Protected A

2016-335279 (C-027)

2019 RCAD 24

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 "K" Division

Conduct Authority

(Appellant)

and

Constable C. Clarke

Regimental Number 55134

(Respondent)

(the Parties)

Protected A

2016-335279 (C-027)

Conduct Board Appeal Decision

ADJUDICATOR: Jennie Latham

DATE: November 28, 2019

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SYNOPSIS

The Respondent was subject of an investigation in which it was found that he engaged in five counts of discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct. The Conduct Board imposed conduct measures comprising a total forfeiture of 35-days pay and a reprimand for each of the five contraventions.

The Appellant presented her appeal, arguing that the conduct measures imposed were clearly unreasonable, and based on an error of law.

The matter was reviewed by the RCMP External Review Committee. The Chairperson determined that the Conduct Board's decision was not clearly unreasonable, nor based on an error of law. With no manifest and determinative error disclosed, the Chairperson recommended that the appeal be denied and the conduct measures be confirmed.

The adjudicator concurred with the Chairperson. In finding no reason to interfere with the Conduct Board's decision, the adjudicator denied the appeal and in accordance with paragraph 45.16(3)(b) of the *RCMP Act*, confirmed the imposed conduct measures.

INTRODUCTION

[1] The Appellant presents this appeal pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*], challenging the conduct measures imposed by the conduct board (Board) when it established that the Respondent had contravened five allegations of discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct.

[2] The Board issued its written decision on June 6, 2016, prompting the Appellant's submission of a *Statement of Appeal* (Form 6437) specifying that the conduct measures imposed by the Board were clearly unreasonable, reached in manner that contravened the principles of procedural fairness, and were based on an error of law.

[3] The Board imposed conduct measures consisting of the forfeiture of 3-days pay for Allegation 1, 8-days pay for Allegation 2, 8-days pay for Allegation 3, 3-days pay for Allegation 4, 13-days pay for Allegation 5, and a reprimand for each of the five allegations. Pursuant to subsection 45.15(1) of the *RCMP Act*, the appeal was referred to the RCMP External Review Committee (ERC). The Chairperson issued his report on August 8, 2019, identified as ERC file C-2016-008 (C-027). In accordance with paragraph 45.16(3)(a) of the *RCMP Act*, the Chairperson recommended that the Commissioner dismiss the appeal, and confirm the conduct measures.

[4] Pursuant to subsection 45.16(11) of the *RCMP Act*, the Commissioner has delegated her authority to me in respect of appeals presented under Part IV of the *RCMP Act*, and Part 2 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 [*CSO (Grievances and Appeals)*]. As such, I have jurisdiction to adjudicate the matter before me.

[5] In rendering this decision, I have considered the material that was before the Board (Material), the ERC report (Report), as well as the appeal record (Appeal) prepared by the Office for the Coordination of Grievances and Appeals (OCGA), collectively referred to as the Record. Unless otherwise stated, I will refer to the documents in the Material and the Appeal by page number, and the Report by paragraph.

BACKGROUND

[6] The ERC provided the following factual summary accurately describing the events that gave rise to this matter:

> [6] On July 17, 2014, the Respondent received a 911 call advising that two male individuals might be in difficulty with their pickup truck on the side of the road. When the Respondent arrived on the scene, the two individuals had fled the scene into the bush where they were later located by the Respondent and another RCMP member and identified as being two youths (Material, pages 167-168; Appeal, page 42). The Respondent saw a blue cooler in the bed of the youths' truck containing multiple bottles of Corona beer and soda cans; however, it did not appear that either of the youths had consumed alcohol (Material, pages 167-168; Appeal, page 42). The Respondent dealt with the driver of the vehicle, whose parents had arrived on the scene, while the other member drove the passenger home. The Respondent issued the driver with a number of provincial violation tickets, including a violation ticket for a contravention of Subsection 87(1) of the *Gaming and Liquor Act* of Alberta (possession of liquor by a minor) (Material, page 250). The Respondent asked the driver and his parents who owned the cooler and the beer; however, no one took ownership of these items.
>
> [7] When the other member returned on the scene, both members retrieved the blue cooler and placed it in the back of the Respondent's police vehicle (Material, page 168). When the Respondent returned to the detachment, he placed the cooler in a storage room. Although he reported the incident in the Police Reporting Occurrence System (PROS), he did not process the cooler or the alcohol as exhibits prior to ending his shift.
>
> [8] On July 22, 2014, the Acting Detachment Commander (A/CO) and two detachment clerks were cleaning the storage room when they noticed the blue cooler (Material, pages 55-56, 79). The A/CO opened the cooler and saw that it contained bottles of beer and soft drinks (Material, page 56). They left the cooler in the storage room. On July 23, 2014, when the Respondent returned to work after a few days' leave, one of the detachment clerks asked him about the cooler and the Respondent replied that was for one of his files. The detachment clerk suggested that he dispose of the alcohol (Material, page 128). Before disposing of the alcohol, the Respondent indicated in his occurrence report in PROS that the alcohol was disposed of and the cooler was still in the detachment's garage. When the Respondent went outside to dispose of the alcohol, he noticed the firefighters across the street doing their weekly training. He went over and told the Fire Chief that he had something for them and presented him with the cooler and the beer and asked whether his team would dispose of the alcohol for him. Both the Respondent and the Fire Chief loaded the cooler into another firefighter's truck

and the Respondent indicated that the cooler would have to be returned (Material, pages 89, 95-96).

[9] On July 25, 2018, the A/CO was in the storage room and noticed that the cooler was no longer there. As he had observed that there were no exhibit tags on the cooler, the A/CO sent a general email to the detachment members enquiring whose exhibit the cooler was, what file it was attached to and where was it now (Material, pages 95-96). On the same date, the Respondent replied by email that it was his exhibit and that it was removed from the possession of minors for destruction. He further explained that nobody had claimed ownership of the alcohol and it was "dumped" and the cooler returned to the storage (Material, page 74). The Respondent indicated that he added an exhibit tag on the cooler. This exhibit tag specified that the contents of the cooler were disposed of locally.

[10] On July 28, 2014, the A/CO contacted the District Advisory Non-Commissioned Officer (DANCO) to discuss the Respondent's treatment of the exhibits. The DANCO asked him to ascertain what exactly transpired with the cooler and the beer (Appeal, page 38; Material, page 58). One of the Detachment clerks told the A/CO that the Respondent, when she inquired as to the whereabouts of the cooler, told her "Fire has it" (Material, pages 58, 79, 82).

[11] On August 1, 2014, the Fire Chief was at the Detachment on an unrelated file when the A/CO inquired about the circumstances of the cooler. At first, the Fire Chief stated that the alcohol was disposed of at the Fire Hall; however, he recanted his story and indicated that the Respondent brought the alcohol to the Fire Hall as a present to the firefighters. At the request of the A/CO, the Fire Chief provided a written statement in which he related the events of July 23, 2014 when the Respondent brought the confiscated cooler with the beer to the Fire Hall, and rather than being disposed of, was loaded into a firefighter's truck (Material, pages 89-90).

CONDUCT PROCEEDINGS

Code of conduct investigation

[7] On August 13, 2014, the Southern Alberta District Commander ordered an investigation to determine whether the Respondent had contravened the Code of Conduct (Material pp 5-6).

[8] On August 15, 2014, the mandate letter was served on the Respondent notifying him that a Code of Conduct investigation was ordered to determine if he had contravened the following sections of the Code of Conduct:

> **Allegation 1**: On or between July 17th, 2014 and July 25th, 2014 at or near [X], Alberta, [the Respondent] while on duty, did fail to follow proper exhibit

handling policies and procedures while seizing evidence in relation to PROS investigation file 2014863145.

With respect to the above noted allegation it is in my view that you may have breached the Code of Conduct, namely Section 47 of the RCMP Regulations:

"A member shall not knowingly neglect or give insufficient attention to any duty the member is required to perform."

Allegation 2*:* On or between July 17th, 2014, and July 29th, 2014, at or near [X], Alberta, [the Respondent] did knowingly or wilfully mislead his supervisor, [Corporal M] verbally and in both his General Report and an internal Groupwise email by indicating that he had disposed of or destroyed the liquor exhibits that had been seized in relation to PROS investigation file 2014863145 when in fact he had given the liquor to members of the local fire department for consumption.

In relation to Allegation 2, it is my view that you may have breached the Code of Conduct, namely Section 45(b) of the RCMP Regulations:

"A member shall not knowingly or wilfully make a false, misleading or inaccurate statement or report to any member who is superior in rank or who has authority over that member pertaining to any conduct concerning that member, or any other member pertaining to any investigation."

Allegation 3: On July 23, 2014 at or near [X], Alberta, [the Respondent] while on duty, did remove seized liquor exhibits from the [X] RCMP detachment in relation to PROS investigation file 2014863145 and give them to a member of the local fire department for use and consumption.

Allegation 4: On July 23rd, 2014 at or near [X], Alberta, [the Respondent], while on duty, did instruct the [X] Fire Chief [Mr. W] to say that if anyone asks about the liquor provided in reference to PROS investigation file 2014863145, that it had been destroyed at the station.

In relation to Allegations 3 and 4, it is in my view that you may have breached the Code of Conduct, namely Section 39(1) of the RCMP Regulations:

"A member shall not engage in any disgraceful or disorderly act or conduct that could bring discredit on the Force."

[9] On August 15, 2014, the Appellant suspended the Respondent from duty with pay effective August 13, 2014 (Material, pp 7-10).

[10] A statutory investigation was also completed into this matter, and with all the elements of the Code of Conduct investigation addressed, one report was generated. The investigator interviewed seven witnesses, reviewed material including the PROS reports, copies of violation tickets,

Detachment meeting minutes, policy related to exhibits, and photographs of the cooler, remaining beer, the Fire Hall, and the Detachment's storage room.

[11] The investigation report was dated October 9, 2014 (Material, p 20).

Notice of Conduct Hearing

[12] On July 16, 2015, the Appellant completed a Notice of Conduct Hearing (Notice) (see Missing Material – Notice of Conduct Hearing), which was served on the Respondent on July 26, 2015. Given the coming into force of the *Enhancing the Royal Canadian Mounted Police Accountability Act* and the *Royal Canadian Mounted Police Regulations,* SOR/2014-28, the matter transitioned to the newly established conduct process. While the substance of the allegations remained the same, they were written to align with the amended sections of the newly generated Code of Conduct. Accordingly, the Allegations and summaries are as follows:

> **Allegation 1**: On or between the 17th day of July and the 25th day of July, 2014, at or near [the detachment area], in the province of Alberta, [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 [a detachment], "K" Division, in the Province of Alberta.
>
> 2. During the night of July 16th 2014 to July 17th, 2014, you arrested [Witness X] and issued several violation tickets to [Witness X].
>
> 3. You seized a cooler and its contents from the vehicle associated with [Witness X]. The cooler contained several items including numerous full bottles of beer.
>
> 4. You put the cooler in your police vehicle and drove back to the RCMP[Detachment] and left the cooler and its contents in the Detachment's storage room.
>
> 5. On July 23rd, 2014, you put the cooler in [Mr. F's] truck. You advised that [Mr. F] could keep the contents but that the cooler must be returned.
>
> 6. On July 25th, 2014, you added an exhibit tag to the cooler and returned it to a secure storage area.

7. You did not secure and safeguard the cooler and its contents into a suitable secure storage area as soon as practicable, contrary to *OM – ch.22.1 Processing,* section 3.1.1.5.

8. You did not enter and track the cooler and its contents in the Record Management system, contrary to *OM ch. 22.1 Processing,* section 3.1.1.6.

9. You did not hold the liquor seized for a period of 30 days, contrary to *K Division Operational Manual – V9 Gaming and Liquor Act,* section 2.5.

10. You did not dispose of the cooler and its contents in conformity with *K Division Operational Manual – V.9. Gaming and Liquor Act,* section 2.5.

Allegation 2: On or about the 23rd day of July, 2014, at or near [the detachment area] in the Province of Alberta, [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 RCMP.

Particulars of the contravention:

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to [a detachment], "K" Division, in the Province of Alberta.

2. During the night of July 16th, 2014 to July 17th, 2014, you arrested [Witness X] and seized a cooler and its contents from the vehicle associated with [Witness X]. The cooler contained several items including numerous full beer bottles.

3. On July 23rd, 2014, you authored a supplementary report on PROS, in which you wrote that the alcohol seized from [Witness X] had been disposed of and that the cooler seized was "still in the garage".

4. Your PROS supplemental report contained misleading and/or false information.

Allegation 3: On or about the 25th day of July, 2014, at or near [the detachment area], in the province of Alberta, [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 [a detachment], "K" Division, in the province of Alberta.

2. During the night of July 16th, 2014 to July 17th, 2014, you arrested [Witness X] and seized a cooler and its contents from the vehicle associated with [Witness X]. The cooler contained several items including numerous full beer bottles.

3. On July 25th, 2014, you authored and sent an email to your supervisor, [Corporal M] in which you stated that "no one claimed ownership of the alcohol and it was dumped".

4. Your email to [Corporal M] contained misleading and/or false information.

Allegation 4: On or between the 17th day of July and the 25th day of July, 2014, at or near [the detachment area], in the province of Alberta, [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 [a detachment], "K" Division, in the province of Alberta.

2. During the night of July 16th, 2014 to July 17th 2014, you arrested [Witness X] and seized a cooler and its contents from the vehicle associated with [Witness X]. The cooler contained several items including numerous full beer bottles.

3. On July 23rd, 2014, you asked [the] Fire Chief [Mr. W] if "the guys" would dispose of the contents of the cooler or something to that effect.

4. On July 23rd, 2014, you put the cooler in to [Mr. F's] truck. You advised that [Mr. F] could keep the contents but that the cooler must be returned.

5. You unlawfully gave away exhibits.

Allegation 5: On or between the 23rd day of July and the 25th of July, 2014, at or near [the detachment area], in the province of Alberta, [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 [a detachment], "K" Division, in the province of Alberta.

2. During the night of July 16th, 2014 to July 17th, 2014, you arrested [Witness X] and seized a cooler and its contents from the vehicle associated with [Witness X]. The cooler contained several items including numerous full beer bottles.

3. On July 23rd, 2014, you asked [the] Fire Chief [Mr. W] if "the guys" would dispose of the contents of the cooler or something to that effect.

4. On July 23rd, 2014, you put the cooler into [Mr. F's] truck. You advised that [Mr. F] could keep the contents but that the cooler must be returned.

> 5. On July 25th, 2014, you told [Mr. W] to provide false information pertaining to the disposal of the alcohol contained in the cooler that was provided to [Mr. F].

[13] The Notice informed the Respondent of the one person designated officer appointed to the Board.

Proceedings before the Board

[14] Prior to the hearing, the Board requested submissions from the Parties on two questions (Appeal, p 35):

1. Whether or not the beer cooler and the beer were exhibits, as alleged in Allegation 4, within the meaning of the RCMP policy in effect at the time, and

2. Whether or not the use of the word seized, which appears in all five allegations, implies that the items in question were, in fact, exhibits within the meaning of the RCMP policy in effect at the time?

[15] On November 27, 2015, the Board rendered its decision advising the Parties that the items in question were exhibits within the meaning of the RCMP policy in effect at the time (Appeal, p 36).

[16] Between April 12 and 14, 2016, a hearing was held, at which time the Board found that the five allegations were established (Appeal, p 29).

a) Decision on the Allegations

[17] The Board stated (Appeal, p 51):

> [103] In summary, I find a reasonable person, with knowledge of all of the circumstances of the case, with knowledge not only of policing in general but policing in the RCMP in particular, would find the following behaviour to be discreditable, and to tarnish the reputation of the Force:
>
> - The deliberate and conscious deviation from policy pertaining to the handling of an exhibit, as per Allegation 1;
> - The deliberate attempt to mislead in the PROS report, as per Allegation 2;

> - The deliberate attempt to mislead in the email message, as per Allegation 3;
> - The unlawful giving away of exhibits, as per Allegation 4, and"
> - The instructions given to Mr. C to provide false information pertaining to the disposal of the beer, as per Allegation 5.
>
> [104] The reasonable person would find all of these actions to be sufficiently related to [the Respondent's] duties to give the Force a legitimate interest in imposing conduct measures.

b) Submissions on conduct measures

[18] The Conduct Authority Representative (CAR) called no evidence, and did not present any record of prior discipline. The Appellant sought the Respondent's dismissal from the Force.

[19] The only evidence presented by the Member Representative (MR) was the Respondent's testimony, supporting conduct measures short of dismissal.

[20] In moving to submissions, the CAR presented several criminal cases involving breach of trust, and several RCMP adjudication board decisions involving elements of compromised honesty or integrity. Lastly, the CAR contended that *R. v McNeil*, 2009 SCC 3 *(McNeil*) would be relevant for the length of the Respondent's career placing undue hardship on the Force to continue his employment.

[21] The MR addressed the case law submitted by the CAR arguing that this matter was distinguished from all those cases in that the misconduct was not motivated by personal gain.

[22] The MR itemized each of the Allegations, and provided the following view of the appropriate conduct measures;

- Allegation 1 relates to the Respondent's failure to be diligent which is prescribed in the mitigated range by a forfeiture of pay of 2 to 8 days.
- Allegations 2 and 3 relate to false police reports with a mitigated range of forfeiture of pay between 11 to 29 days. The MR contended that 20 days would be suitable for Allegation 2, and 15 days for Allegation 3, arguing that the Respondent's actions did not compromise an

investigation, did not compromise the relationship between the local detachment, and the fire department, and did not adversely impact the rights of a third party.

- Allegation 4, the MR argued that the Conduct Measure Guide did not specifically reference the giving away of exhibits contending that the forfeiture of 10-days pay was reasonable considering that no investigation was compromised.
- Lastly, the MR contended that Allegation 5 could be compared to lying to a supervisor, and suggested that the proposed normal range for an isolated incident where the member displayed a gross lack of judgment in an otherwise fully satisfactory career would be 15 to 20 days.

[23] The MR submitted several RCMP adjudication board decisions for the Board to consider, arguing that the Respondent was not motivated by personal benefit, but rather to build relations with the fire department. The MR highlighted the Respondent's positive performance assessments, the many letters of support, a certificate of appreciation, and the Respondent's community involvement throughout his career. Given the mitigating factors, the MR suggested a reprimand and the forfeiture of 45 to 60-days pay.

c) Decision on conduct measures

[24] The Board established that the Respondent gave away seized beer to the fire department in a gesture of good will. The Board stated that the Respondent knew it was wrong as demonstrated through not properly documenting his actions, and coaching the recipient to lie on his behalf. The Board determined that its task was to "assess whether or not these actions betray an irredeemable character flaw and a degree of moral turpitude so extreme that the only conscionable choice is to terminate his employment after nine years of satisfactory service".

[25] The Board considered the cases cited by the CAR and MR noting that issues of honesty and integrity are never black and white favouring a close examination of the degree of moral turpitude involved. The Board noted that in each of the cases cited by the CAR, criminal charges for breach of trust had been brought against employees of the RCMP entrusted with the care of exhibits, which distinguished them from this case.

[26] The Board determined that the range of sanctions in previous related cases ranged from a reprimand, and a significant forfeiture of pay to an order to resign. The Board stated that dismissal only occurred when there had been personal gain sought or obtained, and significant mitigating factors were absent.

[27] The Board favoured a comparable case, including the following summary from 2016 RCAD 2 (Appeal, p 60):

> The Subject Member faced four allegations, arising from his wish to return driving privileges to a driver whose breath samples were 90 milligrams percent and 100 milligrams percent. The Subject Member believed the driver would lose his employment if a charge was filed. A charge would trigger an extended license suspension and the driver's employment required driving.
>
> The Subject Member forged an email exchange with a local Crown prosecutor supporting not laying a charge, and made oral and electronic file reports reflecting or repeating the gist of the email. The forged email was created so a supervisor would conclude the file. It was accidentally transmitted to the Crown prosecutor. Criminally charged with forgery, the Subject Member pleaded guilty and received a conditional discharge.
>
> A motion to merge the two allegations of discreditable conduct and the two allegations of inaccurate account was denied at a pre-hearing. The Subject Member admitted his actions and all four allegations were found established. Absent any motivation for self-benefit, loss of employment was considered disproportionate. The Subject Member's dishonesty affected law enforcement and put the RCMP's relationship with the Crown at risk, warranting very significant forfeitures of pay. In total, the Subject Member was ordered to forfeit sixty days of pay, lose eligibility for promotion for two years, receive appropriate psychological treatment, and be transferred or reassigned as the Conduct Authority considered necessary.

[28] While the similarity of no self-benefit was highlighted, the Board also considered the differences, noting that the Respondent's misconduct was less serious, in that he did not face criminal charges, that his actions did not compromise numerous criminal investigations, and that he did not jeopardize the RCMP's relationship with a policing partner.

[29] In considering the factors present in this case, the Board found the following aggravating factors (Appeal, p 62):

1. Given Allegations 2, 3, and 5 each described three separate instances of deliberate attempts to mislead, the Board found that the Respondent's actions could not be described as a solitary act of indiscretion.

2. The continuing disclosure obligations implied by *McNeil*.

[30] The Board determined the following mitigating factors (Appeal, pp 62-66):

1. The nature of the exhibit. The detachment engaged in a divergent practice of dealing with liquor-related exhibits as compared to other exhibits.

2. The acrimonious relationship between the Respondent and the acting detachment commander.

3. The Respondent's rehabilitative potential.

4. The Respondent's consistent community involvement.

5. The many letters of reference describing the Respondent as a compassionate and caring individual.

6. The Respondent's past instances of bravery, and the virtually non-existent likelihood that the Respondent would again engage in deceptive practices.

[31] The Board imposed the following conduct measures (Appeal, p 67):

- For each of the Allegations, a reprimand.
- For Allegation 1, the forfeiture of three days pay.
- For Allegation 2, the forfeiture of eight days pay.
- For Allegation 3, the forfeiture of eight days pay.
- For Allegation 4, the forfeiture of three days pay.
- For Allegation 5, the forfeiture of thirteen days pay.

[32] The Board confirmed a total forfeiture of 35-days pay, stating that it represents a significant financial penalty closely aligned to the 45-day benchmark described by the *Conduct Measures Guide* as the harshest penalty shy of dismissal. The Board intended the cumulative effect to act as a specific and general deterrent consistent with the severity of the Respondent's misconduct.

APPEAL

[33] On April 18, 2016, the Board provided a partial preliminary decision. In turn, on April 22, 2016, the Appellant presented Form 6437 – *Statement of Appeal* to the OCGA (Appeal, pp 4-5). Given the final decision of the Board had not been rendered, the OCGA determined that the Appellant's presentation was premature.

[34] The final written decision was dated June 6, 2016, and on June 8, 2016, the Appellant resubmitted Form 6437 contending that the conduct measures imposed by the Board were clearly unreasonable, the decision was reached in a manner that contravened the applicable principles of procedural fairness, and the decision was based on an error of law (Appeal, pp 22-23).

Appellant's submission

[35] The Appellant raises twelve grounds of appeal, which she summarized as follows under the headings of errors of law and clearly unreasonable:

> **Errors of law**
>
> 1. The Board erred in minimizing the *McNeil* implications as an aggravating factor.
>
> 2. The Board erred in finding that the risk of recurrent behaviour by [the Respondent] is minimal.
>
> 3. The Board erred by failing to acknowledge the seriousness of the impact of [the Respondent's] actions on the Administration of Criminal Justice.
>
> 4. The Board erred in its overt emphasis on Personal Benefit and the Motivation and in considering them as mitigating factors.
>
> 5. The Board erred by first determining that liquor exhibits are not "second- tier" and then erroneously applying the principle that conduct measures imposed with respect to their handling should be of lesser sanction.

> 6. The Board erred by failing to address the matter of the seized cooler leading to a breach of procedural fairness.
>
> 7. The Board erred by placing too much weight on the relationship between [the acting detachment commander] and [the Respondent].
>
> **Clearly unreasonable**
>
> 8. The Board erred in considering the evidence.
>
> 9. The Board erred in concluding that the misconduct did not amount to the repudiation of the employment contract.
>
> 10. The Board erred in substantially deviating from the RCMP's new *Conduct Measures Guide* 2014 when ordering a total forfeiture of 35 days pay.
>
> 11. The Board erred by failing to adequately explain why it deviated from the forfeiture of pay sanction put forward by the MR.
>
> 12. The Board erred in not concluding that dismissal was the appropriate conduct measure in the circumstances.

Respondent's submission

[36] The Respondent argues that the Appellant improperly characterized her first seven objections as errors of law. He contends that they all relate to the reasonableness of the decision, and must be reviewed based on that standard. Accordingly, the Respondent asserts that the Board as an administrative decision-maker must be afforded appropriate deference.

[37] The Respondent opposes each of the objections raised by the Appellant arguing that the Board's decision fell within the range of possible outcomes, that the Board provided comprehensive reasons for the conduct measures imposed, and that the decision as a whole demonstrated sufficient justification, transparency, and intelligibility (Appeal, p 269).

Appellant's rebuttal

[38] The Appellant argues that the Respondent is mistaken in his suggestion that she erred in her consideration of the proper standard of review on appeal. She contends that the new RCMP legislative scheme should be considered in determining the appropriate standard of review, arguing that legal precedents related to appeals in administrative law hold little value since they pertain to different administrative bodies with different legislative schemes (Appeal, p 360).

[39] The Appellant argues that given the ERC has the authority to institute a hearing and receive new evidence, it owes no deference to the Board's decision. The Appellant contends that the Commissioner as the sole beneficiary of the ERC recommendation, also owes no deference toward the Board's decision. Moreover, given the Commissioner's discretionary powers outlined in the *RCMP Act* to impose another conduct measure, further establishes that the Commissioner need not defer to the decision of the Board. The Appellant states that the final step in the appeal process is the judicial review of the Commissioner's decision in Federal Court, contending that it is only at that stage that the standard of review outlined in *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 applies.

[40] The Appellant contends that the basic requirements of a police officer include upholding the core values of honesty and integrity arguing that when the allegations of lying and directing a third party to provide false information were established, the Respondent no longer met the basic requirements. The Appellant argues that the implications speak for themselves, contending that no further evidence is required.

[41] The Appellant suggests that past behavior is the proper foundation to predict future behavior arguing that the Board erred in finding that the likelihood of the Respondent's behavior reoccurring was minimal.

[42] The Appellant reiterates her initial submissions arguing that the decision to retain the Respondent was clearly unreasonable.

EXTERNAL REVIEW COMMITTEE

[43] The ERC received the appeal on December 7, 2016, and provided its report on August 8, 2019, recommending that the appeal be denied.

[44] The ERC found that the appeal was properly referred pursuant to paragraph 45.15(1)(a) of the *RCMP Act* as an appeal relating to conduct measures consisting of a financial penalty of more than one day of the member's pay.

[45] The ERC determined that the Appellant filed her appeal within the statutory 14-day time limitation period noting that the Appellant received the decision on June 7, 2016, and presented her

appeal the next day. The ERC also determined that the Appellant learned of the Respondent's identity on August 13, 2014, and initiated the hearing prior to the one-year expiry as required by subsection 41(2) of the *RCMP Act*.

[46] The ERC noted that the Parties disagreed on the applicable standard in which the Commissioner and the ERC should review conduct board decisions. The ERC stated that subsection 33(1) of the *CSO (Grievances and Appeals)* establishes the Commissioner's base of review. It states that, "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". The ERC determined that the use of the term "clearly unreasonable" expresses the essential features of the deference owed by the ERC and the Commissioner, and it also is consistent with the terms used in prior ERC recommendations, Commissioner decisions, and relevant court decisions.

[47] The ERC conducted a detailed analysis based on *Elhatton v. Canada (Attorney General*), [2013] F.C.J. No.58, H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, and *Kalkat v. Canada (Attorney General),* 2017 FC 794 *(Kalkat),* determining that the standards include a high level of deference. In considering the Board's decision on conduct measures, the ERC review included a previous ERC recommendation (D-121), findings related to misconduct proceedings in the *Law Society of Upper Canada v. St. Fort* [2001] L.S.D.D. No.67, and the Supreme Court decision of *R. v. Lacasse*, [2015], 3 S.C.R. 1089 *(Lacasse).* The ERC concluded that absent a manifest and determinative error in assessing facts, a failure to consider relevant and important mitigating factors, consideration of irrelevant aggravating factors, or as a result in which the conduct measure is clearly disproportionate, the Board is owed significant deference.

[48] Next, the ERC provided its analysis of the twelve grounds of appeal as outlined by the Appellant.

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

[49] The ERC determined that "the Board did not commit a manifest and determinative error by finding that although there were *McNeil* implications, it remained to be seen whether the Force's

ability to employ the Respondent was compromised" (Report, para 107). The ERC acknowledged that the ramifications of *McNeil* were not known in their entirety, but provided that the responsibility to present such evidence rested with the Appellant as the Party alleging that the Respondent was no longer employable by the Force. Moreover, the ERC reasoned that in the absence of such evidence, the Board had the latitude to draw its conclusions as to the impacts of *McNeil* on the Respondent's continued employment (Report, para 108).

[50] The ERC disagreed with the Appellant that *McNeil* considerations prevent the Respondent from testifying. The ERC determined that while there were disclosure requirements, the actual impact can only be assessed by the judge during the Respondent's testimony. The ERC asserted that it was possible a police officer could remain credible in the face of misconduct and that other evidence could corroborate the implicated member's testimony at any given trial.

2. The Board erred in finding that the risk of recurrent behaviour by the Respondent is minimal.

[51] The ERC considered the evidence presented, and noted that neither Party presented expert evidence on the issue of recidivism. The ERC found that in the absence of evidence to the contrary, the Board was limited to basing its findings on the information presented. The ERC noted that the Board considered the misconduct to be a lapse in judgement that did not outweigh the Respondent's years of satisfactory service.

[52] The ERC noted that the Board considered the Respondent's level of deceit, and determined that while it was an aggravating factor, when the evidence was considered in its totality, the Respondent's performance assessments, and community involvement demonstrated a potential for rehabilitation. Therefore, the ERC found that the Board did not commit a manifest and determinative error in regard to its finding.

3. The Board erred by failing to acknowledge the seriousness of the impact of the Respondent's actions on the Administration of Criminal Justice.

[53] The ERC found that the Board did not err in considering the Respondent's misconduct in relation to its impact on the administration of justice relying on the Board's consideration of the

implications of the *McNeil* decision as an aggravating factor, and the Board's review of case law relative to the honesty and integrity of police officers who retained their jobs. Moreover, the ERC noted that the Appellant did not raise any other impacts that the Respondent's actions may have on the administration of criminal justice.

[54] The ERC recommended that the Commissioner not intervene as other than the Appellant's objection to the weight given by the Board to the Respondent's actions, there was no evidence of a manifest and determinative error that would justify interfering with the Board's decision.

4. The Board erred in finding that the Appellant was not motivated by personal benefit.

[55] The ERC found that the Board did not err in considering the Respondent's lack of self-benefit. While the ERC noted that the Board did not list it as an independent mitigating factor, the reasons supporting the Board's decision clearly indicate that it played an integral role in its consideration of prior cases.

[56] The ERC determined that the Appellant's argument that the Respondent may expect or demand a higher level of service should he ever require the services of the fire department is speculative at best. Moreover, the ERC noted that the Board did not receive any evidence related to the Appellant's speculative argument, nor did the Appellant question the Respondent on such a potential advantage.

[57] The ERC found that the Board's assessment of the impact of dishonesty on conduct measures was in accordance with the precedents established in review of the relevant cases (Report, para 137).

5. The Board erred in minimizing the Respondent's conduct based on the nature of the exhibits.

[58] The ERC determined that the evidence before the Board established that the general management of liquor exhibits veered from policy, and seizures were treated differently than other substances. The ERC also found that the Appellant failed to articulate why this mitigating factor should be irrelevant, when the divergent practice was generalized through the detachment. The ERC concluded that absent any unreasonable error by the Board, the Commissioner should show deference in allowing the Board to weigh the various aggravating and mitigating factors.

6. The Board's reasons were insufficient in that it failed to address the matter of the seized cooler.

[59] The ERC determined that not every issue need be addressed, but rather the reasons must justify and explain the result. The ERC relied on *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* [2011] SCC 62, para 16:

> In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the Dunsmuir criteria [justification, transparency and intelligibility] are met.

[60] The ERC also found that it was not necessary to list the seized cooler as an aggravating factor as the circumstances of the seizure of the cooler and its contents were included in the allegation. In accordance with the definition of "aggravation" as outlined in Black's Law Dictionary, and ERC recommendation C-007, the ERC determined that the Board did not err in not considering the seized cooler as an aggravating factor.

7. The Board erred by placing too much weight on the relationship between the [acting detachment commander] and the Respondent.

[61] The ERC found that the Board's conclusion was problematic in that the relationship was irrelevant to the issue of a proportionate conduct measure (Report, p 159).

[62] The ERC stated that there was no evidence before the Board that other detachment members mishandled or gave away exhibits, finding that the Respondent could not have been singled out. Moreover, the ERC determined that the acting detachment commander had a duty to act on the potential breach of the Code of Conduct, regardless of his relationship with the Respondent.

[63] The ERC concluded that although the Board considered an irrelevant mitigating factor, it was not determinative of whether the Respondent should be dismissed. The ERC noted that the Board considered several other mitigating factors, reviewed other adjudication board cases where members were retained despite being dishonest, and the Board assessed the range through applying the *Conduct Measures Guide*.

[64] The ERC relied on the following excerpt from *Lacasse* (Report, para 160):

> In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

8. The Board erred in considering the evidence.

[65] The ERC found that the Appellant failed to provide any basis for this ground of appeal, noting that any issues raised were addressed in other sections of the ERC analysis.

9. The Board erred in concluding that the misconduct did not amount to the repudiation of the employment contract.

[66] The ERC determined that the Appellant failed to provide any foundation for this ground of appeal finding that the reference to the Respondent's honesty, integrity and *McNeil* implications were already dealt with elsewhere in the Report (Report, para 167).

[67] The ERC found no manifest and determinative error in the Board's finding that the Respondent's actions did not warrant dismissal noting that 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*" (Report, para 169).

10. The Board erred in imposing a forfeiture of 35 days' pay rather than ordering the Respondent's dismissal.

[68] The ERC considered the grounds of appeal listed in 10-12 together noting that they all relate to the appropriateness of the imposed conduct measure.

[69] The ERC found that the Board followed the correct procedure in considering the conduct measures to impose. The ERC noted the flexibility provided to the Board finding that it was not bound to impose the suggested measures.

[70] The ERC determined that the Board considered the evidence presented, and in establishing the allegations, in accordance with subsection 24(2) of the *Commissioner's Standing Order (Conduct)*, SOR/214-29, [*CSO (Conduct)*], noted its obligation to impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct.

[71] The ERC viewed the decision as "extremely well written, well-reasoned and very fair in the circumstances" (Report, para 184).

Conduct measure

[72] The ERC recommended that the Commissioner dismiss the appeal and confirm the conduct measures imposed (Report, para 186).

PRELIMINARY MATTERS

Applicable standard of review

[73] The guiding principles to be followed in conduct appeals is outlined in subsection 33(1) of the *CSO (Grievances and Appeals)*:

> 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.

[74] The Appellant presents 12 grounds of appeal listing seven as errors of law, and five as clearly unreasonable. I agree with the ERC that the first seven grounds raised by the Appellant are mischaracterized as errors of law, resulting in the entirety of the Appellant's objections involving questions of fact or of mixed fact and law. Accordingly, the term "clearly unreasonable" represents the applicable standard of review.

[75] The term "clearly unreasonable" used in subsection 33(1) of the *CSO (Grievances and Appeals)* was considered by the Federal Court in paragraph 62 of the *Kalkat* decision. It states:

> 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 the 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).

[76] The notion of deference is well established in several ERC recommendations, previous Commissioner decisions, and several Federal and Supreme Court of Canada decisions. As a result, interference is only justified in a case where the Board made a manifest and determinative error. While I note that this appeal is restricted to the Board's decision on the imposed conduct measures, previous ERC recommendations and Commissioner decisions emphasized the same level of deference owed to the Board in that regard. As provided by the ERC, D-043 and D-121 provide the following:

> Sanction is inherently a matter of considerable subjectivity and the tribunal of first instance, the tribunal that heard the matter directly before it, is in the best position to exercise this subjectivity. An error of principle, a failure to consider relevant and important mitigating factors, consideration of irrelevant aggravating factors, or a result in which the sanction is clearly disproportionate are all examples of situations that may justify upholding the appeal on sanction in general, however, appellate bodies will not overturn a sanction only on the basis that they would have made a subjective evaluation different in the result from that of the hearing tribunal. These principles, although developed in the context of judicial appellate deference to judicial decisions of first instance, apply in a parallel fashion to the standard appropriate in internal appeals where there is administrative- tribunal appellate review of administrative-tribunal decision of first instance.

[77] Accordingly, I find that the Board is owed significant deference absent a manifest and determinative error.

Statutory time limitation

[78] The statutory time limitation period is prescribed under section 22 of the *CSO (Grievances and Appeals)*, as follows:

> An appeal to the Commissioner must be made by filing a statement of appeal with the OCGA within 14 days after the day on which copy of the decision giving rise to the appeal is served on the member who is the subject of that decision.

[79] While the Appellant first presented her appeal upon receipt of a preliminary partial decision, when she received the final decision on June 7, 2016, she resubmitted her appeal the next day. Therefore, I find that the Appellant satisfied the 14-day statutory requirement.

Role of adjudicator

[80] My role is not to reconsider the Board's decision based on whether I would have rendered the same decision. Rather, as outlined in subsection 33(1) of the *CSO (Grievances and Appeals)*, I must consider whether the decision under appeal, contravened the principles of procedural fairness, was based on an error of law, or was clearly unreasonable.

[81] In accordance with subsection 45.16 (8) of the *RCMP Act*, in rendering my decision, I must consider the findings or recommendations set out in the ERC report. While I am not bound to act on those findings or recommendations, if I do not so act, I must include reasons for not so acting.

[82] The Appellant is appealing the conduct measures imposed by the Board. In accordance with the *RCMP Act*, paragraphs 45.16(3)(a) and (b) require that I dismiss the appeal and confirm the conduct measures or allow the appeal and either rescind the conduct measures or impose the measures I believe the Board should have imposed.

ANALYSIS

[83] In accordance with my mandate, and the issues raised by the Appellant, my analysis will focus on whether the decision was clearly unreasonable. For ease of reference, I will summarize and address the Appellant's arguments in succession.

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

[84] 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 the *McNeil* decision (Appeal, p 155). The Appellant argues that the Respondent no longer meets the basic requirements of a peace officer.

[85] The Appellant asserts that the Board heard no evidence in relation to the following; whether the RCMP could continue to employ the Respondent in a position of trust, whether the Alberta Crown office would ever proceed on criminal cases submitted by the Respondent, and whether the Alberta defence counsel bar would ever be willing to accept the testimony of the Respondent, arguing that any such evidence should have been introduced by the MR. In absence of any such evidence, the Appellant contends that the Board erred in engaging in speculation unsupported by any evidence.

[86] The Respondent submits that while the Crown has a duty to disclose information regarding acts of misconduct, the impact is speculative and untested, suggesting that in most cases, it likely would have little or no impact (Appeal, 262).

[87] The Respondent argues that the impact of his credibility would be limited when there is other corroborating evidence supporting the case being heard.

[88] The Respondent counters that it was the Appellant's responsibility to present evidence to support her own assertion, noting that no evidence was heard by the Board in that regard. The Respondent contends that *McNeil* disclosure implications are faced by RCMP members still retained with the Force.

[89] The Respondent suggests that the Board properly considered case law in determining proportionality and parity of the conduct measures, concluding that the Board did not err in stating that "it will remain to be seen whether or not the Force's ability to deploy him is compromised given the implications of *McNeil*" (Appeal, p 263).

[90] The Board acknowledges that the range of conduct measures for issues of honesty and integrity include dismissal, however, the Board disagreed that every case should use dismissal as its starting point. The Board relied on previous conduct board decisions as submitted by the Parties, and recognized the continuing disclosure obligations implied by *McNeil*.

[91] While the disclosure requirements imposed by *McNeil* may raise the discussion of the Respondent's honesty and integrity during his involvement in a criminal trial, I agree with the ERC that the outcome of those discussions could vary in each instance. Therefore, the ramifications of

McNeil are not known in their entirety. Moreover, the obligation to present evidence to support her assertion that the Respondent was no longer employable rested with the Appellant. Given the absence of such evidence, I also agree with the ERC that the Board had latitude to draw its own conclusions regarding the Respondent's continued employment with the Force. Therefore, I find that this ground of appeal did not establish a manifest and determinative error on the part of the Board.

2. The Board erred in finding that the risk of recurrent behaviour by the Respondent is minimal.

[92] The Appellant contends that the Board offered a conclusion without any evidentiary basis, arguing that such a speculative opinion is an error.

[93] The Appellant argues that the evidence demonstrates that the Respondent not only lied over a period of several days, but urged the Fire Chief to lie on his behalf, and lied to the Board while under oath. Given the evidence of a clear pattern of repeated behavior, the Appellant reiterates that the Board erred in its analysis of the likelihood of the Respondent's deceit reoccurring.

[94] The Respondent argues that the Board accurately depicted the three deliberate attempts to mislead even characterizing the pattern as an aggravating factor. However, he contends that the Board properly accepted the mitigating evidence to assess the identified risk, noting two recent positive performance evaluations, positive contributions to the detachment, and community, the many letters of reference, and the sincere apology to the Board for his actions.

[95] The Respondent contends that with no evidence of previous discipline combined with the information before the Board, there was no error in finding that the risk of recurrent behaviour by the Respondent was minimal.

[96] I agree with the ERC that the presentation of expert evidence might have assisted in determining the Respondent's rehabilitative potential, and note that neither Party introduced such evidence, leaving the Board to arrive at findings based on the evidence before it. The Board's view is that the Respondent's lapse of common sense and good judgement did not outweigh his years of satisfactory service, indicating to the Board that the Respondent was willing to continue to provide solid, reliable service.

[97] I agree with the ERC that the Board's finding that the Respondent has a rehabilitative potential does not contradict the observation that the Respondent attempted to mislead on three separate occasions. The Board acknowledged the deceit apparent in the Respondent's PROS report, the email to his supervisor, and his request for the Fire Chief to lie on his behalf. While the Board noted that the deceitful actions all arose from trying to disguise the fact that he gave away seized beer, the Board also considered the significant submissions outlining the Respondent's positive character supporting the view that the incident was a lapse in judgement rather than a permanent character flaw. Given there was no evidence presented to the contrary, I agree with the ERC that the Board did not commit a manifest and determinative error in this regard.

3. The Board erred by failing to acknowledge the seriousness of the impact of the Respondent's actions on the administration of criminal justice.

[98] The Appellant argues that the Respondent's actions irreparably eroded the relationship with the Crown, which was not recognized by the Board.

[99] The Appellant contends that in finding that the Respondent's "conduct amounts to a violation of the core competencies of honesty and integrity", the Board erred in not considering dismissal as the starting point.

[100] The Appellant suggests that the Board implied that honesty and integrity exist on a spectrum with varying degrees of seriousness. She argues that accepting that some lies are permissible erodes the public confidence and trust in the RCMP contending that the Respondent breached his contract of employment forever impairing his ability to carry out his duties with respect to the administration of criminal justice.

[101] The Respondent argues that the CAR did not seek the testimony of a prosecutor or present any evidence to support his notion that his relationship with the Crown had been affected, never mind eroded beyond repair.

[102] The Respondent argues that the Board did not permit lying as suggested by the Appellant, but rather the Board described a process to determine the consequences of such conduct.

[103] The Respondent contends that the opinion that any member found to have lied should be dismissed is not consistent with the intent of the RCMP as observed in the *Conduct Measures Guide* that uses a range of conduct measures for “lying to a superior”.

[104] I agree with the ERC that the Board assessed the impact of the Respondent’s misconduct. This was evident in the Board’s consideration of the implications of the *McNeil* decision, as well the Board’s extensive review of cases that involved members whose honesty and integrity were found lacking. I also agree that there was no evidence presented or ignored by the Board on what impact the Respondent’s misconduct might have on the administration of criminal justice.

[105] Given the Board weighed the evidence presented absent any manifest and determinative error, I find no reason to intervene in the decision.

4. The Board erred in finding that the Respondent was not motivated by personal benefit.

[106] The Appellant argues that the Board stated that dismissal only occurs in instances where personal gain is obtained or sought, which is a position that has not been judicially tested suggesting that it was premature for the Board to rely on it as an established legal principle. Moreover, the Appellant contends that the Board knows that the case relied on, 2016 RCAD 2 was under appeal.

[107] The Appellant argues that the Board failed to distinguish the actions of the Respondent from the actions of members who were dismissed for the same level of deceit. The Appellant contends that the Board’s conclusions contradict its articulation of the facts.

[108] The Appellant argues that the Board erred in framing the Respondent’s actions as altruistic, contending that giving away seized RCMP exhibits could not possibly ever be interpreted as “an unselfish interest in the welfare of others” (Appeal, p 122).

[109] The Appellant contends that the Respondent’s actions were motivated by self-benefit, noting that the Respondent’s testimony provided that his intention was to generate self-benefit with the local fire department. The Appellant argues that the Respondent created an advantage for himself that could be relied on at some future date.

[110] The Appellant relied on *R v. Perreault*, 1992 Carwell Que 2136, and *R v. Boulanger*, 2006 SCC 32 *(Boulanger),* arguing that with the Respondent's actions establishing a breach of trust, the Board erred in diminishing the significance of its own findings. Moreover, the Appellant argues that findings of breach of trust do not require that a personal benefit be realized contending that if the criminal offence threshold does not require it, it is improper to apply it as necessary in an internal discipline process.

[111] The Respondent argues that there was no evidence presented demonstrating that he personally benefited from giving the beer away. Moreover, the Respondent maintains that the CAR had the opportunity but failed to cross-examine him when he testified that he did not personally gain from giving the beer away.

[112] The Respondent argues that he was not charged with breach of trust, nor did the Board provide any opinion whether such an offence was established. He contends that the phrase is used only by the Appellant and is not relevant to the proceedings.

[113] The Respondent also refers to the Appellant's citing of *Boulanger* and *Perreault*, noting that at paragraph 45, *Boulanger* discounts the argument raised in *Perreault*:

> The benefit requirement proposed in *Perreault* has not been uniformly accepted; see *R. v. Fisher* (2001), 139 O.C.A. 96 (Ont. C.A.) where the court of Appeal declined to pronounce on the issue. Where it has been applied, difficulties have arisen. Uncertainty also persists as to whether the benefit need actually be obtained or merely pursued, and the dissenting opinion of Dalphond J.A. in the instant case raises the issues of whether every benefit, no matter how small, brings a public official within s. 122.

[114] The Board found (Appeal, p 59); "where dishonesty or a lack of integrity has been ascribed to a member, dismissal typically only occurs where there has been personal gain sought or obtained, and significant mitigating factors are absent". I agree with the ERC that the Appellant did not accurately depict the Board's findings failing to recognize that personal gain was not considered in isolation, noting also several mitigating factors. In my view, the Board considered the cases presented in comparison to the facts of this matter, and reached a conclusion grounded in that information.

[115] Moreover, I agree with the Respondent that he was not charged with a breach of trust, nor did the Board establish such a finding. Accordingly, I find that the Appellant's arguments related to a breach of trust to be irrelevant.

[116] Lastly, I agree with the ERC that the CAR had the opportunity to cross examine the Respondent when he testified that he did not benefit from giving the beer away, and that his sole intention was to strengthen the relationship between the detachment and the fire department. Without any evidence to the contrary, the Board could only consider what was before it. In my view, the Appellant's speculation on appeal is without foundation.

[117] While the Board did not list the Respondent's lack of benefit as a mitigating factor, I agree with the ERC that it was an underlying factor considered by the Board in determining the conduct measures to impose. In my view, such an analysis demonstrates that the Board weighed all the information provided, and reached a conclusion that accurately reflects the information before it. Accordingly, I find that the Appellant failed to establish that the Board erred in concluding that the Respondent was not motivated by self benefit.

5. The Board erred in minimizing the Respondent's conduct based on the nature of the exhibits.

[118] The Appellant argues neither the CAR nor the MR classified the handling of liquor exhibits as secondary to other seized items. The Appellant contends that the Board erred in characterizing the seized beer as not second-tier, then contradicting that assertion by concluding that the Respondent's handling of the beer warranted a lesser conduct measure.

[119] The Respondent asserts that the Board summarized how the detachment handles liquor exhibits, noting that even the acting detachment commander testified that there was little significance given to alcohol related exhibits. He submits that the Board concluded that it would be unfair to unduly punish the Respondent when everyone in the detachment mishandles liquor exhibits.

[120] The Respondent argues that the Board did not err in its findings, asserting that the Board considered the parity and fairness of an appropriate conduct measure based on the evidence provided related to the accepted handling of liquor seizures at the Respondent's detachment.

[121] The evidence before the Board confirmed that liquor exhibits were dealt with differently than other exhibits. The acting detachment commander accepted the practice, stating that charges would be withdrawn should the disposed liquor be required for court. While the Board considered the practice as troubling, and a mitigating factor in his assessment, he did not equate the giving away of any type of exhibit as an acceptable practice. I agree with the ERC that the Appellant did not provide any argument as to why the mitigating factor would be irrelevant.

[122] Given the Appellant did not establish any error in the Board's weighing of this mitigating factor, I find no reason to interfere.

6. The Board's reasons were insufficient in that it failed to address the matter of the seized cooler.

[123] The Appellant argues that the Board failed to address the Respondent's handling of the cooler contending that it should have been considered as either a mitigating or aggravating factor. The Appellant asserts that the Board's omission is unreasonable, and a breach of procedural fairness.

[124] The Respondent submits that the Appellant failed to demonstrate a lack of procedural fairness.

[125] The basis of Allegation 1 relates specifically to the handling of the cooler. The particulars of the contravention include the seizure of the cooler and the subsequent improper handling of it. I agree with the ERC that it would be inappropriate to consider the handling of the cooler as a mitigating or aggravating factor when those facts are necessary parts of the established allegation. The ERC recommendation C-007, para 83, frames this point:

> Although dishonesty is a relevant aggravating circumstance to consider when imposing discipline, it is not an appropriate factor in the present case because the consideration of aggravating factors is a consideration of factors "beyond the essential constituents" of the misconduct (Appendix 1-20 of the RCMP Conduct Policy, pp. 77; *R v. Flight*, 2014 ABCA 380, para. 4). A lack of honesty is not an appropriate aggravating circumstance in this case as the allegations are themselves based on dishonesty.

[126] In determining that the Board made no error in not considering the seized cooler as a factor in establishing the appropriate conduct measures to impose, the Appellant's argument that the Board's reasons were insufficient holds no merit.

7. The Board erred by placing too much weight on the relationship between the [acting detachment commander] and the Respondent.

[127] The Appellant argues that the Board erred in speculating that the Respondent's misconduct would not have escalated absent the acrimonious relationship. The Appellant asserts that by the time the Respondent called the acting detachment commander, he had already given the beer away, and created a false report arguing that any conversation with the acting detachment commander would not have changed those facts. The Appellant argues that the Board's speculation is not based on fact, contending that the Board acted improperly to even suggest it.

[128] The Respondent argues that the Board appropriately concluded that the conduct may not have escalated had it been dealt with more expediently. He contends that the Board never concluded that the Respondent was not liable for his conduct, only that the relationship between the acting detachment commander and the Respondent was a mitigating factor that jeopardized the Respondent's employment.

[129] In explaining mitigating circumstances, *Black's Law Dictionary, 8th ed.*, states; "A fact or situation that does not bear on the question of a defendant's guilt but that is considered by the court in imposing punishment and especially in lessening the severity of a sentence".

[130] The question is whether the Board erroneously considered a mitigating factor? The Board stated, (Appeal, p 64):

> [154] … [The acting detachment commander] testified to a long-standing acrimonious relationship with [the Respondent].
>
> [155] … [The Respondent] was obviously not the only one at this detachment whose exhibit-handling practice left something to be desired, but he was singled out for special attention, likely because of this acrimonious relationship.
>
> [156] …[The acting detachment commander's] dislike for [the Respondent] was palpable, and I do not find it surprising he immediately brought the situation

> involving the cooler of beer to the attention of the district advisory non-commissioned officer rather than deal with it himself at the detachment level.
>
> [157] On Friday evening, July 25, 2014, [the Respondent] made two telephone calls to [the acting detachment commander], who did not respond because he saw the calls were from [the Respondent's] personal phone. [The acting detachment commander] knew [the Respondent] was on duty when the calls were made. Had their relationship not been so acrimonious, an earlier discussion would have taken place and the situation would not have escalated to the point where [the Respondent's] job was in jeopardy.

[131] The testimonies of the acting detachment commander and the Respondent left no doubt that their relationship was strained. Moreover, with the Board having the benefit of hearing their testimonies, there is no reason to question its observation that the acting detachment commander's dislike for the Respondent was palpable. While the Board did not consider the acrimonious relationship in establishing the allegations, by raising it as a mitigating factor, according the *Conduct Measures Guide* (p, 9), it should assist in explaining the misconduct or it should help in lessening the gravity of the Respondent's actions.

[132] I agree with the ERC, in that the inferences drawn by the Board are problematic. First, while it appears that the general handling of liquor related exhibits raised some questions, the issue giving rise to the allegations relates specifically to giving exhibits away. There was no evidence that anyone else at the detachment had given exhibits away. In my view, without such evidence before the Board, its conclusion that the Respondent was treated differently because of an acrimonious relationship had no probative value.

[133] Secondly, the Board's comment related to the phone calls is also problematic. There was no evidence presented giving any indication of what would have transpired had the acting detachment commander answered the calls from the Respondent on July 25, 2014. What is known for sure, is that the Respondent had already given the beer and cooler away. While the Respondent called the acting detachment commander in response to the questions posed in the detachment wide email, there is no evidence that the Respondent would have responded any differently than the information he included in his email message sent to the acting detachment commander that same evening. While I certainly do not condone ignoring the Respondent's calls, it is speculative at best to suggest that the return of those calls would have altered the Respondent's conduct.

[134] Thirdly, in paragraph 157 of its decision, the Board seems to be saying that if the acting detachment commander had a more positive relationship with the Respondent, he would have dealt with the matter at the detachment level, rather than engaging the DANCO. Again, this comment is not based on the evidence. I agree with the ERC that when the acting detachment commander learned that an exhibit was given to the Fire Department, he had a duty to act on the possible breach of the Code of Conduct. There is no evidence that the acting detachment commander dealt with this possible breach any differently than he had dealt with any previous potential breaches of the Code of Conduct. Moreover, whether he sought guidance from the DANCO, the acting detachment commander was responsible pursuant to paragraph 37(e) of the Code of Conduct to "ensure that any improper or unlawful conduct of any member is not concealed or permitted to continue".

[135] The question that remains is whether the Board's erroneous consideration of a mitigating factor impacted its decision in determining the conduct measures to impose? In determining the weight given to it by the Board, I note that the Board considered several other mitigating factors, and reviewed relevant adjudication board decisions, and assessed the range of conduct measures provided in the *Conduct Measures Guide*. As outlined in *Lacasse* (para 44), "…the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence".

[136] Beyond speculating as to the possible impact of the acrimonious relationship, it was not the determining factor in the Board's conclusion that the Respondent should not be dismissed. In my view, the Board placed significant weight on its finding that the Respondent did not benefit from the misconduct, distinguishing it from all the other cases warranting dismissal. Accordingly, I agree with the ERC that while the Board considered an irrelevant mitigating factor, it was not a determinative error. Therefore, I see no reason to interfere with the Board's decision.

8. The Board erred in considering the evidence.

[137] The Appellant did not present any arguments, rather, she submitted a general statement asserting that the Board erred in considering the evidence resulting in the imposition of conduct measures that are clearly unreasonable.

[138] The Respondent argues that the Board imposed conduct measures that are permitted pursuant to the related regulations.

[139] In not providing any basis for this ground of appeal, I agree with the ERC that the Board's consideration of evidence is addressed in the other sections of this analysis. Therefore, as itemized, I will not consider this objection any further.

9. The Board erred in concluding that the misconduct did not amount to the repudiation of the employment contract.

[140] The Appellant maintains that the Respondent's lack of credibility resulted in his inability to testify in court proceedings, and record information in his files, arguing that those duties are required for the Respondent to maintain his employment as a peace officer. The Appellant argues the actions of the Respondent have resulted in his inability to satisfy the basic requirements of a peace officer, creating too great a liability for the RCMP to continue his employment.

[141] The Respondent argues that there was no evidence presented to support the Appellant's "bold assertion". In fact, contrary to the Appellant's assertion, the Respondent notes that the cases considered during the hearing demonstrate that other members were retained despite having *McNeil* implications.

[142] The Respondent asserts that one instance of improperly documenting a file does not lead to his inability to properly record information on every future file.

[143] While I agree with the Appellant that a member who is unable to satisfy the basic requirements of a peace officer would likely face dismissal, the evidence in this case does not support that the Respondent is not able to satisfy those requirements. As previously stated, the Record does not support any evidence that the Respondent is unable to testify, or properly record information in his files. Members subject to *McNeil* implications exist throughout the organization, and the Appellant did not provide any evidence to demonstrate that the Respondent's testimony would not be accepted. Each case stands on its own, and the Respondent's testimony may or may not impact the outcome of any

given proceedings. In the absence of evidence from any prosecutorial regime denouncing the future evidence of the Respondent, I find the Appellant's assertion without merit.

10. The Board erred in deviating from the *Conduct Measures Guide*.

11. The Board erred in deviating from the conduct measures submitted by the MR.

12. The Board erred by not concluding that dismissal was the appropriate conduct measure.

[144] The last three objections are considered together as they all relate to the conduct measures, specifically the imposition of 35-days forfeiture of pay opposed to dismissal.

[145] The Appellant argues that the Board failed to identify the Respondent's attempt to avoid responsibility as an aggravating factor, contending that the Respondent asked the Fire Chief to lie for him to assist him in concealing his action. The Appellant argues that the *Conduct Measures Guide* identifies such behaviour as an aggravating factor, which the Board omitted to consider.

[146] The Appellant contends that the Board was obligated to address why it did not adopt the submission of the MR to impose forfeiture of 45 to 60-days pay. She also argues that the imposed conduct measure of 35-days is an error as it circumvented the *Conduct Measures Guide*.

[147] The Appellant concludes that the Board failed to properly consider the evidence, the aggravating and mitigating factors and the *Conduct Measures Guide*, rendering the decision to impose the conduct measure of 35-days forfeiture of pay clearly unreasonable.

[148] The Respondent asserts that the conduct measures imposed by the Board, were in the range outlined in the *Conduct Measures Guide* relying on page 7 which states:

> A "hard" maximum financial penalty of 31-45 days for cases of serious contraventions where dismissal from the Force is a distinct possibility. This hard maximum is to be employed in situations where the conduct authority is "on the fence" about retaining or terminating a member but decides, in light of all the aggravating and mitigating factors to continue to employ the member. A member receiving the 45 day penalty should be thankful to still have a job at the conclusion of the conduct meeting.

[149] The Respondent argues that he presented several decisions under the old legislation where similar conduct was established, noting that the decisions resulted in the forfeiture of pay in the mid-range with the exception falling at the highest end shy of dismissal. Accordingly, he made his suggestion of what might be appropriate in the untested new realm knowing that the decision remains at the discretion of the Board.

[150] The Respondent argues that the Board considered all the factors, and provided an appropriate rationale for its decision. The Respondent concludes that the Board provided a lengthy analysis, and in determining that dismissal was not appropriate provided comprehensive reasons for the conduct measures imposed. The Respondent asserts that the decision demonstrates sufficient justification, transparency and intelligibility.

[151] *Black's Law Dictionary, 6th ed.* defines aggravation as: "Any circumstance 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". The particulars of Allegation 5 include telling the Fire Chief to provide false information pertaining to the disposal of alcohol. Therefore, I find that telling the Fire Chief to lie is an underlying factor necessary to establish that the Respondent attempted to avoid responsibility, particulars required to establish the alleged discreditable conduct outlined in Allegation 5. As essential constituents of the Allegation, those circumstances cannot be identified as an aggravating factor.

[152] After finding that the five allegations against the Respondent were established, the Board stated that its obligation was to impose conduct measures that were appropriate and proportionate as outlined in section 24(2) of the *CSO (Conduc*t) (Appeal, p 58). The Board reviewed the cases citied, and acknowledged that the range of conduct measures for dishonesty range from a reprimand, and imposition of significant forfeiture of pay to an order for resignation. The Board noted that acts of dishonesty in the cases provided involved a self-benefit finding that this case could be distinguished from those on that basis (Appeal, p 60).

[153] The Board then considered the principle of parity of sanction finding that dismissal in this case would be disproportionately harsh given the lack of self-benefit. The Board considered cases dealing

with rehabilitative potential, viability of the employment relationship, fitness to remain an employee, and termination as a final resort. In applying the facts of this case, the Board found that the Respondent's actions were a serious error in judgement rather than an irredeemable character flaw (Appeal, p 62). The Board found no reason to suspect that the Respondent would act again in a similar fashion, and determined that the organization was not at a final resort in relation to the Respondent's rehabilitation.

[154] Next, the Board considered the aggravating and mitigating factors relying on the *Conduct Measures Guide* to impose the forfeiture of 35-days pay. I agree with the ERC that the Board's imposition of the stated conduct measures was reasonable in the circumstances noting that the Board is owed significant deference recognizing the tribunal of first instance is in the best position to exercise the considerable subjectivity characteristic of the process. I also agree with the ERC that the Board's decision reflects a full understanding of the evidence before it, the serious nature of the misconduct, the circumstances surrounding the misconduct, and the statutory requirements and policy considerations applicable to the conduct boards in the imposition of conduct measures (Report, para 180).

[155] The Board is not bound by either Party's recommendation, page 3 of the *Conduct Measures Guide* states:

> A conduct authority can impose a measure outside 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).

[156] Moreover, in this case, the suggested range was the forfeiture of 31 to 45-days pay. The cumulative 35-day forfeiture imposed is obviously within the suggested range. Given the *Conduct Measure Guide* is a flexible instrument, and the Board provided detailed reasons for why the conduct measures were appropriate in the circumstances, I agree with the ERC that the Appellant failed to establish a manifest and determinative error with the Board's decision.

[157] The ERC noted that a key issue in imposing dismissal as a conduct measure, is whether the member's conduct demonstrated that he or she was beyond rehabilitation, and no longer fit to perform his or her functions. I agree with the ERC that the Record demonstrates that the Respondent is a

satisfactory performer of good character with no prior discipline, and with continued support from a community in which he is greatly involved. The Board recognized the challenges facing the Respondent upon being found to have lied, but in considering the totality of the information, the Board assessed the Respondent to have a rehabilitative potential. Given the Board's decision was void of any determinative error, I find no reason to interfere.

DISPOSITION

[158] Based on the foregoing reasons, I find the Appellant has not established that the Board made any determinative errors. Therefore, in accordance with subsection 45.16 (3) of the *RCMP Act*, I deny the appeal and confirm the conduct measures imposed by the Board.

November 28, 2019

Jennie Latham — Date

Adjudicator