



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, "H" Division

(Conduct Authority)

and

Constable Aaron MacGillivray

Regimental Number 52654

(Subject Member)

Conduct Board Decision

Christine Sakiris

June 16, 2021

Staff Sergeant Jon Hart, Conduct Authority Representative

Ms. Nasha Nijhawan, Subject Member Representative

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SUMMARY

The *Notice of Conduct Hearing* contains a total of five allegations of contraventions of the RCMP Code of Conduct. Allegations 1 and 2 involve Constable MacGillivray's interactions with a member of the public housed in cells and his reporting of those interactions. Allegations 3 and 4 involve Constable MacGillivray's actions following a collision with his personal vehicle. Allegation 5 relates to his unauthorized use of a fleet vehicle for personal purposes.

The Conduct Board found Allegations 1, 3 (as amended) and 5 to be established. Allegation 2 was found not to be established. Allegation 4 was withdrawn by the Conduct Authority Representative.

The following conduct measures were imposed: (1) a financial penalty of 2 days' pay, to be deducted from Constable MacGillivray's pay; (2) a forfeiture of 20 days of annual leave; (3) a direction to undergo medical treatment as specified by a Health Services Officer; a direction to complete the Incident Management Intervention Model Certification Course on Agora, or, if he has previously completed this course, to complete the Incident Management Intervention Model Recertification Course on Agora. Proof of completion of the training is to be provided to the Conduct Authority within 120 days of the date of this written decision.

INTRODUCTION

[1] Constable MacGillivray is facing five alleged contraventions of the RCMP Code of Conduct. The contraventions involve three incidents that took place over a period of three months.

[2] In December 2018, Constable MacGillivray was the lead investigator on an impaired driving complaint involving K.S. Constable MacGillivray is alleged to have used more force

than was reasonably necessary against K.S. while he was housed in cells, in contravention of section 5.1 of the RCMP Code of Conduct (Allegation 1). He is also alleged to have drafted a false and misleading narrative about his interactions with K.S., in contravention of section 8.1 of the Code of Conduct (Allegation 2).

[3] In February 2019, Constable MacGillivray was involved in a collision with a deer while driving his personal vehicle. Constable Arsenault, a member from the local RCMP detachment attended the scene. Constable MacGillivray is alleged to have misrepresented the status of his insurance, in contravention of section 8.1 of the Code of Conduct (Allegation 3). He is also alleged to have failed to act with integrity, fairness and impartiality in his interactions with Constable Arsenault, in contravention of section 3.2 of the Code of Conduct (Allegation 4).

[4] Also in February 2019, Constable MacGillivray is alleged to have used an RCMP fleet vehicle for personal purposes, without authorization, in contravention of section 4.6 of the Code of Conduct (Allegation 5).

[5] The allegations are set out in the *Notice of Conduct Hearing*, dated November 25, 2019. On January 31, 2020, Constable MacGillivray filed his response to the allegations, pursuant to section 15 of the *Commissioner's Standing Orders (Conduct)*, SOR/2014-291 [*CSO (Conduct)*]. He denied Allegations 1, 2, 3 and 4. He admitted to Allegation 5.

[6] Shortly before the conduct hearing, Constable MacGillivray filed an amended response to the allegations, in which he also admitted to Allegation 1, with an explanation. Additionally, the parties filed an *Agreed Statement of Facts*, which amended Allegation 3 and reframed it as a contravention of section 7.1 of the Code of Conduct. The Conduct Authority Representative requested that Allegation 4 be withdrawn.

[7] I have been appointed as the Conduct Board pursuant to subsection 43(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 [*RCMP Act*]. In accordance with section 45 of the *RCMP Act*, I must decide whether each allegation is established on a balance of probabilities. In other words, for each allegation, I must determine whether it is more likely than not that Constable MacGillivray has contravened the RCMP Code of Conduct.

[8] Even though Constable MacGillivray has admitted to Allegations 1, 3 (as amended) and 5, there are many facts in dispute. I must make my own determination as to whether the allegations are established by assessing whether the acts to which he admits, together with my findings of fact, constitute a contravention of the Code of Conduct. If I find one or more of the allegations to be established, then I must impose conduct measures.

[9] For the reasons that follow, I find that Allegations 1, 3 (as amended) and 5 are established; Allegation 2 is not established; Allegation 4 is withdrawn. Constable MacGillivray did use more force than reasonably necessary in his interactions with K.S. (Allegation 1). However, I do not find that he filed a false or misleading narrative about this interaction (Allegation 2).

[10] By operating both an unregistered and uninsured motor vehicle, Constable MacGillivray behaved in a manner that discredited the Force (Allegation 3). By using a fleet vehicle for personal purposes, he failed to use government-issued equipment and property for authorized purposes and activities (Allegation 5).

[11] Consequently, the following conduct measures are imposed: (1) a financial penalty of 2 days' pay, to be deducted from Constable MacGillivray's pay; (2) a forfeiture of 20 days of annual leave; (3) a direction to undergo medical treatment as specified by a Health Services Officer; a direction to complete the Incident Management Intervention Model Certification Course on Agora, or, if he has previously completed this course, to complete the Incident Management Intervention Model Recertification Course on Agora. Proof of completion of the training is to be provided to the Conduct Authority within 120 days of the date of this written decision.

ALLEGATIONS

[12] In accordance with the *Notice of Conduct Hearing* and the *Agreed Statement of Facts*, the allegations, as amended, are as follows:

Allegation 1

On or about December 9, 2018, at or near Enfield, in the Province of Nova Scotia, Constable Aaron MacGillivray used more force than was reasonably necessary in the circumstances, contrary to section 5.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars:

1. At all material times, you were a regular member of the Royal Canadian Mounted Police (“RCMP”) posted to “H” Division, Enfield, RCMP Detachment, Nova Scotia.
2. On December 8, 2018, you were the lead investigator on an impaired driving complaint involving a male later identified as [K.S.]. Police Occurrence Reporting System file [redacted] was generated concerning the complaint. [K.S.] was arrested for impaired driving at the scene and transported to the Enfield RCMP detachment in furtherance of the investigation. It is accepted that [K.S.] was appropriately charged with impaired driving and driving with a blood alcohol level which exceeds eighty milligrams of alcohol in one hundred milliliters of blood (.08). It is further accepted that it was proper to lodge [K.S.] in cells.
3. The interactions of police with [K.S.] at the Enfield RCMP Detachment were video recorded. At 00:36:46 hrs, [K.S.] is observed being lodged into Cell [B] (“cell”) by you. Over the span of the next three minutes, [K.S.] is observed sitting on the cement bench area in the cell and also standing using the toilet in the cell. At 00:37:55 hrs and 00:38:51 hrs, you are observed closing the physical distance between yourself and [K.S.] Commencing at 00:38:57 hrs, you are observed placing your right hand onto the chest area of [K.S.] and physically pushing him back towards the rear bench area of the cell. At 00:38:59 hrs you are observed placing your right hand onto the neck area of [K.S.], followed by physically pushing him down and onto the cement bench area. At 00:39:00 hrs, Constable James Stapleford (“Stapleford”) is observed entering into the cell. Between 00:39:00 hrs and 00:39:26 hrs you are observed in a leaning bent forward position with your body physically on top of [K.S.] and appear to be holding him down on the cement bench area. At 00:40:08 hrs, you are observed exiting the cell along with Constable Stapleford.
4. Your actions and intervention with [K.S.] in the cell were not consistent with RCMP Policy, law or training standards and do not meet the test of reasonableness. You were not authorized, nor was it realistic for you to use the level of force that you did against [K.S.].
5. The level of force you used on [K.S.] was not reasonably necessary in the circumstances. [K.S.] did not pose a legitimate threat to you in cells and your actions demonstrate that you were in fact the aggressor. The degree of physical force you exerted on [K.S.] is excessive given the totality of the circumstances.

6. You committed an assault on [K.S.].

Allegation 2

On or between December 9, 2018 and December 17, 2018, at or near Enfield, in the Province of Nova Scotia, while on duty, Constable Aaron MacGillivray failed to provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties and the conduct of investigations contrary to section 8.1 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars:

1. At all material times, you were a regular member of the Royal Canadian Mounted Police (“RCMP”) posted to “H” Division, Enfield, RCMP Detachment, Nova Scotia.

2. On December 8, 2018, you were the lead investigator on an impaired driving complaint involving a male later identified as [K.S.]. Police Occurrence Reporting System file [redacted] was generated concerning the complaint. [K.S.] was arrested for impaired driving at the scene and transported to the Enfield RCMP detachment in furtherance of the investigation. It is accepted that [K.S.] was appropriately charged with impaired driving, and driving with a blood alcohol level which exceeds eighty milligrams of alcohol in one hundred milliliters of blood (.08). It is further accepted that it was proper to lodge [K.S.] in cells.

3. The interactions of police with [K.S.] at the Enfield RCMP Detachment were video recorded. You assaulted [K.S.] shortly after he was placed into Cell B (“cell”).

4. On December 17, 2018, you completed a General Report for the PROS file that was both inaccurate and written in a manner so as to justify your use of excessive force on [K.S.]. You drafted a false and misleading narrative following the placement by you of [K.S.] into the cell that included:

a. “[K.S.] began to bang on the cell door, demanding to speak to a member about his situation and demanded to take the breath test again” (The video evidence does not support this false statement)

b. “[K.S.] became very aggressive upon hearing this, CST MACGILLIVRAY told [K.S.] that he needed to calm down and that there will be no retest” (The video evidence does not support that [K.S.] became aggressive with you)

c. “[K.S.] walked towards CST MACGILLIVRAY in an aggressive manner and put his hand on CST MACGILLIVRAY’s chest” (The video evidence does not support that [K.S.] either walked towards you in an aggressive manner or placed either of his hands on you)

5. You completed police notes concerning your interactions with [K.S.]. Your police notes were not an accurate account of the performance of your duties and the conduct of your investigation. You drafted a false and misleading narrative following the placement of [K.S.] into the cell that included:

a. “[K.S.] became very agitated and aggressive. I moved him back to the bench and told him to calm down. I closed the door where he continued to act aggressive” (The video evidence does not support that [K.S.] was the aggressor prior to you assaulting him. Further more, [K.S.] does not act aggressively after you leave the cell).

Allegation 3

On or about February 1, 2019, at or near Mill Cove, in the Province of New Brunswick, while off duty, Constable Aaron MacGillivray 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:

1. Constable Aaron MacGillivray (“MacGillivray”) is a member of the Royal Canadian Mounted Police (“RCMP”) posted to “H” Division, Enfield RCMP Detachment, Nova Scotia.

2. On February 1, 2019, Constable MacGillivray was operating his personal motor vehicle, a 2017 Dodge Charger, when he became involved in a collision with a deer on Highway #2 Mill Cove, approximately 20 kms east of Oromocto. The force of the collision was sufficient to necessitate police attendance to the scene of the accident and the creation of Police Occurrence Reporting System (“PROS”) file [redacted]. Constable John Arsenault (“Arsenault”) of the Oromocto RCMP Detachment was dispatched to investigate. Constable Arsenault became aware at the scene of the accident that you were a member of the RCMP.

3. When Constable Arsenault asked you to produce your driver’s licence, vehicle registration and insurance card, he noted that your insurance card was not only expired but that it also indicated a 2015 Chrysler Town and Country vehicle as being insured.

4. Vehicle licence plate [redacted] was unattached from your 2015 Chrysler Town and Country on October 5, 2018, when you sold the vehicle to Hayden Agencies in Bedford, Nova Scotia. You failed to properly register licence plate [redacted] to your 2017 Dodge Charger and agree that you were in fact operating an unregistered motor vehicle at the time of the accident.

5. Constable MacGillivray’s TD Insurance Policy [redacted] was cancelled by the policy holder on August 6, 2018, following non-payment of premiums. TD Insurance Policy [redacted] was never transferred by the

policy holder to your 2017 Dodge Charger. The day following the accident, you confirmed with the insurance company that you were in fact operating an uninsured motor vehicle at the time of the accident.

6. On February 11, 2019, Constable Arsenault contacted Constable MacGillivray via email to confirm if your vehicle possessed valid insurance when you were driving on Highway #2 at the time of the accident. On February 12, 2019, you replied to Constable Arsenault confirming that: “I did not have coverage at the time of the collision.” Constable Arsenault subsequently modified the Vehicle Report [redacted] on PROS to reflect the fact that the 2017 Dodge Charger bearing licence plate [redacted] was uninsured at the time of the collision.

7. Constable MacGillivray accepts and agrees that by operating both an unregistered and uninsured motor vehicle on Highway #2 at the time of the accident, he behaved in a manner that discredited the Force, contrary to section 7.1 of the Code of Conduct of the RCMP.

Allegation 4 – Withdrawn

Allegation 5

On or between February 16, 2019 and February 18, 2019, at or near Halifax in the Province of Nova Scotia and Fredericton in the Province of New Brunswick, while off duty, Constable Aaron MacGillivray failed to use government-issued equipment and property for authorized purposes and activities, contrary to section 4.6 of the *Code of Conduct of the Royal Canadian Mounted Police*.

Particulars:

1. At all material times, you were a member of the Royal Canadian Mounted Police (“RCMP”) posted to “H” Division, Enfield RCMP Detachment, Nova Scotia.

2. You were in Block Training the week of Monday February 11, 2019, to Friday, February 15, 2019. You signed out an RCMP carpool vehicle, call sign CP-04, for the duration of your Block Training. It is accepted that your use of CP-04 for the purposes of attending Block Training was legitimate. The use of carpool vehicles is managed by Commissionaire Al Massey (“Massey”), Fleet Manager at “H” Division HQ.

3. On February 16, 2019, you contacted Fleet Management via email at 15:49 hrs and requested to keep CP-04 for another week. On Monday February 18, 2019, at 06:08 hrs Massey denied your request to keep CP-04 for the week as the vehicle was scheduled for service maintenance on Tuesday, February 19, 2019. You returned the vehicle on the evening of Monday February [18], 2019. It was later learned that CP-04 had an excessive amount of mileage on it for the time period in which you had the vehicle and the location of Block Training.

4. Without authorization or justification, you operated CP-04 for personal reasons following the conclusion of Block Training until you returned the vehicle on Monday, February 1[8], 2019. You travelled in CP-04 to Fredericton, New Brunswick, to visit your daughter. There existed no operational reason for you to travel to Fredericton in CP-04 and by your actions you misused government issued property.

[Sic throughout]

EVIDENCE

Facts not in dispute

[13] With respect to Allegation 1, there are several facts that are not in dispute. At all material times, Constable MacGillivray was a member of the RCMP, posted to “H” Division, Enfield RCMP Detachment. K.S. was lawfully arrested and detained in cells. There were three officers present during K.S.’s time in cells: Constable Kayla Jeffrey, Constable James Stapleford and Constable MacGillivray. Their statements are found in the Record.

[14] It is also not disputed that Constable MacGillivray applied force to K.S. while he was in cells. However, the circumstances preceding the use of force and the specific force applied are in dispute. My findings of fact in this regard will significantly impact my findings with respect to Allegation 2.

Applicable legal principles to determine credibility and reliability of evidence

[15] The statements of Constable Jeffrey and Constable Stapleford were not challenged on cross-examination. I heard oral evidence from K.S., Constable MacGillivray and Sergeant Beauchamp.

[16] In assessing each witness’s evidence, I must consider whether they are being truthful as well as whether their evidence is reliable (i.e., whether the witness is in a position to accurately perceive and recollect what they observed). I may find a witness’s evidence to be truthful, but unreliable. It is also open to me to accept some, none or all of a witness’s evidence on a given point.

[17] In assessing credibility, I must not look at a witness's evidence in isolation, but rather look at the totality of the evidence. I must also consider the impact of the inconsistencies in that evidence and whether, when taken as a whole in the context of the totality of the evidence, they impact the witness's credibility.¹

[18] In *Faryna*,² the Court noted that a witness's evidence cannot be assessed solely on their demeanour, i.e., that they appear to be telling the truth. Rather, a trier of fact must determine whether the witness's story is consistent with the most probable interpretation of the surrounding facts.

[19] The determination of whether the witness's account has an "air of reality" is subjective, but must be grounded in the totality of the evidence.³

Evidence of Constable Stapleford

[20] I do not have any concerns with respect to the credibility or reliability of Constable Stapleford's evidence. He engaged with or was in close proximity to K.S. and Constable MacGillivray during key periods of their interactions; therefore, he was in a clear position to independently observe K.S.'s actions. His statements are both internally and externally consistent.

Evidence of Constable Jeffrey

[21] On the whole, I find Constable Jeffrey's evidence to be credible and reliable. She directly observed K.S.'s actions, as the member who administered the breathalyzer tests to K.S. She was present when he was advised of the results of these tests and when he was searched before being lodged in cells. She further observed K.S.'s actions while monitoring the video surveillance of the cells. Her statements are, for the most part, internally and externally consistent. I do have some concerns with respect to one area of her evidence, which I shall detail in my analysis.

¹ *F.H. v McDougall*, 2008 SCC 53, at paragraph 58.

² *Faryna v Chorney*, (1952) 2 DLR 354 [*Faryna*].

³ *F.H. v McDougall*, 2008 SCC 53, at paragraph 58.

Evidence of K.S.

[22] I did not find the evidence of K.S. to be credible or reliable. He was often evasive or argumentative in his responses. Key elements of his evidence were not supported or were clearly contradicted. He initially repeated his account of Constable MacGillivray's use of force, namely that Constable MacGillivray opened the door, screamed at him to sit down, and then lunged at him as Constable MacGillivray entered the cell, grabbing his throat and slamming him against the wall. He only acknowledged that this was not the case after being shown the video.

[23] K.S. admitted in cross-examination that he exaggerated the level of force used by Constable MacGillivray when he reported the incident to his friends and to his father. His father, in turn, relied on that information in filing a complaint with the Detachment.

[24] On the night in question, K.S. had consumed a significant quantity of alcohol, with a blood alcohol level of almost three times the legal limit. He had also smoked cannabis. There is no question that his ability to recall events was affected as a result. He asserts that he does not recall details of his conversations with the members, except where it accords with his stated version of events.

[25] Consequently, I have accorded very little weight to K.S.'s evidence.

Evidence of Constable MacGillivray

[26] Constable MacGillivray provided oral evidence at both the allegations and conduct measures phases of the hearing. I find his evidence to be credible. His oral evidence was consistent with his statement to Sergeant Leblanc, which was made prior to his having the opportunity to review the video evidence. He provided a detailed and frank account of the events. He responded to questions in a clear and direct manner, even when the answers were not favourable to him. He readily acknowledged the discrepancies between his statements and the video evidence.

[27] I do note that the video evidence clearly shows that K.S. was not banging on the cell door prior to Constable MacGillivray entering the cell, as he initially reported. Constable

MacGillivray provides an explanation of how he came to be mistaken; however, the reliability of his evidence on this point is not strong.

[28] That said, I have preferred Constable MacGillivray's account of events where it is consistent with the preponderance of the evidence.

Expert evidence of Sergeant Beauchamp

[29] The RCMP conducted an Incident Review into Constable MacGillivray's use of force. Sergeant Beauchamp completed the Incident Review. His review involved an assessment of whether Constable MacGillivray had adhered to the Incident Management Intervention Model and supporting RCMP policies. In this case, Sergeant Beauchamp found that Constable MacGillivray had not done so.

[30] An expert's evidence may, as a result of their special knowledge or training, assist me in evaluating the evidence. However, I must ensure that the factual basis for their opinions is consistent with the evidence and assess the weight to be given to their evidence. I cannot simply adopt their conclusions as my own. Rather, their reports are one aspect of the evidence I will consider in my determination of the ultimate issue, namely whether the force used by Constable MacGillivray was reasonably necessary in the circumstances.

[31] I have made findings of fact with respect to the mechanics of the force applied by Constable MacGillivray that do not align with Sergeant Beauchamp's assessment of the incident. I note that Sergeant Beauchamp did not have the benefit of viewing the video in sequence prior to completing his report. He did not have Constable MacGillivray's statement, nor did he conduct a secondary interview. In my view, these factors may have affected the reliability of the facts on which he based his review.

[32] The Conduct Authority Representative was able to review the full video, in sequence, with Sergeant Beauchamp at the hearing. While it did not alter his final conclusion, Sergeant Beauchamp acknowledged, on cross-examination, various instances in which K.S. may have demonstrated aggressive behaviours, which were not reflected in his report.

ANALYSIS

Allegation 1 – Use of force

[33] Allegation 1 states that Constable MacGillivray used more force than was necessary in the circumstances, contrary to section 5.1 of the Code of Conduct.

[34] In order to establish a contravention of section 5.1 of the Code of Conduct, the Conduct Authority must establish each of the following on a balance of probabilities:

- a. the identity of the member;
- b. the member's actions, which constitute the use of force; and
- c. that the use of force was not reasonably necessary.

[35] Constable MacGillivray's identity as the member who applied force to K.S. is not in dispute. The nature of his actions that constitute the use of force and the circumstances under which he came to apply that force are in dispute.

[36] I will begin by providing my findings of fact with respect to Constable MacGillivray's interactions with K.S. on the night of December 8, 2018, to the early morning of December 9, 2018. I will then provide my findings with respect to each element of the test under section 5.1 of the Code of Conduct.

Findings with respect to Constable MacGillivray's interactions with K.S.

[37] I find that, on the night in question, Constable MacGillivray was the lead investigator on an impaired driving complaint involving K.S. K.S. was arrested at the scene and transported back to Enfield Detachment.

[38] The interactions between Constable MacGillivray, Constable Stapleford, Constable Jeffries and K.S., while in the cellblock and processing area of Enfield Detachment, were video recorded. There is no audio with the video. All of the video is taken from cameras at a high level, looking down. The images are blurry, but are sufficiently clear to identify individuals in the

video and their general movements. There are sections of the video, for example while K.S. is being processed, where the view of K.S. is obstructed or he is only viewed from the back.

[39] K.S. was cooperative at the scene and during his transport to the Detachment. K.S. was cooperative and pleasant with the officers when he arrived at the Detachment and over the course of the breathalyzer testing. He provided two breath samples.

[40] At approximately 00:30 on December 9, 2018, K.S. was advised of the results of the testing, namely that he was found to have a blood alcohol level of 210 milligrams of alcohol in 100 millilitres of blood. He was housed in cells for the night.

[41] The oral evidence and statements of Constable MacGillivray, as well as the statements of Constable Jeffrey and Constable Stapleford, are consistent that, upon being advised of his charges, K.S.'s demeanour changed. In his oral evidence at the hearing as well as in his statement, Constable MacGillivray described visual and auditory cues that support this assessment. Constable Stapleford's statements provide a description of the visual and auditory cues that are consistent with those identified by Constable MacGillivray. Constable Jeffrey's statements also provide some support. Sections of the video corroborate their observations.

[42] I find that, during the transition from the stool where he was advised of his charges to the search, as well as during the search and processing for cells, K.S. displayed aggressive behaviours, including but not limited to cursing, raised voice, tensing his body and gesturing. He did remain cooperative in that he followed the directions he was given by the officers. They did not consider him to be a threat at that time. However, his behaviour raised their awareness and was factored into their ongoing assessment of the situation.

[43] In his General Report of December 17, 2018, Constable MacGillivray reported that K.S. began banging on the cell door, was yelling and demanding to take another breathalyzer test. Both Constable Stapleford and Constable Jeffrey reported that K.S. was demanding to take another test while in cells.

[44] Initially, in her statement to Staff Sergeant Dara, Constable Jeffrey also reported that K.S. was banging on the cell door. However, she was less certain in her statement to the Professional Responsibility Unit investigator.

[45] The video provides the clearest evidence on this point. I find that, in the approximately three minutes from the time K.S. entered the cell to the time that Constable MacGillivray entered with the blanket, K.S. did not display any aggressive behaviours, yell or bang on the cell door.

[46] After taking the blanket from Constable MacGillivray, K.S. turns and engages him in conversation.

[47] K.S. denies that he asked for a third breathalyzer test at any point during this conversation. I find that his evidence on this point is not reliable. K.S. was very intoxicated and testified that he cannot remember what he said in the course of his exchanges with the members. Yet he insisted that he was sure that he did not ask for a third test. I find it difficult to believe that someone who cannot remember what they did say can reliably attest to what they did not say. Moreover, his evidence is contradicted by that of Constable Jeffrey and Constable MacGillivray. Consequently, I find that, after taking the blanket from Constable MacGillivray, K.S. was asking for or demanding a third test and that his request was denied.

[48] I find that, over the course of that conversation, K.S. demonstrated increasingly aggressive behaviour, including but not limited to cursing, raised voice, gesturing, closing the distance between himself and Constable MacGillivray, and clenched hands. I find in particular that these behaviours were demonstrated between 00:37:55 and 00:38:51. K.S. ignored Constable MacGillivray's direction to sit down on the bench. In their oral evidence, both Constable MacGillivray and Sergeant Beauchamp described K.S.'s behaviour, namely by refusing to follow direction, as passively resistant at this time.

[49] Constable MacGillivray felt at the time that this change in behaviour justified the use of force. In his amended response to the allegations and in his oral evidence, he admitted that, at this point, he could have and should have exited the cell.

[50] At 00:38:52, Constable MacGillivray closed the remaining distance between himself and K.S. It is to be noted that it only took him two steps to do so. Constable MacGillivray admitted again that, at this point, he still had an opportunity to exit the cell and that he should have done so.

[51] Instead, Constable MacGillivray then placed his hand on K.S.'s chest and began to walk him backwards towards the bench. Both Constable Jeffrey and Constable Stapleford heard the commotion. Constable Stapleford entered the cell at this time, but he did not physically intervene.

[52] As Constable MacGillivray and K.S. approached the bench, K.S.'s left arm came up towards Constable MacGillivray's arm or chest area. In the video, it appears that K.S.'s arm did make contact with Constable MacGillivray. Sergeant Beauchamp comes to the same conclusion in his report. I find that it is more likely than not that K.S. did make contact with Constable MacGillivray.

[53] K.S. asserted that Constable MacGillivray grabbed him by the throat and that his head banged against the wall.

[54] Constable MacGillivray asserted that he placed his right hand on K.S.'s face, chin or jaw area, and that he applied a pain control technique to K.S.'s right hand or wrist.

[55] In his statement to Staff Sergeant Dara (at lines 285 to 289), Constable Stapleford reported that Constable MacGillivray used his right hand to make contact with K.S. He indicated that contact was made high on K.S.'s body.

[56] In her statement to Staff Sergeant Dara (starting at line 300), Constable Jeffrey reported that Constable MacGillivray used his left hand to apply force to K.S.'s right hand and that Constable MacGillivray's right hand controlled K.S.'s head, possibly on his face.

[57] I note that both Constable Jeffrey and Constable Stapleford were both in a position to directly observe Constable MacGillivray's actions. Constable Jeffrey observed his actions on the monitors. Constable Stapleford was present in the cell at the time.

[58] Sergeant Beauchamp's report indicates that Constable MacGillivray connected with K.S.'s "upper chest/neck area". In his oral evidence, Sergeant Beauchamp described this as anywhere from above the collar bone to below the chin.

[59] I have viewed the video multiple times, at various speeds. I find that it is consistent with Constable MacGillivray's account. Taken together with the evidence of Constable Stapleford and Constable Jeffrey, I find that Constable MacGillivray's right hand made contact with the right side of K.S.'s jaw area to control his head. He also applied a pain control technique to K.S.'s right hand or wrist area.

[60] I find that K.S.'s head jerks as Constable MacGillivray took him down to the bench. While K.S. testified that his head struck the wall as a result of the contact and that he suffered a bump to his head, Constable MacGillivray denied this.

[61] Again, I have concerns with the credibility and reliability of K.S.'s evidence. No injury was reported. While K.S. testified that he told his girlfriend about the bump the next morning, he also admitted to exaggerating the level of force used by Constable MacGillivray. Sergeant Beauchamp testified that he could not say whether K.S. struck his head nor was this clear in my review of the video. Ultimately, I do not have sufficient evidence to find that K.S.'s head struck the wall or that he was injured as a result of Constable MacGillivray's actions.

[62] K.S. was physically struggling as he was being brought down to the bench and during the first five seconds of being held. He was held there for approximately 20 seconds. He was visibly upset, gesturing and yelling after being released by Constable MacGillivray. K.S. continued yelling as Constable MacGillivray and Constable Stapleford exited the cell.

[63] At some point between being taken down to the bench and Constable MacGillivray's exit from the cell, K.S. made a comment to the effect of "I've got you". Constable MacGillivray responded in a dismissive manner.

[64] In the four minutes after the officers left the cell, the video shows that K.S. sat on the bench, made his bed and lay down. He then got up and knocked on the cell door a few times.

[65] K.S. spoke with Constable MacGillivray through the door. I find that Constable MacGillivray's account of the overall tone of their conversation is consistent with the video. Namely, I find that K.S. asked to call his girlfriend, that he was animated but calmed down as directed by Constable MacGillivray. Constable MacGillivray then brought K.S. his phone. K.S. spoke with his girlfriend for approximately six minutes. He returned the phone to Constable MacGillivray, who then exited the cell. K.S. then lay down and went to sleep.

[66] I will now turn to the application of the test under section 5.1 of the Code of Conduct.

Identity of the member who applied force

[67] The identity of the member is not in dispute. Constable MacGillivray is the member who had a physical encounter with K.S. while he was lodged in cells in the early morning of December 9, 2018.

Actions that constitute the use of force

[68] The actions that constitute the use of force by Constable MacGillivray are as follows: Constable MacGillivray placed his right hand on the chest of K.S., walking him backwards towards the bench. Constable MacGillivray's right hand made contact with the right side of K.S.'s jaw area to control his head. Constable MacGillivray also applied a pain control technique to K.S.'s right hand or wrist area as he guided him down to the bench in the cell.

Reasonableness and necessity of the use of force

[69] At issue is the third branch of the test, namely whether the use of force was reasonably necessary. There are three conditions that must all be met in order for the use of force to be reasonably necessary:

- a. At the time in question, Constable MacGillivray was acting within the scope of his lawful duties;
- b. Constable MacGillivray had reasonable grounds for using force. In other words, his belief that it was necessary to apply force *at all* objectively reasonable; and

- c. Constable MacGillivray did not use unnecessary force. This third element focuses on the amount of force used.

[70] As noted by the Conduct Authority Representative, in Sergeant Beauchamp's opinion, Constable MacGillivray did not have the authority to compel K.S. to sit down once in cells. Constable MacGillivray does not take issue with Sergeant Beauchamp's opinion. I have come to the same conclusion. Constable MacGillivray's stated intent was to have K.S. sit down, so he could explain to him why his request for a third test was denied. Regardless of his intent, Constable MacGillivray simply did not have the authority to compel K.S. to sit down in order to have a conversation. The conversation was not required in order for Constable MacGillivray to execute his duties. In seeking to enforce his direction to sit on the bench, Constable MacGillivray was not acting within the scope of his lawful duties.

[71] Having found that Constable MacGillivray did not act with lawful authority, the necessary conclusion is that he used unreasonable force. Consequently, I agree with the Subject Member Representative that this is where my analysis ends.

[72] I find that particulars 1 and 2 are established. Particular 3 is established in part. Namely, I find that K.S. did display aggressive behaviour between 00:37:51 and 00:38:51.

[73] Particular 4 is established, to the extent that Constable MacGillivray's actions were not authorized by law.

[74] With respect to Particular 5, I find that Constable MacGillivray was the aggressor in that he initiated physical contact with K.S. As I have already found that Constable MacGillivray was not acting within his lawful authority, I decline to make a finding as to the level of force applied.

[75] I decline to make a finding with respect to Particular 6. A finding of assault is not a constituent element of a contravention of section 5.1.⁴

[76] Allegation 1 is accordingly established.

⁴ *Commanding Officer, "K" Division and Constable Simon Bigras, 2020 RCAD 02, at paragraph 21.*

Allegation 2 – Obligation to report

[77] Allegation 2 concerns a contravention of section 8.1 of the Code of Conduct of the RCMP, which provides:

Members provide complete, accurate and timely accounts pertaining to the carrying out of their responsibilities, the performance of their duties, the conduct of investigations, the actions of other employees and the operation and administration of the Force.

[78] As there appeared to be disagreements as to the constituent elements of a contravention of section 8.1 of the Code of Conduct, I asked for the parties' submissions on the allegations to specifically address this issue. In particular, I requested their submissions as to whether knowledge is a requisite element, as well as the extent to which the *Conduct Measures Guide* and *Annotated Code of Conduct* may be used to inform the interpretation of the nature of conduct that falls within the scope of section 8.1 of the Code of Conduct.

[79] I agree with both parties that the *Conduct Measures Guide* and the *Annotated Code of Conduct* inform the interpretation of the scope of conduct that may be subject to discipline.⁵ Members must be able to rely on them to inform their understanding of the scope of behaviour, under a given provision of the Code of Conduct, that may constitute misconduct. As noted by the Conduct Authority Representative, they are not determinative, but an interpretation of the Code of Conduct must be consistent with the principles set out within these documents.

Timeliness and completeness of reports

[80] I agree with the Conduct Authority Representative that section 8.1 may be breached when a member fails to provide complete, accurate or timely accounts of their actions. Each of these three elements may form an independent basis for an alleged contravention of section 8.1 of the Code of Conduct. This was seen in *Greenlaw*,⁶ where the member faced two allegations under

⁵ *Commanding Officer, "K" Division and Constable Simon Bigras*, 2020 RCAD 02, at paragraph 20.

⁶ *Commanding Officer "K" Division and Constable D. Greenlaw*, 2019 RCAD 22 [*Greenlaw*].

section 8.1. The first was for the failure to file a complete and timely account of his actions, while the second was for filing an inaccurate account of his actions.

[81] However, as noted in *Greenlaw*, at paragraph 212, the provisions of the Code of Conduct are cited broadly within an allegation: “The very purpose of particulars is to provide details to a subject member in order that they can respond to what are often broadly stated allegations [...]” The principles of procedural fairness and, in particular, the principle that the member must know the case they have to meet require that the particulars clearly set out the acts that constitute the alleged misconduct. In the matter before me, the particulars do not reference the timeliness or completeness of the reports in question. Rather, particulars 4 and 5 speak solely to their allegedly false and misleading nature.

[82] I note that the Conduct Authority Representative did, in his cross-examination of Constable MacGillivray and in his submissions, draw attention to aspects in which Constable MacGillivray’s reports could be considered incomplete or untimely. However, it is too late in the process to allege additional failings with respect to the reports. Therefore, my analysis will reflect the particulars as written.

False, misleading or inaccurate account

[83] The parties both submit that when a member is alleged to have made a false, misleading or inaccurate report, the allegation will be made out if the member acted with knowledge that the report was false, misleading or inaccurate, or was negligent or reckless as to the validity of the report.

[84] In *Greenlaw*, at paragraph 262, the Conduct Board discussed the general principles related to the interpretation of section 8.1 of the Code of Conduct, but it declined to make a finding as to “the knowledge requirement of section 8.1”. In *Girard*,⁷ at paragraphs 25 and 26, the Conduct Board considered the discussion in *Greenlaw* and found that when a member is

⁷ *Deputy Commissioner Curtis Zablocki and Constable Jason Girard*, 2020 CAD 30 [*Girard*].

alleged to have contravened section 8.1 of the Code of Conduct and, in particular, is alleged to have made a false, misleading or inaccurate report, there are generally three categories of cases:

[...]

- a) Where the police officer knew the statements he made were false, misleading or inaccurate;
- b) Where the police officer was negligent, reckless or careless as to the validity of the statements being purveyed; and
- c) Where the police officer makes an honest but mistaken statement that ultimately turns out to be false, misleading or inaccurate.

[26] The first two categories attract liability, while the third does not.

[85] This analysis is also consistent with the *Conduct Measures Guide*, at page 62, which cites the same principles, as articulated by Ceysens.⁸

[86] I agree with the Subject Member Representative that the first question is whether the statement in question is accurate. If I find it to be inaccurate, then I must determine which of the foregoing three categories are applicable.

[87] Particulars 1, 2 and 3 are not in dispute. The core of the allegations is set out in particulars 4 and 5. Particular 4 refers to the General Report completed by Constable MacGillivray. Particular 5 refers to his police notes. I will begin by considering the impugned sections of the police notes, as set out in Particular 5, as this will in turn inform my analysis of Particular 4.

[88] Particular 5 alleges that Constable MacGillivray's police notes were not an accurate account of the performance of his duties and that they reflect a false and misleading narrative of events following the placement of K.S. in cells.

[89] The impugned section of the notes, set out in paragraph a), contains three sentences. The preceding entries in the notebook reflect K.S.'s change in demeanour upon being advised that he will be charged as well as his demand for another test.

⁸ Paul Ceysens, *Legal Aspects of Policing*, EarlsCourt Legal Press, Volume II, Chapter 6, revised March 2012, p. 6-108.

[90] The first sentence is: “[K.S.] became very agitated and aggressive.” In accordance with my findings of fact with respect to Allegation 1, this statement is accurate.

[91] The second sentence is: “I moved him back to the bench and told him to calm down.” The Conduct Authority Representative submits that this was a deliberately vague description, which was akin to withholding information or a failure to be forthright. This, he argues, also makes them inaccurate. The Subject Member Representative argues that the primary purpose of police notes is to refresh the officer’s memory.

[92] However, as noted by the Conduct Authority Representative, this is not the sole purpose of police notes. Section 2 of the *Operational Manual*, Chapter 25 “Investigative Aids”, incorporates the principles from *Wood v Schaeffer*, [2013] 3 SCR 1053, at paragraph 67, namely that “police officers do have a duty to prepare accurate, detailed and comprehensive notes as soon as practicable after an investigation”. Additionally, these notes are subject to disclosure.

[93] The Subject Member Representative concedes that Constable MacGillivray’s notes could have been more detailed. I agree that they certainly could have been more detailed about the manner in which Constable MacGillivray “moved” K.S. back to the bench.

[94] The question is whether the lack of detail renders this sentence inaccurate.

[95] As per *Girard*, the totality of the member’s actions must be considered. On the facts of this case, I do not find that the statement was so vague as to render it inaccurate or misleading. It reflects the most important aspect of this interaction, namely that Constable MacGillivray physically moved K.S. to the bench. While there is room for improvement, I do not find that the line from a performance issue to misconduct has, on a balance of probabilities, been crossed.

[96] The third sentence is: “I closed the door where he continued to act aggressive.” I accept the Subject Member Representative’s submission that this sentence is a reflection of Constable MacGillivray’s direct observations, which ceased when he closed the door. This interpretation is supported by placing this sentence into context within the notes as a whole. Constable MacGillivray’s next entry reflects K.S. knocking on the door and requesting to call his girlfriend.

[97] Again, this statement is accurate. K.S. was agitated and yelling at Constable MacGillivray and Constable Stapleford as they exited the cell. The video confirms the visual cues of yelling, as described by Sergeant Beauchamp. These continue until the cell door is closed.

[98] Having found that the impugned excerpt from Constable MacGillivray's notes is accurate, I find that Particular 5 is not established.

[99] Particular 4 alleges that Constable MacGillivray's General Report was both inaccurate and written in a manner so as to justify his use of excessive force on K.S. It then goes on to list three excerpts from the General Report that are alleged to constitute a false and misleading narrative.

[100] The excerpt at paragraph a) reads as follows: "[K.S.] began to bang on the cell door, demanding to speak to a member about his situation and demanded to take the breath test again."

[101] The video evidence clearly establishes that K.S. did not bang on the cell door. While he did demand to take another breath test, he did so after Constable MacGillivray entered the cell. The statement is, accordingly, inaccurate.

[102] Once again, the question I must now answer is whether Constable MacGillivray knew that it was false, misleading or inaccurate; was negligent, reckless or careless as to the validity of the statement; or if it reflects an honest mistake.

[103] The Conduct Authority Representative submits that Constable MacGillivray deliberately drafted a false narrative, imputing aggressive behaviour to K.S., in order to justify his use of force. The Subject Member Representative argues that the inaccuracy identified is solely with respect to the reason why Constable MacGillivray entered the cell, which did not have a significant bearing on the determination of whether his use of force was reasonably necessary. She further argues that this inaccuracy is the result of an honest mistake.

[104] Constable MacGillivray did know that a complaint had been filed in advance of completing his General Report. One could argue that he had an incentive to exaggerate K.S.'s behaviours in order to justify his use of force.

[105] However, having found that K.S. was in fact behaving in an aggressive manner both prior to and after entering the cell, as described by Constable MacGillivray, I do not find this argument compelling.

[106] Constable MacGillivray explained that, when he heard banging, he assumed it was K.S. kicking the cell door. He testified that he was in a back room, trying to find him a clean blanket. He explained that it was his normal practice to bring a blanket to a person in cells. I note that it was December and K.S. was in a t-shirt. Sergeant Beauchamp also testified that it is a common practice for members to offer a blanket to someone in cells.

[107] I accept Constable MacGillivray's evidence that, in his mind, the kick, had it occurred, would have been consistent with an agitated prisoner signalling that he wanted something. Constable MacGillivray testified that it was his normal practice to try to address a prisoner's concerns, when possible, as this helped to keep them calm. Ultimately, the reason why Constable MacGillivray entered the cell informs little in the analysis of whether his use of force was reasonable.

[108] I also accept that, when he completed his General Report, Constable MacGillivray was referring to his notes as a source of the primary events and actions taken on the file, but that he then relied on his memory to provide a more fulsome narrative.

[109] The next question is whether Constable MacGillivray was negligent, reckless or careless as to the validity of the statement.

[110] In order to find that Constable MacGillivray was negligent, reckless or careless as to the validity of the statement, I would need to find that Constable MacGillivray was "careless and gave the evidence in question in a frivolous manner with little regard as to content or

consequence”.⁹ The Subject Member Representative likens this to willful blindness or a conclusion that the member ought to have known the statement was inaccurate.

[111] Constable MacGillivray knew that his actions in the cellblock were recorded. The Conduct Authority Representative suggests that if he were unsure of his memory after referring to his notes, Constable MacGillivray could and should have reviewed the video evidence to ensure the accuracy of this report.

[112] I agree with the Subject Member Representative that this would be improper given Constable MacGillivray’s knowledge that a complaint had been filed. Had he done so, he may then have been accused of tailoring his evidence to the video.

[113] There is little evidence to suggest that Constable MacGillivray was careless or gave little regard to the content of his General Report. His conduct suggests otherwise. The Conduct Authority Representative acknowledged that, on the whole, the General Report is thorough. In the absence of clear, cogent and compelling evidence to the contrary, I cannot find that an inaccuracy on this point was the result of negligence, carelessness or recklessness on the part of Constable MacGillivray.

[114] This necessarily means that the error was the result of an honest mistake. As submitted by the Subject Member Representative and as acknowledged by Sergeant Beauchamp, it is commonly understood that the human memory is imperfect. Per *Sikorski*,¹⁰ an expert report is not required to confirm this.

[115] Consequently, Particular 4 a) is not established.

[116] Turning to Particular 4 b), it cites the following excerpt from the General Report: “[K.S.] became very aggressive upon hearing this, CST MACGILLIVRAY told [K.S.] that he needed to calm down and that there would be no retest.”

⁹ Ceysens, Paul, *Legal Aspects of Policing*, vol. 2, Saltspring Island, British Columbia: Earls court Legal Press, 1994 (looseleaf updated June 2019, release 35), at page 6-119.

¹⁰ *R v Sikorski*, [2013] OJ No 5936 [*Sikorski*].

[117] When looking at the General Report as a whole, the actions described in this excerpt take place after Constable MacGillivray has entered the cell and has advised K.S. that he will not be retested.

[118] I have found with respect to Allegation 1 that, after Constable MacGillivray entered the cell, K.S. engaged him in a conversation to request a retest and that this request was denied. I have also found that, over the course of that conversation, K.S. demonstrated increasingly aggressive behaviour.

[119] The excerpt from Particular 4 b) is consistent with my findings of fact. Consequently, I find that it is accurate.

[120] Finally, Particular 4 c) cites: “[K.S.] walked towards CST MACGILLIVRAY in an aggressive manner and put his hand on CST MACGILLIVRAY’s chest.”

[121] Again, the assertion that K.S. walked towards Constable MacGillivray in an aggressive manner is consistent with my findings of fact for Allegation 1.

[122] I have found that as they approached the bench, K.S. raised his left arm and made contact with Constable MacGillivray’s chest or arm. The statement is inaccurate to the extent that the timing of this contact is mistaken. The actual contact took place approximately 30 seconds later than indicated in Constable MacGillivray’s report.

[123] I do not deny the possibility that Constable MacGillivray intended to provide a misleading account to justify his use of force. If K.S. had been the aggressor, then the analysis of Constable MacGillivray’s use of force may have been different. However, I have nothing other than the Conduct Authority Representative’s submissions to lead me to that conclusion. On the evidence before me, this conclusion is speculative.

[124] Nor do I find, for the reasons articulated with respect to Particular 4 b), that the inaccuracy was the result of negligence, recklessness or carelessness on the part of Constable MacGillivray.

[125] The incident evolved very quickly. A mere minute and ten seconds elapsed from the time that K.S. closed the distance between himself and Constable MacGillivray, and when the entire incident of physical contact was over. Consequently, the totality of the evidence leads me to conclude that it is more likely than not that the inaccuracy was the result of an honest mistake. Particular 4 c) is not established.

[126] As Particulars 4 and 5 are not established, I find that Allegation 2 is not established.

Allegation 3 – Conduct likely to discredit the Force

[127] Section 7.1 of the RCMP Code of Conduct states: “Members behave in a manner that is not likely to discredit the Force.”

[128] The test for “discreditable conduct” under section 7.1 of the Code of Conduct requires that the Conduct Authority establish the following four elements on a balance of probabilities:

- a. the acts that constitute the alleged behaviour;
- b. the identity of the member who is alleged to have committed these acts;
- c. that the member’s behaviour is likely to discredit the Force; and
- d. that the member’s actions are sufficiently related to their duties and functions as to provide the Force with a legitimate interest in disciplining them.

[129] Constable MacGillivray drove his vehicle without the proper registration or insurance, in contravention of provincial legislation. By virtue of Constable MacGillivray’s admission to each of the particulars of Allegation 3, as amended, I find that the first two elements of the test are satisfied. Therefore, I must determine whether the third and fourth elements of the test are established.

[130] It is well established that members must adhere to the Code of Conduct both on- and off-duty. As a member, Constable MacGillivray is called upon to enforce the law, laws that, as the Conduct Authority Representative submits, he himself did not respect.

[131] I find that a reasonable person in society, with knowledge of all of the relevant circumstances, including the realities of policing in general and the RCMP in particular, would view Constable MacGillivray's actions as likely to bring discredit to the Force. I further find that his actions may impair his ability, or the public's confidence in his ability to impartially perform the duties of a member of the RCMP. As such, I find that Constable MacGillivray's actions are sufficiently related to his duties and functions as to provide the Force with a legitimate interest in disciplining him.

[132] Consequently, I find that Allegation 3 is established.

Allegation 5 – Unauthorized use of RCMP equipment and property

[133] It is alleged that Constable MacGillivray failed to use government-issued equipment and property for authorized purposes and activities, contrary to section 4.6 of the Code of Conduct. He is alleged to have used an RCMP fleet vehicle for personal and unauthorized purposes.

[134] Constable MacGillivray has admitted to all of the particulars of this Allegation. He admits that he used an RCMP fleet vehicle, without the proper authorization, to visit his daughter. Consequently, I find that Allegation 5 is established.

CONDUCT MEASURES

[135] Allegations 1, 3 and 5 have been established. These allegations involve, respectively, excessive use of force, discreditable conduct and improper use of RCMP equipment and property. In accordance with subsection 45(4) of the *RCMP Act* and the *RCMP Conduct Measures Guide*, I am required to impose “a fair and just measure that is commensurate to the gravity of the contravention, the degree of blameworthiness of the member, and the presence of mitigating and aggravating factors”.

[136] In arriving at my decision on measures, I am guided by section 36.2 of the *RCMP Act*, which sets out the purposes of the conduct process. These include at paragraph (e):

[...] to provide, in relation to the contravention of any provision of the Code of Conduct, for the imposition of conduct measures that are proportionate to

the nature and circumstances of the contravention of the Code of Conduct, and where appropriate, [...] are educative and remedial rather than punitive.

[137] In determining the appropriate sanction, I must ascertain the appropriate range of measures. The *Conduct Measures Guide* is a useful reference in this regard. However, it is important to note that the *Conduct Measures Guide* is just that, a guide. It is not meant to be prescriptive. I will then identify the aggravating and mitigating factors. Finally, I will weigh all of these factors in order to determine the appropriate conduct measures.

[138] I have considered the representatives' submissions and am guided by the principles of proportionality and parity, as well as the public interest.

Range of possible conduct measures

[139] I acknowledge that, in light of my findings on the allegations and in particular my finding that Allegation 2 is not established, the Conduct Authority Representative has indicated that dismissal is no longer a proportionate measure. I agree.

[140] I also agree with the Conduct Authority Representative that a global sanction is appropriate, recognizing the short proximity of time in which these three contraventions took place. It will also allow me to tailor the measures to the overarching circumstances in which these contraventions took place.

[141] I will start by reviewing the appropriate range for each of the three allegations in order to identify the appropriate range for a global measure.

Allegation 1 – section 5.1 of the Code of Conduct

[142] The Conduct Authority Representative submits that the excessive use of force in this instance falls within the aggravated range. He submits that the impact of the excessive use of force was significant from a public interest perspective. He emphasizes that it is this impact that brings it within the aggravated range.

[143] The Subject Member Representative suggests that the contravention in this case is best characterized as minimally above a “technical breach”. She submits that there was no

premeditation and no use of weapons. In addition, K.S. was not in a vulnerable position and that, while intoxicated, he was of a similar stature to Constable MacGillivray. She submits that the misconduct falls at the low end of the normal range and that the appropriate range is of a financial penalty of 2 to 4 days of pay, in combination with remedial measures of undergoing treatment as directed by a Health Services Officer, as well as training with respect to use of force.

[144] I agree with the Conduct Authority Representative that there is a significant public interest component. I will address this in more detail later in my analysis.

[145] In this case, Constable MacGillivray used force when he was not legally authorized to do so. He did so against an intoxicated person who, while young, could not be said to be comparable in strength or stature to Constable MacGillivray. While not restrained, he had been searched and was in cells at the time of the incident. As acknowledged by the Subject Member Representative, there was no provocation.

[146] These factors take me to the mid- to high-end of the normal range, which is a financial penalty of between 8 and 20 days of pay, alone or in combination with other measures.

Allegation 3 – section 7.1 of the Code of Conduct

[147] Constable MacGillivray has admitted to knowingly driving an uninsured and unregistered vehicle. He acknowledges that he had been doing so from approximately October 2018 to February 1, 2019, being the date on which his vehicle was damaged. The misconduct arose while off-duty and involves serious provincial or territorial violations.

[148] The Conduct Authority Representative submits that the length of time for which this continued, together with Constable MacGillivray's apparent position that his personal needs justified an ongoing violation of provincial laws, demonstrates a blatant disregard for the applicable laws. As such, the misconduct falls within the aggravated range.

[149] The Subject Member Representative submits that Constable MacGillivray did not demonstrate a blatant disregard for the law. He does not take the position that he was justified in

his actions. He was simply unable to keep on top of his personal administrative responsibilities, due to his personal circumstances. I will address the stressors in Constable MacGillivray's life, as well as his medical concerns, in the discussion of mitigating factors.

[150] The Subject Member Representative further submits that the aggravated range is reserved for offences that involve a risk to safety, such as hunting without a licence. It is not necessary to prove actual harm.

[151] In my view, driving an uninsured vehicle does pose a risk to safety. The purpose of insurance is, in part, to ensure that anyone injured as a result of the actions of an insured driver is able to secure treatment and compensation for physical injuries that they may suffer. Without which, they may be left in a vulnerable and precarious position.

[152] When considered in conjunction with the length of time during which Constable MacGillivray drove without the proper insurance or vehicle registration, I find that the misconduct falls within the aggravated range, which is a financial penalty of 6 to 10 days of pay, alone or in conjunction with other measures.

Allegation 5 – section 4.6 of the Code of Conduct

[153] Constable MacGillivray admits that he used a fleet vehicle for purely personal purposes, without authorization.

[154] The parties agree that his misconduct falls within the aggravated range. It cannot be said that this was an isolated incident. Constable MacGillivray has prior recent misconduct for a similar contravention. He acknowledges that he was not forthcoming about the purpose for which he was requesting extended use of the fleet vehicle and that he did not have clear authorization for its continued use.

[155] That said, in using the vehicle to visit his daughter, I acknowledge that Constable MacGillivray did not use the vehicle for highly improper purposes that would compromise the reputation of the RCMP.

[156] Therefore, I find that the appropriate range is in the middle of the aggravated range, which constitutes a financial penalty of between 3 and 6 days of pay, alone or in combination with other measures.

[157] Considering the foregoing, I find that the appropriate range for global measures is a financial penalty of between 17 and 36 days of pay, alone or in combination with other measures.

Aggravating factors

[158] Of the aggravating factors proposed by the parties, I have retained the following six.

[159] First, Constable MacGillivray has prior, recent and related discipline. According to the *Record of Decision* dated July 16, 2018, three allegations were established. Two under section 4.2 and one under section 4.6 of the Code of Conduct, for unauthorized use of an RCMP vehicle. I note that both contraventions under section 4.2 had a negative impact on the administration of justice.

[160] Second, Constable MacGillivray's actions had a negative impact on the administration of justice. The evidence before me suggests that charges against K.S. were not pursued largely, if not solely, because of the allegations against Constable MacGillivray. The case was otherwise sound.

[161] I agree with the Conduct Authority Representative that this is a significant aggravating factor. There is a strong societal interest in pursuing charges of impaired driving and that opportunity was lost. Moreover, this is the third time in the last few years that Constable MacGillivray's actions have been found to have negatively impacted the administration of justice.

[162] Third, Constable MacGillivray's actions involved a member of the public.

[163] Fourth, Constable MacGillivray's actions undoubtedly caused physical discomfort and undue stress to K.S. K.S. reports that the incident had a significant and negative impact on his view of the RCMP and of police officers generally.

[164] That said, I have found that K.S. did not suffer any injuries as a result of the use of force. Nor do I find that his loss of employment was caused by Constable MacGillivray's actions. Several weeks after the incident, K.S. advised his employer that he needed to take the day off to see his doctor. While he reports that this appointment was necessary due to injuries from the incident, there is no evidence to support his assertion. K.S. did not attend his doctor's office that day. His employer found out and fired him. His loss of employment is due to his own actions.

[165] Fifth, Constable MacGillivray's actions do not reflect well on the reputation of the RCMP with the Crown's office who had to withdraw the criminal charges against K.S.

[166] Sixth, Constable MacGillivray is a senior constable, to whom, as is clear from his performance reviews, junior members look to as an example. Moreover, two of the allegations at issue took place while Constable MacGillivray was temporarily reassigned as a result of a Code of Conduct investigation. As noted by the Conduct Authority Representative, this was a time when he should have been particularly mindful of the choices he was making.

Mitigating factors

[167] Of the mitigating factors proposed by the parties, I have retained the following six.

[168] First, Constable MacGillivray cooperated throughout both the statutory and conduct investigations, has made significant admissions, and has apologized for his conduct. He accepts responsibility for his actions.

[169] Second, at the time that these contraventions took place, Constable MacGillivray was navigating very difficult personal circumstances. These, together with the stresses of work, including involvement in traumatic operational incidents, and his decision to step down from his responsibilities with the Emergency Response Team took a heavy personal toll. The comments from his supervisors on his performance reviews demonstrate a recognition that these stressors also had an effect on his work performance.

[170] Third, prior to the time that these contraventions took place, Constable MacGillivray had sought medical attention. The letter from his treating psychologist sets out symptoms she

observed and his diagnoses. This information is helpful in that it gives a sense of the challenges that Constable MacGillivray was facing. However, I cannot rely on it to establish a causal link between his medical conditions and the contraventions at issue.

[171] Fourth, Constable MacGillivray has, in seeking treatment, taken steps to manage his medical conditions, and to better cope with the stressors in his life. He is open to the imposition of a measure that would ensure he continues to do so.

[172] Fifth, I have reviewed Constable MacGillivray's performance reviews in detail. I note that these cover all of his service with the RCMP. They reveal a very strong performer, who is trusted and relied upon by his fellow members and supervisors. I also note a few themes in the comments over the years. They highlight his efforts and success at building relationships with the community, his tactical knowledge, his high service standards and, in particular, his compassion when dealing with members of the public and clients.

[173] Sixth, I acknowledge that Constable MacGillivray paid for the gas for the fleet vehicle out of his own pocket.

Decision on conduct measures

[174] Members are, first and foremost, human beings. It is clear that Constable MacGillivray has been navigating very difficult personal circumstances, as well as health challenges. There is no question that the duties of a first responder can take their toll, and the public must have empathy for members.

[175] However, members are vested with extensive powers and they must uphold a high standard. The public has a right to expect, at a minimum, that they will act only within their lawful authority and that they will hold themselves to the same standards in their personal life, to which other members of the public are held. Where they fail to live up to that standard, they must be held accountable. This is essential to maintaining public confidence in the RCMP.

[176] I am mindful of the principles of correcting member misconduct, as set out in the *Conduct Measures Guide*, and of the importance of identifying educative and remedial measures

whenever possible. However, there is also a need to be corrective when a member has been previously warned about their behaviour and it does not appear that they have clearly received the message.

[177] That said, the evidence before me makes it clear that Constable MacGillivray has been a very strong and valued member of the RCMP. His misconduct has been contemporaneous with his personal and medical challenges, which suggests that he has strong rehabilitative potential.

[178] After balancing all of these factors, I impose the following conduct measures:

- a. Pursuant to section 4, paragraph (d) of the *CSO (Conduct)*, a financial penalty of two days (16 hours) to be deducted from Constable MacGillivray's pay;
- b. Pursuant to section 5, subsection (1), paragraph (i) of the *CSO (Conduct)*, a forfeiture of annual leave for a period of 20 days (160 hours);
- c. Pursuant to section 3, subsection (1), paragraph (d) of the *CSO (Conduct)*, a direction to undergo medical treatment as specified by a Health Services Officer; and
- d. Pursuant to section 3, subsection (1), paragraph (c) of the *CSO (Conduct)*, a direction to complete the Incident Management Intervention Model Certification Course on Agora. If Constable MacGillivray has previously completed this course, he is to complete the Incident Management Intervention Model Recertification Course on Agora. Proof of completion of this training is to be provided to the Conduct Authority, not to this Conduct Board, within 120 days of the date of my written decision.

CONCLUSION

[179] Allegations 1, 3 (as amended) and 5 are established. Allegation 2 is not established. Allegation 4 is withdrawn.

[180] Having found the allegations to be established, the aforementioned conduct measures are imposed.

[181] Constable MacGillivray is being given the opportunity to continue his career with the RCMP. However, any future contravention of the Code of Conduct will be seriously reviewed by the appropriate conduct authority and could lead to his dismissal from the Force.

[182] Any interim measures in place should be resolved, in a timely fashion, in accordance with section 23 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

[183] Finally, either party may appeal this decision by filing a statement of appeal with the Commissioner in accordance with subsection 45.11 of the *RCMP Act*.

June 16, 2021

Christine Sakiris

Date

Conduct Board