Protected A
File: 2018-335779 (C-054)

IN THE MATTER OF
an appeal of an Adjudication Board Decision
Pursuant to section 45.11(1)(b) of the
***Royal Canadian Mounted Police Act*, RSC 1985, c R-10, as amended**

BETWEEN:

Constable Ashley Goodyer
Regimental Number 61089

Appellant

and

Commanding Officer, "E" Division
Royal Canadian Mounted Police

Respondent

(Parties)

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Decision of the Commissioner
Royal Canadian Mounted Police

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2022

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INTRODUCTION

[1] Following a conduct hearing, an RCMP conduct board (Board) determined that Constable Ashley Goodyer, Regimental Number 61089 (Appellant), had contravened sections 3.3 (by not carrying out a lawful direction) and 8.1 (by not providing complete, accurate and timely accounts of responsibilities and performance of duties) of the *RCMP Code of Conduct* (*Royal Canadian Mounted Police Regulations 2014*, SOR/2014-281 [*Regulations*]), after finding four of five allegations against the Appellant to be established.

[2] The Board rendered the decision on August 24, 2018 (Decision). Apart from ordering the Appellant to resign within 14 days, in default of which he would be dismissed in relation to making false statements (Allegations 3, 4 and 5), the Board seems to have imposed a 20-day forfeiture of pay for failing to follow the direction of a supervisor (Allegation 1).

[3] The Appellant appeals the conduct measures.

[4] The allegations relate to the events that occurred between mid-June or July 2016 and late November 2016, while posted at a detachment in British Columbia (Detachment), the Appellant had certain interactions with a member of the public (Ms. F), and based on the circumstances of those interactions and subsequent events, he faced five allegations (as outlined in the Notice of Conduct Hearing and particulars, dated December 21, 2017) (Notice).

[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 November 23, 2021 (ERC file no. C- 2021-015 (C-054)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be partially allowed pursuant to paragraph 45.16(3)(b) of the *RCMP Act*.

[6] Subsection 45.16(8) of the *RCMP Act* states that 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] In rendering this decision, I have considered the record consisting of the material before the Board (Material) and the appeal record (Record) prepared by the Office for the Coordination

of Grievances and Appeals (OCGA), as well as the Report. References to legislative provisions reflect those in effect at the time of these events.

[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, allow the appeal in part on the 20-day forfeiture of pay, and otherwise confirm the Board's decision.

BACKGROUND

[10] Just after having completed his probationary period at a detachment in British Columbia, the Appellant had an extramarital affair with a member of the public (Ms. F), between mid-June or July 2016 to late November 2016.

[11] The Appellant claimed that the affair had ended by September 2016.

[12] Members of the detachment noticed the Appellant's police vehicle out of his patrolling area while he was on duty and reported the issue to the detachment Commander. It was later determined that Ms. F resided in the area where the Appellant's police vehicle was seen.

[13] The Appellant met with the detachment Commander and was subsequently ordered not to attend Ms. F's residence while on duty. The detachment Commander clarified that the Appellant's presence at Ms. F's home, while on duty, to engage in an extramarital affair might bring the reputation of the RCMP into disrepute.

[14] In late November 2016, the Appellant requested permission from his supervisor, Corporal (Cpl.) BW to attend a birthday party for a short period, while on duty, for one of his wife's friends outside his patrolling area. Cpl. BW granted the request.

[15] It was later discovered that the Appellant never attended a birthday party, but instead attended Ms. F's residence.

[16] The Commander of A Watch, Staff Sergeant (S/Sgt.) D, and Cpl. BW, met with the Appellant to discuss his whereabouts on November 13, 2016. The Appellant maintained that he attended the alleged birthday party.

[17] Based on the circumstances of those interactions and subsequent events, the Appellant was accused of four *Code of Conduct* contraventions and an investigation was mandated by the conduct authority.

[18] A fifth allegation was added after it was determined that the Appellant lied to the investigator (Material, pp 2562-2566).

[19] The Appellant explained to the *Code of Conduct* investigator that he attended the birthday party; yet when his wife advised him that she had left the party, he decided to attend Ms. F's residence to apologize for how the affair ended.

[20] The investigator advised he intended on contacting the Appellant's wife to determine whether there ever was a birthday party. At this point, the Appellant admitted there never was a party and he had attended Ms. F's residence that evening.

[21] The Appellant was temporarily reassigned on January 16, 2017, and then suspended with pay on November 22, 2017 (Material, pp 2567-2568, 2575-2577).

[22] After reviewing the investigation report, the conduct authority initiated a conduct hearing as she was seeking the Appellant's dismissal (Material, pp 2203-2204).

[23] The allegations as set out in the Notice to Designated Officer were as follows (Material, pp 2203-2204):

> **Allegation 1**
>
> Between November 12, 2016, and November 23, 2016, at or near [X], in the Province of British Columbia, Constable Ashley Goodyer failed to carry out lawful orders and directions, contrary to section 3.3 the Code of Conduct of the Royal Canadian Mounted Police. [failing to follow the direction of his superior not to attend Ms. F's residence while on duty],

Allegation 2

Between November 12, 2016, and November 13, 2016, at or near [X], in the Province of British Columbia, Constable Ashley Goodyer engaged in discreditable conduct, contrary to section 7.1 of the Code of Conduct of the Royal Canadian Mounted Police. [engaging in a sexual, intimate or romantic activity with Ms. F at her residence while on duty],

Allegation 3

Between November 12, 2016, and November 13, 2016, at or near [X], in the Province of British Columbia, Constable Ashley Goodyer failed to provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties, and the operation and administration of the Force, contrary to section 8.1 of the Code of Conduct of the Royal Canadian Mounted Police. [failing to provide complete, accurate and timely accounts to his supervisor regarding the alleged birthday party]

Allegation 4

On or about November 28, 2016, at or near [X], in the Province of British Columbia, Constable Ashley Goodyer failed to provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties, and the operation and administration of the Force, contrary to section 8.1 of the Code of Conduct of the Royal Canadian Mounted Police. [providing false information to two supervisors during a subsequent meeting regarding the alleged birthday party]

Allegation 5

On or about January 5, 2017, at or near [X], in the Province of British Columbia, Constable Ashley Goodyer failed to provide complete, accurate and timely accounts pertaining to the carrying out of his responsibilities, the performance of his duties, and the operation and administration of the Force, contrary to section 8.1 of the Code of Conduct of the Royal Canadian Mounted Police. [being untruthful to the Code of Conduct investigator in relation to the alleged birthday party]

CONDUCT HEARING PROCEEDINGS

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

> **CONDUCT BOARD PROCEEDINGS**
>
> [10] After the Board was established, pre-hearing conferences were held between the parties and the Board, documentary evidence was filed (including the investigation report containing witnesses' statements), as well as the parties' written submissions on the allegations. The Appellant admitted the facts underlying Allegation 1; however, he explained that the order not to attend Ms. F's residence while on duty was unlawful. He admitted attending Ms. F's residence as it pertained to Allegation 2, but he denied engaging in any sexual, romantic or intimate activity with Ms. F on that day. The Appellant then admitted Allegations 3, 4 and 5 (Material, pages 2305-2311).
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> [11] After reviewing all the material filed, the Board indicated that no further information or testimonies were necessary. The Appellant waived his right to be read the allegations. The Board found Allegations 1, 3, 4 and 5 established. It indicated that a hearing on the conduct measures would be scheduled and requested that parties file their material on conduct measures. Both parties provided evidence and written submissions on conduct measures.
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> **1. Evidence on Conduct Measures**
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> **A. CAR's Evidence**
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> [12] The Conduct Authority Representative (CAR) provided impact letters from S/Sgt. D and Cpl. BW and authorities to support her position:
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> - Cpl. BW's letter (Material, page 2151): Cpl. BW was the Appellant's direct supervisor for a few shifts when the Appellant transferred to A Watch "for a fresh start". He explained that he expects open, honest and truthful communication from members under his supervision. In his view, the allegations pertaining to himself did not affect his ability to operationally supervise the Appellant. Cpl. BW felt that the Appellant is a good member and a team player and could be a Field Recruit Coach. He stated that he felt guilty and reflected on the impact his role had on the Appellant's life and career.
>
> - S/Sgt. D's letter (Material, page 3516): S/Sgt. D was the Watch Commander of A Watch. He explained that to welcome the Appellant, who had difficulties with his previous Watch, and provide him with a "fresh start", he had to move a senior member to another Watch. He stated that the team morale was affected by this change because it was losing a "go-to" senior member. S/Sgt.

D clearly outlined his expectations to the Appellant; nevertheless, the incident occurred only three shifts after the Appellant's arrival. S/Sgt. D indicated that it affected the Watch's morale again because it was now short an investigational member. In his view, the Appellant, by lying to his supervisors, lost all trust and integrity.

B. Appellant's Evidence

[13] For the conduct measures phase, the Member Representative (MR) filed some of the Appellant's Performance Evaluations, eight support letters from members of the RCMP and a letter from a Deputy Regional Crown Counsel. Most of the support letters stated that the Appellant should be retained in the RCMP and was a motivated police officer. Because the Appellant has raised issues with the Board's treatment of some of the support letters in his appeal, I will briefly summarize the letters at issue:

- Cpl. BW's letter (Material, page 3616): Cpl. BW wrote two letters: one on behalf of the Appellant and one impact statement on behalf of the Conduct Authority (CA), which is related above. The support letter was based on his six-week supervision of the Appellant and his Promotional Assessment. Although Cpl. BW was aware of the incident, he stated that he was still recommending the Appellant for promotion because he met the competencies such as knowledge of policing, ability to conduct investigations and client services. He opined that the Appellant's coming to A Watch was a switch to prevent an extramarital affair between two members of A Watch and not as a result of the allegations against the Appellant.

- Cpl. WC's letter (Material, page 2334): Cpl. WC was a supervisor on A Watch at the Appellant's detachment. His letter focused on the management by S/Sgt. D of the extramarital affair between the two members of A Watch. The letter does not address the Appellant's competencies or otherwise.

- Mr. NW's letter (Material, page 2332): Mr. NW was a Regional Crown Prosecutor. In his letter of support, he indicated that the incident was, in his view, at the low end of the spectrum and he would not hesitate to proceed with a prosecution in which the Appellant was involved.

2. Decision on Conduct Measures

[14] Ultimately, the Board indicated that a hearing would not be necessary as it had all the information, including the parties' submissions, the Appellant's statement to the Board and the Appellant declined to address the Board in-person or be read the allegations. It therefore informed the parties that they

should expect a written decision on conduct measures as the next step (Material, pages 245-247).

[15] On August 20, 2018, the Conduct Board emailed both the MR and the CAR indicating that it would issue its decision on conduct measures soon and the Board anticipated sending the decision by email (Material, page 245). It acknowledged that the *Commissioner's Standing Orders* (*Conduct)* (*CSO (Conduct)*) required that the decision be served on the member, but that there was an ability to waive this requirement.

[16] On August 21, 2018, the MR confirmed that she discussed this request with the Appellant and he agreed to waive the obligation that the decision be served on him, that she would accept service on his behalf and confirm receipt of the decision (Material, page 205). Therefore, on August 27, 2018, the Conduct Board served the decision on both representatives by email (Material, page 205).

[17] In its decision, the Board reiterated the guiding principles in imposing conduct measures. First, the established framework was to establish the range of possible conduct measures; then assess any mitigating and aggravating factors and finally impose the appropriate conduct measure (Appeal, page 67). Second, although a conduct board is not bound by previous conduct board decisions, it must impose similar conduct measures in similar circumstances. Third, the Conduct Measures Guide is available to provide guidance, but is not of a binding nature. Fourth, aggravating factors are circumstances that go beyond the essential constituents of an allegation; and lastly, police officers are held to higher standards of behaviour (Appeal, page 67). The Board further found that, as a general matter, sanctions or measures, whether under the legacy discipline process or new conduct process that arises from a joint submission cannot be assigned significant weight, as they are the product of resolutive efforts or negotiations that resulted in an agreement which a conduct board can only reject in very limited circumstances (Appeal, page 69).

[18] Turning first to the range of measures that may apply to acts of dishonesty, deceit and lying, the Board noted that cases provided by both parties confirm that, in policing, lying to supervisors or lying in the course of a conduct investigation is considered to be very serious misconduct, and based on the authorities provided, the range of measures is a financial penalty to dismissal.

[19] In terms of aggravating factors, the Board disagreed with the MR that the Appellant "owned up to the lie" and cooperated with the investigation

(Appeal, page 72). It found that the Appellant acknowledged the lie only once the investigator told him that his spouse would be contacted. The Board further found that the misconduct was not an isolated incident because the Appellant had ample opportunity to come clean, but perpetuated the deceit over 55 days. The Board further found that the misconduct was intentional, deliberate and planned. It also considered personal gain as an aggravating factor:

> Clearly, the Subject Member knew there were potential disciplinary consequences for lying by the time of the Meeting and later Interview, as he lied to continue and try and cover up his activities and thereby gain personal advantage or gain by avoiding being accountable, and any suggestion to the contrary simply does not withstand scrutiny.

[20] The Board did not believe the Appellant was genuinely remorseful because as late as in his Statement to the Board, the Appellant was still qualifying his deceit as a "white lie" and "ruse" (Appeal, page 76). The Board further noted that materials filed before it revealed that the Appellant did not understand the seriousness of lying to a supervisor (Appeal, page 77). Although the Board found that *McNeil* implications were an aggravating factor, it did not bear much weight in the circumstances beyond the ongoing disclosure obligation to defence counsel. The Board also did not accept the MR's mitigating factor of the Appellant's junior service. The Board explained that the years of service or rank had no bearing on the issue of lying to a supervisor, especially since the Appellant had prior service in another police service (Appeal, page 78).

[21] As for S/Sgt. D's letter and of Cpl. BW's and Cpl. WC's letters discussing the management of another member's extramarital affair, the Board found the differing accounts did not have to be resolved. The Board found that it was clear that the Appellant was given a fresh start on a new watch and within two days, the incident occurred (Appeal, page 79). It further noted that whether S/Sgt. D had a zero-tolerance approach to deceit or not is irrelevant because the Board determines the measures; and second, S/Sgt. D did not exercise any decision-making relevant to the investigation and initiating of formal conduct proceedings. Similarly, it did not attribute much weight to Cpl. BW's support letter because the latter had supervised the Appellant for only six weeks and, in the Board's view, his role as a supervisor appeared to have been overtaken by his personal feelings and beliefs about the misconduct of the Appellant, which seem to lack objectivity and lessens their mitigative value. In addition, the letter did not refer to the Appellant's admission that he continued to lie to Cpl. BW and to the investigator.

[22] However, the Board found, as a mitigating factor, that the Appellant admitted to Allegations 3, 4 and 5 in his response; therefore avoiding the

> requirement for a lengthy hearing (Appeal, page 73). The Board further accepted as a mitigating factor that the Appellant performed the duties which he was assigned and was a proactive officer (Appeal, page 83). However, the Board noted that the support letters referred to instances or duties that were generally expected of RCMP members and some were dated (Appeal, pages 84-85). The Board also accepted that the Appellant continued to work although on Order of Temporary Reassignment. The Board noted that the Appellant had no prior discipline, but this mitigating factor was lessened by the fact that the Appellant had two years' service with the RCMP and the incidents occurred while he was on probation.
>
> [23] The Board concluded that had the Appellant fully admitted the lie in the first meeting with S/Sgt. D and Cpl. BW, or walked into the interview with the investigator and admitted the lie, rather than continue the deceit, the situation would have been markedly different. The Board did not accept that this situation could be attributed to a mistake, confusion, inexperience, or lack of clarity, as it is a fundamental tenet of employment, particularly as a police officer, was that you do not lie to a superior, regardless of whether it involves an operational or non-operational/personal matter, particularly when it relates to your activities while on-duty. The Board indicated that regarding Allegation 1, it imposed a forfeiture of 20 days' pay; "however", in light of the findings regarding Allegations 3, 4 and 5, the Board ordered the Appellant to resign within 14 days or be dismissed.

APPEAL

[25] On September 10, 2018, the Board informed the Parties it would be providing an amended decision (Amended Decision) because of some clerical errors in the original (Material, p 204).

[26] The Appellant's Member Representative (MR) filed his first Statement of Appeal on September 11, 2018 (Record, pp 227-229). The Board provided an Amended Decision to the Parties on October 23, 2018, where clerical errors were revised (Record, pp 498-500). The Appellant filed a second Statement of Appeal of that decision on November 5, 2018, based on the updated decision raising the same issues in an effort to protect his right to appeal (Record, pp 497, 1183).

[27] On November 17, 2018, the Appellant also filed a third appeal (initially in the form of a grievance) arguing that the Respondent's actions relating to the forfeiture of pay for Allegation 1 were based on an incorrect interpretation of the Board's decision.

[28] On May 1, 2019, an adjudicator provided a direction on the preliminary issue of standing consolidating the three appeals pursuant to the *Commissioner's Standing Orders (Grievances and Appeals) (CSO Grievances and Appeals)* (Record, pp 98-112). The OCGA referred the appeal to the RCMP External Review Committee (ERC) pursuant to subsection 45.15(1) of the *RCMP Act*. On March 26, 2021, the Chair of the ERC, Mr. Charles Randall Smith, issued his findings and recommendations (ERC C-2019-025 (C-046)) and recommended that the appeal be dismissed for being filed outside of the statutory time limit. The ERC did not pronounce on the merits.

[29] Accordingly, this is the second ERC Report relating to the Appellant's appeal of the Board's decision. In the first report (ERC C-2020-025 (C-046)), the ERC had not reviewed the merits of the appeal, and had determined that the Appellant had filed his appeal outside the statutory time limit, and there were no exceptional circumstances to justify a retroactive extension.

[30] However, although a conduct appeal adjudicator agreed that the appeal was filed outside the statutory time limit, in his view there was a reasonable explanation for the delay and gave the Appellant the option of having the merits of his appeal dealt with directly by me or to have his file returned to the ERC for a recommendation on the merits. The Appellant chose the latter option.

[31] The ERC did not address the Findings and Recommendations in C-046 regarding the corrected version of the decision, and consequently did not do so in C-054. The C-054 Report addresses the grounds set out in the first Statement of Appeal, as well as the third Statement of Appeal regarding the 20-day forfeiture of pay.

[32] The Appellant raised the following grounds of appeal (Report, para 26):

1. The Board breached procedural fairness by not holding a hearing on conduct measures;

2. The Board failed to assess the credibility of the authors of the support letters when there was conflicting evidence;

3. The Board erred in its assessment of the mitigating and aggravating factors and did not abide by the principle of parity of conduct measures; and

4. The Board erred in imposing a 20-day forfeiture of pay in addition to dismissal.

ERC ANALYSIS AND FINDINGS

1. Applicable Standard of Review

[33] The ERC noted that this appeal deals with multiple grounds of appeal involving a variety of questions of fact, or mixed fact and law, and issues regarding procedural fairness.

[34] 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, "Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect."

[35] In *Smith v Canada (Attorney General)*, 2021 FCA 73, at para 50, the Federal Court of Appeal determined that there is no presumption that an administrative appeal should be subject to the ordinary common law standards of judicial review or appellate review, "[…] it seems tenable that neither the standards of judicial review, nor appellate review, should be presumed when it comes to administrative appeals. In line with the approach supporting legislative intent and statutory interpretation, it all depends on whether the conduct adjudicator reasonably interpreted subsection 33(1) of the *CSO*s."

[36] Subsection 33(1) of *CSO (Grievances and Appeals)* requires the Commissioner to examine allegations of errors of fact or mixed fact and law by considering whether the decision under appeal was "clearly unreasonable":

> 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.

[37] As referenced in multiple Federal Court cases, the term "clearly unreasonable" under subsection 33(1) 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).

[38] The SCC addressed the degree of deference for the patent unreasonableness standard in *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.

[39] As outlined in *Law Society of New Brunswick v Ryan*, [2003] 1 SCR 247, at para 52 [*Ryan*], "[…] a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective". Further explained in *Canada (Attorney General) v Public Service Alliance of Canada*, [1993] 1 SCR 941, at pp 963-64, a patently unreasonable decision is one that must be, "[…] described as 'clearly irrational' or 'evidently not in accordance with reason'". The SCC in *Ryan* adds, "[a] decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand" (para 52).

[40] The ERC noted that 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 which was succinctly explained in *Victoria Times Colonist v Communications, Energy and Paperworkers*, 2008 BCSC 109, at para 65:

> When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree

> described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.

[41] The standard of patent unreasonableness precludes re-weighing of evidence, or rejecting the inferences drawn by the decision maker from that evidence. A finding of fact is only patently unreasonable where the evidence is incapable of supporting it (*British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25, at para 30).

[42] A finding of fact based on merely insufficient evidence is not patently unreasonable (*Toronto Board of Education v OSSTF*, [1997] 1 SCR 487, at para 44; *Speckling v British Columbia (WCB)*, [2005] BCJ No 270 (CA), at para 37).

[43] The ERC acknowledged that the Appellant claims the Board breached his right to procedural fairness by not holding a hearing on conduct measures. Ultimately, the question to be answered is whether the Appellant knew the case to be met and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, para 56).

[44] The ERC explained that the decision maker either did or did not follow the principles of procedural fairness. If not, the decision is invalid and must be set aside, except in rare cases where the result is inevitable even if the violation was to be rectified (*Mobil Oil Canada v Canada Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at p 228).

2. Preliminary Issue

[45] Prior to addressing the merits of the Appellant's appeal, the ERC considered a preliminary issue regarding a document submitted on appeal. In essence, the Appellant filed an unsigned Promotion Assessment during the conduct hearing. However, at the time of the close of submissions, the signed version could not be located (Record, pp 637, 790, 872). The Appellant was able to locate the signed version and file it as evidence on appeal (Report, para 34).

[46] The Respondent objected to the filing of the signed version, arguing that the Appellant could not file new evidence on appeal.

[47] The Respondent agreed that the Appellant had attempted to obtain the signed version between April 24, 2018, and May 14, 2018, but the Board confirmed that submissions were closed on June 19, 2018.

[48] However, the Appellant never informed the Board that he was attempting to obtain a signed version.

[49] The ERC found the document to be admissible. Paragraph 25(2)(a) of the *CSO (Grievances and Appeals)* states that no new document can be filed on appeal that was not provided to the initial decision maker if it was available to the Appellant (Report, para 36):

> 25 (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.

[50] Section 5.3.1.5 of Chapter II.3 of the RCMP Administrative Manual, "Grievances and Appeals" (AM II.3) reflects the limitation described in paragraph 25(2)(a) of the *CSO (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.

[51] Although this provision is contained in the section of appeals of decisions other than from a conduct board, the ERC position is that it reflects *CSO* and policy intent: no new evidence can be filed on appeal, unless it was unavailable to the Appellant when the original decision was made (Report, para 37).

[52] The ERC accepted the evidence that the Appellant made several attempts to obtain a signed version of his Promotion Assessment. He was informed that it could not be found on his personnel file (Report, para 37).

[53] The ERC suggested that the objective of paragraph 25(2)(a) is to ensure a conduct authority or board has all available information prior to making a decision and to prevent abuse of the conduct appeal process by allowing the admission, without explanation, of previously available evidence on appeal (Report, para 37).

[54] The SCC decision *R v Palmer*, [1980] 1 SCR 759, was previously referred to by the ERC in relation to the consideration of fresh evidence on appeal. The context in which it was examined was in reference to determination of whether the admission of this new evidence was in the interest of justice, if the evidence could not reasonably have been adduced at the hearing, is relevant to an issue, is credible, and, if believed, could reasonably be expected to have affected the Board's decision (Report, para 38).

[55] In the ERC's view, the new evidence meets this test because the Appellant tried to obtain it before the close of the hearing, however, was advised it could not be found. This is indeed credible because it is an RCMP Form signed by all parties and the Board had found that it could only give limited weight to the unsigned version (Report, para 38).

[56] The ERC acknowledged that the material difference between the two documents was that the second had been signed by the parties; it did not contain information that was not within the first document and presented to the Board.

GROUNDS OF APPEAL

1. The Board breached procedural fairness by not holding a hearing on conduct measures

A. Appellant's Submission

[57] The Appellant references the principles of procedural fairness set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], to highlight that when a member's employment is at stake, a higher degree of procedural fairness is owed.

[58] The Appellant further argues that the Board assured him that there would be a conduct measures hearing, yet later changed its mind. Consequently, the Appellant suggests this was a breach of procedural fairness because he had a legitimate expectation of a conduct measures hearing taking place. The Appellant points out that a plain reading of the *RCMP Act* and the *CSO* (*Conduct*) does not lend to an interpretation that a conduct board can bypass a conduct measures hearing altogether.

B. Respondent's Submission

[59] The Respondent contends that the procedures followed by the Board and the Parties were clear such that there would be no hearing on conduct measures. The Respondent insists, however, that the Appellant confirmed that he was waiving his right to having the allegations read to him and declined addressing the Board through videoconference.

[60] Consequently, the Board informed the Parties that it would proceed with the decision on conduct measures (Record, p 638). While the Board may have proceeded in another direction, the Respondent maintains that there is no doubt the Appellant was very well aware that the next step was the written decision on conduct measures.

[61] The Board informed the Parties on July 26, 2018, that it was still working on the decision (Record, p 492). On August 20, 2018, the Board informed the Parties that "The Board anticipates being able to provide the decision on measures in the near future, and subject to any comments, anticipates providing the decision electronically by email" (Record, p 494).

[62] The Respondent states that there is no requirement to have an oral hearing before a conduct board and that in this case, the Appellant had ample and meaningful opportunity to participate in the process.

C. ERC Analysis

[63] The ERC identified two issues stemming from this ground of appeal in relation to the determination of whether or not the Board breached procedural fairness by not holding a hearing on conduct measures (Report, para 42):

1) Whether the Appellant is barred from raising this ground on appeal; and

2) Whether the Board was required to hold an in-person hearing.

[64] In the end, the ERC determined that the Appellant is barred from raising this issue on appeal.

[65] Through a detailed examination, the ERC cited *Zündel v Canada (Canadian Human Rights Commission*) (2000), 195 DLR (4th) 399 (FCA), and concluded that the Appellant should have raised this issue at the earliest opportunity, especially given the procedural nature of the matter (Report, para 43).

[66] The ERC elaborated on this principle referring to *Chrétien v Canada (Attorney General)*, 2005 FC 925 [*Chrétien*]. The FC highlighted that what the law requires is not that a judicial review be commenced immediately where a party to a proceeding before an administrative decision maker has, for example, a reasonable apprehension of bias on the part of the decision maker. Instead, the party must raise the procedural issue before the tribunal at the earliest opportunity, "and must not remain silent, relying on such [an apprehension] only if the outcome turns out badly" (*Chrétien*, para 44) (Report, para 43).

[67] On June 18, 2018, the Appellant waived his right to have the allegations read to him, and declined to address the Board in person, citing he had provided the Board with a written statement (Record, p 1501).

[68] The previously expressed explanation for this choice was that the Appellant was essentially waiting for information on the next step and the issuance of the decision on conduct measures (Material, pp 246-47).

[69] The following day, the Board acknowledged the MR's email and indicated that the imposition of conduct measures would proceed (Material, p 246). Parties had clearly confirmed that there were no further submissions.

[70] On July 26, 2018, the Board provided an update to the Parties indicating that it anticipated issuing the decision at the end of August (Material, p 245). On August 20, 2018, the Board advised that it expected to issue its decision shortly and asked the Parties whether their respective clients

would waive their right to be served personally. The MR indicated that the Appellant waived his right and the decision could be served on her (Material, p 244).

[71] The Appellant never asked for an in-person hearing with respect to the conduct measures phase. Furthermore, the Appellant did not object to the Board's notification that it would issue a decision shortly.

[72] As early as June 18, 2018, there was some indication that the Board would not be holding an in-person hearing. This was confirmed on July 26, 2018, when the Board stated an intention to issue a written decision at the end of August. If the Appellant had concerns about the Board not holding a conduct measures hearing, he should have raised his concern before the Board at that time.

[73] The ERC therefore held that the Appellant cannot raise the issue of procedural fairness in relation to the absence of an in-person hearing on conduct measures after the fact (Report, para 45).

[74] In referencing the ERC analysis in C-2020-012 (C-047), the ERC emphasizes that procedural fairness does not dictate that an in-person hearing is required in all cases where a conduct hearing has been initiated (Report, para 46).

[75] The ERC in that matter determined that the *RCMP Act* and the *CSO* (*Conduct*) allow a conduct board to adapt its process as long as procedural fairness is respected. It also determined that there could be instances where written submissions on proceedings are sufficient and effective enough to allow the subject member to *adequately* present the case necessary to protect their interest at stake (Report, para 46).

[76] The ERC added that this explanation is emphasized in the principles set out in *Baker*, where the SCC found that an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues involved. The duty of fairness has a flexible nature which in turn recognizes that meaningful participation can occur in a variety of ways, adaptable to varying situations (Report, para 46).

[77] In *Baker*, the SCC clarified that the opportunity accorded to the appellant to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in that case.

[78] Even if the ERC had found that the Appellant could raise the issue on appeal, the Chair concluded that the Board's decision to proceed without a hearing did not deprive the Appellant of a procedurally fair process. The MR had indicated that her case was complete and the Appellant declined to address the Board in person (Report, para 47).

D. Commissioner's Analysis

[79] I agree with the ERC on the two issues stemming from this ground. I will therefore be brief.

a) Can an issue curable by the tribunal be brought on appeal?

[80] As explained in *Newfoundland Telephone Co. v Newfoundland (Public Utilities Board)*, [1992] 1 SCR 623, at para 40, the Appellant is entitled to be treated fairly when appearing before an administrative board of this nature. This is an independent and unqualified right that has been well established in law. If there has been a denial of a right to a fair hearing, it cannot be cured by the tribunal's subsequent decision.

[81] Procedural fairness is an essential aspect of any hearing before a tribunal and must not be sacrificed for expediency.

[82] Courts have generally adopted the view that procedural fairness is entrenched within any hearing before a tribunal and constitutes an essential aspect of the proceedings. The Appellant participated fully in the hearing, corresponding on time, and voicing any concerns as they arose. Having not objected to the lack of in-person hearing after many opportunities, the Appellant implicitly waived his right to object after the fact.

[83] I acknowledge that even an implied waiver of objection to an adjudicator at the initial stages is sufficient to invalidate a later objection (*Re Thompson and Local 1026 of International Union of Mine, Mill and Smelter Workers et al.* (1962), 35 DLR (2d) 333 (Man CA); *Bateman v McKay et al.*, [1976] 4 WWR 129 (Sask QB).

[84] Suffice it to say, to continue the proceedings without objecting constituted, in my view, acquiescence on the part of the Appellant to the written submissions instead of an in-person hearing with respect to conduct measures. Lastly, as the ERC also highlighted, the Appellant did not object to the Board's declaration that it would issue a decision "shortly".

[85] Simply, the Appellant cannot bring forward this issue on appeal when he had many opportunities to do so at the hearing.

b) Was the Board required to hold an in-person hearing?

[86] To begin, I note that the ERC Report C-2020-012 (C-047) cited by the ERC distinguishes itself from the case before me (Report, para 46). While the legal principles remain the same, in that appeal the conduct board never informed the Parties, before rendering its decision on the allegations, that there would be no oral hearing. While the *RCMP Act* and the *CSO* (*Conduct*) allow conduct boards to reasonably modify processes and procedures in conduct hearings provided that procedural fairness is not compromised, proceeding without an oral hearing before a conduct board on the allegations is not a typical practice in the absence of an admission by the subject member or the presentation of an agreed statement of facts. Here though, the question is whether oral submissions on the conduct measures were required.

[87] Subsection 45.1(2) of the *RCMP Act* addresses when and how a hearing can be limited to the public or *in camera*:

> Hearing in public
>
> 45.1(2) The hearing shall be held in public but the conduct board, on its own initiative or at the request of any party, may order that the hearing or any part of it is to be held in camera if it is of the opinion
>
> > (a) that information, the disclosure of which could reasonably be expected to be injurious to the defence of Canada or any state allied or associated with Canada or to the detection, prevention or suppression of subversive or hostile activities, will likely be disclosed during the course of the hearing;
> >
> > (b) that information, the disclosure of which could reasonably be expected to be injurious to law enforcement, will likely be disclosed during the course of the hearing;

> (c) that information respecting a person's financial or personal affairs, if that person's interest or security outweighs the public's interest in the information, will likely be disclosed during the course of the hearing; or
>
> (d) that it is otherwise required by the circumstances of the case.

[88] In using the term "public", the current *RCMP Act* is not referring to the Parties in a proceeding, but referring to the non-participating members of the public. The current *RCMP Act* modified the previous section 45.1(14). This interpretation is supported by the fact that section 45.1(2) authorizes a conduct board to hold the hearing "in camera" in specified circumstances; i.e. meaning that the conduct proceedings are to be held in public, except in exceptional circumstances.

[89] I turn now to the *CSO* (*Conduct*), which should be read in conjunction with the *RCMP Act*, stating that a conduct board can, absent witness testimony, render a decision based solely on the record:

> Decision without further evidence
>
> 23 (1) If no testimony is heard in respect of an allegation, the conduct board may render a decision in respect of the allegation based solely on the record.

[90] The maxim of *audi alteram partem* does not mean that a *viva voce* hearing is always necessary. The current conduct regime, in force since November 28, 2014, removed from the *RCMP Act* the right of the Parties to a traditional hearing in all cases.

[91] The conduct hearing process does not prescribe an oral hearing in every case as reflected by the *CSO* (*Conduct*):

> Conduct hearing
> 13 (1) Proceedings before a conduct board must be dealt with by the board as informally and expeditiously as the principles of procedural fairness permit.
>
> Adaptation of rules
> (2) The conduct board may adapt these rules of procedure if the principles of procedural fairness permit.
>
> […]

> Documents to be provided by member
> 15(3) Within 30 days after the day on which the subject member is served with the notice or within another period as directed by the conduct board, the subject member must provide to the conduct authority and the conduct board
>
> > (a) an admission or denial, in writing, of each alleged contravention of the Code of Conduct;
> > (b) any written submissions that the member wishes to make; and
> > (c) any evidence, document or report, other than the investigation report, that the member intends to introduce or rely on at the hearing.
>
> […]
>
> Recording of proceedings
> 22 A hearing before a conduct board must be recorded and, at the request of a party who is appealing a decision of the board, a transcript of the recording must be prepared and given to them.
>
> Decision without further evidence
> 23 (1) If no testimony is heard in respect of an allegation, the conduct board may render a decision in respect of the allegation based solely on the record.
>
> [Emphasis added.]

[92] "Hearing" does not always mean "oral hearing". Natural justice and fairness do not require an oral hearing in all cases. There may be instances where written proceedings are quite sufficient to allow the individual to *adequately* present the case necessary to protect their interest at stake.

[93] The duty of fairness has a flexible nature, which in turn recognizes that meaningful participation can occur in a variety of ways, adaptable to varying situations. The SCC found, in *Baker*, that the opportunity accorded to the appellant to produce full and complete written documentation in relation to all aspects of her application, satisfied the requirements of the participatory rights required by the duty of fairness. As summarized by Guy Régimbald, *Canadian Administrative Law*, 2nd ed. (LexisNexis, 2015), at p 298:

> There are many forms of hearings, some may be oral with court-like procedures, while others may be written only. It all depends on the statutory prerequisites, the statutory mandate, the principles of fundamental justice, and the rules of procedural fairness. As long as the hearing allows parties to

> communicate their positions in a fair manner and allows the parties to collect the necessary information, the hearing will be adequate.
>
> [Emphasis added.]

[94] In *Behnke v Canada (Department of External Affairs)*, [2000] FCJ No 1166, the FC noted that in determining whether an oral hearing is required in any given instance, one considers factors such as:

- the complexity of the matter;
- whether the issues raise questions of public interest that are novel so that oral argument would be of great assistance to the court;
- whether an assessment of the credibility of witnesses and full legal argument is required;
- whether the Parties cannot adequately present their cases in writing;
- the urgency of the matter and which form of hearing may be more expedient; and
- the procedural ability of the format being considered to operate efficiently in light of the number of Parties.

[95] Lastly, in *Singh et al. v Minister of Employment and Immigration*, [1985] 1 SCR 177, at pp 213-214, the SCC emphasized that when the credibility of the person affected is a central issue, an oral hearing is generally required:

> I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing […] I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

2. The Board failed to assess the credibility of the authors of the support letters

A. Appellant's Submission

[100] The Appellant insists that because there was conflicting evidence within the letters issued by S/Sgt. D, Cpl. BW and Cpl. WC and filed by the MR and the CAR, the Board should have ordered witness testimonies.

[101] The conflicting evidence concerned the reason why the Appellant was transferred to a different watch. The Appellant explains that, because it relied on the letters, the Board was required

to proceed with a credibility assessment of the authors of the letters (Record, pp 509-512). The Appellant indicated in his submissions:

> [10] The AR relies upon the decision of *Yu v Canada (Correctional Service)*, 2011 FC 38 (CanLII) for the principle that failing to make findings of credibility impacts upon procedural fairness (where the emphasis is the AR's):
>
> > [26] In addition to a thorough investigation, adequate reasons are also required to meet the standards of procedural fairness....
> >
> > [27] As well, credibility was a key component in this case, that is the credibility of both the Applicant and employees at the Matsqui Institution. The Senior Deputy Commissioner makes no finding as to credibility whatsoever. In that regard, he failed to give adequate reasons.

B. Respondent's Submission

[102] According to the Respondent, the Board has a broad latitude to accept relevant evidence and discretion as to how this evidence is weighed.

[103] The Respondent argues that if the Appellant was aware of credibility issues, or that the letters contained false information, he could have called these witnesses to testify. The Appellant never requested that the authors of the letters be called to testify (Record, pp 640-642).

ERC Analysis

[104] The ERC determined the Appellant's argument that the Board's alleged failure to assess the credibility of the authors of the support letters when there was conflicting evidence constitutes a reviewable error cannot succeed (Report, para 50).

[105] First, given the MR's submissions on conduct measures before the Board, the latter was alive to the issues relating to S/Sgt. D's letter as well as Cpl. BW's and Cpl. WC's letters. The MR provided lengthy submissions on the credibility of S/Sgt. D's letter. However, the MR never requested to have these members testify before the Board (Report, para 50).

[106] The ERC noted that the Appellant argues that the Board should have called these members as witnesses, yet some responsibility rests with the Parties. Pursuant to section 18 of the *CSO*

(*Conduct*), parties must provide a list of witnesses within 30 days after the day on which the notice of hearing is served. From that list, a conduct board establishes a list of witnesses that it will hear and provides reasons for accepting or refusing any witness requested by a party.

[107] Second, although a hearing is necessary to assess serious credibility issues as canvassed in *Singh et al. v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*], this was not the case with regard to S/Sgt. D's, Cpl. BW's and Cpl. WC's letters.

[108] By not requesting that the authors of the letters be called as witnesses, the Appellant left the Board with no other option than to assess for itself the weight it would afford the letters. Regardless, I agree with the ERC that the Board afforded little weight to the letters and clearly explained why it did so (Report, para 51).

[109] The Board noted that the evidence on record showed that the Appellant was given a "fresh start" on a new watch, but within two shifts, he lied to his supervisor (Record, p 193). The Appellant admitted to this. In the Board's view, the differing accounts of the Appellant's transfer were irrelevant in determining conduct measures and, as a result, afforded little weight to the letters (Report, para 51).

D. Commissioner's Analysis

[110] I agree with the ERC analysis concerning *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 [*Huang*], where the FC reiterated the principle that was expressed in *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*], regarding the interplay between weight, sufficiency, and credibility of the evidence.

[111] As the FC stated, when a trier of fact assesses the weight and sufficiency of the evidence, they are "simply saying the evidence that has been tendered does not have sufficient probative value, either on its own or coupled with the other tendered evidence, to establish on the balance of probability, the fact for which it has been tendered" (*Ferguson*, para 27). In *Huang*, the FC reiterated, at paragraph 44:

> It is perfectly open to a trier of fact to assess the weight and probative value of evidence without considering first whether it is credible or not (*Ferguson*

> at para 26). This will occur when the trier of fact is of the view that the evidence is to be given little or no weight, even if it is found to be reliable.

[112] Invariably this occurs when the trier of fact is of the view that credibility is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence.

[113] For example, evidence of third parties who have no means of independently verifying the facts to which they testify is likely to be attributed little weight, whether it is credible or not.

[114] When the trier of fact assesses the evidence in this manner, there is no determination made based on the credibility of the person providing the evidence. Instead, the trier of fact is simply saying the evidence that has been tendered either does not have sufficient probative value, either on its own or with the other evidence, to establish on the balance of probability the fact for which it has been tendered to establish or, the fact is either irrelevant or of no great importance.

[115] Considering the Board in this case found that the reason of the initial transfer was irrelevant and that there was evidence that the Appellant's reassignment to administrative duties impacted the watch's morale, I find that the Board was under no obligation to make credibility findings on the authors of the letters. The responsibility fell on the Appellant to request the witnesses and question them as discussed in the ERC analysis.

3. The Board erred in its assessment of the mitigating and aggravating factors and did not abide by the principle of parity of conduct measures

A. Appellant's Submission

[116] The Appellant believes that the Board put excessive weight on the act of lying to a supervisor, and disagrees with the weight the Board placed on the proposed mitigating factors, support letters and others. The Appellant argues that although the Board indicated that an aggravating factor goes beyond the acts contained in the allegation, it used the allegation of lying to dismiss the mitigating factors, "The AR submits that it constitutes an error in principle to dismiss the letters of support included in the SM's submissions because of the misconduct itself" (Record, p 513).

[117] In addition to this disagreement regarding the weight distribution, the Appellant does not elaborate or provide any sort of explanation as to why the Board erred in principle in the weight distribution related to the proposed mitigating factors. He does, however, highlight the Board's emphasis on the misconduct to reject some of the proposed mitigating factors (Record, pp 513-514):

> The reasons of the Board focus on what it calls, :[t]he simple fact [that] is that it is never appropriate to lie to a supervisor . . . " , i.e. the actual act of the misconduct, while failing to give adequate weight to the letters of support.
>
> […]
>
> The AR submits that this constitutes an error in principle as it reflects an overemphasis on the allegations themselves; and although this arguably makes the reasons appear consistent, the AR submits that it actually reflects a no tolerance approach to deceit.

[118] The Appellant also emphasizes his disappointment with the Board's disbelief of his remorse; even though the Appellant admitted the allegations (Record, p 514). Lastly, the Appellant argues that the Board did not abide by the parity of measures principle and erred in rejecting precedents involving joint submissions based on *McBain v Canada (Attorney General)*, 2016 FC 829 [*McBain*].

[119] The ERC noted that in *McBain*, the FC found the principle that joint submissions on sanction must be respected unless unreasonable, was not followed by the adjudication board when it rejected the joint submission (Report, para 56).

B. Respondent's Submission

[120] The Respondent maintains that the Board did not simply dismiss the letters of support and other mitigating factors, but rather considered all the evidence and the context in which they were provided (Record, p 643). The Respondent states that, although the Board weighed the evidence differently than the Appellant would have preferred, it does not amount to a reviewable error (Record, p 643).

[121] In addition, the Board clearly explained why some mitigating factors were afforded less weight; it did not "basically dismiss" or "give no weight" to the letters of support as suggested by the Appellant (Record, p 513).

[122] On the parity of measures, the Respondent argues that the Appellant is misapplying *McBain*, in that the Board did not reject a joint submission; rather it indicated that cases involving joint submissions carried less weight because of the principle that they cannot be rejected unless clearly unreasonable (Record, p 516).

C. ERC Analysis

[123] The ERC recommends that this ground of appeal be rejected. Referencing previous cases, the ERC emphasized that conduct boards are owed a significant degree of deference regarding the imposition of conduct measures (Report, para 58).

[124] Turning to the applicable standard of review, the ERC focussed on *R v Lacasse*, [2015], 3 SCR 1089, where the SCC expanded on the notion of deference (Report, para 58):

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

[125] The Appellant alleges that the Board overemphasized the elements of the misconduct in order to dismiss factors that should properly serve to mitigate the misconduct and determine its relative level of seriousness (Report, para 59).

[126] The ERC recognized the Board explained that aggravating factors go above and beyond the allegations and accordingly did not consider lying to a supervisor as an aggravating factor. To do otherwise would have been an error. The Appellant reiterates the Board's findings and states that he disagrees with the weight the Board gave to each factor (Report, para 59).

[127] Secondly, the Board explained why some of the proposed mitigating factors were given less weight and the findings are supported by the evidence in the record. Although the Appellant disagrees with the Board's findings, he has not provided supporting arguments which would justify overturning the Board (Report, para 60).

[128] The ERC concluded that on this ground, the Board did not err when it determined that precedents involving sanctions imposed because of joint submissions were to be given less weight.

[129] The ERC cited *R v Anthony-Cook*, [2016] 2 SCR 204, where the trial judge determined that a joint submission was not appropriate in certain circumstances when it was contrary to the public interest (Report, para 62).

[130] However, a conduct board still carries the obligation to impose the sanction that it determines to be appropriate in all the circumstances, even in situations where a joint submission regarding sanction is presented (Report, para 62).

[131] The ERC also highlighted the importance of such cases as useful examples where the issue of parity of sanction is addressed (ERC 3200-08-01 (D-122)) (Report, para 62)

[132] The ERC determined that the Board did abide by the principle of parity of sanction in reviewing the cases to determine which range of conduct measures applied to the established allegations (Report, para 62).

D. Commissioner's Analysis

[133] I agree with the ERC analysis.

[134] Courts have consistently emphasized the importance of the role of joint submissions regarding penalty or sanction (*Rault v Law Society of Saskatchewan*, 2009 SKCA [*Rault*]; *R v GWC*, 2000 ABCA 333). In *Rault*, the Court stated (para 13) (Report, para 61):

> In summary, those principles establish that there is an obligation on a trial judge to give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to the public interest; and, it should not be departed from unless there are good or cogent reasons for doing so.

[135] The Appellant argues that it was an error in principle for the Board to make the following findings:

> (1) that the Appellant's "clean record" was not mitigating because he was a two-year recruit on probation;
> (2) that the Promotion Assessment appraisal was of little weight because Cpl. BW was only the Appellant's supervisor for six weeks; and
> (3) that some of the support letters indicating that the Appellant was "diligent in the provision of service to the public" were of no weight because this was something that "would be expected".

[136] The Appellant does not indicate how these findings would be an error in principle. These findings go directly to the weight given to mitigating factors by the Board and are owed considerable deference.

[137] The weight given to aggravating and mitigating factors is not within the reviewable type of errors enunciated in *Lacasse* as the ERC highlighted (Report, para 58). Absent an error identified in *Lacasse*, I cannot overturn a decision on conduct measures simply because the Appellant disagrees with the weight the Board afforded to a particular factor (Report, para 59).

[138] Again, I owe the Board a very high degree of deference. While I can consider the evidence, review it, and make sense of the weight distribution, in the absence of a reviewable error, my role on appeal does not include reweighing, or redistributing the Board's assessment which comprised a long, comprehensive and detailed analysis (see for example, Decision, paras 385-490; Record, pp 292-307) which culminated in the following finding:

> [490] Although the MR2 Submission argues at length about dismissal being disproportionate and punitive, the reality is that the significant mitigating factors are few, and substantial aggravating factors many, when the actions and explanations of the Subject Member are subject to minimal critical scrutiny.

[139] The Board was in the best position to make that determination which based on my review of the evidence is supported, intelligible and justifiable. In the absence of a manifest and determinative error, I will therefore not intervene.

4. The Board erred in imposing a 20-day forfeiture of pay in addition to dismissal

A. Appellant's Submission

[140] The Appellant argues that the Board's decision on conduct measures does not support the interpretation that the Board impose a financial penalty on the member, and the additional conduct measure of dismissal from the RCMP.

[141] The Appellant submits that the relevant wording used by the Board is not ambiguous in this sense, focussing specifically on the wording "but for". Meaning that, "but for" the deceit-based misconduct, a financial penalty would have been appropriate.

[142] The Appellant insists that it was not the Board's intention to impose both a financial penalty and the dismissal (Record, p 1188); had it been, then the word, "and", would have been set out at the beginning of paragraph 507 – not the word, "however" (Record, p 202).

B. Respondent's Submissions

[143] The Respondent contends that the conduct measures ordered by the Board were within its authority to impose and therefore, are not clearly unreasonable.

[144] The Respondent makes reference to the rules set out in paragraph 45(4)(c) of the *RCMP Act* which is more broadly defined in the *CSO (Conduct)* under sections 3, 4, and 5 as the enabling authorities permitting a conduct board to impose multiple conduct measures.

[145] The Respondent maintains that subsection 5(3) of the *CSO (Conduct)* permits a conduct board to impose any of the measures referred to in section 5(1) of the *CSO (Conduct)*, which includes section 5(1)(j), a financial penalty deducted from the member's pay.

> Conduct boards and persons designated by Commissioner

> 5(3) Conduct boards and persons who are designated as conduct authorities by the Commissioner under subsection 2(3) of the Act may impose any of the measures referred to in subsection 5(1) against a subject member.

[146] The Respondent states the ability to impose multiple measures in the form of a forfeiture of pay in addition to an order to resign, is in accordance with the intent of the conduct regime and that there is no manifest and determinative error in the Board's choice of sanction.

C. ERC Analysis

[147] The ERC found that this ground of appeal has merit. To clarify, the ERC identified the underlying issue as whether the Board had the authority to impose both an order to resign within 14 days or be dismissed, and a financial penalty of 20 days pay (Report, para 65).

[148] The ERC examined the following provisions as relevant and applicable to this ground (Report, para 65):

> Section 45(4) of the *RCMP Act*:
>
> Conduct measures
>
> (4) If a conduct board decides that an allegation of a contravention of a provision of the Code of Conduct by a member is established, the conduct board shall impose any one or more of the following conduct measures on the member, namely,
>
> > (a) recommendation for dismissal from the Force, if the member is a Deputy Commissioner, or dismissal from the Force, if the member is not a Deputy Commissioner,
> >
> > (b) direction to resign from the Force and, in default of resigning within 14 days after being directed to do so, recommendation for dismissal from the Force, if the member is a Deputy Commissioner, or dismissal from the Force, if the member is not a Deputy Commissioner, or
> >
> > (c) one or more of the conduct measures provided for in the rules.

[149] The ERC pointed out that the introduction to section 45, notably subsection (4), is unambiguous in that a conduct board can impose one or more of the measures listed (Report, para 66).

[150] However, the use of the word "or" at paragraph 45(4)(b) would tend to indicate that the Board could not concurrently impose the conduct measures provided at (a), (b) and (c) (Report, para 66).

[151] The ERC explained that the introductory paragraph at subsection 45(4) refers to the numerous conduct measures provided for in section 5(1) of the *CSO (Conduct)* (forfeiture of pay, reprimand, demotion, etc.) (Report, para 66).

[152] Consequently, the ERC concluded that the most plausible interpretation based on the provision itself would be that the Board could impose either a dismissal, an order to resign within 14 days and in default, be dismissed, OR one or more of the conduct measures provided for in the rules (Report, para 66).

[153] The ERC also considered the French version of this provision in which the "or" is not present (Report, para 67):

> Mesure disciplinaire
>
> (4) Si le comité de déontologie décide qu'un membre a contrevenu à l'une des dispositions du code de déontologie, il prend à son égard une ou plusieurs des mesures disciplinaires suivantes :
>
> > (a) il recommande que le membre soit congédié de la Gendarmerie, s'il est sous-commissaire, ou, s'il ne l'est pas, le congédie de la Gendarmerie;
> >
> > (b) il ordonne au membre de démissionner de la Gendarmerie, et si ce dernier ne s'exécute pas dans les quatorze jours suivants, il prend à son égard la mesure visée à l'alinéa a);
> >
> > (c) il impose une ou plusieurs des mesures disciplinaires prévues dans les règles.

[154] The ERC undertook a comprehensive assessment of the section in order to determine whether the Board did in fact err. Reviewing the principles of bilingual statutory interpretation, the ERC noted that where one version is ambiguous and the other is clear and unequivocal, the common meaning of the two versions would *a priori* be preferred as established in a variety of

cases including but not limited to: *R v Daoust*, 2004 SCC 6; *R v Côté*, [1978] 1 SCR 8, at p 327; and *Tupper v The Queen*, [1967] SCR 589 (Report, para 68).

[155] The ERC cited *R v Dubois*, [1935] SCR 378, and explained the well-known principle in statutory interpretation that, where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning (Report, para 68).

[156] In addition, the ERC clarified that the English version would be the narrower interpretation because it does not permit the Board to impose dismissal AND forfeiture of pay (Report, para 68).

[157] The ERC added that this interpretation would also be consistent with the Board's use of the word "however". The Board's finding was the following (Report, para 69):

> In conclusion, given the Subject Member's blatant disregard for the Direction on two occasions, the Board has concluded that Allegation 1 is in the aggravated range and imposes a forfeiture of 20 days' pay.
>
> However, based on the circumstances, the Subject Member's willful and repeated deception as found in Allegation 3, Allegation 4, and Allegation 5, collectively, make it untenable to continue his employment with the RCMP, and the Board hereby orders the Subject Member to resign from the RCMP within fourteen days, in default of which he will be dismissed.

[158] The ERC concluded that the Board could not, and did not, impose both conduct measures and the Appellant should be reimbursed his 20 days forfeiture of pay (Report, para 70).

D. Commissioner's Analysis

[159] The Appellant submits that regardless of what is permitted under the *CSO (Conduct)*, the plain wording of the Board's decision on measures does not actually support the Respondent's interpretation that the Board imposed a financial penalty in addition to the direction to resign.

[160] The Respondent takes the position that subsection 5(3) of the *CSO (Conduct)* permits a conduct board to impose any of the measures referred to in section 5(1) of the *CSO (Conduct)*, which includes section 5(1)(j), a financial penalty deducted from the member's pay. This is not in dispute. The focus remains on the issue of whether a financial penalty and a direction to resign (or dismissal) can be imposed concurrently.

[161] Subsection 5(3) of the *CSO (Conduct)* reads as follows:

> Conduct boards and persons designated by Commissioner
>
> 5(3) Conduct boards and persons who are designated as conduct authorities by the Commissioner under subsection 2(3) of the Act may impose any of the measures referred to in subsection 5(1) against a subject member.

[162] This is in reference to the conduct measures within the authority of the Board to impose under subsection 45(4) of the *RCMP Act*.

[163] Looking at subsection 45(4) of the *RCMP Act* from a logical standpoint, it would not make sense that the Board could impose (a) and (b) simultaneously (Report, para 68). This makes it obvious that subsection 45(4) is an enumerated list of individual and mutually exclusive options.

[164] Moreover, I am not entirely convinced that the Board intended to order a forfeiture of pay in addition to the termination.

[165] It is evident enough that the options available under subsection 45(4) are mutually exclusive from one another. A more detailed explanation would have me turn to the words "any one or more" referred to in subsection 45(4) which must be read with the understanding that the "or more" refers to paragraph 45(4)(c), the conduct measures that "are provided for in the rules".

> (4) If a conduct board decides that an allegation of a contravention of a provision of the Code of Conduct by a member is established, the conduct board shall impose **any one or more** of the following conduct measures on the member, namely,
>
> […]
>
> **(c) one or more** of the conduct measures **provided for in the rules**.
>
> [Emphasis added.]

[166] In sum, I accept that the option to impose more than one conduct measure is available under paragraph 45(4)(c) of the *RCMP Act*, however, not simultaneously with the measures set out in paragraphs 45(4)(a) and (b).

ERC RECOMMENDATION

[167] The ERC recommends that I partially allow the appeal on the 20-day forfeiture of pay, but deny the other grounds. I agree.

DISPOSITION

[168] I allow the appeal of conduct measures in part. Although the Appellant was found to have contravened the *Code of Conduct* with respect to Allegation 1, regardless of the Board's intention, I rescind the 20-day forfeiture of pay, and direct the Respondent to ensure the Appellant is reimbursed without delay.

[169] Paragraph 45.16(3)(b) and subsection 45.16(5) of the *RCMP Act* enable me to impose any conduct measure to replace the one rescinded, as long as the measure constitutes one that the Board could have imposed. Since the Board determined that Allegations 3, 4, and 5 were also established and held that they collectively made it untenable for the Appellant's employment with the RCMP to continue, I order the measure for Allegation 1 to form part of the global sanction originally imposed by the Board.

[170] The appeal is dismissed on the remaining grounds.

[171] Pursuant to paragraph 45.16(3)(a) of the *RCMP Act*, I confirm the Board's order directing the Appellant to resign from the Force within 14 days, in default of which he was to be dismissed.

[172] Should the Appellant disagree with my decision, he may seek recourse with the Federal Court pursuant to section 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7.

_____ _____

Brenda Lucki Date
Commissioner