

Protected A

File 2020335274

2021 CAD 18



**ROYAL CANADIAN MOUNTED POLICE**

IN THE MATTER OF

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

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

BETWEEN:

**Constable Konstantinos Xanthopoulos**

Regimental Number 60852

(Appellant)

and

**Commanding Officer, "E" Division**

Royal Canadian Mounted Police

(Respondent)

Protected A

File 2020335274

(the Parties)

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**CONDUCT APPEAL DECISION**

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**ADJUDICATOR:** Steven Dunn

**DATE:** July 12, 2021

## INTRODUCTION

[1] Former Cst. Konstantinos Xanthopoulos (Appellant) challenges, pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, as amended (*RCMP Act*), the decision of a conduct board (2019 RCAD 05), finding two contraventions of the Code of Conduct established related to: interfering with a conduct investigation in which he was the subject member (7.1 – Discreditable Conduct: by inappropriately contacting a witness (Allegation 2)); and, to providing misleading and false statements and submissions in a previous conduct matter (8.1 – Reporting: by failing to give accurate accounts pertaining to the carrying out of his responsibilities and duties (Allegation 3)). A third count (Allegation 1: related to 7.1 – Discreditable Conduct) alleging the Appellant inappropriately pursued and engaged in a sexual relationship with a vulnerable person and complainant he met through the course of his duties, and who was the victim of domestic abuse (the witness referred to in Allegation 2) was found by the conduct board to have been initiated after the expiration of the one-year limitation period prescribed by subsection 41(2) of the *RCMP Act*, and was dismissed.

[2] The conduct board found that retaining the Appellant “would not be in the best interests of the public or the Force”, and at the conclusion of the hearing held in Vancouver, British Columbia, from March 19 to 21, 2019, in an oral decision, directed him to resign within 14 days or be dismissed. The written decision was issued on April 25, 2019. Although satisfied with the conduct measure imposed, the Respondent appealed the legal basis relied on by the conduct board to dismiss Allegation 1 because of the broader implications to conduct proceedings in the RCMP (2019335365).

[3] The Appellant concedes that he was served the impugned decision on May 1, 2019, but, even so, he did not file his appeal until March 26, 2020, despite the 14-day prescription period set out in section 22 of the *Commissioner’s Standing Orders (Grievances and Appeals)* (*CSO (Grievances and Appeals)*) and referred to in subsection 45.11(1) of the *RCMP Act*. Instead, the Appellant made a deliberate decision to file an application for judicial review in the Federal Court (T-522-19) on March 25, 2019, just days after the conclusion of the conduct hearing. That application would eventually be dismissed, but required three Federal Court decisions (2019 FC

1609, 2020 FC 297, 2020 FC 401), resulting in the Appellant filing an appeal at the Federal Court of Appeal on April 4, 2020, that remains ongoing (A-98-20).

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

[5] For completeness, on October 15, 2020, I declined to rule on a request by the Office for the Coordination of Grievances and Appeals (OCGA) to consolidate this appeal (2020335274) with the Respondent's appeal of the dismissal of Allegation 1 (2019335365), and instead, directed the OCGA to obtain submissions from the Appellant explaining why I should grant a retroactive extension, with an opportunity for the Respondent to reply, and the Appellant to rebut. After obtaining the submissions and preparing the 402-page appeal record (AR) along with the 4439-page package (in addition to audio files) that was before the conduct board (Material), the OCGA returned the matter for adjudication.

[6] I note that the Appellant has been adamant since he filed his statement of appeal that he does not want this case referred to the RCMP External Review Committee (ERC) (AR, pp 6, 224). Subsection 45.15(3) of the *RCMP Act* allows a member to request that their conduct appeal not be referred to the ERC. I acknowledge that subsection 23(1) of the *CSO (Grievances and Appeals)* imposes a 14-day limitation period from the date of service of the conduct board decision to make such a request; however, section 29 of the *CSO (Grievances and Appeals)* allows me to override that requirement. I confirm that I grant the Appellant's request not to refer this appeal to the ERC.

[7] In brief, this appeal is before me on the question of whether the circumstances justify a retroactive extension. Both Parties have provided comprehensive submissions and confirmed the completeness of the record. For reasons I will explain, I am not prepared to grant the Appellant an extension in these circumstances. The appeal is therefore dismissed.

## ANALYSIS

[8] To begin, paragraph 29(e) of the *CSO (Grievances and Appeals)* provides the Commissioner (or her delegate) the authority to extend the time limit to file a conduct appeal in “exceptional circumstances”. When considering the circumstances of a given case, the ERC, the Commissioner and delegated adjudicators have long adopted judicial guidance suggesting four non-conjunctive and non-exhaustive considerations: continuing intention to pursue the appeal; subject matter discloses an arguable case; reasonable explanation for the delay; and prejudice to the other party (see, *Grewal v Canada (Minister of Employment and Immigration)*, [1985] FC 263 (FCA); *Canada (Minister of Human Resources Development) v Hogervorst*, 2007 FCA 41; and, *Canada (Attorney General) v Pentney*, 2008 FC 96). The weight to be given to each will vary with the circumstances of the case (*Stanfield v Canada*, 2005 FCA 107). I commend the Parties for succinctly formulating their arguments around these factors (AR, pp 111-116, 139-144, 176-181).

### **Continuing intention to pursue the appeal**

[9] The Appellant relies on the fact that he filed an application for judicial review in the Federal Court within days of the conduct hearing to demonstrate that he has maintained an intention to “pursue the underlying case” (AR, pp 113, 177), and emphasizes comments made by Lafrenière J. from the Bench during the December 11, 2019, motion hearing to support this assertion.

[10] I accept Lafrenière J. pondered aloud the possibility of including a comment as “*obiter*” in his written decision to the effect that the fact the Appellant appears “to have maintained a continued intention to challenge the conduct board’s decision” by pursuing it before the Federal Court, and this “should be taken into consideration when any application for extension of time to appeal is brought” (AR, p 128). I also note that there was a brief exchange with Department of Justice counsel about fettering discretion. The Appellant concedes the comment is not determinative, but maintains that it is surely persuasive (AR, pp 115-116). In the end, though,

Lafrenière J. did not include any such “*obiter*” comments in the written decision dismissing the application (2020 FC 401).

[11] In my view, to rely on the benefit of this factor, the moving party must demonstrate an intention to pursue the application or right of appeal in the correct forum or at least show a good faith mistake. In contrast, the Appellant, having appealed a prior conduct decision in 2017 (Material, pp 65-66) knew the statutory process to be followed and intentionally chose to ignore it. The Appellant filed an application for judicial review of the ensuing conduct appeal decision on May 21, 2020, that remains ongoing (T-574-20).

### **Subject matter discloses an arguable case**

[12] The Appellant maintains that he “possesses an exceptionally strong case” and alleges negligent investigation, violations of RCMP policy and disclosure obligations, hearing irregularities, as well as a disproportionate sanction (AR, pp 114, 129-134).

[13] I accept that the threshold for an arguable case is low, but the merits must still be demonstrably tenable (see, for example, in a different context, *Desjardins Financial Services Firm Inc v Asselin*, 2020 SCC 30, at para 217). I note that the Appellant was represented by an able counsel before the conduct board, who, by my reading of the submissions and hearing transcripts, provided highly competent representation (Material, pp 3-11, 101-106, 253-260, 4390-4403). And yet, no assertions of negligent investigation or hearing irregularities were raised. Disclosure was dealt with prior to the hearing, and focussed on the timeliness of Allegation 1 which eventually garnered sufficient evidence to convince the conduct board the one-year time limitation period prescribed by subsection 41(2) of the *RCMP Act* had indeed expired.

[14] I do recognize that the Appellant sought additional disclosure at the Federal Court which was denied (2020 FC 297), and continues to raise disclosure in this appeal associated to possible records related to the modification of the allegations that were ultimately incorporated into the Notice of Conduct Hearing (AR, p 230). The conduct board rejected the suggestion that modifying the wording of the allegations as the conduct investigation progressed and after all the

evidence had been compiled before finalization in the Notice of Conduct Hearing was somehow inconsistent with statutory and policy requirements (Material, pp 4398-4403; AR, pp 17-19). The reality is that the disclosure provided to the Appellant in the conduct proceedings and the evidence presented to the conduct board, including witness testimony, addressed the particulars of the two remaining allegations. Allegation 2 fell to an assessment of credibility about the context and dialogue of the September 22, 2016, telephone conversation, which the conduct board carefully explained (AR, pp 21-23). Allegation 3 fell to statements the Appellant he himself made, in addition to relevant RCMP cellphone records (Material, pp 84, 87-88, 2545-2561; AR, pp 23-25). The authenticity of the Appellant's statements and cellphone records put into evidence was never disputed. The conduct board had this to say (AR, p 27):

[63] Second, [the Appellant's] actions cannot be considered isolated behaviour on his part. The three similar incidents that make up the Allegations took place over a total of six months. This was not a one-time lapse in judgment for the Subject Member, rather it shows a propensity to lie and manipulate in order to avoid responsibility for his own mistakes. In addition, providing the false statements in relation to Allegation 3 can be categorized as planned and deliberate. The circumstances relating to his contact with [the witness] do not reflect similar planning and deliberation. However, at the same time, it cannot be said to be a spur of the moment reaction without any thought to the consequences in that he testified that he knew an order was coming that would prohibit him from contacting her, yet he went ahead and did it anyway.

[15] Regardless, even where an appeal on the findings of the allegations appears hopeless, a member who is ordered to resign or be dismissed can usually mount some semblance of an arguable case that the sanction is disproportionate. I therefore find this factor to be met.

### **Reasonable explanation for the delay**

[16] The Appellant relies on his rationale for pursuing the application for judicial review – that is, an assertion of excessive delays in the RCMP internal process – to explain why he delayed filing his appeal (AR, pp 114, 178-179). While this is *an* explanation, once again, I am not convinced that intentionally circumventing the right of appeal prescribed by Parliament in the *RCMP Act* constitutes a *reasonable* explanation (i.e., fair, proper, sensible; see *Black's Law Dictionary*, 10<sup>th</sup> ed., s.v., “reasonable”).

**Prejudice to other party**

[17] The Appellant contends that he is the only Party enduring any prejudice, does not “foresee any prejudice towards the Respondent” and rejects the Respondent’s assertion that allowing this appeal to proceed will prejudice the RCMP in the management of its workforce (AR, pp 115, 180).

[18] In a recent report (C-046) involving a dismissal case where the statement of appeal was filed only one day late, the ERC had this to say (para 45):

To allow the Appellant this extension would provide him an unfair advantage over other members who either chose not to appeal or were not permitted to appeal because they had missed the time limit. In my view, it would be an arbitrary and unwarranted “watering down” of the time limit.

Those comments ring especially true here. I am simply not convinced that condoning the Appellant’s deliberate forum shopping would not, to at least some degree, prejudice the broader management of the RCMP conduct appeal process.

**Conclusion**

[19] In sum, I find that the Appellant has not shown he maintained a continued intention to exercise his statutory right of appeal, nor has he given a reasonable explanation for the delay. I also find that condoning the Appellant’s forum shopping would prejudice the RCMP conduct appeal process. While the evidence appears to support the conduct board’s findings for the two contraventions, I am prepared to accept that the Appellant meets the low arguable case threshold with respect to the sanction.

[20] In my view, the weight of the three factors militating against granting the Appellant an extension overwhelms the fourth that does fall in his favour.



**DISPOSITION**

[21] The Appellant made a tactical decision to ignore the governing statutory conduct appeal process by filing an application for judicial review at the Federal Court. This was not a good faith mistake.

[22] In examining this case through the *Pentney* lense, including the Appellant's own admissions and explanations during the conduct proceedings, the Federal Court application, and this appeal, I do not find the Appellant has demonstrated exceptional circumstances that would warrant an extension.

[23] The appeal is dismissed.

[24] Should the Appellant disagree with my decision, he may seek recourse to the Federal Court pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

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Steven Dunn, Adjudicator

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Date