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2018 RCAD 18



ROYAL CANADIAN MOUNTED POLICE

CONDUCT HEARING

IN THE MATTER OF THE

ROYAL CANADIAN MOUNTED POLICE ACT

BETWEEN:

Commanding Officer, "D" Division

Conduct Authority

and

Constable Fahd El Aste, Regimental No. 58572

Subject Member

Conduct Board Decision

Josée Thibault

December 19, 2018

Mr. Denys Morel, for the Conduct Authority

Ms. Sabine Georges, for the Subject Member

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SUMMARY OF DECISION

The Subject Member admitted to discreditable conduct under section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police. The Conduct Board concluded that allegations 4 and 5, in connection with incidents of domestic violence by the Subject Member against his spouse, were established on a balance of probabilities. Furthermore, the Board accepted the joint proposal on conduct measures submitted by the parties and imposed a reduction of 15 days (125 hours) in the Subject Member’s annual leave bank as a global measure for both allegations.

INTRODUCTION

[1] The Notice of Conduct Hearing was signed by the commanding officer of “D” Division on July 21, 2017, and was served on the Subject Member on August 16, 2017. The Notice sets out five allegations in connection with incidents of domestic violence by the Subject Member against his spouse, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

[2] On September 12, 2018, the parties filed a joint motion with the Conduct Board, seeking the following:

1. amend the statements of particulars contained in allegations 4 and 5 of the Notice dated July 21, 2017, with those included in the Summary of Facts of September 12, 2018; and
2. accept the information set out in the Summary of Facts to establish allegations 4 and 5 on a balance of probabilities.

[3] Because the member admitted allegations 4 and 5, the Conduct Authority asked the Board to grant his motion to withdraw allegations 1, 2 and 3 of the Notice.

[4] Pursuant to the motion, I cancelled the conduct hearing scheduled for the week of September 17, 2018.

[5] On September 21, 2018, I sent my response to the parties in which I granted the joint motion and concluded that allegations 4 and 5 were established on a balance of probabilities.

[6] On November 2, 2018, the parties sent the Board a joint proposal on conduct measures.

[7] This decision contains my response sent to the parties on September 21, 2018, as well as my findings on the member’s conduct measures following the parties’ joint proposal.

DECISION ON THE JOINT MOTION

[8] In their motion, the parties submitted two Conduct Board decisions in which the Board agreed to the withdrawal of the allegations and acceptance of a summary of facts:

- a. *Commanding Officer, "X" Division, and Constable "Y", 2018 RCAD 3*
- b. *Commanding Officer, National Division and Constable Wyant, 2016 RCAD 4*

[9] I have analyzed the contents of the Summary of Facts, the information included in the investigation report related to the two allegations, as well as the documents submitted by the Conduct Authority following the pre-hearing conference held on May 11, 2018. I grant the proposal to amend the statements of particulars contained in allegations 4 and 5 of the Notice dated July 21, 2017, with those of the Summary of Facts.

[10] Notwithstanding my appointment as the Conduct Board to rule on the allegations against the Subject Member, discretion remains with the Conduct Authority to withdraw the allegations contained in the Notice (*Commanding Officer, "E" Division, and Constable O'Brien, 2017 RCAD 9*). Consequently, I grant the Conduct Authority's request to withdraw allegations 1, 2 and 3 of the Notice of July 21, 2017. In short, I will not render a decision on those allegations.

ALLEGATIONS

[11] The Subject Member admits to the following allegations:

[translation]

Allegation 4

Between April 12, 2015 and April 17, 2015 inclusive, at [name redacted] or vicinity, in the Province of Manitoba, [Subject Member] conducted himself in a manner likely to bring discredit upon the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Allegation 5

On or about December 22, 2015, at [name redacted] or vicinity, in the Province of Manitoba, [Subject Member] conducted himself in a manner

likely to bring discredit upon the Force, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police.

[French original quoted verbatim]

[12] The parties submitted a Summary of Facts, dated September 12, 2018, which replaces the statements of particulars in the Notice dated July 21, 2017. The Summary reads in part as follows:

[...]

3. At the material time [Subject Member] was a member of the Royal Canadian Mounted Police (RCMP) assigned to “D” Division, in the Province of Manitoba.

4. At the material time [Subject Member] lived with his spouse [Ms. Z], and their four children in the community of [name redacted], in the Province of Manitoba.

Allegation 4

5. In April 2015, [Subject Member]’s mother was visiting and living in the family home for an extended period that ended on April 17, 2015.

6. On Sunday, April 12, 2015, [Subject Member] and his mother argued with [Ms. Z].

7. During the argument, [Subject Member] became angry with [Ms. Z] and threw her handbag out of the house. He then grabbed [Ms. Z] and pushed her out of the house. Despite [Ms. Z]’s efforts to hold on to the door frame, [Subject Member] forcibly ejected her from the residence and locked the door.

8. [Ms. Z] then pounded the door and demanded that [Subject Member] allow her back into the house, but he refused and told her to leave.

9. [Ms. Z] then contacted the police so she could recover her things and stay at the home of some friends.

10. The following day, [Subject Member] allowed [Ms. Z] to come back home on condition that she not be in the same room as his mother for the rest of her stay and thereby avoid another fight.

11. Over the next three days, [Ms. Z] felt obliged to remain in her bedroom and not come out because of [Subject Member]’s behaviour. When she tried to access the kitchen, [Subject Member] insulted her and told her to return to her room. She felt confined to her bedroom and bathroom. [Ms. Z] had to ask [Subject Member] and the children to bring her food into her room.

12. [Subject Member] acknowledges that his actions, as described in the particulars set out above, bring discredit upon the Force, contrary to section 7.1 of the RCMP Code of Conduct.

Allegations 5

13. On or about December 22, 2015, [Subject Member] and [Ms. Z] fought in the presence of the children.

14. During the fight, [Subject Member] became angry and advanced toward [Ms. Z] with his hand raised in a threatening manner.

15. [Ms. Z] interpreted this action as threatening and believed that [Subject Member] was going to hit her.

16. [Subject Member] stopped what he was doing when [Ms. Z] stated that she would call the police if he touched her. [Subject Member] desisted and did not strike [Ms. Z].

17. Following this incident, [Ms. Z] feared for her safety and left the house.

18. [Subject Member] acknowledges that his actions, as described in the particulars set out above, bring discredit upon the Force, contrary to section 7.1 of the RCMP Code of Conduct.

[French original quoted verbatim]

[13] The Summary of Facts also contains additional facts concerning allegations 4 and 5:

19. On April 19, 2017, [Subject Member] entered into a recognizance under section 810 of the *Criminal Code* before the Provincial Court of Manitoba in connection with the facts set out above.

20. In the said recognizance, [Subject Member] recognizes that [Ms. Z] fears for her safety. He also promises to keep the peace and be of good behaviour for a period of one year and to respect other conditions.

21. Consequently, the Crown suspended four charges of assault under section 266 of the *Criminal Code* and one charge of assault causing bodily harm under paragraph 267(b) of the *Criminal Code*.

22. On December 22, 2015, [Subject Member] and [Ms. Z] separated, and they officially divorced on February 27, 2018.

23. Since the time of the incidents, [Subject Member] and [Ms. Z] have both moved on with their lives and have not had any altercations.

24. [Subject Member] adhered to the terms of his recognizance, which ended on April 19, 2018 (appended).

25. On June 27, 2017, [Subject Member] successfully completed an anger management course with the [name redacted] institution.

[*French original quoted verbatim*]

DECISION ON THE ALLEGATIONS

Discreditable Conduct – section 7.1 of the Code of Conduct

[14] To determine whether the allegations have been established on a balance of probabilities under section 7.1 of the Code of Conduct, I applied a test similar to the one developed by the RCMP External Review Committee in recommendation (1991), 4 A.D. (2d) 103, regarding disgraceful conduct pursuant to subsection 39(1) of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361, in force prior to the legislative reform of November 28, 2014.

[15] The three parts of the test are as follows:

1. The Conduct Authority must prove the acts constituting the alleged behaviour, as well as the identity of the member who is alleged to have committed these acts.
2. The Conduct Board must conclude that the member's behaviour is likely to discredit the Force.
3. The Board must determine whether the behaviour is sufficiently related to the member's duties and functions to provide the Force with a legitimate interest in disciplining the member.

[16] Based on the admissions of the Subject Member and the Summary of Facts submitted jointly by the parties, I find that the identity of the member and the acts constituting the alleged misconduct for both allegations were established by the Conduct Authority on a balance of probabilities.

[17] Regarding allegation 4, the Conduct Authority established that, following a family dispute between Subject Member's mother and Ms. Z, the member grabbed Ms. Z, pushed her out of the house and locked the door. Ms. Z sought help from the police to recover her personal effects and she went to stay at the home of some friends. When she returned to the house, Ms. Z was not allowed to be in the same room as her mother-in-law. For three days, Ms. Z felt obliged

to remain in her bedroom because the Subject Member would tell her to go back to her room and insult her when she tried to reach the kitchen. Accordingly, Ms. Z felt confined to her bedroom and bathroom. She had to ask the Subject Member and her children to bring her food to her room.

[18] Regarding allegation 5, the Conduct Authority also established that, during a dispute in front of the children, the Subject Member became angry and advanced toward Ms. Z with his hand raised in a threatening manner. He desisted when Ms. Z stated that she would call the police if he touched her. Following this incident, Ms. Z feared for her safety and left the house.

[19] The incidents in allegations 4 and 5 were the subject of criminal proceedings and were resolved through a recognizance under section 810 of the *Criminal Code*, RSC (1985), c. C-46 (*Criminal Code*), in Manitoba Provincial Court. The recognizance ended on April 19, 2018.

[20] RCMP members play a key role in domestic violence prevention by enforcing the law. They are asked on a daily basis to intervene in domestic violence situations. The Subject Member's behaviour towards his spouse was entirely unacceptable, and the public would be disappointed in his conduct, as they expect RCMP members to act in an exemplary manner and uphold the core values of the RCMP, which are honesty, integrity, professionalism, compassion, accountability and respect.

[21] Consequently, I find that a reasonable person in society, with the knowledge of all the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the member's discreditable conduct as set out in the two allegations as discrediting the Force. His behaviour is related to his duties and functions as a member of the RCMP, and conduct measures are necessary.

[22] Allegations 4 and 5 are established on a balance of probabilities.

DECISION ON CONDUCT MEASURES

Analysis of conduct measures

[23] The RCMP External Review Committee established that the Board's analysis of conduct measures must be carried out as a three-step process:

1. establish the range of appropriate sanctions;
2. consider the aggravating factors and mitigating factors to assess the seriousness of the misconduct; and
3. impose a fair and just conduct measure proportionate with the seriousness of the misconduct in question while taking the principles of parity of sanction and deterrence into account.

Range of conduct measures

[24] The range of conduct measures applicable to the Subject Member's misconduct, which is in contravention of section 7.1 of the Code of Conduct, extends all the way to dismissal. The parties assert that, in accordance with the *Conduct Measures Guide, 2014*, the recommended conduct measure is forfeiture of three to ten days' pay for cases involving relatively minor use of force.

[25] Consequently, the parties note that a global measure for both allegations, which would include a 15-day (125 hours) reduction from the Subject Member's annual leave bank, is an appropriate sanction in the circumstances.

Aggravating factors

[26] I accept the following aggravating factors submitted by the parties:

1. The necessity for the member to rely on the intervention of RCMP members to resolve the family dispute of April 12, 2015.

2. The member is responsible for two incidents that became the subject of criminal proceedings and were resolved through a recognizance entered into under section 810 of the *Criminal Code* in Manitoba Provincial Court.
3. The member's disciplinary record includes three incidents relating to failure to report to work that took place on November 13, 2015, June 30, 2016, and between April 6, 2018 and July 27, 2018. The three most recent incidents occurred while the member was required to comply with his Code of Conduct obligations, as indicated in the suspension order issued in this case on January 11, 2016.
4. The member has already been subject to conduct measures on four occasions, and he has only nine years' service with the Force, which is relatively short.

Mitigating factors

[27] I accept the following mitigating factors:

1. The Subject Member accepts his responsibility and admits to allegations 4 and 5. He acknowledges that his conduct was inappropriate.
2. The Subject Member has a good work record. I note that his supervisor feels he has the qualities required to become a productive member of his detachment, that he is dedicated to his work, and that he makes efforts to excel in whatever he undertakes.
3. The Subject Member cooperated with the internal and criminal investigative services by providing two statements, on January 8 and 21, 2016.
4. In the joint proposal submitted by the parties, the Subject Member demonstrates a desire to resolve this case without necessitating the testimony of vulnerable witnesses.
5. The Subject Member complied with all of the conditions imposed on him as part of the recognizance he entered into under section 810 of the *Criminal Code* before the Provincial Court of Manitoba following the incidents described in allegations 4 and 5 of the Notice. The recognizance ended on April 19, 2018.

6. The Subject Member completed anger management training on June 27, 2017.
7. There is a low probability of recidivism for the misconduct admitted by the Member because he has not lived with Ms. Z since December 22, 2015. Since the incidents, the Subject Member and Ms. Z have moved on with their lives and have not had any altercations.
8. The Subject Member has the support of the Commanding Officer for a return to work, and the reintegration process has already begun.

Imposition of conduct measures

[28] The third and final step is to determine the appropriate sanction in this case.

[29] In accordance with paragraph 36.2(e) of the *RCMP Act*, conduct measures are required to be proportionate to the nature and circumstances of the contravention and, where appropriate, educative and remedial rather than punitive.

Authorities in support of the requested conduct measures

[30] In support of the joint proposal on the requested conduct measures, the parties rely on four RCMP Conduct Board decisions:

1. *Constable A. Wyant*, 2016 RCAD 4
2. *Constable Kirychuk*, (2013) 13 A.D. (4th) 605
3. *Caporale Henry*, (2011) 6 D.A. (4th) 41
4. *Gendarme Jolson*, (2009) 4 D.A. (4th) 241

[31] As indicated by the parties, with the exception of *Wyant* (2016 RCAD 4), the other decisions submitted to the Board were decided under the former disciplinary process. Since the new RCMP conduct process came into effect in 2014, the range of disciplinary measures has increased significantly. Under the old system, the maximum sanction for forfeiture of pay was

limited to 10 days. Notwithstanding the importance of these decisions, the Board nevertheless has the discretion to impose a higher forfeiture of pay for situations involving similar facts.

[32] This discretion is limited, however, when a joint proposal on conduct measures is submitted to the Board by the parties, as in the present case. As a general rule, even if the courts or administrative tribunals do not fully agree with the joint proposal, they will not reject it unless they can show that it is contrary to the public interest.

[33] The public interest test has a very high threshold. The Supreme Court of Canada, in *R. v. Anthony-Cook*, 2016 SCC 43, indicates at paragraph 34 that a joint proposal must not be rejected too readily:

Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

[34] The public interest test was also adopted in the context of professional discipline in *Rault v. Law Society (Saskatchewan)*, 2009 SKCA 81 [*Rault*], and in the recent decision of the RCMP Commissioner, *Constable Coleman and Appropriate Officer, "F" Division*, (2018) 18 A.D. (4th) 270. Following *Rault*, a joint proposal must be seriously considered by the Board unless it is unsuitable, unreasonable, or contrary to the public interest.

Additional comments submitted by the parties

[35] In the joint proposal, the parties inserted additional comments in support of their joint proposal on conduct measures. The parties indicate, first, that the nature of the Subject Member's actions had aggravating aspects. For example, Ms. Z felt she was being confined to her bedroom and bathroom; for four days she had to ask the children and the member to bring her food (from April 13 to 17, 2015); and the acts of domestic violence occurred in the children's presence.

[36] As I indicated above, such behaviour on the part of the Subject Member was entirely unacceptable. According to the Code of Conduct, members must at all times consider the potential impact of their acts and behaviour in order to protect their credibility and public

confidence. These two elements are necessary in order to carry out their mandated policing duties effectively.

[37] Second, the parties explained that the proposed global measure, namely, a reduction of 15 days (125 hours) from the Subject Member's annual leave bank, took into account the member's financial burden, which includes an obligation to pay child support for his four children.

[38] Finally, the Conduct Authority added the following comment, which I strongly support:

[Translation]

Subject to the Board's decision on the joint proposal in this case, the Disciplinary Authority, the Commanding Officer of "D" Division, expects the Subject Member to demonstrate exemplary conduct in the future. This joint proposal represents an opportunity for the Subject Member to pursue his career while respecting the values of the RCMP and the standards of conduct imposed by the Code of Conduct. Any future contraventions will be treated seriously by the Subject Member's supervisors and disciplinary authorities and may lead to the Subject Member's dismissal. [*French original quoted verbatim*]

CONCLUSION

[39] Having reviewed the evidence on the record, the nature of the member's misconduct, the aggravating and mitigating factors, the decisions submitted by the parties and the additional comments, I am unable to conclude that the joint proposal on conduct measures submitted by the parties is contrary to the public interest.

[40] Therefore, I accept the joint proposal on conduct measures. I am imposing, as a global measure for both allegations, a reduction of 15 days (125 hours) in the Subject Member's bank of annual leave.

[41] This decision may be appealed to the Commissioner by filing a statement of appeal within 14 days of the service of this decision on the Subject Member (section 45.11 of the *RCMP Act*; section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289).

December 19, 2018

Josée Thibault

Date

Conduct Adjudicator