

CORRECTED DECISION

Corrections or changes to the final decision were effected and issued on October 23, 2018, and are appended



IN THE MATTER OF A CONDUCT PROCEEDING

PURSUANT TO

THE *ROYAL CANADIAN MOUNTED POLICE ACT*

BETWEEN:

Commanding Officer "E" Division

("Conduct Authority")

and

Constable Ashley Goodyer Regimental Number 61089

("Subject Member")

Record of Decision

Conduct Board

Assistant Commissioner Craig S. MacMillan

Ms. Shahana Khan, Conduct Authority Representative (“CAR”)

Staff Sergeant Colin Miller, Member Representative (“MR”) in relation to the decision on merit

Ms. Tracy Pasenko (“MR2”) in relation to the decision on measures

(collectively, the “Representatives”)

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SUMMARY

The Board found the Subject Member committed four contraventions of the *Code of Conduct* by failing to follow the direction of a supervisor on two occasions and knowingly making false and misleading statements to superiors on three different occasions, one of which occurred during a formal interview forming part of a conduct investigation. An allegation of engaging in discreditable conduct by engaging in sexual, intimate or romantic activity while on duty was not established. The Board imposed a 20 day forfeiture of pay for failing to follow the direction of a supervisor and in relation to the false statements ordered the Subject Member to resign within fourteen days, in default of which he be dismissed.

RECORD OF DECISION

INTRODUCTION¹

[1] This decision arises from a conduct proceeding involving the Subject Member in which the Conduct Board (“Board”) rendered a written-oral decision on merit without hearing any testimony.

[2] The Representatives were subsequently given an opportunity to provide submissions on what measures should be imposed, and the Board has rendered a decision on measures without finding it necessary to hear any testimony.

ALLEGATIONS

[3] Between mid-June or July, 2016 and late November, 2016, while posted at Kamloops Detachment in Kamloops, British Columbia (“Detachment”), the Subject Member had certain interactions with a member of the public (“Ms. F”), and based on the circumstances of those

¹ Unless otherwise stated, page number citations or references relate to the enumeration found in the *Code of Conduct* Investigation Report (dated 2017-02-20) and Appendices (“Conduct Report”), or the pertinent legal decision, authority, or document being referred to at that point in this decision.

interactions and subsequent events related thereto, he faces five allegations (as outlined in the Notice of Conduct Hearing and particulars, dated December 21, 2017) (“Notice”) of contravening the *Code of Conduct*, which the Boards summarizes as:

1. failing to follow the direction of Staff Sergeant Preto contrary to section 3.3 (“Allegation 1”);
2. engaging in discreditable conduct by engaging in a sexual, intimate or romantic activity with Ms. F at her residence while on duty contrary to section 7.1 (“Allegation 2”);
3. failing to provide complete, accurate and timely accounts to Corporal Wood pertaining to the performance of duties contrary to section 8.1 (“Allegation 3”);
4. failing to provide complete, accurate and timely accounts to Staff Sergeant Daly and Corporal Wood pertaining to the performance of duties contrary to section 8.1 (“Allegation 4”); and
5. failing to provide complete, accurate and timely accounts to Corporal Rappel pertaining to the performance of duties contrary to section 8.1 (“Allegation 5”) (collectively, the “Allegations”).

[4] For the reasons outlined below, the Board finds Allegation 1, Allegation 3, Allegation 4, and Allegation 5 established. The Board finds that Allegation 2 has not been established.

[5] In terms of measures, in relation to Allegation 1, the Board imposes a forfeiture of 20 days’ pay, and in relation to Allegation 3, Allegation 4, and Allegation 5, the Board orders the Subject Member to resign from the RCMP within fourteen days, in default of which he will be dismissed.

BACKGROUND

Circumstances

[6] On or about November 10, 2014, the Subject Member completed training at Depot Division and was posted to the Detachment and commenced cadet field training on November 25, 2014 (p. 18).

[7] Although the Subject Member completed the Cadet Field Coaching Program, his probationary status had apparently not been officially signed off due to some ongoing performance issues, but ultimately the conduct dealt with in the Allegations was not addressed under the probation process as the two year probationary period expired a few days before the events dealt with by the Allegations (p. 18).

[8] The Subject Member was initially posted to “C” Watch at the Detachment, and in mid-July, 2016, Staff Sergeant Preto became aware that the Subject Member (who was on probation at the time) was meeting during his shift with Ms. F at her place of work, a local hospital (p. 71). Staff Sergeant Preto was concurrently aware that the Subject Member was engaged to be married to another woman and they lived together (“Spouse”).

[9] Early one morning, during a weekend shift, Staff Sergeant Preto, while driving to a local coffee shop to meet some colleagues, observed the police motor vehicle (“PMV”) operated by the Subject Member, which he considered “odd”, as the Subject Member was posted to the North Shore Zone, which was not their present location, and the Subject Member was not dispatched to a call in the area. Upon checking the Mobile Data Terminal (“MDT”) map, Staff Sergeant Preto saw the Subject Member’s PMV was now parked near the hospital (p. 71).

[10] Based on the foregoing, Staff Sergeant Preto asked Sergeant Fesenko to check and see what the Subject Member was doing. Sergeant Fesenko reported that he saw the Subject Member’s PMV parked beside a smaller car and when he approached the two vehicles drove away. In learning of this information, it was Staff Sergeant Preto’s conclusion that the Subject Member had been meeting someone and did not want to be seen by Sergeant Fesenko.

[11] The next day, Staff Sergeant Preto met with the Subject Member, who admitted he was meeting his “girlfriend”, Ms. F (p. 71). Staff Sergeant Preto told the Subject Member that this type of activity would not be permitted on duty while he was still engaged and living with his Spouse.

[12] Staff Sergeant Preto states that “in no uncertain terms” he made it clear to the Subject Member that he was not to see Ms. F while on duty (“Direction”), as it would bring the reputation of the RCMP and Subject Member into disrepute, as well as noting the implications for Ms. F and

his Spouse, both of whom held professional positions in the community (p. 71). Staff Sergeant Preto states he reinforced the Direction by stating to the Subject Member that he was “prohibited while on duty with having any social contact with...” Ms. F (p. 72).

[13] When interviewed during the conduct investigation (“Interview”), the Subject Member acknowledged that he met with Staff Sergeant Preto and received the Direction, but felt his “lunch” time was “untouched” or “unfettered”, “[t]hat’s kinda how I saw it” (pp. 124 and 149-150).

[14] The Subject Member purportedly ended his relationship with Ms. F in or about early September, and although his relationship with the Spouse was experiencing some difficulties, they were married a few days later on September 10, 2016 (pp. 122-123).

[15] In November, 2016, the Subject Member moved to “A” Watch as part of getting a fresh start as certain aspects of his interactions with Ms. F had become known within “C” Watch and/or the Detachment.

[16] On November 12, 2016, during his second shift with “A” Watch (and his first nightshift), the Subject Member was assigned to the North Shore Zone performing general duties (i.e., uniform patrol) (pp. 22, 51, and 167), and at about 23:58 hours he contacted Corporal Wood by cellular phone and asked for permission to attend a residence (in a part of Kamloops generically referred to as the Juniper area) outside of his assigned zone to take part in a birthday party for one of his Spouse’s friends (p. 23). Corporal Wood stated he understood the Subject Member was going to meet with his “wife” (i.e., Spouse) at the birthday party (p. 24). Permission was granted to attend by Corporal Wood.

[17] At some point, another member observed the Subject Member’s marked PMV at an address in the Juniper area (later identified as the residence of Ms. F) (“Residence”), which he brought to the attention of Corporal Butler. Corporal Butler was uncertain, but did not think the Subject Member had any link to the Residence, and it caused her to remember she had seen the Subject Member’s PMV at the Residence on a previous shift, which was unusual because he worked the North Shore Zone (p. 47) (and the Juniper area is not part of that zone). At the time, Corporal Butler did not think too much about it, but she also recalled that at the start of the shift the Subject

Member had asked to drive an unmarked PMV to look for “impaireds”, which she denied, pointing out that a marked PMV can work just as well (p. 47).

[18] During the time that the Subject Member was at the Residence of Ms. F (variously indicated as being between 97 to 101 minutes depending on the technological source), an “urgent” (not a 10-33 (i.e., officer in trouble)) request for assistance came over the radio from a member at another location (p. 24) (“Assistance Call”).

[19] The witnesses were not consistent in their description of the Assistance Call, as it was variously interpreted as “need some members here” and not urgent (pp. 24 and 30) to being “priority one” with some urgency (p. 47), but given there was consensus it was not a 10-33 call, the Board does not consider it to have been one that required an emergency assistance response.

[20] The Subject Member was at the Residence and did not acknowledge or respond to the Assistance Call, and during the Interview indicated he heard the Assistance Call over the radio, but given there were a number of members responding and the situation was in hand, he elected not to respond.

[21] In the interim, however, Corporal Butler had noted that the Subject Member did not respond to the Assistance Call and he had not been heard on the radio for a while, and so she decided to check on the Subject Member and found that his PMV was still parked in front of the garage at the Residence (p. 48). Corporal Butler checked the logs and found that the Subject Member was reported to be on a lunch break.

[22] Later in the shift, at approximately 03:00 hours, Corporal Wood was made aware by Corporal Butler that the Subject Member had been at the Residence for an extended period of time (p. 26).

[23] On November 28, 2016, the issue of the time the Subject Member spent at the Residence of Ms. F was raised during a meeting with Staff Sergeant Daly and Corporal Wood (“Meeting”).

[24] Much of the Meeting was recorded in writing in a Performance Log created by Staff Sergeant Daly (pp. 76-79). During the Meeting, the Subject Member said he had gone to the birthday party and met his Spouse, had some food, and then went to the Residence of Ms. F to

clear the air on some things, and that he left after about 45 minutes. The Subject Member stated nothing physical occurred with Ms. F at the Residence.

[25] The Subject Member is also reported to have acknowledged in the Meeting (as recorded in the Performance Log) that what he told Corporal Wood when he asked to attend the birthday party and meet his Spouse, and what he actually did (i.e., going to the Residence) could be perceived as a “lie”, and that he should have told Corporal Wood what he was doing, but wanted to keep matters “private and low profile.” The Subject Member indicated that he realized he let others down, but had just gone through a difficult period, and reiterated that it was only a discussion, nothing physical, with Ms. F.

[26] When asked if he had gone to the Residence at any other time since coming to “A” Watch, the Subject Member admitted there was one other time, but he did not stay (p. 78). Staff Sergeant Daly noted that the Subject Member had brought this personal matter into his professional life, and that any number of bad outcomes could have arisen, particularly if the Spouse of the Subject Member had followed him and there was a confrontation, noting he was in uniform and/or “A” Watch members (i.e., his co-workers) would have to respond.

[27] The Meeting closed with Staff Sergeant Daly directing the Subject Member not to attend the Residence on duty again, and a decision would be made by the Detachment management as to next steps.

[28] After further investigation and inquiries, Global Positioning System (“GPS”) data was obtained from the Subject Member’s PMV from the night of November 12/13, 2016, and it revealed that he only attended the Residence of Ms. F and did not make any other stops (i.e., he did not go and meet his Spouse at a birthday party before going to the Residence).

[29] During the conduct investigation, and Interview, it was confirmed that while working an overtime shift with “B” Watch on November 22, 2016, the Subject Member had also attended the Residence of Ms. F.

[30] On this latter occasion, the Subject Member advised a supervisor he was going to attend the Juniper area, but did not advise the supervisor that he was specifically attending the Residence of Ms. F or what he was doing (p. 142). The Subject Member states he attended and had his lunch

at the Residence of Ms. F for about an hour (p. 142) (also confirmed by GPS), and that they just talked (which is inconsistent with his statement during the Meeting that on the second visit he “went in and out and...didn’t stay”) (p. 78).

[31] The foregoing information was brought to the attention of the Detachment Commander, and on December 12, 2016, a conduct investigation was mandated.

[32] After several attempts, the conduct investigator, Corporal Rappel, was able to make contact with Ms. F on December 14, 2016, and when she attended the Detachment, she did not want the interview to be recorded, and would only provide information she felt was relevant (p. 97).

[33] Corporal Rappel felt Ms. F was “on the offensive from the start”, “argumentative” and “unwilling to be frank” (pp. 97 and 99), but she did confirm her relationship with the Subject Member commenced in June or July, 2016, and that she learned through social media he had married on September 10, 2016 (p. 97).

[34] Ms. F stated that prior to November 12, 2016, the Subject Member had wanted to come over and apologize, and wondered out loud why it mattered where he took his breaks (p. 98). When advised by Corporal Rappel that it mattered because the Subject Member had lied about his whereabouts, Ms. F dismissed it as non-issue because the “police” knew where he was anyhow. Ms. F stated the Subject Member kept his boots on, they were in the foyer of the Residence, and after about 45 minutes her children woke up and the Subject Member spoke to them (p. 98).

[35] Without prompting, Ms. F then said she was unaware that the Subject Member missed a call (i.e., Assistance Call) which prompted Corporal Rappel to note to himself that it was clear that Ms. F was aware that this was a concern in advance (i.e., possibly from the Subject Member) (p. 98). Ms. F was also upset that the Subject Member may lose his job, another issue not brought up by Corporal Rappel.

[36] When questioned about whether there was any intimate or sexual interaction with the Subject Member when he was on duty, Ms. F said there was not, as her kids were at home (p. 99).

[37] On January 5, 2017, the Subject Member agreed to the Interview, and provided a recorded and voluntary statement to Corporal Rappel (pp. 119-151).

[38] During the initial part of the Interview, the Subject Member confirmed he had an intimate relationship with Ms. F, which commenced in June, and ended in September, 2016, prior to the Subject Member getting married to his Spouse (pp. 121-23).

[39] Initially, the Subject Member is somewhat equivocal about the Direction from Staff Sergeant Preto, indicating that it did not include his lunch time, which he considered unfettered, but ultimately acknowledges that he was told in no uncertain terms not to see Ms. F while on duty and what Staff Sergeant Preto reported on this point was accurate (pp. 124-126).

[40] In turning to the Subject Member's attendance at the Residence of Ms. F on November 12/13, 2016, he says he wanted to make amends for the way the relationship dissolved, and that he remained in the foyer the whole time, and he also spoke with Ms. F's children (p. 127).

[41] In regards to arranging his attendance at the Residence, the Subject Member advised there was a series of texts over a period of time with Ms. F trying to arrange a meeting, which finally firmed up on the night in question about half an hour before he attended the Residence, as previously Ms. F was not willing to talk (p. 131).

[42] In respect of his Spouse and the birthday party, the Subject Member varied his story by saying his intent was to meet her and have a quick bite, but while he was enroute his Spouse advised she had already decided to leave, and since he was going up to the Juniper area, he ended up going to the Residence of Ms. F to "bury that hatchet on my lunch" (which is not what he initially reported to Corporal Wood, and later to Staff Sergeant Daly and Corporal Wood in the Meeting in relation to meeting his Spouse) (pp. 131-133).

[43] The Subject Member stated that his Spouse texted him and told him she was leaving the party about five minutes after he spoke to Corporal Wood (p. 133), and at this juncture in the Interview, as Corporal Rappel began seeking specifics about phone numbers relating to the texts and their content, and specifically where the birthday party was being held, the Subject Member expressed some concern about that his "personal life is being attacked" and wondered whether he will continue with the Interview (p. 134).

[44] When asked directly by Corporal Rappel whether the Subject Member is "lying...about there being a birthday party", the Subject Member stated "No", and expressed concerns about his

Spouse being brought into the matters “because it’s going to affect me personally and financially and everything else” (p. 134).

[45] When pressed to provide details about the address of the birthday party, the Subject Member stated he did not get it, as the Spouse had already left, and “I didn’t bother asking”, again advertizing to the fact that if the Spouse is “... brought in the mix she’s gonna leave me and sue me for support and everything else all because of this” (p. 135).

[46] Corporal Rappel informed the Subject Member that now is the time to be “frank” as he will be taking the necessary steps to address any unresolved questions, which may include speaking to the Spouse, which prompted the Subject Member to complain about the “difficult situation” he finds himself, that he just wants to “move on” (a comment repeated throughout the Interview), but it is like “...a tap that keeps opening and the water just keeps going down the drain but I can’t stop it” (p. 136).

[47] The Subject Member acknowledged he should have included in his conversation with Corporal Wood that he intended to go the Residence of Ms. F, that he put himself in a position where he does not know what to do, and that his Spouse has already threatened to leave him, and it is going to cost him a “huge amount of money” (p. 137).

[48] At this point in the Interview, Corporal Rappel tells the Subject Member that he believes what the Subject Member told Corporal Wood, and later reiterated in the Meeting with Staff Sergeant Daly and Corporal Wood about meeting his Spouse at the birthday party was a “lie”, and that the Spouse is going to confirm that the Subject Member is “lying” (p. 137).

[49] The Subject Member replied that he does not want to lose his job, and Corporal Rappel reiterates that he will get to the bottom of the situation, and upon stating “[t]here was no birthday party, correct?”, the Subject Member admits (p. 137):

Your correct. There was no party. I went up there to see [Ms. F] and that was the only reason why I went up there.

[50] Corporal Rappel acknowledged the admission by the Subject Member, and after some discussion about the importance of trust, integrity, honesty, and rapport and relationships with people, summarizes the situation for the Subject Member (p. 138):

I knew from the minute I read the [Performance Report from the Meeting]...that there was something of concern with regard to the party. And you came in here and sat down and for half an hour have lied to me about it. And only because I pushed you into a corner and showed you there was no way out of this except for the truth did you come clean. And that's concerning for me absolutely.

[51] As a result of the admission in the Interview about lying to Corporal Rappel, an additional allegation was added to the conduct investigation (i.e., Allegation 5) (p. 195).

[52] On January 16, 2017, the Subject Member was served with a Notice of Reassignment and moved to administrative duties on "E" Watch (pp. 160-62).

[53] On or about February 20, 2017, the Conduct Report was provided to the Officer in Charge of the Detachment (p. 1), and on or about April 10, 2017, the Conduct Report and supporting materials were forwarded to the Commanding Officer as the appropriate Conduct Authority given the level of measures that may apply to the Allegations (pp. 163-65).

[54] On November 10, 2017, some nine months after the Conduct Report was submitted, and just prior to the expiration of the one year limitation period, the Conduct Authority signed the Notice to the Designated Officer seeking the appointment of a conduct board to deal with the Allegations.

[55] The Subject Member was suspended from duty with pay on November 22, 2017 (pp. 205-7), and the Notice of Appointment of the Board was signed by the Designated Officer on November 23, 2017.

[56] The Notice was served on the Subject Member on January 9, 2018.

Response

[57] After reviewing the Conduct Report, the Board held a preliminary meeting with the Representatives on February 2, 2018 ("Meeting 1"), and a number of procedural issues were discussed, including elements of the Notice and particulars (as outlined in an email of the same date), and the Subject Member was provided until February 16, 2018 (later extended to February 23, 2018) to provide a response ("Response") as required under subsection 15(3) of the *Commissioner's Standing Orders (Conduct)* ("*CSO (Conduct)*").

[58] During Meeting 1, the Board noted that in relation to Allegation 2 (engaged in sexual, intimate or romantic activity at the Residence) the Conduct Report did not appear to contain any direct evidence supporting the activity alleged (particular 7), and the CAR expressed a desire to consider the Response before indicating whether Ms. F would be required as a witness. The CAR also clarified that particular 5 (did not respond to Assistance Call) of Allegation 2 was not being relied upon to establish discreditable conduct.

[59] In the afternoon of February 23, 2018, the CAR sent an email to the Board indicating that, based on further contact with Ms. F, additional and new information about the relationship with the Subject Member was provided, which was communicated to the MR, and that an investigator would be requested to obtain a statement from Ms. F.

[60] The MR confirmed that he had spoken with the CAR, and asserted that there was no evidence within the Conduct Report to substantiate particular 7 of Allegation 2, and that any “new information” that would be gathered falls outside the prescription period and should not be admitted.

[61] The Board replied to the Representatives by email that because the Subject Member had not yet provided the Response it would permit the CAR to gather information in this instance, and granted seven days to complete that task. The Board further directed that once the CAR received the additional information, it would be provided to the Board and MR, and after reviewing it, the Board would set a date to meet and discuss its admissibility. In the interim, the timeframe for the Subject Member to furnish the Response was suspended pending the forthcoming meeting.

[62] On March 2, 2018, the CAR advised that a statement had not been obtained from Ms. F, and the CAR was no longer seeking to summons her as a witness.

[63] The same day, based on an email exchange with the MR, it was determined that the Response would be provided on March 5, 2018, and it was received on that date.

[64] In addressing the Allegations, the Subject Member denies Allegation 1 (i.e., failing to follow the Direction), but admits some of the particulars, including that he was a member at the material time, was operating a PMV, and that Staff Sergeant Preto issued the Direction (particulars

1-3). The Subject Member also admits that Ms. F lived at the Residence, and that he attended there on November 12/13 and November 22, 2016 (particulars 4-6).

[65] However, the Subject Member explains (in relation to particular 6) that when he attended the Residence on November 22, 2016, he “believes that he told” the Watch Commander “...that he was going to his friend [Ms. F’s] place, but cannot say with complete certainty.”

[66] Further, the Subject Member submits that although he did attend the Residence on two occasions contrary to the Direction, the Direction itself was not in fact a lawful order, as it was based on Staff Sergeant Preto’s “...own personal morality and not for operational reasons or related to the accomplishment of the duties or the performance of functions by the [Subject] Member.”

[67] In relation to Allegation 2 (i.e., engaging in sexual, intimate or romantic activity), the Subject Member admits to some of the particulars, but denies his conduct was discreditable.

[68] The Subject Member admits to being a member at the material time, that he was operating the PMV, and that he attended the Residence on November 12, 2016 (particulars 1-4).

[69] In relation to the assertion in particular 5 that he failed to respond to the Assistance Call, the Subject Member notes he did not believe it was an urgent call, and that the CAR advised in Meeting 1 that this particular was not being relied upon to establish Allegation 2.

[70] In response to the assertion that he had no operational reason to be at the Residence, the Subject Member states he attended during his lunch break, and that although he remained at the Residence after coming back into service (for approximately 45 minutes), he continued to monitor the calls for service over his radio (particular 6).

[71] The Officer Radio Log (“ORL”) (pp. 60-62) shows that the Subject Member indicated he was on his personal cell at 00:14 hours, and approximately 47 minutes later went back into service at 01:02 hours (but did not depart the Residence), and approximately 53 minutes later he was back in the PMV in service at 01:55 hours (approximately 100 minutes total elapsed time). This information is also confirmed by the GPS data obtained from the MDT logs (pp. 73-75).

[72] In connection with the assertion in particular 7 that he engaged in sexual, intimate, or romantic activity with Ms. F, the Subject Member denies there was any such activity, that there are “no grounds to support this particular”, and it amounts to an abuse of process if it were to be pursued.

[73] The Subject Member admits Allegation 3 (failing to provide an accurate account to Corporal Wood) (and the related particulars 1-6), confirming that he was a member operating the PMV, sought permission to attend a birthday party with his Spouse in the Juniper area, but in fact drove directly to the Residence (because there was no birthday party), and thereby knowingly provided false and misleading information to Corporal Wood.

[74] Similarly, the Subject Member admits Allegation 4 (failing to provide an accurate account to Staff Sergeant Daly and Corporal Wood), confirming he was a member, attended the Meeting, which led to the completion of the Performance Log, and that he knowingly provided false and misleading information that there was a birthday party, and that he attended the party to meet his Spouse, when in reality he attended the Residence of Ms. F.

[75] However, the Subject Member qualifies particular 2 by noting the Performance Log provided by the CAR does not include his signature, and in relation to particular 3, explains that he cannot recall if he said in the Meeting that he actually met his Spouse, and notes the timeframe provided is not accurate (although it is not disputed he was at the Residence for a significant period of time).

[76] Finally, the Subject Member admits Allegation 5 (failing to provide an accurate account to Corporal Rappel) (and related particulars 1-5, with one qualification), confirming that he was a member, was under investigation for providing false information to Corporal Wood (on November 12, 2016) and Staff Sergeant Daly and Corporal Wood (on November 28, 2016 during the Meeting), and during the Interview made false and misleading statements in the form of fabricating a fictitious birthday party by creating extensive and utterly false details related to his Spouse, her actions, the nature and existence of the birthday party, as well as repeating the false and misleading information that he was going to meet his Spouse at the birthday party, but she decided to leave before he arrived, when his sole reason for going to Juniper was to see Ms. F.

[77] The Subject Member does correct subparticular f. of particular 5 of Allegation 5 by explaining that he told Corporal Rappel in the Interview that the birthday party was for a friend from his Spouse's law firm, not that the birthday party was at the law firm.

Reply

[78] On March 7, 2018, the Board advised that it did not appear that any reply was required from the CAR to the Response, and that subject to any comments of the Representatives, it did not consider any testimony would be required at the merit stage of the conduct proceeding.

[79] The CAR replied the same day that she wished to provide a brief response to six points arising from the Response, and after reviewing the points identified, the Board advised that based on the record it did not require submissions on four of the points (i.e., particular 6 of Allegation 1, and particulars 5, 6, and 7 of Allegation 2), but did agree to brief submissions on particular 7 of Allegation 1 and subparticular f. of particular 3 of Allegation 4, which were to be submitted by March 9, 2018.

[80] The next day, on March 8, 2018, the CAR reiterated her request to provide a submission on particular 7 of Allegation 2 at the merit stage, and also to request an amendment to particular 7 by removing the word "sexual."

[81] The same day, the Board replied that the CAR could provide a submission regarding particular 7 of Allegation 2, including a request to amend particular 7, but in so doing the Board noted the amendment was being sought at a very late stage, after the Subject Member had submitted the Response, and in the context of the extensive material already furnished.

[82] The date to provide the submissions by the CAR remained the same, being March 9, 2018, and the MR was advised that the Board would determine whether anything further was required from the Subject Member after reviewing the submissions of the CAR.

[83] On March 9, 2018, the CAR provided a written reply to the points arising from the Response as identified above, along with supporting materials ("Reply").

[84] In relation to particular 7 of Allegation 1 (i.e., lawfulness of the Direction), the Reply states that the Subject Member is bound to follow lawful orders based on the Oath of Office, and the

Conduct Measures Guide (2014) at p. 17 notes that members are expected to obey an order or direction, unless it is clearly illegal or compliance would constitute a criminal offence, violation of the *Charter*, or contravention of the *Code of Conduct*. If a member disagrees with an order or direction, she or he must comply with it and any subsequent recourse is through a grievance.

[85] Simply put, the Reply asserts that if the Subject Member disagreed with the Direction, his obligation was to comply with it and seek recourse through a grievance, and given there is no evidence the Subject Member sought any recourse against the Direction, it appears that although he "...seemingly agreed to it, [he] then took steps to conceal his action in order to defy the [D]irection."

[86] The Reply further notes that the Direction did not meet any of the exceptions noted in the Conduct Measures Guide, that it was restricted to the Subject Member's activities while on duty, and it was clearly understood by the Subject Member (p. 126²).

[87] According to the Reply, the Subject Member was "blatantly socializing while on duty", which is a misuse of public funds, and given he was on probation at the time, the Direction appropriately reminded him of his responsibilities, which was not based on the personal morality of Staff Sergeant Preto, but rather a concern over the perception of the Subject Member's integrity and promoting good conduct in accordance with the *Code of Conduct*.

[88] In closing on this point, the Reply states the Direction did relate to "operational reasons" and the accomplishment of duties and performance of the Subject Member, as he was "not being paid to socialize with a romantic partner."

[89] Next, the Reply indicates that the CAR is seeking to remove the word "sexual" from particular 7 (engaged in sexual, intimate or romantic activity) of Allegation 2, and will not be calling evidence to support this term (i.e., sexual).

² The Reply refers to lines 184-188 of p. 126 in the Conduct Report, which does not appear to be correct, and likely meant lines 222-234.

[90] As background, the Reply states that on February 23, 2018, the CAR wrote to the MR to advise it would be seeking to withdraw the term “sexual” and met later in the day with the MR and confirmed an intention to proceed solely on the “intimate or romantic activity” of particular 7.

[91] The Reply then adverts to the fact that the Board suspended the due date for the Response, which had been February 23, 2018 (the date the CAR wrote to and met with the MR), and the Response was submitted on March 5, 2018, which provides a denial of particular 7 in its entirety.

[92] As a result, the Reply asserts there has been no prejudice because the MR had notice in advance of submitting the Response of the intended course to amend particular 7, and presumably, but not stated, the Response also provided a complete denial in any event.

[93] The Board feels compelled to pause and note that at no time did the CAR indicate in its email communication with the Board on February 23, 2018, that she was going to seek an amendment to particular 7, but rather the CAR advised Ms. F had “provided additional new information pertaining to the extent of her relationship with the Subject Member”, which was communicated to the MR, and that an investigator would be requested to meet with Ms. F to obtain a statement (which the Board approved given the Response had not been submitted).

[94] The concern of the Board is that the CAR indicated that there was new additional information about the extent of the relationship between the Subject Member and Ms. F, which had to be obtained, but at the same time had already communicated an intention to the MR to amend particular 7, which was not made known to the Board, and is important given that in Meeting 1 the Board expressed concern about the apparent lack of evidence in the Conduct Report to support that any sexual, intimate or romantic activity occurred when the Subject Member attended the Residence (given the express denial of Ms. F and the Subject Member on this point), and now the CAR appeared to be seeking to gather further information to remedy that situation and/or amend particular 7 to avoid the potential lack of sufficient evidence.

[95] However, the Reply notes in the alternative that if an amendment to particular 7 is not granted, the phrase “engaged in sexual, intimate or romantic activity”, because of the “or”, does not require the CAR establish all three forms of activity (i.e., the phrase is disjunctive), as the

External Review Committee has noted that not all particulars must be proven, only those that are essential to an allegation.

[96] According to the Reply, “intimate or romantic activity” includes “a broad range of activities”, and the Conduct Report reveals that the Subject Member and Ms. F “were involved in an extra-marital relationship at the relevant time, they were discussing their personal relationship”, which is an interaction that falls within intimate or romantic activity.

[97] As a consequence, the Reply submits the Subject Member engaged in discreditable conduct (based on the commonly applied test) because he engaged in intimate or romantic activity while on duty in uniform, with an extra-marital partner, knowing that the Direction prohibited him from meeting with Ms. F, he attended the Residence for an extended period (contrary to the Direction), and then lied to his supervisor about his whereabouts.

[98] In conclusion on this point, the Reply states that the claim of abuse of process by the Subject Member is unsupported.

[99] The final point addressed in the Reply relates to subparticular f. of particular 3 of Allegation 4 (timeframe at the Residence), and indicates that the Subject Member during the Meeting with Staff Sergeant Daly and Corporal Wood attempted to account for his time by stating he attended the birthday party and then went to the Residence for 45 minutes, and then remained an additional 20-30 minutes, which is misleading because he did not attend two different locations, which was a calculated and deliberate falsehood.

[100] Continuing, the Reply observes that the ORL, MDT and GPS show the Subject Member was at the Residence for approximately one hour and forty minutes, yet the Response asks the Board to accept that by monitoring radio communications at the Residence, he was actively engaged in the performance of duties, which the Reply rejects because that cannot be accomplished while at the Residence with a “romantic partner.”

[101] The Reply states that the Subject Member was not in service while at the Residence because he was not in his PMV and in a position to promptly respond to urgent calls for service, and in fact chose not to attend the Assistance Call.

[102] After reviewing the Reply, on March 12, 2018, the Board advised the CAR that the request to amend particular 7 of Allegation 2 was denied (with reasons to follow), advised the MR that nothing further was required in relation to the points raised in the Reply, sought confirmation from the MR that the Subject Member waived the requirement to read the Allegations at a hearing, and informed the Representatives that no testimony from witnesses would be required at the merit stage, as there were no unresolved issues upon which a witness could provide further material and necessary information in order to make a decision.

MERIT

Context

[103] Before proceeding to the merit of the Allegations, the Board notes that the purpose, objectives and intent of the new conduct regime, and in particular reforms to formal proceedings, has been articulated in the Principles section of the *Conduct Board Guidebook* (2017):

2. Principles

2.1 The Legislative Reform Initiative (LRI) was tasked with developing a modernized conduct process and engaged in broad-based consultations with a wide range of stakeholders and examined various internal and external reports and studies regarding the RCMP, as well as other police agencies, relative to dealing with instances of alleged misconduct by police officers.

2.2 The reforms adopted under the LRI were expressly based upon certain principles arising from a broad consensus and understanding among stakeholders that conduct proceedings, including hearings before a conduct board, are to be timely and not overly formalistic, legalistic, or adversarial.

2.3 As such, proceedings before a conduct board are not to be interpreted or understood as requiring highly formalized and legalistic practices and procedures akin to a formal court-like process, but rather will be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

2.4 In most respects, a conduct hearing will unfold much like a conduct meeting, except that a conduct board has certain authorities to compel evidence and give direction, when it considers it necessary, given it is dealing with a dismissal case. A conduct hearing is administrative in nature and will be led by the conduct board (and not the parties), and it has broad discretion to control its own process and give direction.

2.5 In support of this approach, the former right of parties to be afforded a full and ample opportunity to present evidence, cross-examine witnesses, and to make representations at a hearing were expressly removed from the *Royal Canadian Mounted Police Act*, R.S.C 1985, c. R-10 (as amended) (*Act*) (former subsection 45.1(8)).

2.6 Further, a conduct board will expressly rely upon an investigative report and supporting material in making findings and determinations. At the sole discretion of the conduct board, a witness will generally only be summoned to testify where the conduct board considers there to be a serious or significant unresolved conflict in the evidence and the testimony of the witness would be material and necessary in resolving that conflict.

2.7 The responsibility for determining whether the information in the investigative report and supporting material is sufficient to permit a determination of whether an allegation is established resides with the conduct board.

2.8 The conduct board may issue a direction for further investigation or order the production of further information or documents only where it determines that the additional investigation or information is material and necessary to resolving an outstanding issue in the conduct proceeding.

2.8 Finally, subject members are now required to admit or deny an allegation as early in the proceedings as possible and to identify any defences or evidence which they seek to rely upon, in order that the conduct board can effectively complete a conduct proceeding.

[104] More recently, responding to an assertion by the External Review Committee in report C-017 (dated June 28, 2017), that the role of conduct boards in the new regime does not differ materially from the former or legacy discipline and adjudicative process, the Level II (appeal) Adjudicator in *Commanding Officer "J" Division v. Constable Cormier* (dated November 20, 2017) (file 2016-33572) ("*Cormier*") stated:

[132] ...With respect, this is a point of view I do not share. The amendments to the RCMP Act and the creation of the new conduct regime changed the nature of the role of conduct boards by enhancing their ability to actively manage proceedings and make conclusive determinations in a more informal and expeditious setting. In short, a conduct board is no longer reliant on the traditional to and fro presentation of evidence by the parties.

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

[134] First, conduct boards now have comprehensive knowledge of the case before the hearing. In accordance with subsection 45.1(4) of the former RCMP Act (in effect prior to November 28, 2014), the only document

provided to adjudication boards in the normal course was a bare notice of hearing containing the allegations and the particulars against the subject member. Now, conduct boards are provided with the notice of hearing, the investigation report, including witness statements and exhibits, an admission or denial of each alleged contravention of the Code of Conduct, the subject member's written submissions, any evidence, document or report the subject member intends to rely on at the hearing, as well as a list of witnesses submitted by the parties for consideration. The applicable provisions under the current process are the following:

RCMP Act

43(2) As soon as feasible after making the appointment or appointments, the conduct authority who initiated the hearing shall serve the member with a notice in writing informing the member that a conduct board is to determine whether the member contravened a provision of the Code of Conduct.

CSO (Conduct)

15(2) As soon as feasible after the members of the conduct board have been appointed, the conduct authority must provide a copy of the notice referred to in subsection 43(2) of the Act and the investigation report to the conduct board and must cause a copy of the investigation report to be served on the subject member.

15(3) Within 30 days after the day on which the member is served with the notice or within another period as directed by the conduct board, the subject member must provide to the conduct authority and the conduct board

(a) an admission or denial, in writing, of each alleged contravention of the *Code of Conduct*[:];

(b) any written submissions that the member wishes to make; and

(c) any evidence, document or report, other than the investigation report, that the member intends to introduce or rely on at the hearing.

18(1) Within 30 days after the day on which the notice of hearing is served, the parties must submit to the conduct board a list of the witnesses that they want to have summoned before the board and a list of the issues in respect of which they may want to rely on expert testimony.

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

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

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

[Repealed, 2013, c 18, s 29]

45.12(1) After considering the evidence submitted **at the hearing**, the adjudication board shall decide whether or not each allegation of contravention of the *Code of Conduct* contained in the notice of hearing is established on a balance of probabilities.

[Repealed, 2013, c 18, s 29]

45.13(1) An adjudication board shall compile a record of the hearing before it, which record shall include

- (a) the notice of the hearing under subsection 43(4);
- (b) the notice of the place, date and time of the hearing under subsection 45.1(2);
- (c) a copy of all written or documentary evidence **produced at the hearing**;
- (d) a list of any exhibits **entered at the hearing**; and
- (e) the recording and the transcript, if any, of the hearing.

[Emphasis added.]

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

CSO (Conduct)

26 The conduct board must compile a record after the hearing, including

- (a) the notice of hearing referred to in subsection 43(2) of the Act;
- (b) the notice served on the subject member of the place, date and time of the hearing;
- (c) a copy of **any other information provided to the board**;

- (d) a list of any exhibits entered at the hearing;
- (e) the directions, decisions, agreements and undertakings, if any, referred to in subsection 16(2);
- (f) the recording and the transcript, if any, of the hearing; and
- (g) a copy of all written decisions of the board.

[Emphasis added.]

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

CSO (Practice and Procedure) [Repealed, SOR/2014-293]

6(1) Any party requiring the attendance of a witness at a hearing shall forward the name of the proposed witness to the registrar who **shall** issue a summons of behalf of the board.

CSO (Conduct)

18(3) The board **must** establish a list of the witnesses that it intends to summon, including any expert in respect of whom a party has indicated an intention under subsection 19(3) to question, and may seek further submissions from the parties.

18(4) The board **must** provide the parties with a list of witnesses that it will hear and its reasons for accepting or refusing any witness on the list submitted by the parties.

[Emphasis added.]

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

[105] The foregoing quotations, while somewhat lengthy, provide a clear indication of the context in which conduct boards are now operating, which requires a conduct authority and subject member, and in particular representatives to critically examine their cases as early as possible, as the default or mindset that matters will simply, or must be, litigated in a formal hearing before the Board is no longer extant.

Analysis

[106] The Board reviewed in detail the Conduct Report and supporting material, as well as the Response and Reply, in making the following findings regarding the Allegations.

[107] As a foundational matter, it is commonly understood that members of the RCMP, by the terms of their engagement, have voluntarily agreed to abide by a higher standard of conduct than that of the ordinary citizen, although this standard does not call for perfection (*The Queen v. White*, [1956] S.C.R. 154 at 158 (“*White*”)). Furthermore, this agreement to abide by a higher standard of conduct covers both off, as well as on-duty behaviour.

Allegation 1

[108] With respect to Allegation 1 (failing to follow the Direction), based on the Interview and Response, it is not in doubt that the Subject Member received the Direction from Staff Sergeant Preto, and it was clearly understood to mean that he was not to have any social contact with Ms. F while on duty.

[109] The Subject Member essentially has two replies to Allegation 1 and the Direction, and the first is that it did not apply during his “lunch” period because it somehow relieved him of his operational or on-duty status, which enabled him to meet with Ms. F unencumbered by the Direction.

[110] There are a number of observations about this claim, the primary one being that the Subject Member has not demonstrated how he was no longer on-duty and/or operational during his lunch break given his own acknowledgement (by word or action) that he was still in uniform, operating a marked PMV, had to advise telecoms of his status and whereabouts, and was still required to monitor and respond to calls for service regardless of being on a lunch break. In other words, being on a lunch break did not put the Subject Member into some form of non-duty or non-operational condition.

[111] Another observation is that even if the Subject Member’s rationale was accepted (which it is not), by his own admission he returned to service while at the Residence on November 12/13,

2016, and remained there for a considerable period after ending his lunch break, which based on his own logic put him on-duty in contravention of the Direction.

[112] Moreover, while the Subject Member asserts he also went to the Residence for his lunch break on November 22, 2016, he has provided no persuasive evidence that he sought or received permission to be on a lunch break at the Residence or dealt with the existence of the Direction.

[113] Even more to the point, while the Subject Member now says in the Response he “believes...but cannot say with complete certainty” that he told the Watch Commander he was going to Ms. F’s, in the Interview he explicitly stated that he did not tell the Watch Commander why he was going to the Juniper area (p. 146).

[114] The Subject Member’s second claim is that the Direction did not constitute a lawful order because Staff Sergeant Preto was acting on his own personal morality and it did not relate to operational reasons or the performance of duties or functions.

[115] The foregoing claim is problematic on a number of levels, not the least of which is it entirely overlooks the fact that what prompted the Direction in the first place is that the Subject Member was observed in another part of the Detachment area, completely outside of his assigned zone, and the MDT provided no justification for him being there, and as such, his going outside his assigned zone to meet with Ms. F at her workplace was clearly engaging operational considerations.

[116] While it is clear that Staff Sergeant Preto did not approve of the Subject Member’s actions, it was also entirely within his purview to issue the Direction to ensure that the Subject Member was not damaging his own and the RCMP’s professional reputation, and the Direction was circumscribed to operational timeframes and in no way limited how the Subject Member interacted with Ms. F while not on duty.

[117] Simply put, it has been demonstrated on a balance of probabilities that the Direction was issued to the Subject Member, it was clear and precise as to its requirements, it dealt with the performance of duties and functions relating to operational matters, and the Subject Member disobeyed it on at least two occasions (November 12/13 and 22, 2016) by attending the Residence

of Ms. F while on duty for social reasons. The Subject Member has not persuaded the Board that the Direction was improper or unlawful.

Allegation 2

[118] Initially, the Board did not intend to spend considerable time addressing Allegation 2, given there is no direct evidence that the Subject Member engaged in sexual, intimate, or romantic activity with Ms. F at the Residence while on duty on November 12/13, 2016, or at any other time while on duty.

[119] However, upon further consideration, the Board concluded that Allegation 2, and some of the points arising from the Reply, required some analysis, along with providing reasons as to why the request by the CAR to amend particular 7 of Allegation 2 was denied.

[120] The fact that the Subject Member was at the Residence for approximately 100 minutes is not, by itself, evidence that is sufficient to establish that the Subject Member engaged in sexual, intimate or romantic activity (i.e., particular 7 of Allegation 2), and indeed, given the express denial of Ms. F on this point (in addition to that of the Subject Member), it is not clear why Allegation 2 even formed part of the Notice.

[121] Any suggestion that it would be a “logical conclusion” that the Subject Member and Ms. F engaged in sexual, intimate or romantic activity (as the phrase is commonly understood), simply based on the timeframe the Subject Member was at the Residence, or because of the past relationship with Ms. F, does not constitute evidence upon which to ground Allegation 2, and asks the Board to make a finding based on speculation and conjecture.

[122] It is also not clear to the Board why the CAR sought to amend particular 7 to remove the word “sexual” given the concurrent argument in the Reply that the phrase “sexual, intimate or romantic” is disjunctive, and therefore particular 7 and the requirement of discreditable can be established based on the presence of intimate or romantic activity. In other words, why seek to amend particular 7 if it asserted that “sexual” activity does not have to be proven to establish Allegation 2?

[123] Moreover, the assertion in the Reply that the Subject Member engaged in intimate or romantic activity at the Residence with Ms. F is also not consistent with the evidence, or indeed, the common understanding of the meaning to be assigned to intimate or romantic activity in the context of the conduct process, or more generally.

[124] The undisputed evidence contained in the Conduct Report from both Ms. F and the Subject Member is that the sexual, intimate or romantic aspect of their relationship ended before or in early September, 2016, and the express purpose of the Subject Member attending the Residence on November 12/13, 2016, was to apologize for the manner in which the relationship dissolved (which appears to include Ms. F finding out about the Subject Member's marriage through social media).

[125] Thus, the suggestion in the Reply that the Subject Member and Ms. F “were involved in an extra-marital relationship at the relevant time” (emphasis added) is inaccurate and inconsistent with the evidence, as is any claim that the Subject Member attended the Residence for an intimate or romantic purpose, given it related to providing an apology to Ms. F and her kids, and any such assertion or finding otherwise would be based on conjecture.

[126] A reasonable person may harbour all sorts of suspicions or opinions about what transpired at the Residence on either November 12/13 or November 22, 2016, but findings of professional misconduct must be based on credible evidence, which is simply not present in respect of particular 7.

[127] The Reply also attempts to establish that the terms “intimate or romantic” include a “broad range of activities”, but other than stating this proposition, does not provide any authority or case in support of such an interpretation. It can be equally and credibly argued that the common or reasonable person understanding of intimate or romantic is that it involves some form of physical interaction or activity, as reflected in the cases and commentary in the Conduct Measures Guide relative to sexual activity as a form of misconduct.

[128] But even if the Board were to accept the interpretation proffered in the Reply, the evidence does not establish that the Subject Member's attendance at the Residence was for the purposes of an intimate or romantic activity. Both Ms. F and the Subject Member state, which has not been refuted, that the Subject Member came to apologize, which is not an act of intimacy, nor is it in

support of or in furtherance of a romantic activity, as there is no evidence that he was at the Residence for the purpose of re-initiating the former relationship.

[129] It is in this regard that the Reply has incorrectly asserted that Ms. F and the Subject Member were “involved in an extra-marital relationship”, as the evidence that exists on this points indicates that one did not exist on November 12/13, 2016.

[130] The Reply goes further however, saying that the Subject Member and Ms. F “were discussing their personal relationship”, and in tandem with being involved in “extra-marital” affair falls within the definition of “intimate or romantic activity.”

[131] Setting aside that it has not been established that an extra-marital relationship existed at the time, it cannot be the case, as suggested by the Reply, that merely discussing a “personal relationship” while on duty in uniform constitutes “intimate or romantic activity” upon which to ground a finding of discreditable conduct on the specific circumstances presented, or in general under the *Code of Conduct*.

[132] At one level, to follow the logic of the Reply, if a member is involved in an extra-marital relationship and discusses it with the other person while on duty and in uniform, it constitutes misconduct, which is an interpretation that cannot be sustained.

[133] Even more directly, however, is that on a plain reading, the language employed in particular 7 in the context of Allegation 2 is grounded on the Subject Member engaging in some form of activity of a sexual, intimate or romantic nature, connoting a physical aspect, which has simply not been established.

[134] In fact, read closely, the Reply on this point is now trying to recast the basis of Allegation 2 by stating there was discreditable conduct because the Subject Member defied the Direction (which is the basis of Allegation 1 and not stated as a particular in Allegation 2), lied to his supervisor (which is the basis of Allegation 3 and not stated as a particular in Allegation 2), and while on duty and in uniform was at the Residence for approximately 100 minutes “engaging in intimate and romantic activity, with an extra-marital partner”, which was not an operational purpose.

[135] While being at the Residence for approximately 100 minutes might be something for which the Subject Member can be censured, the crux of Allegation 2 is that the Subject Member engaged in intimate or romantic activity, which has not been established, nor has it been established that Ms. F was an “extra-marital partner” at the time he attended the Residence, as the weight of the evidence is the converse on both points as already outlined.

[136] Furthermore, the Reply does not argue or assert that the timeframe the Subject Member was at the Residence by itself supports a finding of discreditable conduct, as it expressly relies upon that factor in conjunction with engaging in intimate or romantic activity as constituting discreditable conduct in the view of a reasonable person, which as noted, has not been established.

[137] Finally, the Board denied the request of the CAR to amend particular 7 of Allegation 2 to remove the word “sexual” because, as noted by the Reply itself, it was not necessary to establishing the Allegation.

[138] Further, the Conduct Report was submitted in February, 2017, and the RCMP had nine months to examine the evidence and make determinations, and having done so issued a Notice which alleged that the Subject Member engaged in sexual, intimate or romantic activity when, on any reading of the Conduct Report, it could not be sustained based on the evidence.

[139] An assertion that Ms. F should be the subject of a summons to testify at a hearing in the circumstances here is problematic at two levels: first, because a witness will generally only be summoned to testify where a conduct board considers there to be a serious or significant unresolved conflict in the evidence and the testimony of the witness would be material and necessary in resolving that conflict, and in the present case there is no such conflict in the evidence to be resolved (as both Ms. F and the Subject Member denied any form of sexual, intimate or romantic activity, and aside from suspicions otherwise, there is no contrary evidence on this point); and second, attempting to compel Ms. F to testify to try and get her to admit under cross-examination that she lied and they did engage in sexual, intimate or romantic activity at the Residence could be the subject of an abuse argument given the state of evidence on this point as contained in the Conduct Report.

[140] The Board is also concerned that the CAR communicated to the MR on the date the Response was due that an amendment was going to be sought, which was not brought to the attention of the Board when, concurrently, the CAR was seeking to gather further “new” information from Ms. F, which ultimately did not apparently materialize.

[141] While there is always the possibility that new information may surface after a Notice of Conduct Hearing has been issued, that is not the case with the request to amend particular 7, which was not minor or technical in nature, and was in response to an obvious lack of evidence that was evident in the Conduct Report for many months, and the Board was not prepared to permit a substantive amendment so late in the proceedings, regardless of whether the MR was aware of the intent to request an amendment, which was not known to the Board at the time it approved that gathering of further information from Ms. F.

[142] In summary, based on the evidence, it has not been established on a balance of probabilities that the Subject Member engaged in sexual, intimate, or romantic activity, which is the gravamen of Allegation 2.

Allegation 3

[143] The Subject Member has admitted Allegation 3 (providing an inaccurate account), and it has been established on a balance of probabilities that he provided incomplete and inaccurate information to Corporal Wood, and in so doing, knowingly provided him with false and misleading information as part of a charade to attend the Residence of Ms. F for personal reasons, which included asking permission to meet with his Spouse at a non-existent birthday party.

Allegation 4

[144] The Subject Member has admitted Allegation 4 (providing an inaccurate account), and it has been established on a balance of probabilities that he provided incomplete or inaccurate information to Staff Sergeant Daly and Corporal Wood during the Meeting, and in so doing, knowingly provided false and misleading misinformation as part of an ongoing deception about his attendance at the Residence of Ms. F for personal reasons while on duty, which included saying he met his Spouse at a non-existent birthday party.

[145] Whether or not the Performance Log provided by the CAR was signed by the Subject Member is of no consequence, as he has not disputed its substantive content in the Interview, Response or otherwise. Further, the notes of Corporal Rappel indicate that Staff Sergeant Daly did have the Subject Member sign the Performance Log, but it is not necessary to request a copy of the signed version or resolve why the copy in the Conduct Report is unsigned, for the reason noted.

[146] Further, whether or not the Subject Member recalls whether he actually said he met his Spouse, or whether there is a slight discrepancy in the time he was at the Residence, does not change the result on Allegation 4, as the Subject Member has admitted and it has been established that during the Meeting, he perpetuated the misrepresentations about the existence of the birthday party, his attendance, that he met his Spouse, and the circumstances of his attendance at the Residence of Ms. F.

Allegation 5

[147] The Subject Member has admitted Allegation 5 (providing an inaccurate account), and it has been established on a balance of probabilities that he provided incomplete or inaccurate information to Corporal Rappel during the Interview, and in so doing, knowingly provided false and misleading information as part of an ever-expanding deception about his attendance at the Residence of Ms. F for personal reasons while on duty, which included saying he was attending a non-existent birthday party to meet his Spouse, with the added and new misrepresentation that she had left the party before he had arrived, causing him to attend the Residence instead.

Conclusion

[148] In conclusion, on merit, the Board has found Allegation 1, Allegation 3, Allegation 4, and Allegation 5 have been established. Allegation 2 has not been established.

MEASURES

[149] The Board provided the written-oral decision on merit to the CAR and MR by email on March 16, 2018 (on the understanding that certain minor editing or other corrections, as well as

formatting and transition paragraphs may be required in order to complete the final decision, which would also deal with measures).

Background

[150] The Board also posed two possible procedural options for dealing with measures, and proposed a further meeting or discussion by email to settle on a way forward.

[151] Based on Representatives desire to meet, over the next few days the Board exchanged emails with the Representatives to try and set a date for a further meeting, which occurred on March 21, 2018 (“Meeting 2”), which dealt with a number of procedural issues, including:

- The MR was provided until March 23, 2018, to obtain a medical report from a psychologist ("Letter"), or to provide an update on its obtention, noting the Board has requested it be provided soonest [note: the psychologist was later identified as Dr. Mak, who will be referred to as the “Psychologist” and the Letter will now be referred to as the Mak Letter]
- Once the Mak Letter is obtained, the MR will be more specific about its anticipated use at the measures stage, but has confirmed it is not intended to be any form of substantive response to the Allegations.
- The Representatives may confer about the content and use of the Mak Letter, as absent knowing its content, the CAR is unable to articulate at present any concerns that may require direction from the Board, including whether it will require testimony.
- It was agreed that the CAR will provide a written submission on or before April 4, 2018, and that the MR will provide a reply on or before April 11, 2018, and it will be determined whether the CAR will need to respond.
- The MR has indicated that the Subject Member would like to address the Board, and will provide an indication in his submission whether that may be some basic comments from the representative table, or formal testimony (subject to cross-examination), and if the latter, the Board has requested that an outline of the topics to be addressed be provided, and preferably, a written outline of what the Subject Member intends to say.

- In respect of “reference letters”, the Board indicated that written and signed statements are preferred, but will accept email or other electronic versions provided they can be properly validated as to the sender (although screen shots are not likely in that category).

[152] In closing Meeting 2, a tentative schedule for the measures phase was identified for the week of April, 30, 2018, which would be finalized on or after April 11, 2018, once the written submissions on measures were provided.

[153] On March 23, 2018, the MR advised he had not received the Mak Letter from the Psychologist, but understood it was being drafted and expected to have it on March 26, 2018.

[154] On March 26, 2018, the MR advised that things were being finalized in relation to the Mak Letter and an extension of time until the next day was requested, which was granted by the Board.

[155] In the late afternoon of March 27, 2018, the MR advised the Board he was no longer representing the Subject Member.

[156] Subsequent to the update from the MR, the CAR advised that Staff Sergeant Daly had incorrectly sent a letter to the Board, which was to have been sent to the CAR (which the Board deleted).

[157] During the evening, within several minutes, Ms. Pasenko, private legal counsel in Alberta (“MR2”) sent three emails to the Board, which in summary advised that she had been retained by the Subject Member and to furnish a time sensitive letter seeking: (1) an extension of time until April 4, 2018, to provide the Mak Letter (from the Psychologist, who was currently away on holidays); (2) an extension of time until April 18, 2018 to provide the Subject Member’s submission on measures; and (3) the timeframe for the CAR to provide a written submission on measures be extended until April 11, 2018.

[158] The next morning, March 28, 2018, the CAR provided MR2 with a copy of the *Conduct Board Guidebook* and the RCMP policy dealing with conduct.

[159] During the afternoon, MR2 emailed the CAR to inquire, not having heard from the Board, whether she had the correct email address and whether she should contact someone else regarding

the time sensitive letter, and the CAR replied a short while later that the email address was to correct and recommended not contacting anyone else.

[160] Shortly after, the Board sent an email to the Representatives summarizing the content of the eight emails and related activities, and requested that the MR2 clarify the timeline regarding the absence of the Psychologist as the Board was previously advised that the Mak Letter would be provided by the end of the previous day.

[161] During the evening of March 28, 2018, MR2 sent correspondence clarifying the timeline relating to the Mak Letter from the Psychologist, and provided further submissions in support of the extension of time requests.

[162] The next day, March 29, 2018, the Board granted the extensions of time to submit the Mak Letter on April 4, 2018, the CAR to provide a submission until April 11, 2018, and the MR2 to provide a submission until April 18, 2018, and requested the CAR forward a copy of the Conduct Measures Guide to MR2.

[163] Later in the day, the CAR asked the Board whether the measures phase would still go ahead as tentatively proposed during Meeting 2, and the Board replied that the dates of May 1 and 2, 2018 should be held, subject to receipt and review of the submissions on measures.

[164] On April 3, 2018, MR2 emailed the Board and requested another extension of time (one day) to provide the Mak Letter from the Psychologist, and based on comments about the nature of the proposed Mak Letter, the Board inquired if the CAR had any submissions on the extension request or the application of section 19 (expert reports) of the *CSO (Conduct)*.

[165] On April 4, 2018, the CAR replied by noting that during Meeting 2 it was confirmed by the MR that the purpose of the Letter was not to be any form of substantive response to the Allegations, and that absent knowing its content, the CAR was not able to articulate any concerns, noting if it is an expert report it will raise issues with timelines (e.g., provision of report 30 days before a hearing).

[166] The Board replied the same day noting that it has the authority to manage the timelines, and the present issue is whether the CAR has a view on the application of section 19 of the *CSO*

(*Conduct*), and in this regard, suggested it may be helpful to speak with MR2, as it appeared from MR2's email that the Mak Letter solely relates to the measures phase.

[167] Later in the day, the CAR confirmed that after speaking with MR2, the CAR needed to see the Mak Letter before taking a position on whether it should be accepted as an expert report, and also advised that a copy of the *CSO (Conduct)* and the Board's email enumerating the items detail from Meeting 2 have been provided to MR2.

[168] During the evening, MR2 also confirmed the conversation with the CAR, and did not object to the CAR seeing the Mak Letter before taking a position, and that the Mak Letter would be provided the next day (requiring a further one day extension).

[169] Early the next morning, April 5, 2018, the Board confirmed the additional extension of time request to furnish the Mak Letter.

[170] Just before midnight, MR2 provided an unsigned copy of the Mak Letter from the Psychologist, and offered to provide a signed copy if required.

[171] The next morning, Friday, April 6, 2018, the CAR requested until the following week to provide a response pursuant to section 19(3) (party receiving an expert report has 14 days to notify whether they intend to question the expert or obtain a responding report) of the *CSO (Conduct)*, which appeared to assume that section 19 applied even although the CAR had declined to state a position.

[172] The Board replied by email confirming receipt of the Mak Letter and requested a signed copy from MR2, and provided the CAR until April 10, 2018, to provide a position, noting that the application of section 19 of the *CSO (Conduct)* had been raised earlier in the week, and it should not be presumed that the strict process therein applies, as the Board has been flexible thus far, and will determine if questioning of the Psychologist or a further expert report is required once it has reviewed any submissions of the CAR in that regard.

[173] During the evening of April 6, 2018, MR2 forwarded correspondence to the Board relating to the issue of section 19 of the *CSO (Conduct)*, and in summary:

1. noted that if the Mak Letter is to be treated as an expert report, clarification would be required on the timelines for written submissions given the relevant regulatory timeframes;
2. confirmed that the Mak Letter is intended as a “letter of support” based on the principles set out in *R. v. Graat*, [1982] 2 S.C.R. 819 (“*Graat*”) relating to non-expert opinions;
3. advised the Psychologist was deliberately asked to avoid setting out a particular medical diagnosis and then drawing a nexus between that condition and the fact that the Subject Member engaged in misconduct;
4. noted the Psychologist has provided her impressions and beliefs that same way that a non-expert witness can give opinions;
5. submitted that *Graat* is clear that the weight to be given to non-expert evidence is entirely a matter for the decision maker who accept all, part or none of the evidence; and
6. advised the Mak Letter of the Psychologist was redacted so it does not run afoul of section 19 of the *CSO (Conduct)*, but if the Board finds the Mak Letter is an expert report that the Psychologist should be permitted to provide a more comprehensive and proper report that meets the requirements of subsection 19(2) of the *CSO Conduct*.

[174] MR2 provided a signed copy of the Mak Letter on April 7, 2018, and on April 9, 2018, the CAR, in response to the Mak Letter and the communication immediately above from MR2 clarifying the status of the Mak Letter, emailed the Board, and in summary:

1. requested that the Subject Member confirm his position that there is no causal link between various work and home issues described in the Mak Letter and his misconduct;
2. asserted the Mak Letter is an expert report prepared by a psychologist providing medical opinions outside the Board’s expertise;
3. submitted that in the absence of evidence to the contrary or further questions posed to the Psychologist the Board is limited in making any findings regarding the Psychologist’s opinion;

4. asserted if the Subject Member relies on the reported stressors in the Mak Letter to excuse or explain his state of mind and intent, the Psychologist must be called to testify in order to test the contents of the Mak Letter and her opinions through cross-examination;
5. asserted if the Subject Member raises police stress and duty related trauma as outlined in the Mak Letter to address his degree of responsibility, the CAR relies on *Pizarro v. Canada*, 2010 FC 20 (“*Pizarro*”), as it illustrates the dangers of the Board substituting its own opinions contrary to those of the Psychologist;
6. the Mak Letter expresses an opinion that the Subject Member is “honest” and “will not make the same mistake again” which is pertinent to determining conduct measures and the CAR will be relying on evidence from the Conduct Report to question those opinions and the Board’s acceptance or rejection of those opinions will be affected by the Psychologist’s expertise; and
7. argued that the Psychologist should be subject to cross-examination rather than trying to classify the Mak Letter somewhere between an “expert” report and a
8. “letter of support”.

[175] Based on the foregoing, and although not seeking a postponement to provide a written submission, or of the tentative hearing date, the CAR requested:

1. the Subject Member take a clear position whether there was a causal link between his misconduct and the work and personal stressors;
2. the Psychologist provide her *curriculum vitae* and any literature or documents specifically relied on in support of her opinion, in particular the notes she reviewed prior to drafting the Mak Letter, at the earliest opportunity;
3. that the CAR’s submissions on the Mak Letter be submitted in reply to the Subject Member’s submissions and at the hearing;

4. if the Subject Member is claiming there was a causal link between his stress and the misconduct, or is not required by the Board to put forth a position, the CAR requests (2) above and:
 - a. the Psychologist be summoned to testify in person on May 1, 2018;
 - b. that the CAR's submissions on the Mak Letter and Psychologist's testimony be submitted following the Psychologist's testimony at the hearing; and
 - c. the Board direct an order of disclosure from the Health Services Office for the Subject Member's medical records.

[176] The Board advised that it would address the correspondence of the CAR the next day, noting MR2 had been clear about the scope and nature of the Mak Letter, and advised MR2 that pending the Board's reply to the CAR, no response was required from MR2.

[177] During the afternoon of April 10, 2018, the Board provided a determination regarding the email of the CAR about the Mak Letter:

Based on recent emails, the purpose of this correspondence is to address the treatment of the "Psychological Consultation Report" of Dr. Mak [i.e., Psychologist] (dated April 5, 2018) that was submitted to the Board, and referred to by [MR2]...as a "letter of support" ("Letter") [now Mak Letter].

In brief, the [Mak] Letter indicates that the SM [Subject Member] sought assistance from Dr. Mak on or about January 20, 2017, where he participated in therapy and counselling over a period of time, as part of dealing with stress, anxiety and other symptoms arising from several traumatic operational incidents. Based on a number of sessions, the results of several assessment instruments, and the application of learned coping skills, the [Mak] Letter indicates that positive prognosis in overcoming the symptoms outlined in the [Mak] Letter. The [Mak] Letter does not provide or state any expert opinion or views about any conditions or symptoms relative to the Allegations or the conduct of the SM related thereto.

Near the end of the Letter, based on the SM's sincerity about his fault and extreme remorsefulness, Dr. Mak states "...it is my opinion that he will not make the same mistake again."

The MR[2] for the SM provided some supplemental written comments after submitting the [Mak] Letter, stating it is "intended to a be a letter of support read in the light of the principles set out in the SCC case of *R. v. Graat*[,]

[1982] 2 SCR 819 ("Graat") and the related case law." The MR has indicated that Dr. Mak was specifically asked to avoid setting out a particular medical diagnosis and drawing a nexus between that condition and the misconduct of the SM. The MR[2] states that the Dr. Mak "has provided her impressions and beliefs" relative to the SM "the same way that non-expert witnesses can give opinion evidence on matters within their own experience." Citing *Graat*, the MR[2] states "a layperson may testify as their belief" in relation to impairment (as well as certain other matters), and Dickson J. (as he then was) made it clear that the weight to be given to the evidence is entirely a matter for the judge, who can accept all, part, or none of the evidence.

Based on the foregoing submissions of the MR[2], plainly understood, the [Mak] Letter is not being relied upon to provide or express a medical/expert opinion, and following *Graat*, the [Mak] Letter is admissible as providing a relevant non-expert opinion about whether the SM would make the same mistake again (i.e., lying). As the Court noted in *Graat*, whether non-expert evidence is accepted is for the decision-maker (p. 838). In other words, the weight to be given to the non-expert opinion of Dr. Mak is entirely a matter for the Board, and its value will depend on the view the Board takes in all the circumstances (*Graat*, p. 838). As the Court also reinforced in *Graat*, non-expert opinions are to be given no greater weight because of the experience or background of a particular witness, so in that case, the non-expert opinions of police officers about the impairment of a driver were not entitled to greater weight or special regard than that of an ordinary person with ordinary experience (p. 840). It is also clear the [Mak] Letter is not providing a non-expert opinion on a legal issue, which falls within the remit of the Board (p. 839).

In response to the [Mak] Letter, the CAR has raised concern that the SM may raise police stress and trauma as part of addressing his responsibility or as an excuse for his misconduct. Further, the CAR relies upon *Pizarro v. Canada*, 2010 FC 20 ("*Pizarro*") to highlight the danger of the Board substituting its own opinion contrary to an expert, and as a result, Dr. Mak should be subject to cross-examination so the Board can determine what weight to place on it. The CAR also does not accept the "letter of support" approach asserting the prudent course is to treat it as an expert report. As a consequence, the CAR makes a series of requests of the Board.

Based on the circumstances, it does not appear that *Pizarro* has application, as it dealt with the treatment of an expert opinion, whereas here, the MR[2] has explicitly indicated that the Mak Letter is a "letter of support" providing the non-expert opinion of Dr. Mak, and based on *Graat*, the Board can determine its weight and application, which does not attract the requirements of *Pizarro* for dealing with an expert report.

As a result, it is unnecessary for the SM to state whether a causal link is being asserted between the misconduct and his personal or work-related stressors, as one has not been stated or claimed in the [Mak] Letter, and based on the non-expert status of the [Mak] Letter, Dr. Mak's resume or documents she

relied upon are not required, nor has a basis to require that she testify been established, given the Representatives are able to make submissions on the weight of the non-expert opinion [Mak] Letter based on the circumstances.

In conclusion, the [Mak] Letter is not being treated as an expert report or opinion for the reasons stated, and I believe that finding addresses the concerns arising from the email of the CAR. [underline emphasis original]

CAR Submission

[178] The CAR provided a written submission on conduct measures (“CAR Submission”), a letter from Staff Sergeant Major (formerly Staff Sergeant) Daly (“Daly Letter”), a letter from Corporal Wood (“Wood Letter”), and supporting authorities on April 11, 2018.

[179] Relying on the principles of *Ennis v. The Canadian Imperial Bank of Commerce* (1986) BCJ No. 1742 (Q.L.) (B.C.S.C.) (“Ennis”), approved by the Commissioner (as the Level II) in *Inspector Lemoine and The Appropriate Officer “C” Division*, 12 A.D. (4th) 192 (“Lemoine”), as well as the decisions in *Commanding Officer “E” Division and Constable Vellani*, 2017 RCAD 3 (“Vellani”), and the *Appropriate Officer “F” Division and Cst. Gregson*, 5 A.D. (4th) 213 (“Gregson”), the CAR asserts that the circumstances surrounding the acts of dishonesty and failure to follow the Direction by the Subject Member are so serious as to justify dismissal. In basic terms, the Subject Member has failed to abide by and/or repudiated the terms of employment.

[180] The CAR further submits there are, in the circumstances of the Subject Member’s misconduct, insufficient mitigating factors to outweigh the significant number of aggravating factors.

[181] First, turning to the seriousness of the misconduct, the CAR notes the Subject Member admitted to providing false and misleading information to Corporal Wood, Staff Sergeant Daly, and Corporal Rappel, which the Subject Member repeated in order to cover up the truth of his activities, which was exacerbated by the fact that he disobeyed the Direction and persisted in lying during the Interview as part of the conduct investigation.

[182] In *The Appropriate Officer “H” Division and Constable Neil Edwards*, 15 A.D. (4th) 331 (“Edwards”) the Adjudication Board characterized lying to a supervisor as very serious given honesty and integrity are essential Core Values (para. 45) and the CAR submits that the

circumstances of this case do not warrant the mitigated range suggested in the Conduct Measures Guide (at pp. 63-5).

[183] Second, citing *Vellani*, the CAR asserts that instances of dishonesty attract dismissal where there is personal gain involved, and here the Subject Member was motivated by his desire to avoid the financial consequences associated with his Spouse becoming aware of his activities, given that during the Interview the Subject Member referred three times to these personal and financial consequences.

[184] Third, the CAR notes the Subject Member's actions were not an isolated incident, given he provided inaccurate accounts to supervisors on two occasions, and on the third occasion, perpetuated and elaborated on his falsehood during the Interview, as well as the fact that he disobeyed the Direction on two occasions. Rather than be forthright when the opportunities presented themselves, the Subject Member chose to repeat and elaborate upon the non-existent birthday party fabrication.

[185] Fourth, referring to Gregson, and The Appropriate Officer "J" Division and Levasseur, 16 AD (3d) 175 ("Levasseur"), the CAR submits the Subject Member's conduct demonstrated a lack of respect and level of contempt, as well as being purposeful, deliberate and insubordinate, when failing to follow the Direction, which attracts more severe measures. The Direction was not onerous and the Subject Member knowingly and deliberately acted to defy the Direction, and moreover, during the Interview demonstrated a "flippant" attitude when making excuses about the failure to follow the Direction, although he ultimately admitted he should not have done what he did (p. 134, lines 512-13).

[186] Fifth, the CAR asserts that the actions of the Subject Member were deliberate, intentional and planned, constituting a reasoned fabrication to permit him to act on personal interests, and the deception did not arise out of a panicked reaction. Noting the Allegations spanned a three month period, and in particular that the Subject Member had time to think about things before the Meeting and Interview, he chose wilful deception, and further corroborated the false narrative he had created. The Subject Member only admitted to the misconduct when confronted with the possibility of his Spouse becoming involved. Further, the Subject Member intentionally disregarded the Direction.

[187] Sixth, the CAR notes that Subject Member was warned in the past about the inappropriateness of his action, and the Direction was clear and precise on his obligations, and although he expressed concern about his “badge” being taken in the Interview, which confirmed he knew the matter was serious, he chose to repeat the false story in the Meeting and Interview. The CAR refers to the Subject Member providing “a self-serving technical interpretation” of the Direction in order to avoid responsibility. As well, the CAR adverts to the fact that the Subject Member had been transferred to a new Watch and rather than taking the opportunity to move forward, during his second shift disobeyed the Direction and was misleading about his activities, which showed a disregard for the accommodations afforded him.

[188] Seventh, the CAR submits the Subject Member should not be given the benefit of apologizing in the first instance as a mitigating factor, as although he apologized during the Meeting and Interview, he had continued to mislead supervisors during the Meeting as well as the Interview. Further, the Subject Member’s regrets were about the potential of losing his job and his Spouse becoming involved, not for being dishonest, disrespectful, and not taking accountability, or his repeated disregard of the Core Values of the RCMP.

[189] Eighth, the CAR further submits that cooperation in the investigation should not be available as a mitigating factor, given the Subject Member lied to Corporal Rappel during the Interview, and “attempted to interfere in the internal investigation” and only admitted the truth when cornered during the Interview, which reveals a lack of accountability and honesty in reporting his actions. In *The Appropriate Officer “F” Division and Corporal T.R. Love* (2005) 26 A.D. (3d) 147 (“*Love*”) the Board observed that when an employee provides a statement, the RCMP has a right to expect that the employee will be truthful (p. 11).

[190] Ninth, citing *Vellani*, it is asserted by the CAR that because the Subject Member is now subject to the requirements of *R. v. McNeil*, 2009 SCC 3 (“*McNeil*”), it is an aggravating circumstance due to the administrative burdens of disclosing the disciplinary record and the additional “problems of deployment.”

[191] Tenth, the CAR notes Allegation 1, Allegation 3, and Allegation 4 arose when the Subject Member was on probation, and Allegation 5 (Interview) occurred within three months of him completing probation, which makes the misconduct completely unacceptable, given probationary

and junior members are expected to vigilantly promote the Core Value of the RCMP (citing *The Appropriate Officer “K” Division and Constable Pierre Poirier*, 4 A.D. (4th) 105 (“*Poirier*”) at para. 91). In addition, as a junior member with less than three years of service, the Subject Member does not have sufficient service to rely on his performance as a mitigating factor, and even if he met expectations, it is also not mitigating, as average or satisfactory performance is not a mitigating factor based on *Vellani*.

[192] Eleventh, the CAR submits the Subject Member abused the trust afforded him as a general duty (i.e., uniform) member by taking advantage of a perceived lack of direct supervision, which required reliance on GPS data to expose his lie. As well, the Direction was necessitated by the fact that the Subject Member was observed outside his assigned zone without authorization, which disregarded his operational responsibilities. In *Poirier*, it was an aggravating factor that the misconduct of the member arose shortly after he was trusted to begin patrolling on his own (para. 92).

[193] Twelfth, the CAR relies upon the Daly Letter as it outlines the disappointment and frustration of Staff Sergeant Daly in the manner which the Subject Member disregarded the efforts to provide him a fresh start on a new Watch, and the consequent disruption to workloads and morale following the Allegations, and in particular the transfer of a respected senior member to accommodate the transfer of the Subject Member.

[194] Noting the conduct investigation apparently had a significant impact on Corporal Wood, the CAR describes the Wood Letter as “unfortunately” taking some personal responsibility for the Subject Member’s circumstances.

[195] Thirteenth, the CAR submits the Board should place no or little weight on the [Mak] Letter or opinion of the Psychologist for the following reasons:

1. the Psychologist’s characterization of the misconduct indicates incomplete knowledge of the Allegations and circumstances;
2. the Subject Member was the sole source of information for the Mak Letter and opinion;

3. the Mak Letter was prepared without reviewing the Conduct Report, Notice, or the (written-oral) Record of Decision of the Board (on merit);
4. the content of the Mak Letter indicates a minimal reflection of the facts of the misconduct given there is no indication the Psychologist was aware:
 - a. of the Direction;
 - b. that the Subject Member was transferred to a new Watch to address issues arising from his relationship with Ms. F;
 - c. the Subject Member fabricated a non-existent birthday party connected to his Spouse as a reason for going outside his assigned zone for his lunch break;
 - d. when confronted about his extended lunch break the Subject Member failed to admit his mistake and instead elaborated on his lie; and
 - e. when confronted with the incontrovertible GPS data, he maintained the lie until he was threatened with the financial consequences of his Spouse becoming aware of his misconduct;
5. while the Mak Letter reports that the Subject Member acknowledges he should have “clarified” that he spent time with Ms. F during his lunch break and that “he would not make the same mistake of not disclosing all personal information honestly to his supervisor in the future”, these are incorrect interpretations of the misconduct, as the issue is he deliberately lied about his plan to see Ms. F and only reluctantly admitted the truth when confronted after attempting to maintain his lies, which also raises whether, even now, the Subject Member has an appropriate understanding of his misconduct;
6. the Mak Letter characterizes the misconduct as an issue of “protection of privacy at work” in which the Subject Member identified the solution as “the importance of sustaining balance between work and personal life to ensure effectiveness at work and avoid complications”, which does not reflect an understanding that the misconduct is about his responsibility for repeatedly providing inaccurate, false and misleading accounts to supervisors and during the course of an internal investigation;

7. given the flawed interpretation of the misconduct in the Mak Letter, the Board should question how the Subject Member can be understood to have “learned” from his “mistake” and how he is “sincere about his fault and extremely remorseful about his behaviour”; and
8. the stressors experienced by the Subject Member as described in the Mak Letter should not be considered as a significant mitigating factor, given the Commissioner in *Lemoine* (at para. 112) adopted the words of Commissioner Inkster ((1990) 3 A.D. (2d) 62) that:

Stress inducing events do not sufficiently dispel the pall of inadequate character. After all, it is the ability to withstand the difficulties that life presents that is the essence of what we call good character and integrity.

[196] For the foregoing reasons the CAR submits that the Psychologist’s opinion that the Subject Member “will not make the same mistake again” or that he “will make better decisions and better judgment moving forward” should receive no weight, and the stress and anxiety experienced by the Subject Member arising from operational incidents is not a significant mitigating factor.

[197] In conclusion, noting trust and honesty are the cornerstone of a viable employer-employee relationship (*Lemoine* at para. 83), the CAR asserts the Subject Member’s misconduct contravened the Core Values, constituted repeated dishonesty despite opportunities to be forthright, and the appropriate measure is a direction to resign from the RCMP within 14 days.

MR2 Submission

[198] On April 16, 2018, MR2 wrote to the Board seeking an extension of time to provide a reply until April 20, 2018, given the time it was taking to get reports from the External Review Committee and the need to secure information from some other witnesses given the unexpected content of the Daly Letter.

[199] The CAR advised the Board on April 17, 2018, that there was no objection to the further extension of time request of MR2, providing notice that the CAR “may” request an opportunity to provide submissions regarding any evidence submitted in relation to the Daly Letter, and clarifying the status of two legal authorities provided with the CAR Submission.

[200] The Board replied the same day that an opportunity for the CAR to respond to submissions will likely follow as it may pertain to new information or arguments, and confirmed an extension for MR2 to provide the submission on measures until April 23, 2018.

[201] The submissions and supporting materials of MR2 relating to the conduct measures stage were provided through 16 emails between April 23-24, 2018, including various authorities and supporting statements, letters, and other documents (“MR2 Submission”).

[202] During the morning of April 24, 2018, after the Board scanned the 16 emails from MR2 and associated attachments, it wrote to MR2 expressing concern about two issues: first, the method and form of transmission of the MR2 Submission; and second, the content of the letter submitted by Corporal Chung (“Chung Letter”), which aside from possible considerations relating to admissibility and relevance, contained information that may constitute allegations against another member and/or implicate the reporting obligations of Corporal Chung and others, which may require further direction from the Board subject to comments of the CAR. The Board also provided the CAR until April 30, 2018 to organize the material provided as part of the MR2 Submission and it would entertain a request to make further submissions, if required. Later in the day, MR2 apologized to the Board regarding the manner in which the MR2 Submission and supporting material were provided.

[203] The MR2 Submission commences by asserting parity or consistency of sanction is a recognized and relevant principle in the context of police disciplinary proceedings generally, and within the RCMP specifically, as outlined in various sources, including paragraphs 36.2 (Purposes) (d) and (e) of the *RCMP Act*, subsection 24(2) the *CSO (Conduct)*, the Conduct Measures Guide, and Federal Court decisions, which speak to imposing measures that are proportionate to the nature of the circumstances of the contravention.

[204] MR2 submits that that educative and remedial measures are appropriate in the present case and that the imposition of dismissal would, based on the criminal, and general, standard for the review of sanctions, be grossly disproportionate.

[205] It is further submitted by MR2 that the issue is not one of repudiation (i.e., *Ennis*), but rather whether the Subject Member's misconduct, taken in its complete context and considering the range of sanctions in other deceit cases, warrants dismissal.

[206] Although MR2 asserts that *Ennis* and the principle of repudiation do not apply, MR2 submits that the factual findings of the Board do not establish that the Subject Member repudiated the contract of employment.

[207] Relying on *Roden v. Toronto Humane Society*, 2005 CanLII 33578 (ON CA) ("*Roden*"), which cites *McKinley v. B.C. Tel*, 2001 SCC 38 ("*McKinley*"), MR2 notes the courts have stated that whether dismissal is justified on the grounds of dishonesty is a question that requires evaluation in the context of the alleged misconduct (*McKinley* at para. 48), which is the approach articulated in the Conduct Measures Guide (pp. 61-62), and accounts for gradations of dishonesty in terms of seriousness.

[208] In this regard, MR2 distinguishes *Lemoine* because it involved a commissioned officer who committed a serious breach of trust involving, over many months, a careful and deliberate course of action to pursue an affair with a subordinate's spouse, and that the member never expressed any recognition that his actions were unacceptable.

[209] Based on the factors outlined in the Conduct Measures Guide (pp. 63-64), MR2 submits that even although the Subject Member's "dishonesty was serious", he is remorseful, and the deception was not maintained for a prolonged period, the rights of a third party were not severely affected, and it did not cause or have the potential to significantly affect the reputation of the RCMP or expose it to major civil liability.

[210] Noting that the CAR has not cited one decision that objectively justifies the Subject Member's dismissal, MR2 asserts that the more appropriate range of sanctions is set out in sections 3.2 and 3.3 of the Conduct Measures Guide, being financial penalties ranging from three to 20 days, depending on the circumstances.

[211] Relying on various Alberta Law Enforcement Review Board and Alberta Court of Appeal decisions, in particular, *Camrose (Chief of Police) v. MacDonald*, 2013 ABCA 422 ("*MacDonald*") (and *MacDonald v. Camrose (Police Service)*, 2014 ABLERB 055 ("*MacDonald*"))

(*LERB*)”), MR2 notes that an approach wherein dismissal is an automatic or inevitable penalty for deceit in all cases has been rejected as not being reasonable. In other words, *MacDonald* and other cases from Alberta stand for the proposition that deceit is not to be treated as career ending in all cases, it depends on the circumstances or factors of each case.

[212] In this regard, MR2 suggests *Toy v. Edmonton (Police Service)*, 2018 ABCA 37 (“*Toy*”) represent a rare case where a police officer was dismissed for deceit due to the egregious acts of lying in a sworn involuntary statement and during testimony under oath, and the presiding officer properly noted that dismissal is not automatic in a decision that distinguished the facts from other cases where dismissal did not follow.

[213] MR2 then turns to various External Review Committee reports to support the view that dismissal should not apply in the present case, citing C-017, which was recently concluded (but not cited in the MR2 Submission) on appeal in the Level II decision of *Cormier* (cited above under merit), wherein it was found in a deceit case (i.e., criminal conviction for forgery) that the conduct board did not make any manifest or determinative errors when it did not dismiss the subject member based on factors that are similar, if not the same, as those posed in the present CAR Submission (i.e., repudiation of employment contract, serious and deliberate actions, planned and deliberate, *McNeil*, and violation of Core Values).

[214] Reference is also made by MR2 to External Review Committee reports C-007 (subject member falsely alleged an officer treated him with disrespect and lied that the issue had been resolved: six days’ forfeiture of pay) and C-008 (subject member gave false and misleading statements: three days’ forfeiture of pay and other non-financial measures), both of which resulted in financial penalties and not dismissal (note: although the Board will continue to use the C-007 and C-008 citations, they are to be understood, respectively, as referring to the final Level II appeal decision in ACMT File No. 201533564, dated May 13, 2016, and the final Level II appeal decision in ACMT File No. 201533563, dated April 28, 2016, and not the respective External Review Committee reports).

[215] With respect to adjudication board decisions under the legacy discipline process, MR2 submits and replies upon the following cases:

The Appropriate Officer "F" Division and Constable Brady Koshman, 14 A.D. (4th) 431 (May 23, 2014) ("Koshman") (untruthful statement in the context of an internal investigation and prior informal discipline for false statement: expedited hearing and joint submission resulting in reprimand and eight day's forfeiture of pay)

The Appropriate Officer "O" Division and Sergeant Michael Payne, 13 A.D. (4th) 258 (June 24, 2013) ("Payne") (false information in competency resume: joint submission resulting in reprimand and ten days' forfeiture of pay)

The Appropriate Officer "E" Division and Constable Andre Eric Lenger, 2 A.D. (4th) 186 (oral decision rendered May 15, 2008) ("Lenger") (absent from duty without authorization and false statements: joint submission resulting in reprimand and forfeiture of eight days' pay)

The Appropriate Officer "J" Division and Cst. G.M. Lawless, 12 A.D. (3rd) 144 (decision rendered November 15, 2001) ("Lawless 1") (neglect wherein false statements were involved: joint submission reprimand and forfeiture of one days' pay)

The Appropriate Officer "J" Division and Constable G.M. Lawless, 23 A.D. (3rd) 261 ("Lawless 2") (oral decision rendered the May 27, 2004) (two findings of false and misleading statements in performance of duties as well other contraventions: direction to resign within 14 days or be dismissed)

The Appropriate Officer "E" Division and Corporal L.M.J. Frechette, 5 A.D. (4th) 264 ("Frechette") (oral decision rendered February 1, 2010) (false and misleading statement to third party: joint proposal of reprimand and 10 day's forfeiture of pay)

The Appropriate Officer "K" Division and Constable Angela Richard, 16 A.O. (4th) 425 ("Richard") (oral decision rendered February 25, 2016) (neglect of duty and false statement to a superior: joint proposal of reprimand, forfeiture of ten days' pay and recommended transfer)

The Appropriate Officer "K" Division and Constable Jason Simpson, 14 A.D. (4th) 269 ("Simpson") (April 22, 2014) (forgery of spouse's signature on loan application: joint proposal of reprimand, forfeiture of ten days' pay accepted)

[216] Turning to discipline cases arising from British Columbia, MR2 first refers to the *Matter of the Public Hearing into the Complaint Against Constable #134 Ken Jansen of the South Coast British Columbia Transportation Authority Decision Arising from Public Hearing* (December 6, 2013) ("Jansen 1") and *Decision on Disciplinary and Corrective Measures* (February 13, 2014) ("Jansen 2"), which dealt with founded counts of deceit dealing with false statements in reports, a notebook, and statements to three supervisors about the use of force that resulted in suspension for 14 days and demotion for each contravention.

[217] MR2 also refers to the Matter of the Public Hearing into The Complaint Against Constable #369 Adam Page of the Abbotsford Police Department Decision Arising from Public Hearing Part II (dated April 17, 2013) (“Page”), where the disciplinary defaults of abuse of authority and making false or misleading statements in a report and statements were established in a use of force incident, which also led to a conviction for assault by the officer, resulting in a total suspension period of 28 days (and in so doing the decision-maker did not adopt two other cases from British Columbia where police officers were dismissed in relation to improper use of force and deceit throughout the discipline process).

[218] Turning to the issue of disobeying a direction, MR2 distinguishes *Gregson* based on the fact that a lawful order was disobeyed twice, and there was an absence of mitigating factors, lack of remorse, and prior discipline, which supported the direction to resign in that case.

[219] Based on the Conduct Measures Guidebook (pp. 17-18), MR2 asserts that factors normally associated with termination for failure to follow a direction or an order (e.g., risk to organization, deliberate, critical to operations, harm to organization, pattern of contempt) are not present in the case of the Subject Member, making it a matter at the low end of the measures range.

[220] With respect to the aggravating factors outlined in the CAR Submission, MR2 first deals with the assertion that the deception of the Subject Member was not an isolated incident, and that it was deliberate, intentional and planned.

[221] MR2 submits that it is inaccurate to represent that the Subject Member stuck to his story when caught in a lie, but rather while he may have changed some of the details when in the Meeting, during the Interview he did not elaborate or perpetuate the deception, instead he backed away from it and “outright admitted to the deception” when confronted by Corporal Rappel.

[222] MR2 asserts that characterizing the fact that the Subject Member admitted to the deception in the Interview as an aggravating factor is penalizing the Subject Member for owning up to the “lie.” According to MR2, the Subject Member “admits to be being deceitful as opposed to being faced with evidence that reveals the deception.”

[223] In terms of personal gain as alleged in the CAR Submission, MR2 distinguishes the *Vellani* decision by noting it involved more egregious misconduct than that of the Subject Member, given

it involved false reporting to an insurance company and making misleading statements to a member of the RCMP and under oath to a Notary Public.

[224] MR2 states that the Subject Member was not motivated by personal gain when lying to Corporal Wood or during the Meeting, as it was only in the Interview that he became emotional and expressed concerns about the repercussions of his Spouse being contacted and at that point what he might lose going forward became a concern. MR2 submits the Interview was about expressing remorse and not geared towards a calculated response toward personal benefit, as the Subject Member had no “plan B”, and the realization that he might “lose everything” that was on display.

[225] MR2 asserts that the Subject Member was not motivated to lie about his lunch break or the birthday party “because” he stood to gain financially or otherwise, as it is clear that the any matrimonial or financial concerns were not the motivation for the actual misconduct, as he did not know he was going to face disciplinary action for lying, and comments during the Interview were related to “consequences” and “not motive.”

[226] It is further asserted by MR2 that the Subject Member was motivated by concerns about how he might be viewed or treated by the Watch if he was perceived as having a relationship with Ms. F, and therefore tried to maintain the lie “temporarily” during the Meeting, which he ultimately admitted during the Interview when “confronted.”

[227] Adverting to the Performance Log, MR2 notes it reflects that the Subject Member said he was going to the Residence because of all of the issues of the past year, and he wanted it kept private, and to have a separate private and professional life, but that as a “junior member” he was confused about “keeping what he thought treasured on a personal level separate from his professional duties”, but he now knows there is no distinction.

[228] With regard to the alleged lack of respect for the Direction, MR2 asserts that failing to follow it on two occasions does not constitute repeated conduct amounting to a pattern of contempt, nor does it attain the level of contempt found in *Gregson*, which involved blatant challenges to the lawful authority of the commanding officer, and also included past discipline, and lack of rehabilitation.

[229] MR2 reiterates that the Subject Member, “as a new recruit”, made a serious mistake, and although he may have questioned the Direction and did not challenge it, he expressed remorse in the Interview, which does not reflect a cavalier or flippant attitude.

[230] MR2 also relies upon a letter from Sergeant Buliziuk (“Buliziuk Letter”) (who supervised the Subject Member in two different capacities at the Detachment) to demonstrate that the Subject Member was a hard worker with a positive attitude and otherwise followed instructions without question.

[231] Addressing the submission of the CAR that the Subject Member was warned in the past about the inappropriateness of his action, and although not discounting “the seriousness of the contravention” of not following the Direction, MR2 notes he stopped taking coffee to Ms. F while on duty, even though he was not certain about the lawfulness of the Direction and was “involved in an intense relationship with Ms. F and wanted to see her.”

[232] MR2 professes that the Subject Member had no contact with Ms. F after he stopped seeing her in “the summer of 2016” until he received a text from her in late October, 2016, when she sent a text saying “I forgive you”, and since Ms. F was not his girlfriend the Direction was not something the Subject Member had in mind when he went to the residence on November 12, 2016.

[233] The purpose of the Subject Member going to the Residence on November 12, 2016, during “his dinner break” was not part of a relationship according to MR2, but to apologize as he was not sure if he would have another opportunity.

[234] In terms of the alleged lack of remorse, MR2 notes that the Performance Log reflects that the Subject Member apologized, saying “I’m really sorry” and that he indicated he would also apologize to Sergeant (then Corporal) Buliziuk, which the Buliziuk Letter confirms occurred, as well as confirming that the Subject Member expressed remorse regarding the conduct matter when under his later supervision.

[235] As to the import of *McNeil*, MR2 asserts that it may be a significant factor where the police officer is found to have lied under oath (e.g., *Toy*), and citing C-017 (i.e., *Cormier*) and *Richard*, it is not the case that a finding of misconduct, even for deceit, necessarily creates an untenable administrative or deployment burden on the RCMP.

[236] In this case, MR2 submits and relies upon a letter from Neil Wiberg (Deputy Regional Crown Counsel for Kamloops) (“Wiberg Letter”) in asserting that the Subject Member’s misconduct will not impact upon the Crown Counsel’s willingness to proceed with criminal cases, given the Subject Member did not falsify official documents or lie under oath, as the matter is more a private and internal and one not engaging his relationship with the courts or crown counsel.

[237] In terms of the Subject Member being junior in service, MR2 asserts that it is not an aggravating factor, but rather in police disciplinary cases it is being senior in service that has a greater aggravating impact (e.g., *Lawless 2*).

[238] More specifically, addressing *Lemoine*, MR2 notes that members with more experience or senior rank are held to a higher standard. In the case of the Subject Member, MR2 submits that he “did not fully appreciate the significance of this lie, because he thought it related to a non-operational private matter” (emphasis added), but he did make sure to obtain the required permission to leave his zone.

[239] It is asserted by MR2 that the Subject Member is still learning and that he will not repeat this mistake is reflected in several supporting letters, including that of Sergeant Dimopoulos (“Dimopoulos Letter”), which stated that the Subject Member was in tears while explaining the reason he misled his supervisors, because he was embarrassed with what was happening in his personal life and did not know how to cope, and opines that he will not display the same behaviour again.

[240] Relative to the Daly Letter submitted by the CAR, MR2 asserts it places equal emphasis on the disruption occasioned by moving the Subject Member (and the senior member who was transferred) to the Watch in the first instance and the impact caused by the Subject Member’s subsequent suspension.

[241] In the view of MR2, the Daly Letter’s reference to the impact on moral and operations by transferring the senior member to accommodate the Subject Member is not material to the misconduct, as the misconduct occurred after-the-fact, and further, the fact members had to work extra shifts temporarily to deal with the suspension of the Subject Member is “not something

directly correlated to the misconduct” because it was not within his control and did not arise from his being deceitful about an operational matter.

[242] Even if the Board does not accept the points in the foregoing paragraph, MR2 submits that the Daly Letter should be given little weight because of the emphasis it places on the Assistance Call (as well as in the Performance Log) and its purported impact on the Watch when the Subject Member did not respond, which does not accord with the evidence (e.g., Subject Member’s explanation in the Interview and Wood Letter) or the supporting letters (e.g., Buliziuk Letter) provided by MR2.

[243] MR2 asserts that the Daly Letter (and Performance Log) have deliberately mischaracterized the Assistance Call (as a 10-33) even after Corporal Wood specifically told Staff Sergeant Daly during a break in the Meeting that there was no 10-33 call, and upon becoming aware of this misinformation, Staff Sergeant Daly refused the Subject Member’s request to change the Performance Log.

[244] Relatedly, MR2 asserts the senior member was removed from the Watch because he was engaging in “intimate relations” and an extra-marital affair with another member of the Watch (“Affair”), and as such he was not an “innocent” bystander, but moved to prevent the ongoing situation, which is raised in a second letter provided by Corporal Wood (“Wood Letter 2”) submitted at the request of MR2:

I became aware of an extramarital affair that was occurring on A Watch between a female member I supervised on the North shore and a male member on the South Shore. . . Although I do not recall having a specific conversation regarding the switch of the male member on A watch for Constable Goodyer, ***I was of the impression that it was done to prevent the affair from continuing during working hours and that Cst. Goodyer joining A Watch was in fact, solving a problem for A Watch.*** [MR2 bold and italics emphasis original, underline emphasis added]

[245] MR2 further alleges that Staff Sergeant Daly’s knowledge of the Affair is substantiated by the Chung Letter, and how it was allegedly handled by Staff Sergeant Daly and Sergeant Morrissey. According to MR2, the Chung Letter makes it clear that Staff Sergeant Daly was responsible for the decision to move the senior member off the Watch and it was based on the need to separate the

two members due to the Affair and not solely to accommodate the Subject Member as alleged in the Daly Letter.

[246] MR2 asserts that Staff Sergeant Daly has adopted a “zero tolerance approach to deceit” in the Daly Letter which conflicts with the principle of *McKinley*, even though it did not deal with an operational occurrence, or pursuing rehabilitation given the Subject Member’s junior service, which is also the approach of the CAR, and is contrary to the Alberta Court of Appeal decision in *MacDonald*.

[247] MR2 agrees with the CAR that, based on the Wood Letter, Corporal Wood has been personally impacted by the Subject Member’s situation, as he now wonders if he recalled the phone conversation with the Subject Member accurately, and he is concerned that dismissal may occur. According to MR2, the Wood Letter reveals an understanding between lying about operational versus non-operational matters, and he does not expect subordinates to confide in him about their personal lives.

[248] Further, MR2 notes the Wood Letter is clear that the lying of the Subject Member did not affect his ability to operationally supervise the Subject Member, nor did it impact him or the Watch operationally. Specifically, Corporal Wood states he would have provided the Subject Member permission to leave the zone for his meal break without any rationale.

[249] According to Wood Letter, the removal of the Subject Member only impacted the Watch because he was well-liked by his co-workers, not based on the reasons articulated in the Daly Letter.

[250] Wood Letter 2 notes that the Subject Member received a positive assessment (identified below as the RCMP Promotion Assessment Level 1 – Constable (form 3447) completed by Corporal Wood (no date or signature) (“Promotion Assessment”)) and that he received the Alexis Award after one year of service for working with minimal supervision, as well as other positive comments about his work and competencies.

[251] According to MR2, the Wood Letter and Wood Letter 2 reflect that the Subject Member is a strong performer and asset to the RCMP, and “that the gravamen of his misconduct does not warrant dismissal.”

[252] Addressing the Mak Letter of the Psychologist, MR2 states that the Board has ruled it is not being treated an expert report, and therefore, contrary to the CAR Submission, it cannot be simply “cast off” because it does not meet related technical requirements.

[253] MR2 states that in the Mak Letter it is clear that the Psychologist is aware of the deceit and related facts forming the basis of the conduct proceeding, and that her “impression” is that the Subject Member is honest and dedicated and has gained a better understanding of himself and will make better decisions in the future. According to the Mak Letter, the Subject Member had feelings about having little understanding of the expectation of reporting private matters to his supervisor and disciplinary procedures of the force, being a junior member.

[254] Of the general list of mitigating factors outlined in the Conduct Measures Guide (p. 9), MR2 asserts the following apply to the Subject Member’s circumstances.

[255] First, the Subject Member accepted responsibility and admitted the relevant Allegations given he admitted there was no birthday party in the Interview when confronted with that lie, which “purged his deceit”, and in the Response admitted to Allegation 3, Allegation 4, and Allegation 5.

[256] Second, the Subject Member has apologized and is remorseful, given he apologized to Staff Sergeant Daly and Corporal Wood in the Meeting, the Dimopoulos Letter notes that over the past year the Subject Member “has always stated he knew what he did was wrong...”, the Buliziuk Letter, although not familiar with the conduct matter, notes his remorsefulness, and Constable Eccleston’s “take on everything” is that he is remorseful for “bad decisions” (“Eccleston Letter”).

[257] Third, the Subject Member has no prior record for misconduct and has a good work ethic as reported in Wood Letter 2 (outlining positive comments of Crown Counsel regarding a file as an example of pro-active policing), the Eccleston Letter, which notes the Subject Member reported to work despite the ongoing situation and was proactive when working within the limits of his administrative reassignment, and the Buliziuk Letter, which referred to his willingness to learn and return to duties.

[258] Fourth, in terms of being a team player and professionalism, the Eccleston Letter reports the Subject Member was always professional when attending calls with Cst. Eccleston and the

letter of Constable Mallais (of the Canadian Pacific Police Service) (“Mallais Letter”) reports the Subject Member as being concerned for fellow members when responding to calls.

[259] Fifth, the misconduct is an isolated incident and out of character, as detailed in the various letters of support submitted by MR2, which portray the Subject Member as having integrity and professionalism, and he has “owned his mistake.”

[260] Sixth, the Subject Member sought and is undergone counselling as set out in the Mak Letter of the Psychologist.

[261] Seventh, the letters of support in the form of the Wood Letter (and presumably Wood Letter 2), Buliziuk Letter, Dimopoulos Letter, Eccleston Letter, Mallais Letter, Wiberg Letter, and letters of Staff Sergeant Van Laer (“Van Laer Letter”) and Constable Foley (“Foley Letter”), show positive community contributions.

[262] Eighth, the Subject Member cooperated with the conduct investigation, there is a minimal likelihood of recidivism, there is a great potential to rehabilitate (due to the Subject Member being junior, taking responsibility, learning from his actions, and remorsefulness), and there was no malicious intent.

[263] Ninth, the delay in initiating the formal conduct proceeding, which only happened two days before the expiration of the one year limitation period is identified as a mitigating factor by MR2, as such proceedings are stressful, even if on paid suspension, and the Subject Member regularly reported as required, revealing his continued dedication and commitment.

[264] Also included in the MR2 Submission were notes from Ms. S and Mr. B (“S&B Note”) and Ms. B (“B Note”), members of the public thanking the Subject Member for his assistance in dealing with certain matters that arose during the course of his duties.

[265] In conclusion, MR2 asserts that imposing dismissal in the circumstances of the Subject Member “would be unprecedented”, and would be grossly disproportionate to the nature and circumstances of the contraventions based on the cases outlined above, and those relied upon in the CAR Submission dealt with the most egregious of circumstances not found here.

[266] Further, MR2 asserts the fact that members were not dismissed in the cases outlined under the legacy process, even when 10 days or dismissal were the maximum sanctions, speaks to what is proportionate in the present case.

[267] Given the remedial and educative approach of the new conduct process, MR2 finds it difficult to fathom how the CAR's approach fits with Conduct Measures Guide and other changes, as dismissal would be purely punitive and nothing more.

[268] According to MR2, the various letters of support indicate that the Subject Member understands the seriousness of the misconduct, and the prospect of his lying to a supervisor again or misconducting himself are remote, as he "clearly 'gets it'".

[269] On April 25, 2018, the Representatives exchanged emails as part of determining which cases were to be attached as part of the MR2 Submission, and on April 30, 2018, the Board requested that MR2 provide an index listing cases, reference letters and other materials to ensure that the Board and CAR had all the information being relied upon.

[270] Later the same day, the CAR sent an email to the Board dealing with three matters: first, subject to receiving the index from MR2, a request to submit a reply to selected issues arising from the MR2 Submission (as outlined in a three page attachment); second, requesting clarification as to the role of a Mr. John Benkendorf referred to in two of the letters of support provided by MR2; and third, seeking clarification as to how the Board should treat the signed "Hearing Statement" of the Subject Member ("SM Statement") and a document entitled "Recalling call for Service 10-33" ("SM Note") provided as part of the MR2 Submission, asserting that if the Board intends on placing weight on them, the Subject Member should be subject to cross-examination.

[271] On May 1, 2018, MR2 requested further time (until May 2, 2018) to provide an index, and on May 2, 2018, the Board granted further time, as well as approving the CAR's request to submit a response to the MR2 Submission, subject to any comments of MR2, and requested that the CAR particularize concerns about the SM Statement and SM Note, proposing a date of May 9, 2018 for the CAR rebuttal. The CAR confirmed that a reply could be provided by the date identified, and shortly thereafter MR2 asked for one day to provide some comments regarding the CAR's request to comment on the MR2 Submission.

CAR Rebuttal

[272] In the early morning hours of May 3, 2018, MR2 provided an index of cases and supporting documents, and later in the day submitted a brief document setting out concerns with respect to the scope of the CAR's proposed response to the MR2 Submission.

[273] The only item of note from the index is that it clarifies that although provided as authorities, the decision in *Appropriate Officer "E" Division and Constable Kalke* 18 A.D. (4th) 66 ("*Kalke*") and External Review Committee report D-133 are not referred to in the MR2 Submission and are not being relied upon by MR2.

[274] In respect of the prospective rebuttal of the CAR, relying upon *R. v. Krause*, [1986] 2 S.C.R. 466 ("*Krause*"), MR2 expressed concern that the CAR would be splitting its case by putting in further or additional evidence to bolster its position after the completion of the defence case. The Court in *Krause* stipulated that in criminal and civil cases, the prosecuting party may be allowed to call evidence in rebuttal after completion of the defence case where the defence has raised some new matter or defence which they did not have an opportunity to deal with and could not reasonably have anticipated, but rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced by the prosecuting party (para. 16).

[275] MR2 indicated there is no issue with the CAR addressing matters arising from statements of particular individuals, but that does not include submissions as to the proper range of sentence or how decisions should be interpreted where they would constitute bolstering the position originally advanced. MR2 expressed uncertainty, based on amendments to the *RCMP Act* and related policies, as to where the line is drawn in relation to providing replies, but at a minimum procedural fairness would not support stopping submissions at point where the "CAR is simply bolstering the CAR's case."

[276] The day closed with the CAR replying to the submission and comments of MR2 by indicating there is "no intention to 'split my case'" and she will adhere to the rules of rebuttal, noting if the Board finds otherwise, it can determine the appropriate remedy.

[277] After reviewing the CAR's initial outline of the items to be addressed relative to the MR2 Submission, as well as MR2's brief outline and concern about splitting the case, and the response

of the CAR immediately above, the Board advised on May 4, 2018, that the CAR could proceed with a rebuttal as outlined, noting the principles of *Krause*, and the Board's discretion to address any such concerns once the rebuttal was submitted and reviewed.

[278] On May 9, 2018, the CAR provided its rebuttal ("CAR Rebuttal"), which commences by noting that the cases relied upon in the MR2 Submission confirm that dishonesty is serious misconduct and dismissal is consistently considered as within the range of appropriate sanctions, and where not administered (e.g., where the circumstances establish there was no personal gain or significant mitigating medical evidence), sanctions remain severe including demotion and significant forfeitures of pay.

[279] Turning to the cases relied upon in the MR2 Submission, the CAR Rebuttal notes that in *MacDonald (LERB)*, although it is confirmed that deceit is not career-ending in every instance, the LERB relied upon expert psychological reports and evidence establishing a nexus between the member's depression and his misconduct for the purposes of mitigation (para. 76), which the Subject Member has expressly not drawn relative to his purported stress or any medical condition and misconduct.

[280] With respect to *Cormier*, the CAR Rebuttal notes the member was not primarily self-motivated as there was an intent to help a civilian motorist (para. 96), whereas the Board found the Subject Member's deceit here was for personal reasons (at paras. 140, 141 and 144).

[281] In relation to External Review Committee reports C-007 and C-008, the CAR Rebuttal notes these files dealt with misconduct in the context of a conduct meeting, where the Conduct Authority has determined on a balance of probabilities that the member has contravened the *Code of Conduct* and is of the opinion that the measures provided at the Conduct Authority's level (i.e., which does not include dismissal) are sufficient based on the circumstances, and because the relevant Conduct Authority determined they did not meet the threshold for dismissal, these case should be given minimal weight and not relied upon in determining an appropriate range of sanction at the conduct board level (which also applies to C-011 as well, in addition to the fact that the MR2 Submission did not address this report).

[282] The CAR Rebuttal also notes that, in *Vellani*, the conduct board observed that little weight can be assigned to decisions on sanction arising out of the acceptance of a joint submission (para. 107) (given such agreements arise out of tangible and intangible factors known only to the parties, which is why such resolutions are to be given great deference).

[283] As such, the CAR Rebuttal asserts that decisions where the subject member had the support of the Commanding Officer (or Conduct Authority) and/or were resolved on the basis of a joint submission (because dismissal was not sought) should be given little weight, which includes *Koshman, Payne, Lenger* (which also included mitigating medical evidence), *Lawless1* (where the adjudication board did not accept the joint submission of one day loss of regular time off and substituted one day forfeiture of pay), *Frechette* (which also included a superior work record), *Richard*, and *Simpson* (which also included a 17 year solid work record).

[284] While the MR2 Submission cites *Lawless 2* (para. 41) of the External Review Committee, the CAR Rebuttal notes it was dealt with on appeal at Level II (G-395-15-1 (June, 2007) cited as 32 A.D. (3rd) 292 (“*Lawless 2 (Level II)*”), where the sanction of dismissal was varied to forfeitures of pay based on the medical evidence which was found to be a significant mitigating factor in the specific circumstances of the case (paras. 97-99).

[285] The CAR Rebuttal asserts the sanction decision in *Jansen 2* should be distinguished because Constable Jansen concealed the misconduct for the purpose of assisting a fellow officer, which, like *Cormier*, was not for a personal benefit.

[286] In the case of *Page*, the work record of Constable Page was described as “above average” and the Chief was “neutral” in support (although as the first level decision maker he did not substantiate the misconduct, which led to the hearing), which is not the situation in the present case involving the Subject Member as the Conduct Authority is seeking dismissal.

[287] Returning to *Vellani*, the CAR Rebuttal states that it is instructive on dealing with cases of dishonesty under the new conduct regime, noting it and the majority of other cases that have been submitted confirm that the range of sanctions available for issues of dishonesty and integrity include dismissal, which contradicts the assertions in the MR2 Submission that it would be

“grossly disproportionate” or contravene “principles of procedural fairness” (particularly given the accepted test for determining measures is to first determine or consider the range).

[288] The CAR Rebuttal also rejects that suggestion that *Vellani* or the CAR Submission adopt a “zero tolerance approach to deceit”, as it was expressly rejected by the conduct board in *Vellani* (paras. 94-95).

[289] With respect to *Gregson*, the CAR Rebuttal clarifies that it does not equate the Subject Member’s misconduct with that in *Gregson*, but notes the decision does establish that dismissal is within the range of measures in cases of disobeying an order, and more specifically, that the CAR is not suggesting dismissal would be appropriate based solely on Allegation 1, but, in accordance with the Conduct Measures Guide, in those circumstances where the disobeying of an order has elements of contempt or lack of respect it moves into the aggravated range.

[290] Addressing the letters of support, the CAR Rebuttal notes that Wood Letter 2 specifies it only pertains to the two allegations pertaining to him (i.e., Allegation 3 and Allegation 4), and there is no indication that his discomfort with the Subject Member being dismissed is based on a knowledge of the full Allegations or the full extent of the information before the Board or its findings.

[291] Further, the comments by Corporal Wood pertaining to the Subject Member in the Promotion Assessment are based on six weeks of immediate supervision, which is not sufficient to establish that the Subject Member is a “stronger performer and asset to the RCMP.”

[292] With respect to the Eccleston Letter, the CAR Rebuttal notes Constable Eccleston was not on the same Watch as the Subject Member (i.e., “B” Watch versus “E” Watch), which may bring into relief his ability to make authoritative statements or assessments regarding the Subject Member’s performance, which were not echoed in the Bulziuk Letter (and he actually supervised “E” Watch).

[293] The CAR Rebuttal also cautions against comparing the Subject Member’s performance against others on “E” Watch given accommodations that may be afforded or exist in relation to those members on that Watch who are on a Graduated Return to Work (“GRTW”) or under “Duty Restrictions” (“DRs”) based on medical or other issues.

[294] At this stage, the CAR Rebuttal turns to three documents that were submitted as part of the MR2 Submission, but were not the subject of any comments, commencing with a Toronto Police Service Job Referral Form (dated July 8, 2013) completed by Constable Cornett (“TPS Form 1”) and a second Toronto Police Service Job Referral Form (dated August 22, 2013) completed by Constable Stephens (“TPS Form 2”) (collectively, “TPS Forms”).

[295] Generally, the CAR Rebuttal asserts the TPS Forms should be given minimal weight in determining the Subject Member’s performance abilities because they are based on non-RCMP positions and reflect performance from 2011 to 2013 as an Auxiliary with the Marine Unit of the Toronto Police Service.

[296] More specifically, the CAR Rebuttal states that TPS Form 2 has minimal comments and limited information about the Subject Member, and TPS Form 1 is based on knowledge of the Subject Member for 2.5 years and before he became employed with the RCMP.

[297] Second, the MR2 Submission also contains a to-whom-it-may-concern letter from FS (dated September 5, 2013) (“FS Letter”), which the CAR Rebuttal asserts should be given minimal weight relative to the Subject Member’s performance, as it appears to relate to sales which is unrelated to the performance of a member (i.e., police officer) in the RCMP.

[298] Third, there is also a handwritten note (dated November 3, 2016) in the supporting materials of the MR2 Submission, which is titled “O’Callaghan’s Notes” in the electronic file title (“Unattributed Note”), which the CAR Rebuttal suggests is inappropriately before the Board because the author of the note is unknown.

[299] Turning to the Mak Letter of the Psychologist, the CAR Rebuttal indicates that the MR2 Submission has misstated that the CAR is concerned about it meeting “technical requirements”, but rather the concern is that the Psychologist appears to have insufficient knowledge of the Allegations to provide a reliable opinion as to whether the Subject Member has “learned from his mistake”, and further, given the Subject Member is not claiming the stressors reported by the Psychologist provide a justification for his misconduct, the medical status of the Subject Member is not a significant mitigating factor.

[300] Although the MR2 Submission addresses the response of the Subject Member to the Assistance Call (in terms of it being a “10-33”), the CAR Rebuttal states it should not be a significant factor in assessing mitigating and aggravating circumstances because the Board already determined it was not a “10-33”, there is no reference to the “10-33” in the CAR Submission nor does it attempt to tie the deception to operations relative to that call, and the CAR previously confirmed during Meeting 1 that it was not being relied upon as constituting “discreditable conduct”.

[301] In terms of the MR2 Submission’s questioning of the Daly Letter and its characterization of the Subject Member’s failure to respond to an “urgent call” (i.e., Assistance Call) and the related “ripple effect”, the CAR Rebuttal states it is within his role as Watch Commander to assess the actions of the Subject Member, and albeit not a “10-33”, within his purview to expect that the Subject Member should have attended.

[302] The CAR Rebuttal states there is also no merit to the MR2 Submission that there is a “troubling layer to the circumstances” regarding the Performance Log completed by Staff Sergeant Daly, as it reflects the facts upon which the Meeting between himself, Corporal Wood, and the Subject Member occurred, and his decision to refuse to amend the Performance Log was reasonable (i.e., to remove the reference to the Assistance Call as being a “10-33”), given it reflects that Staff Sergeant Daly and Corporal Wood had a conversation outside the room (and although not stated, the Performance Log later states that after their conversation “[t]here was no tone alert rather a request...for immediate backup”) (p. 78).

[303] The assertion in the MR2 Submission that Staff Sergeant Daly has adopted a “zero tolerance approach to deceit” in the Daly Letter is also rejected by the CAR Rebuttal, noting that in the context of the Meeting and Performance Log, he determined that the Subject Member’s misconduct fell within the purview of a more senior conduct authority and advised during the Meeting (and recorded in the Performance Log) that the matter would be forwarded to senior officer for any decisions, which the CAR asserts was a reasonable and appropriate course of action.

[304] Noting that the MR2 Submission also challenges the subjective views expressed in the Daly Letter regarding “context” and the “potential for rehabilitation”, the CAR Rebuttal observes that Staff Sergeant Daly provides significant background which forms the basis of his

disappointment with the Subject Member's actions, and although in a supervisory role at the time of the Allegations, he is not the Conduct Authority in this matter nor responsible for imposing measures, and as such, the Daly Letter has been provided by a witness directly impacted by the dishonesty of the Subject Member and reflects the elevated standard of conduct he expects of members. The CAR Rebuttal submits that the Subject Member disagrees with the Daly Letter because he "has not fully accepted responsibility for his actions and has a disregard for authority."

[305] The CAR Rebuttal points out that the Chung Letter in fact provides no reference about the Subject Member's character or work record, and is solely directed at undermining the credibility of Staff Sergeant Daly on the basis that he mischaracterized the circumstances of the Subject Member's transfer to "A" Watch.

[306] In further reply, the CAR Rebuttal notes: first, that while the Chung Letter, Wood Letter 2, Buliziuk Letter and Subject Member (in the form of the MR2 Submission) provide observations about the transfer, none of them were in positions of authority or otherwise that would allow them to be aware of all the reasons for any staffing arrangements; and second, contrary to the assertions in the MR2 Submission and Chung Letter, Staff Sergeant Daly was not solely responsible for the transfer of the Subject Member, as the Daly Letter confirms that a senior officer initiated the discussion of the transfer and held the authority to be responsible for any decision-making (and there is no indication this officer was unduly influenced by the female member who Corporal Chung suggested should be transferred).

[307] In this regard, the Unattributed Note appears to be clear that the Subject Member's transfer to "A" Watch was based on the approval and authority of a senior commissioned officer at the Detachment (after a meeting with the Subject Member).

[308] Additionally, while Staff Sergeant Daly may have been aware of the Affair, the CAR Rebuttal notes that the personal information of those members is protected and it would have been entirely inappropriate to include it in the Daly Letter, and as such, its non-inclusion should have no bearing in assessing the credibility of Staff Sergeant Daly.

[309] Further, while the MR2 Submission describes the description in the Daly Letter of the member being transferred as "innocent", because he was involved in the Affair, the CAR Rebuttal

asserts the emphasis was on Staff Sergeant's Daly impression that the senior member was well-liked, trusted and a go-to constable, and indeed, whether Corporal Chung was "appalled" is not material to determining conduct measures relative to the Subject Member.

[310] In conclusion on this aspect, the CAR Rebuttal submits that the record does not support an adverse finding of credibility relative to Staff Sergeant Daly in terms of the Daly Letter.

[311] Turning next to the nature of the misconduct, the CAR Rebuttal states the MR2 Submission mischaracterizes what transpired in the Interview by claiming the Subject Member did not "elaborate or perpetuate" the deception but further backed away from it, and outright admitted the deception. The CAR Rebuttal pointedly states that the Subject Member only admitted his dishonesty in the Interview when confronted with the real possibility that the Spouse would become involved, and his admission was self-serving rather than based on a desire to be accountable, as it was not an outright admission as claimed.

[312] The CAR Rebuttal further describes the MR2 Submission as "entirely inaccurate" when it states that the CAR is penalizing the Subject Member for owning up to the deception. The CAR Rebuttal states that the Subject Member did not take various opportunities to be accountable for his actions, and contrary to claims otherwise, he was not honest in the Interview but rather lied during the Interview, and only when confronted with evidence that would have revealed his deception did he tell the truth (as the Spouse would have confirmed there was no birthday party and she would have learned of the circumstances of visiting the Residence, and of the *Code of Conduct* investigation, causing the Subject Member more personal problems as he described in the Interview).

[313] While the MR2 Submission distinguishes *Vellani* as involving more egregious conduct than involving the Subject Member, the CAR Rebuttal posits that even although he did not make a false statement under oath, the Subject member deliberately misled his supervisors, and intentionally provided a false statement as part of an investigation during the Interview, which formed part of a "cautioned" statement, acknowledging that he understood he could be the subject of further *Code of Conduct* proceedings for making false or misleading statements. It is in this context, after confirming an intention to provide the truth, the Subject Member lied.

[314] Adverting to the conduct board's observation in *Vellani* (at para. 12) that for reasons of good governance, any member must be able to rely on information provided from another member as being true, the CAR Rebuttal submits the seriousness of the misconduct of the Subject Member is comparable to the dishonesty in *Vellani*.

[315] The CAR Rebuttal also points to the MR2 Submission and SM Statement as providing additional reasons for his misconduct that relate to personal gain and benefit, including: being deceptive about how he spent his lunch break over concerns about how he may be viewed and treated by his new watch if he was perceived as having a relationship with Ms. F.; and to get closure and apologize to Ms. F and her children.

[316] In responding to the MR2 Submission relative to the Direction, the CAR Rebuttal asserts the "continued reliance on excuses about the Direction demonstrates [the Subject Member] has not accepted responsibility for his actions and may not understand his obligations to follow orders and directions as a member."

[317] First, while the MR2 Submission notes that the Subject Member may have questioned the Direction at the time given it involved his personal life, to support the argument that his actions were less egregious than that in *Gregson*, the CAR Rebuttal observes that while he did not "officially challenge" the Direction, the way he did question it through action resulted in a contravention of the *Code of Conduct*.

[318] Second, the CAR Rebuttal asserts that the claim in the MR2 Submission that the Subject Member demonstrated a pattern of compliance with the Direction at a time when he was involved in an intense relationship, even though he was not sure about its lawfulness given it pertained to his personal life, should not be accepted as a mitigating factor, noting the Direction did not prevent the Subject Member from seeing Ms. F. while not on-duty.

[319] Third, and relatedly, the CAR Rebuttal asserts that the dual assertion in the MR2 Submission that the Subject Member did not see Ms. F while on-duty after receiving the Direction, nor did he have it in mind months later when he went to the Residence (as she was no longer his girlfriend), is an aggravating factor in terms of being "oblivious to the Direction" and compliance, as already stated, should not be considered a mitigating factor.

[320] Fourth, the CAR Rebuttal suggests the Board should be “skeptical” of the claim in the MR2 Submission that the Subject Member had to see Ms. F on the night in question, as he was not sure he may get another opportunity, as the Conduct Report establishes that the Subject Member saw her again ten days later while on duty, and when he had ample time off to arrange a personal visit, given he acknowledged during the Interview that had since seen her on his “personal time.”

[321] In terms of recidivism, the CAR Rebuttal states that the Subject Member “appears to have learned the wrong lesson”, which is that members have a right to privacy in their personal lives when it does not impact operations, but the issue is honesty.

[322] In this case, the Subject Member intentionally misled Corporal Rappel during the Interview, and for personal reasons, he chose to frustrate the investigation, and according to the CAR Rebuttal there is no evidence that he understands the seriousness of interfering in that investigation.

[323] Without an understanding of how his actions fell below the standard expected of members, the CAR Rebuttal submits the Subject Member cannot establish that he can be rehabilitated and that it cannot be assured there is a minimal likelihood of recidivism.

[324] In support of the assertion that the Subject Member has failed to grasp the issue is one of honesty, not a distinction between personal and professional matters, the CAR Rebuttal refers to three statements in the MR2 Submission: first, that the Subject Member, as a junior member, had some confusion about keeping what he thought impinged on a personal level separate from his professional obligations, but now knows there is no distinction (para. 71); second, the Subject Member learned there is no distinction to be drawn between his personal and professional life when speaking with a superior officer (para. 94); and third, because the Subject Member has taken responsibility and learned from his actions, is remorseful and is a junior member (para. 140).

[325] In terms of addressing the work record and prior discipline, the CAR Rebuttal submits the approach in *Poirier* should be adopted (at para. 87) where it was found that while there is a right to expect at least satisfactory performance from members, in terms of sanction, performance may be likened to an account upon which to draw, which has less weight as a mitigating factor where the

term of service is shorter, which also applies to there being no prior record of discipline when there is extremely limited service.

[326] Adverting to the Daly Letter and the fact that it indicates the Subject Member was having difficulty with supervisors and completion of probationary training, balanced against the materials provided with the MR2 Submission on performance (e.g., Promotion Assessment), the CAR submits that the Subject Member's performance has been minimally satisfactory and should be given limited weight as a mitigating factor.

[327] The CAR Rebuttal submits that no weight should be given to the SM Note (where the Subject Member purports to describe how he responded to an urgent call for assistance when he was subject to an Order of Temporary Reassignment ("OTR") due to the *Code of Conduct* investigation) as a mitigating factor: first, there is no indication the Subject Member sought permission to attend this call, and given he was on administrative duties and not permitted to work in an operational capacity he may have failed to comply with the OTR; second, it contains uncorroborated assertions that four members involved considered his action a "job well done", yet, having been involved, neither Corporal Wood or Corporal Chung refer to this incident in their letters, nor have the other two members who were present submitted any such information, there is no file number associated to the call, and the SM Note is not signed by the Subject Member; and third it only confirms the Subject Member's poor performance when he did not respond to the Assistance Call.

[328] Similarly, the CAR Rebuttal asserts that the SM Statement should be given little weight because it is unsworn and untested through cross-examination, and provides several observations about its content.

[329] First, the CAR Rebuttal states that the Subject Member's expression of remorse and/or apology has limited value because it blames Staff Sergeant Daly for initiating the Meeting and Performance Log based on information that had not been "vetted" by Corporal Wood, and further attempts to excuse his own false story about the birthday party in the Meeting based on Staff Sergeant Daly purportedly misleading the Subject Member about the seriousness of the Assistance Call.

[330] Second, the CAR Rebuttal states that based on the SM Statement, there should not be any confidence that the Subject Member understands his duty to be accountable when he states that he ultimately confessed to lying, as it became clear that the birthday party “ruse was anything but a minor part of the investigation”, an interpretation the CAR finds troubling when the Interview is clear that the Subject Member only confessed when confronted with the possibility his Spouse would be contacted.

[331] Third, the CAR Rebuttal asserts that while the Subject Member emphasizes his integrity, the SM Statement conforms to the Subject Member’s method of “being substantively truthful”, and in this vein, the CAR states the personal information provided regarding the relationship with Ms. F is “self-serving and misleading”: first, the Subject Member states the relationship grew until June, 2016, at which point there was a transition period during which they would see one another on occasion, but at the same time, the Subject Member claims to have stopped all contact earlier that summer and had not spoke with Ms. F until late October, 2016; and second, the Direction was issued when the Subject Member was reported to be frequently seeing Ms. F in mid-July, 2016, yet in the Interview the Subject Member admits the intimate relationship concluded “about September”. Simply stated, the CAR Rebuttal notes the complete lack of clarity by the Subject Member around the circumstances and timing of the termination of his relationship with Ms. F.

[332] Given that the Subject Member is either being reckless with his accuracy on the issue of the relationship with Ms. F, or is attempting to minimize it, the CAR cautions that the advice in the Daly Letter should be adopted in that any reporting or statement by the Subject Member should not be accepted without corroborating evidence.

[333] Fourth, the CAR Rebuttal also questions the Subject Member’s emphasis in the SM Statement on his apology to Ms. F’s children, noting the Subject Member has various versions, such as stating he let Ms. F go because she was seeking to reconcile with her husband, but then portrays that he somehow erred in how the relationship ended, creating a requirement for him to apologize. In this version, the SM Statement elaborates that he received a text from Ms. F wanting to know if he could meet with her children to explain why he stopped seeing them and got married, as the children were upset and wanted an apology and explanation.

[334] However, based on the comments of the Subject Member during the Interview, the involvement of the children was not planned, as he indicated that they may have already been awake and just came out after he was talking with Ms. F, while the notes of Corporal Rappel's meeting with Ms. F indicate that her children woke up about 45 minutes after the Subject Member arrived and he had to apologize.

[335] The CAR Rebuttal asserts the SM Statement exaggerates the purpose of the visit as being premised, in part, on the need to apologize to Ms. F's children in order to obtain mitigation.

[336] Fifth, in the SM Statement, the CAR Rebuttal notes the Subject Member largely attributes his attendance at the Residence as being instigated by a text from Ms. F after he had stopped all contact until she texted him in October, 2016, expressing she may want to talk one day, but in the Interview, the Subject Member states he had been trying to connect with Ms. F for about a month, and as such, the portrayal in the SM Statement is intended to diminish his responsibility in attending the Residence on-duty.

[337] Sixth, the CAR Rebuttal requests that the Subject Member be required to testify if the Board is considering "placing significant weight on the contents" of the SM Statement.

[338] In closing, the CAR Rebuttal summarizes that the Subject Member had little over two years of service at the time of the misconduct, he should have endeavoured to consistently demonstrate the Core Values, he fell short of the high standard of conduct expected of a member, there are limited mitigating factors in the MR2 Submission, which has also not established there are sufficient mitigating factors to avoid dismissal, and caution must be exercised that he has accepted responsibility, is remorseful, and has rehabilitative potential.

[339] The day after submitting the CAR Rebuttal, on May 10, 2018, the CAR provided the Board with two Level II decisions which had been cited but not attached to the CAR Rebuttal.

[340] The Board confirmed receipt of the two Level II cases on May 11, 2018, and advised the Representatives that, absent any other issues, it would review the submissions and determine if any further information is required, and provide a timeline for the hearing on measures or other procedural considerations.

[341] On June 6, 2018, the Board inquired as to the availability of the Representatives for the hearing on measures on June 27 or 28, 2018.

[342] Although the CAR was available, the MR2 advised on June 7, 2018, that she was not, and the MR2 sought clarification on how the hearing would be conducted, including procedures and substantive issues, where it would take place, and if appearing by video is an option.

[343] On June 11, 2018, the Board advised the MR2 that:

- Prior to her engagement, there had been agreement (with the MR and CAR during Meeting 2) that the measures component would occur in-person in Kamloops, however, there were other potential options or variations, including video conferencing.
- The Subject Member had declined to waive the technical requirement of having the Allegations formally read to him, and there had been some interest in him addressing the Board, but if the Subject Member is now relying on the signed "hearing statement" (i.e., SM Statement) it may make his addressing the Board unnecessary.
- However, if the Subject Member wanted to address the Board and/or does not waive the reading of the Allegations, it may be that these aspects could be dealt with by way of a preliminary video conference, which would then be followed by the issuance of a decision on measures, which can be by way of video conference as well, or potentially with some parties appearing by video conference, but if the Subject Member wished to address the Board beyond some form of acknowledgement, it is likely that the CAR will be requesting to have the ability to examine the Subject Member.

[344] The Board closed by noting it was nearly finished reviewing the submissions on measures, and at this stage it did not appear any further information would be required, and if so, unless the Representatives had any other issues to address, a preliminary video conference could be held if required, followed by a video or in person hearing of some form as required to deal with measures, and the Board was open to suggestions.

[345] Absent a reply from the MR2, on June 18, 2018, the Board sent an email seeking dates from the Representatives for the first week of July for a preliminary video conference should the

Subject Member continue to want to make a statement to Board and/or require reading of the Allegations. If a preliminary video conference were not required, the Board would provide direction on the next steps and timing.

[346] The MR2 replied the same day that the Subject Member waived the reading of the Allegations, and appreciated the opportunity to address the Board but would like to proceed to a decision on the measures stage, given he has addressed the Board in the SM Statement. The MR2 closed by stating any direction on the next steps or timing of the issuance of the decision on measures would be awaited.

[347] On June 19, 2018, the Board confirmed receipt of the MR2's email, and subject to any comments from the CAR, indicated that with the waiver of reading the Allegations and notice that the Subject Member would not be addressing the Board, the imposition of the measures phase would proceed. The Board also confirmed its understanding that no further submission are being provided by the Subject Member.

[348] The CAR confirmed she had not further submissions the same day, and no further response was provided by the MR2.

[349] Between August 20 and 21, 2018, the Board confirmed through emails with the Representatives that the requirement to "serve" the decision was waived, and that they would accepted service on behalf of their respective clients.

Analysis

[350] The Board has given careful consideration to the Response, CAR Submission, MR2 Submission, CAR Rebuttal and related supporting documentation, decisions, and authorities, and as these materials outline, there are several guiding considerations relating to the imposition of measures for misconduct in policing, and the RCMP in particular.

[351] First, having established Allegation 1, Allegation 3, Allegation 4 and Allegation 5, the Board is obliged pursuant to paragraph 36.2(e) of the *RCMP Act* and subsection 24(2) of the *CSO (Conduct)* to impose measures that are proportionate to the nature and circumstances of the

contraventions of the *Code of Conduct*, and where appropriate, that are educative and remedial rather than punitive.

[352] Second, the framework for determining the appropriate measures in a specific case requires the Board to first consider the range of measures that may apply to the misconduct that has been established, and then second, aggravating and mitigating factors must be taken into account, at which point the measures to be imposed are determined in the specific case before the conduct board.

[353] Third, a conduct board is not bound by previous decisions of other boards, but if similar in nature, they do help to establish the range of measures applicable to established misconduct, as the principle of consistency in imposing measures is to ensure fairness and that similar forms of misconduct are treated similarly (*Lemoine* (Level II) at para. 121; *Vellani* at para. 101).

[354] Fourth, the Conduct Measures Guide is available to provide guidance on considerations around the imposition of measures, but it is just that, a guide, and not binding or determinative.

[355] Fifth, generally speaking, aggravating (or potentially mitigating) factors are those that exist above or beyond the essential constituents of the misconduct itself (normally found in the allegation or accompanying particulars or as determined by a conduct board) (*Cormier*, para. 89)).

[356] Sixth, police officers hold positions of trust, and are held to higher standards of behavior (*White, Lemoine, Poirier* (para. 82), *Toy, Jansen 2*).

[357] Turning first to the range of measures that may apply to acts of dishonesty, deceit and lying, the cases and reports provided by the Representatives are generally consistent, confirming that, in policing, lying to supervisors or lying in the course of a conduct investigation is considered to be very serious misconduct, and based on the authorities provided, the range of measures is a financial penalty to dismissal.

[358] Indeed, as noted in *Vellani* and *Cormier*, where there is personal gain, dismissal tends to be administered as the appropriate measure, but it is always dependent on the factors relating to each individual case.

[359] Although a conduct board must always calibrate measures relative to the misconduct of a specific case, the following quote from *Page* (also adopted in *Jansen 2*) provides a useful context regarding the view taken of deceit in policing (see also *Edwards* in the RCMP):

[11] ...deceit is the most serious disciplinary default that can be committed by a police officer. The fact an officer knowingly makes a false or misleading statement in a duty report or in the course of reporting to, or being interviewed by, a senior officer must adversely affect one's assessment of the officer's integrity and honesty, and one's assessment of his or her suitability to be or remain a member of a police department. Integrity is a core value the public has a right to expect and demand of police officers in order that the public will have confidence in the fair, lawful, and trustworthy administration of justice. Lying or the making of misleading statements in relation to an officer's dealings with a member of the public cannot be condoned.

[12] In addition, it must be apparent that deceit compromises internal organizational effectiveness. A police organization must be able to expect and receive honest accounts of incidents and the involvement of officers in them from its members. Nothing can compromise police effectiveness more readily than loss of confidence in an officer's preparedness to tell the truth to superiors whatever the consequences may be.

[360] The MR2 Submission asserts that dismissal is not appropriate in the circumstances of the misconduct of the Subject Member relative to Allegation 3, Allegation 4, and Allegation 5, but that ultimate determination only arises after the range of measures has been determined and once the aggravating and mitigating factors have been considered, as suggested in the CAR Submission and CAR Rebuttal.

[361] The Board also finds that a financial penalty to dismissal is within the range of measures that may be applied to disobeying or failing to follow an order or direction, and relative to Allegation 1, it will also be matter of determining the appropriate measures once the aggravating and mitigating factors have been considered in the specific circumstances.

[362] However, the CAR Rebuttal (para. 26) seems to suggest in the alternative that while dismissal may not apply to Allegation 1 by itself, it would, globally, taking into account Allegation 3, Allegation 4, and Allegation 5.

[363] Either way, in respect of Allegation 1, Allegation 3, Allegation 4, and Allegation 5, the MR2 Submission argues that based on the specific nature and circumstances of the contraventions by the Subject Member, dismissal would be "grossly disproportionate" (para. 20, 142) and a breach

of procedural fairness, whereas the CAR Submission and CAR Rebuttal assert that the misconduct of the Subject Member is sufficiently serious to warrant dismissal.

[364] The Board does not intend on reconciling the potential difference in the *Ennis* (repudiation) and *McKinley* (contextual) approaches to dealing with acts of dishonesty by an employee, to the extent there may be any in actual application, as ultimately, it is a question of what constitutes the appropriate measures to deal with the misconduct of the Subject Member based on the specific circumstances of this case.

[365] Indeed, both the MR2 Submission (para. 109) and the CAR Submission (para. 8) and CAR Rebuttal ultimately endorse the approach of the Supreme Court of Canada in *McKinley*, which has been applied in the RCMP (e.g., *Lemoine* and as reported in the Conduct Measures Guide), wherein the proper framework for determining if dishonesty provides cause for dismissal is one that examines the particular facts and circumstances and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship.

[366] As a general matter, consistent with and for the same reasons as cited in *Vellani* (at para. 107), the Board does not find that sanctions or measures, whether under the legacy discipline process or new conduct process that arise from a joint submission can be assigned significant weight, as they are the product of resolute efforts or negotiations that resulted in an agreement which a conduct board can only reject in very limited circumstances (see, *R. v. Anthony-Cook*, 2016 SCC 43 (“*Cook*”) (involving a unanimous majority of seven justices) at paras. 32-34 and *Rault v. Law Society (Saskatchewan)*, 2009 SKCA 81 (“*Rault*”)).

[367] The Board does not accept the assertion in the MR2 Submission that because the maximum sanction under the legacy discipline process was either a forfeiture of ten days’ pay or dismissal (and nothing in between) and that members were still not dismissed in the cases relied upon by the MR2 Submission, demonstrates what is proportionate in the circumstances of the Subject Member.

[368] As will be outlined below, the cases relied upon in the MR2 Submission, particularly those relating to the RCMP, were based on plea resolutions, relied upon medical or psychological

conditions, and/or other significant mitigating factors (e.g., cooperation) to determine dismissal did not apply, but as also observed by the Commissioner in *Lemoine*:

[124] As I noted recently in *Poirier*, the relevance of some cases may be questionable when they would not necessarily be decided the same way if they were heard today, given the growing intolerance that society and the Force have expressed towards certain acts of misconduct, such as sexual harassment.

[369] While the MR2 Submission provides or cites *Koshman, Payne, Frechette, Richard, Lenger, Simpson, Kalke* (not ultimately relied upon by MR2), and *Lawless 1* (pre-*Rault* and *Cook*, where the board amended the joint submission to one day forfeiture of pay versus regular time off) to establish that dismissal does not apply or is grossly disproportionate, these cases were all resolved on the basis of expedited hearings, joint submissions and/or agreed statement of facts relative to sanction. The noted cases are of little weight in the present circumstance given they are the product of a negotiated proposal relative to sanctions, and the Appropriate Officer did not seek dismissal and/or supported the member's continued employment, which does not apply in the present case.

[370] In *Lemoine*, it was affirmed that continued support and confidence of a Commanding Officer is a significant mitigating factor, often reflected in a decision not to seek dismissal (para. 127)³ (see also, *Page* in the municipal police context where the neutrality of the Chief was an important mitigating factor in determining dismissal was not warranted).

[371] Another consideration relative to the authorities cited by the Representatives pertains to the application and mitigative implications of the Mak Letter from the Psychologist regarding the Subject Member. As noted above, MR2 explicitly asserted that the Mak Letter was being submitted as a "letter of support" in accordance with *Graat* relative to a non-expert opinion on whether the Subject Member would make the same mistake again. In other words, no expert opinion is, or has been, proffered that there is any medical or psychological condition or nexus that

³The Board does not adopt the view of the adjudicator in *Vellani* at para. 117 that loss of confidence of the Commanding Officer should not be considered an aggravating/mitigating factor.

caused the Subject Member to act as he did for purposes of merit or as a mitigative factor relative to measures.

[372] It is in this regard that several of the authorities relied upon by MR2 can be distinguished, in that, as noted by CAR Rebuttal, in *MacDonald (LERB)* (nexus between depression and actions for purposes of mitigation), *Lenger* (post-traumatic stress disorder), *Lawless 2* (psychological/medical evidence a significant mitigating circumstance), and *Cormier*, there was mitigating medical or psychological evidence as part of determining that dismissal was not the appropriate measure in those specific cases.

[373] Moreover, in part dismissal was not considered appropriate in *Cormier*, *Lawless 1*, C-007 and C-008, and in particular *Richard* (where the member proactively reported her misconduct), due to the fact that the member cooperated with the *investigation*, which is understood to mean providing truthful accounts during formal interviews and otherwise, and more notably, the absence of cooperation, or at least being deceitful or untruthful during formal interviews, is considered an aggravating factor (e.g., *Lawless 2* and *Love*).

[374] The MR2 Submission also relies on the External Review Committee website descriptions regarding the basic facts and disposition of C-007 and C-008 to assert that dismissal ought not to apply in the circumstances of the Subject Member, but there are several factors that distinguish these cases from the present circumstances involving the Subject Member.

[375] C-007 dealt with a conduct matter handled under the conduct meeting process (as part of the reformed conduct regime), and involved a finding that the member had misled a supervisor on two occasions about the actions of another supervisor. The 10 day forfeiture of pay imposed by the conduct authority was overturned on appeal and the Level II imposed six days globally and retained the other conduct measures.

[376] The CAR Rebuttal asserts that C-007 should be given minimal weight as it involves a decision by a conduct authority under the conduct meeting process (which is to be distinguished from the formal conduct process) to not pursue dismissal, as it was determined that the circumstances did not warrant dismissal.

[377] The Board, however, is not entirely persuaded by the CAR's assertion, in that the Level II noted a number of serious errors with the reasons relating to the measures of the conduct authority in C-007, but in terms of relevant factors, the Level II found there was a prior, relevant instance of informal discipline which was considered to be the only aggravating factor. Also, because the two contraventions of misleading occurred on the same day it did not involve an extended period of time, the fact that the member cooperated during the internal investigation, and remained in his position during the disciplinary process, were specifically considered as mitigating factors, which, as will be outlined below distinguishes this decision from the circumstances of the Subject Member.

[378] Similarly, the MR2 Submission relies upon C-008, which involved the substantiation of two allegations regarding misleading statements by a member to supervisors regarding money allegedly stolen from the member's locker.

[379] The CAR Rebuttal argues that C-008 should also be given little weight for the same reason as C-007, but the Board notes there are other considerations that impact the utility of C-008 in the present case.

[380] Following the External Review Committee's recommendations in C-008, the Level II found the decision of the Conduct Authority on substantiation was both procedurally unfair and clearly unreasonable, and proceeded to make new findings, in particular that the first allegation was not established and the second allegation was established (although in so doing, the Level II rejected the findings of the External Review Committee that the second allegation should also not be established because a finding of a likelihood of discredit required actual evidence).

[381] Of particular note is that the Level II in C-008 found that the member "did not intend to mislead his superior" and was only seeking to put an end to an investigation into the loss of the money (para. 51), and characterized the situation as one of being a "misunderstanding" (para. 63) that the member should have cleared up. Even more specifically, the Level II observed (para 63):

I also note, however, that the misleading statements were not made during any of the formal statements taken from the Appellant for purposes of either the Statutory or *Code of Conduct* investigation[s]. His sole motivation for making those statements was to end the Statutory investigation and not for any personal gain. [emphasis original]

[382] Also of note to the Level II in C-008 was that the misleading statement was made on one date or occasion and not repeated further, the member cooperated with the internal investigation, and he remained in his position during the disciplinary process, which placed the misconduct at the “minor” end of the spectrum (para. 64), and resulted in the imposition of the forfeiture of three days’ pay and two other remedial measures.

[383] Similar to C-007, a number of factors distinguish C-008 from the circumstances of the Subject Member, most notably the false statement (in modified form) of the Subject Member was repeated several times over an extended period, and at least one of those repetitions occurred during the Interview, which involved a formal investigation into the alleged misconduct.

[384] The MR2 Submission also submitted C-011 (ACMT File No. 2015335327, dated August 3, 2016), a case also involving deceit, but no submissions were provided on its application, which caused the CAR Rebuttal to assert no weight should be assigned to the decision for the same reasons as C-007 and C-008, however, the more specific factor is that on appeal the Level II in C-011 found that the allegation was not established and rescinded the measures.

[385] In terms of aggravating and mitigating factors, the CAR Submission, MR2 Submission, and CAR Rebuttal have provided extensive commentary and observations, and the following attempts to aggregate these various factors for analysis under the heads applied by the Representatives.

[386] First, in summary terms, the MR2 Submission contests the assertion of the CAR Submission that the lying of the Subject Member was not an isolated incident, and that it was deliberate, intentional and planned, being perpetuated over a period of time. According to the MR2 Submission, the Subject Member “actually backed off the lie with respect to the details of the birthday party” during the Interview and “admitted to the deception”, which should not be an aggravating circumstance for “ow[n]ing the lie”.

[387] The Board has considerably difficulty with the explicit or implicit claim that the Subject Member owned up to his misconduct or “purged his deceit” during the Interview, as the simple fact is that he only did so, after perpetuating the lie, when it became unequivocally clear and apparent that Corporal Rappel was going to contact the Spouse of the Subject Member about the

details of the evening in question. In fact, during the Interview, Corporal Rappel directly asked the Subject Member if he was lying about the birthday party, and the Subject Member replied “No. I’m not” (p. 134. Lines 515-16).

[388] This is not a case where the Subject Member came into the Interview and proactively disclosed his deceit. Thus, it cannot be credibly claimed that the Subject Member cooperated in the Interview given he only admitted to the lie when it was clear his completely fabricated story was going to unravel. As noted in *Love* and *Poirier*, the RCMP has a legitimate expectation that members will tell the truth during investigations, which does not include only admitting to a lie when “confronted.” In effect, the Subject Member lied during the Interview which constituted a “warned” formal statement and places it on a plane comparable to *Vellani*.

[389] As noted, rather than being honest with Corporal Wood when seeking permission to go the Juniper area on November 12, 2016, the Subject Member lied about where he was going and what he was doing.

[390] During the subsequent Meeting, approximately 16 days later, on November 28, 2016, the Subject Member elaborated on the lie by saying he had some food at the birthday party and then went to see Ms. F at the Residence.

[391] During the subsequent Interview, approximately 39 days later, on January 5, 2017, the Subject Member further elaborated on the lie by saying his Spouse left the birthday party before he arrived and so he went directly to Ms. F’s Residence.

[392] Thus, it cannot be claimed that the Subject Member’s misconduct was isolated or impulsive, and as noted in *Page* (para. 18), in cases of deceit, “seriousness is compounded by repetition...on successive occasions.”

[393] The fact that the Subject Member ultimately admitted to the lie when confronted with the undeniable reality that it was going to be exposed, cannot be fairly or properly characterized as being cooperative, or owning up to the lie, as he only did so when he knew it would be exposed, rather than proactively acknowledging it during the Meeting or Interview, but instead he continued to develop a more elaborate lie.

[394] The period of deceit is approximately 55 days, during which the Subject Member lied to his immediate supervisor, Corporal Wood, and then lied to Corporal Wood and Staff Sergeant Daly during the Meeting, and continued the lie in the Interview with Corporal Rappel, and at any point he could have proactively admitted or revealed what he had done and taken responsibility, rather than clinging to a web of falsehood to the very last minute when it was clear he was going to be exposed.

[395] It is also clear that the lies were deliberate, intentional, and planned, certainly that was the case when seeking permission from Corporal Wood, and as the Subject Member modified the lie in the Meeting, and again in the Interview. It also does not involve a temporary situation, panicked or impulsive reaction, or single isolated incident, involving at least three separate instances of deliberately lying to superiors over a period of almost two months.

[396] Furthermore, none of these incidents were spontaneous, short-lived situations, but rather were the subject of a deliberate scheme by the Subject Member to mislead various superiors, which is an aggravating consideration.

[397] However, the MR2 Submission has correctly noted that the Subject Member did admit Allegation 3, Allegation 4, and Allegation 5 in the Response as part of this proceeding, which to some degree is a mitigating consideration, as it avoided the requirement for a lengthy hearing and permitted matters to be expedited to some degree.

[398] In terms of personal gain, the CAR Submission asserts that the Subject Member was motivated by the importance of avoiding the financial and marital strife that would follow the disclosure of his actions to the Spouse, as evidenced by his referral to these consequences at least three times during the Interview.

[399] The MR2 Submission asserts that the Subject Member was not motivated due to gain financially or otherwise at the time he lied to Corporal Wood, or when he lied during the Meeting or Interview. The MR2 submission claims that any “matrimonial property or financial concerns” were not the basis for the actual misconduct, as he did not know he was going to face disciplinary action when he lied about the birthday party, and any financial concerns only materialized after-

the-fact during the Interview when the Subject Member became emotional and realized the Spouse may be implicated in the follow-up by Corporal Rappel.

[400] The MR2 Submission posits that the Subject Member's motivation is not determinable from later statements pertaining to potential consequences. The interpretation of the MR2 Submission is that the Subject Member was motivated to be deceptive based on his concerns over how he might be perceived by other members, and it was a temporary lie. Which to the Board, seems to constitute motivation based on personal gain or advantage.

[401] In some respects the submissions by the Representatives raise the issue of what is meant by "personal gain", and it is not in doubt that financial gain forms part of its meaning. However, in reading the cases, there does not appear to be any definitive statement as to the meaning of personal gain, but it has been interpreted to include personal advantage or avoiding accountability for a member's action by covering up her or his misconduct (e.g., *Vellani* and *Page* (para 22)).

[402] On the other hand, personal gain does not apparently include acting with deceit or dishonesty to benefit someone else (e.g., *Cormier* (trying to protect citizen from consequences of an impaired conviction), and *Jansen 2* (deceit to protect another police officer)), although the Board has some difficulty in seeing how such a distinction merits considerable weight in cases where a police officer has engaged in deceit or lying given the repeated and recurring homage paid in various sources to the public trust and asserting that higher standards must exist in policing as a profession (e.g., *White*).

[403] Nevertheless, the first point to be made about personal gain in the present case is that the Subject Member was clearly motivated to lie during the Interview out of concern about the marital and financial implications of the Spouse learning about his activities and/or her being contacted by Corporal Rappel regarding the Subject Member's representations about the birthday party, and the Spouse's presence and actions that night.

[404] Indeed, it is readily apparent that the Subject Member had concluded that there could be any number of personal and financial consequences for him should his Spouse learn of his visit to the Residence, which motivated him to perpetuate the lie during the Interview. While there may have been some emotion attending the Interview, the reality is that the Subject Member was

essentially focussed on any repercussions that may attend him, despite the purported emotionalism of the Interview, and he was quite deliberate in expressing them solely around the impact on himself.

[405] Even more revealing is the fact that at one point during the Interview (at 41:28 of audio (being p. 141, line 761)), the Subject Member can be heard casually whistling as he shuffles through some materials looking for his notes to confirm the second time he attended the Residence. Such a response is wholly inconsistent with the Subject Member taking the situation seriously, which is later confirmed by the SM Statement provided during the measures phase (as will be addressed below) wherein he refers to the lie as simply a “ruse.” It also seriously undermines the Subject Member’s claim of genuine remorse and regret.

[406] The Board also does not accept the assertion in the MR2 Submission that the Subject Member did not consider disciplinary consequences as part of his motivation when he lied to Corporal Wood, and indeed rejects the latest and recent claim by the Subject Member in the SM Statement that he was not thinking about the Direction at the time he attended the Residence (because, purportedly, the relationship with Ms. F had ended months earlier).

[407] While the MR2 Submission attempts to parse between motivation and consequences, it is clear that the Subject Member was attempting to avoid responsibility and accountability for meeting with Ms. F on duty and the perceptions of his colleagues and/or failing to follow the Direction, both of which also contain an element of personal advantage.

[408] Further, by the time the Subject Member reached the Meeting approximately two weeks later, he was fully aware of the potential negative consequences of lying to Corporal Wood, and rather than tell the truth, continued to lie. Evidence of this is found in the Performance Log where the Subject Member indicated he was aware before the Meeting (and shortly after he attended the Residence) that material was being gathered about his activities, and the Subject Member asked in the Meeting if his badge would be taken (i.e., fired) (p. 79).

[409] Based on the Performance Log, it also appears clear that the Subject Member was aware his activities of November 12/13, 2016 were subject to scrutiny, and yet he visited Ms. F a second time on November 22, 2016.

[410] Clearly the Subject Member knew there were potential disciplinary consequences for lying by the time of the Meeting and later Interview, as he lied to continue and try and cover up his activities and thereby gain personal advantage or gain by avoiding being accountable, and any suggestion to the contrary simply does not withstand scrutiny.

[411] To suggest, as the MR2 Submission does, that the underlying problem was that Subject Member “had some confusion” about separating or managing personal and professional matters is also not sustainable. It is clear that the Subject Member knew going into the Meeting there were potential, apparently serious, consequences for lying to Corporal Wood, and yet he simply modified the lie.

[412] The Board simply cannot accept that the Subject Member was operating under some form of naïve understanding or lack of awareness, as he was fully aware he had lied to Corporal Wood, and simply perpetuated and developed the lie during the Meeting and the Interview, which was motivated by his desire to avoid accountability and responsibility to Corporal Wood, Staff Sergeant Daly, Corporal Rappel, and his Spouse, among others, as well as to avoid any potential disciplinary implications, all of which constituted personal gain in these specific circumstances, in addition to the avoidance of the marital, financial, and personal implications discussed above.

[413] The Representatives also have divergent views on whether the Subject Member is remorseful, and there are some elements of the record that cause the Board concern in this regard.

[414] First, while the MR2 Submission points to the fact that the Subject Member apologized during the Meeting, such apology can hardly be considered genuine, given it occurred in a context where the Subject Member had just modified the lie to both Corporal Wood and Staff Sergeant Daly. Simply put, the Subject Member apologized all the while knowing he was still perpetuating a lie.

[415] Second, the apology recounted in the Buliziuk Letter and SM Statement is not material to the lying to Corporal Wood, Staff Sergeant Daly, or Corporal Rappel, it is about his not attending the Assistance Call.

[416] To be clear, the Board has no intention of being drawn into or resolving whether the Subject Member should have responded to the Assistance Call, and it is not being relied upon in any form in this decision.

[417] Third, the MR2 Submission also points to the comments in the Dimopoulos Letter, Buliziuk Letter, and Eccleston Letter that the Subject Member acknowledged what he did was wrong and that he was remorseful, but again, there is the consistent element permeating the materials wherein the Subject Member's acknowledgement or remorse is somewhat conditional, or alternatively, not wholly genuine.

[418] One example arises from the Van Laer Letter, which recounts that the Subject Member worked with Staff Sergeant Van Lear for approximately five days during August, 2017, as part of a response to the wildfires in the province:

I will confirm that [the Subject Member] admitted to me that he had been wrong about lying to both his supervisors and to Professional Standards about this issue, but also felt that under the circumstances, the threat of dismissal appeared excessive. In short, he stated that he basically felt compelled to lie because he wanted to protect his personal life, which in his eyes would be different than to lie to protect a criminal action of some sort.

[419] These comments are particularly revealing, and indicate that as late as August, 2017, the Subject Member continued to explicitly or implicitly think that it is okay to lie to a supervisor where it pertained to a personal matter, or at least it was less serious, and that honesty and integrity exist along a continuum of what type of lie is or is not acceptable or condonable. Indeed, lying to multiple superiors is, for the Subject Member, where it involves personal information, apparently not something that is as serious according to the account in the Van Laer Letter or that it should be the subject of dismissal.

[420] Fourth, the Board also did not develop any confidence that the Subject Member truly understands the seriousness of this situation, or the importance of honesty, when stating in the SM Statement that during the Interview he "tried to continue my story [i.e., the lie]...again believing that I was being substantively truthful while trying to avoid the disclosure of my dishonesty" but he "ultimately confessed to lying" when it became clear that the birthday party "ruse" had become more than a minor aspect of the investigation.

[421] The Subject Member further states in the SM Statement that he now appreciates that the “white lie” and his view of the matter being one of personal rather than professional was misplaced.

[422] Even more telling, is that the Subject Member states in the SM Statement that “Professionally, I believe I always understood the importance of honesty as it relates to operational matters, but I now understand that it applies to every aspect of my duties and responsibilities as a police officer.” The Subject Member speaks of how his understanding of integrity and honesty “became clouded” because he felt his personal life was separate from his professional life, but now realizes there is no separation between the two.

[423] It is hard to understand how a mature man (in his late thirties at the relevant time), with considerable previous auxiliary police and private work experience, as well as the training provided by the RCMP, could have any credible doubt about being honest in all aspects of his workplace activities (not just apparently on operational matters), a basic tenet of employment, regardless of context, and especially in policing.

[424] Moreover, as noted in the CAR Rebuttal, the Subject Member’s recurring explanation about personal and professional life still reveals a basic misunderstanding, which is not whether his actions, albeit occurring on-duty, were to be understood as being in separate realms (as clearly there are such divisions), but that the obligation was to be honest about what he was doing and not to deliberately lie, repeatedly, particularly when speaking to a superior or providing a formal statement in a conduct investigation.

[425] This is especially so when the MR2 Submission explicitly or implicitly claims, based on the TPS Letters and FS Letter, that the Subject Member is known for his integrity and honesty. The Board simply does not accept that the Subject Member was operating under some form of lack of comprehension, understanding or confusion about his obligation to be honest with superiors based on personal versus professional matters, particularly when the Subject Member now attempts to further rationalize in the SM Statement that he did not think about the Direction when he attended the Residence, as the “affair” had ended months earlier.

[426] While the Subject Member and MR2 Submission repeatedly speak of remorse and regret, the Board is not persuaded that it is truly present to the extent claimed, especially given the content of the SM Statement.

[427] In terms of *McNeil*, the Board does consider this to be an aggravating factor, but not one of significant weight, as the reality is that there is some administrative burden that attends the legal obligation that the Subject Member and RCMP now have to disclose the misconduct and attendant measures, and it may limit somewhat potential transfers or positions for some period of time.

[428] In this regard, while the Wiberg Letter is interesting as to whether or not that particular prosecutor considers the Subject Member can testify in light of the findings of misconduct and measures, it does not fully exclude the implications of the administrative requirements of reporting under *McNeil*.

[429] The Board does not find it necessary to resolve whether the purported opinion of the Wiberg Letter on the form and nature of the deception is of any bearing, given the higher standard expected of police officers, as in the end the implications of *McNeil* are not being given significant weight beyond the ongoing administrative obligation of disclosure that will now be present.

[430] The Representatives also view the “junior” status of the Subject Member as a factor for purposes of conduct measures, and based on the cases provided, it is clear that longer service (e.g., *Lawless 2*) or higher rank (e.g., *Lemoine*) are factors to be considered when determining an appropriate measure, as can be limited or junior service (e.g., *Jansen 2*).

[431] The MR2 Submission portrays the Subject Member as being “junior” and “who did not fully appreciate the significance of his lie, because he thought it related to a non-operational, private matter”, but he “learned that there is no distinction to be drawn between his personal and professional life when speaking to a superior officer.”

[432] As noted by the CAR Rebuttal, the difficulty is that the Subject Member still does not appear to grasp that the issue is one of not lying to a superior, rather than perpetuating that he was a junior member who made a mistake and did not understand the dividing line between personal and professional obligations when lying to superiors on three separate occasions.

[433] It is worth repeating that the Subject Member was approximately 38 years old when the Allegations arose, and in addition to his training at Depot, he had considerable work experience in both policing (at least two and half years with Toronto Police Service in the Auxiliary Marine Unit Program (TPS Letters)) and five years in the private sector (FS Letter), where honesty and integrity were clearly expected and formed part of the expectations and values of the workplace, so the notion of not deliberately lying to a superior about workplace activities would not be unknown or novel to the Subject Member.

[434] The simple fact is that it is never appropriate to lie to a superior, but there clearly is, and remains (e.g., Van Laer Letter), gradations in the mind of the Subject Member who thought that lying about a private or personal matter to a superior (or alternatively characterized, non-operational matters), even when it directly related to his on-duty time and actions, or as part of a conduct investigation, was okay.

[435] To suggest that the Subject Member, as the MR2 Submission does, is a “junior officer who is still learning” cannot be reconciled with the acts of lying committed by the Subject Member, as age, rank, or length of service do not inform the basic tenet of telling the truth to a superior.

[436] Indeed, it is a significant concern for the Board that it was necessary to issue the Direction while the Subject Member was still on probation, and having just attained the two year probationary period when the Allegations arose, the Subject Member was engaging in the types of misconduct substantiated in this decision.

[437] Thus, while the Dimopoulos Letter, Mak Letter and others speak to the fact that they believe the Subject Member will not lie again, the Board is not persuaded or confident that it is an accurate assessment given his actions to date, and the fact that, aside from the Wiberg Letter, none of the letters of support are based on a complete and fulsome understanding of the facts or findings of misconduct by the Board (e.g., Foley Letter (no indication of knowledge of findings), Chung Letter (solely deals with the Affair), Dimopoulos Letter (limited knowledge of findings), Eccelston Letter (no indication of knowledge of findings), Wood Letter 2 (limited knowledge of findings), Van Laer Letter (no knowledge of findings), Buliziuk Letter (limited knowledge), and Mak Letter (limited knowledge of findings)).

[438] The MR2 Submission expends considerable time trying to impugn the actions or behaviour of Staff Sergeant Daly, and it is the Board's view that assertions about the alleged Affair involving two other members, how it was treated, the impact on the Watch or members, or the circumstances of the Subject Member's or senior members transfer, do not need to be resolved, or are of little value, given as noted by the CAR Rebuttal, it involved personal information unrelated to the Allegations and/or the transfers were all subject to approval by a senior commissioned officer in the Detachment hierarchy (and were not matters ultimately under the control of Staff Sergeant Daly).

[439] What is clear, is that, in part based on his own desire, the Subject Member was transferred to a new Watch to get a fresh start, and within a couple of days or so, he completely and utterly jettisoned any concern about how his actions with Ms. F would be perceived by lying to a supervisor in order to meet with her at the Residence, and he continued to lie, regardless of the apparent cost.

[440] Moreover, the simple fact that the Subject Member attended the Residence, located outside of his zone, on two occasions, while on duty, wearing a uniform, driving a marked police vehicle, and for extended periods, while at the same time being reportedly concerned about what he thought others would think does not make sense, as there was the real likelihood that his activities would be observed or come to the attention of someone, as indeed happened.

[441] If the Subject Member was truly concerned about the reported "stigma", "criticism" and "ostracism" that arose from colleagues about his relationship with Ms. F in the past, it brings into serious question his judgment and fitness to be a police officer that he would jeopardize returning to the very same situation for the reasons stated in the SM Statement, given the existence of the Direction and GPS in police vehicles, the length of time he spent at the Residence, and the fact he went back to the Residence a second time, among other factors.

[442] The fact that the Chung Letter and Wood Letter 2 make reference to their understanding or beliefs as to the basis of the transfer of the senior member, and what Staff Sergeant Daly knew or did, does not change the fact that the Subject Member wanted a transfer, which was provided by a senior commissioned officer in the Detachment after they met to discuss it (e.g., Unattributed Note).

[443] In some respects, it is disappointing that non-commissioned officers in supervisory roles would apparently and purportedly harbour serious concerns about workplace issues and rather than acting on them, as it was their responsibility to do, instead recorded them in letters to be provided to the Board as part of trying to discredit Staff Sergeant Daly.

[444] As noted above, the Board registered its concerns about the allegations being made, particularly in the Chung Letter, and the CAR has taken the appropriate steps to bring the matter to the attention of the relevant authority in the Division.

[445] Additionally, whether or not Staff Sergeant Daly adopted a “zero tolerance approach to deceit” is of little concern to the Board in determining the appropriate measures: first, because the Board determines measures; and second, as pointed out by the CAR Rebuttal, Staff Sergeant Daly did not exercise any decision making relevant to the investigation and initiating of formal conduct proceedings, or ultimately any transfers, which were undertaken by a senior officer in the Detachment (e.g., Unattributed Note).

[446] The comments of Corporal Wood in the Wood Letter, Wood Letter 2 and Promotion Assessment, have also caused some concern for the Board, in that his role and responsibilities as a supervisor appear to have been overtaken by his personal feelings and beliefs about the misconduct of the Subject Member, which seem to lack objectivity and lessens their mitigative value.

[447] Indeed, the fact that the Subject Member and/or Corporal Wood apparently actively conduct their activities on a basis that distinguishes between the seriousness of a lie to a supervisor depending on whether it is an operational as opposed to a non-operational matter is somewhat disconcerting (see, Wood Letter and SM Statement).

[448] As a result, the Board does not ascribe much weight to the Wood Letter or Wood Letter 2 for several reasons, the first of which, is Corporal Wood’s admission that he has “struggled” personally regarding the investigation of the Subject Member and has a “sense of guilt and often reflects on the phone call” with the Subject Member wondering “whether I accurately recalled my conversation...” and what he should have asked him knowing what he knows now.

[449] Corporal Wood also states he has personally “reflected countless times over the past year about the impact my statement has had on [the Subject Member’s] life and career” and questions himself as to whether his recollection was accurate given the seriousness of the Allegations, and ultimately he is “uncomfortable” that actions by the Subject Member in relation to Corporal Wood could possibly result in his dismissal.

[450] Whether or not Corporal Wood accurately recalled the phone conversation with the Subject Member is of little moment, given the Subject Member acknowledged that he misled Corporal Wood as to his intended activities during that phone call, and the responsibility is on the Subject Member to be honest and forthright in his conversation with a supervisor, not for the supervisor to ask detailed questions to get at the truth (or distinguish the level of honesty required based on whether it involves a perceived operational or non-operational matter, or whether it would have changed the ultimate decision to provide approval to attend the Juniper area).

[451] Second, the Wood Letter wholly fails to address the fact that the Subject Member continued to lie to Corporal Wood during the Meeting, even after “apologizing”, and the reality is that the Subject Member made deliberate choices to lie, which hardly is the responsibility of Corporal Wood.

[452] Nor does the Wood Letter address the existence or implications of the Direction, and as such, he could not have countenanced attendance at the Residence. The regret and guilt of Corporal Wood seems quite misplaced and somewhat uninformed, and as pointedly identified by the CAR Rebuttal, Corporal Wood does not seem to be aware of the full extent of the information before the Board relating to the Allegations.

[453] The Board also has concern about the objectivity of the comments in Wood Letter 2, given that Corporal Wood only supervised the Subject Member for approximately six weeks, and on the third day or so into that period the Subject Member was under scrutiny for his honesty and integrity, which crystallized into a formal conduct investigation on or about December 12, 2016, and led to his subsequent removal from the Watch, yet Corporal Wood recommended the Subject Member for promotion to First Class Constable in the Promotion Assessment.

[454] It is unclear how, at the time, Corporal Wood could indicate “met requirements” and/or recommend promotion of the Subject Member given the form, nature, and circumstances of the unresolved Allegations, particularly so given the Promotion Assessment specifically addresses competencies related to courtesy, respect, and teamwork (11), working knowledge of manuals (15), monitoring (25), making appropriate decisions and taking appropriate action (29 and 30), professionalism and integrity (35), managing and coping with stress (37), and accepts and responds to feedback from superiors (41), all of which are built on the foundation of character and the Core Values which include Honesty, Integrity and Professionalism, and which, specifically, ground training and evaluation in the Cadet Training Program (Depot), the Field Coaching Program (Learning, Training and Development Manual 2.2.), completion of Probation (A.M. 27.4.1.6.5), as well as the competency of regular members (Career Management Manual 2 (Performance Evaluation)).

[455] In fact, there is no mention in the Promotion Assessment of the Subject Member’s circumstances at the time of its completion, and indeed, even more troubling given the outstanding disposition of the conduct investigation, Corporal Wood recommended that the Subject Member become a Recruit Field Coach.

[456] Although the Allegations constituted just that, allegations, the public interest would seem to have required that Corporal Wood at least reserve judgement on making a recommendation for promotion in the Promotion Assessment until the Allegations were resolved.

[457] In terms of other comments and observations in Wood Letter 2 and the Promotion Assessment, they outline examples of performance by the Subject Member that are consistent with a developing member, and while overall positive, do not indicate he was an exceptional or high performer at two years of service, even noting his intervention in an apparent male-on-female assault he observed while on patrol highlighted by the MR2 Submission and his being recognized with the Alexis Award (for making twelve impaired arrests during a one year period).

[458] It is also noted that the Promotion Assessment is not signed by Corporal Wood or the Subject Member, nor are there comments or signatures of the Unit Commander or Career Development and Resource Officer, both of whom may have some thoughts about the recommendation(s) it contains.

[459] The CAR Rebuttal asserts that six weeks as an immediate supervisor is insufficient time for Corporal Wood to state the Subject Member is a strong performer and asset, which the Board has noted is a further limiting consideration.

[460] Returning to the Mak Letter, which is relied upon by the MR2 Submission to assert that the Subject Member has demonstrated remorse and regret and to highlight the Psychologist's "impression" that the Subject Member is "an honest, dedicated member...", the Board has some serious reservations about the depth of understanding of the circumstances upon which these views are based.

[461] The Board does not accept the assertion in the MR2 Submission that it is clear the Psychologist "is aware of the deceit related facts forming the basis for these proceedings" and her impressions of the Subject Member are based thereon.

[462] Aside from the fact that the apparent and only source of the Psychologist's knowledge of the Allegations is based on the self-reporting of the Subject Member, which can be fairly evaluated as at least self-interested, the Mak Letter demonstrates a very limited knowledge of the circumstances of the misconduct, merely stating the Subject Member was "suspended from police duty... to assist with an internal review regarding allegations of misconduct during shift", and the "work issue" resulting in his suspension dealt with him not disclosing to his supervisor that he had spent time with Ms. F during his lunch break during shift.

[463] Fairly read, the above circumstances relayed in the Mak Letter only reference Allegation 3 (lying to Corporal Wood), and not the other acts of deceit in the Meeting or Interview, or disobeying the Direction (even though the first visit of the Subject Member to the Psychologist's office was January 20, 2017, approximately 15 days after the Interview, resulting in biweekly/triweekly visits until March 9, 2018).

[464] Aside from the clear lack of knowledge of the broader facts and findings relating to Allegation 1, Allegation 3, Allegation 4, and Allegation 5, the Mak Letter (drafted April 5, 2018, after the issuance of the Board's written-oral decision on merit provided to the Representatives) continues to reflect the Subject Member's ongoing assertion that he thought his lunch break was his personal time and his limited "understanding of the expectation about reporting private matters

and the disciplinary procedures of the Force at the time” because he was a “relatively new member,” and in hindsight, he would not “make the same mistake of not disclosing all personal information honestly to his supervisor in the future.”

[465] The troubling aspect of this recounting for the Board in the Mak Letter, is that, like the Van Laer Letter, as late as March, 2018, the Subject Member, in addition to not apparently disclosing fully the nature and extent of the Allegations, continued to parrot the explanation that he was somehow confused about reporting private matters to a supervisor, which is somehow an excuse or exemption from the more basic tenet which is at play, which is you do not lie to superiors.

[466] This raises an alternative and fundamental point for the Board, which is how could the Subject Member be expressing genuine remorse and regret throughout 2016-2017 for lying to his superiors and/or contravening the Direction, when his view was that it really was a non-issue, or at best a minor matter, because it involved lie about a personal matter or non-operational matter, the Direction did not apply to his lunch time (Interview and Response), it was just a “ruse” or “white lie”, and/or that he was not thinking about the Direction when he went to the Residence (SM Statement), particularly when he indicates in the SM Statement that it not until the CAR noted in 2018 that his lunch time was not unfettered that he understood this point.

[467] While the Psychologist expresses her lay opinion that the Subject Member will not make the same mistake again, the Board is not persuaded that the Subject Member actually understands that the issue is one of honesty when speaking to superiors, regardless of whether it involves personal information or operational matters.

[468] The Mak Letter outlines a number of stress and anxiety inducing operational incidents experienced by the Subject Member, but as previously noted, none of these are related to any medical or psychological condition, and reportedly any symptoms were treated or fully treatable. Nor do the events described create any palpable mitigative conditions relative to determining the appropriate conduct measures, and while seeking and completing counselling is laudable, it is not a mitigating factor when none of those conditions related to the misconduct established by the Board.

[469] Ultimately, as a letter of support, and not an expert medical opinion, the Board has not placed a lot of weight on the Mak Letter for the reasons stated, but even if it were considered an expert medical opinion, it does not provide any justification, excuse or defence on merit, and has minimal value as a mitigating consideration relative to measures.

[470] That the Subject Member has a “good work ethic” is highlighted in the MR2 Submission based on Wood Letter 2 (including presumably the Promotion Assessment), which, as already noted, recounts several instances where the Subject Member demonstrated pro-active policing and positive responses to operational situations, and both the Eccleston Letter and Buliziuk Letter refer to the Subject Member’s continued positive contributions to his administrative duties while reassigned.

[471] The Board accepts that the Subject Member performed the duties he was assigned, which has some mitigative value, but the RCMP does have a right to expect that members, even those who may be reassigned during the investigation and disposition of conduct matters attend work and perform their duties. Nevertheless, the Board does place some value on the fact that the Subject Member continued to work while subject to the OTR and was attentive to his duties as reported in the Buliziuk Letter.

[472] In this regard, however, the Board is mindful of the cautionary note of the CAR Rebuttal in relation to the Eccleston Letter that comparing the actions of the Subject Member to other members who may be on graduated return to work or modified duties based on various medical conditions may not be an entirely fair comparator when the Subject Member was reassigned as a result of alleged misconduct.

[473] The Board must pause, briefly, to observe that it places no weight whatsoever on the SM Note apparently authored, but not signed, by the Subject Member, which purports to self-report and highlight his actions in responding to a 10-33 incident while on administrative duties as part of his OTR, particularly as it purports to report upon the various comments made by certain individual members about his actions, none of which is independently corroborated or confirmed, even by some who were apparently present and provided supporting letters (e.g., Corporal Wood and Corporal Chung).

[474] In the Board's view, the content and nature of the SM Note was blatantly self-serving and aggrandizing, and properly ought to have been validated by those individuals involved rather than reporting what they purportedly thought or said, and the CAR Rebuttal is correct that no weight should be assigned to this document.

[475] In addition to the Eccleston Letter referred to in the MR2 Submission, several of the letters of support, including the Van Laer Letter, Foley Letter, and Buliziuk Letter speak generally to the Subject Member being professional and a team player while performing his duties, which is expected behaviour and performance of a member.

[476] References is also made to the Mallais Letter, wherein the Subject Member provided assistance to a Canadian Pacific Police Service officer during the apprehension of two subjects, and as well, the Board reviewed the B Note, and S&B Note, as evidence of the Subject Member being diligent in the provision of service to the public, as would be expected.

[477] While the Board has noted some concerns about the Wood Letter, Wood Letter 2, and Promotion Assessment in terms of objectivity and ratings, the latter two do discuss specific examples of where the Subject Member is noted to have performed his duties well and with satisfaction, which is also supported by a Performance Log (dated April 7, 2016) completed by Corporal Starr regarding the Subject Member's handling of an incident involving a young person who was suffering from mental health issues.

[478] The MR2 Submission also points to the fact that the Subject Member has no prior record of discipline, which is correct, but given the circumstances in part occurred while he was on probation (e.g., issuance of Direction), and that he had just two years of service, this does not create a significant mitigating factor.

[479] The mitigative value of performance and no prior discipline in the case of a member with limited service is perhaps best described in *Poirier*:

[87] Only one performance evaluation and review report was submitted because of the Member's limited service. Testimony and documentary evidence was also provided which attested to Constable Poirier's satisfactory performance and good work ethic, as well as his ability to work alongside community partners. Although the Force has a right to expect at least

satisfactory performance from its members, performance is relevant to sanction, but only in that it may be likened to an “account” upon which the Member may draw in circumstances such as this hearing. Constable Poirier, with less than four months of service as a regular member of the RCMP, has no such account upon which to draw. The Board can therefore place very little weight on his performance as a mitigating factor. In addition, that this was an isolated occurrence in the career of Constable Poirier and that he has no record of any prior discipline can be attributed little weight because of his extremely limited service.

[480] The observation in the MR2 Submissions that, based on the supporting letters and other materials, the Subject Member “is viewed as someone with integrity”, and the fact that Corporal Wood considers him ideal as a potential mentor for new recruits (i.e., Recruit Field Coach), are not highly persuasive as mitigating factors and must be tempered in the context of the present proceeding wherein he has been found to have engaged in three acts of lying to superiors and contravening the Direction.

[481] In this regard, although the TPS Letter and FS Letter speak to the Subject Member’s past performance, they are somewhat dated (2013), and do not provide considerable mitigative weight for purposes of determining measures in the present circumstances.

[482] As noted, the Board also recognizes that the Subject Member has sought counselling from the Psychologist, which is a positive step for him, but given there is no medical or psychological component or relationship relative to the substantiated misconduct, does not garner considerable weight as a mitigating factor.

[483] The timeframe taken by the Conduct Authority and/or CAR to initiate formal proceedings is of concern to the Board, due to the uncertainty and stress it causes, but as the MR2 Submission points out, he had been on paid suspension, and there is no other evidence of prejudice to the Subject Member in terms of not being able to respond to the Allegations and/or provide submissions regarding the appropriate measures.

[484] The MR2 Submission asserts there is minimal likelihood of recidivism and great potential to rehabilitate the Subject Member, which in large part is based on the suggestion that he is remorseful and now recognizes his mistake. But given the absence of medical or psychological factors as a persuasive mitigating factor, the simple and unvarnished fact remains that when the Subject Member was called upon to act with honesty and integrity, he, without hesitation, and

repeatedly, chose his personal interests over his professional obligations. These circumstances create a stark and difficult reconciliation dilemma in terms of recidivism, rehabilitation, and employability.

[485] As the conduct board noted in *Vellani* (quoting and citing various External Review Committee reports and board decisions (at paras. 55-57)), although rehabilitative potential is an important consideration, it does not overcome the right to terminate employment where the breach of trust goes to the heart of the employer-employee relationship, even where the member is repentant. In basic terms, the damage to integrity can simply be too great and is fatal.

[486] To suggest that the Subject Member cooperated with the investigation and had no malicious intent, as the MR2 Submission does repeatedly, is to ignore the factual circumstances of the misconduct that have been established.

[487] In the circumstances, it might have been possible to characterize the actions of the Subject Member as a “serious mistake” when it came to lying initially to Corporal Wood about his intentions, but when the Subject Member perpetuated an expanded lie during the Meeting, and then lied during the Interview, he crossed the rubicon ethically, and exposed a character flaw or disposition inconsistent with being a police officer, despite claims otherwise in the MR2 Submission.

[488] If the Subject Member had fully admitted the lie in the Meeting, or walked into the Interview and “fessed up” as they say, rather than continue to lie, the situation would have been markedly different.

[489] Simply put, the Board cannot, and does not, accept that this situation can be attributed to a mistake, confusion, inexperience, or lack of clarity, as it is a fundamental tenet of employment, particularly as a police officer, that you do not lie to a superior, regardless of whether it involves an operational or non-operational/personal matter, particularly when it relates to your activities while on-duty.

[490] Although the MR2 Submission argues at length about dismissal being disproportionate and punitive, the reality is that the significant mitigating factors are few, and substantial aggravating

factors many, when the actions and explanations of the Subject Member are subject to minimal critical scrutiny.

[491] Moreover, as already noted, the cases relied upon by the MR2 Submission to assert that dismissal is only reserved for the most “egregious” cases or circumstances, overlooks that the cases where dismissal was not imposed were the subject of a resolutive agreement, complete cooperation by the subject member, the existence of significant medical or psychological factors, and/or other mitigating factors, which are not present in this case.

[492] The MR2 Submission asserts that ending the Subject Member’s career would be an ultimate punitive measure where educative and remedial measures are not incongruent with the current *RCMP Act*, but these steps are available to a member who has genuinely made a mistake or there are other factors that promote retention. The stark reality is that the Subject Member was motivated to lie and/or contravene the Direction for personal reasons and totally ignored any obligations of trust, loyalty and honesty based on the need to meet Ms. F regardless of the circumstances, and the Board found little comfort in the SM Statement to mollify these concerns.

[493] To support a non-dismissal outcome, the MR2 Submission relies upon the Conduct Measures Guide, wherein acts of deceit or lying involving a supervisor are categorized by whether they involve an operational or administrative (non-operational) matter or an internal investigation. While the lying of the Subject Member to some degree straddles the line between a non-operational versus operational matter as it pertained to initial dealings with Corporal Wood and the Meeting, by the time of the Interview, it ultimately involved lying during an internal/conduct investigation. In any of these categories, the fact that the lie was not isolated but persistently maintained over a prolonged period, involved multiple superiors, and was for personal gain or advantage (e.g., covering up misconduct), or to avoid responsibility, propels matters into the aggravated range, including dismissal (pp. 62-65).

[494] While the acts of deceit of the Subject Member may not have “severely compromised” the rights of a third party, they certainly did implicate the privacy and other rights and interests of the Spouse and Ms. F, as well several supervisory and organizational obligations of Corporal Wood, Staff Sergeant Daly, and Corporal Rappel.

[495] In relation to Allegation 1 (Direction), the CAR Submission and CAR Rebuttal emphasize that, similar to *Gregson*, the Subject Member displayed a degree or level of contempt, disrespect, flippancy, and deliberate disregard for the Direction, which increases the seriousness of the misconduct. The CAR Submission asserts that the Subject Member knowingly and deliberately disobeyed the Direction on two occasions by visiting the Residence of Ms. F.

[496] The MR2 Submission asserts that the Subject Member's circumstances do not reach the level of that found in *Gregson*, nor was it repeated, cavalier or flippant, or disrespectful.

[497] The Board agrees with the CAR Rebuttal that if the Subject Member had genuine concerns regarding the Direction, rather than attempting to place his own gloss over its application, he should have challenged it through the grievance process or otherwise sought clarification or raised his concerns. He did not do any of these things and simply overlaid the Direction with his own interpretation, which was neither persuasive nor cogent.

[498] Having carefully considered the Interview, Response, and SM Statement, the Board also has some serious concerns about the Subject Member's ongoing response to Allegation 1, first, because at no point during the Interview did he contest the existence of the Direction.

[499] Second, while the Subject Member attempted to assert that the Direction did not apply to his lunch break, as such time was unfettered, as noted by the CAR Rebuttal, at best, he was equivocal, and ultimately admitted in the Interview that when he went to see Ms. F he knew he should not, which is a demonstration of some level of disrespect or disregard for the Direction, which was repeated when the Subject Member attended the Residence a second time.

[500] Now, however, the Subject Member claims in the SM Statement, in apparent mitigation, that he was not thinking about the Direction when he attended the Residence, or alternatively and implicitly, that it no longer applied because the relationship with Ms. F had ended.

[501] This new claim is inconsistent with what he said in the Interview and somewhat suspect given it was never uttered or relied upon previously in the Interview or Response, and even more so when consideration is given to the fact that it appears the Subject Member knew his actions were under scrutiny, as reported in the Performance Log, before he attended the Residence a second time contrary to the Direction.

[502] The convenience of this new claim about the application of the Direction is also not inconsistent with the Subject Member stating in the Interview he did not tell the Watch Commander he was going to the Residence on the second occasion, which he later attempted to qualify in the Response that he believed, but was not certain, he had told the Watch Commander he was going to the Residence.

[503] As noted in the CAR Rebuttal, there is also a notable degree of imprecision around why and when the relationship with Ms. F purportedly ended and/or the purpose of the Subject Member's attendance to the Residence of Ms. F, given the varying, inconsistent, and contradictory accounts provided by Ms. F (as reported by Corporal Rappel) and that of the Subject Member in the Interview, Response, and subsequent SM Statement.

[504] In particular, that there was some basis upon which the Subject Member had to apologize is open to question given his description of how and why the relationship ended (at the request of Ms. F), and that the premise of the visit to the Residence was to apologize to the children given they were apparently not even awake, yet the Subject Member's attendance was anticipated.

[505] In the end, the Board did not find it necessary to try and resolve or rely upon these differences, other than to note that two such basic points could not apparently be explained coherently.

Conclusion

[506] In conclusion, given the Subject Member's blatant disregard for the Direction on two occasions, the Board has concluded that Allegation 1 is in the aggravated range and imposes a forfeiture of 20 days' pay.

[507] However, based on the circumstances, the Subject Member's wilful and repeated deception as found in Allegation 3, Allegation 4, and Allegation 5, collectively, make it untenable to continue his employment with the RCMP, and the Board hereby orders the Subject Member to resign from the RCMP within fourteen days, in default of which he will be dismissed.

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



Craig S. MacMillan

August 24, 2018

Assistant Commissioner

Conduct Board

Appendix A Table of Defined Terms

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| <i>Act</i> | <i>Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-9</i> |
| Affair | Alleged extra-marital affair between a senior member and another member on the same Watch |
| Allegation 1 | Failing to follow the direction of Staff Sergeant Preto contrary to section 3.3 of the <i>Code of Conduct</i> |
| Allegation 2 | Engaging in discreditable conduct by engaging in a sexual, intimate or romantic activity with Ms. F at her residence while on duty contrary to section 7.1 of the <i>Code of Conduct</i> |
| Allegation 3 | Failing to provide complete, accurate and timely accounts to Corporal Wood pertaining to the performance of duties contrary to section 8.1 of the <i>Code of Conduct</i> |
| Allegation 4 | Failing to provide complete, accurate and timely accounts to Staff Sergeant Daly and Corporal Wood pertaining to the performance of duties contrary to section 8.1 of the <i>Code of Conduct</i> |
| Allegation 5 | Failing to provide complete, accurate and timely accounts to Corporal Rappel pertaining to the performance of duties contrary to section 8.1 of the <i>Code of Conduct</i> |
| Allegations | Collectively, Allegation 1, Allegation 2, Allegation 3, Allegation 4, and Allegation 5 relating to the Subject Member |
| Assistance Call | Request for assistance over the radio from a member at another location in the Detachment area |
| Board | Conduct Board |
| B Note | Note from Ms. B (not dated) and submitted in MR2 Submission thanking the Subject Member for his assistance in dealing with certain matters that arose during the course of his duties |
| Buliziuk Letter | Letter from Sgt Buliziuk (dated February 15, 2018) submitted by MR2 on behalf of the Subject Member |
| CAR | Ms. Shahana Khan, Conduct Authority Representative |
| CAR Rebuttal | Submission provided by CAR (on or about May 9, 2018) in response to MR2 Submission |
| CAR Submission | Submission of CAR (on or about April 11, 2018) on conduct measures |
| Chung Letter | Letter written by Corporal Chung (dated April 3, 2018) and submitted by MR2 on behalf of the Subject Member |
| Conduct Report | Code of Conduct Investigation Report and Appendices provided by Division |
| <i>Cormier</i> | Level II (appeal) Decision Adjudicator in <i>Commanding Officer "J" Division v. Constable Cormier</i> (dated November 20, 2017) (file 2016-33572) |
| <i>CSO (Conduct)</i> | <i>Commissioner's Standing Orders (Conduct)</i> , SOR/2014-291 |

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| Daly Letter | Letter from Staff Sergeant Daly (now Staff Sergeant Major) (dated March 26, 2018) and submitted by CAR on behalf of the Conduct Authority |
| Detachment | Kamloops Detachment in “E” Division (British Columbia) |
| Dimopoulos Letter | Letter written by Sergeant Dimopoulos (dated April 18, 2018) and submitted by MR2 on behalf of the Subject Member |
| Direction | From S/Sgt Preto to Subject Member that he was not to see Ms. F while on duty |
| Eccleston Letter | Letter written by Constable Eccleston (not dated) and submitted by MR2 on behalf of the Subject Member |
| <i>Edwards</i> | <i>The Appropriate Officer “H” Division and Constable Neil Edwards, 15 A.D. (4th) 331</i> |
| Foley Letter | Letter written by Constable Foley (dated April 14, 2018) and submitted by MR2 on behalf of the Subject Member |
| <i>Frechette</i> | <i>The Appropriate Officer “E” Division and Corporal L.M.J. Frechette, 5 A.D. (4th) 264</i> |
| FS Letter | Letter written by FS (dated September 5, 2013) and submitted by MR2 on behalf of the Subject Member |
| GPS | Global Positioning System |
| <i>Graat</i> | <i>R. v. Graat, [1982] 2 S.C.R. 819</i> |
| <i>Gregson</i> | <i>The Appropriate Officer “F” Division and Cst. Gregson, 5 A.D. (4th) 213</i> |
| Interview | Interview of Subject Member by Corporal Rappel pursuant to <i>Code of Conduct</i> investigation held January 5, 2017 in Kamloops, British Columbia |
| <i>Jansen 1</i> | <i>Matter of the Public Hearing into the Complaint Against Constable #134 Ken Jansen of the South Coast British Columbia Transportation Authority Decision Arising from Public Hearing Disciplinary and Corrective Measures (December 6, 2013)</i> |
| <i>Jansen 2</i> | <i>Decision on Disciplinary and Corrective Measures (February 13, 2014)</i> |
| <i>Kalke</i> | <i>Appropriate Officer “E” Division and Constable Kalke 18 A.D. (4th) 66</i> |
| <i>Koshman</i> | <i>The Appropriate Officer “F” Division and Constable Brady Koshman, 14 A.D. (4th) 431</i> |
| <i>Krause</i> | <i>R. v. Krause, [1986] 2 S.C.R. 466</i> |
| <i>Lawless 1</i> | <i>The Appropriate Officer “J” Division and Cst. G.M. Lawless, 12 A.D. (3rd) 144</i> |
| <i>Lawless 2</i> | <i>The Appropriate Officer “J” Division and Constable G.M. Lawless, 23 A.D. (3rd) 261</i> |
| <i>Lawless 2 (Level II)</i> | Appeal at Level II Appeal (G-395-15-1 (June, 2007) cited as 32 A.D. (3rd) 292 |
| <i>Lemoine</i> | <i>Inspector Lemoine and The Appropriate Officer “C” Division, 12 A.D. (4th) 192</i> |

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| <i>Lenger</i> | <i>The Appropriate Officer “E” Division and Constable Andre Eric Lenger, 2 A.D. (4th) 186</i> |
| Letter (or Mak Letter) | Letter from Psychologist (dated April 5, 2018) and submitted by MR on behalf of the Subject Member |
| <i>Levasseur</i> | <i>The Appropriate Officer “J” Division and Levasseur, 16 AD (3d) 175</i> |
| LRI | Legislative Reform Initiative |
| <i>MacDonald</i> | <i>Camrose (Chief of Police) v. MacDonald, 2013 ABCA 422</i> |
| <i>MacDonald (LERB)</i> | <i>MacDonald v. Camrose (Police Service), 2014 ABLERB 055</i> |
| Mak Letter (or Letter) | Letter from Psychologist (dated April 5, 2018) and submitted by MR2 on behalf of the Subject Member |
| Mallais Letter | Letter written by Constable Michael Mallais of Canadian Pacific Police Services (not dated) submitted by MR2 on behalf of the Subject Member |
| McKinley | <i>McKinley v. B.C. Tel, 2001 SCC 38</i> |
| MDT | Mobile Data Terminal |
| Meeting | Meeting held on November 28, 2016 between Subject Member, Corporal Wood and Staff Sergeant Daly regarding activities of the Subject Member on November 12, 2016 |
| Meeting 1 | Preliminary meeting with the Board and Representatives on February 2, 2018 |
| Meeting 2 | Meeting with the Board and Representatives on March 21, 2018 |
| MR | Staff Sergeant Colin Miller, Member Representative for the decision on merit |
| MR2 | Ms. Tracy Pasenko, private counsel for the decision on measures |
| MR2 Submission | The submissions and supporting materials of MR2 relating to the conduct measures stage provided through 16 emails between April 23-24, 2018, including various authorities and supporting statements, letters, and other documents |
| Ms. F Notice | Civilian woman involved in relationship with Subject Member Notice of Conduct Hearing and particulars, dated December 21, 2017 |
| ORL | Officer Radio Log |
| OTR | Order of Temporary Reassignment |
| Performance Log | Report completed after the Meeting with the Subject Member, Staff Sergeant Daly and Corporal Wood. Also known as RCMP form 1004 |
| <i>Pizarro</i> | <i>Pizarro v. Canada, 2010 FC 20</i> |
| PMV | Police Motor Vehicle |
| Psychologist | Dr. Mak |
| <i>RCMP Act</i> | <i>Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-9</i> |
| Promotion Assessment | RCMP Promotional Assessment Level 1 - Constable (form 3447) completed by Corporal Wood (not dated or signed) in relation to the Subject Member |

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| Residence Response | Residence of Ms. F Response provided by the Subject Member as required under subsection 15(3) of the <i>CSO (Conduct)</i> |
| <i>Richard</i> | <i>The Appropriate Officer "K" Division and Constable Angela Richard</i> , 16 A.O. (4th) 425 |
| <i>Roden</i> | <i>Roden v. Toronto Humane Society</i> , 2005 CanLII 33578 (ON CA) |
| SM Note | Document submitted by MR2 (not dated) on behalf of the Subject Member entitled "Recalling call for Service 10-33" |
| <i>Simpson</i> | <i>The Appropriate Officer "K" Division and Constable Jason Simpson</i> , 14 A.D. (4 th) 269 |
| S&B Note Note written by S&B (not dated) included in the MR2 | Submission thanking the Subject Member for his assistance in dealing with certain matters that arose during the course of his duties |
| SM Statement Spouse | "Hearing Statement" of the Subject Member submitted by MR2 Spouse of Subject Member (married September 2016, and common law prior to this date) |
| Subject Member | Constable Ashley Goodyer, Regimental No. 61089 |
| <i>Toy</i> | <i>Toy v. Edmonton (Police Service)</i> , 2018 ABCA 37 |
| TPS Form 1 | Document submitted by MR2 on behalf of the Subject Member (Toronto Police Service Job Referral Form (dated July 8, 2013) completed by Constable Cornett |
| TPS Form 2 | Document submitted by MR2 on behalf of the Subject Member (Toronto Police Service Job Referral Form (dated August 22, 2013) completed by Constable Stephens |
| TPS Forms | Collectively, TPS Form 1 and TPS Form 2 submitted by MR2 on behalf of the Subject Member |
| Unattributed Note | A handwritten note (dated November 3, 2016) included in the supporting materials of the MR2 Submission |
| Van Laer Letter | Letter written by Staff Sergeant Van Laer (not dated) submitted by MR2 on behalf of the Subject Member |
| <i>Vellani</i> | <i>Commanding Officer "E" Division and Constable Vellani</i> , 2017 RCAD 3 |
| Wiberg Letter | Letter written by Neil Wiberg, Deputy Regional Crown Counsel for Kamloops (not dated) submitted by MR2 on behalf of the Subject Member |
| Wood Letter | Letter written by Cpl. Wood (dated March 29, 2018) and submitted by CAR |
| Wood Letter 2 | Letter written by Cpl. Wood (dated April 22, 2018) and submitted by MR2 on behalf of the Subject Member |

**Corrections or changes made to the final decision issued on
August 24, 2018**

ACMT File Number changed from 2017336232 to 201733833

Citation number added: 2018 RCAD 13

Paragraph 126 corrected to replace “November 22, 2018” with “November 22, 2016”.

Paragraph 375 corrected to replace “mislead” with “misled”.

Paragraph 381 corrected to replace “He” with “His” in the last line of the quote.