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ROYAL CANADIAN MOUNTED POLICE

in the matter of

a conduct hearing pursuant to the

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

Between:

Commanding Officer, "E" Division

Conduct Authority

and

Constable Valerie Little, Regimental Number 58351

Subject Member

Conduct Board Decision

Josée Thibault

January 29, 2020

Staff Sergeant Jonathan Hart, Conduct Authority Representative

Ms. Sara Novell, Subject Member Representative

TABLE OF CONTENTS

SUMMARY	3
BACKGROUND	5
PRELIMINARY MOTIONS	6
a) Preservation order	6
b) <i>In camera</i> hearing	7
c) Publication ban for <i>in camera</i> hearing	8
ALLEGATIONS.....	9
Summary of facts	10
Credibility of witnesses	11
Post-incident encounters.....	15
Test for discreditable conduct	18
Allegation 1 – video room incident.....	19
Allegation 2 – hallway incident	21
CONDUCT MEASURES	25
Range of conduct measures	25
Aggravating factors	28
Mitigating factors	28
Parity of sanction.....	29
CONCLUSION.....	30

SUMMARY

The *Notice of Conduct Hearing* contained two allegations of discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct. In the first allegation, it is alleged that between November 1, 2009, and February 3, 2010, Constable Little, while on-duty, made an inappropriate comment of a sexual nature to Constable A. F. and touched his thigh without consent. In the second allegation, it is alleged that on February 3, 2010, Constable Little was off-duty, but met

Constable A. F. in the hallway of the Detachment as they prepared to play in a community broomball game. Constable Little squeezed Constable A. F.'s genitals for 1-2 seconds, without consent. No one witnessed the two incidents.

Following a contested hearing, the Conduct Board concluded that the two allegations were established on a balance of probabilities. Given the nature of the allegations and the similarity of events, the Conduct Board imposed the following:

- a. A global forfeiture of 30 days, including 20 days' forfeiture of pay and 10 days' forfeiture of annual leave, due to Constable Little's financial hardship;
- b. Ineligibility for promotion for a period of 2 years, effective from the date of Constable Little's reinstatement;
- c. A direction to work under close supervision for a period of 1 year, effective from the date of Constable Little's reinstatement; and
- d. A restriction on Constable Little's duties, if and as required, in order to ensure that she is not posted to the same Detachment or work location as Constable A. F. It is also ordered that a copy of this decision be provided to the "E" Division Career Development and Resourcing Officer (EHQ, CDRO).

BACKGROUND

[1] On January 21, 2019, the Commanding Officer and Conduct Authority for “E” Division (the Conduct Authority) signed a *Notice to the Designated Officer* requesting a conduct hearing be initiated in relation to this matter. On January 29, 2019, I was appointed as the Conduct Board pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*].

[2] The *Notice of Conduct Hearing* (the Notice) contained two allegations of discreditable conduct contrary to section 7.1 of the RCMP Code of Conduct. The Notice was signed by the Conduct Authority on February 21, 2019. It was served on the Subject Member, together with the investigation package, on March 13, 2019. The particulars of the allegations describe conflicting accounts by the parties regarding two historical non-consensual sexual incidents that occurred in the workplace. The first incident occurred in or about November 2009 and the second incident in February 2010.

[3] On April 4, 2019, Constable Little provided her response to the Notice, pursuant to subsection 15(3) of the *Commissioner’s Standing Orders (Conduct)*, SOR/2014-291 [*CSO Conduct*].

[4] The hearing in this matter was held in Vancouver, British Columbia, from August 19 to 22, 2019. The oral decision establishing the two allegations was delivered on August 22, 2019. The oral decision on conduct measures was delivered on August 28, 2019. This written decision incorporates and expands upon those oral decisions.

[5] Before pursuing with my analysis of this matter, I want to state at the outset that I did not draw a negative inference from Constable A. F.’s delay in reporting (i.e., almost 10 years after

the first incident);¹ and/or post-incident conduct including stereotypes and assumptions about how a victim of sexual misconduct should behave.²

[6] I would also like to specify that any reference to sexual assault made in the Notice or during these proceedings should not be interpreted as a determination as to whether a sexual assault, as set out in the *Criminal Code*, RSC, 1985, c C-46, has been established. The Supreme Court of Canada, in *F.H. v McDougall*, 2008 SCC 53 [*McDougall*], has specified that the standard of proof for administrative law proceedings is on a balance of probabilities. This includes sexual misconduct or sexual harassment matters adjudicated by an RCMP conduct board.

PRELIMINARY MOTIONS

a) Preservation order

[7] On April 2, 2019, the Member Representative requested that the Conduct Board issue a preservation order of the video footage of the Nanaimo Detachment for the period dating from March 22, 2017, to May 20, 2017. The Member Representative argued that there was contradictory evidence with respect to encounter that took place in the spring of 2017 between the parties. Specifically, Constable A. F. claimed that he was uncomfortable in Constable Little's presence and denied giving her a tour of the Detachment. Since the RCMP computer system was automatically overwriting video footage data for February 2017, the preservation order was necessary to safeguard the evidence.

[8] Constable Little's version of events differed and she believed that the video footage would corroborate her evidence. However, Constable Little was unable to confirm the date of the encounter. According to the Conduct Authority Representative, preserving the video footage for

¹ *R. v D.(D.)*, 2000 SCC 43, [2000] 2 SCR 275, starting at paragraph 58; *R. v ADG*, 2015 ABCA 149, at paragraph 30.

² *R. v T.B.*, 2018 PEI SC; *R. v Ururyar*, 2017 ONSC 4428; *R. v Nyznik*, 2017 ONSC 4392.

a period of 60 days, as requested, was not a simple process. There were technical difficulties and significant resource implications.

[9] I denied the Member Representative's request because, as indicated by the Conduct Authority Representative, the video footage did not pertain to the alleged conduct as set out in the allegations. It was also unclear at the time of the motion that the evidence sought by Constable Little was material and necessary to assist the Conduct Board in determining whether the allegations would be established. Lastly, although the video footage may have contradicted Constable A. F.'s evidence by showing that he did give Constable Little a tour of the Detachment, as claimed, credibility of witnesses is assessed on the totality of clear, cogent and reliable evidence. Several factors such as demeanour, ability to perceive, memory, motivation, probability and consistency will be considered by the Conduct Board.

b) *In camera* hearing

[10] On June 21, 2019, the Member Representative requested that the entire hearing be held *in camera* in accordance with subsection 45.1(2) of the *RCMP Act*. In addition, the Member Representative requested that Constable Little's identity be protected with a publication ban on information disclosed during the *in camera* hearing as per paragraph 45.1(7)(b) of the *RCMP Act*. The Conduct Authority Representative did not oppose the Member Representative's request and submitted that, given the sensitive nature of this matter, Constable A. F. also preferred that the hearing be held *in camera*.

[11] Notwithstanding the parties' position, I denied the request for the following reasons:

- a. As clearly stated in the *RCMP Act*, Conduct Board hearings are held in public. The open court principle was applied in *Southam Inc. v Canada (Attorney General)*, 1997 CarswellOnt 4376, in which the Ontario Superior Court of Justice stated that RCMP conduct hearings are public. The Court also acknowledged that information pertaining to ongoing criminal investigations, the identity of a confidential source of information and police operational techniques may have to be protected.

- b. In exceptional cases, conduct boards have held entire hearings *in camera* where there was a serious risk that the evidence might reveal the identity of a confidential source of information or police operational techniques. Parts of hearings have also been held *in camera* to protect the member's medical information.
- c. Although I recognized that highly personal and sensitive information may be revealed during the hearing, I did not find that the sensitivity of the issues outweighed the considerations in favour of a public hearing. Conduct hearings involve the misconduct of RCMP members where the Commanding Officer of a Division is requesting the member's dismissal. The public has a vital interest in the performance of police officers who are given broad powers to preserve the peace and uphold the law. The need for transparency is high and holding an entire hearing *in camera* is an extraordinary measure that must be determined on a case-by-case basis and applied in truly exceptional cases. In the end, I did not find that the circumstances in this case met that threshold.

c) Publication ban for *in camera* hearing

[12] With regard to ordering a publication ban to protect Constable Little's identity, it, too, was denied as the hearing was not going to be held *in camera*. In addition, pursuant to the *RCMP Act*, Constable Little was not a witness or a person under the age of 18. Any departure from the general rule of openness and public access to conduct proceedings must meet the test defined by the Supreme Court of Canada in *Dagenais-Mentuck*.³ Essentially, the publication ban must be necessary and relate to an important objective that cannot be achieved by a reasonable alternative measure. In addition to limiting its use as much as possible, the positive effects of the ban must outweigh the negative impact of other rights and interests affected.

[13] Given the public interest into open hearings, compelling reasons are required to warrant a publication ban on the identity of Constable Little as well as the allegations or particulars alleged against her. I found that these reasons did not exist in this case.

³ *Dagenais v C.B.C.*, (1994) 94 CCC (3d) 289, and *R. v Mentuck* (2001) 1 CCC (3d) 449

ALLEGATIONS

[14] As previously noted, there are two allegations before the Conduct Board and they read as follows:

Allegation 1

On or between November 1, 2009, and February 3, 2010, at or near Vernon, in the Province of British Columbia, Constable Valerie Little behaved in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars of Allegation 1

1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to “E” Division, at Vernon Detachment in British Columbia.
2. While on duty, you and Constable A. F. were observing the Serious Crime Unit – along with other members – conduct an interview of a suspect who was accused of a sexual related offence. You were observing this interview by way of video feed for educational and training purposes. At one point in the interview, when the male suspect was discussing his own sexual preferences, you leaned over to Constable A. F. and placed your right hand on his left thigh and quietly whispered in his ear words to the effect of: “I like to take it from behind”.
3. Constable A. F. did not give you consent to touch him. Constable A. F. did not initiate or otherwise engage with you with respect to your inappropriate sexual preference comment made within the workplace.

Allegation 2

On or about February 3, 2010, at or near Vernon, in the Province of British Columbia, Constable Valerie Little behaved in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars of Allegation 2

1. At all material times you were a member of the Royal Canadian Mounted Police (“RCMP”) posted to “E” Division, Vernon detachment in British Columbia.
2. On February 3, 2010, both you and Constable A. F. participated in a community relations event – broomball tournament – which was supported by RCMP management. The Vernon RCMP entered a team into the tournament. It became known amongst the tournament players that they needed to take steps to protect themselves by wearing a jockstrap and cup as

the game can get “pretty rough”. This conversation amongst RCMP players took place within the Vernon RCMP detachment in a hallway outside of the [Operations] Support [Non- Commissioned Officers] office.

3. At one point, only you and Constable A. F. remained in the detachment hallway. You approached Constable A. F. while he was leaning up against a wall. You proceeded to grab the penis of Constable A. F. and squeezed his penis with your fingers while stating: “I see you’re not wearing a cup”. Constable A. F. was wearing athletic wear including thin polyester shorts at the time you grabbed onto his penis.

4. Constable A. F. did not give you consent to touch him in a sexual manner. You sexually assaulted Constable A. F. Constable A. F. was embarrassed and shocked by [y]our unwanted sexual advance and responded by walking away from you.

5. As a male RCMP member and you being a female, Constable A. F. determined that there was nothing he could do about your unwanted sexual advance. Shortly after the incident, Constable A. F. sought out the assistance of retired [member, Ms. K. S.], however, she did not take his complaint as a male victim of sexual assault seriously as she “chuckled” when informed.

[Sic throughout]

Summary of facts

[15] Constable A. F. and Constable Little are both regular members that worked at Vernon Detachment in 2009 and 2010. At the time of the two sexual misconduct incidents, Constable Little was a new recruit at the Detachment.

[16] The parties did not work or socialize together on- or off-duty. While on-duty, they barely interacted with each other, never joked or flirted together or even exchanged personal information.

[17] Constable Little felt respect and reverence towards Constable A. F. due to her knowledge of his involvement in a difficult on-duty shooting incident early in 2007.

[18] The first sexual misconduct incident, known as the video room incident, occurred between November 1, 2009, and February 3, 2010. The second incident, known as the hallway incident, occurred on February 3, 2010.

[19] The parties never discussed the incidents between themselves. Constable A. F. did not respond to Constable Little's comment or gesture on either occasion.

[20] Constable A. F. left Vernon Detachment in March 2011 and the parties had no interactions after his departure.

[21] The parties unexpectedly met in the spring of 2017. At that time, Constable A. F. was on-duty at Nanaimo Detachment. Constable Little, who was on maternity leave, came into the Detachment to visit someone. The parties have conflicting accounts of the interaction between them at the time.

[22] The parties unexpectedly met again on August 2, 2018, while they were both attending a medical appointment located in the same building in Nanaimo. The parties also have dissimilar versions of this encounter.

[23] Following the encounter on August 2, 2018, Constable A. F. informed RCMP management of the video room and hallway incidents, which led to the Code of Conduct investigation against Constable Little.

[24] Both parties have high regard for Ms. K. S., who was an experienced RCMP officer working in Vernon Detachment at the time of the incidents. Constable A. F. only confided in her about the hallway incident.

Credibility of witnesses

[25] I have heard oral evidence from three witnesses: Ms. K. S., Constable A. F. and Constable Little. In assessing their credibility, I have taken into consideration many factors such as their motivation, whether they were frank, forthright or evasive, and consistent throughout. As stated in paragraph 56 of *R. v T.B.*, 2018 PESC 3: "The assessment of credibility is not a science. [...] The law directs that I consider a variety of factors in assessing credibility including commons sense and logic."

[26] Given the historical nature of this matter, reliability was a significant factor. Therefore, I also assessed the witnesses' ability to observe, recount and recall the details of the two incidents, the inconsistencies and whether the explanations were improbable on their face or even lacked an air of reliability. Finally, I was guided by *R. v. Clark*, 2012 CMAC 3, which states in paragraph 40 that "a trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings". In paragraph 48, the court states that the "testimony of a credible, in other words an honest witness, may nonetheless be unreliable: *R. v. Morrissey* (1995), [...] 97 CCC (3d) 193 (Ont CA), at p. 205)."

[27] In this specific case, when assessing the credibility of each witness, I was also guided by two leading authorities. The first one is *Faryna v Chorny*, [1952] 2 DLR 354 (BCCA), at page 357, which states:

[...] The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. **The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions.** In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. **Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.** [...]

[Emphasis added]

[28] The second decision is *McDougall*, in which the Court specified that "[...] evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. [...]"

[29] I found Ms. K. S. to be credible and for her evidence to also be reliable. She was honest in expressing her views and she had no resentment towards either party. She admitted to acting

friendly with Constable Little because they were co-workers, but that she was not personally close to her.

[30] On the other hand, Ms. K. S. confirmed that she worked on a daily basis with Constable A. F. In fact, they spent about 60% of their time working together in the School Liaison Program. She acted as a mother towards him and he considered her his mentor. Nonetheless, they never attended social gatherings together. They also did not communicate with each other after Constable A. F. left Vernon Detachment in March 2011. Ms. K. S. testified that she commented a few times on pictures he posted on Facebook, but Constable A. F. never replied.

[31] At the hearing, Ms. K. S. described Constable A. F. as a “very together with-it guy”.⁴ “He was a stand-up, decent, hard-working guy”.⁵ She felt that he confided in her about the hallway incident because he trusted her. In cross-examination, she categorically denied that he could be lying or fabricating the two incidents in question. I would like to clarify that I was not bound to accept Ms. K. S.’ character evidence of Constable A. F. As such, I made my own determination based on the evidence presented at the hearing and in the record.

[32] According to the Member Representative, the testimonies of Constable A. F. and Ms. K. S. were filled with a myriad of inconsistencies, which negatively affected their reliability. For example, while Ms. K. S. said that Constable A. F. got really angry at her initial reaction when learning about the hallway incident, he did not recall his outburst when testifying at the hearing. However, Constable A. F. did testify that he was upset and embarrassed as he felt that Ms. K. S. did not take him seriously at first. In the end, he felt confident that Ms. K. S. understood what happened, she believed him and was going to tell Constable Little that he did not want to pursue any kind of relationship with her.

[33] Another inconsistency is the fact that Constable A. F. testified that he did not pursue that matter further as he was satisfied that Ms. K. S. had spoken to Constable Little as requested. When she testified at the hearing, Ms. K. S. explained that she did not have a fulsome

⁴ Hearing Transcript, August 19, 2019, page 43 of 160

⁵ Hearing Transcript, August 19, 2019, page 45 of 160

conversation with Constable Little. In fact, she made a short comment in passing to the effect of: “You gotta keep your hands to yourself it’ll get you in trouble”,⁶ as this was her way of jokingly dealing with delicate situations such as these. Also Ms. K. S., could not confirm if she addressed the issue with Constable Little within a few days or weeks after the incident since the parties had different work schedules. It must be noted that in his testimony, Constable A. F. confirmed having felt that Ms. K. S. may have “brush[ed] it off a little bit”. Regardless, he had hoped that the message had gotten across and that such incidents would not happen again.

[34] Although I acknowledge that there were some inaccuracies between the testimonies provided by Ms. K. S. and Constable A. F., I disagree with the Member Representative that they were significant when looking at the totality of the evidence and most importantly the passage of time. In the end, I find that the inaccuracies were explained by the evidence in the record and they had little effect on Ms. K. S.’s overall credibility and reliability.

[35] As for Constable A. F., I found him credible. Given the circumstances, he was a very anxious and emotional witness. At times, his recollection of events and descriptions of the video room and the hallway, for example, was not as precise as that of Constable Little. Nonetheless, he was very direct in his answers and he did not try to embellish or perfect them over time. He exhibited sincerity and candour. In the end, his evidence was more logical and plausible than that of Constable Little.

[36] In addition, Constable A. F.’s evidence did not point to any plausible motive for him to fabricate the allegations in question against Constable Little, with whom he barely interacted while working at Vernon Detachment. Although his evidence contained some inconsistencies with Ms. K. S.’s testimony, as previously mentioned, I disagree with the Member Representative that they negatively affected his reliability. When looking at the totality of the evidence, I conclude that it was clear, convincing and cogent.

⁶ Hearing Transcript, August 19, 2019, page 59 of 160

[37] As for Constable Little, I generally found her to be credible. During her testimony, she appeared to have a firm memory and provided a myriad of details and observations regarding the two incidents as well as her post-incident encounters with Constable A. F. at the Nanaimo Detachment in the Spring of 2017 and the psychologist office in August 2018.

[38] However, when analyzing more closely the totality of the evidence, I found that Constable Little embellished and editorialized her testimony which in the end negatively impacted my assessment of her credibility. This was done for example when describing the Vernon and Nanaimo detachments, the missing girl poster hanging on the wall, the physical description of the officers sitting in the front entrance of the Nanaimo Detachment or recalling the exact conversations she had a decade ago with colleagues.

[39] Also, during her testimony, Constable Little made some assertions regarding her transfer to Nanaimo Detachment in 2018 which were unsupported by the evidence. In the end, Constable Little's certainty in her recollection of the two historical incidents and her conversations with Constable A. F. raised some doubts and concerns on the reliability of her evidence. It simply did not have a clear ring of truth which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Post-incident encounters

[40] There are two significant post-incident encounters between the parties that were used in my assessment of the witnesses' credibility and the reliability of their evidence. Although they do not form part of the two allegations and particulars found in the Notice, they provide context and helped me understand how the sexual misconduct complaint arose. It must be noted that the encounters were first raised in Constable Little's statement of November 10, 2018, sent to the Code of Conduct investigation. Then on April 2, 2019, the Member Representative requested that the Conduct Board issue a preservation order of the video footage of the Nanaimo Detachment, stating that the evidence was relevant to the credibility of the parties who had contradictory accounts of the spring 2017 encounter. Constable A. F. provided a statement of

both encounters to the Code of Conduct investigator. Finally, at the hearing, both parties provided evidence on the encounters during direct and cross-examinations.

[41] The first post-incident encounter took place in the spring of 2017, at Nanaimo Detachment. Constable Little testified that she went to the Detachment to speak to the supervisor of the School Liaison Program, where she was pursuing a future position. Upon her arrival, she saw Constable A. F. standing near the mailbox at the entrance. According to Constable Little, Constable A. F. greeted her warmly. They had a friendly conversation and spoke for approximately 10 minutes about her pregnancy, her current living arrangements in Nanaimo, and most importantly her plans to transfer to Nanaimo Detachment after her maternity leave in September 2018. They also discovered that they were both seeing the same psychologist. Finally, Constable A. F. gave her a tour of the Detachment and brought her to the School Liaison Office, where he introduced her to a female member named Samantha.

[42] In her response to the Conduct Board, Constable Little raised that Constable A. F. neglected to voluntarily disclose this first encounter when providing his initial statement to the Code of Conduct investigator. In cross-examination, Constable A. F. explained that he did not mention the encounter when giving his first statement because he believed that he had answered all relevant questions asked by the Code of Conduct investigator. In addition, to him, the encounter was benign. The record indicates that the investigator did not ask Constable A. F. if he had met Constable Little following the incidents. When questioned about it in his second statement, Constable A. F. provided a full account of the encounter. Specifically, he denied talking about his psychologist and giving her a tour of the Detachment. Although he explained that he was hoping to never see Constable Little again and he did the minimum he could to remain professional. He also stated that the encounter was brief. Constable Little told him that she worked in Campbell River, was on parental leave, and asked superficial basic office questions. Since she wanted access to a computer, he brought her the first one available and went back to his office.

[43] I find Constable Little's version of the encounter implausible. As indicated by the Conduct Authority Representative, the two members were not friends and never discussed

personal information while working together at Vernon Detachment. Now during this short 10-minute impromptu encounter, Constable Little discussed two material facts with Constable A. F. At first, she was transferring to Nanaimo Detachment where she was interested to work in the School Liaison Program. Secondly, they both consulted the same psychologist who had diagnosed each of them with post-traumatic stress disorder.

[44] Considering Constable A. F.'s reserved demeanour as well as his short and precise answers during his testimony, I prefer by far his version of events and find that Constable Little's testimony was self-serving and bolstered by details to enhance her credibility.

[45] As explained by Constable A. F. at the hearing, when he left Vernon Detachment in March 2011, he thought that the two sexual misconduct incidents with Constable Little were behind him. If he had known in the spring of 2017 that Constable Little was transferring to his Detachment in September 2018, as she claimed, he would have denounced her then and not after the second encounter in August 2018. I find this response from Constable A. F. to be more consistent with the evidence.

[46] In fact, the evidence shows that it is more likely than not that Constable A. F. discovered he was consulting the same psychologist as Constable Little when giving his second statement to the Code of Conduct investigator and not when he spoke to her briefly during the spring 2017 encounter, as she claimed. This is a summary of his response to the investigator: "Like, are you talking about the same office or the same doctor? ... the same psychologist? That, that's the first I heard about that. ... I don't just randomly tell people I go see a psychologist. ... same psychologist, my goodness."

[47] I further questioned the reliability of Constable Little's evidence when she described the second post-incident encounter with Constable A. F. on August 2, 2018. According to her, she was in the presence of Constable A. F. for approximately 10 seconds. She said hello to him and he pointed the finger at the ceiling indicating the psychologist's office on the floor above and said something to the effect that he was late and had to go before he ran up the stairs.

[48] As for Constable A. F., he said that they talked for about one minute. She informed him that she was transferring to Nanaimo Detachment in September 2018. He was completely overwhelmed and never thought that he would see her again. As a result, he spent his entire session with the psychologist talking this through. He felt stuck and knew he could not work with her as he was afraid something else may happen. As per the evidence, immediately following the appointment, Constable A. F. contacted his Member Workplace Advisor and informed him of the two sexual misconduct incidents.

[49] The evidence also indicates that, on August 1, 2018, the day before the encounter at the psychologist's office, Constable Little received her official Form 1272 – *Notification of Transfer Planning*, which confirmed her willingness to transfer to the Nanaimo Detachment. At the hearing, she testified being quite excited about the possible transfer she had been requesting for a few years. Given Constable Little's very expressive and talkative personality, as observed during the hearing, I find that it is more likely than not, that she shared her great news with Constable A. F. when she met him at the psychologist's office and not during the first spring 2017 encounter at the Nanaimo Detachment, as claimed.

Test for discreditable conduct

[50] Section 7.1 of the RCMP Code of Conduct states: "Members behave in a manner that is not likely to discredit the Force." The test for "discreditable conduct" was developed by the RCMP External Review Committee and consists of three steps. First, the Conduct Authority must prove, on a balance of probabilities, the acts that constitute the alleged conduct, as well as the identity of the member who is alleged to have committed these acts. In this matter, the identity of Constable Little is not an issue. Second, if the Conduct Authority is successful, the Conduct Board must then determine if a reasonable person in society, with knowledge of all of the relevant circumstances, including the realities of policing in general and of the RCMP in particular, would view Constable Little's conduct as likely to discredit the Force. Finally, the Conduct Board must determine whether the conduct is sufficiently related to Constable Little's duties and functions as to provide the Force with a legitimate interest in disciplining her.

Allegation 1 – video room incident

[51] In Allegation 1, Constable Little admitted to particular 1 and denied particulars 2 and 3. With regard to particular 2, Constable Little denied placing her right hand on Constable A. F.'s left thigh and quietly whispering in his ear words to the effect of: "I like to take it from behind." She submitted that, although she does not recall viewing a sexual assault suspect interview video in the Vernon Serious Crime Unit, she did attend this area on another occasion to observe an interview of a male suspect accused of shaking his girlfriend's baby to death. She explained that she was new in the Detachment and would not touch or discuss her sexual preference with a stranger in a room full of RCMP members.

[52] During her cross-examination, Constable Little became defensive and replied that she did not remember if she was sitting when watching the video she alleged she was watching or if she may have been standing to see over people's head. She also added that this was why she did not draw chairs on her drawing of the video room layout; instead, she had drawn arrows to show the direction that everyone was facing. She also agreed that there were chairs in the room, but she did not recall Constable A. F. being there.

[53] Constable A. F. confirmed in his statements to the Code of Conduct investigator and at the hearing that the comment from Constable Little was unexpected. He testified that he did not misinterpret what Constable Little said. Her comment essentially mirrored what they had been watching on the video. He was surprised by the comment and did not respond to Constable Little.

[54] As indicated in particular 3, Constable A. F. did not consent to being touched and did not initiate or otherwise engage with Constable Little with respect to her sexual preference comment. In fact, he testified that the comment made him very uncomfortable as it was not welcomed or solicited in any way. Following the incident, he avoided interaction with Constable Little and he did not report the incident to his supervisors. He thought she understood that he was not interested, that it was a "one-off", and that she would not try anything again.

[55] In cases of unwanted sexual advances, corroboration is not required to establish the allegation on a balance of probabilities. There is no evidence to corroborate Constable A. F.'s assertion that the two of them attended the video session. No one witnessed the incident and Constable A. F. never mentioned anything to a colleague or even his wife. He simply ignored the gesture and did not reciprocate.

[56] It was Constable Little's position that the Conduct Board can, with common sense and logic, assess that the events as described by Constable A. F. lack an air of reality. In her view, it was unlikely that a new recruit at a detachment, in a committed relationship and who had virtually no relationship with Constable A. F., whom she respected, would touch his thigh and share sexual preference details in a room full of other members who were watching a suspect interview in the workplace.

[57] Where there is conflicting testimony, the Supreme Court of Canada at paragraph 86 in *McDougall* states: "[...] finding the evidence of one party credible may well be conclusive of the result because that evidence is inconsistent with that of the other party [...]." In this case, I must say that my credibility findings of the parties were determinative of the outcome. When assessing the totality of the evidence, I found it improbable that Constable A. F. would have made up this first allegation to fit a particular set of circumstances. For example, in this allegation, the content of the video where the interviewee was speaking about his sexual preference matched the comment whispered by Constable Little to Constable A. F. The same can be said for the second allegation where the gesture and comment made by Constable Little mirrored the hallway conversation that took place prior to the incident.

[58] As a result, I find that it is more probable than not that the video room incident happened. It would also explain Constable A. F.'s reaction when the second incident occurred. He told Ms. K. S. and asked her to tell Constable Little on his behalf that he was not interested in having a relationship with her. It would also be consistent with his behaviour in August 2018 when he learned that Constable Little was transferring to his Detachment. He immediately informed RCMP management of the two sexual misconduct incidents as he did not want to work with her.

[59] For these reasons, I found on the totality of the evidence that particulars 2 and 3 were established on a balance of probabilities.

[60] Members of the RCMP are held to a higher standard of behaviour than the general public, both on- and off-duty. I find that a reasonable person in society, with knowledge of all the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view Constable Little's actions as likely to bring discredit to the Force. The misconduct happened when both members were on-duty, in the workplace, and is sufficiently related to Constable Little's duties and functions to provide the Force with a legitimate interest in disciplining her.

[61] For the aforementioned reasons, Allegation 1 is established on a balance of probabilities.

Allegation 2 – hallway incident

[62] In Allegation 2, Constable Little admitted to particular 1 and emphatically denied particulars 2, 3 and 4.

[63] As for particular 5, Constable Little submitted in her response that she could not speak to Constable A. F.'s thoughts or conversations with Ms. K. S. as she was not a party or privy to it. I agree with the Member Representative that the particular is simply a summary of how Constable A. F. felt following the hallway incident and how Ms. K. S. reacted when she learned about it. It is not a statement of the act or omission constituting the alleged contravention. Therefore, particular 5 is not established.

[64] With regard to particular 2, Constable Little admitted that, on February 3, 2010, she participated in a community broomball tournament. She denied taking part or being privy to the hallway conversation that took place prior to the tournament about the need of the players to wear a jockstrap when playing.

[65] In particular 3, Constable Little denied that, while she was alone in the hallway with Constable A. F., she grabbed and squeezed his penis for 1 to 2 seconds over his gym shorts while

stating: “I see you’re not wearing a cup.” She explained in particular 4 that the parties never discussed the issue of consent and she denied sexually harassing Constable A. F.

[66] At the hearing, the Member Representative submitted that since Constable Little was not present during the hallway conversation, her comment to Constable A. F. about not wearing a cup was highly coincidental and highly improbable. The presence of security cameras and people arriving from all sides in the hallway rendered such a gesture very risky. There was also a possibility that Constable A. F. would react negatively and make a scene. Finally, since Constable A. F. had already rejected Constable Little’s sexual advances in the video room, it lacked an air of reality to think that she would make another attempt to engage him in a sexual relationship as perceived by Constable A. F. since she knew he was married.

[67] Constable A. F. confirmed in his first statement to the Code of Conduct investigator and at the hearing that he could not recall if Constable Little participated in the group conversation. He said he assumed so because she grabbed him and commented that he was not wearing a jockstrap, which was the main subject of the hallway conversation. He also testified that he was not sure if the hallway had security cameras as claimed by Constable Little. When asked about the risk that Constable Little took when grabbing him, he replied: “My opinion is that it’s risky but it happens all the time. It happens on buses, it happens in line-ups...”

[68] Lastly, Constable A. F. testified that he was shocked, ashamed, embarrassed, angry and never expected this in the workplace as it was not something he wanted or asked for: “Going to work, standing in the hallway, it seems completely obvious that you don’t expect that to happen”.⁷ During his testimony, Constable A. F. explained that he felt that the 1- to 2-second gesture made by Constable Little was intentional and not because she accidentally bumped into him. Completely shocked, he walked away. He did not file a complaint because he was satisfied that Ms. K. S. had told Constable Little that he did not want a relationship with her. Finally, Constable A. F. stated that, at the time of the incident, he was working on his rehabilitation in

⁷ Hearing transcript, August 19, 2019, page 138 of 160.

relation to a 2007 work-related shooting, and he was waiting to be transferred to another detachment. The last thing he needed was this sexual misconduct incident.

[69] During her testimony at the hearing, Ms. K. S. confirmed that she was not present during the hallway incident. Constable A. F. confided in her either the day of the incident or the next day. He told her that Constable Little grabbed his “balls” or penis in the hallway, prior to going to the broomball tournament. At first, she laughed or chuckled, not at Constable A. F.’s revelation, but at what she had heard. Constable A. F. was very upset with her for not taking him seriously.

[70] Constable Little denied being approached by Ms. K. S. regarding her alleged inappropriate behaviour. According to her: “This would be something that I [would] absolutely remember to this day. And it just didn’t happen.”⁸ On the other hand, Ms. K. S. recollected making a short comment to her in passing. She explained that this was her way of dealing with similar delicate situations. It would appear from the evidence that Ms. K. S. had the tendency to get her point across by making short comments to co-workers.

[71] Ms. K. S. also confirmed at the hearing that Constable A. F. asked for her advice on whether he should file a sexual misconduct complaint against Constable Little. Ms. K. S. confirmed that she did not recommend him filing the complaint due to the lack of trust in the direct supervisor and senior management working in Vernon Detachment at the time. Ms. K. S. recognized at the hearing that she had a duty to report the incident, whether internally or externally, and that she failed to do so as she did not want to betray his trust. She also knew that Constable A. F. was in a fragile state of mind due to the 2007 work-related shooting incident. She was worried how he would react psychologically if he reported the incident and nothing was done. She truly hoped that he would transfer out of the Vernon Detachment and be healthy.

[72] Given the totality of the evidence in this case, I conclude that it is unlikely in my view that Constable A. F. would make up this hallway allegation, as the less embarrassing and

⁸ Hearing transcripts, August 19, 2019, page 88 of 163.

stressful route would have been to not file a sexual misconduct complaint against Constable Little, which subjected him to making public statements and testifying at this hearing. No evidence was provided to show that he had a pattern of making false allegations against other members. He consistently testified that he did not consent to being touched in a sexual manner by Constable Little. He filed the complaint as he could not work in the same detachment as her.

[73] Furthermore, I find it improbable that Ms. K. S., who had nothing to gain in this matter and was respected by both parties, would simply fabricate advising Constable A. F. not to file a complaint or even telling Constable Little in passing to keep her hands to herself. Although she did have some memory lapses, which I attributed to the passage of time (i.e., 8 years), her account of events was consistent, on the whole, with that of Constable A. F.

[74] For these reasons and on the totality of the evidence, I find that particulars 2, 3 and 4 are established on a balance of probabilities. I would like to clarify that the Conduct Authority does not have to establish each particular but only those that are essential to the allegation, in this case, the threshold of discreditable conduct. In this matter, particular 5 was not essential to the establishment of the allegation.

[75] The Force has issued several communications, both internally and publicly, to reinforce the importance of treating each other with respect, ensuring that the workplace is free of harassment, discrimination and other forms of disrespectful behaviour. If established, sexual misconduct will lead to serious consequences.

[76] I find that a reasonable person in society, with knowledge of all the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the actions of Constable Little as likely to bring discredit to the Force. The misconduct occurred within the RCMP workplace and involved another RCMP member. It is sufficiently related to her duties and functions as to provide the Force with a legitimate interest in disciplining her.

[77] For the aforementioned reasons, I find Allegation 2 to be established on a balance of probabilities.

CONDUCT MEASURES

[78] When imposing conduct measures, I followed the RCMP External Review Committee three-step test. The first step is to determine the appropriate range of sanction. Then, the Conduct Board must consider the aggravating and mitigating factors. Finally, it must impose conduct measures which accurately and fairly reflect the gravity of the misconduct at issue, keeping in mind the principle of parity of sanction which ensures that similar forms of misconduct are treated equally.

Range of conduct measures

[79] As indicated by the Member Representative, the matter of Constable Little pertains to two allegations of non-consensual sexual incidents which are not prescribed in the *Conduct Measures Guide* (2014) (the *Guide*). It must be noted that, as stated in previous conduct decisions, the *Guide* provides guidance on considerations for the imposition of conduct measures, but it is not binding or determinative on a conduct board.

[80] In support of their position on conduct measures, the parties relied on several RCMP decisions from the previous discipline regime known as legacy decisions as well as the current conduct board process. Those decisions confirm that, in matters where sexual misconduct is established, dismissal is within the range of sanctions available. As conceded by both parties, I am not bound by previous conduct board decisions. Yet, they remain helpful in establishing the range of conduct measures applicable to misconduct that is similar in nature while ensuring consistency and fairness to conduct matters.

[81] The Conduct Authority Representative relied on two decisions in the legacy regime, namely the *Cooke*⁹ and the *Cardinal*¹⁰ decisions, in which the adjudication boards dismissed the members following the establishment of sexual misconduct allegations. In both cases, the boards found that the subject member's behaviour revealed a fundamental character flaw that

⁹ *The Appropriate Officer, "K" Division and Constable Cooke*, 15 A.D. (4th) 475.

¹⁰ *The Appropriate Officer, "K" Division and Constable Cardinal*, 17 A.D. (4th) 111

undermined the essential trust and confidence placed in them by the Force and which made them unsuitable for continued employment within the organization. It must also be noted that important distinctions can be made between those cases and the one at hand. For example, in the *Cooke* case, there was a power imbalance between the two parties; while in the *Cardinal* case, the subject member had a record of prior discipline of a similar nature, which increased the risk of repetitive behaviour, and the misconduct resulted in the disruption of service within the Detachment.

[82] The Conduct Authority Representative also provided the *Hedderson*¹¹ decision, in which the conduct board provided guidance at paragraph 326 regarding the seriousness of the allegations of sexual misconduct and the fact that they do not necessarily translate to automatic dismissal, as each case must be examined under its particular circumstances:

To be clear, the Board is not stating that every case of sexual misconduct must result in dismissal, but rather, sexual misconduct, in its varied manifestations, is increasingly perceived as an extremely serious issue that must be addressed as such, taking into account the specific circumstances and based on applicable mitigating and aggravating factors.

[Emphasis added]

[83] The Member Representative submitted that the RCMP principles of correcting a member's misconduct are meant to be educative and remedial rather than punitive. In the present circumstances, dismissal is not an appropriate measure and a global sanction in the range of 30 to 40 days of pay would be proportionate along with any other appropriate measures including a reprimand, as well as an order to work under close supervision for the next year. The Member Representative made a thorough review of the 2019 decisions of previous RCMP conduct boards, including *Pulsifer*,¹² *Allen*,¹³ *K. Brown*,¹⁴ *L. Brown*¹⁵ as well as the 2017 decision in

¹¹ *Commanding Officer, "E" Division v Constable Hedderson*, 2018 RCAD 19.

¹² *Commanding Officer, "H" Division v Constable Pulsifer*, 2019 RCAD 09.

¹³ *Commanding Officer, "H" Division v Constable Allen*, 2019 RCAD 10.

¹⁴ *Commanding Officer, "K" Division v Constable K. Brown*, 2019 RCAD 15, used oral decision of June 11, 2019.

¹⁵ *Commanding Officer, "K" Division v Constable L. Brown*, 2019 RCAD 12, used oral decision of July 11, 2019.

*Caram*¹⁶, to support her submission that in cases of non-consensual sexual touching, which violates Constable A. F.'s sexual integrity, dismissal was deemed a disproportionate measure by previous conduct boards.

[84] Since the two incidents took place almost a decade ago, the Member Representative also provided two decisions of the previous discipline regime where the maximum financial penalty was 10 days' pay, and then it went to dismissal. She submitted that, in the cases of *Glasier*¹⁷ and *Lebrasseur*¹⁸, the members were not dismissed even when more serious sexual misconduct allegations were established. The Member Representative's intention was to draw the Conduct Board's attention to the fact that, in the prior disciplinary regime, the measures imposed were a reflection of the way the RCMP dealt with sexual misconduct cases at that time. She clarified that she did not mean to diminish the seriousness of the allegations in the present case, but she asked the Conduct Board to attribute some weight to the fact that these events did occur in 2009 and 2010 when determining the appropriate measure to impose in this historical matter.

[85] The Member Representative also asked that a portion of the sanction be deducted in leave due to Constable Little's established financial hardship. Finally, the Member Representative asked that the Conduct Board not issue an order preventing Constable Little from working at Nanaimo Detachment because, pursuant to the terms of her separation agreement, she must reside within 15 km of Nanaimo and no other detachment in commuting distance can accommodate her situation.

[86] To determine if dismissal is an appropriate conduct measure in relation to Constable Little's contravention of the Code of Conduct, I must consider the aggravating and mitigating circumstances of this matter. As defined in the *Guide* and as explained by previous conduct board decisions, aggravating factors are external to the misconduct which oblige consideration of a harsher sanction.¹⁹ They exist above or beyond the essential constituents of the misconduct

¹⁶ *Commanding Officer, "E" Division v Constable Caram*, 2017 RCAD 8.

¹⁷ *The Appropriate Officer, "K" Division v Constable Glasier*, 16 A.D. (4th) 178.

¹⁸ *The Appropriate Officer, "C" Division v Constable Lebrasseur*, 14 A.D. (4th) 520.

¹⁹ *Commanding Officer, "H" Division v Constable Shawn Green*, 2017 RCAD 5.

itself (normally found in the allegation or accompanying particulars or as determined by a conduct board).²⁰ While mitigating factors do not constitute a justification or an excuse for the offence, they are considered to reduce the severity of the conduct measures to be imposed and ensure that the misconduct is dealt with appropriately in the circumstances.

Aggravating factors

[87] I consider the following to be aggravating factors:

- a. There were two incidents of non-consensual touching that took place in the workplace. In the first incident, Constable Little was on-duty, and she was off-duty for the second incident.
- b. The negative impact of these events on Constable A. F., who testified to being ashamed and embarrassed as he never expected such behaviour in the workplace;
- c. The repeated messaging by the RCMP since 2003 given to all employees that harassment, including sexual misconduct, is unacceptable and will not be tolerated.

Mitigating factors

[88] I consider the following to be mitigating factors:

- a. Although Constable Little has been on leave a number of times in recent years, she does have positive performance evaluations, in which she is described as an enthusiastic member with a “high level of competence in her approach to her duties”. Her approach to “personal and professional pressures are inspirational”.
- b. As indicated in the reference letters submitted by her peers, a supervisor and her field coach, they are aware of the allegations. Nonetheless, they have no concerns in relation to working with her again and would welcome such an opportunity.

²⁰ *Commanding Officer, "J" Division v Constable Cormier*, 2016 RCAD 12.

- c. She also has two letters of reference confirming her significant weekly contribution to the community and youth activities.
- d. She has no record of prior discipline.
- e. Given the lengthy lapse of time that has occurred since the last incident in February 2010, I consider that there is a minimal likelihood of recidivism. I have no reason to suspect that any further contraventions of a similar nature would be committed by Constable Little.

[89] Collectively, these mitigating factors demonstrate that Constable Little has the potential to reform or rehabilitate. In her background letter to the Conduct Board, Constable Little demonstrated that she was proactively bettering herself personally and professionally by attending university to complete a Bachelor of Arts and Policing honours. She also continues to consult a psychologist on a weekly basis.

Parity of sanction

[90] Pursuant to paragraph 36.2(e) of the *RCMP Act* and subsection 24(2) of the *CSO (Conduct)*, when allegations have been established, I am obliged to impose conduct 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.

[91] Having considered the record before me, the nature and seriousness of the misconduct and the cases submitted, I find that the presence of significant mitigating factors outweigh the gravity of Constable Little's misconduct. Therefore, I find that dismissal is not a proportionate response in this matter.

[92] Nonetheless, given the specific circumstances of this case, I find that serious conduct measures are required to not only serve as a deterrent to Constable Little, but also as a warning to other members to ensure that this inappropriate behaviour is not repeated.

CONCLUSION

[93] With regard to Constable Little's request that I do not issue an order preventing her from working at Nanaimo Detachment, I want to clarify that Constable A. F. has been posted to that Detachment since March 2011. As for Constable Little, she has been posted to Campbell River Detachment since June 2015. Nonetheless, in September 2016, she moved to Nanaimo where she is currently living. Although Constable Little received her Form 1272 – *Notification of Transfer Planning* to Nanaimo Detachment on August 1, 2018, the transfer never materialized following the initiation of the Code of Conduct investigation. Having established the two allegations of misconduct, I am of the opinion that it would be improper for Constable Little and Constable A. F. to work in the same detachment.

[94] In accordance with subsection 45(4) of the *RCMP Act*, I impose the following conduct measures:

- a. A global forfeiture of 30 days divided as such due to Constable Little's financial hardship:
 - i. 20 days' forfeiture of pay. I strongly recommend that a lower recovery rate of less than 10 percent be approved, as determined by the delegated level and in accordance with the *National Compensation Manual*, Chapter 2.5 "Overpayments, Underpayments and Recoveries"; and
 - ii. 10 days' forfeiture of annual leave.
- b. Ineligibility for promotion for a period of 2 years, effective from the date of Constable Little's reinstatement;
- c. A direction to work under close supervision for a period of 1 year, effective from the date of Constable Little's reinstatement; and
- d. A restriction on Constable Little's duties, if and as required, in order to ensure that she is not posted to the same detachment or work location as Constable A. F. Although I am

restricted to impose this restriction for a period of not more than three years, as per the *CSO (Conduct)*, I would hope that consideration will be given to the impact on Constable A. F. if Constable Little were to be posted at his work location in the near future. As such, I order that a copy of this decision be provided to the “E” Division Career and Development Resource Officer (EHQ, CDRO).

[95] Either party may appeal this decision by filing a statement of appeal with the Commissioner within the 14 days of the service of this decision on the Subject Member, as set out in section 45.11 of the *RCMP Act* and section 22 of the *Commissioner’s Standing Order (Grievances and Appeals)*, SOR/2014-289.

Josée Thibault

January 29, 2020

Ottawa, Ontario

Conduct Board