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2018335823 (C-040)

2020 CAD 27

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

an appeal filed pursuant to subsection 45.11(1) of the

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

BETWEEN:

Constable Philippe Raymond
Regimental No.: 48229

(Appelant)

and

Commanding Officer, "C"Division
Royal Canadian Mounted Police

(Respondent)

RECOURSE DECISION

APPEAL

ADJUDICATOR: Steven Dunn

DATE: November 2, 2020

SUMMARY

The appellant appealed against a decision by an RCMP conduct board finding that two allegations of contraventions of section 7.1 of the Code of Conduct made against him had been established, and ordering that the appellant be dismissed. The first allegation concerned his use of cocaine, and the second concerned the improper use of his work BlackBerry. The appellant argued that the Board demonstrated reasonable apprehension of bias and erred in its assessment of the evidence and of the aggravating and mitigating factors.

Finding that the appellant's allegation of bias was without merit and that the Board did not commit a palpable or overriding error, the adjudicator accepted the ERC's recommendation and dismissed the appeal.

INTRODUCTION

[1] Pursuant to subsection 45.11(1) of the *Royal Canadian Mounted Police Act*, RSC (1985), c. R-10 (*RCMP Act*), Constable Philippe Raymond, regimental number 48229 (the appellant), is appealing against a decision rendered by a Royal Canadian Mounted Police (RCMP) conduct board (the Board) finding that two allegations against him had been established, which contravened section 7.1 of the Code of Conduct (set out in the Schedule to the *Royal Canadian Mounted Police Regulations*, 2014 (SOR/2014-281)) (Code of Conduct). As a conduct measure, the Board ordered that the appellant be dismissed.

[2] The case was referred to the RCMP External Review Committee (ERC) for an in-depth review pursuant to subsection 45.15(1) of the *RCMP Act*. In ERC report C-2019-018 (C-040), dated September 25, 2020 (the Report), the ERC Chairperson, Charles Randall Smith, did not identify any palpable or overriding error in the Board's decision and recommended that the appeal be dismissed.

[3] In making this decision, I reviewed the appeal record prepared by the Office for the Coordination of Grievances and Appeals (OCGA) (the Appeal), the material used to make the decision being appealed (the Material), as well as the ERC's written report (the Record). Unless

otherwise specified, documents in the Record are referred to by page number; the legislation, policies and directives that I reference are those in effect at the time of events.

[4] The appeal is dismissed for the reasons below.

CONDUCT PROCEEDINGS

Conduct Investigation

[5] On January 21, 2016, an investigation mandate was issued, ordering an investigation under Part IV of the *RCMP Act* to establish whether the appellant had contravened the Code of Conduct (Material, p. 130). The investigation mandate included just one allegation:

> [Translation]
>
> Allegation 1:
>
> In or about the months of August and September 2013, in the Province of Quebec, [the appellant] exchanged text messages suggesting that he or close acquaintances of his were using illegal drugs such as cocaine, marijuana, GHB, ecstasy and heroine.
>
> It is therefore alleged that [the appellant] did not behave in a manner that was not likely to discredit the Force, contravening section 7.1 of the Code of Conduct.

[6] On December 12, 2016, an investigation report on the appellant's alleged conduct was prepared by the "C" Division Professional Standards Unit (Material, pp. 111–241). The report detailed information collected throughout the investigation and included summaries, transcripts of recorded witness statements, and an audit report with detailed analysis of text messages received and sent by the appellant's telephone.

Alleged contraventions of the Code of Conduct

[7] On February 6, 2017, the appellant was served a Notice of Conduct Hearing (Notice), which informed him that a conduct board had been appointed and would meet to determine whether he had contravened the Code of Conduct. The Notice included the following two allegations (Material, pp. 102–103) [*French original quoted verbatim*]:

[Translation]

Allegation 1:

Between June 18, 2012, and January 1, 2015, at or near Montreal, at or near Trois-Rivières, and elsewhere in the Province of Quebec, [the appellant] demonstrated discreditable conduct in contravention of section 7.1 of the RCMP Code of Conduct.

Particulars – Allegation 1:

1. At all material times, you were and still are a member of the Royal Canadian Mounted Police (RCMP) assigned to "C" Division in the Province of Quebec.

2. While off duty, you consorted with people involved in the use of illegal drugs; on several occasions, you were present when these people, members of the public, used illegal drugs such as cocaine.

3. On more than one occasion, in the presence of your friend [Ms. X], you used illegal drugs such as cocaine.

4. On one occasion, at an after party in Trois-Rivières, which you attended with [Constable C], that constable saw you in the bathroom with two other people and a line of white powder on the counter. In this context [Constable C] believed it was cocaine.

5. You were aware that using illegal drugs is inappropriate conduct for a police officer. [Constable C] spoke with you about it several times, including on January 1, 2015, where he had an animated discussion with you, begging you to stop your illegal drug use habit.

6. Your association with people using illegal drugs is considered inappropriate conduct for a police officer.

7. Your participation in or association with activities involving illegal drug use is inappropriate conduct for a police officer.

8. Your use of illegal drugs is inappropriate conduct for a police officer.

Allegation 2:

Between August 1, 2013, and September 30, 2013, at or near Montreal, Quebec, [the appellant] demonstrated discreditable conduct in contravention of section 7.1 of the RCMP Code of Conduct.

Particulars – Allegation 2:

1. At all material times, you were and still are a member of the Royal Canadian Mounted Police (RCMP assigned to "C" Division in the Province of Quebec.

> 2. On July 11, 2012, the RCMP assigned you a BlackBerry phone with the user number [number redacted]. This BlackBerry was given to you to help you perform your duties.
>
> 3. For personal purposes, you texted third-party individuals several times alluding to the use of illegal drugs such as [translation] “a little line”, date rape drugs, heroin, crack, joints and “eeee”.
>
> 4. You used your BlackBerry, RCMP property, in an improper manner.

[8] On July 10, 2017, the appellant, through his counsel, submitted his written submissions in response to the Notice (Material, pp. 105–110).

[9] The appellant admitted to allegation 1, with certain clarifications. The appellant explained that the alleged conduct began in the spring of 2013, not on June 18, 2012. He then clarified that the people he socialized with were not, to his knowledge, associated with the criminal element. The appellant submitted that he had only used cocaine and no other illegal drugs. The appellant also confirmed that he attended an after party in Trois-Rivières, but stated that he did not remember having used cocaine or other illegal drugs there. Although the appellant admits that using illegal drugs is inappropriate conduct for a police officer, he denied having any conversation about his drug habits with Constable C. According to the appellant, the discussion he had with Constable C, who was intoxicated at the time, was actually about the cocaine use of a third party who was at his house for a New Year’s Eve party.

[10] The appellant then clarified that he only used cocaine when certain people offered it to him and when he was intoxicated. He also explained that he had only used drugs occasionally and over a short period, not regularly or for a prolonged period. According to the appellant, at the time indicated in allegation 1, his lifestyle included regularly going to bars and seeing people who sometimes used cocaine. However, he stated that he sincerely regrets living that way, which led him to make some bad decisions, and that he has changed his lifestyle since then by no longer seeing those people, and by no longer using cocaine or drinking immoderately.

[11] With regard to allegation 2, the appellant admitted to the allegation and its four points. However, he explained that the text messages should be taken figuratively, as jokes, and not literally.

Conduct hearing

[12] A hearing for the allegations took place from May 22 to 24, 2018. The Board rendered two oral decisions, one on May 24, 2018, on the allegations, and one on June 26, 2018, on the conduct measures. The Board then issued a written decision on September 17, 2018, with its findings on the allegations and conduct measures, as well as a corrected decision on September 20, 2018 (Appeal, pp. 6–35, Material, pp. 3241–3270).

a) Decision on the allegations

[13] The Board first assessed the witnesses' credibility. In doing so, the Board acknowledged that the conduct authority's six witnesses were friends of the appellant and did not want to testify at the hearing. The Board also considered the fact that the events surrounding the allegations took place five years earlier, which would affect the reliability of evidence drawn from the witnesses' and the appellant's memories. As for the assessment of the witnesses, the Board found that the testimonies of Constable C, Ms. X and Ms. Y were credible, while those of Mr. A, Mr. B and Mr. Z were not, due to significant contradictions, as well as friendships and professional ties between themselves and the appellant. The Board also found that the appellant's version of the facts was unclear and raised significant doubts as to the extent of his drug use and how he acquired cocaine.

[14] The Board then described the test to assess discreditable conduct under section 7.1 of the Code of Conduct. The test considers how a reasonable person in society, with knowledge of all relevant circumstances, including the realities of policing in general and the RCMP in particular, would view the behaviour. The Board also stated that it applied a test similar to the one developed by the ERC in D-019 to determine whether the allegations were established on a balance of probabilities. According to this test, the onus is on the conduct authority to prove the member's identity and acts constituting the alleged behaviour. Then the decision maker must decide whether the conduct was likely to discredit the RCMP, and whether it was sufficiently related to the member's work and duties to give the RCMP a legitimate interest to impose conduct measures.

[15] Starting with allegation 1, the Board indicated that, due to a lack of certainty in Constable C's testimony regarding the details of his outing with the appellant to Trois-Rivières, the fourth point was not established. However, the Board found that the appellant used cocaine over a period of at least 15 months, from March 2013 to July 2014, which the Board described as a prolonged period, not a short period as the member's representative stated. As for the frequency of use, the Board determined that the appellant had used cocaine at least 15 times in 15 months. The Board therefore found that, on a balance of probabilities, the appellant's conduct, in relation to his work and duties, discredited the RCMP, and thus contravened section 7.1 of the Code of Conduct.

[16] With regard to allegation 2, the Board agreed that the conduct authority had established the allegations' four points. The Board noted that the appellant admitted that the text messages exchanged with his friends for personal purposes contained inappropriate content, as they were alluding to the use of illegal drugs. Thus, the Board found that, on a balance of probabilities, the appellant had contravened section 7.1 of the Code of Conduct.

b) Decision on conduct measures

[17] To start, the Board listed the three stages of analyzing conduct measures: establishing a range of appropriate conduct measures, considering the aggravating and mitigating factors, and imposing a just and fair conduct measure that reflects the seriousness of the misconduct in question, while taking into account the principles of parity of the sanction and deterrence.

[18] While reviewing the range of conduct measures, the Board noted that the RCMP has few precedents of drug use. The Board conditionally accepted the precedents submitted by the member's representative for the following reasons: the decisions were from the former discipline regime, under which the range of conduct measures was more limited; the majority of the cases did not involve dismissal; in three of the cases submitted, the parties made a joint submission on sanction; and, unlike this case, significant mitigating factors were present in several of the submitted decisions. Accordingly, the Board found that, based on its analysis, the appropriate

overall conduct measure for the two allegations was between a forfeiture of pay for a number of work days and dismissal.

[19] The Board then proceeded to the second stage of the analysis, considering the aggravating and mitigating factors. The Board found the following aggravating factors:

1. The appellant used cocaine, a substance listed in Schedule 1 to the *Controlled Drugs and Substances Act*, SC 1996, c. 19, meaning the appellant associated with activity incompatible with police work and not tolerated by society.

2. The appellant used drugs for personal recreational purposes over a period of at least 15 months, which is a prolonged period.

3. The use of drugs took place at his home with members of the public, and it was mainly the appellant who prepared the lines of cocaine he took with his girlfriend.

4. The appellant used cocaine at least 15 times in 15 months, which demonstrates frequent and prolonged behaviour.

5. The appellant knew that cocaine was associated with the criminal element, and this lack of integrity tainted the public's perception of and trust in the RCMP and the administration of justice.

6. The appellant's cocaine use was linked to immoderate use of alcohol.

7. Despite having been suspended for this conduct in a separate case, the appellant continued to use cocaine for at least 10 months and excessively increased his use of alcohol, knowing that his employer had reprimanded him for this behaviour.

8. Under Supreme Court decision *R v. McNeil* (2009) 1 SCR 66 (*McNeil*), the appellant's conduct can now be disclosed for the purposes of an investigation involving him.

[20] The Board found the following mitigating factors:

1. The appellant admitted to the allegation.

2. The appellant acknowledged his misconduct and expressed remorse for his actions.

3. The appellant apologized and acknowledged that his illegal activities were inappropriate for a police officer and went against his personal values.

4. The appellant had never been the subject of conduct measures before, and his performance evaluations were positive.

5. The appellant experienced some emotional stress in fall 2012, after a romantic break-up. However, the Board stated that it gave very little weight to this factor, as a break-up is not a reasonable excuse to break the law repeatedly over a prolonged period.

6. The appellant received medical attention for his drug and alcohol use, and participated in several monthly Alcoholics Anonymous meetings. However, the Board noted the appellant's limited comments to his psychologist and family doctor about the extent of his drug problem, as well as his intention to practise moderate alcohol use over abstinence. The Board found this behaviour considerably reduced the weight of this mitigating factor.

7. The appellant allegedly stopped using cocaine in July 2014, about 18 months before being notified in January 2016 of the conduct investigation for this case. However, the Board found that the lack of evidence to support this statement from the appellant considerably diminished this factor.

[21] With regard to allegation 2, the Board identified the following aggravating factors: the appellant's use of equipment for personal purposes; and the appellant's disorderly conduct while using the equipment, which would disappoint members of the public. As for the mitigating factors, the Board took into account the appellant's acknowledgement that the text messages exchanged with his friends contained inappropriate content.

[22] The Board then proceeded to the third and final stage of the conduct measures analysis. While considering the appropriate conduct measure, the Board relied on *Ennis v. Canadian Imperial Bank of Commerce*, 1986 CanLii 1208 (BC SC) and *Greene* (2017 RCAD 5) to conclude that the appellant continually violated the fundamental values of the RCMP. According to the Board (Material, p. 3269):

> [Translation]
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> [The appellant] had the obligation, whether on or off duty, to consider the impact of his actions and conduct at all times, in order to maintain his credibility and the public's trust. Both of these things are essential for RCMP members to effectively perform their policing duties, and [the appellant] grossly neglected them for a prolonged period.

[23] The Board reasoned that there were multiple aggravating factors in favour of the appellant's dismissal and a lack of significant mitigating factors to justify a lesser sentence. The Board also took into account the diverging opinions of the expert witnesses with respect to the appellant's rehabilitation prognosis. It stated that it was not satisfied by the appellant's word alone that he was fully rehabilitated and trustworthy. The Board noted the significant risk posed to the RCMP in maintaining a working relationship with the appellant. Given the appellant's serious and repeated errors in judgment, the Board determined that his misconduct undermined his integrity, public trust and the trust of his employer. The Board therefore concluded that a reasonable person with knowledge of all the circumstances of the case would view his continued employment as a breach of public trust and the RCMP's values. Consequently, it was ordered that the appellant be dismissed.

APPEAL

[24] On October 1, 2018, the appellant submitted his Statement of Appeal (Form 6437f) to the OCGA, in which he stated that the Board's decision contravened the applicable principles of procedural fairness, was based on an error in law and was clearly unreasonable (Appeal, pp. 3–5). The appellant made the following arguments (Appeal, p. 4) [*French original quoted verbatim*]:

> [Translation]

> The conduct board's decision is biased, as the appellant has a second conduct record that the Board did not have before it.
>
> With regard to determining the conduct measure, the Board found certain factors that were not aggravating factors given the evidence (e.g. *McNeil*, alcohol use, etc.). The Board also failed to consider or exclude certain mitigating factors.
>
> The Board erred in its assessment of evidence related to the seriousness of the alleged misconduct (e.g. the assessment of the credibility of certain witnesses' statements, etc.), which influenced the fairness of the imposed conduct measure.

[25] With regard to corrective conduct measures, the appellant is asking that the appeal be allowed, that the Board's decision be set aside and that the adjudicator impose the measure requested by his representative or another measure besides being ordered to resign, which would be more appropriate and fair given the circumstances.

[26] Although the appellant was given several deadline extensions, I note that the appellant did not submit any written submissions besides what was in Form 6437f (Appeal, p. 122).

ANALYSIS

Standard of review

[27] Subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)* [*CSO (Grievances and Appeals)]* provides the principles guiding the RCMP Commissioner or final level adjudicator in the matter of an appeal:

> 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.

[28] The Supreme Court of Canada (Supreme Court) rendered a decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, in which it conducted a much-needed analysis of standards of review. For the present purposes, I note that the Supreme Court states that the statutory standards of review should be applied (paras. 34–35), and that the majority has

clearly distinguished the approach to statutory appeals from the approach to judicial reviews of administrative decisions (paras. 36–45).

[29] The appellant's first ground of appeal is a lack of impartiality on the Board's part, which I consider an issue of procedural fairness. The issue of whether a decision maker has respected the principles of procedural fairness must be reviewed on a standard of correctness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, para. 43). The application of this standard requires no deference to the decision under review. A breach of the principles of procedural fairness will normally render a decision invalid and the usual remedy will be to order a new hearing, unless a decision on the merits was inevitable (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, pp. 228–229; *Renaud v. Canada (Attorney General)*, 2013 FCA 266, para. 5).

[30] The two other grounds of appeal submitted by the appellant are the Board's consideration of the aggravating and mitigating factors and its assessment of the evidence. I am of the view that these grounds of appeals are errors of mixed fact and law. The term "clearly unreasonable", used in subsection 33(1) of the *CSO (Grievances and Appeals)* describes the standard to be applied in reviewing questions of fact or questions of mixed fact and law. In *Kalkat v. Canada (Attorney General)*, 2017 FC 794, the Federal Court examined 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).

[31] In *Smith v. Canada (Attorney General)*, 2019 FC 770, a similar finding was reviewed 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.

[32] In *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 SCR 748, at para. 57, the Court explains that a decision is patently unreasonable if "the defect is apparent on the face of the tribunal's reasons". Then in *Law Society of New Brunswick v. Ryan,* 2003 SCC 20, at para. 52, the Court explains 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".

[33] Hence, considerable deference must be accorded to questions of fact and of mixed fact and law, and only a palpable or overriding error could lead to the conclusion that the respondent's decision is clearly unreasonable.

Merits of the appeal

Did the appellant demonstrate reasonable apprehension of bias on the part of the Board?

[34] The appellant challenged the Board's impartiality, stating that in its decision it refers to a second conduct record involving the appellant which was not before it. I note that besides this statement, the appellant did not submit any other argument or evidence to support this ground of appeal.

[35] First, there is a presumption of impartiality from the decision maker, and the burden of proof falls to the party alleging bias (*Mugesera v. Canada (Minister of Citizenship and Immigration),* [2005] 2 SCR 91, at para. 13). To determine whether there is bias, the test is whether a reasonably informed bystander would reasonably perceive bias (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities),* [1992] 1 SCR 623 [*Newfoundland Telephone*], page 636). In reviewing the evidence to support allegations of bias, a real likelihood of bias must be demonstrated and a mere suspicion is not enough (*R v. S (RD),* [1997] 3 SCR 484, para. 112). Therefore, the threshold for establishing a reasonable apprehension of bias is high.

[36] The Supreme Court has recognized two situations in which a reasonable apprehension of bias on the part of a decision maker can be discerned: where the decision maker has a personal interest in the issue or where the decision maker does not have an open mind (*Newfoundland Telephone; 2747–3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 SCR 919 (paras. 235–246)).

[37] I share the ERC's view that the case law is clear that a reasonable apprehension of bias is not automatically established when a decision maker makes a decision in another case involving the same individual (Report, para. 56; *Nord-Deutsche Versicherungs Gesellschaft et al. v. The Queen et al.*, [1968] 1 Ex.C.R. 443)

[38] Regarding the appellant's second conduct record, the Board stated the following in its decision (Material, p. 3265):

> [Translation]
>
> [21] On September 18, 2013, [the appellant] was suspended from duty for a contravention of the Code of Conduct in a record completely separate from the current case. Besides the information provided in the investigation report, I was not informed of the facts and allegations surrounding that suspension.
>
> …
>
> [85] On September 18, 2013, [the appellant] was suspended from the RCMP for a contravention of the Code of Conduct in another record separate from this one. According to his statements to both expert witnesses, [the appellant] did not stop using drugs. In fact, he used cocaine for at least 10 months, from September 2013, to July 2014, and he excessively increased his use of alcohol, knowing that his employer had accused him of misconduct. As I stated in my oral decision at the hearing, I recognize that for an RCMP member, being suspended from work is usually an extremely difficult time. However, the member in question continued to engage in illegal activity for a prolonged period, indifferent to the negative consequences on his job. In my view, this shows a blatant lack of judgment and a failure to accept responsibility.

[39] It is clear from this excerpt that the Board did not have the appellant's prior conduct record before it. Furthermore, the Board did not consider the details of that conduct record in its decision. Rather, the Board found that the appellant's continued use of alcohol despite his

suspension was an aggravating factor under the circumstances. The Board recognized the hardship of being suspended, but found that the member's misconduct following a Code of Conduct suspension in another case demonstrated a lack of judgment and a failure to accept responsibility on his part. The Board therefore, in my view, considered the appellant's continued cocaine use with the fact that the appellant knew his employer had accused him of another misconduct in mind. I am satisfied that in reaching its decision, the Board relied on the evidence on the record, and I find, as does the ERC, that the appellant did not discharge his burden of establishing a reasonable apprehension of bias on the part of the Board.

Did the Board err in its assessment of the evidence?

[40] The appellant argues that the Board erred in its assessment of the evidence with regard to the seriousness of the alleged misconduct. He mentioned the following example: [translation] "the assessment of the credibility of certain witnesses' statements, etc.". I agree with the ERC that the appellant's argument lacks specificity (Report, para. 59). Besides this example, the appellant provided no argument to support his position. Despite this, I will consider the appellant's argument by addressing the Board's assessment of the witnesses' credibility.

[41] In its decision, the Board first attributed the witnesses' and the appellant's unreliability to the time that had passed since the events on which they testified occurred. The Board went on to explain in detail its assessment of the witnesses' credibility. In the Board's view, despite the more reserved comments of Ms. Y, it considered her testimony, as well as Constable C's and Ms. X's testimonies, to be credible (Material, pp. 3250–3251). However, the Board noted significant contradictions in the testimonies of Mr. A, Mr. B and Mr. Z, as well as the friendships or professional ties they had with the appellant. For these reasons, the Board found these three witnesses to not be credible. Lastly, with respect to the appellant, the Board drew specific examples from the appellant's testimony showing a contradiction between his testimony and that of Ms. Y with respect to her use of drugs. The Board also noted the lack of reliable testimony from the appellant with respect to the names of the people who gave him cocaine, and the cautious and evasive nature of his responses in cross-examination regarding the extent of his drug use (Material, pp. 3251–3254).

[42] The Board reiterated the Supreme Court's comments on witness credibility issues set out in *F.H. v. McDougall*, 2008 SCC 53, stating that "the evidence must always be clear, convincing and cogent in order to satisfy the balance of probabilities test" (Material, p. 3254). It also relied on the principles for assessing credibility established in *Wallace v. Davis*, (1926) 31 OWN 202, *MacDermid v. Rice*, (1939) R. de Jur 208 and *Faryna v. Chorny*, [1952] 2 DLR 354 (Material, pp. 3249–3250). The Board found that, because the appellant's account was unclear and raised significant doubts as to the extent of his drug use and how he acquired cocaine, it accorded more weight to the version of the facts provided by Ms. X, Ms. Y and Constable C.

[43] As the ERC mentioned, in *Elhatton v. Canada (Attorney General)*, 2013 FC 71, the Federal Court addressed the advantage that tribunals of first instances have in making findings of fact. It then considered the resulting role of appellate courts and the high degree of deference that must be given to a decision maker of first instance:

> [47] It is, in this regard, axiomatic that an appellate court, and similarly, the Commissioner, should not intervene in credibility findings unless the trier of fact made a palpable and overriding error or made findings of fact that were clearly wrong or unsupported by the evidence.

[44] I am of the view that the Board meticulously described the appellant's and other witnesses' testimonies and clearly articulated why it gave more credibility to some of them than others. In my view, these reasons are supported by the totality of the evidence in the Record. While the appellant is of the view that the Board erred in its assessment of the witnesses' credibility, he offered no explanation or evidence to support this argument. Therefore, I find that the Board made no palpable or overriding error in its assessment of the evidence.

Did the Board err in its consideration of the aggravating and mitigating factors?

[45] The appellant maintains that the Board erred by including certain aggravating factors and not considering other mitigating factors. The appellant explains that the Board should not have considered *McNeil* and his alcohol use as aggravating factors.

[46] With respect to *McNeil*, I note that the Board explained that even if the appellant was not a drug investigator, the disclosure principles in *McNeil* could have an impact on any potential

transfer of the appellant to an operational position, and that his conduct record was a burden on the RCMP (Material, p. 3265).While I am of the view that the disclosure implications under *McNeil* do not automatically warrant a member's dismissal and that the circumstances of each case must be reviewed and assessed (see, for example, C-017 and D-110). I find that, as the Board noted, its analysis was made in the context of the appellant's lack of honesty and integrity with regard to his frequent use of cocaine over a prolonged period of time (Material, p. 3265). Appendix XII 1.20 of the *Administration Manual*, c. XII.1 Conduct (Appendix XII 1.20), sets out the mitigating and aggravating circumstances that may be taken into consideration to reduce or increase the severity of the sanction to be imposed. Lack of honesty and integrity is included in the list of aggravating factors. Therefore, I find that the Board did not make a palpable or overriding error in concluding that the appellant's lack of honesty and integrity, which could affect his ability to testify or to be assigned to another position, would be a burden to the RCMP.

[47] Next, with regard to the aggravating factor in relation to the appellant's alcohol use, the Board stated the following (Material, p. 3264):

> [Translation]
>
> Although alcohol use was not the focus of the allegations against the member, the evidence on the record shows that his cocaine use was linked to his immoderate use of alcohol. Therefore, I consider this to be an aggravating factor under the circumstances.

[48] The appellant is of the opinion that the Board should not have considered his use of alcohol as an aggravating factor. However, the appellant makes no argument to support this assertion. Although both expert witnesses stated that his alcohol use was in no way associated with an addiction, they both testified about the appellant's frequent use of alcohol during the period that he used cocaine (Material, p. 3258). The appellant himself admitted that his alcohol use was immoderate (Material, p. 108). I am of the view that the evidence in the Record supports the Board's finding of excessive alcohol consumption. In Appendix XII-1–20, alcohol consumption is identified as an aggravating circumstance: "Alcohol involved / intoxication / excessive alcohol consumption". Consequently, I am of the view that the Board did not commit any palpable or overriding error by identifying the appellant's alcohol use as an aggravating factor.

[49] Although the appellant did not submit this argument, I agree with the ERC that the Board erred in identifying the appellant's use of his BlackBerry for personal purposes as the aggravating factor for allegation 2. On this subject, I will reiterate the ERC's comments (Report, para. 67):

> [Translation]
>
> An aggravating factor is defined in the RCMP's Conduct Policy (XII.1, Appendix 1–20) as being "[any] circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself (*Black's Law Dictionary*, 6th ed.)." Given that allegation 2 specifically addressed the appellant's use of his BlackBerry, the Board could not include this conduct as an aggravating factor. In other words, his personal use of the BlackBerry did not go above and beyond the essential elements of allegation 2. Consequently, in my view, the Board erred at this stage of its analysis.

[50] Like the ERC, I find that, despite the Board's error in assessing this aggravating factor, the conclusions it reached regarding allegation 1 are enough to warrant the conduct measure imposed on the appellant. I am of the view that all the evidence on the record, the range of appropriate conduct measures for such a misconduct, as well as the aggravating and mitigating factors identified by the Board in this case support its decision to order the appellant's dismissal. Thus, I find that the appellant did not establish that the Board's decision was clearly unreasonable.

DECISION

[51] Pursuant to section 45.16 of the *RCMP Act*, the appeal is dismissed.

[52] If the appellant disagrees with my decision, he may apply to the Federal Court for review under section 18.1 of the *Federal Courts Act*.

Steven Dunn, Adjudicator | Date