Protected A

File 2016-33572 (C-017)

**ROYAL CANADIAN MOUNTED POLICE**

IN THE MATTER OF

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

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

**BETWEEN:**

**Commanding Officer, "J" Division**
Conduct Authority

(Appellant)

and

**Constable Jonathan Cormier**
Regimental Number 55497

(Respondent)

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**CONDUCT APPEAL DECISION**

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File 2016-33572 (C-017)

**ADJUDICATOR:** Steven Dunn

**DATE:** November 20, 2017

**Table of Contents**

## INTRODUCTION

[1] The Commanding Officer (CO), "J" Division, Conduct Authority (Appellant), presents an appeal pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R- 10, as amended [*RCMP Act*], challenging the conduct measures imposed by an RCMP conduct board (Board), when it found that four allegations of discreditable conduct and inaccurate accounts contrary to sections 7.1 and 8.1 of the RCMP Code of Conduct (a schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281) against Constable (Cst.) Jonathan Cormier, regimental number 55497 (Respondent), were established.

[2] The Board rendered an oral decision on November 16, 2015. The written decision was later issued and served on the Appellant on January 28, 2016.

[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 28, 2017 (ERC file no. C-2016-005 (C-017)) (Report), the Chair of the ERC, Ms. Elizabeth Walker, recommended that the Commissioner dismiss the appeal and confirm the Board's decision pursuant to paragraph 45.16(3)(a) of the *RCMP Act*.

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

[5] In rendering this decision, I have considered the material that was before the Board (Material), as well as the appeal record (Appeal). Like the ERC, I will refer to pages 1 to 606 contained in the Material as "vol 1", and pages 607 to 1212 as "vol 2".

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

## BACKGROUND

[7] The ERC accurately described the facts surrounding the present matter as follows:

> [5] On January 25, 2015, the Respondent arrested an individual (Mr. B) for impaired driving (Material, vol 2, pp 1153, 1167). Mr. B provided breath samples of 100mg% and 90mg%. The Respondent did not immediately document the file in the Police Report Occurrence System (PROS). On February 26, 2015, following an inquiry from him supervisor, the Respondent forged an email exchange with a local Crown prosecutor (EL) in which the latter stated that there would be no charges (Material, vol 2, p 1108). The Respondent made electronic file reports reflecting this exchange and repeated the gist of the email to his supervisor (Material, vol 2, p 1098). He placed a copy of the email exchange on the file and in PROS.
>
> [6] The Respondent did not know Mr. B. However, he believed Mr. B would lose his employment if a charge was filed as the charge would trigger an extended license suspension. The forged email was created so the Respondent's supervisor would conclude the file and the Motor Vehicle Branch would return Mr. B's license (Material, vol 2, pp 1101-1102).
>
> [7] The Respondent accidently transmitted the email to EL (Material, vol 2, pp 1153, 1101-1102). As he did not remember this particular file, EL reviewed his files and other email correspondence and realized that he had not discussed the file with the Respondent. EL brought the matter to the attention of his supervisor, the Regional Director of Public Prosecutions who filed a complaint with the Force (Material, vol 2, pp 1099-1100).
>
> [8] The Respondent was criminally charged with forgery and uttering a forged document (Material, vol 2, pp 1144-1149). He pled guilty to the charge of forgery and received a conditional discharge, four months' probation, and order to make a $1,000 charitable contribution (which was made) and a direction to continue psychological counselling (Material, vol 1, p 9; Material, vol 2, p 855).

## CONDUCT PROCEEDINGS

### Code of Conduct Investigation

[8] On March 20, 2015, Superintendent (Supt.) PB, the Officer in Charge of the Respondent's detachment, initiated an investigation in relation to the forging of the email exchange between the Respondent and the Crown prosecutor with the aim of establishing whether the Respondent contravened the Code of Conduct.

[9] On March 26, 2015, the Investigation Report was completed by the Professional Standards Unit (Material, vol 2, pp 1097-1212), providing a summary of the interviews conducted with Cst. PR, the Respondent's acting supervisor at the time of the events, and EL, the

Crown prosecutor. Given that the Respondent did not provide a statement as part of the Code of Conduct investigation, the Investigation Report also included a summary of the Respondent's statement obtained on March 20, 2015, by the investigator of the criminal investigation, Staff Sergeant SP.

**Notice of Conduct Hearing**

[10] On September 8, 2015, the Respondent was served with a *Notice of Conduct Hearing* (Notice), signed by the Appellant on September 2, 2015, setting out four allegations against him made pursuant to sections 7.1 and 8.1 of the Code of Conduct. The allegations are as follows (*sic throughout*):

> **Allegation 1**
>
> On or about February 26th, 2015, at or near [XX], [the Respondent], did not provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties and his conduct of an investigation, contrary to section 8.1 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 "J" Division, in the province of New Brunswick.
>
> 2. On or about February 26th, 2015, while on-duty, you told Constable [PR], acting supervisor, that Crown Counsel was not supporting criminal charges for PROS file [X] and that you had received an email from Crown Counsel to this effect.
>
> 3. Your statement to Constable [PR] contained misleading and/or false information.
>
> **Allegation 2**
>
> On or about February 26th, 2015, at or near [XX], [the Respondent], engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.
>
> Particulars of the contravention:
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "J" Division, in the province of New Brunswick.

2. On or about February 26th, 2015, while on-duty, you removed the content of an original email you had received from Crown Counsel [EL] on an unrelated matter and replaced it with false information in regards to PROS file [X]. The email you created appeared to have been authored by [EL].

3. On February 26th, 2015, you sent the forged email to Crown Counsel [EL] using the RCMP Groupwise system.

**Allegation 3**

Between February 26th, 2015 and March 24th, 2015, at or near [XX], [the Respondent], engaged in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars of the contravention:

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

2. On or about February 26th, 2015, while on-duty, you removed the content of an original email you had received from Crown Counsel [EL] on an unrelated matter and replaced it with false information in regards to PROS file [X]. The email you created appeared to have been authored by [EL].

3. Between February 26th, 2015 and February 27th, 2015, you provided the forged email to acting supervisor Constable [PR], who instructed you to place it on file.

4. Between February 26th, 2015 and March 24th, 2015, you placed the forged email on RCMP file [X].

5. On or about February 26th, 2015, you sent a facsimile letter to New Brunswick Motor Vehicle Branch in regards to File [X] indicating: "Charges will not be going forward."

6. On February 27th, 2015, acting supervisor Constable [PR] closed the file [X].

7. You did not maintain the integrity of the law, law enforcement and administration of justice.

**Allegation 4**

On or about February 26th, 2015, at or near [XX], [the Respondent], did not provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties and his conduct of an investigation, contrary to section 8.1 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 "J" Division, in the province of New Brunswick.
>
> 2. You prepared a summary for PROS file [X] indicating: "Member spoke to Crown. No charges to be laid and [Mr. B] advised."
>
> 3. You prepared a general report for PROS file [X] indicating for February 19th, 2015: "Member sent an email to Crown as to the extrapolation and the Crown inquired about the driving incidence. Member didn't have any driving evidence and went off of the signs of impairment at the time of the arrest." Also you indicated for February 26th, 2015: "Member received the email from [EL] stating there would be no charges as RCMP policy is we don't charge over 100mg% and I had no driving evidence."
>
> 4. Your PROS entries contained misleading and/or false information.

**Proceedings before the Board**

*a) Preliminary motion to merge Allegations*

[11] On October 30, 2015, the Board held a pre-hearing conference with the Parties. During the conference, the Member Representative (MR) brought a motion requesting the merging of Allegations 1 and 4, and of Allegations 2 and 3. In her submissions dated November 4, 2015 (Material, vol 2, pp 728-737), the MR contended that while Allegations 1 and 4 were identical and their particulars should be merged into one allegation, Allegations 2 and 3 were essentially identical with the exception of the dates to which they refer. The Conduct Authority Representative (CAR) provided her submissions on November 6, 2015 (Material, vol 2, pp 719-721); she advanced that, although Allegations 1 and 4 should remain separate by reason of the distinct elements each allegation respectively contained, she held no position on the merging of Allegations 2 and 3.

[12] On November 16, 2015, at the hearing on the Allegations, the Board rendered an oral decision denying the MR's motion based on the absence of redundancy and the distinctiveness of the acts described in each allegation (Material, vol 2, pp 931-937; Board written decision: Material, vol 1, pp 13-14).

*b) Decision on the Allegations*

[13] Following the decision on the preliminary motion, the Board rendered an oral decision on the Allegations (Material, vol 2, pp 938-964; Board written decision: Material, vol 1, pp 14-19). The Board first set forth the reasonable person test applied following a finding of contravention to the Code of Conduct, and stated that, in rendering the decision, it had considered the materials contained in the Record, as well as the written submissions of the Parties, including the Respondent's admissions pertaining to the Allegations. Although a list of witnesses to be presented at the hearing had been provided by the CAR for consideration, no witnesses were called.

[14] The Board found all four Allegations to be established on a balance of probabilities. In applying the reasonable person test, the Board found that, in regard to Allegations 2 and 3, the transmission of the forged email by the Respondent to the Crown prosecutor, though unintentional, was nonetheless likely to bring discredit on the Force, which is contrary to section 7.1 of the Code of Conduct. With respect to Allegations 1 and 4, the Board found that the Respondent's actions constituted deliberate inaccurate accounts, which are in contravention of section 8.1 of the Code of Conduct.

[15] On November 17, 2015, a second pre-hearing conference was held with the parties, during which it was agreed that the CAR would disclose materials pertaining to the conduct measures phase to the MR, and that these materials would be discussed between them prior to their presentation before the Board (Material, vol 1, pp 586-588). It was also determined that no witnesses would be called nor required for cross-examination by either Party.

*c) The CAR's submission on conduct measures*

[16] In her written submission, the CAR argued that the circumstances of the case warranted a sanction of dismissal (Material, vol 1, pp 305-309). The CAR made reference to recent RCMP conduct cases and argued that, in misconduct cases involving an element of dishonesty or a lack of integrity, as well as the absence of significant mitigating factors, the sanction should amount to dismissal. The CAR advanced that the mitigating factors in the Respondent's case were not

sufficiently significant to warrant a sanction other than dismissal and presented the following aggravating factors:

1. The misconduct was serious enough to amount to a repudiation of the employment contract between the Respondent and the Force.

2. The misconduct was voluntary. He made a false statement to his supervisor, forged an email, entered the email in police files and falsely advised another government agency. These were serious, voluntary and deliberate actions, constituting more than a mere error in judgment.

3. The Respondent's misconduct was planned and deliberate.

4. As a result of the Respondent's serious acts of misconduct and the implications of the Supreme Court of Canada (SCC) decision in *R v McNeil*, 2009 SCC 3 (*McNeil*), the Respondent has become unemployable as a police officer.

5. The Respondent's misconduct caused his supervisor to close an operational file without proper consideration.

6. The Respondent's actions had a significant impact on the integrity of the law, law enforcement and administration of justice, particularly in undermining the trust of the Crown prosecutor's office.

7. The Respondent's credibility has been irreparably damaged.

8. The misconduct was deemed by the courts to be a criminal offence.

9. The misconduct significantly affected the RCMP's reputation.

10. The Respondent is untrustworthy. Regardless of other options available to assist Mr. B, the Respondent chose to break the law and violate his duties as a police officer.

[17] In conclusion, the CAR argued that the RCMP's core values had been deeply violated by the Respondent's misconduct and that his credibility was irreparably damaged, which rendered impossible his fulfillment of the fundamental tasks required of a police officer (Material, vol 1, p 309).

[18] The CAR filed the following documents (Material, vol 1, pp 281-576):

1. **Incident report** regarding the Respondent's accidental discharge of his shotgun on August 10, 2014 (Material, vol 1, pp 282-286).

2. **Administrative guidance** regarding the Respondent's involvement in a dispute at his babysitter's home where he caused minor damage to the wall (Material, vol 1, pp 287-288).

3. **Impact statement** by the Regional Director of Public Prosecutions (Material, vol 1, p 292) confirming that as a result of the decision made not to call the Respondent as a witness due to his dishonesty, over 20 files involving the Respondent as a witness were closed. The Regional Director indicated that the incident had not impacted his office's relationship with individual members or the RCMP in general and that he appreciated the way the matter was handled by senior management of the RCMP.

4. **Impact statement** by EL (Material, vol 1, pp 296-302) in which he stated that his main concern was that a person who had been arrested for an alleged impaired driving incident had been able to obtain the return of his driver's licence and that, in doing so, EL's name had been used without his consent. EL also stated that he had to step down as the lead prosecutor in a separate file in which the Respondent was a key witness, and that due to credibility issues, charges were not pursued. EL indicated that a reassessment of all active files involving the Respondent was requested of prosecutors in Moncton, and that as a result, many files were withdrawn.

5. **Authorities** on which the CAR intended to rely on at the hearing (Material, vol 1, pp 313-576).

[19] On November 19, 2015, at the hearing on conduct measures, the CAR reiterated the aggravating factors listed in her written submission and commented on additional aggravating factors present within the two impact statements from the Crown prosecutor's office (Material, vol 2, pp 977-987). The CAR advanced that, as explained in EL's impact statement, the Respondent's misconduct placed an important administrative burden on the Crown's office by entailing the reassessment and withdrawal of at least 20 criminal prosecutions. The CAR also maintained that the Regional Director's appreciation with the way the matter had been handled by senior RCMP management implied that he supported management's decision to seek the Respondent's dismissal.

[20] With respect to the aggravating factor previously presented pertaining to the Respondent's misconduct rendering him unemployable as a police officer, the CAR added that the RCMP's obligation to accommodate the Respondent for the damage caused to his integrity would also place a significant administrative burden on the Force and would be contrary to the public interest.

[21] The CAR subsequently informed the Board that she did not intend to cross-examine individuals having authored materials submitted by the Respondent, but reserved the right to respond to the MR's oral submission.

*d) The MR's submission on conduct measures*

[22] In anticipation of the hearing on conduct measures, the MR filed a number of documents comprising of the following:

1. **The Respondent's written statement** dated November 12, 2015 (Material, vol 1, pp 195-199) in which he provided background information on his family life and his career path leading to his employment with the RCMP. The Respondent described a series of major events in which he was involved, most notably the June 4, 2014, shootings of the RCMP members in Moncton, which he describes "greatly affected" him and led him to seek psychological help. The Respondent also addressed the context surrounding the Allegations, and explained that his actions had been driven by the devastating impact of

an impaired driving conviction witnessed on an individual the Respondent had arrested at the start of his policing career. In closing, the Respondent admitted his error in judgment and stated accepting responsibility and deeply regretting his actions.

2. **Pre-sentence report** provided to the Provincial Court (Material, vol 1, pp 223-228) presenting general information regarding the Respondent's social situation.

3. **Letters from the Respondent's treating psychologist** (Material, vol 1, pp 230-233) dated October 15, 2015 and November 10, 2015. In the letter dated October 15, 2015, the psychologist provided a summary of the therapy sessions held with the Respondent following his involvement in the 2014 Moncton shootings and also described the symptoms exhibited by the Respondent as well as an account of his feelings ensuing the events surrounding the Allegations. The purpose of the psychologist's November 10, 2015, letter was to express her opinion that the Respondent's conduct underlying the Allegations was an isolated incident and that the chances of reoccurrence were very unlikely. She also added that the Respondent was under a significant amount of stress prior to the incident, which she believes could have contributed to his poor judgment on the day of the events.

4. **Positive performance logs and evaluations** of the Respondent (Material, vol 1, pp 235-250).

5. **Six letters of reference** from co-workers supporting the Respondent (Material, vol 1, pp 252-260).

6. **Three letters of apology** from the Respondent to EL, the Regional Crown Prosecutor and Cst. PR (Material, vol 1, pp 262-264).

7. **Two news media documents** concerning the Respondent's sentencing (Material, vol 1, pp 266-267).

8. **Email from the Respondent's supervisor, Cst. PR**, asserting that he would work with the Respondent again without any hesitation given that he trusts him (Material, vol 1, p 275).

9. **List of authorities** (Material, vol 1, pp 587-580).

10. **Two news media documents** concerning the criminal sentencing of a member for uttering a forged document (Material, vol 1, pp 581-583).

[23] At the hearing on conduct measures, the MR presented the Board with the range of available serious conduct measures listed under subsection 5(1) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], and stated that, in spite of the new *Conduct Measures Guide*, the existing precedents should be considered by the Board when imposing conduct measures for the first time under the new regime.

[24] Next, the MR set forth the sanctions she considered appropriate for each Allegation against the Respondent. The MR submitted that, with respect to Allegation 2 (sending the forged email to the Crown prosecutor), the essence of the misconduct was similar to the misuse of Force IT equipment, warranting a reprimand. As for Allegation 3 (creating the forged email and placing it in the file), the MR reasoned that an appropriate conduct measure would be the forfeiture of 30 days' pay, the ineligibility for promotion for one to two years, and a potential transfer. According to the MR, the Respondent's actions underlying Allegation 1 (misleading statement to his supervisor) warranted a conduct measure within the mitigated to normal range of a forfeiture of 15 to 20 days pay. Lastly, addressing Allegation 4 (PROS entry containing false/misleading information), the MR advanced that the *Conduct Measures Guide* provided a mitigated range of a forfeiture of 3 to 10 days pay and a normal range of 15 to 20 days. The MR added that, according to the *Conduct Measures Guide*, situations justifying a sanction in the mitigated range included conduct that was out of character, isolated incidents and admission of deceit by the member all applied to the Respondent's case.

[25] The MR proceeded to an analysis of RCMP cases involving serious allegations of fraud or similar conduct not resulting in the subject member's dismissal from the Force (Material, vol

2, pp 1000-1016). The MR emphasized the mitigating factors present in each case and drew parallels with the Respondent's misconduct to further her position that the dismissal of the Respondent was not warranted. She submitted that the Respondent had been forthright and that his misconduct was an isolated incident, not prompted by personal gain.

[26] The MR addressed some of the aggravating factors raised by the CAR (Material, vol 2, pp 1018-1032). She advanced that, although voluntary, the Respondent's actions were not planned or deliberate; he had seen an opportunity to make the file go away and took it. With regard to the consequences of the *McNeil* decision, the MR argued that the Respondent had been informed of the availability of Duty to Accommodate (DTA) employment positions within the Force, rendering concerns of *McNeil* implications not insurmountable. Furthermore, the MR reasoned that little weight should be attributed to the aggravating factor raised by the CAR in regard to the Respondent's supervisor closing an operational file without proper consideration, given that the Respondent had discretion to close the file himself without obtaining Crown authorization. The MR also raised the Regional Director's statement that the Respondent's actions had not had an impact on his office's relationship with individual members nor the Force in general (Material, vol 1, p 292), and argued that, contrary to the CAR's submission, the Respondent's actions had not damaged the Force's relationship with the Crown's office. In the same vein, the MR refuted the CAR's interpretation of the Regional Director's statement as meaning that he supported management's decision to seek the Respondent's dismissal given the absence of any clear indication of this in the letter. The MR disputed the CAR's assertion that the Respondent's credibility had been irreparably damaged considering the letters of support authored by the Respondent's supervisor and co-workers. With reference to the aggravating factor pertaining to the Respondent's untrustworthiness, the MR argued that, as confirmed by the Respondent's psychologist, the Respondent was under significant stress and the misconduct was an isolated incident.

[27] According to the MR, the presence of significant mitigating factors in the Respondent's actions merited consideration (Material, vol 2, pp 1030-1032, 1041-1046). The Respondent expressed remorse for his misconduct, he was being rehabilitated through counselling with his

psychologist, who deemed his chances of reoccurrence very unlikely, and he maintained a stellar reputation.

[28] Once the MR completed her submission on conduct measures, the Respondent was provided with the opportunity to address the Board (Material, vol 2, pp 1059-1061). In doing so, he apologized for his actions and expressed his remorse and embarrassment. The Respondent also asserted his pride to be a member of the RCMP.

*e) The CAR's rebuttal on conduct measures*

[29] In her rebuttal, the CAR raised several arguments countering the MR's submissions on conduct measures (Material, vol 2, pp 1062-1087). The CAR argued that there had been no evidence that the Respondent was offered DTA positions or that such positions were available to him. In response to the MR's assertion that no evidence had been presented regarding the adverse effect of the Respondent's misconduct on the Force's reputation, the CAR argued that any misconduct affects the Force. The CAR also stressed that the misconduct led to criminal proceedings and was publicized.

[30] The CAR submitted that little weight should be given to the letters written by the Respondent's psychologist (Material, vol 2, pp 1067-1071). She argued that the psychologist's conclusion on the unlikelihood of a reoccurrence was unsubstantiated and that, although she had acknowledged the Respondent's stress, she had not established a clear correlation between the said stress and his misconduct. Furthermore, the CAR maintained that the Respondent's psychologist had not provided a plan for his rehabilitation.

[31] Next, the CAR rebutted the MR's mitigating factor relating to the Respondent's performance and reputation. In terms of reputation, the CAR submitted that, despite four letters of support, the Respondent's reputation had clearly been affected with the organization, the CO and the Crown's office. As for performance, the CAR reminded the Board of the Respondent's administrative guidance received with respect to the disturbance at his babysitter's residence, which was determined to have violated the values of respect and professionalism. Specific to the misconduct underlying the Allegations, the CAR argued that the Respondent had numerous

opportunities to admit his misconduct and that only when he was caught did he become forthcoming.

[32] The CAR concluded by emphasizing the irreparable impact of the Respondent's misconduct on the Force, on his ability to work and on his employment contract. The CAR submitted that, as opposed to a number of cases referred to by the MR, the Respondent's misconduct had a significant operational impact by reason of the direct link to the Crown's office.

*f) The Board's request for additional submissions*

[33] On December 1, 2015, the Board notified the Parties of a relevant decision rendered by an RCMP adjudication board not referenced by the Parties, and provided them the opportunity to file additional submissions (Material, vol 1, p 172). The decision in question was *Appropriate Officer, "E" Division and Constable Orr* (2013), 12 AD ($4^{th}$) 472 [*Orr*] (Material, vol 1, pp 173-182), in which the adjudication board found three allegations of disgraceful conduct to be established against the member for having falsified information on documents submitted to the provincial Motor Vehicles Office. The member, in his attempt to extend leniency, had falsely indicated that the three suspected impaired drivers had refused to provide roadside breath samples, when in fact they had registered a "fail". A significant mitigating factor was that the member informed the Force of two of the three incidents. The sanction imposed by the Board was the one proposed by the parties' joint submission on sanction: a reprimand and forfeiture of 10 days' pay.

[34] In her December 7, 2015, submission (Material, vol 1, p 147), the CAR submitted that the *Orr* case was distinguishable from the Respondent's case for several reasons. First, in *Orr*, the subject member's misconduct had less of a negative effect on the administration of justice given that, unlike the Respondent, his act of falsification did not involve the creation of a document with the purpose of falsely representing it to have been authored by a Crown prosecutor. Second, the CAR argued that no criminal proceedings had been initiated against Cst. Orr. Finally, in *Orr*, the joint submission on sanction was indicative of the support shown by the subject member's

Commanding Officer. To this effect, the CAR stated that a sanction of dismissal was usually the outcome for cases involving dishonesty and lack of integrity for which a joint submission was not provided.

[35] In her December 9, 2015, submission (Material, vol 1, pp 143-144), the MR reasoned that, despite distinguishing factors in *Orr*, a number of relevant similarities had to be considered by the Board; most notably, the fact that Cst. Orr falsified information on documents in order to extend leniency to suspected impaired drivers. The MR advanced that, in the consideration and comparison of mitigating and aggravating factors between the cases, both cases were similar and principles used in *Orr* were relevant to the Respondent's case. The MR noted that Cst. Orr was facing allegations related to three separate incidents, while the Respondent was facing four allegations related to one incident; in both cases, there was no personal gain; Cst. Orr had one prior informal discipline, while the Respondent had none; both were high performers with many letters of support submitted on their behalf; and both members provided a sincere apology and took responsibility for their actions. In closing, the MR argued that the lack of implied support from management should not be considered as an aggravating factor warranting the automatic dismissal of the member, but rather, as the absence of a mitigating factor.

*g) Decision on conduct measures*

[36] In a written decision issued on January 29, 2016 (Material, vol 1, pp 5-33), the Board reviewed the Respondent's personal overview, his professional history prior to joining the RCMP, as well as his performance evaluations while in the Force. From these performance evaluations, the Board noted that his supervisors and superiors were consistently very positive in their assessments of the Respondent, and that, even among his co-workers, the Respondent was a recognized leader. The Board also examined the Respondent's psychological assessments, following the 2014 Moncton tragedy, and the two letters from the Respondent's psychologist, whom the Board deemed an expert in psychology, as confirmed during the November 17, 2015, pre-hearing conference (Material, vol 1, pp 586-588). The Board also reviewed previous disciplinary case law submitted by both Parties and remarked that, for cases involving dishonesty, the range of sanctions imposed was from a reprimand and the imposition of a

significant forfeiture of pay to an order for resignation. However, the Board emphasized that, in all the cases submitted, the act(s) of dishonesty involved some personal gain or advantage to the member, and that dismissal typically only occurred in such cases.

[37] The Board found that, based on the Respondent's videotaped statement, his decision to create the forged email exchange was not premeditated. The Board also found that, although the creation of the forged email constituted criminal behaviour, none of the acts underlying the Allegations were for personal benefit and that the Respondent did not seek to compromise the integrity of any investigation or prosecution. The Respondent's acts were motivated by his wish to avoid Mr. B's potential loss of employment.

[38] In considering the aggravating and mitigating factors present in the case, the Board found the following aggravating factors (Material, vol 1, pp 27-28):

1. The misconduct was not planned in advance but nevertheless comprised a deliberate sequence of actions that reflected a profound error in judgment.

2. Although not motivated by self-benefit, the Respondent's misconduct involved a lack of honesty and integrity. In referring to the *Orr* decision and establishing a similarity with the Respondent, the Board noted that Cst. Orr's considerable respect for the law was overshadowed by his empathy for three drivers in difficult situations.

3. The misconduct was committed by a senior constable.

4. Given the *McNeil* implications, the misconduct imposed a significant but not untenable administrative burden on the Force.

5. The misconduct caused the Respondent's supervisor to close an operational file without proper consideration. The CAR confirmed that the Respondent had discretion not to charge Mr. B, but the RCMP's procedure of supervisory oversight was not followed.

6. Crown resources were required to conduct a review of all files involving the Respondent. The misconduct affected law enforcement in the area, given the Crown's decision to

withdraw a prosecution for assault with a weapon and approximately 20 impaired driving matters involving the Respondent.

7. The Respondent admitted his guilt to a charge under the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] for uttering a forged document and received a conditional discharge.

8. The misconduct damaged the Respondent's credibility, although not irreparably, and brought negative media coverage.

[39] The Board determined the following mitigating factors (Material, vol 1, pp 28-30):

1. At the first opportunity, the Respondent admitted his actions, accepted criminal responsibility, admitted to the Allegations and instructed his MR to conduct his representation in a manner that did not demand formal proof of exhibits or the attendance of any witnesses, minimizing the use of administrative resources.

2. The Respondent made formal written apologies to the Crown prosecutors and has maintained the trust of his supervisor, Cst. PR.

3. The Respondent demonstrated profound regret and genuine remorse.

4. The Respondent had no prior formal discipline. His operational guidance and remedial training matters do not relate to his honesty and integrity.

5. The Respondent had an above-average work record, and had been recognized for his strong work ethic.

6. The misconduct was an isolated incident and was out of character.

7. The Respondent was still dealing with significant stressors at the time of the events, including stressors relating to critical on-duty incidents. Although the Board was not prepared to find that the misconduct was caused by these stressors, the Board determined that the Respondent's psychologist had established that the connection was possible but not probable. However, the Board found that, given that the Respondent's dishonesty was

not for personal gain, a causal connection between his compromised mental health and his unethical actions was not essential to finding that loss of employment was a disproportionate outcome.

8. The Respondent was undergoing counselling and would continue to do so.

9. The Respondent was recognized as a committed team player.

10. The Respondent had been recognized for individual acts of exemplary professionalism.

11. The Respondent had maintained the support of peers and supervisors within this detachment as confirmed by reference letters.

12. The Respondent demonstrated his accountability when he provided a statement admitting his actions.

13. The Respondent has a long record of commitment to the community.

14. There was a minimal likelihood of any future misconduct. The Board based its finding not only on the psychologist's opinion, but also on the Respondent's demeanour and words when he addressed the Board.

15. Restitution to the community was made indirectly in the form of a significant charitable contribution under the terms of the Respondent's conditional discharge.

[40] Following consideration of the established contraventions, the materials and submissions, the relevant cases, the aggravating and mitigating factors, as well as the *Conduct Measures Guide*, the Board found that dismissing or directing the Respondent to resign within 14 days would not be proportionate to the nature and circumstances of his contraventions. The Board stated that, in the Respondent's highly unique circumstance, "his actions do not amount to the repudiation of his employment contract, and his misconduct does not represent a breach of an essential condition of his employment" (Material, vol 1, p 30).

[41] The Board imposed the following conduct measures:

1. For each of the Allegations, a reprimand.

2. For Allegations 1, 3 and 4, a direction for the Respondent to undergo medical treatment in the form of psychological services.

3. For Allegation 2, no measure beyond a reprimand given that, although the transmission of the forged email contravened the Code of Conduct, the real issue was the content of the forged email, which the Board addressed by the serious conduct measures imposed under Allegation 3.

4. For Allegation 3, a forfeiture of 30 days' pay, an ineligibility for promotion for a two-year period and a transfer to be left at the discretion of the Conduct Authority. The Board noted that the *Conduct Measures Guide* stated that dishonesty involving actual theft may still attract an order for 30 days' loss of pay in certain mitigated circumstances, and that the mitigated range for false police reporting extends to 29 days' loss of pay.

5. For Allegation 1, a forfeiture of 10 days' pay. The Board determined that the short period of time between the Respondent's oral account and the actions relevant to Allegation 4 must be considered. The Board found that the out of character nature of the Respondent's actions mitigated the forfeiture of pay, and that a mitigated range included 10 days' loss of pay for misconduct involving lying to a superior concerning an operational event.

6. For Allegation 4, a forfeiture of 20 days' pay. The Board noted that section 33 of the *Conduct Measures Guide* provides that normal range reached 20 days' loss of pay for lying to a superior concerning an operational event.

[42] In closing, the Board acknowledged that, while the maximum forfeiture possible under a single notice of hearing in the previous disciplinary system was 10 days' pay, there is no longer such restriction on the total amount of forfeiture that may be imposed by a conduct board. The Board confirmed the total forfeiture of 60 days' pay, and stated that, under the new regime, conduct boards have greater authority and flexibility to impose greater financial consequences. The Board considered the suggestion in the *Conduct Measures Guide* that where a 45 days'

forfeiture of pay was insufficient, dismissal could not be too harsh. However, the Board concluded that, in this case, the loss of the Respondent's employment was too harsh.

**APPEAL**

[43] On February 2, 2016, the Appellant presented Form 6437 – *Statement of Appeal* to the Office for the Coordination of Grievances and Appeals (OCGA) (Appeal, pp 4-5), in which he submits that the conduct measures imposed by the Board were clearly unreasonable. The Appellant also contends that the Board's decision was reached in a manner that contravened the applicable principles of procedural fairness and was based on an error of law. The Appellant seeks a conduct measure pursuant to subsection 45(4) of the *RCMP Act* for the Respondent's dismissal from the Force or a direction for him to resign from the Force within 14 days.

[44] In his appeal submissions, forwarded to the OCGA on April 19, 2016, the Appellant raises 10 grounds of appeal, which he divided into errors of law, findings that are clearly unreasonable, and breaches of procedural fairness:

> **Errors of law**
>
> 1. The Board erred in minimizing the *McNeil* implications as an aggravating factor.
>
> 2. The Board erred in not considering all of the Respondent's criminal behaviours as aggravating factors.
>
> 3. The Board erred in minimizing the impact of the Respondent's actions on the administration of justice and the Force's partnership with the Crown as an aggravating factor.
>
> 4. The Board erred in its appreciation of the Respondent's personal benefit and motivation and in considering the lack of personal benefit to the Respondent as a mitigating factor.
>
> 5. The Board erred in considering the significant stressors affecting the Respondent as a mitigating factor.
>
> **Clearly unreasonable**
>
> 6. The Board erred in considering the evidence.
>
> 7. The Board erred in concluding that the Respondent's misconduct did not amount to the repudiation of the employment contract.

> 8. The Board erred in substantially deviating from the suggested measures in the *Conduct Measures Guide*.
>
> 9. The Board erred in not correctly considering the impact of all the aggravating and mitigating factors.
>
> **Procedural fairness**
>
> 10. The Board contravened the principles of procedural fairness in failing to call essential witnesses and without requiring them to provide *viva voce* evidence.

[45] The Appellant also states that he is seeking permission to introduce new evidence that could not reasonably have been known at the time of the decision. Notably, he seeks to introduce an affidavit from the Respondent's line officer which contradicts the information provided to the Board by the Respondent in relation to available DTA positions (Appeal, p 92).

[46] On May 16, 2016, the Appellant filed submissions regarding the introduction of this new evidence (Appeal, pp 171-175). The Appellant states that, on the final day of the hearing, double hearsay information was provided to the Board by the MR regarding a conversation the Respondent had with Supt. PB on suitable positions for the Respondent. This information was considered by the Board in reaching its decision. The Appellant argues that the Board should not have given any weight to the double hearsay, given that the information was vague, unreliable and too important to rely on in this form. The Appellant submits that the best evidence rule was not respected and that Supt. PB could have provided direct evidence had the Board obtained a written statement from him or called him as a witness. The Appellant claims that the new evidence was obtained at the earliest reasonable opportunity and that it is both required for and relevant to the appeal.

[47] On June 17, 2016, the Respondent provided his submission, objecting to the Appellant's request to introduce new evidence (Appeal, pp 347-350). The Respondent argues that the proposed new evidence is information that was known or could reasonably have been known by the Appellant at the time of the hearing. The Respondent also argues that options were available at that time for the CAR to address concerns about the information relayed by the MR, such as requesting to cross-examine the Respondent or requesting an adjournment to contact Supt. PB and inquire about the accuracy of the information. The Respondent submits an affidavit

indicating that although Supt. PB did not offer him a position, he did confirm that DTA positions were available and mentioned the Call Back Team and the Youth at Risk Unit (Appeal, pp 351-352).

[48] On September 22, 2016, in correspondence to the OCGA, the Appellant disputed the fact that the Respondent provided an affidavit with his submission in response to the Appellant's representations regarding the introduction of new evidence (Appeal, p 438). The Appellant requests that the OCGA remove the Respondent's submission and the attached affidavit from the record, and that the OCGA request a new submission from the Respondent.

[49] On September 27, 2016, the Appellant submitted an unsolicited rebuttal, contending that the OCGA did not follow the procedure outlined in section 6.1.7 of the *RCMP National Guidebook – Appeals Procedure* and failed to respect the Appellant's right to procedural fairness by denying him the opportunity to reply to the Respondent's new evidence (Appeal, pp 467-471). The Appellant further argues that the affidavit is inadmissible because the Respondent failed to provide an explanation as to why the information contained in the affidavit was not previously known or available to the Respondent. The Appellant maintains the following: the Respondent was present at the conduct hearing; he chose not to testify under oath; and he was aware of the details mentioned in the affidavit.

**EXTERNAL REVIEW COMMITTEE**

[50] The ERC first considered the admissibility of Supt. PB's affidavit presented as new evidence by the Appellant. The ERC found that the evidence in the affidavit could reasonably have been produced by the Appellant prior to the Board rendering its decision, given that the CAR had the opportunity to question or verify the information relayed by the MR at the hearing concerning the Respondent's phone call with Supt. PB. Therefore, the ERC recommends that the affidavit of Supt. PB and, as a result, the affidavit of the Respondent submitted in response, not be considered in this appeal (Report, paras 101-106).

[51] The ERC then proceeded to the analysis of the 10 grounds of appeal raised by the Appellant.

**1. The Board erred in minimizing the *McNeil* implications as an aggravating factor**

[52] The ERC noted that neither Party presented convincing evidence regarding the extent of the burden the Respondent's continued employment as a police officer would have on the Force, or the alternative positions within the Force available to him (Report, para 114). However, the ERC acknowledged that the obligation to present evidence in support of the Respondent's inability to continue his employment as a police officer rested with the Appellant, and that in the absence of such evidence, the Board had latitude to draw its conclusions as to the impact of *McNeil* on the Respondent's continued employment. The ERC found that the Board's consideration of the double hearsay led by the MR, though debatable, was not a determinative error given that little weight was placed on the evidence. In reviewing prior RCMP discipline decisions, the ERC concluded that a member's obligation to disclosure under *McNeil* does not automatically lead to dismissal (Report, para 115).

[53] Further, with respect to the impact statement provided by the Regional Director of Public Prosecutions, the ERC disagreed with the Appellant's interpretation of the Regional Director's statement pertaining to the decision to withdraw charges in 20 files in which the Respondent was involved by reason of the Respondent's obligation to disclose his offence of dishonesty to the defence. Specifically, the ERC refuted the Appellant's argument that the impact statement relates to the Respondent's future ability to be called as a witness, and characterized this assertion as speculative (Report, paras 116-117).

[54] Therefore, the ERC determined that the Board, in the absence of specific evidence from either Party concerning the potential administrative burden the Respondent's continued employment as a police officer would have on the Force, considered all present factors and applicable case law. In view of this, the ERC found that the Board committed no manifest or determinative error in considering and weighing the implications of the *McNeil* disclosure obligations (Report, para 118).

**2. The Board erred in not considering all of the Respondent's criminal behaviours as aggravating factors**

[55] The ERC found that, although the Board incorrectly considered as an aggravating factor the *Criminal Code* offence of uttering a forged document rather than the offence of knowingly making a false document to which the Respondent pled guilty to, it was clear from the decision that the Board was aware that the criminal offence in question was that of forgery (Report, para 121).

[56] Regarding the Appellant's argument that the Board erred when it did not consider as aggravating factors other actions of the Respondent related to the Allegations constituting criminal offences, the ERC cited its findings and recommendations in C-2015-002 (C-007), in which it commented on the consideration of aggravating factors as "a consideration of factors 'beyond the essential constituents' of the misconduct" (Report, para 123). The ERC found that the particulars of Allegations 2, 3 and 4 refer to each element the Appellant claims the Board should have considered as aggravating factors, namely the creation of the forged email, its use with the intention that it would be relied on and the use of another person's identity in the forged email. Consequently, the ERC concluded that these factors were correctly not considered by the Board as aggravating factors.

**3. The Board erred in minimizing the impact of the Respondent's actions on the administration of justice and the Force's partnership with the Crown as an aggravating factor**

[57] The ERC failed to find any apparent or determinative error in the Board's description of the serious impacts of the Respondent's misconduct on both the administration of justice and on the Force's relationship with the Crown. The Board considered the Regional Director's impact statement in assessing the repercussions of the Respondent's actions, and acknowledged that the Respondent's misconduct affected law enforcement in the area given the Crown's decision to withdraw a prosecution for assault with a weapon, as well as approximately 20 impaired driving matters (Material, vol 1, p 28). The Board determined that the misconduct "had the potential to

put the RCMP's reputation and partnership at risk" (Material, vol 1, p 28) and found that this was an aggravating factor in the consideration of the conduct measures. The ERC examined the CAR's interpretation of the Regional Director's communication of satisfaction as a result of his knowledge that RCMP management was seeking the Respondent's dismissal. The ERC found that this interpretation was speculative and unsupported.

**4. The Board erred in its appreciation of the Respondent's personal benefit and motivation and in considering the lack of personal benefit to the Respondent as a mitigating factor**

[58] The ERC acknowledged that, in the determination of appropriate conduct measures, the Board put significant weight on its conclusion that the Respondent's dishonesty was not led by personal benefit. According to the ERC, although the Respondent did, in fact, mention in his video statement of March 20, 2015, of his desire to reduce the weight placed on him by his supervisor (Appeal, p 87; Material, vol 2, p 784), he informed the investigator on two occasions his intent to help Mr. B. The ERC found that the Board made no manifest error in its appreciation of the Respondent's motivation, given that his intent to help Mr. B was clearly present from the start of the investigation into the Allegations (Report, paras 140-141).

**5. The Board erred in considering the significant stressors affecting the Respondent as a mitigating factor**

[59] In considering the Board's assessment of the significant stressors affecting the Respondent, the ERC found the presence of clear evidence in regard to the stress experienced by the Respondent at the time of the incident. The ERC held that the Board demonstrated a nuanced understanding of this evidence (Report, para 146). Furthermore, the ERC viewed the Appellant's argument on appeal concerning the lack of reliable evidence to support the conclusion that stress was a mitigating factor difficult to comprehend when, at the time of the hearing, the CAR acknowledged having no issue with the psychologist's finding and stating that it appeared that the Respondent was under stress at the time of the event (Material, vol 2, p 1071). The ERC found that the CAR had ample opportunity to raise concerns regarding the psychologist's

assessment, including the possibility for cross- examination. The ERC concluded that there was no error in the finding made by the Board.

**6. The Board erred in considering the evidence**

[60] Given the Appellant's failure to provide specific arguments in support of his argument that the Board erred in considering the evidence "as outlined throughout the Appellant's submissions" (Appeal, p 89), the ERC indicated that if specific issues related to the Board's consideration of evidence were raised by the Appellant under other grounds of appeal, then they would be addressed in other sections of the Report (Report, para 150).

**7. The Board erred in concluding that the Respondent's misconduct did not amount to the repudiation of the employment contract**

[61] The ERC found that the Appellant's appeal submission and rebuttal provide no foundation for this ground of appeal apart from arguing that the Board did not properly consider the evidence, notably the criminal behaviour admitted to by the Respondent, the *McNeil* implications and the assertion that the Respondent will no longer be able to testify in criminal proceedings. The ERC noted that the issue concerning the Respondent's criminal behaviour and the *McNeil* disclosure implications was dealt with elsewhere in the Report (Report, para 155).

[62] Regarding the rejection of a sanction of dismissal, the ERC found no manifest or determinative error in the Board's finding. The ERC noted that the Board identified substantial mitigating factors when determining the conduct measures, particularly the Respondent's strong performance with no prior discipline, the continued support from his peers and supervisors, the isolated nature of the incident and the unlikely chances of reoccurrence as indicated by the Respondent's psychologist, as well as the Respondent's demonstration of real remorse and accountability for his actions (Material, vol 1, p 29). As a result, the Board concluded that a loss of employment was not required in the Respondent's unique circumstances. In the ERC's view, the Board clearly considered that, despite the gravity of his misconduct, the Respondent had significant rehabilitative potential, and relied on the evidence presented as well as prior cases in

which criminal behaviour had not led to dismissal in order to make such a finding (Report, para 157).

**8. The Board erred in substantially deviating from the suggested measures in the *Conduct Measures Guide***

[63] The ERC found that the Board followed the correct process for the consideration of conduct measures by establishing the range of possible sanctions from prior relevant cases and assessing at length the aggravating and mitigating factors in the present case (Report, para 164). The ERC also found that the Board's decision reflects a full understanding of the evidence before it as well as an acknowledgement of its deviation from the *Conduct Measures Guide* (Report, paras 162, 164). The Board emphasized the flexibility provided to conduct boards under the new conduct regime and concluded that despite the suggested measures, loss of employment was too harsh in this case (Report, para 166; Material, vol 1, pp 30, 32-33). Recognizing this flexibility and noting that the Board provided detailed reasons for its conclusion, the ERC found that there is no manifest or determinative error in the Board's decision (Report, para 168).

**9. The Board erred in not correctly considering the impact of all the aggravating and mitigating factors**

[64] The ERC found that the Appellant provided no basis for this ground of appeal and instead made a general reference to his appeal submission (Report, para 170). Therefore, the ERC indicated that such issues raised by the Appellant regarding the Board's consideration of aggravating and mitigating factors are addressed in other sections of the Report (Report, para 172).

**10. The Board contravened the principles of procedural fairness in failing to call essential witnesses and without requiring them to provide *viva voce* evidence.**

[65] The ERC reasoned that, contrary to the Appellant's submission that conduct boards have a more inquisitorial function under the new *RCMP Act*, the nature of the role of conduct boards in the new regime does not substantially differ from that of former adjudication boards (Report,

para 177). According to the ERC, conduct boards in the current process maintain the adversarial nature of former adjudication boards, and there is no indication in the *RCMP Act*, the *CSO (Conduct)* or conduct policy (*Administration Manual*, Part XII) of a move to an inquisitorial process (Report, para 178).

[66] With respect to the Appellant's argument that the Board failed to provide him with the opportunity to address the evidence submitted by the MR, the ERC found that the Appellant had the obligation to present evidence, call witnesses and rebut evidence provided by the Respondent (Report, para 179). The ERC stated that the Appellant had several opportunities to call and cross-examine witnesses, but the CAR declined each occasion (Material, vol 1, p 588; vol 2, p 986). The ERC concluded that the Board did not contravene the principles of procedural fairness by not calling witnesses, when it was clearly the Appellant's responsibility to do so.

[67] Ultimately, the ERC recommends that the appeal be dismissed and the conduct measures imposed by the Board be confirmed (Report, para 182).

**PRELIMINARY MATTERS**

**Applicable standard of review**

[68] 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.

[69] The Appellant appeals the conduct measures imposed by the Board, and raises 10 grounds of appeal, identifying five errors of law, four findings that are clearly unreasonable, and one breach of procedural fairness. I agree with the ERC that the first five grounds raised by the Appellant are mischaracterized as errors of law, and that, as a result, the first nine grounds of

appeal relating to the Board's determination of the conduct measures to be imposed on the Respondent involve questions of fact or of mixed fact and law.

[70] The term "clearly unreasonable" used in subsection 33(1) of the *CSO (Grievances and Appeals)* describes the standard to be applied in a review of questions of fact and of mixed fact and law. In *Kalkat v Canada (Attorney General)*, 2017 FC 794, the Federal Court considered the term "clearly unreasonable" as it is set out in subsection 33(1) of the *CSO (Grievances and Appeals)*:

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

[71] As a result, questions of fact or of mixed fact and law are entitled to significant deference. Moreover, I agree with the ERC that this deference is owed even in instances where no oral evidence was heard and no credibility findings were made (Report, paras 96-98). Therefore, with regard to the first nine grounds of appeal raised by the Appellant, only the presence of a manifest or determinative error would lead to a conclusion that a finding made by the Board is clearly unreasonable.

[72] The Appellant's final ground of appeal concerns an alleged breach of procedural fairness by the Board. A question of procedural fairness is considered on the basis of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, para 43), or in other words, requires no deference. Breaches of procedural fairness will normally render a decision invalid; the usual remedy is to order a new hearing, with the exception where the circumstances will inevitably lead to the same outcome (*Mobil Oil Canada Ltd v Canada- Newfoundland Offshore Petroleum Board*, 1994 1 SCR 202, paras 51-54; *Renaud v Canada (Attorney General)*, 2013 FCA 266, para 5).

**Admissibility of new evidence**

[73] The Appellant is seeking permission to add Supt. PB's affidavit as new evidence in response to information relayed by the MR during the conduct hearing regarding a phone call between the Respondent and Supt. PB, in which suitable positions for the Respondent were apparently mentioned (Appeal, p 173).

[74] In determining the admissibility of Supt. PB's affidavit, I must consider the application of subsection 25(2) of the *CSO (Grievances and Appeals)*, which provides the following:

> 25(2) The appellant is not entitled to
>
> (a) file any document that was not provided to the person who rendered the decision that is the subject of the appeal if it was available to the appellant when the decision was rendered; or
>
> (b) include in their written submissions any new information that was known or could reasonably have been known by the appellant when the decision was rendered.

[75] The Appellant indicates that the information relayed by the MR was presented to the Board during the conduct hearing. Specifically, the Appellant states (Appeal, p 173):

> The Conduct Authority became aware of this hearsay information for the first time when it was presented to the Board on November 19, 2015, and could not have reasonably anticipated that such information would be presented before that time. Furthermore, the Conduct Authority could not have reasonably anticipated that such information would form part of the Board's decision.

[76] The crux of the matter turns on whether the information in the affidavit of Supt. PB could have been available to the Appellant when the decision was rendered. As mentioned by the Appellant, the MR relayed the information about the phone call between the Respondent and Supt. PB at the conduct hearing. Although the information addressed by the new evidence may not have been available to the Appellant at that very moment, I find that it could reasonably have been made available in short order. I agree with the ERC that, upon communication of the information by the MR, the Appellant was in a position to either question the information, verify with Supt. PB the accuracy of the information allegedly provided to the Respondent, or request Supt. PB as a witness (Report, para 106). Instead, the CAR informed the Board that there was no

evidence that the Respondent was offered or was welcomed in a DTA position, and that the information should not be taken into account as a mitigating factor (Material, vol 2, p 1063). The fact that the CAR chose not to question the information, or the fact that the CAR did not anticipate that the information would form part of the Board's decision, fails to meet the requirements of subsection 25(2) of the *CSO (Grievances and Appeals)*. As a result, I find that the affidavit of Supt. PB is not admissible.

**ANALYSIS**

[77] While repetitive, for ease of reference, I intend to summarize and address the Appellant's arguments in succession.

**1. The Board erred in minimizing the *McNeil* implications as an aggravating factor**

[78] With respect to the first ground of appeal, the Appellant maintains that the Board failed to properly consider the extent to which the Respondent is able to continue his employment as a police officer, in light of his obligation to disclose his misconduct to defence counsel under the implications of the *McNeil* decision (Appeal, pp 82-83, 384). Accordingly, the Appellant contends that the Respondent no longer meets a fundamental requirement of being a peace officer. The Appellant further argues that the Board failed to consider important distinctions between the Respondent's situation and submitted cases involving RCMP members retained despite the *McNeil* implications resulting from their misconduct. According to the Appellant, contrary to the Respondent's case, certain of the precedents involved joint submissions on sanctions as well as evidence of a causal link between a medical condition and the misconduct.

[79] The Respondent submits that, beyond the Crown's duty to disclose information regarding acts of misconduct, the impact on the member's credibility in court or on his ability to testify remains speculative and untested (Appeal, p 278). The Respondent argues that the CAR failed to provide any evidence in support of the position that the Respondent is unemployable in the RCMP. According to the Respondent, the email from the Regional Director concerned active files only and did not present any evidence with respect to the Respondent's future ability to be called as a witness. Lastly, in response to the Appellant's argument concerning the distinction of

a joint proposal on measures, the Respondent contends that, under the new process, a joint submission for non-dismissal before a conduct board would be a rare occurrence since conduct boards are only appointed when the conduct authority is seeking the dismissal of the member (Appeal, p 279).

[80] I agree with the ERC that, given the absence of specific and reliable evidence from either Party regarding the impact of the *McNeil* disclosure requirements on the Respondent, the Board had latitude to draw its conclusions on the Respondent's continued employment with the Force (Report, para 114). The Board considered the information relayed by the MR regarding a phone call between the Respondent and Supt. PB, in which a number of positions available were apparently mentioned (Material, vol 1, p 28). Although little weight was accorded to this information, the Board stated that this information "does resonate with the submitted case law in which the members were retained notwithstanding serious McNeil issues" (Material, vol 1, p 28).

[81] The precedents considered by the Board consisted of prior RCMP discipline cases in the aftermath of the *McNeil* decision involving subject members who had either been retained or dismissed following findings of serious misconduct. Notably, the Board addressed the RCMP adjudication decision *Orr*, and stated that, although the Respondent's misconduct involved a lack of honesty and integrity, his actions had not been motivated by self-benefit (Material, vol 1, p 27). The Board noted the same absence of personal gain in *Orr*, where the *McNeil* disclosure had not been cited as an aggravating factor and the subject member had been retained by the Force (Material, vol 1, p 28). As mentioned by the ERC, the relevant point of the cases reviewed by the Board was that members who could be subject to *McNeil* disclosure obligations had not automatically been dismissed from the Force (Report, para 115).

[82] Relying on the impact statement from the Regional Director of Public Prosecutions, the Appellant argues that, given *McNeil*, the Respondent's misconduct prevents him from testifying. I disagree with this assertion. Under *McNeil*, the Crown is required to disclose to defence counsel records relating to findings of serious misconduct by police officers. Beyond the general concern that such a disclosure may have a significance on the outcome of a given criminal proceeding, the true implications of *McNeil* in a particular case remain theoretical. While the

general duty on the part of the Crown exists to disclose all relevant material and evidence, it is in the context of an actual trial where the credibility of a member subject to *McNeil* implications will be assessed by the judge during the member's testimony and cross-examination.

[83] In the discipline appeal *Constable Haywood and Appropriate Officer, "H" Division* (2012), 11 AD (4th) 67, (D-110) [*Haywood*], the effect of *McNeil* was considered by the Commissioner following his decision to allow the appeal and impose a lesser sanction than dismissal for Cst. Haywood's disgraceful conduct resulting from a conviction of giving contrary evidence in a criminal proceeding. With regard to Cst. Haywood's future ability to testify, the Commissioner acknowledged the statement of the Crown attorney that "most defence counsel would not raise it as an issue once the background was revealed" (*Haywood*, para 175) and the statement from a defence counsel that "Cst. Haywood's recantation was 'totally out of character' and 'an isolated incident'" (*Haywood*, para 176). I find that similar conclusions may be drawn from the Board's recognition of significant stressors relating to the Respondent's involvement in the 2014 Moncton shootings, as well as the out of character and isolated nature of his actions.

[84] Although the Respondent's misconduct may affect future transfer opportunities, in the absence of cogent evidence, the Board had the leeway to reject the Appellant's contention that the Respondent can no longer be employed in any capacity by the RCMP by reason of the *McNeil* disclosure obligations. After all, while misconduct, including the issue of disclosure obligations under *McNeil*, is described as a consideration when staffing a given position in the context of transfers, deployments and promotions (see *Career Management Manual*, Chapter 3 "Transfer and Deployment", section 1.1.17; *Career Management Manual*, Chapter 4 "Promotion", section 1.20), *Operational Manual*, Chapter 20.1 "Disclosure", section 10, sets out a comprehensive process for disclosing RCMP member misconduct including the requisite submission of Form 6326 – *Employee Misconduct Disclosure for Crown Attorney*.

[85] For these reasons, I agree with the ERC that the Board committed no manifest or determinative error in weighing the impact of *McNeil* disclosure obligations on the Respondent's continued employment and in concluding that "the misconduct imposes a significant but not untenable administrative burden on the Force" (Material, vol 1, p 28; Report, para 118). I also

agree with the ERC that a joint submission on sanction is unlikely under the current process, and that, even in the presence of such a submission, all other circumstances must be considered by a conduct board prior to imposing a sanction (Report, para 115). In this case, I find that the Board considered all relevant factors.

**2. The Board erred in not considering all of the Respondent's criminal behaviours as aggravating factors**

[86] The Appellant argues that the Board erred in identifying as an aggravating factor the Respondent's guilty plea to a *Criminal Code* offence of uttering a forged document, when in fact, the Respondent pled guilty to "knowingly making a false document under section 367 of the Criminal Code" (Appeal, p 84, 385). The Appellant also submits that the Board erred by not considering as additional aggravating factors other actions of the Respondent constituting criminal offences such as creating and using a false document, as well as using another person's identity in the forged document.

[87] In response, the Respondent argues that although the Board erred at paragraph 18 of its decision by identifying the criminal offence of uttering a forged document, it is clear from the remainder of the decision that the Board was aware that the criminal offence in question was that of forgery (Appeal, p 279). The Respondent further argues that it would have been beyond the Board's jurisdiction to make findings on other alleged criminal behaviours.

[88] I agree with the ERC that, despite its mischaracterization of the offence of uttering a forged document as an aggravating factor, the Board was aware that the actual *Criminal Code* offence admitted to by the Respondent was that of forgery given the Board's reference to this offence throughout the decision (Report, para 121; Material, vol 1, pp 9, 15, 17, 26, 31).

[89] I also find that the Board did not err by not considering as aggravating factors the other criminal actions raised by the Appellant, since each of these form part of the Allegations. As mentioned by the ERC, the particulars of Allegations 2, 3 and 4 refer to the creation and use of the forged email by the Respondent, as well as using the Crown counsel's identity in the forged email (Report, para 124). Considering these elements as aggravating factors would be duplicative

and inconsistent with the following definition of "aggravation" as set out by *Black's Law Dictionary* (6th edition) and conduct policy (*Administration Manual*, Appendix XII-1-20 "Aggravating Circumstances"):

> Any circumstances attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is **above and beyond the essential constituents of the crime or tort itself**. [Emphasis added.]

**3. The Board erred in minimizing the impact of the Respondent's actions on the administration of justice and the Force's partnership with the Crown as an aggravating factor**

[90] The Appellant submits that the Board failed to properly consider as an additional aggravating factor the fact that the Respondent used the identity of a Crown prosecutor in forging the email, which demonstrates, according to him, "a deep contempt and profound disregard for the administration of criminal justice" (Appeal, p 84). The Appellant also contends that the Board improperly minimized the aggravating factor regarding the impact of the Respondent's misconduct on the Crown's office. The Appellant argues that, as submitted by the CAR during the hearing, the Regional Director's satisfaction with respect to the way the matter was handled by RCMP management, as expressed in his impact statement, was a result of his knowledge that they were seeking the Respondent's dismissal.

[91] On the other hand, the Respondent argues that the Board did not improperly minimize this aggravating factor. According to the Respondent, there is no evidence to support the CAR's assertion that the Regional Director was satisfied with RCMP management because the Respondent's dismissal was being sought (Appeal, p 280).

[92] I find that the Board did not err in considering the impact of the Respondent's actions on the administration of justice and the Force's partnership with the Crown. The Board specifically assessed the impact of the Respondent's misconduct on the Crown's office, based on the Regional Director's impact statement. Particularly, the Board acknowledged that the Respondent's actions not only led to the expenditure of Crown resources, given the revision of

all files involving the Respondent, but also had the potential to put the RCMP's reputation and partnership at risk (Material, vol 1, p 28). The Board also noted the Regional Director's satisfaction with the Force's response in handling the misconduct.

[93] The CAR provided her interpretation of the impact statement, contending that the Regional Director had expressed his satisfaction with the Force's response because it was seeking the Respondent's dismissal (Material, vol 2, pp 978-979). I agree with the ERC that this interpretation is speculative, given the lack of supporting evidence (Report, para 131). The Board considered all elements of the Regional Director's impact statement in its assessment of the impacts of the misconduct on the administration of justice and the Force's relationship with the Crown. In the process, I find that the Board committed no manifest or determinative error.

**4. The Board erred in its appreciation of the Respondent's personal benefit and motivation and in considering the lack of personal benefit to the Respondent as a mitigating factor**

[94] The Appellant submits that, although the Board concluded that the Respondent's motivation for his actions was to "close the file" and "help Mr. [B] get his driver's licence back" (Appeal, p 85), the notion of personal benefit was applied too narrowly by the Board given the evidence available (Appeal, p 86). The evidence to which the Appellant refers to is the Respondent's warned video statement of March 20, 2015, in which the Respondent expressed that he was under a lot of pressure and that he wanted to make the file and the stress go away (Appeal, p 87). The Appellant claims that helping Mr. B was not the only motivation for the Respondent's misconduct, and that the Board failed to consider the broader range of motivations identified by the Respondent in his video statement (Appeal, p 85). The Appellant also maintains that the Board failed to appreciate the discrepancies between the Respondent's warned video statement and his written statement of November 12, 2015.

[95] The Respondent argues that both the warned video statement and the written statement were disclosed to the Appellant in advance of the hearing. According to the Respondent, if the Appellant wanted to challenge this evidence, then he should have done so during the hearing (Appeal, p 281).

[96] As noted by the ERC, it is clear from the transcript of the warned video statement that the Respondent's motivation to help Mr. B was present from the beginning of the investigation and did not arise subsequently in his written statement (Report, para 139). In fact, as mentioned by the ERC, in the warned video statement, the Respondent refers on two occasions to his intent to help Mr. B (Report, para 139; Material, vol 2, pp 776, 779). Although the Board conceded that the Respondent was also driven by his intent to close the file in question, I find no manifest or determinative error in the Board's consideration of motives underlying the Respondent's misconduct. The Board's finding that the Respondent's actions were not primarily self-motivated is supported by the evidence.

**5. The Board erred in considering the significant stressors affecting the Respondent as a mitigating factor**

[97] The Appellant submits that, although the Board correctly concluded the absence of a causal connection between stress and the Respondent's misconduct, the evidence does not support the Board's finding that "significant stressors" affecting the Respondent were a mitigating factor (Appeal, p 88). The Appellant further submits that the psychologist's letters demonstrate that the Respondent was fit for duty and that the stress he experienced was never sufficient to modify his work routine or warrant a recommendation for medical leave (Appeal, p 89). According to the Appellant, the "significant amount of stress" referred to by the psychologist falls short of being a mitigating factor. In the alternative, the Appellant contends that very little weight should have been given to the psychologist's letters.

[98] The Respondent maintains that the Board properly considered stressors as a mitigating factor. The Respondent notes that, during the conduct hearing, the CAR informed the Board that she had no issue with the psychologist's finding that the Respondent was under a significant amount of stress prior to the events and she further stated that "[i]t appears that he was under stress at the – before the events" (Appeal, pp 281-282; Material, vol 2, pp 1070-1071).

[99] The ERC held that the Board made no error in finding that the Respondent was dealing with significant stressors at the time of the incident and in considering the Respondent's stress as

a mitigating factor (Report, para 147). I agree. I note that the Board thoroughly addressed the issue of significant stressors in view of clear evidence from the letters authored by the Respondent's psychologist, and determined that, despite the absence of a causal connection between the stressors and the misconduct, the Respondent was under significant stress relating to critical incidents encountered while on duty (Material, vol 1, p 29).

[100] Like the ERC, I also have difficulty comprehending the Appellant's sudden contention with the Board's finding that significant stressors affecting the Respondent were a mitigating factor, when such concerns were not raised by the CAR at the hearing. In fact, the CAR informed the Board at the second pre-hearing conference that she did not intend to cross-examine individuals having authored materials submitted by the Respondent, including the psychologist (Material, vol 1, p 588, para 17). In addition, during the hearing, the CAR stated that she had no issue with the psychologist's findings and that it appeared that the Respondent was under stress at the time of the events (Material, vol 2, p 1071).

[101] That being said, the weighing of evidence in the context of a conduct hearing is the Board's responsibility. The decision is owed significant deference and should not be interfered with absent of a manifest and determinative error. I accept the Board's finding that the Respondent was dealing with significant stressors at the time of the incident. I also find no manifest or determinative error in the weight placed by the Board on this mitigating factor.

**6. The Board erred in considering the evidence**

[102] The Appellant submits that the Board erred in considering the evidence, as outlined throughout his submission, and consequently imposed conduct measures that were clearly unreasonable (Appeal, p 89).

[103] According to the Respondent, the Board did not err in considering the evidence. The Respondent argues that, pursuant to subsection 24(1) of the *CSO (Conduct*), the Board was allowed to examine any material submitted by the Parties (Appeal, p 282).

[104] Given the absence of proper foundation for this ground of appeal, I reiterate the ERC's approach and I find that other sections of this analysis will address specific issues raised by the Appellant with regard to the Board's consideration of the evidence.

**7. The Board erred in concluding that the Respondent's misconduct did not amount to the repudiation of the employment contract**

[105] The Appellant argues that the Board erred in not considering the Respondent's misconduct as amounting to the repudiation of his employment contract with the Force (Appeal, p 89). In particular, the Appellant maintains that the Board did not consider the criminal behaviours admitted to by the Respondent, as well as the *McNeil* implications that make him no longer able to testify in court proceedings.

[106] On the other hand, the Respondent submits that the CAR failed to provide any evidence supporting this assertion in both her written submission on sanction and at the hearing (Appeal, p 282; Material, vol 1, p 306; Material, vol 2, p 979). In response to the Appellant's argument concerning the *McNeil* implications, the Respondent maintains that the impact of misconduct disclosure remains untested and speculative. The Respondent contends that no evidence was provided in support of the assertion that he can no longer fulfil the role of a peace officer (Appeal, p 283).

[107] The Board found that the Respondent's actions did not justify the termination of his employment and did not represent a breach of an essential condition of his employment (Material, vol 1, p 30). In order to reach the finding that the dismissal of the Respondent was disproportionate to the nature and circumstances of his contraventions, the Board considered the established contraventions, the Parties' materials, submissions and case law, the aggravating and mitigating factors, and the considerations and forfeiture ranges cited from the *Conduct Measures Guide*.

[108] Among the mitigating factors identified, the Board found that the Respondent demonstrated his remorsefulness and accountability, has no prior formal discipline, has an above-average work record, and has the continued support of peers and supervisors (Material,

vol 1, p 29). The Board also found that, based on the psychologist's assessment, the Respondent's misconduct represented an isolated incident that was out of character and that there was a minimal likelihood of any future misconduct. The Board based this finding on not only the psychologist's opinion, but also on the Respondent's demeanour and words when addressing the Board (Appeal, p 30).

[109] Although there may be some disciplinary situations where the presence of good character and rehabilitative potential are not sufficient to overcome the right to terminate a subject member, it is clear from the Board's decision that it found the rehabilitative potential of the Respondent outweighed the gravity of the misconduct. The Board described the Respondent's situation as highly unique in this respect (Material, vol 1, p 30). The review of the Board's decision shows that the evidence, particularly with respect to the mitigating factors identified and prior cases in which criminal behaviour did not result in the dismissal of the subject member, supports the Board's reasoning that dismissal was not proportionate to the nature and circumstances of the misconduct.

[110] This ground of appeal raises a question of mixed fact and law, to which significant deference on review is owed. I find that the Board committed no manifest or determinative error in evaluating and weighing the evidence leading to the conclusion that the Respondent's misconduct did not warrant his dismissal from the Force.

**8. The Board erred in substantially deviating from the suggested measures in the *Conduct Measures Guide***

[111] The Appellant contends that the Board's imposition of a forfeiture of 60 days' pay, which exceeded the 45-day forfeiture of pay threshold as suggested by the *Conduct Measures Guide* by more than 33%, should have led the Board to the conclusion that dismissal was the appropriate measure (Appeal, p 90). In support of this argument, the Appellant cited several sections of the *Conduct Measures Guide*, including the following (Appeal, p 90; *Conduct Measures Guide*, p 6):

> […] it is difficult to conceive of a situation where 45 day forfeiture of pay would be seen as insufficient, yet dismissal too harsh. It is likely, based on a

> review of adjudications from the Public Service Labour Relations Board, that a financial penalty exceeding 45 days could be viewed as having questionable utility considering that conduct measures are designed to be proportionate to the nature and circumstances of the contravention of the Code of Conduct.

[112] The Respondent emphasizes that the *Conduct Measures Guide* does not set a maximum limit for a financial penalty (Appeal, p 283; *Conduct Measures Guide*, p 7):

> [T]he new Act does not establish a maximum limit on the range of financial penalties. Parliament's intent was to ensure that RCMP managers were given the flexibility to respond to situations based on the totality of the circumstances.

[113] The Respondent argues that the Board imposed conduct measures that were available, and that it provided reasons for deviating from the suggested "hard" maximum proposed by the *Conduct Measures Guide*. The Respondent also notes that, during the hearing, upon being asked by the Board about their understanding of the legal status of the *Conduct Measures Guide*, the CAR replied that it was a guide and that the Board was not bound by it.

[114] After finding that the four allegations against the Respondent were established, the Board acknowledged the obligation to impose conduct measures that are "proportionate to the nature and circumstances of the contravention of the Code of Conduct" in accordance with subsection 24(2) of the *CSO (Conduct)* (Material, vol 1, p 22). The Board first reviewed the Respondent's personal and professional history, noting his positive performance assessments and recognized enthusiasm and leadership skills (Material, vol 1, p 23). The Board then detailed the psychological assessment of the Respondent provided in the two letters from his psychologist (Material, vol 1, pp 24-25). Next, the Board reviewed the precedents submitted by both Parties noting the range of sanctions imposed for cases concerning dishonesty, but emphasizing that these cases involved self-benefiting dishonesty (Material, vol 1, p 25). The Board noted that, contrary to those cases, the Respondent's acts were not for personal benefit (Material, vol 1, p 26). Finally, the Board identified a series of aggravating and mitigating factors (Material, vol 1, pp 27-30).

[115] Upon review of the Board's analysis for the consideration of sanction, I agree with the ERC that the Board's decision reflects a full understanding of the nature and circumstances surrounding the Respondent's misconduct (Report, para 162). The Board found that the dismissal of the Respondent would not be proportionate to the nature and circumstances of the Respondent's misconduct. Instead, it imposed a forfeiture of 60 days' pay (Material, vol 1, p 30).

[116] In closing observations, the Board noted the authority and flexibility granted to conduct boards in the new conduct regime to ensure proportionate measures (Material, vol 1, p 33). The Board considered the suggestion in the *Conduct Measures Guide* that where a 45-day forfeiture of pay is insufficient, dismissal cannot be too harsh, but found that, in this case, dismissal was too harsh. The Board found that the imposition of a 60-day forfeiture of pay was consistent with the highest loss of pay permitted under the statutory maximum of a number of other Canadian police agencies.

[117] As conceded by both the Respondent and the Appellant, the Board was not bound by the recommended measures set forth in the *Conduct Measures Guide*. In fact, the *Conduct Measures Guide* specifically addresses the flexibility given to conduct authorities and conduct boards (*Conduct Measures Guide*, p 3):

> A conduct authority can impose a measure outside of the suggested range(s), either higher or lower, but is expected to explain the particular circumstances surrounding the misconduct that would warrant a deviation from the usual range(s).

[118] I find that the Board's consideration of the *Conduct Measures Guide* was not clearly unreasonable. The Board described at length the Respondent's "highly unique circumstance" (Material, vol 1, p 30), which warranted the imposition of such a significant forfeiture of pay rather than dismissal. As recognized in *Kinsey v Canada (Attorney General)*, 2007 FC 543, para 43, "strong deference" is owed to the tribunal's choice of sanction. I find no manifest or determinative error in the Board's decision.

**9. The Board erred in not correctly considering the impact of all the aggravating and mitigating factors**

[119] The Appellant submits that the Board did not properly consider the aggravating and mitigating factors, as detailed throughout his submission, and, consequently, imposed conduct measures that were clearly unreasonable (Appeal, p 90).

[120] The Respondent contends that deference is owed to the Board on sanction appeals, and that, in this case, the conduct measures imposed upon him fall within the range of possible outcomes (Appeal, p 284). The Respondent also argues that the decision as a whole shows sufficient justification, transparency and intelligibility.

[121] Once again, the Appellant provides no foundation for this ground of appeal. For this reason, other sections of this analysis serve to address specific issues raised by the Appellant concerning the Board's consideration of aggravating and mitigating factors.

**10. The Board contravened the principles of procedural fairness in failing to call essential witnesses and without requiring them to provide *viva voce* evidence**

[122] The Appellant submits that the amendments to the *RCMP Act* substantially changed the role of conduct boards in favour of a more inquisitorial approach to adjudication (Appeal, p 91). The Appellant emphasizes that, in accordance with subsection 18(3) of the *CSO (Conduct)*, conduct boards now receive the investigative material and determine which witnesses will be called to testify.

[123] The Appellant argues that the Board contravened the principles of procedural fairness in failing to call essential witnesses in view of the quality, reliability and credibility of the evidence on which it relied to make its findings. According to the Appellant, the Board gave significant weight to inconsistent and unreliable documentary evidence. Specifically, the Board relied on the Respondent's November 12, 2015, letter rather than the Respondent's video statement of March 20, 2015, regarding his explanation as to why he forged the email exchange. The Board also erred in relying on the evidence presented by the psychologist without questioning the reasons

there were three versions of her November 10, 2015, letter. The Appellant submits that the Board's overall consideration and selectivity of the evidence, as well as its failure to call witnesses to clarify circumstances which were unclear demonstrated that the Board was biased against dismissing the Respondent.

[124] The Respondent takes the position that the Board did not contravene the principles of procedural fairness. According to the Respondent, the CAR had the opportunity to seek the testimony of witnesses and address evidence, but chose not to (Appeal, p 276). Prior to the hearing, the Parties discussed procedure at the two pre-hearing conferences and the materials relied upon by the Respondent were disclosed to the Appellant and the Board. The materials included, among others, the Respondent's statement of November 2015 as well as the letters from his psychologist.

[125] The Respondent maintains that, during the second pre-hearing conference, the Board canvassed the CAR as to whether she intended to cross-examine the author of any materials filed by the Respondent, including the psychologist (Appeal, p 277). The CAR responded that she did not (Material, vol 1, p 588). During the hearing, the CAR stated that she would not be calling any witnesses (Material, vol 2, pp 986-987). The Respondent emphasizes that the CAR had ample opportunity to request the cross-examination of witnesses, but she deliberately refrained. The CAR did not raise any concerns with regard to the reliability of the evidence or with the credibility of the authors. In the Respondent's view, the Board was transparent and provided the Parties with adequate opportunities to make submissions.

[126] With regard to the Appellant's argument that the Board contravened the principles of procedural fairness by not providing him with an opportunity to address evidence submitted by the MR, which he considers clearly inconsistent and unreliable, the CAR was fully aware of her responsibility to seek the testimony of witnesses and she was presented with several opportunities by the Board to do so throughout the proceedings (Report, para 179).

[127] First, the Record indicates that, on October 2, 2015, in compliance with subsection 18(1) of the *CSO (Conduct)*, the CAR provided the Board and the Respondent with a list of witnesses

for consideration (Material, vol 1, p 8; Material, vol 2, pp 911-912). These witnesses included the Crown prosecutor, EL, the Respondent's supervisor, Cst. PR, and the investigator of the criminal investigation, Staff Sergeant SP.

[128] Second, during the first pre-hearing conference on October 30, 2015, the CAR identified no additional witnesses (Material, vol 2, 767). On November 17, 2015, during the second pre-hearing conference, the MR filed documentation from the Respondent's psychologist. The CAR indicated that she did not require the cross-examination of anyone who authored materials filed by the Respondent, including the psychologist (Material, vol 1, p 588).

[129] Third, during the hearing, the Appellant confirmed that she did not intend to cross-examine the psychologist or present the testimony of any witnesses (Material, vol 2, pp 986-987). The CAR stated that little weight should be given by the Board to the psychologist's letters (Material, vol 2, pp 986, 1067-1071).

[130] In support of the CAR's decision not to seek the testimony of witnesses, the Appellant indicates in his rebuttal that he was satisfied that the psychologist's evidence could not be relied on; for this reason, the CAR did not wish or need to call the psychologist as a witness (Appeal, p 386). The Appellant further submits that the Board erred by choosing to rely on the psychologist's inconsistent and unreliable evidence and by not exercising its discretionary powers to call witnesses. I find that it was the Appellant's responsibility through the CAR to pursue the testimony of witnesses with the Board to establish his case (Report, para 179). If the Appellant was of the view that little weight should be afforded to what he deemed "inconsistent and unreliable" evidence submitted by the Respondent's psychologist, then he had the obligation to fully argue this point before the Board and refute the evidence in a convincing manner. The documentation from the Respondent's psychologist was filed at the second pre-hearing conference; at which time, the Appellant was also informed of the Board's intention to deem the psychologist an expert in psychology and attribute the appropriate weight to her correspondence (Material, vol 1, p 588). The Board considered this evidence reliable and was under no obligation to call witnesses on behalf of the Appellant after being informed previously that the Appellant did not require them.

[131] With regard to the Appellant's statement that the Board was biased against dismissing the Respondent, I remind the Appellant of the presumption of impartiality. This presumption can be displaced, but with convincing evidence demonstrating a reasonable apprehension of bias. In my view, the Appellant has not met this burden.

*The nature of the role of conduct boards*

[132] I now turn to the ERC's assertion that the nature of the role of conduct boards in the current regime does not differ materially from that of former adjudication boards (Report, para 177). With respect, this is a point of view I do not share. The amendments to the *RCMP Act* and the creation of the new conduct regime changed the nature of the role of conduct boards by enhancing their ability to actively manage proceedings and make conclusive determinations in a more informal and expeditious setting. In short, a conduct board is no longer reliant on the traditional to and fro presentation of evidence by the parties.

[133] A comparative analysis of a conduct board's knowledge of the case prior to the hearing, the form and presentation of evidence, and the management of witnesses provides a useful illustration.

[134] First, conduct boards now have comprehensive knowledge of the case before the hearing. In accordance with subsection 45.1(4) of the former *RCMP Act* (in effect prior to November 28, 2014), the only document provided to adjudication boards in the normal course was a bare notice of hearing containing the allegations and the particulars against the subject member. Now, conduct boards are provided with the notice of hearing, the investigation report, including witness statements and exhibits, an admission or denial of each alleged contravention of the Code of Conduct, the subject member's written submissions, any evidence, document or report the subject member intends to rely on at the hearing, as well as a list of witnesses submitted by the parties for consideration. The applicable provisions under the current process are the following:

*RCMP Act*

> 43(2) As soon as feasible after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.
>
> *CSO (Conduct)*
>
> 15(2) As soon as feasible after the members of the conduct board have been appointed, the conduct authority must provide a copy of the notice referred to in subsection 43(2) of the Act and the investigation report to the conduct board and must cause a copy of the investigation report to be served on the subject member.
>
> 15(3) Within 30 days after the day on which the 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.
>
> 18(1) Within 30 days after the day on which the notice of hearing is served, the parties must submit to the conduct board a list of the witnesses that they want to have summoned before the board and a list of the issues in respect of which they may want to rely on expert testimony.

[135] In fact, under the former *RCMP Act*, in the absence of an admission by the subject member or evidence presented by the Appropriate Officer at the hearing, a finding of misconduct could not be established by an adjudication board. Conversely, in the current regime, by virtue of subsection 23(1) of the *CSO (Conduct)*, a conduct board can render a decision based entirely on the documentary record provided before the hearing should the parties choose not to make further submissions:

> 23(1) If no testimony is heard in respect of an allegation, the conduct board may render a decision in respect of the allegation based solely on the record.

[136] Second, the rules surrounding the presentation of evidence before conduct boards have changed. Previously, evidence was presented during the hearing:

> [Repealed, 2013, c 18, s 29]

> 45.12(1) After considering the evidence submitted **at the hearing**, the adjudication board shall decide whether or not each allegation of contravention of the Code of Conduct contained in the notice of hearing is established on a balance of probabilities.
>
> [Repealed, 2013, c 18, s 29]
>
> 45.13(1) An adjudication board shall compile a record of the hearing before it, which record shall include
>
> (a) the notice of the hearing under subsection 43(4);
>
> (b) the notice of the place, date and time of the hearing under subsection 45.1(2);
>
> (c) a copy of all written or documentary evidence **produced at the hearing**;
>
> (d) a list of any exhibits **entered at the hearing**; and
>
> (e) the recording and the transcript, if any, of the hearing.
>
> [Emphasis added.]

[137] Under the current regime, in accordance with subsection 15(3) of the *CSO (Conduct)*, extensive information is filed with the conduct board prior to the hearing. Section 26 of the *CSO (Conduct)* reflects this change. While evidence and exhibits were previously produced at the hearing; now, available information and exhibits are produced beforehand and may be treated as evidence as a conduct board sees fit (see also, the long-standing powers granted by subsection 45(2) of the *RCMP Act*; and previously, section 45 of the former *RCMP Act*). This reality is demonstrated by the replacement of a specific reference to evidence produced at the hearing in former paragraph 45.13(1)(c) by a more general reference to any information provided to the conduct board in paragraph 26(c) of the *CSO (Conduct)*:

> *CSO (Conduct)*
>
> 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.
>
> [Emphasis added.]

[138] Lastly, the management of witnesses has also changed. While the adjudication registrar was previously obligated to issue a summons at the request of a party, pursuant to subsection 6(1) of the *Commissioner's Standing Orders (Practice and Procedure)*, SOR/88-367 [*CSO (Practice and Procedure)*], conduct boards, in accordance with subsections 18(3) and 18(4) of the *CSO (Conduct)*, must provide the parties a list of witnesses they intend to summon. In addition, conduct boards must give reasons for accepting or refusing any witness that is requested by the parties. The applicable provisions in both the repealed and current regimes are the following:

> *CSO (Practice and Procedure)* [Repealed, SOR/2014-293]
>
> 6(1) Any party requiring the attendance of a witness at a hearing shall forward the name of the proposed witness to the registrar who **shall** issue a summons of behalf of the board.
>
> *CSO (Conduct)*
>
> 18(3) The board **must** establish a list of the witnesses that it intends to summon, including any expert in respect of whom a party has indicated an intention under subsection 19(3) to question, and may seek further submissions from the parties.
>
> 18(4) The board **must** provide the parties with a list of witnesses that it will hear and its reasons for accepting or refusing any witness on the list submitted by the parties.
>
> [Emphasis added.]

[139] In all, the amendments to the *RCMP Act*, the repeal of the *CSO (Practice and Procedure)*, and the enactment of the *CSO (Conduct)* have meaningfully changed the nature of the role of conduct boards and, in particular, their authority to manage proceedings.

**DISPOSITION**

[140] I find that the Appellant has not established that the Board made any reviewable errors. Accordingly, I deny the appeal and confirm the conduct measures imposed by the Board.

Steven Dunn Date

Adjudicator