relied upon Code sections

[26] In the course of making her written responses under section 15(3) of the *CSO (Conduct)*, the Subject Member argued that certain allegations of misconduct should not have been made under the general wording of section 7.1 "Discreditable Conduct" of the RCMP Code of Conduct, when a more specifically worded section existed. She further argued that the RCMP Conduct Guide indicates to use a specific Code provision where applicable.

[27] The Subject Member's response indicated that Allegation 1 should be amended by the CAR to rely on section 2.1 "Courtesy and Respect" of the RCMP Code of Conduct, or be withdrawn. Similar arguments were made for the amendment of Allegations 3 and 4 to rely on specifically worded sections (section 8.1 "Reporting" and section 4.6 "Misuse of Force Property", respectively) or their withdrawal. The CAR did not formally reply to these arguments. Instead, he sought findings of contravention based on the RCMP Code of Conduct sections originally relied upon.

[28] I do not believe that the Conduct Authority's use of section 7.1, rather than more specifically worded sections, deprives the Subject Member of procedural fairness or otherwise prevents her from knowing the case to meet. However, it must be observed that proving likely damage to the reputation and image of the Force under section 7.1 involves assessment against the reasonable expectations of the community, which appears to be a potentially more exacting assessment than proving, for example, a lack of courtesy, inaccurate reporting or misuse of Force property.

[29] In a decision rendered by an RCMP Adjudication Board (2013), 12 AD (4th) 383, the term "disgraceful" was closely examined. At paragraph 51, the Adjudication Board noted that the term should be given its ordinary meaning and that dictionary definitions included "ignominy: shame", "dishonour". I agree with this Adjudication Board that to label a member's actions as disgraceful, or to bring discredit on the Force, is a serious matter. It should not always be pursued where workplace conflicts appear to demand a non-disciplinary response.

[30] There was no issue concerning the Subject Member's identity. Therefore, this element of all three allegations was understood to be admitted and proven.

Remedies declined by the CAR to address late filing of expert medical report

[31] Before the close of the Subject Member's case in response to the allegations, the treatment of Dr. P's report and his qualification as an expert were resolved. For the purposes of the allegations phase of the hearing, the MR agreed that the last major paragraph of the report should not be considered by the Conduct Board. On the basis of the *curriculum vitae* of Dr. P and the CAR's helpful stipulation that Dr. P has been widely recognized by past RCMP adjudication boards as qualified to give psychiatric expert opinions, Dr. P was deemed qualified as an expert in medicine and psychiatry, including assessment, diagnosis, treatment and prognosis.

[32] The CAR was asked whether he wished an adjournment or other remedies in order to address the large portion of Dr. P's report accepted into evidence for the allegations phase of the hearing. The CAR declined any such remedy.

Abuse of process submissions

[33] The MR had filed written submissions in advance of the hearing, raising issues of abuse of process. However, these submissions did not seek a stay of proceedings and only provided arguments concerning the allegations and any conduct measures to be imposed.

Utterance concerning dream co-workers "go to a call and get shot" (particular 2(a) of Allegation 1)

[34] Marked as exhibit CAR-2, the CAR (with the consent of the MR) read into the record very brief summaries of certain transcribed statements. These summaries were prepared by the Professional Standards Unit internal investigator Sergeant P S, located within Coquitlam Detachment. The portions considered relevant to particular 2(a) of Allegation 1 provide:

> **Constable [E L]**
>
> [T]hat in September of 2014, he found [the Subject Member] crying in the general detachment area; [the Subject Member] described the negative 10-04 and said that she dreamed of the day they attended a file and got shot
>
> **Constable [C M]**
>
> [The Subject Member] was frequently crying in the bathroom.

[35] Constable E L provided two statements as part of the so-called "watch review" that, at its inception, was conducted by Sergeant B T. Having reviewed the questioning conducted by Sergeant B T in her interviews with members at Coquitlam Detachment, it appears that, as the MR rightly suggests, the questioning took on the character of an inquiry into the Subject Member, rather than an impartial review of issues present on her team. I note that in his testimony, Staff Sergeant D S indicated that, while this review was conducted by Sergeant B T, he was uncertain whether she completed it. This leaves me to conclude that, at some point, it was determined that her review did not comply with administrative standards.

[36] A transcript was produced for the statement Constable E L provided on September 2, 2014, but only Sergeant B T's synopsis of Constable E L's comments on September 25, 2014, could be produced.

[37] Constable E L's first statement paints a bleak picture of the morale on the Subject Member's team, "A" Watch, and he describes how he expressed his concern over her precarious mental state directly to the Subject Member:

> […] [S]he really really changed um to a point where I said 'you need to get out. My suggestion to you is if you are not, if your head is not in the game and uh **you are at a breaking point**, if you go to a call you will be, **you will be a danger to yourself because you won't be able to focus and you will probably be a danger to your partner or public**'. And that's because **she was at her breaking point**. Her morale was so down um **I felt that she was yeah, on the verge of breaking**. […]
>
> [Emphasis added; *sic* throughout]

[38] Constable E L provides details of an encounter with the Subject Member that occurred about two weeks before giving his September 2, 2014, statement:

> […] [S]he was in front of her computer and […] I was just walking by and I just said 'hey [Subject Member]'. And **I saw her crying, balling**. So she got up and she walked me towards the GI area […] and **seems very desperate**. And I asked her 'what's going on?' And she said that uh she felt that uh people where ganging up on her […] that the [Non-Commissioned Officers (NCOs)] were um, had told her that basically that all the Members of the Watch complain about her and she felt really concerned, of course. So um, I didn't engage um a long conversation with her. **I felt that she was so uh, how should I say, desperate**. Um, I asked her if she was OK and **she didn't seem ok** and I asked her like, 'if I draw a line on a table and **I'm asking you [Subject Member] if you are at the breaking point, where are you according to the line**?' **And she showed me that she was on the line**. And I said, '[Subject Member], if your head is not in the game and you are going to a call tonight, it's a major, it's a safety issue. **You are not safe for yourself, you are not safe for your partner or the public and I think you should take this options right now to take a decision.**' […]
>
> [Emphasis added; *sic* throughout]

[39] It was in Constable E L's second statement of September 25, 2014, that he discloses details of the utterance made by the Subject Member in the detachment building when he encountered her despondent in August 2014. The relevant portion of the synopsis made by Sergeant B T states:

> […] **She was crying and bawling**, which is why he was concerned about her. At that time she made a comment to him that he didn't make much of because he thought it was just because of her anger. **She said "I dream of the day where [R M-M] and [C S] will go to a file and get shot." He thought she was just talking crazy because she was emotionally unstable**

> **and was venting**. He kept it to himself, but it's been bothering him a lot. […] He cares for [Sergeant R M-M] and [Corporal C S]. If they go to a file and [the Subject Member] is there and she is not emotionally stable and she has other issues, if she doesn't see a threat…he just doesn't want anything to happen to them. He doesn't want there to be a safety concern for them or for [the Subject Member].
>
> […] He felt he had a responsibility to warn them that if they were going to go on a call with her, they needed to be careful. **The reason he didn't mention this in the last statement is just because he didn't make much of it. He just saw [the Subject Member] as having a meltdown and talking crazy.** But after she said she was going back to A Watch, he felt that was not good. That was 2 weeks ago that she told him she was going back to A Watch (determined to be September 3, 2014).
>
> [Emphasis added]

[40] The Subject Member provided a written response, in advance of the hearing, pursuant to section 15(3) of the *CSO (Conduct)*, denying any contravention of the stated allegations. The Subject Member provided a specific response concerning particular 2(a) of Allegation 1:

> [Subject Member] was under an extreme amount of stress in and around the month of August, 2014. She recalls having a conversation with [Constable E L], but does not remember making the comment referred to in the Notice of Conduct Hearing.

[41] In the Subject Member's direct examination (Transcript, September 20, 2016, page 71), she described the circumstances of her conversation with Constable E L as follows:

> I was, I don't remember what, what events led up to that specific moment. All I remember was sitting in my cubicle with my chair pushed up to the point where my, you know, my head is in the cubicle. Actually I had to move the computer so that my head was in the cubicle because I just, I, I needed to cry. I needed to just let go of some stress. [Constable E L] was sitting close to me. He saw that I was extremely upset. He asked to speak with me in a room which was the -- how do I describe it – the major crimes section of the office. Coquitlam office is very open. The offices are not closed. So we went into the major crimes section. Nobody was working that day I think. Actually I remember the lights being off. I was, **I was crying. I actually couldn't stand up straight. I was, I was sitting on a desk, crying, and just venting to him how overwhelmed I was with all the things that were just going wrong.**
>
> [Emphasis added]

[42] Under cross-examination (Transcript, September 21, 2016, page 17), the Subject Member had the following exchange with the CAR:

> Question: Okay. But you don't recall speaking to Constable [E L] about the day -- that you dreamed of the day when [Sergeant R M-M] would go to a file and get shot?
>
> Answer: I recall the day. I just don't recall the specific words I used.
>
> Question: Okay. But you recall making a comment to that effect?
>
> Answer: Yes.

[43] I do not find that, because it was made to Constable E L while he was the local Staff Relations Sub-Representative, the utterance was made with any formal expectation of confidentiality. Moreover, it was not protected as a privileged communication akin to a solicitor-client communication under then-operative section 47.1(2) of the *RCMP Act.* The Subject Member may have received negative performance feedback that greatly affected her mental or emotional state, but she was not being represented or assisted by Constable E L with respect to a grievance, proceeding or appeal when the utterance was made.

[44] I am satisfied on a balance of probabilities that the Subject Member, in the month of August 2014, told Constable E L that "she dreamed of the day when [Sergeant R M-M] and [Corporal C S] go to a file and get shot", or words to that effect, as identified in particular 2(a) of Allegation 1.

[45] The utterance concerned two of the Subject Member's superiors at Coquitlam Detachment. On its face, the utterance seemed to invite or support serious physical harm befalling these two members when attending a call for service. Furthermore, this utterance was made in the workplace. The sentiment expressed by the Subject Member is completely contrary to the bedrock expectation in any policing organization that every officer will, at all times, strive to preserve the safety of their policing colleagues. The utterance is unsettling, even if we now know that it was made during a period of acute mental distress and that the Subject Member has testified to never genuinely wishing any harm to come to them.

[46] In employment law, the argument is still made that, where an employee's mental condition is clearly compromised, their inappropriate behaviour should not be viewed as misconduct. It is argued that the employee's mental issues (often the subject of formal psychiatric diagnoses, such as depression or addiction) relieve them of a clear intention to misconduct themselves or remove the appropriateness of punishing or imposing discipline given the mental state or recognized disability of the person at the time of their actions. See, for example, the dissenting opinion in *Wright v College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 (leave to appeal to the Supreme Court of Canada denied March 28, 2013), at paragraph 124. In dissent, it was stated that a nurse's drug addiction, which constituted a disability under provincial human rights legislation, was at least a strong contributor to her theft of hospital narcotics; therefore, it should be considered at an earlier stage in the adjudicative process, not merely as a mitigating factor.

[47] I adopt what I understand to be the more prevalent and accepted approach. Where inappropriate conduct takes place while the member suffers significant mental issues (short of automatism or some other condition robbing the member of a reasonable degree of free will), the fact that their mental status greatly contributes to their behaviour does not exonerate them or preclude disciplinary action. Instead, the role of mental issues as a cause or significant contributor to misconduct can, depending on the specific health circumstances, be treated as a greatly mitigating factor. See, for example, the reasons found in *Spawn v Canada (Parks Canada Agency)*, 2004 PSSRB 25, at paragraph 288, where this approach is applied after a detailed consideration of arbitral jurisprudence. This approach is also consistent with the approach taken by RCMP adjudication boards adjudicating matters under the former internal disciplinary system.

[48] In making my finding on the Subject Member's utterance, I have applied the approach articulated by the RCMP External Review Committee in recommendation C-008, as previously quoted:

> [D]iscreditable behaviour is based on a test that considers how the reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the behaviour.

[49] As described by Constable E L in his eye-witness account, the Subject Member's utterance was made when she was "bawling", at her "breaking point", "having a meltdown and talking crazy". I find that she nevertheless possessed sufficient mental awareness to know that her conduct brought discredit on the Force. Given its clear connection to a number of workplace interests and policing realities, this sort of behaviour is misconduct that should be addressed under the Force's conduct management system.

[50] The information and psychiatric opinions provided by Dr. P do not establish a legal defence to the discreditable act identified in particular 2(a). Dr. P's findings and opinions do not establish circumstances where a reasonable person would consider the utterance not to bring discredit to the Force. Instead, Dr. P's report plainly provides a basis to find a significant mitigating factor concerning this episode of misconduct.

[51] Accordingly, I find that the Subject Member contravened section 7.1 of the RCMP Code of Conduct as alleged by the act identified in particular 2(a) of Allegation 1.

"General mistrust of NCOs" expressed to specific members (particular 2(b) of Allegation 1)

[52] The Conduct Authority relied upon specific summaries in exhibit CAR-2 to establish particular 2(b) of Allegation 1. I consider the following to be relevant:

> **Corporal C S**
>
> Corporal [C S] advises that [the Subject Member] frequently announced that she does not trust NCOs, ranks of corporal and up to and below the level of inspector.
>
> **Corporal N B**
>
> [The Subject Member] told Corporal [N B] she didn't trust NCOs
>
> **Sergeant R M-M**
>
> [T]hat [the Subject Member] spoke openly about her mistrust of NCOs

> **Constable T D**
>
> [The Subject Member] told him she doesn't trust NCOs
>
> **Constable N S**
>
> [T]hat [the Subject Member] told him she doesn't trust NCOs and most of her coworkers
>
> **Constable D C**
>
> He heard [the Subject Member] announce to the room that her watch sucked and "The NCOs don't know what they're doing" and she would "rather work for a bunch of crackheads on the street than the NCOs on the watch"

[53] The CAR submitted that, with respect to particular 2(b) of Allegation 1, the statements of the Subject Member's co-workers and the Subject Member's admissions established that she expressed a general mistrust of RCMP NCOs, whether encountered at her previous posting or at Coquitlam Detachment.

[54] In her response, pursuant to section 15(3) of the *CSO (Conduct)*, the Subject Member provided a specific response concerning particular 2(b) of Allegation 1:

> [The Subject Member] admits that she has expressed a general distrust for RCMP [NCOs]. She was experiencing a great deal of work-related stress and anxiety at the time.

[55] I find that the Subject Member expressed general distrust for RCMP NCOs to the specified NCOs (Corporal C S, Corporal N B, Sergeant R M-M), and to Constable T D. It is noteworthy that, until a formal allegation was lodged under the RCMP Code of Conduct, there is little if any indication that any of these supervisors and NCOs ever formally challenged or otherwise sought to address the Subject Member's comments.

[56] In my view, the wording of particular 2(b) in Allegation 1 appears overly broad. I appreciate that I have had access to the investigation report and other materials and, to some extent, the process invites me to put additional meat on the bones. But as this act of alleged misconduct is identified in particular 2(b) of Allegation 1, I do not believe a reasonable person would consider a police officer expressing "general distrust" for NCOs to almost exclusively NCOs to be discreditable conduct.

[57] There may be a tenuous performance issue involving some form of lack of courtesy. But I do not find the behaviour to be discreditable, especially where a large measure of what I understood the Subject Member to be talking about, at least upon her arrival at Coquitlam Detachment, was the mistrust she held for certain NCOs at her previous detachment. I can contemplate that any number of members, when they get to a new posting, talk about their experiences under their previous supervisors, sometimes in uncomplimentary terms.

[58] Had particular 2(b) of Allegation 1 gone on to include particulars of some form of disobeying an order or otherwise lacking compliance with direction, tantamount to insubordination in making these comments, then the alleged act might describe a contravention of section 7.1 of the RCMP Code of Conduct. But what is alleged is simply expressing a general distrust with RCMP NCOs.

[59] Particular 2(b) of Allegation 1 is broadly worded, but it does not speak to any unwanted effect that these expressions created or that these expressions were made in aid of insubordination or, for example, specifically urging a lack of compliance with supervisory oversight. While the Subject Member's utterances to Constables N S and D C served to corroborate that she expressed "general mistrust" to the members identified in particular 2(b) of Allegation 1, the particular did not encompass any utterance to either of these members as an act of discreditable conduct.

[60] My observations concerning the limits of particular 2(b) in Allegation 1 are not intended to suggest that the RCMP, as a police organization, with what is still a paramilitary structure and tradition, does not have an expectation that members will trust in their supervisors and officers, whether commissioned or otherwise. But I do not find that the Subject Member's expression of a general distrust, within the confines of the Force to four specific members, constitutes discreditable behaviour.

[61] I do not find that the Subject Member contravened section 7.1 of the RCMP Code of Conduct, as alleged by the acts or omissions identified in particular 2(b) of Allegation 1.

Slanderous remarks about co-workers having an "affair" (particular 2(c) of Allegation 1)

[62] The Conduct Authority relied upon specific statement summaries in exhibit CAR-3 to establish particular 2(c) of Allegation 1. I find the following relevant:

> **Corporal N B**
>
> [The Subject Member] alleged that Sergeant [R M-M] was having an affair with Constable [C P]
>
> **Sergeant R M-M**
>
> [T]hat [the Subject Member] wrote an 11-page rebuttal alleging Sergeant [R M-M] had engaged in an extramarital affair; that Sergeant [R M-M] found the remarks to be offensive and slanderous
>
> **Constable E L**
>
> [The Subject Member] shared her belief that [R M-M] and Constable [C P] had been engaged in an affair, saying they were more than just friends; [the Subject Member] believes the alleged affair was the reason Constable [C P] was always given acting responsibilities.
>
> **Constable T D**
>
> [The Subject Member] alleged favouritism by [R M-M] to Constable [C P];
>
> **Constable N S**
>
> [Constable N S] agreed with [the Subject Member] that there had been favouritism relating to acting duties.
>
> **Constable C P**
>
> He denied any allegations of an affair with Sergeant [R M-M]; and he called the rumours malicious and slanderous.

[63] The MR filed as an exhibit (MR-5) the performance log issued to the Subject Member by Sergeant R M-M, accompanied by Corporal C S, on July 9, 2014. The Subject Member responded in writing to this performance log. While this written response was not entered as an exhibit, it is located at pages 38 to 48 of the Code of Conduct investigative report (as a scanned, linked attachment) prepared by Sergeant P S, dated October 23, 2014. This report was part of the initial disclosure to the Subject Member and was among the materials filed with the Conduct Board; therefore, it was considered part of the record for this matter.

[64] Particular 2(c) of Allegation 1 refers to the Subject Member's written response making "slanderous remarks about an affair between Sergeant [R M-M] and Corporal [C P]". At page 4 of the written response (page 41 of the report by Sergeant P S), the Subject Member states:

> [The Subject Member] witnessed and experienced blatant favoritism based on the seeming affair/extremely close relationship between [Sergeant R M-M] and [Corporal C P]. This "relationship" seems abnormally close as the tow have many holiday, off duty sick days and travel, training and overtime shifts in common. [*Sic* throughout]

[65] The CAR also pointed to the statement and testimony of Constable N B, the synopsis of Constable E L's September 25, 2014, statement and the admissions, testimony and written response made by the Subject Member after receiving the July 9, 2014, performance log (Form 1004), as sufficient proof that the oral and written remarks concerning an affair between Sergeant R M-M and Constable C P took place. When specifically asked, the CAR did not define the term "slanderous remarks" other than to say it amounted to "misconduct".

[66] In her response pursuant to section 15(3) of the *CSO (Conduct)*, the Subject Member provided a specific response concerning particular 2(c) of Allegation 1:

> [The Subject Member] admits to writing her response to the performance log (negative 1004). She was experiencing a great amount of stress and anxiety at the time. [The Subject Member] verily believed that [Constable C P] and [Sergeant R M-M] were having an inappropriate relationship at the time. [The Subject Member] did not intend to slander [Sergeant R M-M] or [Constable C P].

[67] Whether or not her mental health status played a significant role in her perception of events and the behaviour of others, it is apparent that the Subject Member genuinely held the belief that there was inappropriate managerial favouritism being shown to Constable C P by Sergeant R M-M. In fact, in her testimony, the Subject Member maintained that she believed this NCO and subordinate were engaged in some form of inappropriate relationship, referring to many of the same questionable occurrences the Subject Member had listed in her forceful written response to the negative Form 1004.

[68] I do not find the written mention made by the Subject Member of an "affair" in her written response to constitute a slanderous remark, nor discreditable conduct, as it must be considered in its full context. However imprecisely, the entire sentence "[The Subject Member] witnessed and experienced blatant favoritism based on the seeming affair/extremely close relationship between [Sergeant R M-M] and [C P]" sought to identify supervisory favouritism the Subject Member genuinely felt was affecting her opportunities for acting corporal assignments. This concern was not fanciful, as Corporal N B confirmed under cross-examination that, with respect to favouritism, he discussed it with the Subject Member and may have observed that "Only a blind man can deny it."

[69] In terms of oral remarks made by the Subject Member to other members, as captured in certain summaries contained in exhibit CAR-3, these also arose as part of the Subject Member's informal discussion of supervisory favouritism and were not simply discrete, malicious gossip or speculation lacking any greater context.

[70] It must be added that, in my view, the manner in which the statements of relevant co-workers were conducted in the "watch review" affects their use in the adjudication of this allegation, as in some interviews there was pointed discussion of the Subject Member's potential misconduct before recording began. Adopting an interviewer's prior suggestions, once the recording tape is running, the weight to be given an interviewee's statement is reduced and detracts from its use in an adjudicative process.

[71] I do not find that the Subject Member contravened section 7.1 of the RCMP Code of Conduct, as alleged by the acts or omissions identified in particular 2(c) of Allegation 1.

Misleading supervisor concerning direction from earlier supervisor (Allegation 3)

[72] The two transcribed statements of Corporal C S, taking place on August 25, 2014, and September 25, 2014, were entered as exhibits by the MR (MR1 and MR2). In addition, the MR entered the general occurrence hard copy for PRIME file # 2014-13564, comprised of 40 pages of entries by the Subject Member, Corporal N B, Corporal C S, Constable N (who attended the

call with the Subject Member, and whose entries at pages 28-29 capture the entirety of his involvement), and Staff Sergeant D S (MR3). This file involved a female complainant who came to be involved in a tug-of-war with her estranged spouse over a sports bag containing equipment belonging to the estranged couple's children. An unaffiliated third-party witness provided his account of the dispute he observed over which parent should possess the sports bag and stated that he observed no assault against the complainant.

[73] The transcribed statement of Corporal N B, given on September 1, 2014, was entered by the MR as an exhibit (MR6). In addition, the MR entered a daily log produced by the Coquitlam Detachment's Professional Standards Unit, containing entries spanning from October 16, 2014, to May 5, 2015 (MR7), and the transcribed statement of Staff Sergeant D S, given on August 27, 2014 (MR9).

[74] The Subject Member did not provide a statement during the Code of Conduct investigation. However, pursuant to section 15(3) of the *CSO (Conduct)*, the Subject Member provided specific responses concerning particulars 3, 4 and 5 of Allegation 3:

> Particular 3 – Deny/Explain
>
> When [the Subject Member] learned that the female party in this file was going to possibly lodge a complaint, she informed [Corporal C S] and advised him that she was on her way to speak with [Sergeant P S] about the matter.
>
> [The Subject Member] explained the circumstances of the file to [Sergeant P S], and [Sergeant P S] agreed that there did not appear to be sufficient evidence to proceed with charges.
>
> [The Subject Member] relayed this information to [Corporal C S], and [Corporal C S] asked [the Subject Member] when she was going to "break her (the female party's) heart?" and tell her that charges were not proceeding.
>
> [Corporal C S] did not direct [the Subject Member] to consult with Crown and get an opinion from Crown regarding the file.
>
> Particular 4 – Admit.

> [Corporal C S] asked [the Subject Member], "When are you going to break her heart?" Which [the Subject Member] understood to mean: When are you going to advise the female party that charges are not proceeding?
>
> Particular 5 – Deny.

[75] With respect to particular 3 and the direction he gave to the Subject Member, Corporal C S testified in his direct examination (Transcript, November 19, 2016, page 54, lines 19-23):

> Answer: […] That was the direction – that was what I wanted to have happen, was to have conversation, get the direction of the Crown and then we'd have a finale to this lady who was upset with her perception of our inaction. [*Sic* throughout]

[76] Corporal C S, who admitted making no file entry capturing any direction given to the Subject Member, offered a summary of his conversation with her on this point (Transcript, November 19, 2016, page 55, lines 2-9):

> Question: […] [D]id you have a conversation and a direction that you gave to [the Subject Member]?
>
> Answer: That was the conversation, like, "Go talk to the Crown."
>
> Question: Okay.
>
> Answer: Either write a report or go talk to the Crown and get their position on this so we can go back to this lady and say, "Here's the deal."

[77] In cross-examination, the MR succeeded in establishing that Corporal C S considered "guidance" and a direction as equivalent (Transcript, November 19, 2016, pages 58-59):

> Question: […] Is it fair to say you offered both guidance and direction?
>
> Answer: I don't see the difference.
>
> Question: I would say guidance would be the benefit of your experience, how you feel a file should go versus direction, more of an order?
>
> Answer: Yeah, I don't see the difference unless you're saying an order is like I write down "I'm ordering you to do something under the RCMP Act." We don't operate like that in general duty. No one does. We're not a paramilitary outfit in that sense. My guidance ---
>
> Question: You're ---
>
> Answer: I'm sorry, you're interrupting me. What?

> Question: What is guidance to you? Would you give them guidance and tell them what to do?
>
> Answer: Again, I don't see a difference between guidance and direction. If I'm running – if I'm working with you on a file and I give you the benefit of my guidance, in my mind, that's pretty much direction because I'm showing you the path to take.

[78] In further cross-examination, Corporal C S was unable to specify the location or kind of verbal communication used to impose his direction upon the Subject Member (Transcript, November 19, 2016, pages 74-75):

> Question: […] And you have said today that you gave [the Subject Member] direction to consult with the Crown or get a Crown opinion?
>
> Answer: That is correct.
>
> Question: How did this direction occur? Is it in person, over the phone or in writing?
>
> Answer: It was given verbally. Whether it was face-to-face or over the phone, that, I do not recall.
>
> Question: Did you write down or document that direction at all?
>
> Answer: No, I did not.
>
> Question: Was there anyone else in your presence when you gave that direction?
>
> Answer: I do not think so, no.
>
> Question: I'm sorry, your response was "I don't think so"?
>
> Answer: My response was I don't think there was anyone there. I think it was just [the Subject Member] and I, and whether it was on the phone or face to face, I can't recall.

[79] The testimony of Corporal C S and the Subject Member, together with the objective evidence captured in the investigative file entries in exhibit MR3, confirms that given the existence of a third-party witness' account of events, Corporal C S and the Subject Member were firmly in agreement that no charge should be laid.

[80] However, after hearing the testimony of Corporal C S, I accept that a good supervisor, a good intermediary supervisor, or a good detachment commander, obliged to respond to an unhappy complainant, may anticipate that the Force could face a public complaint. While no

RCMP personnel involved in the file believes a charge is warranted and no charge is going to be laid, I accept that it remains prudent to seek some form of opinion or consult in some way with a Crown attorney. It is prudent because if a public complaint is made, then a notation will exist on the investigative file that not only did investigators hold the opinion that no charge was warranted, but that, when it was explained to a Crown attorney, they held the same opinion.

[81] I find that, having been apprised of the evidence gathered, including the observations of a neutral third-party witness, Corporal C S did not believe a charge should be laid. I find that, at some point, he believed that the Crown should be consulted for proactive, protective reasons.

[82] I agree with the MR's submission that, to some extent, Corporal C S grew defensive under cross-examination. It was certainly defensive when he was asked directly about ever asking the Subject Member (in reference to the Subject Member advising the dissatisfied complainant that her estranged spouse would not be charged), "When are you going to break her heart?"

[83] When assessing this portion of Corporal C S's testimony, which in earlier direct examination had come across as that of an experienced, articulate investigator and supervisor, I assign significance to his marked pause before responding to this question. In doing so, I expressly acknowledge that, in law, demeanour is not the sole determinant of credibility. In the context of this case, and given how Corporal C S testified generally, and having been asked if he recalled saying to the Subject Member, "When are you going to break her heart?", I would have thought Corporal C S's answer would have been immediate.

[84] Instead, he sought to justify his position by stating that he would never have accepted the opinion of someone from Professional Standards, when it was the opinion of a Crown attorney that he had discussed with the Subject Member. That may be, but in this instance, I am not satisfied that an oral direction was given to the Subject Member to the effect that she was *required* to contact the Crown before the file was concluded.

[85] The nature of the guidance or even oral direction, which arose potentially face-to-face, potentially over the telephone, given by Corporal C S to the Subject Member remains unclear. The absence of a file entry capturing the terms of this guidance or direction is problematic where discreditable conduct is being alleged. I cannot rule out that Corporal C S has simply forgotten the exact nature of his last conversation with the Subject Member, where he said "When are you going to break her heart?", or something similar, and this was taken by the Subject Member as an indication that no consultation with a Crown attorney was required or no longer required.

[86] One of the troubling parts of the evidence is that the Staff Sergeant responsible for Corporal C S's Watch emphasized in his testimony that an allegation involving potential domestic violence was treated as a "high-risk" matter, the sort of complaint where all investigative tasks should be performed by the letter. Yet, MR3, the investigative file, contains no written direction by Corporal C S. There is no written direction by Corporal C S, notwithstanding his long written communication to the Watch Staff Sergeant, a file entry made around the date of the oral guidance or direction supposedly made to the Subject Member.

[87] In addition, if the Subject Member was trying to hide from Corporal N B that Corporal C S had directed her to talk with the Crown, why would she write what she did in her entry of her May 28 communications with both Corporal C S and the female complainant? This does not accord with the preponderance of the evidence necessary to find that a clear oral direction was given to the Subject Member.

[88] From the Subject Member's testimony, it appears that the circumstances present when she communicated the view of Sergeant P S of Professional Standards to Corporal C S involved an extraordinarily casual conversation. I do not find the lack of formality suggested by the Subject Member to undermine her credibility when testifying on that point or to be convenient or self- serving. The lack of formality described by the Subject Member concerning her brief communication with Corporal C S did not detract from her credibility on the content of the verbal exchange.

[89] Accordingly, I am not sufficiently satisfied that, as alleged under particular 3 of Allegation 3, the Subject Member was directed to consult with Crown counsel and get their opinion regarding the file. Furthermore, I find that even if the Subject Member was initially directed to do so, then her exchange with Corporal C S, where he said the words to the effect of "When are you going to break her heart?", relieved her of any duty to carry out a consultation with Crown counsel.

[90] Particular 4 of Allegation 3 states: "You advised Corporal [N B] that [Corporal C S] agreed there was no substance to the complaint and it was not necessary to follow up with Crown counsel." I find that the Subject Member communicating this information to Corporal N B was not discreditable conduct, because the observations of the third-party neutral witness did in fact cause Corporal C S to view the complaint as lacking substance. As considered above, Corporal C S may at one time have wanted certain extra actions done, but once he understood that there was an independent witness describing an event involving an estranged couple tugging over a sports equipment bag, he agreed that there was no substance to the complaint.

[91] There is some ambiguity in the wording of particular 4 of Allegation 3. I have just found that the Subject Member advised Corporal N B that Corporal C S agreed on the lack of substance to the complaint (the first part of particular 4 of Allegation 3). This was in fact a true account of Corporal C S's assessment of the complaint.

[92] However, the second part of particular 4 of Allegation 3 goes on to add "[…] and it was not necessary to follow up with Crown counsel". It is not apparent what this second part means. One reasonable interpretation is that because Corporal C S agreed that there was no substance, the Subject Member told Corporal N B that it was not necessary to follow up with Crown counsel for the purpose of seeking formal charging advice. Corporal C S held the view at one time that a consult with the Crown was prudent in order to be well positioned to respond to any public complaint that the dissatisfied complainant might file, not that it was a "close call" on filing a criminal charge and Crown advice was necessary. Because I accept that Corporal C S said "When are you going to break her heart?" to the Subject Member after she relayed her

consultation with Sergeant P S, I find no discreditable conduct in the Subject Member's actions as captured by the second aspect of particular 4 of Allegation 3. The words used by Corporal C S were reasonably interpreted by the Subject Member as supporting her contacting the complainant to tell her that no criminal charge would be filed, and concluding the file.

[93] I have also considered that if the Subject Member was involved in some sort of subterfuge in her conversation with Corporal N B, then it would not be in harmony with the surrounding circumstances for her to unequivocally state in a file entry that there was no need to follow up with Crown counsel. Such an entry would have been open to an immediate challenge by Corporal C S. I acknowledge that there was a transfer of supervisory responsibilities to Corporal N B. Nevertheless, it is not reasonable to conclude that the Subject Member would have made the entries she did if she was still bound by the direction that Corporal C S believes existed. Given my assessment of the evidence, I am not satisfied that the Subject Member made any statement to Corporal [N B] that contained misleading or false information, as alleged under particular 5.

[94] I do not find that the Subject Member contravened section 7.1 of the RCMP Code of Conduct as alleged by Allegation 3.

Queries on information system for non-duty related purpose (Allegation 4)

[95] The CAR filed the complaint email sent by the Subject Member to Sergeant R M-M on March 20, 2014, which related to a civilian telecoms operator, Ms. S P (CAR-3). Allegation 4 asserts non-duty related computer queries concerning Ms. S P were then made on August 11 and 12, 2014. Computerized system printouts, related to the alleged non-duty-related queries, were also filed (CAR-4).

[96] Internal Investigator, Sergeant P S, received the printouts appearing as exhibit CAR-4. In cross-examination, he frankly conceded that he had never used an in-vehicle mobile work station to conduct the type of queries attributed to the Subject Member. Accordingly, as he relied solely on his personal review of the paper printouts, I find that Sergeant P S concluded that there were

independent plate and criminal information queries performed by the Subject Member, without any personal knowledge of how queries were initiated or query results presented.

[97] A written statement was obtained by the MR from Constable F and was entered as an exhibit (MR10). Constable F was subjected to direct- and cross-examination as a witness.

[98] The Subject Member, while under direct-examination, created a hand-written diagram of the parking area and buildings at Coquitlam Detachment (MR11). She highlighted on this diagram the location of the "police vehicles only" parking spots (MR12), as well as the spot occupied by the vehicle for whom Ms. S P was the registered owner.

[99] With the exception testimony from Constable F, and to some extent the Subject Member, no current and reliable evidence was heard about how the mobile work station located in the Subject Member's police car worked during the period of August 11 to August 12, 2015. The Conduct Authority's case did not offer reliable evidence in terms of what specific information is provided in response to certain workstation computer-generated inquiries and what additional information is automatically added that is not requested in the initial query.

[100] There is insufficient proof in the documentary record and testimonial evidence that the inquiries apparently identified in exhibit CAR-4 could only be generated when specific actions were taken by the Subject Member.

[101] The Subject Member admitted to the plate queries on the Lower Mainland District Officer/Unit Activity showing on August 11 at 10:12 p.m. What is lacking is an adequate explanation by the Conduct Authority about the other, later instances where information was generated.

[102] The testimony of Constable F and the Subject Member's own evidence denying that she made or sought any further queries had the effect of shifting the onus of evidence back to the Conduct Authority. After all, Constable F, an experienced traffic enforcement investigator, testified: "When you put in the licence plate, boom, it all comes up."

[103] In the absence of a better explanation by the Conduct Authority on how the mobile workstation querying system works, and unable to take judicial notice of how that system operates, it remains unproven as to how the latter set of query-related events were generated, in particular when the Subject Member denies making them.

[104] I find that, on something as technical as this, the case required a technical explanation that was more definitive. I am simply not satisfied on a balance of probabilities that it is likely the second, later inquiries arose from some independent inquiry by the Subject Member beyond her initial checking of the plate on a non-police vehicle parked in a designated police vehicle only parking spot.

[105] Furthermore, I am not satisfied that the second queries on the RCMP electronic information system were for a non-duty related purpose. The Subject Member's explanation for her initial query is completely plausible: to determine who had parked their non-RCMP vehicle in the reserved parking spaces. It is an explanation consistent with and corroborated by Constable F's personal experience and practice as well as Constable F's personal observation of what other members do when they find civilian vehicles in designated police only parking at Coquitlam Detachment. The absence of open parking spots in the "police vehicle only zone" can create officer safety issues, create delays in obtaining breath samples from suspected impaired drivers, and cause investigators to interact with police vehicle detainees outside the range of the detachment video cameras. By "running the plate" and determining to whom a non-authorized vehicle belongs, a member can determine if the driver should be contacted to move their unauthorized vehicle.

[106] On August 11, 2014, there was no acrimony or ongoing complaint between the Subject Member and Ms. S P, as confirmed by the fact that the Subject Member's email concerning radio interactions with Ms. S P (CAR-3), dated back to March 20, 2014. I accept the Subject Member's explanation that, when the initial plate query made her aware that the civilian vehicle she noted in a police-vehicle-only parking spot belonged to Ms. S P, she took no further action in order to avoid any further contact with Ms. S P.

[107] I am not satisfied on the balance of probabilities standard of proof that the later twin search inquiries (or search results) pertaining to the early hours of April 12, 2014, were performed by the Subject Member for a non-duty related purpose. Frankly, I am not convinced that the Subject Member physically initiated these searches at this time, or initiated them at any time. I find that it is just as likely that there was some kind of system-based lag from her admitted initial plate query performed on April 11, 2014, or some sort of auto-generated glitch, that resulted in the later criminal name index (CNI) information only appearing at a later time on August 12, 2014.

[108] I do not view this as a situation similar to an absolute liability situation where a member's personal identifier is associated to a search result; therefore, the member cannot dispute that they sought that specific information, and sought it intentionally. I believe the contradictory reliable evidence from Constable F's evidence, and the Subject Member's explanation of her actions, serve to undermine the inferences that might otherwise be drawn from the query-related information contained in exhibit CAR-4.

[109] I have also given consideration to whether the Subject Member was reckless that CNI information concerning Ms. S P was available for review on her workstation screen because she recklessly ran a latter CNI query that she did not intend to run. In effect, that some sort of unintentional second inquiry was made. I am not satisfied on a balance of probabilities that it is more likely than not that the Subject Member unintentionally, but recklessly, performed a second act of querying on her workstation. There is reliable evidence of all kinds of screens popping up, according to Constable F. I am unable to apply, both practically and legally, any sort of personal insight or judicial notice concerning how this system works. I am not satisfied that there was recklessness in running any second search, if in fact one took place.

[110] I do accept that the Subject Member queried Ms. S P on an RCMP electronic information system and I do accept that CAR-4 establishes an initial inquiry and what appears to be a later inquiry (or later provision or generation or report of information triggered by the initial licence plate query). However, I am not satisfied that the first licence-plate-related query was done for a

non-duty related purpose. I am further not satisfied that the Subject Member performed a second query for a non-duty related purpose, as I am not satisfied that she did it at all.

[111] I do not find that the Subject Member contravened section 7.1 of the RCMP Code of Conduct as alleged by Allegation 4.

CONDUCT MEASURES

[112] At the conduct measures phase of the hearing, the MR filed:

- Four letters from civilians, constituting positive "references" for the Subject Member (MR-14)
- Performance evaluations for the periods October 1, 2013 to March 31, 2014 (MR-15) April 1, 2011, to March 31, 2012 (MR-16), and
- Two positive performance logs completed August 16, 2014 (MR-17) and January 31, 2014 (MR-18).

[113] To expedite the Subject Member's unsworn address to the Conduct Board, a list of completed Justice Institute courses (mainly related to negotiation and mediation) was tendered as an exhibit (MR19).

[114] To address the Subject Member's contravention of section 7.1 of the RCMP Code of Conduct, as established under particular 2(a) of Allegation 1, the parties submitted a joint proposal of a formal reprimand and the forfeiture of one day's pay. A decision by an RCMP Adjudication Board, (2007), 1 AD (4th) 254, was filed to support their proposal.

[115] In this decision, the member admitted his demeanour and comments toward his supervisor were unprofessional and insubordinate. The board accepted the parties' joint sanction proposal of a reprimand and the forfeiture of one day's pay as well as a recommendation for anger management counselling. The board noted that the misconduct appeared to be the

culmination of an ongoing interpersonal conflict and it viewed four prior disciplinary matters as aggravating even if for unrelated misconduct. Ultimately, the board accepted the joint proposal, treating the member's serious medical condition at the time of the misconduct as weighing heavily in favour of leniency and compassion.

[116] Immediately after the joint proposal was articulated, the Parties were asked if they had considered the Subject Member being subject to a direction to undergo medical treatment as specified by the Health Services Officer (HSO) for "E" Division.

[117] The MR advised that the Subject Member's treating psychiatrist was providing regular updates to the HSO concerning her ongoing counselling and that there was no opposition to my issuing such a direction.

[118] Moreover, the MR advised that, to support the Subject Member's successful return to work, she was requesting a transfer.

[119] To afford the Conduct Authority the greatest flexibility, the parties were advised that the Conduct Board was also contemplating ordering a change of post for the Subject Member, which could take the form of a reassignment or transfer to another work location. The Conduct Board preferred a transfer to another work location, but it contemplated leaving it up to the discretion of the Conduct Authority.

[120] To respect the principles of procedural fairness, I advised the parties, and in particular the Subject Member, of the right to a recess (pursuant to the procedures described in *The College of Physicians and Surgeons of Ontario v Petrie*, [1989] OJ 187 (Div. Ct.)) and the opportunity to respond to any additional conduct measures being contemplated.

[121] Beyond confirming the joint proposal, the CAR made no submissions concerning appropriate conduct measures and the MR offered brief submissions.

CONCLUSION

[122] I find the Subject Member contravened section 7.1 of the RCMP Code of Conduct, as identified under particular 2(a) of Allegation 1. I find no other contravention established under Allegation 1. I do not find that Allegations 3 and 4 are established.

[123] The Subject Member's misconduct occurred in the workplace, the utterance was made to a co-worker, and the utterance directly violated the Force's interest in maintaining a safe and supportive working environment.

[124] There were submissions concerning the Subject Member's positive performance, and together with the performance logs and annual assessments submitted I accept the Subject Member is capable of at least satisfactory performance of her duties when healthy. The very unsettling nature of the utterance is, primarily and significantly, mitigated by the Subject Member's distressed mental state at the time of the specific misconduct observed by Constable E L and, more generally, mitigated by the mental health condition identified by Dr. P in his report.

[125] Notwithstanding her compromised health at the time of her misconduct, I consider it appropriate for the Subject Member, by her own choice of means, to confirm to the members identified in her inappropriate utterance that she will never hesitate to have their backs in any future operational circumstance where the Subject Member's support is expected.

[126] Having considered the nature of the contravention established and the aggravating and mitigating factors, and treating the parties' initial conduct measure proposal with the high degree of deference recognized in common law jurisprudence, I impose the following conduct measures upon the Subject Member under the *CSO (Conduct)*:

- Reprimand [section 3(1)(i)]
- Financial penalty of eight hours, deducted from the Subject Member's pay [section 3(1)(j)]

- Direction to undergo medical treatment as specified by the HSO for "E" Division [section 3(1)(d)]

- In the discretion of the Conduct Authority, the Subject Member's reassignment [section 3(1)(h)] or transfer [section 5(1)(g)]. It is expected that any transfer of workplace location will be consistent with any health- related services specified by the HSO.

[127] With ongoing monitoring of the Subject Member's health and appropriate treatment now in place, the Subject Member must be given a fair opportunity to put the personality clashes and workplace conflicts that arose in her most recent posting behind her. If, despite reasonable efforts to address any health-related challenges, new clashes and conflicts arise, then the Subject Member must seriously consider better practices in terms of how she interacts with co-workers and supervisors.

[128] These written reasons constitute the final decision of this Conduct Board. The Subject Member and Conduct Authority may appeal this decision as provided for in the *RCMP Act*.

March 28, 2017

John A. McKinlay — Date

Conduct Board