Protected A

File 2018335749 (C-049)

2022 CAD 04

ROYAL CANADIAN MOUNTED POLICE

IN THE MATTER OF

an appeal of a decision pursuant to subsection 45.11(1) of the
Royal Canadian Mounted Police Act, RSC, 1985, c R-10 (as amended) and
Part 2 of the *Commissioner's Standing Orders (Grievance and Appeals)*, SOR/2014-289

BETWEEN:

Civilian Member Marco Calandrini

Regimental Number C7996

(Appellant)

and

Commanding Officer, National Division

Royal Canadian Mounted Police

(Respondent)

(the Parties)

Protected A

File 2018335749 (C-049)

CONDUCT APPEAL DECISION

ADJUDICATOR: Steven Dunn

DATE: January 24, 2022

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INTRODUCTION

[1] Civilian Member (CM) Marco Calandrini, Regimental Number C7996 (Appellant), appeals the decision of an RCMP Conduct Board (Board) finding three allegations of harassment established, contrary to section 2.1 of the *RCMP Code of Conduct*, a Schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, that resulted in his dismissal.

[2] The Appellant contends that the decision contravenes the principles of procedural fairness and is clearly unreasonable because of inadequate reasons and the grossly disproportionate measure imposed (Appeal, pp 5-6).

[3] The Appellant requests that the order of dismissal be replaced with a forfeiture of pay.

[4] In accordance with subsection 45.15(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (*RCMP Act*) the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report issued on July 14, 2021 (ERC C-2019-009 (C-049)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

[5] The Commissioner has the authority, under subsection 45.16(11) of the *RCMP Act*, to delegate her power to make final and binding decisions in conduct appeals and I have received such a delegation.

[6] In rendering my decision, I have considered the material that was before the Board (Material), the written decision, the Appeal Record (Appeal), including the submissions of the Parties, and the Report. I note that the contents of the Material and Appeal Record were not sequentially numbered. I therefore refer to documents in the record by way of page number of the electronic file.

[7] For the reasons that follow, the appeal is dismissed.

BACKGROUND

[8] The ERC succinctly summarized the factual background leading to the conduct hearing (Report, paras 4-9):

> [4] On November 25, 2014, allegations of sexual assault and harassment were brought against the Appellant by a public service employee (the Complainant).
>
> [5] On November 26, 2014, the Officer in Charge of both the Appellant and the Complainant became aware of the identity of the Appellant as well as of the nature of the allegations of misconduct against him. The RCMP thereby commenced conduct proceedings against the Appellant within one year of this date.
>
> [6] On September 10, 2015, a Conduct Authority held a conduct meeting with the Appellant and found three Code of Conduct allegations to be established. On October 5, 2015, conduct measures consisting of forfeitures of pay (15 days in total) were imposed on the Appellant.
>
> [7] On March 1, 2016, a Review Authority served the Appellant with a Notice of Application pursuant to subsection 47.4(1) of the *RCMP Act*, seeking a retroactive extension of time to initiate a conduct hearing against him. The Review Authority advised the Appellant that he was exercising his discretion as per subsection 9(2) of the *Commissioner's Standing Orders (Conduct)*, SOR 2014/291 *(CSO (Conduct)*) to determine if a decision of a conduct authority is clearly unreasonable or the measures imposed are clearly disproportionate to the nature and circumstances of the contravention".
>
> [8] The Appellant challenged the Review Authority's application on the basis that he was statute barred by virtue of the requirement to initiate a hearing within one year. The Appellant also submitted that he would be prejudiced by an extension of the time limit given the fact that the witnesses' memory would inevitably be affected by the passage of time. Additionally, the Appellant suggested that adverse media and political pressures had factored into the RCMP's decision to seek a retroactive extension. Finally, he maintained that an extension was not warranted according to the criteria set forth by the Federal Court (FC) in *Canada (Attorney General) v. Pentney*, 2008 FC 96 (*Pentney*).
>
> [9] ln a decision dated May 12, 2016, a decision-maker found that there was no breach of procedural fairness or natural justice, and that an extension was warranted in the circumstances. As a result, the decision-maker granted an extension of time to initiate a conduct hearing from November 25, 2015, until June 2, 2016.

Allegations

[9] On May 30, 2016, the Review Authority (RA) rescinded the previous conduct measures imposed on the Appellant, finding that they were insufficient and clearly disproportionate to the

nature and circumstances of the contraventions. The RA directed that a conduct hearing be initiated against the Appellant pursuant to subsection 41(1) of the *RCMP Act*. On June 23, 2016, a Notice of Conduct Hearing was issued to the Appellant. The Notice contained three allegations and associated particulars (Material, pp 2792-2793):

> **Allegation 1**
>
> On or between August 31, 2012, and October 29, 2013, at or near the [X], [X], in the Province of Ontario, [the Appellant] failed to treat every person with respect and courtesy and also engaged in harassment, contrary to section 2.1 of the Code of Conduct of the Royal Canadian Mounted Police.
>
> **Particulars of Allegation I**
>
> 1. At all material times you were a civilian member of the Royal Canadian Mounted Police and posted to the [X] at the [X], in the Province of Ontario.
>
> 2. At all material times, public service employee [the Complainant] was employed as the office/course administrator for the [X]. You did not supervise [the Complainant], however, it was permissible for you to task him with completing various administrative work related tasks for you.
>
> 3. You engaged in disrespectful and demeaning conduct of a sexually belittling nature directed towards [the Complainant] in the workplace.
>
> 4. On one occasion while [the Complainant] was using the photocopier, you approached him from behind and proceeded to sexually harass him by first physically touching his buttocks and then sliding your hand towards his inner thigh area. You then informed [the Complainant] in a sexually suggestive manner that "you've got a great ass." [The Complainant] immediately indicated that your physical contact was unwanted and to never touch him again. You replied by stating that you were simply joking around.
>
> **Allegation 2**
>
> On or between August 31, 2012 and October 29, 2013, at or near the [X], [X], in the Province of Ontario, [the Appellant] failed to treat every person with respect and courtesy and also engaged in harassment, contrary to section 2.1 of the Code of Conduct of the Royal Canadian Mounted Police.
>
> **Particulars of Allegation 2**
>
> 1. At all material times you were a civilian member of the Royal Canadian Mounted Police and posted to the [X] at the [X], in the Province of Ontario.
>
> 2. At all material times, public service employee [the Complainant] was employed as the office/course administrator for the [X]. You did not supervise [the Complainant], however, it was permissible for you to task him with completing various administrative work related tasks for you.

3. You engaged in disrespectful and demeaning conduct of a sexually belittling nature directed towards [the Complainant] in the workplace.

4. On one occasion while [the Complainant] was seated in the common lunch room area, you sat next to him and then proceeded to sexually harass him by sliding your hand towards his inner thigh area. You further humiliated [the Complainant] by openly verbalizing to the other employees present in the lunch room that: "you've got such beautiful legs. Right guys? Hahahaha". [The Complainant] immediately indicated that your physical contact was unwanted and to never touch him again. You replied by stating that you were simply joking around.

Allegation 3

On or between August 31, 2012, and October 29, 2013, at or near the [X], [X], in the Province of Ontario, [the Appellant] failed to treat every person with respect and courtesy and also engaged in harassment, contrary to section 2.1 of the Code of Conduct of the Royal Canadian Mounted Police.

Particulars of Allegation 3

1. At all material times you were a civilian member of the Royal Canadian Mounted Police and posted to the [X] at the [X], in the Province of Ontario.

2. At all material times, public service employee [the Complainant] was employed as the office/course administrator for the [X]. You did not supervise [the Complainant], however, it was permissible for you to ask him with completing various administrative work related tasks for you.

3. You engaged in disrespectful and demeaning conduct of a sexually belittling nature directed towards [the Complainant] in the workplace.

4. On one occasion while [the Complainant] was seated at his office desk working, you sneaked up behind him and then proceeded to sexually harass him by shoving your hand inside of his shirt from the collar, sliding your hand across his torso and then stopping on his chest area. You further humiliated [the Complainant] by openly verbalizing that: "Oh, nice pecs you got going on! It doesn't show!" [The Complainant] immediately indicated that your physical contact was unwanted and to never touch him again. You replied by stating that you were simply joking around.

Proceedings before the Federal Court and Federal Court of Appeal

[10] The Appellant sought judicial review of the decision to grant a retroactive extension to initiate a conduct hearing, as well as of the RA decision to initiate the conduct hearing.

[11] On January 19, 2018, the Federal Court (FC) dismissed both applications as premature (*Calandrini v Canada (Attorney General)*, 2018 FC 52 (*Calandrini*), at paras 59-61), finding

that, even if the applications were not premature, the decisions were reasonable. Accordingly, judicial intervention would not be justified (*Calandrini*, paras 88, 144).

[12] The Appellant appealed the FC decision which the Federal Court of Appeal (FCA) dismissed on April 9, 2019 (*Calandrini v Canada (Attorney General),* 2019 FCA 73).

CONDUCT PROCEEDINGS

Stay of proceedings

[13] The conduct hearing was held from May 22 to 25, 2018. The Board commenced the hearing by addressing a motion for a stay of proceedings, filed by the Appellant who argued that the limitation period for a hearing had expired, resulting in the Board lacking jurisdiction. The Appellant maintained that the retroactive extension of time was statute barred pursuant to subsection 41(2) of the *RCMP Act*. Alternatively, the Appellant argued that, according to the criteria listed in *Pentney,* the circumstances did not warrant an extension of time.

[14] The Board dismissed the motion, agreeing with the FC that the decision to grant the time extension was not statutorily barred. The Board also found that the RA's reasons were sufficiently transparent and that the *Pentney* factors were appropriately considered by the delegated decision maker (Appeal, p 23).

Conduct Board hearing and decision

[15] After dismissing the motion for stay of proceedings, the Board took testimony from the Complainant, the Appellant, and Sergeant (Sgt.) M, who witnessed one of the alleged incidents. The Board summarized their respective testimonies as follows (Appeal, pp 24-26):

> [40] Throughout the period encompassed by the three allegations, [the Complainant] worked as an administrative assistant in the [X] at the [X] in [X], [X]. From the moment of his arrival in 2009, [the Complainant] felt out of place in an environment characterized by a certain amount of teasing and joking around among the employees who worked there, many of whom had a police or military background (or, like the [Appellant], both) and were accustomed to this kind of a "locker-room" environment.

[41] The [X] delivered explosives-related training to other accredited agencies, mostly other police forces. There were initially nine instructors, of which the [Appellant] was one. The [Appellant]'s area of specialization was Explosive Forced Entry.

[42] [The Complainant]'s job consisted of providing assistance and support to the instructors who needed it, to aid in the preparation and delivery of the [X]'s training programs. Financial cutbacks eventually reduced the number of instructors from nine to four, and to make matters worse, one of the four was only available on a part-time basis. These resourcing issues created a considerable amount of tension in the workplace. The witnesses collectively described how pranks and jokes were one way of relieving the tension.

[43] [The Complainant] was the recipient of some of the workplace jokes or comments. Some had to do with his clothing; in particular, he was accused of wearing "flood pant" because the hem of his pants was high. He was called "supermodel" presumably because he was tall and thin. Although he could not specifically recall any joke or prank in particular, [the Complainant] said that some had sexual connotations and, for personal reasons, these types of jokes made him uncomfortable.

[44] [The Complainant] testified to three separate incidents which occurred during the summer of 2012. With regard to the incident which forms the basis for Allegation 1, [the Complainant] was working at the photocopier, located in an area of the building in which all of the instructors had their offices.

[45] [The Complainant] testified to being in the vicinity of the photocopier at the time of this incident, when the [Appellant] came up behind him, cupped his hand on one of his buttocks and slid his hand around to the inside of his thigh. The [Appellant] said something like "you've got a great ass". [The Complainant] screamed at him and told him to stop. Later, after he calmed down, [the Complainant] went to the [Appellant] and told him his actions were inappropriate and unwelcomed. [The Complainant] testified that the [Appellant] told him it was just a joke and that he would not do it again. [The Complainant] did not report this to anyone else at the time.

[46] The incident at the photocopier was not witnessed by any other person. The [Appellant] testified that this incident did not happen at all.

[47] Another incident took place in the workplace lunch room, forming the basis for Allegation 2. There was a course going on at the time, so there were guest instructors present in the lunch room as well as the usual staff of the [X]. [The Complainant] was seated at the lunchroom table when the [Appellant] came to sit next to him and, as he sat down, [the Complainant] said the [Appellant] placed his hand on his inner thigh, and while he was doing this, said something like "You have great legs, right guys?" and people at the table broke out laughing. [The Complainant] testified to being

> angry and telling the [Appellant], probably in French, to take his hand away. [The Complainant] testified to the [Appellant] having said it was just a joke.
>
> [48] This incident was witnessed by Sergeant [M], who was in the lunchroom at the time. He saw the [Appellant] go to sit down next to [the Complainant] and, as he was doing so, place his hand on [the Complainant]'s inner thigh. Sergeant [M] said [the Complainant] screamed when he was touched, and people seated around the table broke out laughing at [the Complainant]'s reaction. Sergeant [M] testified it was common knowledge around the office that [the Complainant] did not like being touched.
>
> [49] The [Appellant] agreed this incident happened, but he testified to placing his hand just above [the Complainant]'s knee, not on his inner thigh. The [Appellant] said he could not recall his exact words, but he may have said something like "Hey, sexy" as he did this.
>
> [50] [The Complainant] was not sure which of these two incidents occurred first. However, he recounted a third incident, which he was certain occurred after the first two. In this third incident, which is particularized in Allegation 3, [the Complainant] was seated at his desk and was working with Staff Sergeant B, the Director of the [X], on a spreadsheet for cost calculations. The [Appellant] approached [the Complainant] from behind, reached around and slid his hand down the open collar of his shirt, across his chest, saying something like "nice chest you have". [The Complainant] testified that both the [Appellant] and Staff Sergeant B laughed at this. [The Complainant] said he screamed at the [Appellant] to remove his hand right away. [The Complainant] recalled Staff Sergeant B telling the [Appellant] that he "probably shouldn't have done that".
>
> [51] Staff Sergeant B did not testify at this hearing and has indicated in his statement that he has no recollection of this incident.
>
> [52] The [Appellant] testified to seeing [the Complainant]'s shirt partially unbuttoned and open, and he admitted to placing his hand inside [the Complainant's shirt as a joke.
>
> [53] [The Complainant] testified to an aversion to being touched and did not give consent to any of the touching. On each occasion, he told the [Appellant] he did not want to be touched and to never do it again. [The Complainant] described the incidents as intrusive, humiliating and degrading. Collectively, [the Complainant] stated, the incidents have had a significant negative impact on his work and on his personal life.

[16] In testimony, the Complainant explained why he waited more than two years to file a complaint against the Appellant. The Complainant did not want to report the complaint to Staff

Sergeant (S/Sgt.) B, whom the Complainant felt was a willing participant in the office culture (Appeal, pp 28-29).

[17] Nor did the Appellant mention the three incidents at issue during his statement provided to investigators on April 25, 2014. The Appellant stated that he was directed to speak only to nudity in the workplace during that investigation (Appeal, p 65).

[18] The Complainant also acknowledged that he occasionally went out for lunch with the Appellant, in groups and sometimes alone. Often, the Appellant paid for lunch. However, no inappropriate incidents occurred on these outings (Appeal, p 67).

[19] The Appellant was suspended from duty, in May of 2014, due to incidents of nudity in the workplace (Appeal, p 29). The Complainant was relieved to no longer be in the same workplace as the Appellant; however, he was aware of, and uncomfortable with, the reality that the Appellant would one day return to the workplace.

[20] Yet, the Complainant did not decide to formally report what happened until he attended a "town hall" event in November 2014. After receiving direction and advice from a union representative, on November 25, 2014, the Complainant reported the incidents involving the Appellant to his supervisor (Appeal, p 29).

[21] RCMP senior management instructed the Complainant to make a formal complaint of sexual assault to the police service of jurisdiction. He did so on January 6, 2015 (Appeal, p 30).

[22] The Complainant's account of events changed to a degree over time. The ERC summarized the Board's findings with respect to discrepancies between the statements made by the Complainant in the years since he reported the incidents (Report, para 23):

> […] [W]ith respect to Allegation 1, the Complainant said in his statement dated November 26, 2014 that the Appellant "grabbed my ass and ran his hand down my thigh". In the statement he provided a few days afterward, the Complainant said that the Appellant "grabbed my posterior and moved that hand toward the inner thigh". In another statement, which he provided on March 8, 2016, the Complainant said "I walked towards the photocopier, turned towards it, I grabbed my paperwork, looked at it and then I felt a

> hand on my buttocks". Then, in his statement dated January 6, 2015, the Complainant said the Appellant "took his left hand, slid it over my butt, and... like around my thigh, kinda [*sic*] towards the front...". The Board referred to other similar discrepancies with respect to Allegations 2 and 3 all of which were noted by the MR in a document provided and introduced into the evidence at the hearing (Appeal, pages 70-73). In the end, the Board agreed with the Conduct Authority Representative (CAR) that the inconsistencies were not so significant as to prove fatal to the Complainant's credibility. With respect to Allegation 1, the Board preferred the version of events provided by the Complainant as opposed to the one put forth by the Appellant, which was that the incident never occurred.

[23] The Board determined that the delay in reporting was immaterial and the slight changes in the Complainant's story did not diminish his credibility. The Board found all three allegations were established on a balance of probabilities and the Appellant's behaviour amounted to sexual harassment.

[24] The Board first identified the appropriate range of sanctions available as significant forfeiture of pay to dismissal, then considered mitigating and aggravating factors. Despite strong mitigating factors, on May 25, 2018, at the hearing, the Board determined that dismissal was justified in the circumstances. On July 12, 2018, the Board issued the written decision.

APPEAL

[25] The Appellant was personally served the Board decision on August 17, 2018, and filed his Statement of Appeal on August 29. He argues that the Board's decision contravenes the principles of procedural fairness and is clearly unreasonable. He requests that the Board's findings with respect to Allegation 1 be overturned and that a forfeiture of pay be ordered in place of dismissal (Appeal, p 6).

[26] The Appellant relies on the following grounds of appeal (Appeal, p 5):

i. With respect to Allegation 1, the Board failed to provide adequate reasons justifying his findings on the credibility of the parties; and,

ii. The sanction imposed is clearly unreasonable and grossly disproportionate to misconduct in light of the parity principle.

[27] In his appeal submissions, the Appellant adds that the "clearly unreasonable and grossly disproportionate" conduct measure gives rise to a reasonable apprehension of bias on the part of the Board (Appeal, p 65).

[28] On February 10, 2019, the Commanding Officer of National Division (Respondent) provided his response (Appeal, pp 613-622). The Respondent refutes the Appellant's arguments and requests that the sanction be upheld.

Preliminary issues

Standing

[29] I agree with the ERC that there are no issues with respect to standing.

Timeliness of appeal

[30] Early in the appeal process, the CAR raised the issue of timeliness, arguing that the Appellant filed his appeal outside the 14-day limitation period to do so (Appeal, pp 442-443). There was some discrepancy as to whether the Appellant had been served with the decision on July 19, or August 17, 2018.

[31] The CAR points to an email from the law clerk of the Appellant's representative that stated on July 19, 2018, "we are accepting service on [the Appellant's] behalf" (Appeal, p 442). However, the certificate of service in the OCGA file states that the Appellant received the decision on August 17, 2018 (Material, p 1278).

[32] Despite the arguments presented by the CAR, I agree with the ERC that the certificate of service is the most reliable evidence. I accept that the Appellant received the written decision on August 17, 2018, and there is no evidence that he waived his right to be personally served. In short, I accept that the presentation of the appeal on August 29, 2018, met the time requirements of section 22 of the *Commissioner's Standing Orders (Grievances and Appeals)*, SOR/2014-289 (*CSO (Grievances and Appeals)*).

Admissibility of the Federal Court of Appeal decision

[33] After the FCA dismissed the Appellant's appeal of the FC ruling, the Respondent sent a copy of the FCA decision to the OCGA on May 6, 2019.

[34] The Appellant challenges the admissibility of the FCA decision because it was not before the Board at the time of the hearing (Appeal, p 759). The Appellant argues that the decision is "irrelevant to whether or not the allegations against [the Appellant] were properly found to be substantiated and whether or not the sanction imposed by the [Conduct] Board was disproportionate" (Appeal, p 759).

[35] The ERC concluded that the FCA decision is not admissible after referring to the test for admitting new evidence from *Palmer v The Queen*, [1980] 1 SCR 759 (*Palmer*), at page 761, emphasizing that an appellate body should only accept new evidence where (Report, para 39):

i. it would be in the interests of justice to do so;

ii. the evidence could not reasonably have been submitted at the hearing;

iii. [it] is relevant to an issue;

iv. [it] is credible; and,

v. if believed, [the evidence] could reasonably be expected to have affected the Board's decision.

[36] All of these criteria must be met to warrant the introduction of additional evidence on appeal and in view of these requirements, ERC addressed the salient factors (Report, para 40):

> Although the FCA decision is credible and could not reasonably have been submitted at the hearing, I find that it is irrelevant and would not have affected the Board's decision regarding the issues raised by the Appellant on appeal.

[37] While I agree that the FCA decision is not relevant to Appellant's grounds of appeal, I am not convinced that judicial decisions generally, and an FCA decision arising from the very

case that was before the Board and is now the subject of this appeal, in particular, constitutes evidence to be scrutinized for admissibility as envisioned by the Supreme Court of Canada (SCC) in *Palmer*. Jurisprudence is not proffered to tribunals and courts as evidence, but rather, guidance and persuasion. For this reason, I find the Respondent was right to put the FCA decision into the record. Nothing turns on this, however, because the FCA decision does not speak to the issues of credibility or the appropriateness of dismissal at play here.

ANALYSIS

Did the Board fail to provide adequate reasons with respect to findings of credibility?

[38] The Appellant contends that in pronouncing on Allegation 1, the Board failed to reconcile the contradictory versions of events and address questions of credibility resulting in a breach of procedural fairness (Appeal, pp 497-502, 715-718)

Applicable standard of review for sufficiency of reasons

[39] I agree with the ERC (Report, paras 58-59) that the Appellant's reliance on procedural fairness for this ground misses the mark. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 3 SCR 208 (*Newfoundland Nurses*), the SCC explained the distinction between procedural fairness and a review of the sufficiency of an administrative tribunal's reasons (para 22):

> It is true that the breach of a duty of procedural fairness is an error of law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there are reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[40] The Appellant's arguments are not premised on the absence of a decision, but rather on the insufficiency of the Board's reasons. For completeness, I note that RCMP Conduct policy, Administration Manual (AM) Part XII.1.11.16.2, requires conduct boards to provide a written decision that includes reasons.

[41] Subsection 33(1) of the *CSO (Grievances and Appeals)* stipulates that in circumstances where there is no breach of procedural fairness or presence of an error in law, I must determine whether the decision is "clearly unreasonable":

> 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.

[42] In *Kalkat v Canada (Attorney General)*, 2017 FC 794, at para 62, the FC considered the term "clearly unreasonable" as it is set out in subsection 33(1) of the *CSO (Grievances and Appeals):*

> Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of the term [manifestement déraisonnable], 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).

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

[44] More recently, the FCA reached the same conclusion in the ensuing *Smith* appeal, 2021 FCA 73.

[45] Equating the standard of patently unreasonable to clearly unreasonable means according significant deference to a conduct board's findings of fact or mixed fact and law.

[46] In *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at para 57, the SCC explained that a decision is patently unreasonable if the "defect is apparent on the face of the tribunal's reasons", in other words, it is "openly, evidently, clearly" wrong. The SCC also expanded on the distinction between "unreasonable" and "patently unreasonable" (*Southam,* para 57):

> The difference lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. [...] This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. [...] But once the lines of the problem have come into focus, if the decision is patently unreasonable then the unreasonableness will be evident.

[47] Later, the SCC stated in *Law Society of New Brunswick v Ryan,* 2003 SCC 20, at para 52, that a patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand."

[48] The SCC renewed an examination of the standard of review in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 (*Vavilov*). For present purposes, I note that the SCC confirmed that legislated standards of review should be respected (*Vavilov,* paras 34-35).

[49] I will now consider whether the Board made any reviewable errors.

Submissions

[50] The Appellant argues that the Board failed to provide adequate reasons explaining why the Complainant's accounting of Allegation 1 was preferred over the Appellant's contention that the event never occurred.

[51] The Appellant insists that the Board's reasons specifically failed to address the inconsistencies within the Complainant's accounts to police and throughout the conduct

proceedings (Appeal, pp 497-501). The Appellant draws particular attention to the juxtaposition of the Board stating both that the Complainant had "unwavering consistency in his description of each of the core events" and "significant inconsistencies" in his statements (Appeal, p 500). The Appellant argues that these inconsistencies are significant as they relate to the particulars of the allegations and the Complainant's actions in the days and months that followed them. The Appellant insists that these lapses in memory suggest "that the Complainant had selective memory recall, called into question credibility, and should have been addressed by the Board when assessing the Complainant's credibility" (Appeal, p 501).

[52] The Appellant also refers to the aspects of the Complainant's story that he claims are not believable in the circumstances. For example, he suggests it would be unlikely that no one would hear a scream in the middle of the office, at the photocopier, while others were working. He also stresses that "any prank was carried out in front of an 'audience' as the purpose was to elicit laughter" (Appeal, p 499). Therefore, the Appellant would be unlikely to behave in such a manner when the two parties were alone.

[53] The Appellant suggests that the complaint was lodged as part of a campaign to have the Appellant dismissed, so that the Complainant would not have to work with him again (Appeal, p 500). The complaint is also seemingly at odds with the Complainant's past behaviour, as he often went on lunch alone with the Appellant following the incidents. According to the Appellant, these factors suggest the possibility that the Complainant was not honest and forthright (Appeal, pp 500- 501).

[54] Finally, the Appellant argues that he was the more credible witness and his version of events should have been preferred over the Complainant's. The Appellant acknowledges Allegations 2 and 3, but he categorically denies Allegation 1 (Appeal, p 501). He recognizes that the Board had the discretion to prefer the testimony of the Complainant; however, the Appellant maintains that the Board's reasons did not adequately address why it did so. The Appellant relies on the criminal case, *R v Ururyar*, 2017 ONSC 4428, where the trial judge's reasons were found to be insufficient because the judge failed to explain why they did not believe the evidence of the accused (Appeal, p 501).

[55] In contrast, the Respondent submits that the reasons provided by the Board "were drafted in a comprehensive and complete manner so as to fully demonstrate: '... justification, transparency and intelligibility...' and equally important procedural fairness" (Appeal, p 613). Based on the standard for assessing reasons, derived from *Newfoundland Nurses,* the Respondent argues that the decision provided by the Board was sufficient and reasonable. Accordingly, deference should be shown to the decision because "perfection is not the appropriate standard to apply" (Appeal, p 613).

Findings

[56] I agree with the ERC that the Board's reasons were adequate in the circumstances. The crux of the Appellant's argument is that the Board erred in accepting the Complainant's version of events with respect to Allegation 1 because the Complainant lacked credibility.

[57] The ERC described the adjudicator's responsibility when assessing conflicting accounts (Report, para 61):

> While it is true that a failure to sufficiently articulate how credibility concerns were resolved may constitute a reversible error, the SCC has emphasized that "[r]arely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal" (see *R. v. Dinardo,* [2008] 1 SCR 788 at para. 26). In *R. v. R.E.M.*, [2008] 3 SCR 3 (*R.E.M.*), the SCC explained that, as a general rule, more detail may be required in reasons where the trier is required "to resolve... contradictory evidence on a key issue" (para. 44). Where the evidence is contradictory, "the appellate court should ask whether the trial judge appears to have recognized and dealt with the contradictions" (*R.E.M.* at para. 55). It follows that "[...] [w]here a trial judge demonstrates that she is alive to the inconsistencies but still concludes that the witness was nonetheless credible, in the absence of palpable and overriding error, there is no basis for interference by the appellate court." (*F.H. v. McDougall*, [2008] 3 SCR 41 at para. 70).

[58] The Board was alive to the contradictory nature of the testimony, the inconsistencies found in the Complainant's statements, as well as long standing judicial guidance for triers of fact in these situations (Appeal, pp 24-30, 38-40). Ultimately, the Board emphasized (Appeal, p 40):

> [113] However, I find the inconsistencies are not so significant as to prove fatal to [the Complainant]'s credibility. He shows unwavering consistency in his description of each of the core events (at the photocopier, in the lunchroom and at his desk). For each of the three incidents, he provides a clear account of what the [Appellant] did to him, what the [Appellant] said each time, how he expressed how he felt about being touched, and, most importantly, to never do it again. [The Complainant] was unflinching in his delivery, each and every time he was invited to share his story.

[59] The Board would go on to explain (Appeal, pp 41-42);

> [120] With respect to Allegation 1, I prefer the version of events provided by [the Complainant]. On the basis of his testimony, which I did not find to be evasive at all, as well as on the basis of the consistent account he provided at each and every opportunity, I find the acts occurred as alleged. [The Complainant] was at work at the photocopier and, without warning or provocation (by design, because I find these gestures were all a form of coarse office horseplay), the [Appellant] came up behind him, grabbed him by one of his buttocks, and said something like "you've got a great ass".
>
> [121] I do not find it damaging to [the Complainant]'s credibility that he did not lodge a formal complaint about these incidents at his first available opportunity. [The Complainant] is not a police officer and he is unfamiliar with investigative protocol. It is entirely within the realm of possibility that when the internal investigator outlined the mandate and the parameters for the statement he was about to take (on unrelated conduct matters), [the Complainant] thought the investigation was only about nudity in the workplace and not about anything else. In any case, he was not ready to come forward yet. This bears mentioning because I also do not find it fatal to [the Complainant]'s credibility that he only brought matters forward because of constant reminders in his workplace that the [Appellant] was going to be returning to work alongside him again. If permanent reassignment had taken place, it is quite likely these events would never have seen the light of day. I find [the Complainant] was desperate to avoid having to work with the [Appellant] again, because of what the [Appellant] had done to him in the past.
>
> [122] Unlike Allegations 2 and 3, there were no witnesses to the events forming the basis for Allegation 1. In finding the events to have occurred as alleged, I prefer [the Complainant]'s version to the [Appellant]'s. [The Complainant] has no motive to fabricate this story. Like many assault victims, he had a great deal of difficulty coming forward with a formal complaint and, like many, he has suffered greatly for having done so. He has been obliged to recall the events on a surprisingly large number of occasions. When the inevitable discrepancies appeared, he has been obliged to weather the cross- examination on those discrepancies. Like many

> victims, I expect [the Complainant] has had his moments of doubt, questioning whether or not it was worth all the trouble, and whether or not he would have been better off simply keeping matters to himself. He certainly had nothing to gain from coming forward with a formal complaint. On the contrary, he had a great deal to lose by doing so.
>
> [123] I find [the Complainant] to have acted courageously in this regard, and I find his credibility unassailable.

[60] In sum, the Board preferred the testimony of the Complainant and found no evidence that the Complainant fabricated the allegations. Likewise, the Board determined that the Complainant's delayed disclosure of the allegations did not undermine his credibility. In my view, the Board sufficiently explained these credibility findings and the interpretation of the contradictory evidence. Like the ERC, I am satisfied that the Board's reasoning does not give rise to a reviewable error.

Was the conduct measure imposed clearly unreasonable?

[61] The Appellant argues that the Board erred in determining the appropriate conduct measure by incorrectly weighing the mitigating and aggravating factors and showing little regard for the principle of parity, resulting in a clearly unreasonable sanction (Appeal, pp 502-505).

Standard of review for conduct measures

[62] Where reasons for sanctions are provided, significant deference is owed to the conduct board that imposes conduct measures. In *R v Lacasse*, 2015 SCC 64, at paras 43-44, while expressed in the criminal context, the same principles are applicable here, the SCC expanded on the deference owed in a review of sanctions:

> I agree that an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor can justify the intervention of an appellate court and permit that court to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate. However, in my opinion, every such error will not necessarily justify appellate intervention regardless of its impact on the trial judge's reasoning. If the rule were that strict, its application could undermine the discretion conferred on sentencing judges.
>
> […]

> In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

[63] In general, a conduct appeal adjudicator should only intervene where the conduct measure "is unreasonable, fails to consider all relevant matters (including important mitigating factors), considers irrelevant aggravating factors, demonstrates a manifest error in principle, is clearly disproportionate with the conduct and the sanction in other previous similar cases, or would amount to an injustice" (see D-115, Commissioner's decision, at para 44).

[64] In other words, conduct measures should only be overturned on appeal in rare circumstances.

Summary of conduct measures determination

[65] Before considering the specific points raised by the Appellant related to the identified mitigating and aggravating factors, I must consider how the Board reached the decision to dismiss the Appellant.

[66] The RCMP and ERC have long adopted a three-part process to arrive at appropriate conduct sanctions:

i. determine the appropriate range of sanction, given the seriousness of the conduct;

ii. determine any mitigating and/or aggravating factors; and

iii. select a penalty that best reflects the severity of the misconduct, and the nexus of the misconduct and the requirements of the policing profession.

[67] A conduct authority or conduct board is not required to specifically reference these three steps as a *de facto* test, rather, they must demonstrate that they have turned their mind to each of these elements.

[68] The ERC summarized the process undertaken by the Board. First, the Board determined the available range of sanctions, then the mitigating and aggravating factors to be relied upon,

before finally reaching the decision to dismiss the Appellant. The Board referred to each step of the conduct measure assessment. With respect to the appropriate range of sanctions, the ERC observed (Report, para 75):

> [75] The Board began its analysis on conduct measures by summarizing the parties' representations during the hearing. It then referred to the Conduct Measures Guide and determined that where sexual harassment or other forms of workplace misconduct are concerned, dismissal is within the range of sanctions available.

[69] Then, the ERC summarized the mitigating factors considered by the Board (Report, para 75; see also, Appeal, pp 51-53):

- the Appellant's consistent and sustained pattern of above-average performance;
- the support the Appellant enjoys from his supervisors and peers; and
- the Appellant's rehabilitative potential - the Board determined that there was no reason to suspect that any further contraventions of a similar nature would ever be committed should the Appellant be permitted to remain with the Force.

[70] Next, the ERC summarized the aggravating factors considered by the Board (Report, para 76; see also, Appeal, pp 53-54):

- the fact that the incidents occurred against the backdrop of repeated calls for a respectful workplace and for a zero-tolerance approach to workplace harassment within the Force (general deterrence);
- the fact that the attacks were repetitive and directed towards an individual who was notoriously vulnerable to them; and
- the negative impact of the incidents on the Complainant.

[71] Based on consideration of these factors, the Board dismissed the Appellant, finding that "some hurdles are simply too high to climb. The gravity of the misconduct in this case, combined

with the aggravating factors, outweighs the set of mitigating factors, as powerful as they are" (Appeal, p 58).

[72] To recap, the Board stated and followed the long-standing approach to determine the appropriate sanction by: delineating the range of sanctions available; stating the mitigating and aggravating factors under consideration; and, explaining the rationale for ordering dismissal.

[73] Just the same, the Appellant takes issue with some of the factors relied upon by the Board. I will address each in turn.

Submissions

[74] The Appellant suggests that the RCMP-wide emphasis on combatting sexual harassment and toxic workplace environments "were being made with respect to the RCMP in general, from administrative offices to front line officers" and was less applicable to their unit which was an "unique, high-intensity, all-male workplace with a 'locker-room' environment" (Appeal, p 503). The Appellant portrays the RCMP goal as an attempt to focus on the "issue of gender-based violence and harassment against women" and "the protection and retention of female members in particular" (Appeal, p 503).

[75] With that context, the Appellant argues that the policy changes were not made with the intention of stomping out "hijinks between men" (Appeal, p 503).

[76] He also submits that the perception that the Complainant was deeply impacted by the allegations is not supported by the evidence. The Complainant continued to voluntarily spend time one-on-one with the Appellant at lunches following the events in question (Appeal, p 504).

[77] The Appellant also challenges the severity of the conduct measure, contrasting his dismissal with other sanctions imposed for sexual harassment. He provides the specific example of *The Commanding Officer, "E" Division and Constable C,* 2017 RCAD 8 (*Constable C)* where the subject member was punished less harshly for behaviour that was deemed to discredit the Force and to be discourteous and disrespectful (Appeal, pp 504-505).

[78] Meanwhile, the Respondent argues that the Appellant's attempt to contrast and minimize male-to-male harassment against male-to-female harassment "is tone deaf and simply repeats the position put forward by the [Appellant] in cross-examination and it does not accurately reflect the RCMP policy on the prevention of harassment" (Appeal, p 618).

[79] With respect to parity of sanctions, the Respondent states that such determinations are "a fact-driven determination and discretionary in nature" (Appeal, p 620). He also emphasizes that the precedents provided by the Appellant are distinguishable in that they are all joint-submissions. The Respondent reiterates the Board's observation that "joint submission case law precedents are deemed of lesser weight given the underlying negotiation process comprising a resolution" (Appeal, p 620).

Findings

[80] I agree with the ERC that the zero-tolerance approach to workplace harassment applies to all members of the Force and is relevant to male-on-male behaviour. No evidence was presented suggesting otherwise. Therefore, the Appellant's awareness of the policy represents an aggravating factor.

[81] The ERC has, in the past, recognized that working in a "locker-room" environment could be a relevant mitigating consideration, if all parties participated in the behaviour and pranks (see, for example, NC-040). However, the ERC contrasted that case with the matter at hand because the Complainant provided clear and consistent notice that he was not a willing participant (Report, para 78).

[82] The Board appropriately characterized the Complainant as a vulnerable individual based on the evidence. Testimony confirmed that the Complainant does not like to be touched. What's more, he clearly communicated his aversion to the Appellant and other witnesses. I agree with the Board that there was insufficient evidence to demonstrate post-traumatic stress; however, the "thin-skull rule" applies nonetheless (Appeal, p 54). The Appellant was aware of the effect his actions had on the Complainant. In fact, the Complainant's reaction was clearly a motivator for

the Appellant's behaviour. In my view, the evidence was sufficient for the Board to find that the Complainant is a vulnerable individual.

[83] Moreover, the Board did not err by refusing to place great weight on the cases provided by the Appellant involving joint-submissions. Conduct boards are required to provide significant deference when they receive joint-submission proposals for measures due to the extensive negotiations that help shape them (Appeal, pp 55-56). Oftentimes, they are not necessarily reflective of the sanction that may have been otherwise imposed in the circumstances.

[84] The other cases provided by the Appellant are also distinguishable, including, *Constable C,* which involved a single occurrence at an off-duty watch party in a residence, albeit with two female members being the victims of unwanted sexual touching and gestures, where alcoholic consumption and mental health issues played a major role in the behaviour. Accordingly, in my view, the Board did not err by refusing to attribute significant weight to the sanction in that matter (Appeal, p 55).

Did the Board's findings raise a reasonable apprehension of bias?

Submissions

[85] Finally, the Appellant alleges a reasonable apprehension of bias due to the Board referencing Commissioner statements calling for general deterrence, as well as a lack of precedent for dismissal in the circumstances (Appeal, pp 505-506).

[86] The Respondent maintains that there is no indication of a reasonable apprehension of bias, stating that "there exists no evidence to support that the [Board] ignored his serving RCMP's Conduct Board Member's Oath of Office which mandates that the Board will serve faithfully, impartially, honestly and to the best of their respective knowledge and abilities" (Appeal, p 622).

Findings

[87] The Appellant has not convinced me that there is a reasonable apprehension of bias on the part of the Board. The Appellant provides scant proof to support such a claim. There is a presumption that conduct boards are fair and impartial; therefore, the burden falls on the Appellant to demonstrate a reasonable apprehension of bias (Report, para 81). While the Board did attribute weight to Commissioner statements on general deterrence, this is not sufficient to meet the threshold described in *Yukon Francophone School Board v Yukon (Attorney General)*, [2015] 2 SCR 282, at para 20:

> ...[W]hat would an informed person, viewing the matter realistically and practically - and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted; *Committee for Justice and Liberty v. National Energy Board*, [1978] 7 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting)].

[88] On the question of the harshness of the conduct measure, I also note the statements of the FCA in *Canada (Attorney General) v Boogaard*, 2015 FCA 150, at para 81:

> Under reasonableness review, judges cannot interfere on the basis of their personal views about the harshness or otherwise of the decision. Instead, judges must restrict themselves to this question: bearing in mind the margin of appreciation that the decision-maker must be afforded, is the decision acceptable and defensible on the facts and law?

[89] In my view, the Board's decision to dismiss the Appellant is acceptable and defensible. I agree with the ERC that the Appellant's argument "would not persuade an informed person who has read the impugned decision and thought the matter through, that the Board consciously or unconsciously decided the Appellant's case unfairly" (Report, para 82)

[90] I will conclude by highlighting the ERC's carefully chosen closing comments on the Appellant, his behaviour, and the resulting consequences (Report, para 85):

> Although the outcome is unfortunate, especially given the Appellant's credentials and level of expertise, I, like the Board, strongly believe that the exhibited behaviour needed to be addressed by the severest of sanctions. In addition to being appalling and completely unacceptable, the Appellant's

> actions constituted a complete violation of another person's well-being and dignity. Finally, I find it regrettable that the Appellant had a sense of entitlement to invade the Complainant's personal space and that he did so believing that it was less severe being "male to male" as opposed to "male to female".

[91] I agree that this case is regrettable all around. The Complainant should never have been subjected to unwelcomed touching and taunting in an RCMP workplace. Meanwhile, the Appellant should have known his behaviour was unacceptable and jeopardizing his career. In the end, both men will have to carry these events with them.

DISPOSITION

[92] Pursuant to section 45.16 of the *RCMP Act*, the appeal is dismissed and the conduct measure imposed by the Board is confirmed.

[93] Should the Appellant disagree with my decision, he may seek recourse with the Federal Court pursuant to subsection 18.1 of the *Federal Courts Act*.

Steven Dunn, Adjudicator Date