Protected A

File 2020335427

2021 CAD 21

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

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

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

and Part 2 of the *Commissioner's Standing Orders*

(Grievances and Appeals), SOR/2014-289

BETWEEN:

Commanding Officer, "E" Division

Royal Canadian Mounted Police

(Appellant)

and

Staff Sergeant Bari Emam

Regimental Number 48889

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(Respondent)

(the Parties)

CONDUCT APPEAL DECISION

ADJUDICATOR: Steven Dunn

DATE: August 23, 2021

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INTRODUCTION

[1] The Commanding Officer, "E" Division, as a conduct authority (Appellant) appeals, pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC 1985, c. R-10, as amended (*RCMP Act*), the decision by a conduct board (Board), dated May 19, 2020, to grant

a stay of proceedings on the basis that the Appellant arbitrarily bypassed the *Commissioner's Standing Orders (Investigation and Resolution of Harassment Complaints*), SOR/2014-290 (*CSO (IRHC)*) process by applying the Code of Conduct process which allegedly deprived the subject member of his legal rights and of the duty of procedural fairness owed to him.

[2] The Appellant challenges the stay on the grounds that the Board committed a manifest and determinative error by making factual findings and conclusions that are clearly unreasonable and logically flawed by:

i. Ruling that the evidence supports a concerted effort to bypass either the *CSO (IRHC)* process or the provisions of Administration Manual XII.8 Investigation and Resolution of Harassment Complaints (AM XII.8).

ii. Infringing upon the procedural rights of the conduct authority with the adoption of an unreasonably narrow and restrictive interpretation of policy and statute; and by seeking to dictate the Code of Conduct sections contained within the Notice to Designated Officer.

iii. Finding that a stay of proceedings was an appropriate or justifiable remedy.

[3] 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.

[4] In rendering this decision, I have considered the material that was before the Board (Material) and the 557-page appeal record (Appeal Record) that was prepared by the Office for the Coordination of Grievances and Appeals (OCGA), including the submissions of the Parties.

[5] For the reasons that follow, I find that the decision to stay the conduct proceedings to be clearly unreasonable and direct the matter to proceed to a new hearing before a differently constituted conduct board. The appeal is allowed.

BACKGROUND

[6] On February 23, 2017, a civilian member of the RCMP contacted the "E" Division Harassment Unit to discuss a situation she had been experiencing in her workplace involving Staff Sergeant Bari Emam, Regimental Number 48889 (Respondent). In her statement, the complainant provided names of other female employees who had experienced similar behaviour from the Respondent.

[7] Statements were soon obtained from other alleged victims (Material, CARD DISCLOSURE/Investigation Report, p 727). All the women described inappropriate behaviour by the Respondent. A subsequent meeting with members of the "E" Division Professional Responsibility Unit, the Harassment Unit and the Conduct Unit followed on February 28, 2017, in which the file was discussed and the decision was made that it would not be investigated under the *IRHC* process, but rather the Code of Conduct process (Materials, CARD DISCLOSURE/Investigation Report, p 730). More interviews were subsequently conducted with additional alleged victims. Consistently, the statements described unwanted touching or inappropriate behaviour directed at them by the Respondent and all reported their experiences as unwelcome.

[8] On March 6, 2017, Superintendent G issued a Conduct Investigation Mandate Letter stating that on February 28, 2017, he had been notified that the Respondent may have conducted himself in a manner that, if established, would be in contravention of the Code of Conduct and accordingly, pursuant to subsection 40(1) of the *RCMP Act*, ordered an investigation.

[9] Upon completion of the investigation and considering the matter, on January 16, 2018, the Appellant initiated a conduct hearing pursuant to subsection 41(1) of the *RCMP* Act (Material, Conduct Hearing Documents/Notice to Designated Officer, pp 1-2).

[10] On January 10, 2020, the Respondent brought a motion for a stay of proceedings in which he alleged an abuse of process for the following failures on the part of the Appellant (Materials, Subject Member's Motion/Abuse of Process Motion):

- The Appellant's claim of privilege over documents that are not privileged;
- A lack of full disclosure on the part of the Appellant;
- Non-compliance with the conduct board's direction by the Appellant;
- Circumvention of the RCMP's Investigation and Resolution of Harassment Complaints (IRHC) process by the Appellant;
- Insufficiency of the Appellant's investigation into the harassment allegations;
- Bias on the part of the Appellant in the course of the investigation;
- Institutional delay in getting the matter before the conduct board.

[11] The Respondent argued that the concerns cumulatively amounted to an abuse of process warranting a stay of proceedings. The Appellant responded to the motion on January 24, 2020, and the Respondent filed his rebuttal on February 14, 2020. The Board rendered a decision on the motion on May 19, 2020, directing a stay of proceedings (Appeal Record, pp 10-42).

CONDUCT PROCEEDINGS

Code of Conduct Investigation

[12] On March 6, 2017, a Code of Conduct investigation was initiated in relation to one alleged contravention of the Code of Conduct under section 7.1 (discreditable conduct).

[13] As the investigation progressed, several interviews were completed concerning other allegations that the Respondent may have engaged in a repeated pattern of inappropriate behaviour involving a number of female subordinates.

[14] As a result, an updated Conduct Investigation Mandate Letter was issued by Superintendent G on May 31, 2017, adding five more allegations for a total of six, involving six

different women (Materials, CARD DISCLOSURE/Investigation Report and materials, pp 116-117).

[15] On September 14, 2017, the Investigation Report was finalized by the Professional Responsibility Unit containing an overview, a summary of the interviews conducted with the witnesses and the victims, as well as a number of attachments. In all, the Investigation Report and materials comprise 827 pages, in addition to 22 audio statement files (Material, CARD DISCLOSURE).

Conduct Hearing Proceedings

[16] On March 12, 2018, the Respondent was served with a Notice of Conduct Hearing issued by the Appellant on February 22, 2018, setting out seven allegations: two related to the original accuser (section 7.1 and 3.2 (abuse of authority)); four additional allegations under section 7.1, involving four other women; and, one allegation under section 2.1 (respect, courtesy and harassment) related to a sixth woman.

a) Conduct Hearing

[17] The Conduct Hearing was initiated on January 18, 2018, and Assistant Commissioner Craig MacMillan was originally appointed as the conduct board, later replaced by Adjudicator Gerald Annetts.

b) Stay of Proceedings

[18] On May 19, 2020, upon granting the Respondent's motion, the Board issued a stay of proceedings on the basis that the Appellant arbitrarily bypassed the IRHC process and opted for the Code of Conduct process thereby depriving the Respondent of his legal rights and the procedural fairness owed to him. The Board concluded that allowing the proceedings to continue would be unfair to the Respondent and bring the administration of justice into disrepute. The Board also determined that the institutional delay of nearly 34 months did not meet the Supreme Court of Canada's articulated threshold for an abuse of process in addition to pronouncing on a variety of issues not raised on appeal.

APPEAL

[19] On June 5, 2020, the Appellant presented her *Statement of Appeal* (Form 6437) to the OCGA, contending that the Board committed a manifest and determinative error in directing a stay of proceedings (Materials, pp 4-5). As redress and pursuant to paragraph 45.16(1)(b) of the *RCMP Act*, the Appellant requests a new hearing before a differently constituted conduct board.

[20] The Appellant raises the following grounds of appeal (Appeal Record, pp 4-5):

1. The Board decision to direct a stay of proceedings was both unreasonable and unsupported based upon the totality of the evidentiary record.

2. The Board erred by failing to permit the various complainants and subsequent alleged contraventions of the Code of Conduct to be properly heard.

PRELIMINARY MATTERS

Applicable standard of review

[21] In order to properly address the grounds of appeal raised by the Appellant, it is first necessary to identify the standard against which they must be assessed.

[22] The Supreme Court of Canada renewed an examination of the standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*). For present purposes, I note that the Court confirmed that legislated standards of review should be respected (*Vavilov*, paragraphs 34-35), and the majority distinguished the approaches to be taken between statutory appeals and judicial reviews of administrative decisions (*Vavilov*, paragraphs 36-45).

[23] Subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 (*CSO (Grievances and Appeals)*) provides the guiding principles to be followed in conduct appeals:

> 33(1) The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[24] The grounds of appeal raised by the Appellant involve findings of fact or mixed fact and law. The term "clearly unreasonable" in subsection 33(1) of the *CSO (Grievances and Appeals)* describes the standard to be applied in a review of questions of fact and of mixed fact and law. In *Kalkat v Canada (Attorney General)*, 2017 FC 794, the Federal Court considered the term, "clearly unreasonable":

> [62] Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term, I conclude that the Delegate did not err. Interpreting the "clearly unreasonable" standard as being equivalent to the "patently unreasonable" standard is reasonable in the context of the legislative and policy scheme. This means that the Delegate must defer to a finding of the Conduct Authority where he finds the evidence merely to be insufficient to support the finding *(British Columbia Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25).

[25] In *Smith v Canada (Attorney General)*, 2019 FC 770, a similar finding was considered and adopted:

> [38] The Adjudicator undertook an extensive analysis in order to arrive at the conclusion that the standard of patent unreasonableness applies to the Conduct Authority Decision. This analysis included a review of relevant case law, the meaning of the word "clearly", and the French text of subsection 33(1). The Adjudicator's conclusion that the applicable standard of review was patent unreasonableness is justifiable, transparent, and intelligible. The Court agrees that this was a reasonable conclusion.

[26] The Federal Court of Appeal dismissed the appeal of the *Smith* judicial review decision, 2021 FCA 73, stating, *inter alia*:

> [43] First, I find it interesting that the appellant and the intervener failed to properly address the French version of subsection 33(1) and why the [appeal] Decision is unreasonable in light of it. The French text uses the terms "*manifestement déraisonnable*" which translate to "patently unreasonable", and have been interpreted as such in the Supreme Court jurisprudence. Based on the modern approach to statutory interpretation, the

> conduct adjudicator's analysis demonstrates that subsection 33(1) was reasonably interpreted to require patent unreasonableness.

[27] In *Canada (Director of Investigation and Research) v Southam Inc.*, [1997] 1 SCR 748, at paragraph 57, the Court explained that a decision is "patently unreasonable" only if the "defect is apparent on the face of the tribunal's reasons", or in other words, it is "openly, evidently, clearly" wrong. Additionally, a decision will only be considered "clearly unreasonable" if, even after mistakes are taken into account, the outcome under appeal is not plausible based on the evidence. Later, the Court stated in *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at paragraph 52, that a patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand."

ANALYSIS

[28] The IRHC process was repealed on January 1, 2021, as a result of the coming into force of changes to Part II of the *Canada Labour Code*, RSC, 1985, c L-2 (Bill C-65: An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No 1), and the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130. Accordingly, I will refer to the provisions of the IRHC policy and the *CSO (IRHC)* in the past tense.

[29] Moreover, when a harassment complaint was lodged against a subject member by a willing and engaged complainant, dealt with under the *CSO (IRHC)* and related policy, and a *prima facie* finding resulted, Part IV of the *RCMP Act* and the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 (*CSO (Conduct)*), governed the process to determine whether the subject member had contravened the Code of Conduct on a balance of probabilities.

[30] There is no doubt what question was central to the Board granting a stay of proceedings (Appeal Record, p 11):

> [3] […] Since my decision turns on the allegation surrounding the circumvention of the mandated process for the investigation and resolution of harassment complaints, I will start my analysis there.

[31] As I understand the Board's rationale, the decision to stay rested on essentially three findings: (1) the initiation of the Code of Conduct process rather than the IRHC process was arbitrary; even so, (2) that choice was made in part to avoid the one-year time limitation for complainants to file complaints under the IRHC process; and, as a result, (3) the Respondent was denied certain procedural rights including the potential for informal resolution, to receive copies of each complaint, and to comment on the investigation report before it was finalized and provided to the decision maker. I will address each in turn.

1. Was the decision to proceed by way of the Code of Conduct process arbitrary?

[32] Generally speaking, I agree with the Board that the IRHC process was mandated to be utilized in cases where harassment was present and the process was initiated by a complainant who filed a complaint on Form 3919. However, as I will soon explain, I disagree with the Respondent's assertion that the IRHC process had to be utilized in every situation that may have comprised a potential element of harassment involving a subject member (Appeal Record, p 449).

[33] The Appellant argues that addressing the allegations under the Code of Conduct process rather than the IRHC process in these circumstances accorded with RCMP policy and procedures, and therefore was not an abuse of process. The Appellant maintains the Board's conclusion at paragraph 8 that "[w]ith or without the submission of Form 3919, these were clearly complaints of harassment as defined in section 2.2 of AM XII.8" (Appeal Record, pp 13, 61) is flawed. The Appellant emphasizes that between February 24 and 28, 2017, neither Corporal M nor Harassment Advisor M, was conducting an investigation pursuant to the process outlined in section 5.4.1.8 of AM Xll.8 as no Harassment Investigation Mandate Letter was ever formally issued by the designated decision maker. Likewise, the conduct authority's decision to sign a Conduct Investigation Mandate Letter pursuant to subsection 40(1) of the *RCMP Act* on March 6, 2017, was not only timely but also reasonable.

[34] The Respondent rejects the Appellant's assertion that the IRHC process provided discretion to the decision maker especially where third party disclosure arose. Instead, he insists

that the application of statutory interpretation principles demonstrates that investigations with a possible harassment element had to be dealt with under the IRHC process (Appeal Record, pp 452-455).

[35] To begin, I note that the Board carefully limited the application of the decision (Appeal Record, p 26):

> [40] My findings are not intended to cover all situations in which acts of alleged harassment come to the attention of a conduct authority/decision-maker. Without the benefit of submissions from counsel on those other situations, I decline to stretch my analysis further than the circumstances of this case.

[36] As it happens, four months after the Board rendered this decision, I adjudicated a conduct appeal (RCMP External Review Committee (ERC) C-038; RCMP 2018-335143) with uncanny similarities and involving the same abuse of process argument. In that case, RCMP management was made aware through a third party about inappropriate behaviour by a senior NCO involving a female municipal employee. Shortly afterwards, a second municipal employee victim at another detachment was identified where the subject member had worked three years earlier. Neither woman filed a completed harassment complaint (Form 3919). Ultimately, the investigations were consolidated and advanced under the Code of Conduct process, leading to *prima facie* findings, a conduct meeting and two contraventions of section 7.1 involving sexually inappropriate behaviour and comments being established on a balance of probabilities. On appeal, the subject member alleged an abuse of process because the IRHC policy was not followed. Both the ERC and I rejected the argument based on the circumstances including third party disclosure, and the fact that although the victims provided details of the misconduct, they never fully engaged the IRHC process.

[37] The Appellant insists that IRHC policy was intentionally not drafted in an unduly restrictive or inflexible manner with respect to the authorities granted to a decision maker (Appeal Record, p 62). While that may be so, I accept that when a completed harassment complaint was received against a subject member under the IRHC process, the intake procedure set out in section 10.1 of the IRHC policy was expected to be followed. However, as provided

for in section 9.1.8.1, when accusers did not engage the harassment complaint process by failing to file a written complaint or withdrawing an existing complaint, the IRHC policy conferred discretion to take other action, such as initiating a Code of Conduct proceeding:

> 9.1.8.1 Notwithstanding that a complainant elects to withdraw a complaint, the RCMP retains the discretion to take such other action in respect of the conduct of any employees identified through the complaint as may be appropriate, given the totality of the circumstances, but not including initiating a harassment investigation and resolution process under this Policy or the *Commissioner's Standing Orders (Investigation and Resolution of Harassment Complaints)*.

[38] Furthermore, IRHC policy also envisioned circumstances where the RCMP was made aware of inappropriate behaviour by a third party. In those instances, section 5.2.3 provided discretion for the manager to determine the appropriate course of action including the Code of Conduct process:

> 5.2.3. If a supervisor or manager is advised of an incident or behaviour that appears to be or could be perceived to be harassment by an employee who was not the person at whom the behaviour was directed, the supervisor or manager must take appropriate steps to determine if a response consistent with the Workplace Relations Services would be appropriate, or if an investigation should be initiated under Part IV of the *RCMP Act*, or under this Policy and the *Commissioner's Standing Orders (Investigation and Resolution of Harassment Complaints)*, or to other determine if other processes, such as, but not limited to, performance management procedures, would be appropriate.

[39] In addition, while the IRHC policy referenced non-RCMP personnel working in RCMP workplaces (section 3.1), there were limits set out in section 3.2:

> 3.2 The written complaint process as defined in this Policy applies to RCMP employees only. While other persons working on RCMP premises cannot access the written complaint process as described in sec. 9.1., supervisors and managers are nevertheless expected to respect the spirit and intent of this Policy to ensure that all harassment concerns raised by non-RCMP personnel or in respect of non-RCMP personnel are addressed.

For completeness, the *CSO (IRHC)* applied to civilian and regular member (see subsection 2(1) of the *RCMP Act*, "member") complainants (and respondents), but the aim of the IRHC policy was for the spirit and intent of the process to be followed where the complainant was, for

example, a public service employee. Of course, those latter complainants could not avail themselves of the appeal provisions set out in section 7 of the *CSO (IRHC)*, and would presumably seek recourse through the grievance process prescribed by their collective agreement should they be dissatisfied with the outcome. In this case, the six women represented public servants, civilian and regular members, as well as an employee of another police agency.

[40] The Board held at paragraph 39 that the selection of the Code of Conduct process over the IRHC process was arbitrary (Appeal Record, pp 26); however, not one of the six victims formally filed the requisite harassment complaint Form 3919, and while the initial information did come directly from an alleged victim herself, many of the situations involving the other women came to light through third party disclosure.

[41] To recap, the Appellant faced a scenario involving six accusers, one of which was not an RCMP employee, with some information arising from third party disclosure, and incidents spanning a number of years. This was not a situation where six complainants duly filed written harassment complaints within the established IRHC process requirements only to have the Appellant unilaterally proceed directly to the Code of Conduct process. What's more, even the Board acknowledged that consultations and discussions occurred both in the Division between multiple units as well as with subject matter experts (SMEs) in the conduct (National Conduct Management Section (NCMS)) and harassment (Office for the Coordination of Harassment Complaints (OCHC)) policy centers at National Headquarters (Appeal Record, pp 12-13) to determine the appropriate course of action. Simply put, the Respondent's case did not fit conveniently into the IRHC policy, if at all, given the lack of a single formal written complaint. That said, the contextual factors present were envisioned under sections 3.2 (non-RCMP personnel), 5.2.3 (third party disclosure) and 9.1.8.1 (lack of formal complaint), which irrefutably granted the Appellant the discretion to proceed as she did. The *Black's Law Dictionary* defines "arbitrary" as, "involving a determination made without consideration of or regard for facts, circumstances, fixed rules, or procedures". That is surely not what happened here.

[42] It should not be lost on anyone that a victim may decline to file a formal complaint about a supervisor or colleague for a myriad of reasons, but when the Force is made aware, management has an obligation to address inappropriate behaviour by the most appropriate statutory means at its disposal, even where it is a third party historical disclosure, as long as the perpetrator remains an employee, and the victim is prepared to provide a statement. The Respondent maintains that it was the fault of the RCMP to not compel the victims in this case to file complaints under the IRHC policy (Appeal Record, p 455). I disagree. There was no provision in the *CSO (IRHC)* or IRHC policy that required a victim to initiate and participate in the harassment complaint process, let alone for management to impose that obligation on them.

2. Was the decision to proceed by way of the Code of Conduct process taken to avoid the IRHC process one-year limitation period?

[43] The Respondent argued in the motion that the Appellant opted for the Code of Conduct process as opposed to the IRHC process because some of the allegations fell outside the one-year limitation period to file a harassment complaint. The Board agreed (Appeal Record, p 22):

> [28] […] Why then did the [Appellant] make the decision to do so in this case? The Applicant alleges that it was to bypass the limitation period contained within the IRHC process. That theory is compelling when you consider that the limitation period under the *CSO* (*IRHC*) had already expired for five of the seven Allegations before any complaint was received or any investigation initiated […]

[44] Setting aside the fact that there were actually no formal written harassment complaints lodged by any of the six accusers, just the same, the Board went on to acknowledge the passage of the one-year limitation period was not an automatic bar to the proceedings under the IRHC process (Appeal Record, pp 22-24) because the designated decision maker had the power to extend the time limit in "exceptional circumstances" (see subsection 2(2) of the *CSO (IRHC)*). As the SMEs from the NCMS and OCHC explained, this condition precedent is rarely an obstacle in cases involving elements of sexual harassment (Material, CMM Materials/Emails/Emam_attach/Binder_doc1-109, pp 122, 126).

[45] In C-038, the ERC held that a conduct authority can properly consider misconduct "events" even if they are reported years after the last alleged incident and that this position "is supported by section 5.2.3 and section 9.1.8.1 of AM XII.8, the *National Guidebook (Harassment)* and section 40(1) of the *RCMP Act*" (paragraph 91). In the appeal decision, I accepted that the passage of the one-year limitation period in IRHC process is not an automatic restriction:

> [34] I agree with the ERC that the conduct process does not restrict the timeliness of events brought to the Force's attention for investigation (Report, paras. 94-95). As explained by the ERC, subsection 40(1) of the *RCMP Act* does not provide a limitation period in stating that the conduct authority shall make or cause to be made any investigation that the conduct authority considers necessary to determine whether a member has contravened a provision of the Code of Conduct. Like the ERC, I find that it was appropriate for the Respondent to consider the events raised by MG in the conduct process even if they had occurred more than one year before being reported.

[46] In my view, the very notion that the Appellant sought to deliberately circumvent the IRHC process (especially, in the absence of formal complaints) because of the one-year harassment complaint limitation period, which she had the power to extend, is a bald assertion not substantiated in the record.

3. Was the decision to proceed by way of the Code of Conduct process a violation of the procedural rights of the Respondent?

[47] The Board found at paragraph 36 that depriving the Respondent of IRHC procedures amounted "to a breach of the duty of procedural fairness" (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817) (Appeal Record, pp 25-26), and held that the Respondent was denied certain rights including the potential for informal resolution, to receive copies of each complaint, and to comment on the investigation report before it was finalized and provided to the decision maker (Appeal Record, pp 21-24). In my view, the Board's analysis is misguided.

[48] On this point, the Respondent also overreaches by arguing that the IRHC process "was specifically drafted to grant these protections to the [subject] member" (Appeal Record, p 449). No matter how you may read the *CSO (IRHC)* and related policy, or the Regulatory Impact Analysis Statement, the IRHC process was complainant-centric. Any benefits to a subject member were merely by-products. The substantive "protections" for subject members arose after a *prima facie* finding was made and the conduct meeting or hearing process was advanced by the conduct authority in order to determine whether a contravention of the Code of Conduct could be established on a balance of probabilities.

Informal Resolution

[49] Both the Board and the Respondent seem to equate the availability of informal resolution in section 4 of the *CSO (IRHC)* as somehow bestowing a procedural right on subject members. I disagree. Just as a subject member had no legitimate expectation that every witness describing behaviour that may have harassment related elements was required to file a formal complaint under the IRHC process, where a complainant actually engaged the IRHC process, there was no obligation on their part to participate in informal resolution. In fact, subsection 4(1) set out limitations on the availability of informal resolution, one of which applied to the Respondent:

> 4(1) An informal resolution process is available to the parties unless, in respect of the respondent, **a hearing has been initiated under subsection 41(1) of the Act** or a conduct measure has been imposed under 42(1) of the Act.
>
> [Emphasis added.]

[50] More fundamental though, is the reality that as early as March 6, 2017, the Respondent was ordered in writing not to have any contact directly or indirectly with the first three accusers interviewed by investigators, and by March 24, 2017, the Respondent was suspended with pay under section 12 of the *RCMP Act*, resulting in further restrictions being placed on him (Material, CARD DISCLOSURE/Investigation Report and materials, pp 110-113).

[51] In short, the Respondent did not have a legitimate expectation to informal resolution in the circumstances.

Copies of Complaints

[52] The Board stated at paragraph 34 that the Respondent "was denied his right to receive a copy of the complaint" (Appeal Record, p 24). This "right" was not found in the *CSO (IRHC)*, although the right to a copy of the preliminary investigation report was set out in subsection 5(3). I note that section 5.8.1.1 of the IRHC policy stated that respondents could expect to receive a copy of the complaint. Obviously, that was only possible where there was an actual written complaint and the IRHC process was initiated.

[53] The Code of Conduct process includes provisions for comprehensive notification to subject members. The Respondent received the first Code Investigation Mandate Letter on March 6, 2017, and an update on May 31, 2017. In both instances, the names of the women and a succinct summary of the alleged behaviours were described (Material, CARD DISCLOSURE/Investigation Report, pp 116-117) (*sic* throughout):

> Allegation 1: On or between March 31, 2016 and June 9, 2016, at [X], in the Province of British Columbia, Staff Sergeant Bari Emam sought a romantic relationship with a subordinate, Ms [R], in a manner that constituted abuse of authority contrary to section 7.1 of the Code of Conduct.
>
> Allegation 2: In April, 2015, at [X], in the Province of British Columbia, Staff Sergeant Bari Emam inappropriately kissed on the cheek and hugged Civilian Member [K], contrary to Section 7.1 of the Code of Conduct.
>
> Allegation 3: In December, 2014, at [X], in the Province of British Columbia, Staff Sergeant Bari Emam inappropriately squeezed the arm/bicep of Civilian Member [M], contrary to Section 7.1 of the Code of Conduct.
>
> Allegation 4: In January 2015, at [X], in the Province of British Columbia, Staff Sergeant Bari Emam kissed on the cheek and hugged Detective Constable [T] of the [Y] Police Department, contrary to Section 7.1 of the Code of Conduct.
>
> Allegation 5: In January 2012, at [X], in the Province of British Columbia, Staff Sergeant Bari Emam kissed on the lips and hugged Detective Corporal [S], contrary to Section 7.1 of the Code of Conduct.
>
> Allegation 6: Between January 1, 2011 and September 1, 2011, at [X], in the Province of British Columbia, Staff Sergeant Bari Emam inappropriate comments to Constable [I], contrary to section 2.1 of the Code of Conduct.

[54] Then, on February 22, 2018, an eight-page Notice of Conduct Hearing was issued setting out seven allegations that the Appellant intended to prosecute, the names of the six women (which remained unchanged), along with the particulars of the contraventions (Material, Conduct Hearing Documents/Notice Conduct Hearing, pp 1-8). I note that section 15 of the *CSO (Conduct)*describes the procedures and documents that must be provided to the subject member facing a conduct hearing.

[55] While I acknowledge that there seems to have been a long drawn out Board directed disclosure phase in this case, there is no doubt that the Respondent was provided with timely information concerning the details of the allegations and the names of the accusers early on in 2017.

Response to Investigation Report

[56] The Board also concluded that the Respondent was denied his right to comment on a preliminary investigation report under the IRHC process had it been followed (Appeal Record, p 33):

> [33] […] In addition, ignoring the mandated IRHC process in favour of a conduct investigation denied the Applicant of his ability to provide a response to a preliminary investigation report. That response may have convinced the decision maker either that the Allegations were unfounded or that they were not serious enough to warrant the initiation of a conduct hearing.

[57] The Board does not mention that on June 23, 2017, the investigators contacted the Respondent by email to ask him if he would be willing to provide a statement in person or written format. On July 3, 2017, the Respondent replied, confirming that he would prepare and provide a written statement, but in the meantime, he requested that the investigators contact six witnesses with respect to Allegation 1 and two witnesses with respect to Allegation 5 (as referenced in the May 31, 2017, Conduct Investigation Mandate Letter). On July 11, 2017, the Respondent wrote again to clarify why he wanted the investigators to speak to those eight employees. I note that the investigation report contains statements in the form of emails and/or audio and transcriptions from all eight witnesses, but no “statement of facts” that the Respondent

claimed in the same email he looked forward to submitting (Material, CARD DISCLOSURE/Investigation Report and materials, pp 495-564).

[58] I accept that any statement or submission by the Respondent would have been voluntarily and it is not surprising that he chose not to provide anything further at that time. Given that a response to a preliminary investigation report in the IRHC process by a subject member could be used against them in the ensuing conduct meeting or hearing, I am not convinced that had the Respondent been presented with an opportunity, he would have actually provided much more in writing in an IRHC process to the investigator(s) in the form of a statement or commentary on the preliminary investigation report, or otherwise. After all, an IRHC investigation was deemed to be a Code of Conduct investigation by section 5 of the *CSO (IRHC)*. In any event, when offered the opportunity in June 2017, to clarify anything he would like by providing his version of events before the Code of Conduct Investigation Report was finalized and presented to the Appellant, the Respondent appears to have ultimately declined.

[59] As pointed out by the Board, on June 8, 2018, the Respondent filed a 13-page response to the seven allegations set out in the Notice of Conduct Hearing in compliance with subsection 15(3) of the *CSO (Conduct)* (CMM Materials/Material from MR/Amended Response to Allegations). That subsection states:

> 15(3) Within 30 days after the day on which the subject 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.

[60] While it is true that preliminary investigation reports existed only within the IRHC process, and when an investigation was actually mandated (see section 5.4.1.8 of the IRHC policy, directing the designated decision maker, “if an investigation is required, mandate such investigation as deemed necessary”), I am satisfied that the Respondent had an opportunity to

clarify or rebut the allegations that were succinctly detailed and brought to his attention in the May 31, 2017, Conduct Investigation Mandate Letter, prior to the Appellant determining whether *prima facie* findings for the allegations were made out, as well as, the application of subsection 41(1) of the *RCMP Act*:

> 41(1) If it appears to a conduct authority in respect of a member that the member has contravened a provision of the Code of Conduct and the conduct authority is of the opinion that the conduct measures provided for in the rules are insufficient, having regard to the gravity of the contravention and to the surrounding circumstances, the conduct authority shall initiate a hearing into the alleged contravention by notifying the officer designated by the Commissioner for the purpose of this section of the alleged contravention.

Furthermore, as I just explained, the Respondent was obligated to provide a response to the Board, pursuant to subsection 15(3) of the *CSO (Conduct)*, and, had the case proceeded, he would have benefited from an array of procedural rights affording him a fulsome opportunity to respond to the seven allegations in the quasi-judicial forum of a conduct hearing.

4. Were the conduct hearing proceedings void *ab initio*?

[61] Lastly, I will address the position the Respondent has taken in his appeal submissions regarding jurisdiction (Appeal Record, pp 447-448, 455). The Respondent states that he agrees with the Appellant that a stay of proceedings was not the appropriate outcome. Rather, he contends that by not applying the *CSO* (*IRHC*), a jurisdictional error occurred voiding the proceedings *ab initio*.

[62] In essence, the jurisprudence the Respondent relies on confirms that, in contrast to the *RCMP Act*, *RCMP Regulations, 2014*, and *CSOs*, policy does not have the force of law, and that statutory instruments set out standards and procedures that are expected to be followed. Those principles are well established.

[63] I also accept that an employer cannot depart from its own policies and instead apply an *ad hoc* procedure because "it must be recognized that such policies create employment standards which govern the conduct of all service personnel", and that "[a] failure to follow those policies

vitiates any process initiated to dismiss an officer for unsatisfactory work performance" (*Ottawa Police Services v Diafwila*, 2016 ONCA 627, at paragraph 68, upholding the Ontario Civilian Police Commission's reasons). The Ontario Court of Appeal went on to explain:

> [69] The Commission was not unreasonable in finding that the Hearing Officer misinterpreted the law when he determined that the OPS was entitled to depart from the strict adherence to its policies and apply an *ad hoc* procedure. The Commission is entitled to a high level of deference and the majority of the Divisional Court erred in granting the application and setting aside the decision of the Commission.

[64] As I discussed earlier, however, the Appellant did not resort to *ad hoc* procedures in this case, nor was the decision to apply the Code of Conduct process arbitrary. Given the circumstances, I am satisfied that the Appellant's decision was consistent with all applicable legislation and RCMP policies, and that the Board had the jurisdiction to preside over the conduct hearing.

[65] For completeness and not intended to be exhaustive, a few situations come to mind that would conceivably undermine a conduct board's jurisdiction *ab initio*. None of them are present here: (1) the prescription period to initiate the conduct hearing under subsection 41(2) of the *RCMP Act* expired and no extension was granted; (2) the subject member was no longer a "member" under subsection 2(1) of the *RCMP Act* when the conduct hearing was initiated; and, (3) the subject member was previously disciplined under Part IV of the *RCMP Act* for the exact same misconduct.

CONCLUSION

[66] While I may have a different view on virtually every aspect of the rationale expressed by the Board in granting the stay of proceedings, I recognize this does not necessarily justify my intervention. Determining whether a decision is clearly unreasonable requires considerable deference and depends on the degree to which the decision is deficient in facts, law, or justification, transparency and intelligibility (see *Dunsmuir v New Brunswick*, 2008 SCC 9, at paragraph 47; and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 13; affirmed in *Vavilov*, where the Supreme Court

of Canada emphasized that the review of an administrative decision is concerned with both the outcome and the reasoning that led to that outcome, at paragraphs 15 and 83). In the end, with the exception of transparency, I find the other deficiencies to be so significant and consequential that no amount of deference can let the Board's decision stand.

DISPOSITION

[67] Pursuant to paragraph 45.16(1)(b) of the *RCMP Act*, I allow the appeal and order a new hearing before a differently constituted conduct board.

[68] To be clear, my decision should not be taken as an endorsement of the file management practices previously applied by the Conduct Authority Representative Directorate in these conduct hearing proceedings.

Steven Dunn, Adjudicator

Date