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2018 RCAD 2

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF A CONDUCT HEARING PURSUANT TO THE

ROYAL CANADIAN MOUNTED POLICE ACT

BETWEEN:

Commanding Officer, "D" Division

Conduct Authority

and

Constable Bruce Verhaeghe, Regimental Number 59094

Subject Member

Conduct Board Decision

John A. McKinlay

January 15, 2018

Mr. Denys Morel, for the Conduct Authority

Mr. Gordon Campbell, for the Subject Member

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SUMMARY

The Subject Member, joined by another member, attended an apartment on two occasions in response to disturbance complaints from a third party. Attending the first call, the Subject Member spoke with the third party and with a female resident, A.T. On the second call, almost one hour later, the members spoke with not only the caller and A.T., but also a male inside the apartment who provided a name that came back negative when looked up with the Canadian Police Information Centre. On neither occasion did A.T. indicate that intimate partner violence or abuse had taken place. The Subject Member understood that the woman's infant child was asleep in a room with the maternal grandmother.

Back at the Detachment, the Subject Member took further steps to identify the male, located a photograph that appeared to be him as well as an electronic entry to the effect that he was the subject of a Recognizance that prohibited his consumption of alcohol, proximity within 100 feet of A.T.'s residence, and contact or communication with A.T., except through a third party to exercise his child access. The Recognizance could not be located. The Subject Member and the other member actively discussed whether grounds existed to arrest of the male individual for a breach of the court order, as the grandmother's presence might be viewed as permitting contact for child access. The Subject Member worked on other court files until the end of his shift, which was his last one before scheduled days off. He did not conclude the file, as he considered further investigation necessary.

The Subject Member gave a statement to an external, out-of-province Serious Incident Response Team (SIRT) investigation. The Subject Member faced two allegations concerning his failure to perform his duties with diligence and discreditable conduct for making specific "deceptive and untruthful explanations" to the SIRT investigation.

The failure to diligently investigate allegation was quashed, as it was initiated beyond the one-year time limitation under subsection 41(2) of the *RCMP Act.* A time extension had only been obtained to extend the time for the completion of a conduct meeting, not for a conduct hearing. The allegation concerning the Subject Member's explanations to the SIRT investigation was not established.

REASONS FOR DECISION

INTRODUCTION

[1] With the agreement of the parties, this matter was adjudicated on the basis of the record before the Conduct Board, including audio recordings of statements, the Subject Member's responses to the allegations under subsection 15(3) of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], and other materials filed by the Subject Member.

[2] On April 26, 2016, I was appointed as Conduct Board for this matter. The Subject Member was served with the *Notice of Conduct Hearing* and supporting investigation materials on November 15, 2016. Complying with an extension from the Conduct Board, the Subject Member filed his responses, under subsection 15(3) of the *CSO (Conduct)*, on January 18, 2017. Pre-hearing conferences were conducted on February 8, March 6, April 20, June 7 and June 26, 2017. With the agreement of all parties, all pre-hearing conferences after February 8, 2017, also served as pre- hearing conferences for the Subject Member's colleague, Constable P. (the Other Member), whose matter involved a separate *Notice of Conduct Hearing* and investigative package on related allegations. A joint hearing date was set for July 25, 2017.

Preliminary motions

[3] At the pre-hearing conference on March 6, 2017, I directed the Conduct Authority Representative (CAR) to identify the specific "untruthful and deceptive explanations" alleged in the Particulars for Allegation 2. On April 19, 2017, the CAR specified in writing the impugned explanations, which were considered as formal amendments to the Particulars.

[4] At a joint pre-hearing conference on June 26, 2017, and after a review of the parties' submissions on the subject members' joint motion to quash Allegation 1, I orally decided that Allegation 1 of the Subject Member's Notice should be quashed. A formal time extension had been obtained from the Commissioner to extend the time for the completion of a conduct meeting, but not to initiate a conduct hearing. In the Minutes for this joint pre-hearing conference, I reduced my oral decision to writing, stating:

> […]
>
> I find that the date for initiation of a conduct board to adjudicate Allegation 1 against each [subject member] was February 1, 2016.
>
> I find that for Allegation 1 as alleged against each [subject member], an extension was only granted to the Conduct Authority to impose conduct measures via a conduct meeting, with the extension date being until May 2, 2016.
>
> Accordingly, when the Conduct Authority initiated the conduct board process against each subject member on April 26, 2016, with respect to Allegation 1 as alleged against each subject member, I find this initiation was made beyond the one year initiation time limit of February 1, 2016.
>
> I find the extension granted for imposition of conduct measures by the appropriate level of conduct authority via a conduct meeting did not constitute an extension to initiate a conduct board process after February 1, 2016. An extension under subsection 47.4(1) of the [*Royal Canadian Mounted Police Act*, RSC, 1985, c R-10], to extend the conduct board initiation date from February 1, 2016, to include April 26, 2016, was required in order to exceed the time limit under subsection 41(2) of the Act, and such an extension was never sought by the Conduct Authority concerning Allegation 1 as alleged against each subject member. The extension request filed for each subject member's matter was explicit in seeking an extension to impose conduct measures, and this is not a case where any clerical or typographical error is present.
>
> I acknowledge and can do no better than adopt the CAR's summary of the situation: "[T]he initiation of a hearing for allegation 1 on April, 26, 2016, fell outside the prescribed one year limitation period which expired February 1, 2016. As such, a hearing before the Conduct Board could not be initiated for the purposes of allegation 1."
>
> Therefore, while there may be some redundancy in my choice of terms, I hereby quash, strike and declare of no force and effect:
>
> - Allegation 1 contained in the Notice of Conduct Hearing for [the Subject Member].
>
> […] [*Sic throughout*]

ALLEGATION

[5] Following a Code of Conduct investigation, the amendment of the Particulars to identify the specific, alleged "deceptive and untruthful explanations", and my decision to quash Allegation 1, the Subject Member faced the following allegation:

Allegation 2

On or about the 18th day of June, 2015, at or near Thompson, in the Province of Manitoba, [the Subject Member] engaged in discreditable conduct in a manner that is likely to discredit the Force contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police

Particulars of the Contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) and posted to Thompson RCMP detachment in "D" Division.

2. On June 18th, 2015, you provided a statement to the Nova Scotia Serious Incident Response Team (SIRT) pertaining to your involvement in PROS file 2015-92139 (first disturbance call) and PROS file 2015-92294 (second disturbance call,.

> a) In your statement, you provided deceptive and untruthful explanations regarding your determination that [R.S.] was not arrestable and to justify not enforcing the court order made against him on January 8th, 2015, with the following release conditions: that he abstain from consumption and possession of any alcohol; that he not contact or communicate with [A.T.] except through a third party to arrange access to his child; and, that he not attend within 100 meters of [A.T.'s] residence.

The "deceptive and untruthful explanations" were:

> **Page 19**

"[…] um, got a [Canadian Police Information Centre (CPIC)] printout on him, which basically s', saying that he's on charge for assault on her, and not supposed to be in contact with her um, that there's uh, some conditions regarding where he's supposed to reside, I believe, and I don't think there was any curfews or anything like that. Um, the only other thing that I recall is there was something in there regarding he's allowed to be, or in contact regarding […] child care."

> **Pages 24-25**

> *"Well, w', really we needed to prove that it was him,* […] *okay, we also needed to know that um, he wasn't there for that reason. Right, like we had no reason to know why he was there on that night. So we didn't know whether he was there dealing with the kid, because she wasn't feeling well, or, e', mom had arranged for him to be there,* […]*"*
>
> […]
>
> […] *didn't actually say he couldn't be at that location, it just said, I think within her, right?*
>
> *I think within a hundred meters of h', her, right?*

> […] *I mean, th', there's a possibility that, you know, that could be interpreted in that way, right?*
>
> *Um, th'; there's also lots of situations in the north where people don't have anywhere else to go to live,* […] *so they might arrange for him to come to one place, be with the kids, she might go somewhere else and then come back, or something along those lines.*
>
> *Um, sh', I don't think she was in the state where she was gonna go anywhere, like just looking at her and talking to her and, and what she was saying, she was in a lot of pain, a lot of discomfort. She, I, I got the impression that that's why mom was there, was to help her with the baby."*
>
> **Page 20**
>
> *"So by this time it's probably,* […] *two, three o'clock in the morning, I'm done at four.*
>
> *So, I make, write up the file, say look, we're, we're gonna need to do some more investigation here. We're gonna go back ... uh, talk ta her, ... talk ta him, ... ID him, prove that it ... really is ... the* [R.S.] *guy, 'cause all we've got is a picture that looks like this guy, ... right? Um, and then if he's if he's living there or if he's in contact with her, he's not supposed to be, then we were gonna breach him."*
>
> **Pages 23-24**
>
> [INVESTIGATOR] *"But you thought it was* [R.S.]*"*
>
> [SUBJECT MEMBER]: *"When we looked at the picture on PROS, ... yeah, yeah."*
>
> **Pages 21-22**
>
> *"Appeared ... intoxicated, yeah. Well I didn't, I didn't smell any liquor on him, ... um, I didn't, I didn't actually get in, much in the apartment, I was ... w', there was no, nobody was drinking.*
>
> *There was no evidence ... um, that he had been drinking um, and we certainly didn't see any booze on ... him ... at that time. Yeah, but in ... but in my report, yeah,... it, it, you know, he did appear intoxicated.*
>
> *He had the appearance that he ... was under the influence of something."*
>
> [*Sic throughout*]

[6] With the parties' agreement, I went on to adjudicate Allegation 2 on the basis of the record before me. The Member Representative (MR) had indicated in his written submissions that if I found sufficient evidence to establish the allegation on the basis of the record, then he

reserved the right to request that the Subject Member testify if credibility was in issue. It was not necessary for me to consider the propriety of this position as, on July 10, 2017, I advised the parties by email that upon review of the record, I found that Allegation 2 was not established. I indicated that my email served to reduce to writing what might otherwise be an oral decision on Allegation 2, the abbreviated decision served only to communicate my allegation-phase decision on the merits, with reasons to follow. Therefore, this email was subject to the caveat that I reserved the right to provide and expand upon, clarify and explain my reasons and findings in greater detail in this final written decision.

Submissions on Allegation 2

[7] The CAR alleged that, in his statements to the SIRT, the Subject Member provided "deceptive and untruthful explanations" regarding his determination that the male encountered on January 24, 2015, was not arrestable and to justify the Subject Member not enforcing the court order made against the male. The making of these explanations was alleged to contravene section 7.1 of the Code of Conduct, which is an appendix to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[8] The RCMP External Review Committee (ERC) has offered its analysis on the nature of conduct "not likely to discredit the Force" [ERC C-2015-001 (C-008), February 22, 2016], and I accept and adopt this approach to section 7.1 of the Code of Conduct.

[9] Paragraphs 92 and 93 of the ERC's commentary provide as follows:

> Section 7 of the Code of Conduct requires that members behave in a manner that is not likely to discredit the Force. Section 7 differs from its predecessor provision found in subsection 39(1) of the prior Code of Conduct. Section 39(1) required that members not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force. The ERC and the Commissioner have stated that the test under section 39(1) asked whether a reasonable person with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular would be of the opinion that the conduct was (a) disgraceful and (b) sufficiently related to the employment situation so as to warrant discipline against the member. [...]

> Section 7 of the Code of Conduct does not import the requirement of disgraceful or disorderly conduct in order to discredit the Force. However, the Force's Code of Conduct Annotated Version (2014) largely adopts the test under the prior Code of Conduct for discreditable conduct under the new section 7, noting that "Discreditable behaviour is based on a test that considers how the reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the behaviour." The language used in the Code of Conduct Annotated Version (2014) is consistent with the tests established in other police jurisdictions to establish that misconduct is "likely to discredit a police force". As pointed out in P. Ceyssens' Legal Aspects of Policing, Volume 2, 2002 […] "...where statutory language governing discreditable conduct addresses acting in a manner "likely to discredit the reputation of a police force", actual discredit need not be established. Rather, the extent of the potential damage to the reputation and image of the service should the action become public knowledge is the measure used to assess the misconduct. In conducting this assessment, the conduct must be considered against the reasonable expectations of the community."

[10] The MR adopted many of the legal arguments advanced in the matter involving his colleague, the Other Member. The MR argues that the CAR's reliance on section 7.1 is incorrect and that the Subject Member should have faced an allegation under section 8.1 of the Code of Conduct, which provides:

> Members provide complete, accurate and timely accounts pertaining to the carrying out of their responsibilities, the performance of their duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force.

[11] It is true that the November 2014 *Conduct Measures Guide* (the Guide) states at page 42 that reliance on section 7.1 of the Code of Conduct is envisaged to encompass a variety of conduct "not otherwise provided for" under the Code of Conduct. But there is no legal basis to find Allegation 2 not established, or invalid or inoperative, just because the impugned acts and omissions of the Subject Member could, or should, have been alleged under the more specific and applicable section 8.1.

[12] Relying on the commentary at page 64 of the Guide, the MR argues that an allegation of misconduct under section 8.1 was indicated, as it was misconduct tantamount to lying to a superior during an internal investigation that the CAR alleged; misconduct that, according to the

Guide, requires proof that false information was willfully or intentionally provided. I note that, while the Guide may adopt the requirement of willfulness, the wording of section 8.1 does not. On its face, an account that is incomplete, inaccurate or lacking timeliness may contravene section 8.1, whatever the member's intentions might be.

[13] However, given that specific "deceptive and untruthful explanations" are said by the CAR to have brought discredit on the RCMP under section 7.1, the use of the words "deceptive" and "untruthful" necessarily requires the CAR to prove not only deficient explanations, but explanations that are deliberately or intentionally so. I do not believe it is open to me, given how the Subject Member's acts and omissions are particularized, to ignore the element of intention that is implicit in the wording used.

[14] The CAR argues that, notwithstanding the Subject Member's submissions describing the basis on which he offered genuine explanations, some explanations were so unreasonable that they should be considered deceptive and untruthful and, therefore, bring discredit on the Force.

SIRT statement

[15] In the early morning hours of January 31, 2015, A.T. was found at her apartment bleeding badly from knife wounds that proved fatal. R.S., the male encountered on the second attendance at the apartment on January 24, 2015, was charged with her murder. (He was acquitted in April 2017; the trial judge found that the fatal wounds of A.T. were likely self-inflicted.)

[16] After completion of a Memorandum of Understanding, the Province of Manitoba engaged the Nova Scotia SIRT to conduct an independent, external review of all domestic violence-related investigations related to A.T. and R.S., and to identify any potential criminal culpability, as well as any gaps in policy, operational response and training. Arguably, these terms of reference permitted observations and recommendations of a disciplinary nature.

[17] The SIRT did not constitute a "court in Canada"; its findings neither engaged subsection 23(2) of the *CSO (Conduct)*, nor constrained this Conduct Board's role in adjudicating the

Subject Member's matter. It remained necessary for me to apply the balance of probabilities standard of proof when assessing the information in the record. The findings and opinions expressed in the resulting SIRT report did not operate to shift any burden to the Conduct Board to explain why it did not agree with SIRT's findings and opinions.

[18] Unlike the circumstances of the SIRT investigation, in this conduct process, the Conduct Board was able to assess the Subject Member's explanations to a SIRT investigator after consideration of his responses, under subsection 15(3) of the *CSO (Conduct)*, and further written submissions by his MR. In addition, the forensic medical evidence adduced at the criminal trial of R.S. establishing A.T.'s self-inflicted fatal wounds was not available to the SIRT when it issued its report on November 13, 2015.

[19] As it was first issued, the *Notice of Conduct Hearing* for the Subject Member's matter contained Allegation 1, which alleged a contravention of section 4.2 of the Code of Conduct for failure to enforce R.S.'s breach of his Recognizance on January 24, 2015. For the reasons provided above, this allegation was struck, as it was not initiated within the statutory time limitation period. Therefore, except as is necessary to adjudicate the remaining Allegation 2, it is not appropriate for me to comment on the investigative diligence of the Subject Member on January 24, 2015, nor his response to the call received on January 31, 2015. What remains at issue is whether the specific explanations he provided to the SIRT investigator were deceptive and untruthful.

[20] The CAR provided written submissions on why specific portions of the Subject Member's statement to the SIRT investigator should be considered "deceptive and untruthful explanations".

Recognizance (CPIC conditions)

Pages 19, 24 and 25

[21] It is important to note that the Subject Member was interviewed by SIRT on June 18, 2015, concerning events that began on the night of January 24, 2015. When interviewed, it is

apparent that the Subject Member does not have a printed copy of the CPIC printout in front of him, which contained the conditions restricting R.S.'s contact and communication with A.T. and permitting him to arrange child access through a third party.

[22] Accordingly, assessed in isolation, there is certainly nothing deceptive or untruthful about the Subject Member's statements as found in the impugned excerpt at page 19. It was the Subject Member's accurate recollection that the CPIC printout indicated that R.S. was "on charge for assault" on A.T., he was "not supposed to be in contact with her", and there were conditions on where he was supposed to reside but no curfew. The Subject Member adds that "there was something in there regarding he's allowed to be, or in contact regarding … child care". This last recollection does not fully and accurately capture the condition concerning R.S.'s child access with his infant child, but it is apparent, by how the recollection is worded, that it does not purport to describe the child access condition exactly. In this excerpt, there is nothing the Subject Member says which provides an explanation of his understanding of the conditions that is deceptive or untruthful.

[23] When the Subject Member makes the statements contained in the impugned excerpt at pages 24 and 25, it is apparent that he does not recall any condition prohibiting R.S. from being at the specific apartment address, only a 100-metre requirement on R.S.'s proximity to A.T. This is important, as it clearly influences the Subject Member's subsequent explanations. It is apparent that owing to the obvious difficulty in walking being experienced by A.T., the Subject Member understood the presence of A.T.'s mother was likely to assist with child care. A.T.'s difficulty in walking made it unlikely, in the Subject Member's view, that A.T. would go elsewhere during any child access visit that R.S. might arrange. Whether or not the Subject Member considered it an argument that would succeed if tested legally in a breach of conditions court hearing, he was simply stating that "there's a possibility, you know, that could be interpreted that way, right?"

[24] The terms of R.S.'s Recognizance may appear plainly and unequivocally stated, but it is clear from the Subject Member's statement that he perceived a possible complication when A.T. was not able to vacate the apartment where the infant child was located, A.T. appeared to require

assistance caring for the infant child, and it was, based on the Subject Member's experience in "situations in the north", unlikely R.S. had a place to take or host the infant child to exercise access. Contrary to the CAR's submission on Allegation 2, the Subject Member did not form a "conclusion" that R.S. could be in contact with A.T. for child access because her mother was present, he plainly decided that the issue needed further follow-up. It was plainly his intention to breach R.S. if the male at the apartment was sufficiently identified as being R.S., and if no issue involving child access prevented a proper charge of breach being filed against R.S.

Identifying R.S.

Page 20

[25] The Subject Member's impugned excerpt at page 20 is entirely consistent with his entry on the file of the acronym "SUI" (still under investigation). He tells SIRT what this further investigation would entail: talking to A.T., talking to R.S., positively identifying the male in the picture as being R.S., and then "if he's if he's living there or if he's in contact with her, he's not supposed to be, then we were gonna breach him". The issue of how urgently these further investigative inquiries should have been made by the Subject Member was encompassed by the now quashed Allegation 1. There is nothing deceptive, untruthful or even grossly unreasonable about the Subject Member's explanation of his intended course of action, or the need, in his opinion, to take that course of action. The issue of the appropriate urgency to be given any follow-up investigation does not play a part in the adjudication of Allegation 2.

Pages 23 and 24

[26] The CAR points to the Subject Member's response – "When we looked at the picture on PROS" he thought it was R.S. – as undermining the "sudden uncertainty" of the Subject Member and the need to return to the apartment, as part of a further investigation, to "ID him, prove that it ... really is ... the [R.S.] guy, 'cause all we've got is a picture that looks like this guy, ... right?" I have carefully reviewed the entire audio recorded statement of the Subject Member. While demeanour evidence must be treated with particular caution, and certainly not used as the sole determinant of credibility, the manner in which the Subject Member agrees that he thought R.S.

was pictured is spontaneous and offered without hesitation. "A picture that looks like this guy" certainly does not denote a high level of certainty, and any assessment of the subsequent impugned response must take this into account. The degree to which the Subject Member was convinced that it was R.S. in the photo on PROS may be relevant to how urgently he should have returned to the apartment to further a breach of conditions investigation, or even to lay such a charge, but it does not render his responses on the identification of R.S. deceptive or untruthful. While on its face it denotes a higher level of certainty, and references agreement by the Other Member, I do not find the Subject Member's entry on the file: "Constable [V.] located a photograph on PROS and both he and [the Other Member] identified the male they had dealt with as [R.S.] DOB: 19XX-XX-XX" renders his responses deceptive or untruthful.

R.S. intoxicated

Pages 21 and 22

[27] The CAR's submission on this response by the Subject Member draws on the perspective that there was sufficient evidence to charge R.S. with breach of the condition that prohibited his possession and consumption of alcohol, and the sufficiency of this evidence is made plain by the Subject Member's file entry: "the male was clearly intoxicated, with glossy blood shot eyes, slurred speech, belligerent with police and he kept asking police to leave so he could go to bed". I do not find the Subject Member's impugned response to be deceptive or untruthful. The Other Member did not even note R.S. as being intoxicated and gave no indication that she smelled alcohol in her attendances at the apartment. The Subject Member's indication that he did not smell alcohol is, therefore, corroborated. The Subject Member readily confirmed his observation of R.S.'s condition that he was intoxicated, but (in what I view as an effort to be forthcoming about the limited information on which he based his view of R.S.'s intoxicated state) he relates his observations when looking into the apartment. Nobody was drinking, "we certainly didn't see any booze on him at the time", but R.S. did appear under the influence of something. Absent sufficient evidence of the possession or consumption of alcohol, an immediate charge for breach does not appear appropriate or lawful.

FINDING ON THE ALLEGATION

[28] The Subject Member attended A.T.'s apartment on two occasions on the night of January 24, 2015. Both calls were dispatched as "disturbance" type calls and were the result of telephone complaints received from a single resident located in an apartment below A.T.'s apartment. Without reciting all of the information received by the Subject Member in those two attendances, and the observations he made and the beliefs he genuinely formed, it is my finding that the Subject Member reasonably did not believe any form of partner assault or abuse had been perpetrated at that apartment on that night. Another member attending those calls may well have conducted further investigative inquiries on scene, but legal authority for a police officer to enter a private dwelling must always exist.

[29] Even if the Subject Member understood that the male in the apartment with A.T. had been shouting, the Subject Member determined in good faith that no domestic dispute involving A.T. and R.S. had occurred. This determination involved the Subject Member's consideration of A.T.'s physical appearance and demeanour, and the lack of any complaint or expressed safety concern in her two interactions with the Subject Member and the Other Member.

[30] The focus of Allegation 2 relates to certain explanations provided by the Subject Member in his statements with SIRT investigators. Statement excerpts are alleged to be "deceptive and untruthful explanations" regarding the Subject Member's determination that R.S. was not arrestable and to justify not enforcing the court order issued on January 8, 2015, that placed conditions on R.S. The CAR has alleged that the provision of these explanations constitutes discreditable conduct, in contravention of section 7.1 of the Code of Conduct.

[31] Above, I have provided my analysis for each of the impugned statements made by the Subject Member. I confirm my finding that no impugned statement constitutes a deceptive or untruthful explanation; collectively, there is no deceptive or untruthful intention exhibited. I do not find any impugned statement to be so unreasonable that it must be found deceptive or untruthful. More generally, after reviewing the entire record, including an assessment of the terms of R.S.'s Recognizance and the circumstances encountered by the Subject Member, on a

balance of probabilities, I do not find his explanations for his investigative actions or lack of action to be deceptive or untruthful.

CONCLUSION

[32] With respect to Allegation 2, I find that the allegation is not established.

January 15, 2018

John A. McKinlay

Conduct Board