Protected A

File: 2019-335406 (C-055)

2022 CAD 06

IN THE MATTER OF

an appeal of an Adjudication Board Decision

Pursuant to section 45.11(1) of the

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

BETWEEN:

Commanding Officer, "H" Division
Conduct Authority
Royal Canadian Mounted Police

Appellant

and

Constable Devin Pulsifer
Regimental Number 56030

Respondent

(Parties)

Protected A

File: 2019-335406 (C-055)

Decision of the Commissioner

Royal Canadian Mounted Police

2022

INTRODUCTION

[1] Following a conduct hearing, an RCMP conduct board (Board) determined that Constable Devin Pulsifer, Regimental Number 56030 (Respondent) had contravened the *RCMP Code of Conduct* (*Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281 [*Regulations*]), after finding two allegations against the Respondent to be established.

[2] The Board issued a written decision on May 15, 2019 (Decision), and imposed the following conduct measures:

- the forfeiture of 15 days pay for Allegation 1;
- the forfeiture of 20 days pay for Allegation 2;
- ineligibility for promotion for a period of two years from the date of the written decision; and
- a direction to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer for "H" Division, or their delegate.

[3] The Commanding Officer, "H" Division (Appellant), having sought dismissal, appeals.

[4] The allegations relate to the events that occurred the night of April 17, 2018, stemming from the Respondent's conduct at an evening "team-building" function during a week of training at a local military base with a Tactical Troop. The team-building function was attended only by RCMP members and took place at a local pub.

[5] As required by subsection 45.15(1) of the *RCMP Act*, the appeal was referred to the Royal Canadian Mounted Police External Review Committee (ERC) for review. In a report containing findings and recommendations issued on December 3, 2021 (ERC file no. C-2020-021 (C-055)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be

dismissed and that I confirm the Board's decision pursuant to paragraph 45.16(3)(a) of the *RCMP Act*.

[6] Pursuant to subsection 45.16(8) of the *RCMP Act*, I am not bound to act on ERC findings or recommendations, but if I disagree, I must "include in the decision on the appeal the reasons for not so acting".

[7] References to the material before the Board will be referred to as the "Material" and the Appeal record as the "Record". The impugned decision is referred to as the "Decision", the Appellant's appeal submissions as the "Appeal", and the response by the Appellant as the "Response". Lastly, the ERC Report will be referred to as the "Report".

[8] I sincerely apologize to the Parties for any delays attributable to the RCMP in advancing the adjudication of this appeal.

[9] For the reasons that follow, I agree with the ERC recommendation, and confirm the Board's decision. The appeal is dismissed.

BACKGROUND

[10] On December 7, 2018, the Appellant issued the Notice of Conduct Hearing, which was received by the Respondent on January 8, 2019 (Material, pp 11; 13-20). The Notice of Conduct Hearing set out two allegations of discreditable conduct contrary to section 7.1 of the *Code of Conduct* and the particulars for each of the allegations (Material, pp 13-18):

> **Allegation 1:**
>
> On or about April 17, 2018, at or near Port Williams, in the Province of Nova Scotia, while off-duty, Constable Devin Pulsifer did engage in discreditable conduct, contrary to section 7.1 of the *Code of Conduct* of the Royal Canadian Mounted Police.
>
> Particulars of Allegation 1
>
> 1. At all material times, you were a member of the Royal Canadian Mounted Police ("RCMP") and were posted to Liverpool Detachment in Queen's district, in the province of Nova Scotia.

2. During the week of April 16, 2018, to April 20, 2018, you were scheduled to attend the H&L division Tactical Troop training at Canadian Forces Base ("CFB") Aldershot.

3. After training on April 17, 2018, you attended a Tactical Troop social gathering at [A], a licenced establishment in Port Williams, Nova Scotia, where the following events occurred:

a. You consumed alcohol to the point of rendering yourself intoxicated.

b. You approached Cst. [1] from behind and placed your hands under her shirt.

c. You moved your hands up and grabbed Cst. [1]'s breasts.

d. Cst. [1] pushed your hands away.

e. Cpl. B., another member of the tactical troop who observed your actions, pulled Cst. [1] away from you.

f. Cst. [1] had never met you prior to this incident.

g. Cst. [1] did not consent to being touched in this manner.

h. You touched Cst. [1] in plain view of other Tactical Troop members.

i. You were later removed from the bar and brought back to CFB Aldershot by other Tactical Troop members.

j. You touched Cst. [1] for a sexual purpose without her consent, in front of coworkers, thereby conducting yourself in a manner that discredits the Force contrary to section 7.1 of the *Code of Conduct* of the Royal Canadian Mounted Police.

Allegation 2

On or about April 17, 2018, at or near Port Williams, in the Province of Nova Scotia, while off-duty, Constable Devin Pulsifer did engage in discreditable conduct, contrary to section 7.1 of the *Code of Conduct* of the Royal Canadian Mounted Police.

Particulars of Allegation 2

1. At all material times, you were a member of the Royal Canadian Mounted Police ("RCMP") and were posted to Liverpool Detachment in Queen's district, in the province of Nova Scotia.

2. During the week of April 16, 2018 to April 20, 2018 you were scheduled to attend the H&L division Tactical Troop training at CFB Aldershot.

3. After training on April 17, 2018 you attended a Tactical Troop social gathering at [A], a licenced establishment in Port Williams, Nova Scotia, where the following events occurred:

a. You consumed alcohol to the point of rendering yourself intoxicated.

b. You approached Cst. [2] from behind while she was standing at the bar.

c. You placed your hand underneath Cst. [2]'s shirt and moved it across her bare stomach.

d. You moved your hand upwards and touched Cst. [2]'s breasts.

e. Cst. [2] swatted your hand away and continued the conversation she was having with another member.

f. Despite Cst. [2] swatting your hand away, you again placed your hand underneath her shirt and began moving up towards her breasts.

g. Cst. [2] turned around to face you and struck you in the face.

h. Cst. [2] recognized you as a member of the Tactical Troop but had never spoken with you before.

i. Cst. [2] did not consent to being touched in this manner.

j. You touched Cst. [2] in plain view of other Tactical Troop members.

k. In fact, you touched Cst. [2] a short time after touching Cst. [1] in the manner described in allegation 1.

l. You were later removed from the bar and brought back to CFB Aldershot by other Tactical Troop members.

m. You touched Cst. [2] for a sexual purpose without her consent, in front of coworkers, thereby conducting yourself in a manner that discredits the Force contrary to section 7.1. of the *Code of Conduct* of the Royal Canadian Mounted Police.

CONDUCT HEARING PROCEEDINGS

[11] The ERC summarized the conduct hearing proceedings (Report, paras 15-42):

> **D. Conduct Board Hearing**
>
> [15] On March 1, 2019, the Board held a hearing to determine whether the allegations were established and to decide on the two motions brought by the Appellant. The Board granted the publication ban on the victim's names and denied the Appellant's motion for further investigation, because the Appellant seemed to be attempting to "fill an evidentiary void" by seeking new evidence. The Board further found that it would not be in the interests of justice to allow the Appellant to seek clarification from Cst. 2 at this stage of the proceedings (Appeal, page 14). There were no witnesses at this hearing and no oral

submissions on the allegations as the Respondent did not deny the majority of the particulars.

[16] The Board found that on a balance of probabilities, both allegations were established, with the exception of particular 3(d) in Allegation 2. The Respondent was found to have engaged in discreditable conduct contrary to section 7.1 of the Code of Conduct (Materials, page 259). The findings of discreditable conduct are not being appealed.

E. Conduct Measures Phase

[17] On April 15, 2019 a hearing took place via videoconference regarding the conduct measures to be imposed. The Respondent was questioned by his representative, cross-examined by the Appellant and, lastly, the Board had a few questions for the Respondent.

[18] The Appellant submitted that the allegations, which the Respondent did not deny, met the definition of sexual assault and that the SIRT's decision not to press criminal charges did not mean that there was a lack of evidence to pursue the criminal charges, but that there were other reasons not to (Material, page 390). The Appellant further submitted that the actions of the Respondent also met the definition of sexual harassment in the workplace, as the event was arranged by the RCMP, attended only by members of the RCMP and the RCMP was providing shuttles to and from the pub. The Appellant submitted that the appropriate conduct measure would be for the Respondent to resign within 14 days or be dismissed.

[19] The Respondent made submissions emphasizing that there is no criminal conviction in this case and that the incident did not take place in the workplace. The Respondent submitted that this was his first infraction and that he is very remorseful for what he did and is willing to get any treatment necessary. The Respondent submitted that a financial penalty of 10 days' pay for Allegation 1 and 5 days' pay for Allegation 2, and a global order that the Respondent undergo any treatment as directed by the Health Services Officer of his division would be reasonable.

EXHIBITS BEFORE THE BOARD

[20] There was a significant amount of evidence provided to the Board, including: i) reference and support letters; ii) RCMP annual evaluations and awards given to the Respondent; iii) letter from counsellor for Respondent; and iv) victim impact statement from Cst. 1.

1. Reference and Support Letters

[21] There are several letters in support of the Respondent, which the Board considered as part of the mitigating factors, as many of the letters included

comments that the Respondent is normally very respectful, professional, compassionate and friendly.

[22] In my opinion, because of the potential consequences that could occur here for the Respondent, it is important for the Commissioner to have a thorough appreciation of the Respondent's character (Materials, Volume 1, pages 301- 306):

A. Staff Sergeant G.D.S. (retired)

I am writing this letter in support of Constable Devin PULSIFER. I was the NCO i/c of [X] District RCMP from March of 2016 until August of 2018. Cst. PULSIFER was transferred to [X] District in August of 2017. As Cst. PULSIFER's Commander, I am aware of the allegations that are the subject of his Code of Conduct. In fact I was the member who served the documentation initiating the COC.

During the nine months that Cst. PULSIFER worked at [X] District he consistently displayed leadership traits that were noteworthy. He was not the type to engage in detrimental "Bullpen Banter". He always displayed a positive can-do attitude. He was knowledgable [*sic*]*, and where he did not immediately have an answer to a circumstance, could determine an appropriate course of action through research, consultation and finally seeking direction from the writer. In short, Cst. PULSIFER has clear problem solving skills and abilities that he, and I could rely upon.*

At the time of his transfer we were chronically understaffed due to long term ODS issues with several members. We were consistently missing twenty five percent of our unit to LTODS, including one of the two corporals. Due to Cst. PULSIFER's leadership traits, and despite more senior members at our Unit, I placed him in the role of Acting Corporal for several months. He had the required personal attributes, investigatory skillsets and flexibility to bring those members along to perform at an acceptable level. Furthermore, Cst. PULSIFER had the solid support of all the members at the Unit including the PSE staff. In fact I can confidently state all staff are eager for his return to duty.

As indicated we consistently had critical HR issues that were very detrimental to our Unit. Cst. PULSIFER was one of the members whom I could rely upon to change his schedule and/or adapt to the challenges without negative comment. It was clear that Cst. PULSIFER recognized that in part his role was to try to keep the operation a float as best we, and specifically he, could. In short Cst. PULSIFER's overarching desire was to get the tasks done to the best of his ability. Cst. PULSIFER courage in violent circumstances was evident in one circumstance, where he and I were responding to a suicidal female call. The call was the female was armed with a knife. Arriving on scene prior to the writer he approached the

second story landing of the residence, and was confronted on the narrow landing by a vicious pitbull dog. Cst. PULSIFER deemed it necessary to discharge his service pistol at the animal, injuring it and causing the dog to flee. He then effected a detention of the subject female under lawful authority. Upon my arrival on scene, the other family members were enraged and very hostile. Cst. PULSIFER remained on scene until further backup could attend. In these circumstances, Cst. PULSIFER displayed tremendous courage and his actions in these circumstances were noteworthy.

I retired in August of 2018 after 36 1/2 years of police service. I have seen my share of members in both municipal policing and the RCMP. I would certainly not hesitate to have Cst. PULSIFER work for me. He was easily in the top percentage of solid members I have had the opportunity with whom to work. I always looked forward to Cst. PULSIFER working his day shifts as I knew there would be little intervention required by myself. Furthermore as indicated, can confidently state he has the support of his fellow members and DSA staff at [X] District.

B. Sergeant T.R.G.

I am writing this letter at the request of Cst. Devin Pulsifer. I was Devin's immediate supervisor for the three years until he moved to Nova Scotia in 2017. I have known him since October 2014 when I transferred to the Bonavista RCMP detachment in Newfoundland and Labrador as the detachment commander. Prior to that I was the detachment commander in Fogo Island, NL and have also worked in Baie Verte, NL and New Minas, NS. I am currently the Operations NCO for the Grand-Falls Windsor District and I have 16 years of service with the RCMP.

During the above mentioned time, I have directly witnessed Devin's behaviour and conduct while he completed his duties as a general duty constable. Devin's commitment to his career and to the public in general was excellent. He was one of my top performers and had the opportunity on several occasions to be in charge of the detachment while I was away. I have never received an complaints from the public of other members with regards to Devin's behaviour.

I can honestly say that when I heard of the allegations against Devin (through the media), I was genuinely shocked. The allegations certainly do not represent the man that I know and worked with in the Bonavista Detachment. I would have no issue working with Devin again should the opportunity present itself.

C. Corporal J.L.

I am Corporal [J.L.], *currently assigned to the Firearms Training Unit at Depot Division. Prior to this positing, I had been posted to Bonavista, Newfoundland and Labrador, a six member General Duty Detachment. I had met Constable Devin Pulsifer in August 2013 when he transferred into my unit from a Federal position in Ontario. I worked alongside Cst. Pulsifer and had the privilege to supervise him on numerous occasions until my transfer in 2017.*

Cst. Pulsifer is a very hard working individuals as evidenced by his determination to learn his new role as a general duty member following his federal experience upon graduating Depot Division. Cst. Pulsifer had to adapt to and learn this new role and its responsibilities quickly and without the typical field coaching experience that is available to new recruits beginning general duty policing. He approached this new experience and learning with enthusiasm, thoughtfulness and diligence and became a very competent and capable member of the unit in a very short period of time.

During my time supervising Cst. Pulsifer I had no issues with his composure or character and his work was beyond reproach. He needed little to no guidance and was one of the strongest performers in my unit. Cst. Pulsifer also had opportunities to assume the acting role while the NCO l/c was away, which he performed admirably.

Cst. Pulsifer has also demonstrated his readiness and ability to go above and beyond in his role as a police officer. One example is when he put his own life at risk to rescue a well-known client of our detachment from drowning at sea during a winter storm. As a result of these actions, he was awarded a commendation for bravery from the Commanding Officer of "B" Division.

I know Cst. Pulsifer to be a very hardworking, honest, professional member of high integrity, he is compassionate, respectful and is accountable in his professional and personal life. Cst. Pulsifer is reliable, someone you can always count on and was always there to help in times of need and challenge.

Cst. Pulsifer is one of the best members I have ever worked with and one of the best people I know. I had no hesitation to complete this requested character reference letter given my observations of Cst. Pulsifer's commitment to the values and standards of the R.C.M.P. and his role and responsibilities as a member. I have observed his work and character to be representative of that valued and promoted by the R.C.M.P.

D. Detachment Commander, XX RCMP Detachment, M.F.

This letter [is] *in reference to Devin Pulsifer. I first met and worked with Devin in the summer of 2015 when I transferred to the Bonavista RCMP*

Detachment. I met Devin when my family and I came for our house inspection. Devin was the first person I met and he greeted my family and I. Devin was currently on days off but still took time from his day and family to meet me and show me where my family's new home was located. This speaks to the type of person Devin is, Devin is the type of person who is always willing to help and lend a hand where ever he could, even to someone he didn't know.

Over the next year and a bit I continued to work with Devin and get to know him much better, both professionally and personally. Devin was always a very positive member to work with and his positive morale was great to see and be around. It was very easy to see that Devin was a hard working member of the RCMP as he always put his best foot forward and strived to do the best he could. Devin was a very valuable member of the Bonavista Detachment and his hard work and dedication was appreciated by everyone he worked with. [on] *numerous occasions Bonavista Detachment was working with critical staffing levels, Devin never let this bother him and worked hard with other members and picked up the slack whenever he could. Devin was a great team player and was well respected by each and everyone he worked with, myself included. Working with Devin I see firsthand how he would communicate with people, whether it be the victim of a crime, a suspect or a prisoner, Devin always treated everyone with respect, dignity and kindness* [no] *matter the circumstances.*

Outside of work I would socialize with Devin and his family at social gatherings or just bumping into him in the community. Devin always carried himself in a very professional manner and was well respected by the public and his other colleagues outside of the RCMP.

Devin is the type of person you can depend on when something needs to be done and done right. I would trust Devin with my life and would work with him again in an instant.

[23] There are additional letters of support, too many to repeat in full here. Following is a list of the remaining letters of support (Materials, Volume 1):

a. Cst. T.D, page 303;

b. F.R., page 307;

c. W.B-T., page 308;

d. Cst. D.T., pages 309-310;

e. Cst. D.F., page 311;

f. Cst. D.C., pages 312–313;

g. Cst. T.D., page 314;

h. Cst. M.K., page 315; and

i. Cst. T.O., page 316.

[24] All of the letters provide support for the Respondent, including incidents and events, which were used to show the Respondent's strength of character, both in his professional life and personal life. The Board found that the actions of April 17, 2018 were out-of-character for the Respondent.

2. Performance Evaluation Reports and Awards

[25] The Respondent's Performance Evaluation Reports and Awards are found in the Material, Volume 1, pages 317-325 and Volume 2, pages 835-866.

[26] The Board found that the evaluations indicate that the Respondent performed his policing duties at an above-average level and had consistently demonstrated an "impressive work ethic" and personal bravery in the performance of his duties.

[27] The evidence included a Commendation for Bravery for saving an individual who was suicidal, in bad weather conditions and an official certificate from the Premier of Alberta for assistance during the wildfires in 2016 in Alberta. Both of these include comments on his courage, compassion and professionalism.

3. Counsellor's Letter

[28] The Respondent did not submit this letter as expert evidence and it did not specifically address the issue of alcohol nor the Respondent's usage of it (Materials, Volume 1, page 327). It was provided by the Respondent's representative after the conduct measures hearing, at the request of the Board and with the consent of the Appellant.

[29] The Respondent attended counselling as part of the Health Canada, Employee Assistance Program (EAP), which "is for short term counselling and does not provide a psychological assessment". The Respondent attended five sessions from April 2018 to June 2018, with an additional three to five sessions beginning in January 2019. These sessions were centred around personal stress and life management.

[30] The counsellor stated that the focus of the sessions was "[m]anaging and successfully working through the stress of a work-related incident that shook the personal picture of 'self' as always confident and competent and wanting to display the highest standards of behaviour, ability and professionalism".

[31] The counsellor further noted that the Respondent is "developing more personal stress and anxiety management strategies, so the job stress will be balanced by what [he] does personally".

4. Victim Impact Statements

[32] The Appellant filed an undated victim impact statement from Cst. 1 in which she indicated the difficulties she has experienced because of the actions of the Respondent, including problems with her husband, lack of sleep, anxiety and issues at work (Materials, pages 215-216):

> *On Tuesday evening, April 17th, 2018 I was enjoying a social evening out with my co workers, fellow tactical troop members, team mates, friends, brothers and sisters of the force when I was sexually assaulted by an 'unknown to me' male. I call him 'unknown to me' for many reasons… I had not yet had the opportunity to even introduce myself to this person as he'd only just completed his second day of training with the troop. 'Unknown to me' because I never imagined in my 13.5 years of being a strong female member of the RCMP, a 40 year old mother of two young children that this could ever happen to me. Especially at the hands of a fellow member of the RCMP, a police officer!*
>
> *'Unknown to me' because I learned his name after the incident and have removed it from my head. Whenever this incident is discussed I don't even repeat his name because I never want to hear his name again. Don't get me wrong…. I do know his name, but his name in my opinion, does not deserve to be repeated. As a matter of fact, receiving an email requesting me to write this very statement, with his name being in the subject line triggered a sick feeling in my stomach.*
>
> *I've always felt very safe working with and socializing with my brothers and sisters of the force. To think that we have each other's backs in times that can be the most terrifying, most devastating, we stick together and work together to ensure the public is safe and fight together to safely go home to our families at the end of every shift, God willing. How could I have ever imagined that one of my own could do this to me?*
>
> *When this first happened to me I had a few friends on the troop come forward to offer their support but so many didn't even take the time to check in and simply ask 'how are you doing?'. I was very hurt by some who I believed were true friends and all they seemed to care about was how this incident made the troop look. WOW!! I'm sure if it were their wife, daughter, sister or mother they would be much more compassionate. I'm actually still very disappointed in myself for not taking this matter criminally but for me, dealing with SIRT was a horrible experience. Two months after the incident I ended up at emergency as I was falling asleep behind the wheel… I had no idea that I wasn't sleeping. For the past month, after being asked to work on this statement, and bringing everything back to the service* [*sic*]*, I'm again not sleeping very well. I'm also holding a lot of resentment toward the force for no one ever following up with me and updating me on this matter, where it stands and besides being on leave with pay, not knowing the status of the accused. I reached out five months*

after the incident and got the reply 'privacy issues' and 'let me inquire into a couple things and I will get back to you'. WOW… so lets just leave the victim in the dark while this file sits waiting to be there are any other victims out there because of him?

I will forever hope he will remain 'unknown to me'. I would never want to cross paths with this person again in my lifetime but most importantly in my career. I am a proud member of the RCMP and hold the force to a high standard but having said this, I feel the RCMP has a lot of work to do for their membership and by continuing to keep members in the force that are capable of such actions is a horrible representation of who we are as an organization. In my opinion, it is completely unacceptable to allow this person to continue to be a police officer. I'm praying the RCMP will not disappoint me, and so many other women in the force, who've been a victim at the hands of other members. As a female member I've worked very hard to get where I am. In many cases, there is still a 'boys club' but I can see the force is finally starting to level out the playing field. I've wanted to be on the H Division tact troop for several years, I was finally selected in October 2017 and in my very next training session, this is what I had to endure.

I hope this member gets the help and support he needs so something like this doesn't happen again. To be honest, it would have been nice to get an apology from him, if he was in fact sorry for his actions. Perhaps my healing process could have begun months ago not almost a year after the fact.

I like to think of this as just another bump in my road that will only make me stronger and better!

CONDUCT BOARD DECISION

1. Facts

[33] On May 15, 2019, the Board issued written reasons for both the allegations and the conduct measures (Appeal, pages 7-34). The undisputed general finding of facts is summarized from the Decision (Appeal, pages 25-26):

a) The Respondent had participated in various deployments as a Tactical Troop member, and had become a course trainer with respect to tactical and more specialized obstruction removal team matters;

b) The Tactical Troop was comprised of members from three different RCMP Divisions;

c) The Respondent did not begin drinking until 2009. The Respondent testified that "My drinking continued up until the point where it would be two to three times a week";

d) On September 11, 2017, the Respondent learned that one member of the Tactical Troop, with whom he had worked for four years in a different Division, had committed suicide. The training week in April 2018 was the first time the Tactical Troop had gotten together since the suicide;

e) The Respondent identified two stressors at the time of the Tactical Troop training, namely that his grandmother was in the hospital from a fall, and he had missed a call from a social worker relating to an adoption he and his wife were pursuing;

f) At all material times, the Respondent was posted to X Detachment in the "H" Division;

g) During the week of April 16, 2018 to April 20, 2018 the Respondent was scheduled to attend the X and Y Division Tactical Troop training at a Canadian Forces Base ("CFB");

h) After training on April 17, 2018, the Respondent attended a Tactical Troop social gathering at a local pub, which was organized by the RCMP and the only attendees were other members from the training;

i) The RCMP provided transportation between the CFB and the pub for safety;

j) The Respondent had a drink prior to going to the pub, ate wings and remembers drinking four to five drinks, proceeded to the washroom, returned and had another drink and does not remember anything further;

k) When the attendees were lined up to pay their bills at the end of the night, the Respondent approached Cst. 1 from behind and reached under her clothes and ran his hands up to her breasts, before another member pulled Cst. 1 away from the Respondent;

l) The Respondent then approached Cst. 2 from behind and put his hands under her shirt, and proceeded to move his hands upwards, until she pushed them away. The Respondent then repeated his actions with Cst. 2 and she turned around and punched him;

m) The Respondent was escorted out of the premises by other members of the Tactical Troop and assisted to bed;

n) The Respondent did not deny either allegation and did not deny most of the particulars in the Notice of Conduct Hearing dated November 23, 2018. The Respondent, at some point, went into "black-out" mode and did not remember any of the events that took place that evening;

o) The Respondent, as reported by other attendees, was either intoxicated or highly intoxicated; and

p) The Respondent did not know Cst. 1 and Cst. 2 at the time and they had only seen him around the Tactical Troop training.

2. Decision on the Allegations

[34] The Board found that sufficient particulars were proven on a balance of probabilities to establish each allegation (Appeal, pages 18, 20). The Board found that Allegations 1 and 2 alleging contraventions of section 7.1 of the *Code of Conduct*, were established.

A. Allegation 1

[35] Regarding Allegation 1, the Board found the following (Materials, pages 255-257):

a) The Respondent was deemed to deny the allegation because he could not remember anything;

b) The evidence relied upon includes the statements from Cst. 1 and other RCMP members who observed what occurred, including the member who pulled Cst. 1 away from the Respondent;

c) There was sufficient evidence to find on a balance of probabilities that each particular in the allegation were established;

d) The Respondent placed his hands on Cst. 1 and moved his hands up to grab her breasts, though it is not known if there was an undergarment in the way or direct contact with her skin;

e) Cst. 1 swatted his hands away and another member pulled her away from the Respondent; and

f) The Respondent contravened section 7.1 of the *Code of Conduct* as alleged under Allegation 1.

B. Allegation 2

[36] Regarding Allegation 2, the Board found the following (Materials, pages 257-260):

a) The Respondent was deemed to have denied the allegation as he couldn't remember it;

b) There was insufficient evidence to find, on a balance of probabilities under particular 3(d) that the Respondent touched Cst. 2's breasts, as she was directly questioned and introduced a qualification that the Respondent tried to touch her breasts, but not that he actually had, which was more credible than relying on hearsay from other members she had spoken to who reported that she said he touched her breasts;

c) Found on a balance of probabilities that the rest of the particular 3(d) was established, which was that the Respondent moved his hands upwards on her stomach towards her breasts, and under particular 3(f) that the Respondent again placed his hands underneath Cst. 2's shirt and began moving them up towards her breasts;

d) Cst. 2 swatted the Respondent's hands away the first time, and when he tried again she turned around and punched him;

e) The Respondent does not dispute that he touched Cst. 2 for a sexual purpose without her consent; and

f) There was sufficient evidence to find, on a balance of probabilities, that the Respondent contravened section 7.1 of the *Code of Conduct*.

3. Decision on Conduct Measures

[37] The remainder of the Decision (Appeal, pages 27-34) contains the Board's analysis and reasoning relating to the imposed conduct measures.

[38] It will be helpful for my analysis to quote parts of the conduct measures Decision.

[39] With respect to mental health assistance, the Board found that the Respondent understood what he needed to do to address his behaviour, and that he was genuine and conscientious about abstaining from alcohol in the future. The Board also found that the Respondent was genuine in taking responsibility for his actions and was sorry for what he had done:

With respect to mental health assistance, I find that the Subject Member did what he understood he should do to address his behaviour: he fully participated in the type of counselling that was provided to him. This finding is supported by his answer to a question posed by the Conduct Board: "That was the person who when I asked for a referral, they put me in touch with."

In his testimony, the Subject Member spoke of how his counselling sessions confirmed that alcohol should "have no part in [his] life". I find this realization by the Subject Member genuine, and one that he takes very seriously; he will be conscientious about abstaining from alcohol. I accept that he has now learned how to identify, manage and cope with stress, including ways to seek out effective assistance if he feels overwhelmed by stress and anxiety.

The Subject Member's direct-examination ended with simply apologizing to Cst. 1 and Cst. 2, to his home unit for the burden of being even more short-staffed as a result of his unavailability, and to the RCMP for the shame and embarrassment resulting from his misconduct.

In cross-examination, the Subject Member was asked if he considered himself an alcoholic. He replied: "I consider myself to have issues with alcohol, yes." Displaying a fairly sophisticated understanding of his potential for alcohol abuse, he testified that he did not consider his problem with alcohol to be "solved", stating: "No. I recognize that I have an issue with alcohol, and I have acquired the tools to monitor that issue." He acknowledged that he had not sought guidance specifically concerning "remission prevention". With the birth of his daughter in February 2019, counselling had been paused pending the outcome of this conduct process.

[40] The Board considered the past discipline system and other cases and the Conduct Measures Guide in order to determine what would be reasonable conduct measures against the Respondent:

Range of sanctions

Under the previous RCMP disciplinary system, where a final written decision was issued by an adjudication board, it was an accepted practice, when determining the appropriate sanction for established misconduct, for the adjudication board to begin by identifying the sanction range for similar acts of misconduct. This practice has been continued by conduct boards adjudicating allegations brought under the conduct management system operating since November 28, 2014. In the present matter, after a review of the relevant authorities and the RCMP Conduct Measures Guide, the range of conduct measures for acts of non-consensual sexual touching appears to range from significant financial penalties up to the loss of employment, depending on the nature of the act committed as well as the mitigating and aggravating factors.

As I observed in Caram, at paragraphs 94 and 95:

> *[94] The range of sanction for matters involving off- duty, inappropriate and sexual touching, based on decisions rendered by past RCMP adjudication boards (constrained by a legal maximum of 10 days' forfeiture of pay), spans from moderate to maximum forfeitures of pay. [...]*
>
> *[95] It is apparent from the RCMP case law submitted by the parties that the kind of sexual misconduct established against the Subject Member under section 7.1 of the Code of Conduct has often attracted sanctions from RCMP adjudication boards short of ordered resignation or dismissal, but the range of sanctions has included loss of employment where, for example, violence, a criminal conviction or a record of prior discipline exists. The Conduct Measures Guide certainly supports a range which includes loss of employment.*

The adjudication board decisions filed by the MR are dominated by cases where an agreed statement of facts was relied upon, and either a joint proposal on sanction was made by the parties (Rice, MacDonald, McLean, Lebrasseur, Glasier, Heon), or the Appropriate Officer did not seek the loss of employment (Hanson, Crutchley, Giesinger). While parity of sanction must be part of any assessment of proportionate measures, it is apparent that the range of conduct measures available under the conduct system instituted on November 28, 2014, permits a range of more serious measures short of dismissal and there plainly is no longer any legislated cap at 10 days' forfeiture of pay. In addition, the deference to be afforded joint proposals on sanction reduces the precedential value of cases involving such proposals.

On the other hand, some of the dismissal decisions filed by the CAR include situations that differ markedly from the present matter, such as:

- *a troubling physical assault in which the victim's nose was bitten by the drunken member (Rendell). [I acknowledge that the CAR filed this case primarily to address the issue of parity.];*
- *after prior discipline and an unsuccessful attempt at rehabilitation concerning alcohol issues, the member again exhibited aggressive behaviour before sexually assaulting a further victim (Jimenez); and*
- *in a private arbitration matter, the grievor denied the allegations, a full-testimonial hearing was required to find inappropriate sexual touching of a number of co- workers, and yet it remained unclear that the grievor understood and accepted that her conduct was profoundly inappropriate (Carewest).*

There are two decisions issued by conduct boards that are clearly relevant to the present matter, Caram and Calandrini. The board in Calandrini began by noting how counsel had distinguished Caram, at paragraph 108: "[…] [T]his case involved one drunken party that took place outside the workplace." The board in Calandrini, at paragraph 182, went on to differentiate circumstances where there are a series of repeated incidents directed at the same person (Calandrini), and circumstances where there are transgressions of a drunken party-goer involving a number of unfortunate recipients (Caram).

Notwithstanding the emphasis that is properly placed on general deterrence in Calandrini to address continuing workplace harassment in the RCMP, I believe one must not lose sight of the fact that the circumstances of the Subject Member are those of a drunken pub night patron, and not of a persistent and deliberate office workplace harasser.

[41] The Board identified the requirement to consider mitigating and aggravating factors, such as letters of support, victim impact statements, past conduct of the Respondent, and whether the Respondent was taking responsibility for his actions as well as his likelihood of rehabilitation:

Proportionality

Subsection 24(2) of the CSO (Conduct) states: "A Conduct Board must impose conduct measures that are proportionate to the nature and circumstances of the contravention of the Code of Conduct." The RCMP Administration Manual, Chapter XII.I "Conduct", section 11.15, indicates that aggravating and mitigating circumstances must be considered in determining the appropriate conduct measures in relation to a subject member's contravention of the Code of Conduct.

The Administration Manual includes Appendix XII 1.20, which provides a fairly exhaustive list of potential aggravating and mitigating circumstances, and a definition for each:

> *Mitigating Circumstances: "A fact or situation that does not bear on the question of a defendant's guilt but that is considered by the court in imposing punishment and especially in lessening the severity of a sentence" (Black's Law Dictionary, 8th ed.). Mitigating circumstances do not constitute a justification or an excuse for the offence, but in fairness, these factors may be taken into consideration to reduce the severity of the sanction to be imposed, in order to appropriately deal with the misconduct.*
>
> *Aggravation: "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself" (Black's Law Dictionary, 6th ed.).*

Mitigating circumstances

I have identified the following mitigating circumstances:

- *The Subject Member has accepted responsibility, in the sense that (except with respect to a discrete element of Particular 3(d) for Allegation 2) he admitted or did not dispute the particulars for both allegations. He agreed to be interviewed as part of the Code of Conduct investigation. He has responded to the formal allegations in a manner that showed a clear desire to resolve matters quickly and at the earliest opportunity;*

- *Both in writing and in his testimony, the Subject Member provided apologies to Cst. 1 and Cst. 2, and I accept that he is genuinely remorseful for his actions;*

- *The Subject Member has no prior discipline, and in answer to cross-examination, further testified that he has never been the subject of a public complaint;*

- *The Subject Member has performed his policing duties at an above-average level, and has consistently demonstrated an impressive work ethic and commitment to additional roles with the ceremonial troop and tactical team. His personal bravery in the performance of his duties has been formally commended;*

- *The Subject Member has maintained the support of his District Commander and other members who have worked with him, and letters of reference confirm his dependability and usual good character;*

- *While involving two victims, who were sexually touched in quick succession, the Subject Member's misconduct was clearly an isolated incident, and out of character;*

- *While it is possible that stressors in his personal life contributed to his over-consumption of alcohol, there is insufficient evidence to find that these stressors materially contributed to his abuse of alcohol that night. The suicide of a team member, since the last gathering of the regional obstruction removal team, potentially contributed to the Subject Member's level of inebriation that night, but no direct nexus was established, and negligible weight is given to this factor. (I cannot rule out that the Subject Member's severe degree of intoxication was somehow partly the result of his naïveté, and resulted from his drinking not fewer than five beer glasses of "craft" cider, with the strength of the cider unknown, but no evidence was offered on this possibility and it amounts to speculation of no weight.);*

- *The Subject Member immediately sought and has actively participated in counselling;*

- *I accept that the Subject Member has remained abstinent from alcohol since the incident, and he presents as deeply committed to remaining abstinent;*

- *Given the Subject Member's willingness to accept whatever further assessment and*

- *treatment is identified as necessary, I consider there to be a minimal likelihood that the Subject Member will ever be grossly intoxicated again, and further that there is a minimal likelihood that he will ever engage in similar misconduct again. I consider the Subject Member's potential for successful rehabilitation to be strong.*

Aggravating circumstances

I find the following aggravating circumstances to be present in this matter:

- *The degree of seriousness of the misconduct is high in and of itself. As emphasized in the Calandrini decision, the RCMP has, through repeated messaging to its employees, communicated that workplace harassment, including sexual harassment, and off-duty non-consensual sexual misconduct, are all unacceptable and will not be ignored nor tolerated.*

- *In the absence of any diagnosis of alcohol addiction, or a substance abuse condition, or some other mental health issue that contributed to excessive consumption of alcohol, I view it as aggravating that the Subject Member would render himself so intoxicated as to become disinhibited and sexually touch two co-workers. While the Subject Member did not face an allegation that he rendered himself unfit for duty, and while it is apparent that a number of attendees at the pub were intoxicated by the end of the evening (putting in doubt the overall benefit of a so-called "team building" social event while training continued), drinking to the point of being unable to account for one's actions at an off-duty but work-related social event constitutes an episode where personal responsibility was clearly lacking.*

- *The impact of the Subject Member's misconduct on the two constables who were subjected to his unwanted sexual touching must be considered aggravating, even if only Cst. 1 provided a formal statement as a victim. There is an undeniable element here: the misconduct violated the important trust that should exist between fellow police officers and co- workers. In addition, a number of other members observed some aspect of the Subject Member's misconduct. However, at the oral conduct measures phase of the hearing, I questioned the representatives on the fact that no harassment process, including a harassment investigation, was performed in this matter, and it was from its inception treated internally as a Code of Conduct matter, mainly because of the nature of the alleged misconduct, but possibly because Cst. 1 and Cst. 2 provided statements to the initial criminal investigation, but did not "complain" of harassment by formally filing the applicable form. In my view, some of the frustrations recently expressed by Cst. 1 may have been avoided had some of the processes contemplated by the harassment process at least been entertained, even if ultimately the matter was pursued as a Code of Conduct matter.*

[42] The Board identified that it did not deem loss of employment to be proportionate, and that there are significant measures short of dismissal to adequately denounce, punish and correct the misconduct:

Measures imposed

Having considered the parties' submissions, the materials filed for the conduct measures phase of the hearing, the nature and circumstances of the contraventions, including the aggravating and mitigating

circumstances, I do not find that the loss of employment is a proportionate response to the Subject Member's episode of misconduct. In the present case, significant measures short of dismissal can adequately denounce, punish and correct the Subject Member's misconduct, as well as identify and monitor any necessary rehabilitative therapy. Moreover, measures short of dismissal can also adequately address the respectful workplace and public trust interests that were eloquently discussed in RCMP Conduct Board decision 2018 RCAD 16 [Turner], at paragraphs 308 and 314.

Notwithstanding the mitigating circumstances that are present, I view the contravention under Allegation 1 as deserving of a financial penalty of 15 days' forfeiture of pay, and under Allegation 2 as warranting 20 days' forfeiture of pay. I agree with the CAR that there is a negligible difference in severity between the acts perpetrated against Cst. 1 and Cst. 2. However, the misconduct under Allegation 2 contains an element of persistence or repetition that is aggravating, even if it did occur very soon after Allegation 1.

The severity of these pay forfeitures reflects two primary aggravating features: the invasive nature of the sexual touching; and the prior messaging by the Force to all employees about the unacceptability of sexual harassment and sexual misconduct.

I believe that it is proportionate to impose, as a further punitive and serious measure, a period of ineligibility for promotion of 2 years, to start from the date of this written decision. Given that the Subject Member is an effective investigator, has consistently received positive performance evaluations, and has demonstrated that he is capable of successfully assuming a supervisory role, I recognize that promotion in the near term may have been a real possibility for the Subject Member. But to emphasize to the Subject Member the abject unacceptability of his behaviour, and to make it equally clear to members of the public and employees of the Force just how seriously this type of misconduct is treated by Canada's national police service, both financial penalty and ineligibility for promotion are justified proportionate measures.

Overall, I view the aforementioned selected conduct measures as sufficient to achieve both specific deterrence for the Subject Member, and general deterrence for all members whose behaviour (on- and off-duty) is subject to the provisions of the RCMP Act.

It is apparent that the Subject Member's misconduct, involving tactical troop members drawn from "H" Division, including Cst. 1 and Cst. 2, may make his continued participation in training sessions and deployments awkward or even untenable. The Subject Member is posted to a Detachment, and his work on tactical team matters is independent of that

> *posting; therefore, I see no role for directing a transfer or workplace relocation. But I do see the Subject Member's involvement in tactical team activities to be a matter for careful review by the appropriate personnel in "H" Division. It would be a squandering of the Subject Member's training to date, and acquired instructing capabilities, if he took no part in future obstruction removal activities, but the maintenance of a respectful workplace must be considered a greater priority. The concerns expressed in the victim impact statement of Cst. 1 should be considered as part of any review of the Subject Member's additional tactical troop activities.*
>
> *Globally, I also direct the Subject Member to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer for "H" Division, or their delegate. I do not question the Subject Member's level of commitment to his sobriety, but he must be given all reasonable tools to maintain a healthy lifestyle, and to ensure that he never again abuses alcohol.*
>
> ***CONCLUSION***
>
> *The Conduct Board imposes the following conduct measures:*
>
> - *a reprimand for each allegation, which this written decision shall constitute;*
> - *the forfeiture of 15 days of pay for Allegation 1;*
> - *the forfeiture of 20 days of pay for Allegation 2;*
> - *ineligibility for promotion for a period of 2 years from the date of this written decision; and*
> - *a direction to receive any counselling with respect to alcohol abuse or addiction, or any other counselling, as considered appropriate by the Health Services Officer for "H" Division, or their delegate.*

The Appeal

1. Appeal Presentation

[12] The Appellant presented a Statement of Appeal (Form 6437e) to the Office for the Coordination of Grievances and Appeal (OCGA) on May 27, 2019 (Record, p 5). It is the Appellant's position that the conduct measures imposed on the Respondent are clearly unreasonable. Furthermore, the Appellant believes that the manner by which the Board reached its decision breached fundamental principles of procedural fairness. Lastly, the Appellant contends the decision was based on an error of law.

[13] The Appellant requests that I overturn the Board's decision and direct the Respondent to resign from the Force within 14 days or be dismissed.

2. Appellant's Appeal Submissions

[14] On November 26, 2019, the Appellant filed appeal submissions (Record, p 87-93). The Appellant challenges the conduct measures imposed and raises two principal grounds of appeal;

- The Board made an error of law by not classifying the conduct as sexual harassment or sexual assault; and
- The conduct measures imposed are clearly unreasonable.

[15] The Appellant states that the Board intentionally misclassified the Respondent's actions as "unwanted sexual touching", describing him as an "intoxicated pub patron" with the intent of imposing lesser conduct measures.

3. Respondent's Appeal Submissions

[16] The Respondent provided his response on January 15, 2020 (Record, pp 211-220).

[17] The Respondent suggests that the Appellant is attempting to add new grounds that were not originally identified in the Notice of Conduct Hearing and, the failure of the Board to refer to the Respondent's actions as sexual harassment or sexual assault did not constitute a reviewable error.

[18] The Respondent insists that the conduct measures imposed by the Board are reasonable and supported by the evidence and adds that the Board's findings were based on credible evidence, properly weighed and considered.

4. Appellant's Rebuttal

[19] The Appellant provided a rebuttal on February 21, 2020 (Record, pp 233-236).

[20] The Appellant refers to subsection 33(1) of the *Commissioner's Standing Orders (Grievances and Appeals)* where the Commissioner is specifically required to decide if the decision under appeal contravenes the principles of procedural fairness, was based on an error of law or was clearly unreasonable, but claims this provision does not create a standard of review in and of itself.

[21] The Appellant argues that the proper standard of review for whether the Respondent committed sexual assault or sexual harassment is correctness, not reasonableness as proposed by the Respondent.

[22] The Appellant maintains that there was sufficient information for the Respondent to know the case he had to meet and that he is wrong in stating that this was not a workplace event.

[23] The Appellant submits that the Notice of Conduct Hearing contained sufficient detail to support a finding that the Respondent's conduct was akin to sexual assault and this was argued at length in the Appellant's submissions. The Board would have committed a serious error in law had it ruled that the conduct did not meet the definition of sexual assault. Instead the issue of sexual assault raised in submissions was not addressed by the Board who erroneously used the euphemism of "unwanted sexual touching".

[24] The Appellant highlights that the RCMP has an obligation to protect its employees from sexual harassment and offer a safe work environment. In the present case, the sexual assaults occurred during a Force sponsored event open exclusively to RCMP Tactical Troop members. The responsibility to ensure a harassment free environment clearly extends to such situations.

[25] The mere fact the actions of the Respondent were investigated promptly by the Serious Incident Response Team does not, in the Appellant's view, in any way change the nature of the sexually harassing behavior.

[26] The Appellant also argues that the Respondent's willingness to pursue and continue further treatment is different than presenting evidence of successful treatment and a favourable psychological assessment in terms of predicting a relapse of alcohol abuse or sexual misconduct.

ERC ANALYSIS AND FINDINGS

1. Referability/Timeliness

[27] The ERC determined that the matter was referable, that the Appellant had standing, and the time limits were respected.

2. Applicable Standard of Review

[28] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at para 34, the Supreme Court of Canada (SCC) emphasized that statutory standards of review must be respected. In *Smith v Canada (Attorney General)*, 2021 FCA 73, at para 50, the Federal Court of Appeal stated there is no presumption that an administrative appeal should be subject to the ordinary common law standards of judicial review or appellate review.

[29] Pursuant to subsection 33(1) of the *CSO (Grievances and Appeals)*, I am required to consider whether the decision under appeal is clearly unreasonable in view of errors of fact, or mixed fact and law:

> **Decision of Commissioner**
>
> 33 (1) The Commissioner, when rendering a decision as to the disposition of the appeal, must consider whether the decision that is the subject of the appeal contravenes the principles of procedural fairness, is based on an error of law or is clearly unreasonable.

[30] The term "clearly unreasonable" is equivalent to the common law standard of patent unreasonableness (*Smith v Canada (Attorney General)*, 2021 FCA 73, at para 56; *Kalkat v Canada (Attorney General)*, 2017 FC 794, at para 62).

[31] In terms of requisite degree of deference for the standard of patent unreasonableness the ERC referred to *Canada (Director of Investigation and Research, Competition Act) v Southam Inc*, [1997] 1 SCR 748, at para 57:

> The difference between "unreasonable" and "patently unreasonable" 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. […] As Cory J. observed in *Canada (Attorney General) v. Public Service Alliance of Canada*, 1993 CanLII 125 (SCC), [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". 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.

[32] The ERC went on to explain that a patently unreasonable defect, once identified, "can be explained simply and easily, leaving no real possibility of doubting that the decision is defective." A decision that is patently unreasonable "is so flawed that no amount of curial deference can justify letting it stand" (*Law Society of New Brunswick v Ryan*, [2003] 1 SCR 247, at para 52). The relevant question is whether there is any rational or tenable line of analysis supporting the decision and demonstrating that the decision is not clearly irrational (*Victoria Times Colonist v Communications, Energy and Paperworkers*, 2008 BCSC 109, aff'd 2009 BCCA 229, at para 65).

[33] The ERC notes that significant deference is owed to the Board in considering the appropriateness of the conduct measures imposed (ERC 3200-95-002 (D-043)); passage reproduced and relied on by the Commissioner in ERC 2400-09-002 (D-121)):

> Sanction is inherently a matter of considerable subjectivity and the tribunal of first instance, the tribunal that heard the matter directly before it, is in the best position to exercise this subjectivity. An error of principle, a failure to consider relevant and important mitigating factors, consideration of irrelevant aggravating factors, or a result in which the sanction is clearly disproportionate are all examples of situations that may justify upholding the appeal on sanction. In general, however, appellate bodies will not overturn a sanction only on the basis that they would have made a subjective evaluation different in the result from that of the hearing tribunal.

3. Additional Disclosure

[34] On appeal, the Appellant included the Civilian Review and Complaints Commission for the RCMP, Report into Workplace Harassment in the RCMP (Ottawa: April 2017) (CRCC Report)

(Record, p 94) which sets out nine findings and ten recommendations relating to workplace harassment in the RCMP.

[35] The Appellant explains the relevance of the CRCC Report very briefly (Record, p 89). In response, the Respondent argues that the Appellant is trying to introduce new evidence that may be persuasive, but is not binding on any conduct board and that there was no harassment alleged against the Respondent during the Code of Conduct process (Record, p 216).

[36] An Appellant can provide new evidence if it was not available at the time of the original decision pursuant to the *CSO (Grievances and Appeals)* and reflected in policy. Even so, the test for fresh evidence found in *Palmer v The Queen*, [1980] 1 SCR 759 (*Palmer*) must be satisfied.

[37] The ERC found the CRCC Report to be inadmissible (Report, para 63).

[38] Section 32 of the *CSO (Grievances and Appeals)* grants the Commissioner (or her delegate) considerable discretion in deciding what evidence to accept and consider in a conduct appeal:

> 32. The Commissioner, when considering an appeal or any matter arising in the context of an appeal, may accept any evidence submitted by a party.

[39] The *CSO (Grievances and Appeals)* also indicates that evidence that was not presented to the original decision maker cannot be filed, unless the evidence was not available to the Appellant at the time of the disputed decision (para 25(2)(a)):

> 25 (1) The OCGA must provide the appellant with an opportunity to file written submissions and other documents in support of their appeal.
>
> Restriction
>
> (2) The appellant is not entitled to
>
> (a) file any document that was not provided to the person who rendered the decision that is the subject of the appeal if it was available to the appellant when the decision was rendered; or
>
> (b) include in their written submissions any new information that was known or could reasonably have been known by the appellant when the decision was rendered.

[40] The limitations of paragraph 25(2)(a) of the *CSO (Grievances and Appeals)* are reflected in the Administration Manual (AM II.3, section 5.3.1.5, Grievances and Appeals):

> 5.3.1.5 If the appellant provides a written submission, he/she will not present new evidence or information that was not presented to the respondent in any of the proceedings before the appeal.
>
> EXCEPTION: The evidence or information was not, and could not reasonably have been, known by the appellant when the written decision that is the subject of the appeal was made.

[41] The ERC has recommended on multiple occasions that a document must be relevant and not have been reasonably available prior to the original decision for it to be admissible before the Commissioner (ERC 3300-08-003 (G-501)).

[42] The intended purpose of paragraph 25(2)(a) is to prevent abuse of the appeal process by permitting the admission of evidence on appeal which would have been available at the time of the hearing. Moreover, it ensures a decision maker has all available information prior to making a decision.

[43] The ERC explained the criteria set out in *Palmer* in order to determine whether new evidence can be admitted on appeal (*Palmer; David Suzuki Foundation v Canada (Health)*, 2018 FC 379, at paras 13-19) (Report, para 68):

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. is relevant to an issue;

iv. is credible, and,

v. if believed, could reasonably be expected to have affected the Board's decision. I note that all of these criteria must be met for the additional evidence to be considered on appeal.

[44] The ERC concluded that the elements of the *Palmer* test with regard to the CRCC Report were not met (Report, para 69).

[45] To begin, the ERC determined that the element of due diligence was not met because the CRCC Report was in existence and could have been provided to the Board.

[46] The first hearing in this matter commenced in March 2019. However, the CRCC Report was published two years prior in April 2017. The Appellant has not provided any explanation as to why it was not filed during the course of the conduct hearings.

[47] Second, the ERC determined that the relevancy requirement was satisfied. The CRCC Report specifically outlines sexual harassment within the RCMP followed by recommendations on how the RCMP can address the issue. The CRCC Report provides particulars on how important it is for incidents of harassment to be properly addressed and managed. The ERC described the CRCC Report as a reflection of the changes the RCMP wished to bring about, noting why past attempts were unsuccessful.

[48] Third, the ERC determined that the credibility requirement was met because it was written by the Civilian Review and Complaints Commission leaving no doubt about authenticity and reliability.

[49] Fourth, the ERC concluded that the cogency requirement had not been met notably due to the fact that there was no indication that the document in question would have had any impact on the decision maker in this case.

[50] The Board established a clear tone from the outset and consistently throughout the decision that the Respondent's actions were serious and that the RCMP has been clear that such conduct will not be tolerated.

[51] In the end, the ERC held that the elements of the *Palmer* test were not met and that the CRCC Report should not be allowed into evidence for the purposes of the appeal.

Merits of the Appeal

[52] The Appellant raises two primary grounds of appeal:

i. The Board erred in law in not finding the respondent engaged in sexual harassment or sexual assault; and

ii. The Board's sanction decision is clearly unreasonable.

1. Sexual Harassment and Sexual Assault

A. Appellant's Arguments

[53] The Appellant takes the position that the Board committed an error of law by failing to characterize the actions of the Respondent as sexual assault, instead of "non-consensual sexual touching".

[54] The Appellant maintains the Board's mischaracterization of the incident led to lesser conduct measures being imposed which is why the Appellant argues the review should be undertaken on the standard of correctness.

[55] The Appellant points out that the Respondent admitted to all the elements of sexual assault, specifically that he touched both colleagues for a sexual purpose without consent.

[56] The Appellant submits that the conduct measures do not reflect the gravity of the Respondent's conduct.

[57] In *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252 (*Janzen*), the SCC outlined a test for sexual harassment:

> sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.

[58] The Appellant contends that the Board erred in not applying the test in *Janzen*.

[59] The Appellant furthers alleges that the misconduct took place at an event organized by the RCMP, only attended by RCMP members, and therefore qualifying as an extension of the workplace. Accordingly, the Appellant claims the Respondent's actions should qualify as sexual harassment.

[60] The Appellant submits that the Board's description of the misconduct as indicative of being "those of a drunken pub night patron" mischaracterized what took place and instead emphasized the location of the misconduct.

[61] The Appellant argues that the Board's characterization not only trivialized how detrimental the Respondent's conduct was in affecting the work environment, but also ignored the adverse career consequences for the victims.

B. Respondent's Arguments

[62] The Respondent maintains that the Appellant's assertion that the Board erred in law is a question of fact, making the appropriate standard of review that of reasonableness, with a significant degree of deference owed (Record, pp 211-220).

[63] The Respondent disagrees with the Appellant's position that the Board did not properly classify his actions. On the contrary, the Respondent suggests that the Appellant is attempting to modify the Notice of Conduct Hearing to have the incident reclassified from "unwanted sexual touching" to sexual assault or sexual harassment.

[64] The Respondent describes this as the Appellant's attempt to "alter the record in an effort to obtain a different outcome". He maintains that the absence of charges under the *Criminal Code*, or allegations of the like in the Notice of Conduct Hearing demonstrate the Appellant's attempts to obtain a preferred outcome.

[65] The Respondent does not agree with the Appellant's interpretation of *Janzen*, stating instead that it had been taken out of context:

> First, the reference is found in a section with the title: "Is Sexual Harassment Sex Discrimination". Second, the Court continued on in the cited paragraph to say that sexual harassment in the workplace is an "abuse of power". And further, "by requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being".

[66] The Respondent maintains that the present facts are distinguishable from *Janzen*. He argues that the material difference is that his conduct toward Csts. 1 and 2 was isolated and dealt with by management immediately, whereas what took place in *Janzen* related to ongoing "unwelcomed sexual actions or explicit sexual demands in the workplace".

[67] The Respondent emphasizes that there were no allegations of harassment made through the proceeding. Had there been any allegations of the like, specific statutory requirements would have had to be followed, for example, the *CSO (Investigation and Resolution of Harassment Complaints)* and section 2.1 of the *Code of Conduct*.

[68] The Respondent reiterates that the Board based its decision on the Notice of Conduct Hearing which set out allegations of discreditable conduct, not harassment.

C. Appellant's Rebuttal

[69] According to the Appellant, pursuant to subsection 33(1) of the *CSO (Grievances and Appeals)* (Record, pp 233-236), "the Commissioner is specifically required to decide if the decision under appeal contravenes the principles of procedural fairness, was based on an error of law or was clearly unreasonable but does not create a standard of review in and of itself."

[70] The Appellant maintains the position that according to *Vavilov,* correctness is the standard of appellate review for questions of law.

[71] While subsection 43(3) of the *RCMP Act* requires the Notice of Conduct Hearing to contain "sufficient detail" regarding the allegation in order to allow the Respondent to prepare an adequate response, the Appellant insists that the Notice of Conduct Hearing laid out all the essential elements to assist in the determination that the Respondent engaged in sexual assault.

[72] The Appellant further argues that the Board would have committed a serious error in law in finding that the Respondent did not engage in sexual assault, but instead simply ignored the Appellant's submissions.

[73] The Appellant states that to "contend that the victims were not 'required to contend [with] unwelcomed sexual actions or explicit sexual demands in the workplace' merely because the incident occurred at a pub rather than at the detachment is simply wrong and shortsighted" (Record, p 236). The Appellant maintains that RCMP sponsored events outside of the workplace remain within the RCMP's obligation to protect employees from sexual harassment and maintain a safe work environment.

ERC Analysis

[74] While the Appellant submits that the Board intended to allow for lesser conduct measures to be imposed which explains why it failed to categorize the Respondent's actions as sexual assault, according to the ERC, the Appellant is asking the Board to come to a determination on allegations that were not alleged in the Notice of Conduct Hearing.

[75] The ERC found that the Board properly determined there was a contravention of section 7.1 of the *Code of Conduct*, based on the Conduct Authority's allegation. Specifically, the Board agreed with the characterization of the incident, notably that the Respondent touched Cst. 1 and Cst. 2 in a sexual manner without their consent (Report, para 92).

[76] The ERC referred to subsection 45(1) of the *RCMP Act* which states, "the role of the conduct board is to decide **whether or not each allegation** of a contravention of a provision of the *Code of Conduct* **contained in the notice** served under subsection 43(2) is established on a balance of probabilities" (ERC emphasis) (Report, para 92).

[77] Although having the option to do so, the Appellant did not include specific references to sexual harassment or sexual assault in the Notice of Conduct Hearing. Instead, the particulars characterized the allegations that the Respondent touched the victims "for a sexual purpose without their consent" (Report, para 93).

[78] The ERC referred to a Federal Court decision for the principle that a notice of hearing sets out the allegations of fact which the applicant has to defend against during the proceedings and findings outside of those particulars are improper (*Gill v Canada (Attorney General),* 2006 FC 1106 (*Gill*), at para 67) (Report, para 93):

> In my view, the Board did not give the applicant adequate notice of the allegations of misconduct that were established against him. It is not sufficient that the particulars correctly identified the date and place of the misconduct, or that that the appendix to the notice of disciplinary hearing contained allegations of fact concerning the striking of the complainant's car and the choking of the complainant. The notice of hearing set out the allegations of fact which the applicant had to defend against during the proceedings, namely, that he was discourteous and disrespectful to Sherbuck, including verbally taunting him. Based on those allegations, it cannot be said that the applicant was able to prepare a proper defence to the allegations that he inappropriately struck Sherbuck's car and used excessive force in arresting Sherbuck. I agree with the applicant that the Board improperly strayed outside the particulars in making the findings of misconduct.

[79] The ERC pointed out that the Board mirrored the wording of the Notice of Conduct Hearing, and a finding of sexual harassment or sexual assault would be outside of the scope of the particulars as alleged by the Appellant. An allegation of sexual harassment is very serious and should not be used as a way to bolster submissions that the Respondent should be dismissed when it was never alleged in the first place (Report, para 94). After all, the Respondent has a right to procedural fairness, must be given proper opportunity to respond to allegations, and proper notice of such allegations (Report, para 94).

[80] The ERC made reference to the Conduct Measures Guide and the fact that it does not call for a straight dismissal for cases of harassment, even in the aggravated range, which would include but not be limited to sexual harassment, rather, the Conduct Measures Guide recommends 20 days financial penalty to dismissal for sexual harassment, which is in line with what the Board imposed for Allegation 2 in any event (Report, para 95).

[81] Moreover, the ERC found that the Board did not err by not categorizing the actions of the Respondent as sexual harassment because there was no reference to sexual harassment put forward

by the Appellant from the outset in the Notice of Conduct Hearing. Consequently, the Board did not err in not applying the test for sexual harassment (Report, para 96).

[82] The ERC also noted that there is a distinction between this case and ERC C-2019-005 (C-042) (*Caram*). In *Caram*, the conduct authority put forward an allegation of sexual harassment in the Notice of Conduct Hearing, and on appeal, I found that the Board had incorrectly analyzed whether the Respondent in that case had engaged in sexual harassment. Here though, there was no allegation of sexual harassment in the Notice of Conduct Hearing (Report, para 97).

[83] The ERC explained that should a conduct authority wish to amend the Notice of Conduct Hearing, they must do so in a manner that is procedurally fair to the member, such as seeking an adjournment to amend the original Notice of Conduct Hearing as the member has the right to know what allegations are being brought against them. It is procedurally unfair for a conduct authority to bring forward new allegations at the submissions stage of the conduct hearing or in an appeal of a conduct board's decision (Report, para 98).

Commissioner's Analysis

[84] With respect to the Appellant's first ground of appeal pertaining to an error of law, I agree with the ERC that this argument is actually raising a question of fact.

[85] I do not believe the Board erred in not stating that the Respondent engaged in sexual harassment or sexual assault. In short, pursuant to subsection 45(1) of the *RCMP Act*, the Board was bound by the contents of the Notice of Conduct Hearing and could therefore only decide on whether a contravention of a provision of the *Code of Conduct* took place based on the provisions contained in the notice. The reality is that the Appellant never used either term in the Notice of Conduct Hearing.

[86] For certainty, there is no doubt that the Tactical Troop social event at the pub after training constituted circumstances where the RCMP workplace harassment regime and section 2.1 of the *Code of Conduct* would apply. The Board obviously recognized this connection by observing that "drinking to the point of being unable to account for one's actions **at an off-duty but work-**

related social event constitutes an episode where personal responsibility was clearly lacking" (emphasis added) (Decision, p 82).

[87] The Appellant, however, chose to proceed by way of allegations of discreditable conduct under section 7.1 of the *Code of Conduct*:

> 7.1 - Members behave in a manner that is not likely to discredit the Force.

[88] It was therefore up to the Appellant to determine how the incident ought to have been characterized and described in the Notice of Conduct Hearing. A conduct board cannot stray outside the particulars, as now suggested by the Appellant (*Gill*, at para 67).

[89] Any shortcomings in the Notice of Conduct Hearing ought to have been appropriately handled in a manner that would be procedurally fair. I agree with the ERC that attempting to address new allegations at the submissions stage of the conduct hearing or in an appeal would bring about significant issues of procedural fairness.

[90] In my view, the Board made no error by not specifically describing the Respondent's conduct as sexual harassment. An allegation of sexual harassment under section 2.1 of the *Code of Conduct* needed to be included in the Notice of Conduct Hearing. The Appellant failed to do so.

[91] I also agree with the ERC, the Appellant is attempting to garner a re-weighing of the evidence. However, for me to intervene, I must determine that the Board's decision is so clearly unreasonable that the evidence is incapable of supporting its conclusion (*British Columbia Workers' Compensation Appeal Tribunal v Fraser Health Authority,* 2016 SCC 25, at para 30).

[92] For this ground of appeal, this is simply not the case.

[93] As pointed out by the ERC, *Caram* is readily distinguishable because in the present appeal there was no allegation of sexual harassment in the Notice of Conduct Hearing. Where sexual harassment is not alleged, the applicable provision of the *Code of Conduct* is section 7.1 discreditable conduct.

[94] I would like to comment on the terminology that is commonly used by conduct authorities and conduct boards to describe behaviour that although not being examined under the guise of the *Criminal Code,* plainly amounts to sexual assault by any other name. Here, the Appellant described the Respondent's behaviour in the Notice of Conduct Hearing as touching "for a sexual purpose without […] consent." Meanwhile, the Board used the term "non-consensual sexual touching" after finding that the Respondent grabbed Cst. 1's breasts and shortly after twice moved his hands across Cst 2's bare stomach up towards her breasts. While section 7.1 of the *Code of Conduct* is written in general terms, "Members behave in a manner that is not likely to discredit the Force", and the term "sexual misconduct" used in the Conduct Measures Guide has been defined by the RCMP as "any inappropriate act, behaviour or language of a sexual nature ", there is no disagreeing with the Alberta Court of Appeal (*Calgary (City) v CUPE Local 37*, 2019 ABCA 388, at para 33) that "the grabbing and squeezing of another's breast without consent is sexual assault". Just the same, I am satisfied that the choice of terminology did not minimize the Board's view of the severity of the Respondent's actions (see for example, Decision, paras 73, 82, 84-85).

[95] In fact, the issue of terminology along with other aspects of the RCMP Conduct Measures Guide and the imposition of sanctions arising from sexual harassment and sexual misconduct was recently the subject of an extensive review by two external experts in the field of police discipline and their report and recommendations are expected to assist the RCMP in updating the Conduct Measures Guide, better articulating and applying sanctioning principles, and enhancing conduct authority training.

2. Conduct Measures

A. Appellant's Arguments

[96] The Appellant submits that the conduct measures imposed by the Board are clearly unreasonable for three reasons:

i. The Board erred in considering the totality of the evidence;

ii. The Board erred in not giving appropriate consideration and weight to the victim impact statement of Cst. 1; and

iii. The Board erred in not considering that dismissal was the appropriate conduct measure in the circumstances.

[97] The Appellant also states that the Board provided only a brief comment on the victim impact statement provided by Cst. 1 and failed to analyze the full impacts to Cst. 1. The Appellant cites paragraph 82 of the Decision, where the Board commented on the victim impact statement as part of the aggravating factors:

> The impact of the Subject Member's misconduct on the two constables who were subjected to his unwanted sexual touching must be considered aggravating, even if only Cst. 1 provided a formal statement as a victim. There is an undeniable element here: the misconduct violated the important trust that should exist between fellow police officers and co-workers. In addition, a number of other members observed some aspect of the Subject Member's misconduct.

[98] The Appellant alleges that the Board gave more consideration to the letters of support for the Respondent than the victim impact statement. The Appellant argues that Cst. 1's victim impact statement was "trivialized in comparison to the attention given to each and every personal reference of the subject member, none of whom were directly impacted by his behaviour."

[99] The Appellant insists that the Board should have given more consideration to the statement, in which Cst. 1 speaks of "feeling betrayed by a fellow police officer, family problems that ensued, the need to seek professional counselling, the sickness in her stomach when she was forced to relive the incident, the shame of not pursuing criminal charges and other significantly profound effects the misconduct had on her."

[100] The Appellant claims that the Board's failure to give Cst. 1's victim impact statement proper weight led to the imposition of less severe conduct measures.

[101] In addition, the Appellant maintains that the evidence does not support the Respondent's likelihood of rehabilitation as described in the Board's analysis. The Appellant points out that there

was no expert evidence put to the Board about the Respondent's use of alcohol, his steps to attend Alcoholics Anonymous meetings, or any other actions supporting the Board's conclusion that he was likely to be rehabilitated.

[102] The Appellant clarifies that the Respondent's counselling was to address "personal issues", not overconsumption of alcohol. Furthermore, the Appellant believes that none of the above issues were addressed or could have been addressed by counselling. The Appellant states the counselling therapist's report contained no opinion, treatment plan or diagnosis and was submitted to the Board by the Respondent's representative only after the Board had requested it.

[103] The Appellant continues arguing that the Board does not have the "specialized knowledge or scientific qualifications" to make its own assessment as to whether or not the Respondent is indeed rehabilitated or has the capacity to be rehabilitated. The Appellant adds that the Board's finding that the Respondent was willing to undergo treatment was "purely speculative."

[104] By failing to conclude that dismissal was the appropriate conduct measure to impose, the Appellant insists that the Board's decision is clearly unreasonable.

[105] The Appellant also argues that the Board mistakenly interpreted the elements of general deterrence in *Commanding Officer of "HQ" Division and CM Calandrini,* 2018 RCAD 10 (*Calandrini*), and states that the proper and true interpretation is that "there is a zero-tolerance policy in regards to sexual misconduct of the type displayed by the Respondent" (Record, p 91)

[106] The Appellant submits that by refusing to order the Respondent dismissed, the Board is allowing someone who sexually assaulted two female colleagues at a work function to remain a police officer. The Appellant contends that *Calandrini* supports the Respondent's dismissal (*Calandrini,* para 175):

> There is, however, a well-documented need for general deterrence. Well before the dates encompassed by this Notice of Conduct Hearing, issues of sexual harassment in the RCMP were of foremost concern to the Commissioner, who issued a series of internal bulletins to all employees and engaged in discussions with the media regarding a zero-tolerance policy.

> Conduct measures imposed for contraventions of this sort must reinforce this stance. These are serious contraventions and, as such, must be seen to merit a serious response in terms of conduct measures. General deterrence is of particular importance in this case.

B. Respondent's Arguments

[107] The Respondent emphasizes that the Appellant provided no specifics in how the Board erred in its consideration of the evidence.

[108] The Respondent does not agree with the Appellant that the Board erred. On the contrary, the Respondent states that the Board is permitted to consider the evidence provided by both Parties, and impose conduct measures as was done in this case.

[109] The Respondent maintains that aggravating or mitigating factors are weighed with discretion and consequently reviewed on a standard of reasonableness. The Respondent contends that the Board gave proper consideration and appropriately weighed the victim impact statement.

[110] Being the only person to testify at the conduct hearing, the Respondent argues that it ought not be a surprise that the Board spent a considerable amount of time on his evidence.

[111] The Respondent insists that the conduct measures ordered by the Board were within its authority to impose. Furthermore, the Respondent's position is that the *RCMP Act* and *CSO (Conduct)* do not require a minimum financial penalty or automatic dismissal for the Respondent's conduct, nor did the Appellant provide any precedent that was analogous to this case in which dismissal was the conduct measure imposed.

[112] The Respondent highlights that the Board did not need or require any expert evidence given its position to hear the evidence from the Respondent. The Board addressed the Respondent's health issues and ordered that he get the treatment the Health Services Officer (HSO) deems necessary. The Respondent argues that the Board did not err and that the decision is reasonable.

C. Appellant's Rebuttal

[113] The Appellant submits that the Board's findings were presumptive, particularly as they pertain to the Respondent's assumed willingness to undergo treatment with success.

[114] The Appellant claims this is an error on the Board's part, predominantly due to the fact that the Respondent had not previously taken the initiative to self-admit to treatment, especially when there is no previous counselling or favourable psychological assessment, which are tools to be used to predict the likelihood of relapse.

D. ERC Analysis

General Comments

[115] The ERC acknowledged that this is an extremely difficult case. The events that unfolded have had, and will continue to have a lasting impact on the victims, particularly as presented in Cst. 1's victim impact statement (Report, para 110).

[116] The ERC noted that there are overarching and compelling mitigating circumstances in this case. Had it not been for these circumstances, its recommendation may have varied greatly (Report, 111).

[117] In sum, the ERC views the Respondent's behaviour as unacceptable, acknowledging that this type of conduct must normally be addressed by the severest of conduct measures (Report, para 111).

[118] The ERC identified very strong and compelling mitigating factors in this case, which were clearly identified and considered by the Board. In light of these mitigating factors, the ERC agreed with the Board that dismissal is not appropriate in these specific circumstances (Report, para 112).

[119] In reviewing the transcripts, the ERC determined that it is clear that the Respondent took full responsibility for his actions, despite not remembering what happened due to his level of intoxication (Report, para 112).

[120] The Respondent also apologized to Csts. 1 and 2 during his testimony, and appeared to have prepared apology letters to them, but was forbidden to send them because he was not to have any contact with the victims during the conduct investigation and proceedings (Report, para 112).

[121] The ERC mentions the numerous letters of support that spoke to the Respondent's good character, the majority of which identifying this type of behaviour as very much out of character (Report, para 113).

[122] The Respondent's supervisors and colleagues, all described him as compassionate, honest, dedicated and reliable. He is described as a highly professional, and kind individual, both in his professional and personal life and is known for having integrity (Report, para 113).

[123] The ERC also noted that his performance evaluations and awards evidence how highly he is viewed as an RCMP member, whereas many other references focussed on his exemplary personal attributes. The Respondent has no prior conduct record (Report, para 114).

Commissioner's Analysis

[124] I concur with the ERC. This is a very challenging case, the results of which will have lifelong impacts.

[125] The ERC placed a great deal of emphasis on the mitigating factors and the influence they had on sanctions short of dismissal.

[126] I agree with the ERC analysis.

[127] Although there were aggravating factors in this situation, in light of the mitigating factors, proportionality and the competing interests at play, I am prepared to accept that the Board's decision to not order dismissal in the circumstances is not clearly unreasonable.

[128] The Respondent recognized the harm done, he cooperated with the investigation, took responsibility for his actions, apologized to both victims in his testimony (albeit not directly), and prepared letters for both victims.

[129] While I do not view this in any sort of way as an excuse for his conduct, I am satisfied that based on my review of the Material, the Record, and the Decision, it is evident that the events that transpired on the evening in question, particularly the Respondent's abhorrent behaviour, was uncommon and out of character for him.

[130] His peers spoke highly of him, his performance evaluations were positive, and most importantly he displayed integrity in the manner by which he conducted himself after the incident took place; a quality he had previously been revered for.

[131] The Respondent had no prior conduct record which is also a relevant factor to be taken into consideration, particularly in matters of serious misconduct like this one.

i. Findings Supported by Evidence

[132] The Appellant argues that, in the absence of expert evidence, the Board should not have made a finding about rehabilitation, as it did not have specialized knowledge required to do so, and exceeded the scope of its competence in finding that the Respondent is likely to be rehabilitated.

[133] The Appellant further submits that the finding by the Board that the Respondent is willing to undergo treatment in the future is "both speculative and ignores the evidence that the Respondent failed to do so despite having his drinking cause significant problems at work" (Record, p 93).

[134] According to the ERC, the Respondent attended counselling arranged for him through the Employee Assistance Program. In his testimony, the Respondent stated that he had not consumed alcohol since the incidents occurred (Report, para 116).

[135] The ERC acknowledges that while a counsellor's testimony is not considered "expert evidence", the fact that the Respondent attended counselling, and had plans to continue demonstrate his inclination and motivation to seek assistance (Report, para 116).

[136] The Appellant alleges that only specific evidence from a qualified expert can be used to assess the Respondent's likelihood of rehabilitation. The Appellant does not cite any legal requirement or precedent in support of this assertion (Report, para 116).

[137] The ERC emphasized that the Board is best placed to assess the credibility of the Respondent. And, in doing so, the Board reasonably found (Record, pp 27, 31) (Report, para 116):

> In his testimony, the Subject Member spoke of how his counselling sessions confirmed that alcohol should "have no part in [his] life". I find this realization by the Subject Member genuine, and one that he takes very seriously; he will be conscientious about abstaining from alcohol. I accept that he has now learned how to identify, manage and cope with stress, including ways to seek out effective assistance if he feels overwhelmed by stress and anxiety.
>
> …
>
> I accept that the Subject Member has remained abstinent from alcohol since the incident, and he presents as deeply committed to remaining abstinent;
>
> Given the Subject Member's willingness to accept whatever further assessment and treatment is identified as necessary, I consider there to be a minimal likelihood that the Subject Member will ever be grossly intoxicated again, and further that there is a minimal likelihood that he will ever engage in similar misconduct again. I consider the Subject Member's potential for successful rehabilitation to be strong.

[138] The ERC does not condone the Respondent's behaviour and highlights that overconsumption of alcohol does not excuse the Respondent's action. However, the ERC does make mention that it is not unreasonable for the Board to believe the Respondent was sincere in his sworn testimony that he has learned how to deal with the stressors, particularly accepting that alcohol has no part of his life (Report, para 117).

[139] The ERC found that the Appellant has provided no reason why the Respondent should not be deemed credible in his testimony. Concerns with respect to the absence of expert evidence in relation to his actions/intentions to seek rehabilitation, is not a sufficient reason to do so (Report, para 117).

[140] In *Pizarro v Canada (Attorney General)*, 2010 FC 20 (*Pizzaro*), the Federal Court overturned the Commissioner's appeal decision rejecting expert evidence that was fundamental to understanding why the member had engaged in the discreditable conduct (Report, para 118).

[141] The ERC determined that this case can be distinguished from *Pizarro* primarily due to the fact that expert evidence is not necessary to understand why the Respondent engaged in his conduct, or whether he is likely to be rehabilitated (Report, para 118).

[142] In this matter, the Board was in the best position to assess the credibility of the Respondent. This principle was highlighted in the Commissioner's decision in C-006 at paras 10-12, citing the case of *Law Society of Upper Canada v St-Fort*, [2001] LSDD No 67, in the context of a law society's professional misconduct proceedings. In that case, the Appeal Panel of the Law Society of Upper Canada set out the standard of appeal that it intended to follow in cases involving appeals of Hearing Panel decisions stating (para 29) (Report, para 119) (ERC emphasis):

> The according of deference has traditionally rested on the trial judge's very real advantage in assessing the credibility of witnesses. **Particularly where explicit findings of credibility have been made which turn on the direct observation of witnesses, there may well be nothing in the record to suggest that such a finding would be unreasonable.** But this deference also applies even where no oral evidence has been heard, and when no inferences have been drawn from observation of the behaviour or the person before the tribunal.

[143] The Appellant has not presented any evidence of a reviewable error by the Board in the analysis of the Respondent's credibility. Regardless, a lack of specific expert evidence does not constitute an error on the Board's part.

[144] The ERC therefore concluded that the Board's determination that the Respondent was likely to be rehabilitated is not clearly unreasonable (Report, para 120).

Commissioner's Analysis

[145] The Appellant spent a great deal of effort in challenging the Board's competence to determine the likelihood of the Respondent's rehabilitation.

[146] I believe the Appellant misunderstood the Board's assessment. It appears as though the Appellant is approaching the Board's finding of rehabilitation from a clinical standpoint, similar to a sort of psychological assessment of the Respondent's mental health and well-being. In my view, the Board's approach encompassed sentencing principles such as retribution, restitution, reintegration, in efforts to determine whether the Respondent could eventually, after treatment, return to being a contributing member of the RCMP, and overcoming his own life challenges.

[147] Much like the ERC, I find no reason to question the credibility of the Respondent's testimony. The Appellant brought forth no evidence to suggest the contrary, and the absence of expert evidence does not lead me to waver from my conclusion.

[148] In sum, when the Board speaks of rehabilitation, it is not focussed solely on the Respondent's consumption of alcohol, but also his ability to deal with his life stressors.

[149] The ERC highlighted this point specifically citing *Pizarro* and the fact that expert evidence is not necessary to determine the likelihood of rehabilitation in a case like the one before me.

[150] In the end, I am inclined to agree with the Board and do not find its conclusion clearly unreasonable. Should the Respondent continue to follow the recommendations of the HSO, which may include but not limited to alcohol abstinence, there is a high likelihood of rehabilitation from the incident, taking into consideration all other influencing factors.

ii. Consideration and Weight to the Victim Impact Statement of Cst. 1

[151] The Appellant submits that when considering the aggravating factors enumerated by the Board, the Board did not classify the conduct as sexual harassment in the workplace. In doing so, the Board failed to assess the impact on the victims and their relationship with the workplace (Record, p 90).

[152] It is the Appellant's position that the "totality of Cst. 1's negative experience following the misconduct by the [Respondent] deserved more significant consideration" than it received, particularly in comparison to the Board's reflection on the Respondent's references.

[153] The ERC disagrees with the Appellant and found that the Board did not err in its consideration of the information contained in Cst. 1's victim impact statement (Report, para 121).

[154] The ERC acknowledged that the Board did indeed take into consideration and commented that several of the concerns that Cst. 1 had could have been better handled as a harassment complaint, instead of the *Code of Conduct* matter (Record, p 32; Report, para 121).

[155] The ERC recognized that what Cst. 1 had undergone was and will continue to be traumatic, having a lasting impact on her. The ERC stressed that no member of the RCMP should ever have to experience what Csts. 1 and 2 faced in April 2018 (Report, para 122).

[156] The majority of Cst. 1's victim impact statement (Material, p 215) describes a lasting impact on her. Even so, the entirety of the impact cannot be attributed directly to the Respondent.

[157] Cst. 1 highlights that part of the trauma stemmed from her feelings of abandonment, particularly from people she thought were friends, individuals who never contacted her to see how she was doing.

[158] Cst. 1 also characterized her experience with the SIRT investigation as horrible. The impact of the incident left Cst. 1 unknowingly sleep deprived to the point of falling asleep while driving, putting herself and others at risk.

[159] Cst. 1 also indicated harbouring a great deal of resentment towards the RCMP as an organization for not keeping her informed as to the progression of the investigation and hearing, despite her numerous inquiries.

[160] Cst. 1 expressed frustration that the response she received cited "privacy" as a reason why the organization would not disclose to her the developments or evolution of the investigation.

[161] The ERC emphasizes that none of this is attributable directly to the Respondent, within his control or influence (Report, para 122).

[162] I can confirm, however, that following my decision in *Caram*, RCMP policies and procedures were examined by the Chief Human Resources Officer and the Professional Responsibility Officer with a view to ensuring better support to victims and incorporating more victim oriented obligations on RCMP managers. I expect the updated relevant policies to be soon published.

[163] I recognize that Cst. 1 is now engaged in therapy for assistance in managing the impact this incident has had on her life. Cst. 1 emphasized that if the Respondent was truly apologetic for the events that transpired, reasonable efforts would have been made to apologize.

[164] The ERC notes that the Respondent did in fact apologize in his testimony (Material, p 377) and that he had drafted a letter of apology and readied himself to mail it to Cst. 1 when and if permitted to do so (Material, p 382; Report, para 123).

[165] The ERC recommends the Respondent immediately extend his apologies to both Csts. 1 and 2 as soon as feasible (Report, para 123).

[166] The Appellant appears to have an entirely different view of how events unfolded before the Board, highlighting that the Board ignored Cst. 1's statements of "feeling betrayed by a fellow police officer, family problems that ensued, the need to seek professional counselling, the sickness in her stomach when she was forced to relive the incident, the shame of not pursuing criminal charges and other significantly profound effects the misconduct had on her" (Record, p 91).

[167] The ERC rejected the Appellant's assertions. The ERC was of the view that the Board clearly read the victim impact statement and included it in the aggravating factors against the Respondent (Report, para 125).

Commissioner's Analysis

[168] With respect to the Board's consideration and weighing of Cst. 1's victim impact statement, I agree with the ERC.

[169] As I have previously mentioned, I recognize the trauma Csts. 1 and 2 have endured, along with the future difficulties they may carry forward from this incident.

[170] However, I must consider all factors, as multifaceted as they may be in assessing the Board's decision.

[171] The trauma induced on Cst. 1 from lack of support, and her poor experience with the SIRT, cannot be imposed on the Respondent as solely his responsibility to bear.

[172] That said, I do not negate the nexus between the effect of what happened to Cst. 1 and the incident itself.

[173] After careful review of the Board's decision and the ERC recommendation, I agree with the ERC. The Board was in the best position to determine the weight of the victim impact statement and I see no justification to intervene.

iii Appropriate Conduct Measure

[174] The ERC determined that the Board was correct in identifying the appropriate range of measures. The ERC also recognized that the Board reviewed the cases put forward by both Parties in support of their positions, considered proportionality and the need for specific and general deterrence (Report, para 126).

[175] The ERC noted that the Board correctly characterized and enumerated a vast array of mitigating and aggravating factors that were considered prior to imposing conduct measures (Report, para 126).

[176] The Respondent's mitigating factors included 13 letters of support from other RCMP members and managers who worked with him. All references identified the Respondent as being professional, reliable, hardworking, compassionate and courteous (Report, para 127).

[177] In addition to letters of support, the Respondent had several letters of commendation for bravery and a certificate of appreciation for his work. The Respondent's performance logs were also presented and considered (Report, para 127).

[178] After careful review of these materials, the Board was satisfied that the actions of the Respondent were out of character (Record, p 30; Report, para 127).

[179] The Board also considered aggravating factors, including the seriousness of the misconduct, absence of any alcohol or substance abuse condition or other mental health issue that could have contributed to excessive consumption of alcohol, the fact that he would drink to that level of intoxication and sexually touch two co-workers and the impact on the two victims (Record, p 31; Report, para 128).

[180] The Board discussed the possibility of dismissal, ultimately determining that termination would not be proportionate to the misconduct particularly given that, "significant measures short of dismissal can adequately denounce, punish and correct the [Respondent's] misconduct, as well as identify and monitor any necessary rehabilitative therapy" (Record, p 32; Report, para 129).

[181] The Board stated that "the severity of these pay forfeitures reflects two primary aggravating features: the invasive nature of the sexual touching; and the prior messaging by the Force to all employees about the unacceptability of sexual harassment and sexual misconduct" (Record, p 33; Report, para 130).

[182] The ERC confirmed that the Board only relied on the evidence presented and was in the best position to note mitigating and aggravating circumstances, and imposed conduct measures that it believed would yield specific deterrence and proportionate punishment for the Respondent, as well as a general deterrent to other members of the RCMP (Report, para 131).

[183] The ERC found that the evidence before the Board supported its determinations that the Respondent understood the degree of severity of his actions and their negative impact on the victims (Report, para 132).

[184] The ERC emphasized that the Respondent fully cooperated with the investigation, did not cause any unnecessary delays, and generally did not dispute the allegations or particulars (Report, para 132).

[185] The Respondent showed genuine remorse for his actions and went as far as seeking treatment (Report, para 132).

[186] In examining the Respondent's career trajectory, it is evident that his past history with the RCMP has been excellent and he had no prior misconduct (Report, para 132).

[187] Despite this, the ERC characterized the Respondent's treatment of Csts. 1 and 2 as appalling. The Respondent was not only seriously inebriated, but rather, blackout drunk, neither of which are acceptable behaviours for a member of the RCMP, on or off duty (Report, para 133).

[188] The ERC did note that this behaviour was not planned, not persistent and based on the evidence before the Board, completely out of character for the Respondent (Report, para 133).

[189] In assessing the aggravated conduct measures range, as recommended in the Conduct Measures Guide, in both harassment (20 days to dismissal) and discreditable conduct (15 days to dismissal), along with the mitigating and aggravating factors, the Board's conduct measures of 15 days and 20 days forfeiture of pay are reasonable, and the ERC recommends that I confirm them (Report, para 134).

[190] The ERC also recommends that the other conduct measures be maintained (Report, para 134).

Commissioner's Analysis

[191] I agree with the ERC that the Board did not commit a reviewable error in determining and imposing sanctions. The Board's task was not an easy one and as pointed out by the ERC, I owe the Board significant deference. I would like to thank the Chair for his comprehensive and thoughtful analysis.

[192] The Board described and carefully assessed a number of aggravating and mitigating factors prior to imposing conduct measures, including the victim impact statement, along with 13 letters of support, letters of commendation for bravery, not to mention the underlying clarity that the actions were out of character for him.

[193] I must emphasize that consideration of the mitigating factors is not undertaken to downplay these events and in particular, the impact the Respondent's actions had on the victims. I am satisfied that all relevant factors, including proportionality and a range of important interests arising from the victims, the need to put a stop to sexual misconduct in the Force through specific and general deterrence, and maintaining the public trust in the RCMP, were considered by the Board. Like the ERC, I find the Board's reasoning to be intelligible and justifiable.

[194] Ultimately, I accept that the Board's decision on conduct measures does not give rise to a manifest and determinative error, and is therefore not clearly unreasonable.

[195] I caution the Respondent, however, that any future contravention of the *Code of Conduct* is sure to spell the end of his RCMP career.

ERC Recommendations

[196] The ERC recommends that I confirm the conduct measures imposed in respect to Allegations 1 and 2.

[197] The ERC also recommends that all global conduct measures and directions given by the Board remain.

[198] Lastly, the ERC recommends that I order the Respondent to take sensitivity training to better understand how his actions impacted the victims.

DISPOSITION

[199] Pursuant to paragraph 45.16(3)(a) of the *RCMP Act*, I confirm the conduct measures imposed by the Board.

[200] In accordance with the ERC recommendation, I direct the Appellant to arrange suitable sensitivity training for the Respondent so that he better understands how his actions affected the victims, and now that the conduct proceedings and the interim conditions imposed on him are completed, I direct the Respondent to send his letters of apology to the Appellant without delay so they can be provided to Csts. 1 and 2.

[201] The appeal is dismissed.

Brenda Lucki Date

Commissioner