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File 2019 RCAD 02

ACMT 2018-33810



ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

a conduct hearing pursuant to the

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

BETWEEN:

Commanding Officer, "E" Division

Conduct Authority

and

Constable Troy Bergmann

Regimental Number 56042

Subject Member

RCMP Conduct Board – Record of Decision

Christine Sakiris

February 13, 2019

Representative for the Conduct Authority: Ms. Shahana Khan

Representative for the Subject Member: Mr. Gordon Campbell

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SUMMARY

The original *Notice of Conduct Hearing* contained six allegations of discreditable conduct, arising out of an intimate relationship between the Subject Member and a young woman. The *Notice of Conduct Hearing* was subsequently amended to reflect a single allegation of discreditable conduct, contrary to section 7.1 of the RCMP Code of Conduct. An oral decision in this matter was delivered on December 12, 2018. The Conduct Board found the allegation to be established. A joint proposal on measures was accepted by the Conduct Board and the following conduct measures were imposed: a) a financial penalty of 45 days’ pay; and b) a transfer to another location within “E” Division. The Conduct Board emphasized that the measures imposed are just short of dismissal. Any future contravention of the Code of Conduct will be seriously reviewed by the appropriate conduct authority and could lead to a dismissal from the Force.

INTRODUCTION

[1] On March 12, 2018, the Commanding Officer and Conduct Authority for “E” Division (the Conduct Authority) signed a *Notice to the Designated Officer* requesting a conduct hearing be initiated in relation to this matter. I was appointed as the Conduct Board in this matter,

pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], on March 13, 2018.

[2] The original *Notice of Conduct Hearing* in this matter contained six allegations and was signed by the Conduct Authority on May 14, 2018. It was served on the Subject Member, together with the investigation package, on May 31, 2018.

[3] All six allegations related to alleged contraventions of section 7.1 of the RCMP Code of Conduct, arising out of an intimate relationship between the Subject Member and a young woman who will be referred to as “Ms. P.”

[4] The Subject Member provided his response to the original *Notice of Conduct Hearing*, pursuant to subsection 15(3) of the *Commissioner’s Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*], on August 24, 2018.

[5] As is required in this process, I reviewed a copy of the *Notice of Conduct Hearing* and of the investigation package (the Materials), as received on June 7, 2018 as well as the Subject Member’s response pursuant to subsection 15(3) of the *CSO (Conduct)*.

[6] Following two pre-hearing conferences, hearing dates were set. Proceedings were to begin in Vancouver, on December 5 and 6, 2018, with the testimony of Ms. P., and then continue here in Ottawa from December 12 to 14, 2018.

[7] On September 27, 2018, the Conduct Authority Representative (CAR) advised that Ms. P. was reluctant to testify. The parties subsequently identified a willingness to explore a resolution to this matter which would not require Ms. P. to testify.

[8] At a third pre-hearing conference on November 5, 2018, the CAR advised of her intent to amend the allegations. The Member Representative (MR) was in agreement. It was anticipated that a joint proposal on measures would follow.

[9] Following a fourth pre-hearing conference on November 16, 2018, the Conduct Board confirmed that Allegations 1, 3, 4, 5, and 6 were withdrawn. Allegation 2 was amended and the

Subject Member provided his response to the amended allegation, pursuant to subsection 15(1) of the *CSO (Conduct)*, on November 21, 2018.

[10] As a result, there remained a single allegation of a contravention under section 7.1 of the RCMP Code of Conduct before the Conduct Board.

[11] A hearing was conducted, by videoconference, on December 12, 2018. By way of an oral decision, the Conduct Board found Allegation 2, as amended, to be established. The Conduct Board also accepted the parties' joint proposal on conduct measures. This written decision incorporates and expands upon that oral decision.

ALLEGATION

[12] As noted, there is one allegation before the Conduct Board. Allegation 2, as amended, reads as follows:

Allegation 2:

Between January 1, 2013 and October 1, 2015, at or near [locations redacted], in the Province of British Columbia, [the Subject Member] engaged in discreditable conduct, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars

1. At all material times you were a member of the Royal Canadian Mounted Police posted to "E" Division, at [B.] Detachment, then [R. M.] detachment, in British Columbia.
2. You met [Ms. P.] in your capacity as a civilian Sea Cadets instructor while [Ms. P.] was a Sea Cadet. While volunteering, you would wear either a Sea Cadets uniform, your RCMP uniform, or civilian clothes.
3. On April 3, 2018, when you were 28 years of age, you sent [Ms. P.] Facebook text messages. At the time [Ms. P.] was 17 years of age and in grade 12 in high school.
4. [Ms. P.] turned 18 years old on May 31, 2013.
5. During June 2013, you would spend time alone with [Ms. P.] at parks and at your personal residence. Your relationship became intimate and romantic.
6. You and [Ms. P.] agreed to keep your relationship a secret, including not telling her parents.

7. In July 2013, shortly after [Ms. P.]’s 18th birthday, you and [Ms. P.] had sex for the first time.

8. As a Sea Cadets instructor you were in a position of authority over [Ms. P.]. Despite this power imbalance, you pursued and engaged in an improper relationship with [Ms. P.] soon after she aged out of cadets.

9. Throughout your relationship with [Ms. P.], while you were in a position of trust as a police officer, you demonstrated possessive, controlling and jealous behaviour. For example, one evening while at your brother’s residence you became aware of text messages between [Ms. P.] and her sister. [Ms. P.]’s sister asked her if the “boys” were “cute” and if she was “feeling alone” at university. [Ms. P.] responded “kinda”. A heated argument ensued which made [Ms. P.] want to leave the apartment/condominium. [Ms. P.] later reported that at the time she was scared and did not feel safe.

10. Throughout the course of your relationship, you engaged in consensual “horseplay” with [Ms. P.]. This was in the context of you showing her police defensive moves. In comparison to [Ms. P.], you are of a much larger physical stature. [Ms. P.] described you as being stronger than her and that she was physically smaller than you. On more than one occasion you failed to properly account for your larger physical stature and strength and you applied sufficient physical force on [Ms. P.] that made her uncomfortable, for example, when wrestling with [Ms. P.] and holding [Ms. P.] face down with your knee on her back. On one occasion you pinched [Ms. P.]’s arm causing bruising.

11. The legal drinking age in the province of British Columbia is 19. [Ms. P.] turned 19 years old on May 31, 2014. During your relationship with [Ms. P.] you occasionally provided [Ms. P.] with alcohol while she was under the legal drinking age.

12. You therefore engaged in conduct that is discreditable and likely to discredit the Force.

[13] The Subject Member admitted to Allegation 2 and all particulars, as amended, in his response, pursuant to subsection 15(1) of the *CSO (Conduct)*, dated November 21, 2018.

Decision on the allegation

[14] Section 7.1 of the RCMP Code of Conduct states: “Members behave in a manner that is not likely to discredit the Force.”

[15] The test for “discreditable conduct” under section 7.1 of the Code of Conduct is as follows. The Conduct Authority must prove the acts that constitute the alleged behaviour, as well as the identity of the member who is alleged to have committed these acts. By virtue of the Subject Member’s admission to the allegation and particulars, I find that these first two elements of the test are met.

[16] I must now determine whether the third element of the test is established, namely whether the Subject Member’s behaviour is likely to discredit the Force and that it is sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

[17] The Subject Member’s behaviour, as set out in the particulars, is problematic on three fronts. First, the Subject Member engaged in behaviour that is in direct conflict with his position of trust as a police officer. He represented the RCMP in his role as a volunteer with the Sea Cadets. It was in this capacity that he initiated a personal relationship with a sea cadet. Parents send their teenagers to this program as a safe place where they can learn skills and grow as individuals. They are certainly not expecting that instructors will seek to initiate a romantic relationship with them. It is clear from the Materials that the Subject Member was well aware that doing so was frowned upon within the Sea Cadets organization. While Ms. P. may have been 18 years old when the consensual intimate relationship began, there was a clear power imbalance here that should have caused the Subject Member to take pause.

[18] Second, the Subject Member engaged in behaviours which, while not of a criminal nature, reflect a use of force in a domestic relationship. While the “horseplay” or instruction in police defensive moves may have been consensual, the Subject Member exerted physical force on Ms. P. which did not appropriately account for his much larger stature. The Subject Member further demonstrated possessive, controlling and jealous behaviour which caused Ms. P. to feel unsafe.

[19] Third, the Subject Member provided Ms. P. with alcohol while she was under the legal drinking age in the Province of British Columbia. As a police officer, the Subject Member has a duty to uphold the law.

[20] It is well established that police officers are held to a higher standard than the general public. Members of the RCMP must adhere to the Code of Conduct both on and off duty. The integrity of the Force is put at risk if its officers are called upon to enforce laws and then flout those same laws in their personal life.

[21] I find that the Subject Member's behaviour, as set out in the particulars, is related to his duties as a member of the RCMP and is likely to discredit the Force.

[22] Therefore, I find that Allegation 2 is established on a balance of probabilities.

CONDUCT MEASURES

[23] Having found that the allegation is established, I am required, in accordance with subsection 45(4) of the *RCMP Act* and the *RCMP Conduct Measures Guide*, to impose "a fair and just measure that is commensurate to the gravity of the contravention, the degree of blameworthiness of the member, and the presence of mitigating and aggravating factors". Pursuant to paragraph 36.2(e) of the *RCMP Act*, conduct measures must be "proportionate to the nature and circumstances of the contravention of the Code of Conduct, and where appropriate, [...] are educative and remedial rather than punitive".

[24] On December 6, 2018, the CAR and the MR provided a joint submission on conduct measures. The proposed conduct measures are a forfeiture of pay of 45 days and a transfer to another location within "E" Division. These constitute serious conduct measures under section 5 of the *CSO (Conduct)*.

[25] When presented with a joint submission on conduct measures, there are very narrow circumstances in which a Conduct Board may refuse to accept the proposed conduct measures.

[26] The Supreme Court of Canada has recognized the value of settlement discussions, as well as the strong policy reasons which favour the promotion of certainty to the parties, when a settlement is reached.¹

[27] Generally speaking, courts or administrative tribunals will not override a settlement reached by the parties, unless doing so would be against the public interest.

[28] Therefore, I must determine whether accepting the proposed conduct measures would be against the public interest. This is not a question of whether the conduct measures proposed are the same as what I would impose. Rather, the public interest test sets a much higher threshold.

[29] In its 2016 *Cook* decision, the Supreme Court of Canada provided the following guidance, which is applicable to administrative tribunals:

[...] a joint submission should not be rejected lightly [...] Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of [in this case, the conduct process] had broken down.²

[30] In support of their joint proposal, the parties referenced two decisions from RCMP conduct boards³, excerpts from the RCMP *Conduct Measures Guide*, and the Subject Member's performance evaluations from 2008 to 2016. I have reviewed the RCMP conduct board decisions in detail, and draw from them the following principles:

- a. A conduct board has the flexibility to impose significant measures, short of dismissal, where it is warranted.
- b. While there is no maximum number of days that may be imposed as a financial penalty, it is largely accepted that if a conduct board is considering measures in excess of 45 days,

¹ See for example *Rault v Law Society of Saskatchewan*, 2009 SKCA 81 (Canlii) at paragraph 19; and *R. v Anthony-Cook*, 2016 SCC 43 [*Cook*].

² *Cook*, supra note 1, at paragraph 34.

³ 2016 RCAD 4 [*Wyant*]; and 2018 RCAD 4 [*Jenkins*]

dismissal may be the more appropriate remedy. In short, a financial penalty of 45 days is one small step away from dismissal.

[31] In order to determine whether the proposed measures are against the public interest, it is helpful to have some sense of what the possible measures, short of dismissal, may be. The RCMP *Conduct Measures Guide* is a useful reference in this regard. However, it is important to note that the *Conduct Measures Guide* is just that, a guide. It is not meant to be prescriptive.

[32] While the facts of this case do not squarely align with the examples of impugned behaviour under section 7.1 of the RCMP Code of Conduct, as set out in the RCMP *Conduct Measures Guide*, there are some parallels which can be drawn with contraventions involving an abuse of position. Upon my review, I would place the range of days for which a financial penalty could be imposed as between 21 and 45 days. The mitigating and aggravating factors must then be considered.

Mitigating and aggravating factors

[33] The parties have outlined several mitigating and aggravating factors in this case. Of these, I accept the following mitigating factors:

- a. The Subject Member's admission of the amended allegation and particulars has avoided a contested hearing. This prevented the necessity of calling Ms. P. as a witness.
- b. The Subject Member has no record of formal discipline.
- c. The Subject Member has received very positive performance evaluations. These describe a member who is conscientious, professional and who takes the initiative.
- d. The Subject Member cooperated with the internal investigation and his admission to the allegation demonstrate a desire to resolve the matter quickly.

[34] Of the many aggravating factors presented, I have retained the following:

- a. The Subject Member represented himself as a police officer while volunteering at Sea Cadets. Ms. P. was aware that he was a police officer. Ms. P. and the Sea Cadets organization placed trust in the Subject Member as a police officer.
- b. The Subject Member had previously been warned against improper relationships between instructors and Sea Cadets. Ms. P.'s mother had, prior to the Subject Member's relationship with Ms. P., reported to the Sea Cadets Commanding Officer her concerns of the Subject Member engaging in a relationship with Ms. P.'s older sister, who had expressed an interest in him. The Sea Cadets Commanding Officer spoke to the Subject Member at that time and the Subject Member stated that he would not put himself in that position.
- c. The misconduct involved concealment, as the Subject Member kept the relationship a secret, including from Ms. P.'s parents.
- d. The misconduct occurred over an extended period of time. It was not an isolated incident. The relationship lasted over two years, commencing just after Ms. P. turned 18 years old.
- e. There has been an impact on the M. R. ambulatory organization, a partner agency. The Subject Member often worked alongside Ms. P.'s mother and his misconduct caused disruption in their professional activities.
- f. The Subject Member was subject to a criminal investigation conducted by the Vancouver Police Department. This negatively impacts the RCMP's reputation.
- g. There has been a significant emotional impact on Ms. P. Ms. P.'s relationship with the Subject Member was her first serious romantic relationship and it arose in circumstances where there was a power imbalance. The secretive nature of the relationship had an impact on Ms. P.'s relationship with her family.

Decision on conduct measures

[35] On a balance of all of these factors, I cannot find that the proposed measures of a forfeiture of pay of 45 days and a transfer within “E” Division are against the public interest. They respect the possible range of financial penalties and reflect the numerous aggravating factors in this case. They are serious measures, which will serve as a deterrent to the Subject Member, as well as serve as a warning to other members.

[36] I am also mindful of the Subject Member’s consistently positive performance evaluations. These suggest an above average performer, who has made meaningful contributions as a member of the RCMP.

[37] Finally, the nature of Ms. P.’s and her mother’s professions would likely result in future interactions between them and the Subject Member. The transfer within “E” Division respects Ms. P.’s and her mother’s stated wish not to have any future contact with the Subject Member. The transfer also reflects the Commanding Officer’s stated wish to maintain oversight over this member.

[38] For all of these reasons, I accept the parties’ joint submission on conduct measures.

CONCLUSION

[39] Having found that Allegation 2, as amended, is established, and in accordance with the joint submission presented by the CAR and MR, the following conduct measures are imposed:

- a. Pursuant to paragraph 5(1)(j) of the *CSO (Conduct)*, a financial penalty of 45 days’ pay, to be deducted from your pay; and
- b. Pursuant to paragraph 5(1)(g) of the *CSO (Conduct)*, a transfer to another location within “E” Division.

[40] It should be noted that the measures imposed are just short of dismissal. The Subject Member is being permitted to continue his career with the RCMP. However, any future

contravention of the Code of Conduct will be seriously reviewed by the appropriate conduct authority and could lead to a dismissal from the Force.

[41] These measures should be viewed by all members as a clear message that whether on or off duty, members must conduct themselves in a manner that is consistent with the Code of Conduct.

[42] Either party may appeal this decision by filing a statement of appeal with the Commissioner within the limitation period set out in subsection 45.11 of the *RCMP Act*.

February 13, 2019

Christine Sakiris

Date

RCMP Conduct Board