Protected A

File 201933533 (C-061)

2022 CAD 14

ROYAL CANADIAN MOUNTED POLICE

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

BETWEEN:

Sergeant Will Turner
Regimental Number 47786
HRMIS 000092834

(Appellant)

and

Commanding Officer, "E" Division
Royal Canadian Mounted Police

(Respondent)

(the Parties)

Protected A

File 201933533 (C-061)

CONDUCT APPEAL DECISION

ADJUDICATOR: Steven Dunn

DATE: October 21, 2022

SYNPOSIS

The Appellant faced two allegations under section 7.1 of the RCMP *Code of Conduct* for engaging in discreditable conduct in a manner that is likely to discredit the Force. The Appellant was accused of initiating unwanted sexual contact and pursuing and engaging in an inappropriate relationship of a flirtatious and sexual nature with a cell block guard, over whom he held a position of authority as cell block sergeant.

The Appellant contested both allegations. A Conduct Board found that the allegations were established and ordered the Appellant to resign within 14 days or be dismissed from Force. The Appellant appealed.

On appeal, the Appellant argued that the Board: failed to provide any remedy for the admittedly unreasonable delay associated with the conduct hearing; erred in classifying particulars of the Allegations as aggravating factors rather than as essential elements; made findings on credibility

that we were unsupported by the evidence; and, erred by relying upon evidence that was not properly before it. Accordingly, the Appellant sought reinstatement.

The appeal was referred to the RCMP External Review Committee (ERC) for review. The ERC found that the Board: did not err by refusing to consider the unreasonable delay a mitigating factor; did not breach the relevant principles of procedural fairness; and, did not render a clearly unreasonable decision.

An Adjudicator found that the Board's decision was supported by the record; is not clearly unreasonable; and, was not reached in contravention of the applicable principles of procedural fairness. The appeal was dismissed.

INTRODUCTION

[1] Sergeant (Sgt.) Will Turner, Regimental Number 47786 (Appellant), appeals the decision of an RCMP Conduct Board (Board) finding two allegations (the Allegations) of engaging in discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *RCMP Code of Conduct*, a Schedule to the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, were established. Based on those findings, the Board ordered the Appellant to resign within 14 days or be dismissed.

[2] The Appellant contends that the decision contravenes the principles of procedural fairness, is based on errors of law, and is clearly unreasonable because the Board: failed to provide any remedy for the admittedly unreasonable delay associated with the conduct hearing; erred in classifying particulars of the Allegations as aggravating factors rather than as essential elements; made findings on credibility that we were unsupported by the evidence; and, erred by relying on evidence that was not properly before it.

[3] The Appellant requests that the order of dismissal be rescinded and that he be reinstated with the RCMP.

[4] The Conduct Authority Representative (CAR) filed a preliminary motion seeking a publication ban on any information that could serve to identify the female cell guard. The Board

granted the motion without objection from the Appellant. I agree with the ERC that there is no reason to disturb the ban at this stage of the process. Accordingly, I will adopt the ERC's approach and refer to the female cell guard as Ms. A.

[5] In accordance with subsection 45.15(1) of the *Royal Canadian Mounted Police Act*, RSC, 1985, c R-10 (*RCMP Act*) the appeal was referred to the RCMP External Review Committee (ERC) for review. In a report issued on July 7, 2022 (ERC C-2020-007 (C-061)) (Report), the Chair of the ERC, Mr. Charles Randall Smith, recommended that the appeal be dismissed.

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

[7] In rendering my decision, I have considered the 2665-page package of material that was before the Board including audio and video files (Material), as well as the 2346-page Appeal Record (Appeal) prepared by the Office for the Coordination of Grievances and Appeals (OCGA), and the Report, collectively referred to as the Record. I refer to documents in the Record by way of page number of the electronic file.

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

BACKGROUND

[9] The ERC summarized the factual background leading to the conduct hearing (Report, paras 6-11):

> [6] The Appellant was the Sergeant (Sgt.) in charge of a cell block at a detachment in "E" Division. In the spring of 2014, the Appellant and a female cell guard, Ms. A, from the same Watch at the detachment, started texting each other via their personal cellular phone on work and non-work-related topics. Over the course of the next few weeks, their text exchanges became sexually charged (Material, page 81). These exchanges included the Appellant asking for explicit photos from Ms. A, which she provided.
>
> [7] In June 2014, Ms. A and the Appellant became sexually intimate. It began with kissing in the detachment kitchen. Later, Ms. A would perform fellatio

on the Appellant while at work and while both were on duty. This occurred near the cell block area in the detachment (either the kitchen, the backroom to the kitchen or the stairwell). These encounters were consensual and occurred five times until a culminating incident occurred on October 10, 2014. However, at the end of the summer 2014, upon learning that the Appellant had a girlfriend, Ms. A allegedly told the Appellant to stop texting her and that she wanted to stop the relationship (Material, page 81). She had also started a relationship at the time, and it was becoming more serious. The non-work-related interactions between the two seemed to have stopped.

[8] On October 10, 2014, Ms. A unexpectedly met the Appellant, who was at the end of his shift, in one of the detachment stairwells, as she rushed into the detachment to begin her shift. Their versions of events differ, but they agree that Ms. A again performed fellatio on the Appellant, and that they suddenly stopped. Ms. A stated that the Appellant aggressively kissed her, pushed down on her head to bring her to her knees and asked that she perform fellatio on him, his penis already out of his pants (Material, page 1765). The Appellant stated that Ms. A initiated the kissing and went down on her knees by herself. After the encounter, Ms. A approached Sgt. A, her supervisor, and asked her to let her know, from now on, when the Appellant would leave the area so she could avoid him (Material, pages 81, 1707-1708).

[9] After some pressing from her supervisor surrounding the reason for this request, Ms. A told her what happened in the stairwell. She asked Sgt. A to keep this information confidential. However, Sgt. A felt that she could not keep this information confidential and informed her supervisor and Chief Superintendent X, the Conduct Authority. The Conduct Authority mandated an investigation on the same day (Material, page 1709). Still on October 10, 2014, the Appellant was arrested for sexual assault (Material, pages 82, 1717).

[10] The Appellant was suspended from duty on November 6, 2014 (Material, page 74). I note that a parallel statutory investigation was also held; however, the Crown elected not to proceed to trial with sexual assault charges (Material, page 2476).

[11] On December 29, 2014, the investigators provided their Investigation Report (IR) (Material, page 1707). In her statement to investigators, Ms. A stated that when she complied with the Appellant's demands for fellatio, it made her shift easier. She further indicated that at the beginning, she was a willing participant but that when the Appellant became more aggressive and it became "all about his penis", she wanted the interactions to stop. The Appellant declined to provide a statement to the investigators.

Allegations

[10] On October 7, 2015, the Commanding Officer (CO) of "E" Division, the Conduct Authority at that time, filed a Notice to Designated Officer to Initiate a Hearing (Material, p 2615). He did so one week before the one-year deadline. A Notice of Conduct Hearing was then issued on June 28, 2016, and it was served on the Appellant on August 4, 2016 (Material, pp 222-224).

[11] The Notice delineated the following Allegations:

> **Allegation 1**
>
> On or about October 10, 2014, at or near [X], British Columbia, [the Appellant], engaged in a discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct* of the Royal Canadian Mounted Police.
>
> **Particulars of the contravention:**
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, In the province of British Columbia.
>
> 2. You were a sergeant on "C" Watch at the [X] RCMP detachment, in charge of the cellblock.
>
> 3. Your duties as a sergeant included providing oversight to all cellblock policing operations and in-custody matters, and overseeing the duties performed by the Cell Constables and Guards during your shifts.
>
> 4. You were in a position of authority over [Ms. A] who was a Cell Guard at the [X] RCMP detachment.
>
> 5. At the end of your shift, you encountered [Ms. A] in the stairwell of the [X] RCMP detachment. You initiated and had inappropriate unwanted sexual contact with her.
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> **Allegation 2**
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> On or between the 1st day of November, 2013, and the 10th day of October, 2014, at or near [X], British Columbia, [the Appellant], while on duty, engaged in a discreditable conduct in a manner that is likely to discredit the Force, contrary to section 7.1 of the *Code of Conduct* of the Royal Canadian Mounted Police.
>
> **Particulars of the contravention:**
>
> 1. At all material times you were a member of the Royal Canadian Mounted Police (RCMP) posted to "E" Division, in the province of British Columbia.

> 2. You were a sergeant on "C" Watch at the [X] RCMP detachment, in charge of the cell block.
>
> 3. Your duties as a sergeant included providing oversight to all cellblock policing operations and in-custody matters, and overseeing the duties performed by the Cell Constables and Guards during your shift.
>
> 4. You were in a position of authority over [Ms. A] who was a Cell Guard assigned to "C" Watch and "D" Watch at the [X] RCMP detachment.
>
> 5. Between November 2013 and July 2014, as the Sergeant in charge of the cell block on "C" Watch, you were overseeing the duties performed by [Ms. A].
>
> 6. While on duty, your behaviour in the workplace towards [Ms. A] was inappropriate and included: grabbing and pulling her ponytail, pulling on the front of her shirt, kissing her, exposing your penis, asking her to perform oral sex.
>
> 7. You pursued and engaged in an inappropriate relationship of a flirtatious and sexual nature with [Ms. A], a subordinate.

Motion for a stay of proceedings

[12] The Member Representative (MR) filed a motion for a stay of proceedings on November 25, 2016, in response to the allegedly unreasonable delay between the Notice of Designated Officer and service of the Notice of Conduct Hearing, some 294 days later (Material, pp 2628-2642). The MR argued that the Notice of Conduct Hearing was not served "as soon as feasible" as stipulated in subsection 43(2) of the *RCMP Act* and section 15 of the *Commissioner's Standing Orders (Conduct)* (*CSO (Conduct)*).

[13] Moreover, the MR argued that *R v Jordan*, [2016] 1 SCR 631 (*Jordan*), arising in the context of criminal proceedings, emphasizes the importance of hearing matters within a reasonable and defined period of time. She submitted that this principle is applicable to police discipline proceedings. In the alternative, the MR claimed that the delay met the threshold established in *Blencoe v British Columbia (Human Rights Commission),* [2000] 2 SCR 307 (*Blencoe*), to demonstrate abuse of process; accordingly, a stay of proceedings was warranted. In support of the motion, the MR argued that the Appellant suffered irreparable prejudice from the delay, attributable to the stigma of the Allegations and his two-year suspension from duty. The MR filed

an affidavit from the Appellant detailing the prejudicial effect of the suspension and procedural delays (Material, pp 2626-2627).

[14] In response, the CAR argued that *Jordan* is not applicable in the administrative law context and noted that *Blencoe* was the leading case on such matters. He submitted that the current *RCMP Act*, as well as the *CSO (Conduct)* are drafted with allowance for flexibility with respect to timelines, as demonstrated by the "as soon as feasible" requirement to serve a Notice of Hearing. He argued that the Notice was served as soon as feasible in light of the circumstances, including that this matter occurred at the beginning of a new conduct system; the previous CAR with carriage of the matter had left the RCMP suddenly; and, the CAR Directorate was understaffed, so several files had to be reassigned (Material, p 2464).

[15] The Board, as it was constituted at the time (Initial Board), rendered its decision on the motion on February 6, 2017. The Initial Board found that, while the delay was problematic, it did not warrant a stay of proceedings. The Initial Board concluded that *Jordan* did not apply in the administrative context and instead relied on the leading case, *Blencoe*. The Initial Board determined that the Notice of Hearing was not served "as soon as feasible" and that the delay was unreasonable as it traversed periods of time that were not accounted for. The Initial Board found that the delay prolonged the suspension, which in turned caused significant prejudice. Nevertheless, the Initial Board determined that the delay did not meet the threshold for a stay of proceedings as delineated in *Blencoe*. The Initial Board denied the motion and instead suggested that it may be appropriate to consider the impact of the delay on the Appellant later in the conduct hearing process (Material, p 2571).

Pre-hearing conferences

[16] The Parties held several pre-hearing conferences. During this process the Initial Board was replaced by the presiding Board on July 27, 2017. The Appellant submitted a response to the Allegations, admitting that he participated in consensual sexual acts with Ms. A while in the workplace. He denied that he was in a position of authority over Ms. A and that the sexual contact was non-consensual (Material, pp 2438-2442).

[17] The investigation package provided to the Board included similar fact evidence involving prior allegations of an analogous nature brought against the Appellant by two other women in the detachment. They involved allegations that the Appellant excessively texted a woman, pursued the women despite being rebuffed, and other such behaviour. While the MR characterized the documents as prejudicial, she did not object to vetted copies of the prior allegations being filed with the Board.

CONDUCT PROCEEDINGS

[18] The hearing was held from November 28 to 30, 2017. The Appellant, Ms. A, Sgt. D, and S/Sgt. F each testified.

Evidence on the Allegations

[19] The ERC summarized the evidence provided by each of the Parties that is relevant to this appeal (Report, paras 19-39):

> **A. CAR's Evidence**
>
> **Ms. A**
>
> [19] Ms. A testified first during the allegations phase of the hearing (Material, pages 1232 and forward). She gave a brief history of her employment with the city and how she became a cell guard, as well as her role, at the detachment. Ms. A also explained the reporting structure of the cell block. However, since the Board's decision on the issue of the Appellant's position of authority over Ms. A is not being appealed, I will refrain from repeating Ms. A's explanation of the workings of the cell block.
>
> [20] Ms. A then gave a history of her relationship with the Appellant. She testified that the Appellant was a very knowledgeable man who joked around with his staff (Material, page 1236) However, there was an incident regarding his cellular phone. The Appellant could not find his cellular phone and was certain that one of his employees had hidden it as a practical joke. He became very upset and angry and accused Ms. A of having taken it. Ms. A searched for the cellular phone with the Appellant, but the latter was adamant that she had taken it while patting her down and searching her locker (Material, page 1237). The Appellant later called her to apologize. He had found his phone.
>
> [21] Ms. A testified that when she became a permanent cell guard in January 2014, the Appellant liked to tease her. She came to be known as the bumbling

cell guard in love with the town drunk (Material, page 1240). During a drive to headquarters, Ms. A remembered that the Appellant told her, "If you find a woman who lacks confidence, you can get her to pretty much do whatever you want." Soon after that, the Appellant started texting Ms. A on work-related matters. Then he sent her a text while she was on a day off and doing yard work (Material, page 1241). Ms. A stated that the text messages morphed into sexual tones around May 2014. At work, the Appellant nevertheless was still joking, teasing and "running her down", always criticizing her work and pointing out her errors to everyone.

[22] She testified that the Appellant was persistent in asking her for sexual pictures of herself, which she eventually sent him and later begged him to delete (Material, pages 1243, 1245). At this point, she had discussed with a colleague and a friend that the Appellant's text messages were making her feel uncomfortable. It was also at this point in June 2014 that the Appellant "grabbed her" and kissed her in the kitchen for the first time. She added that, although she had simply tried to act professionally before this happened, the Appellant inferred that she wanted to be physical, and conveyed his belief to colleagues (Material, page 1247):

> *Well, [the Appellant] had made comments that the way I looked at him and the way I treated him at work had changed, that I was making him believe I wanted him and I wanted this to happen. So I talked to […], my team lead, because the last thing I wanted to do was to not be professional at work and have people think that that is -- sometimes you aren't aware of your actions, so I wanted to know if other people were noticing what [the Appellant] was calling me.*

[23] Ms. A testified that the Appellant then started asking her to touch and/or kiss his genitals during the night shifts. She was later adamant that she never initiated these contacts (Material, page 1282). She would respond that they could not do that at work. She stated that the Appellant was aggressive and animalistic in his requests or when he was kissing her. He would push down on her head and she would give in and do what he was asking for in order to go back to work; it would make her night easier as he wouldn't tease her as much (Material, pages 1250-1253, 1257).

[24] When she changed Watch in July 2014, she stated that the interactions between them were overwhelming and extreme. The Appellant always had his genitals out and would repeatedly ask her to do something (Material, page 1256). In August, after the Appellant had pushed her in the backroom and she performed fellatio on him, she told him that she did not want to do this anymore because she was seeing someone who wanted a serious relationship (Material, page 1261). She had also learned that the Appellant had a girlfriend. She testified that the Appellant seemed to "get it" at that point. The next incident took place while Ms. A and the Appellant were going up the staircase; he was in front of her and when he turned towards her, he had his

genitals out and asked her to perform fellatio (Material, page 1264). After this, Ms. A testified that she was trying to figure a way to avoid those situations because the Appellant was not listening to her when she told him that she did not want to do this anymore (Material, page 1266).

[25] On October 10, 2014, Ms. A testified that she was hurriedly coming down the stairs at the detachment because she was running late for work. When she came to open the stairwell door, the Appellant opened it from the other side at the same time. They were both surprised, but then the Appellant pushed her with his body in the corner of the stairwell. Ms. A stated that he kept asking her if she had missed him and kissed her. She repeatedly told him no and asked him to let her go because she was running late. He then pushed her head down towards his genitals that were out of his clothing and asked her to be quick. Ms. A asked him that if she did this, whether he would let her go. She kissed his penis and he let her go, zipped his pants and left (Material, pages 1272-1275).

[26] After this incident, Ms. A testified that she spoke to her Team Lead and asked her to let her know when the Appellant left the building. She did not want the Team Lead to talk to the Appellant because she was afraid he would make life difficult for her and they needed him on their side as the cellblock Sergeant. After some prompting, Ms. A told the Team Lead that she was uncomfortable around the Appellant and he was "out of control". The Team Lead then reported what had happened to her supervisor (Material, pages 1277-1279).

[27] Ms. A testified that a few hours later, she was "blindsided" when her Team Lead and investigators wanted to know what had happened. Ms. A stated that she was humiliated (Material, page 1280). She did not want the Appellant to be angry at her because when he gets angry, he's an intense person and can make life difficult for her. She then related the circumstances surrounding the interview with the investigator and Victim Services.

[28] On cross-examination, Ms. A stated that, at first, she was upset that her supervisor had reported the incident (Material, page 1290). She had not wanted to get the Appellant in trouble as part of the situation was her fault because she was a willing participant in the beginning (Material, pages 1319-1320); but then she felt trapped and had to follow through with the process. Her supervisor and an investigator convinced her to cooperate by indicating that the Appellant was a predator, that it had happened before with other women and that she had been taken advantage of (Material, pages 1295-1298). Ms. A stated:

> *I did not invite the actions, but, yes, I did play along. As I had said in my statement, I texted back and I did what he asked me to do in the kitchen. So playing along, yeah, I did. If that is inviting it, then that is what I did, I will admit.*

[29] Ms. A testified that she felt coerced into providing the Appellant with naked pictures of her breasts because he kept requesting them repeatedly and forcefully. Therefore, she gave in. She agreed that she thought the Appellant was a good sergeant for the cell block, notwithstanding the teasing and the physical interactions between the two (Material, pages 1315, 1356, 1359). She repeated the events that took place on October 10, 2014. The MR asked numerous questions regarding whether Ms. A had her cellular phone in her hand when she left the stairwell; in the end, Ms. A testified that she didn't recall (Material, pages 1329-1339). Ms. A further testified that she told the Appellant several times that she did not want to be physical with him anymore (Material, page 1361).

[30] On redirect, Ms. A agreed that she had been a willing participant in the beginning, but that this changed when the Appellant became aggressive and began making it all about his penis (Material, page 1376). She kept quiet about the interactions because she was just a guard and the Appellant was the cell block sergeant who could make a guard's life difficult.

S/Sgt. F

[31] The CAR then called S/Sgt. F to testify on the role of the cell block sergeant and the relation between the cell guards, who are municipal employees, and the RCMP. As the issue of whether the Appellant was in a position of authority over Ms. A, was not appealed, I will not be summarizing S/Sgt. F's testimony in this regard.

B. MR's Evidence

Sgt. D

[32] The MR's first witness was Sgt. D, a former cell guard with the city. For the same reason stated above, I will not delve into Sgt. D's testimony.

The Appellant

[33] The Appellant first testified regarding his background with the RCMP and his role at the detachment (Material, page 1442 and up). Regarding the atmosphere in the cell block, the Appellant agreed with Ms. A, that there was teasing and pranks, and that it was a pleasant atmosphere.

[34] Regarding his relationship with Ms. A, the Appellant stated that it first started progressing when he received a text message from Ms. A on his work phone (Material, page 1446). He remembered thinking that he did not want that kind of message on his work phone as it was inappropriate. A few days later, Ms. A came into his office and gave him her email address as well as her personal cellular phone number. Again a few days later, Ms. A texted him on his personal cellular phone and asked what he was doing. It then turned into sexting and Ms. A was making suggestive comments. The Appellant

stated that he asked her to send him a picture. At first Ms. A was unwilling, but he reassured her that he would not spread it around (Material, page 1447).

[35] The relationship became sexual when both the Appellant and Ms. A were in the kitchen area at the same time. They started kissing and Ms. A was rubbing his groin area. She eventually kneeled down and performed oral sex on him. He denied applying force on Ms. A or giving her direction to do anything (Material, page 1452). The second incident was initiated by Ms. A, who was sitting next to where the Appellant was standing. He testified that she reached between his legs and started rubbing his groin area again. He indicated that he walked away, but when they found each other in the kitchen once again, Ms. A performed oral sex on him. The Appellant stated that it was a mutual decision to be physical in the stockroom, and that Ms. A walked in there voluntarily. In total, this occurred five times, with Ms. A initiating the sexual encounters either in the sergeant's office, CABS terminal or in the cellblock corridor (Material, page 1460).

[36] Regarding the incident on October 10, 2014, the Appellant agreed with Ms. A, that they were both coming through the stairwell door at the same time and were startled. However, he stated that they both put what they had in their hands on the ground, and started kissing while Ms. A was again rubbing his groin. Ms. A got down on her knees, they both unzipped his pants, she pulled his penis out and started to perform fellatio on him, which lasted about a minute before he decided to put a stop to it (Material, page 1463). The Appellant testified that when he stopped her, Ms. A looked at him quizzically and they both picked up their belongings and went their separate ways. He explained that he stopped her because he thought that they were being unprofessional and that "this was bad".

[37] The Appellant believed at all times that their encounters were voluntary and consensual. He also said that it was Ms. A who initiated sexual contact, and that he never forced her to do anything (Material, page 1467).

[38] On cross-examination, the Appellant acknowledged being in an inappropriate relationship with Ms. A (Material, page 1485). The Appellant further agreed that, as the cell block sergeant, he was in charge of the day-to-day operations of the cell block; that he had influence with the other employees of the cell block (Material, page 1495).

[39] Regarding the Appellant's written statement of December 10, 2014, that is contained in the investigation report, the Appellant indicated that his memory was better today at the hearing because he had time to remember the events. Although the rubbing incident was not in his statement, the Appellant was adamant that it occurred (Material, page 1525). He explained that, when he wrote the statement, he was under an immense amount of stress and facing jeopardy which made recalling incidents more difficult.

[20] The ERC then summarized the submissions provided by both the CAR and the MR as to the Allegations (Report, paras 40-45):

> **C. CAR's Submissions on the Allegations**
>
> [40] The CAR first submitted that not all the particulars had to be proven for the allegations to be established, as some particulars may serve a contextual purpose (Material, page 1552). However, the allegations did have to be established on a balance of probabilities through clear and cogent evidence as per *F.H. v. McDougall,* [2008] 3 SCR 41 (*McDougall*).
>
> [41] The CAR argued that the combination of the determination of established facts adopted by the Board and the evidence produced at the hearing established that the Appellant was a sergeant on "C" Watch that provided oversight of the cellblock. He submitted that a sergeant is the authority on the ground and is responsible for the running of the cellblock at all times. Whether the cellblock sergeant was a direct supervisor and had a direct reporting line with the cell guards is not determinative of whether the Appellant was in a position of authority over Ms. A. In his view, the evidence filed and Ms. A's testimony that the Appellant was in charge showed that the latter was in a position of authority over the cell guards.
>
> [42] The CAR submitted that the chronology of events showed that Ms. A, was a willing participant in the physical encounters at the beginning, but that this changed once the encounters became aggressive and about oral sex (Material, page 1565). The CAR pointed out that the Appellant admitted to having inappropriate sexual contact with Ms. A (Material, page 1559). Regarding Allegation 1, although there are inconsistencies in Ms. A's version of events, the CAR submitted that her version that she was running late for work is more likely. Since she was running late for work, it was unlikely that she would have suddenly decided to perform fellatio on the Appellant. Conversely, the Appellant's testimony was given after he had the opportunity to review all the disclosed evidence (Material, page 1561). There is also other evidence that contradicts the Appellant's evidence; for example, regarding Allegation 2, although he testified to having pulled Ms. A's ponytail only once, other members interviewed saw the Appellant do this more than once. The CAR continued that, as Ms. A had reached out to other cell guards and/or friends stating that she was uncomfortable with the Appellant's text messages, it was more likely than not that she had not initiated the relationship.
>
> **D. MR's Submissions on the Allegations**
>
> [43] The MR first agreed that whether the allegations were established was a question of credibility and findings of fact (Material, page 1566). Since the Appellant admitted having inappropriate sexual contact with Ms. A in the workplace, the MR submitted that the question came down to whether the

> Appellant was in a position of authority over Ms. A and whether the sexual contact was unwanted.
>
> [44] The MR submitted that Ms. A's version of events was not plausible because there were inconsistencies in her statement and the behaviour about which she testified was unreasonable (Material, page 1572). In his view, Ms. A was unhappy when she met with her supervisor, and once she met with the investigators and their statements, she felt trapped in their objectionable prompting. The fact that she went to the Appellant for advice after being promoted to Team Lead and the fact that she did not want to damage his career is not consistent with her version that he was forcing her to perform oral sex on him. Ms. A openly admitted to have engaged in flirting and being flattered by the attention and even texted the Appellant that she would perform oral sex on him.
>
> [45] The MR then went through the Appellant's testimony in which he indicated that it was Ms. A, that pursued him and initiated the sexual contact and denied some of the events Ms. A testified to. The Appellant further testified that he never used force or threats to convince Ms. A to perform fellatio on him. Rather, it was always consensual (Material, page 1583). The incident of October 10, 2014, was also consensual and that is why the Appellant was shocked when he was arrested for sexual assault. The MR argues that Ms. A felt rejected that morning, she was embarrassed and that was the reason why she wanted to avoid the Appellant.

Decision on the Allegations

[21] In its oral decision the Board stated that, while the each of the alleged contraventions of the *Code of Conduct* contained a set of particulars, the CAR was not required to prove every particular in order to establish that Allegation. The Board noted that some particulars were included to provide context to the Allegations. In simple terms, the CAR was required to prove that the Appellant's conduct, as described in each Allegation, was discreditable or likely to bring discredit to the Force.

[22] The Board explained that deciding whether the Allegations were established was not dependent on finding that the Appellant was in a position of authority over Ms. A or that the sexual contact was non-consensual (Material, p 1594). Rather, these factors would demonstrate aggravating factors if they were proven by the CAR.

[23] The Board found that, while the Parties gave contradictory evidence, they agreed on sufficient facts to conclude that both allegations were established.

[24] With respect to Allegation 1, the Board found that the Appellant admitted that he willfully participated in a sexual act in the stairwell (Material, p 1600). The Board concluded that a reasonable person, aware of these facts, would find that a senior Non-Commissioned Officer (NCO) willfully involved in a sexual act, while in uniform in a public high-risk area of an RCMP detachment and with a municipal employee, was discreditable conduct.

[25] As for Allegation 2, which covered a broad timeframe, from November 1, 2013, to October 10, 2014, the Board found that both Parties admitted to sending sexually explicit text messages during this time frame (Material, p 1603). They also agreed that they participated in five incidents where Ms. A performed fellatio on the Appellant in the workplace. At this point the Board reiterated that it was the occurrence of these events, not the Appellant's consent or lack there of, that was relevant to establishing the Allegation itself (Appeal, p 1604):

> Again, whether these incidents were mutually consensual, or forced, or coerced, in my mind, is not relevant to whether or not the allegation is established. What is critical is that they occurred.

[26] The Board subsequently made findings on the respective credibility of the Parties and whether the Appellant was in a position of authority over Ms. A. The Board concluded that both versions of events, presented by Appellant and Ms. A respectively, were plausible (Material, p 1606). The Board noted that the witnesses were relatively consistent between their oral testimony and previous statements; however, they each conveyed inconsistencies as well. Ultimately, the Board determined that Ms. A's version of events was more plausible for reasons that I will address shortly.

[27] After considering the evidence, the Board found that the Appellant was in a position of authority over Ms. A and pointed out that the RCMP conflict of interest policy indicates that members can be in positions of authority over fellow municipal employees (Material, p 1607).

Evidence on conduct measures

[28] The ERC summarized the respective evidence submitted by each of the Parties and detailed the Appellant's testimony at the hearing (Report, paras 53-59):

> **A. CAR's Evidence**
>
> [53] The CAR provided the Appellant's prior discipline record, which consisted of a reprimand, three statements of two RCMP members and a municipal employee forming part of the original investigative package which related to the Appellant's conduct that led to the reprimand, and lastly, notes taken in relation to those incidents. I note that the MR did not object to the filing of this evidence while indicating that [s]he was taking no position (Material, page 1614).
>
> **B. MR's Evidence**
>
> [54] The MR filed a psychologist's report on behalf of the Appellant. The CAR objected to the admissibility of any expert opinion that is provided in the letter, but accepted the letter as evidence that the Appellant was seeing a psychologist. In the material provided beforehand, there was also a commendation for bravery for an incident involving a shooting, and numerous letters of support from work colleagues. The MR then called the Appellant to testify on his own behalf for the conduct measures phase.
>
> **The Appellant**
>
> [55] The Appellant first discussed his background and how he came to be an RMCP member; as well as giving an overview of his postings with the RCMP. He mentioned that he is separated from his spouse, and shares custody of his 11-year-old daughter (Material, page 1628). He stated that since his suspension, he has been seeing a psychologist on a regular basis to work and improve his behaviour. He has also taken numerous online university and other courses on police leadership, general policing and private investigations.
>
> [56] The Appellant testified that he has been diagnosed with post-traumatic stress disorder (PTSD). He indicated that he struggles with sleep, anxiety, irritability, listlessness, and suffers from flashbacks (Material, page 1631).
>
> [57] Lastly, the Appellant expressed his remorse and regret for his conduct. He stated that it was a complete lack of leadership and judgment on his part. He was adamant that he would not repeat his behaviour and he has taken steps to better himself. He asked for a reasonable, measured sanction. He apologized to the Board and the RCMP for his behaviour.
>
> [58] On cross-examination, the Appellant acknowledged that he received a reprimand for doing CPIC searches on his ex-girlfriend's boyfriend. He

> denied having had a conversation with his line officer about his excessive texting of another female at the detachment, but acknowledged that he sent an apology to another supervisor regarding this situation (Material, page 1643). He also acknowledged that, as the Board found, he was in a position of authority over Ms. A at the time of the events that form the basis of the allegations.
>
> [59] On redirect, the Appellant clarified that he had sent the apology to a superior indicating that he was apologizing if his playful and jovial behaviour had made someone uncomfortable. He further explained that the reprimand was given as a result of CPIC queries that he had done because his ex-girlfriend had indicated that her boyfriend may be involved with the Hell's Angels. The Appellant indicated that he now understood that he should have delegated this task to another member, given his romantic relationship with her.

Submissions on conduct measures

CAR submission

[29] The CAR requested that the Appellant be ordered to resign within 14 days or otherwise be dismissed. He requested that the investigation report drafted in response to the Appellant's historical CPIC searches be introduced as evidence. This material was disclosed in a pre-hearing conference. The CAR noted that, as the Appellant had discussed the circumstances surrounding the CPIC search he had opened the door, so to speak, on having the investigation filed as evidence. The MR took no position on entering the report as evidence (Material, p 1652). The Board accepted the Report into evidence in response to the Appellant's previous assertion that the context in which he received the reprimand was important.

[30] The CAR maintained that the aggravating factors in this case warranted dismissal, regardless of the Appellant's good performance or awards received throughout his career (Material, p 1656). Moreover, in light of the Force's controversy related to sexual harassment in the workplace, the CAR contended that a strong message had to be sent that such sexual misconduct would not be tolerated. The CAR then listed the aggravating factors present in the Appellant's case as summarized by the ERC (Report, para 61):

- He was a senior NCO;

- His behaviour was not a one-time lapse in judgment, but spanned over several months;
- There were negative effects on Ms. A;
- There were negative effects on the relationship between the RCMP and the city;
- The misconduct occurred in a high-risk area;
- The Appellant was on duty and in uniform when the events occurred;
- He has previous discipline and an informal documented history of excessive text messaging another female employee.

[31] Finally, the Appellant argued that, while the Appellant did provide a statement, it should not receive the same weight as a statement from a member that cooperated throughout the investigation. The CAR did not suggest that the Appellant's decision to consult with counsel was an aggravating factor, merely that it could not serve as a mitigating factor (Material, p 1662).

MR submission

[32] The MR acknowledged that dismissal was within the range of potential conduct measures; however, he argued that a measure short of dismissal was warranted (Material, p 1665). He recognized that recent RCMP conduct decisions have taken a strong stance on inappropriate sexual behaviour. In spite of this strong stance, he noted that not all cases resulted in dismissal, even where significant aggravating factors were present. The MR then referenced cases where forfeiture of pay was ordered in lieu of dismissal.

[33] The MR listed potential mitigating factors, as summarized by the ERC (Report, para 64):

- The length of the delay, 20 months, to adjudicate this matter and the prejudice suffered by the Appellant;
- The Appellant accepted responsibility for his actions and cooperated with the investigation;

- He apologized and was remorseful;
- He is a good performer as evidenced by performance evaluations filed and commendations;
- The Appellant was diagnosed with PTSD and continues to see his psychologist,
- He made efforts to improve himself through courses; and
- He has the support of colleagues.

[34] The MR acknowledged that the conduct measure should fall on the high end of the scale, based on both the Appellant's conduct and the previous discipline where he received a reprimand. The MR noted that the intention of the conduct system is rehabilitation and correction; it is not punitive. The MR argued that a high financial penalty, demotion, and/or transfer could fulfill the need for general deterrence in the circumstances (Material, p 1679).

CAR reply

[35] In response, the CAR argued that the delay experienced in this case did not rise to the level that it should serve as a mitigating factor in the face of dismissal. He submitted that the delay was not unusual and was explained by the change in counsel, change of Board, and other circumstances previously discussed during the preliminary motion.

Decision on conduct measures

[36] On the last night of the conduct hearing the Board rendered an oral decision (Material, p 1684). The Board found that the Appellant should be ordered to resign within 14 days or otherwise be dismissed. The Board first considered the available conduct measures noted in the Conduct Measures Guide (CMG) relating to the two relevant categories of misconduct, namely, sexual activity while on duty and sexual activity with a subordinate. For the latter category, both the normal and aggravated range included dismissal as a potential measure. The Board concluded that it was at this stage of the conduct proceedings that a determination on the nature of the relationship, and whether the Appellant was in a position of authority over Ms. A, were determinative.

[37] While the Board found that both the Appellant and Ms. A provided accounts that were firm, relatively consistent, and plausible, it held that Ms. A's version of events was more credible and plausible than the Appellant's.

[38] Even so, the Board was alive to inconsistences in both accounts. The Board acknowledged that there was no corroborating evidence to support the Appellant's claim that Ms. A instigated the sexual activities in question. It also noted that facets of the Appellant's testimony did not make sense when juxtaposed against the rest of the evidence considered. While the Board took issue with the manner in which Ms. A was induced to provide an initial statement to investigators, there was no indicia that she had embellished events (Material, p 1693). Ms. A's statement, as well as other evidence in the form of text messages sent to Ms. A and the Appellant's own testimony, confirmed the Appellant's demanding and imposing character.

[39] According to the Board, the evidence demonstrates that Ms. A willfully participated in the beginning of the relationship, but her behaviour changed as the Appellant became increasingly aggressive over time. The Board concluded that, while the relationship began as a consensual one, this ceased to be the case over time (Material, p 1695). The Board found that the Appellant was in a position of authority over Ms. A based on the RCMP conflict of interest policy and the evidence provided by witnesses.

[40] RCMP conflict of interest policy defines a person in authority as one who has an actual or perceived ability, authority, responsibility, whether full-time or temporary, to direct, control, evaluate, or influence the workplace or career of an employee. In the end, the Board found that Ms. A felt compelled to perform fellatio on the Appellant due, in part, to the authority derived from his position as cell block sergeant.

[41] The Board then determined the following mitigating factors were present, as summarized by the ERC (Report, para 70):

- The Appellant was a good performer;
- The Appellant made efforts at self-improvement;

- He apologized for his actions, however, did not apologize to Ms. A;
- The Appellant cooperated with the investigation.

[42] As part of its deliberation on mitigating factors, the Board addressed the delay in proceedings. The Board found that the lengthy delay could be explained by the change in counsel; the change in conduct board; and, the fact that the Allegations fell within the transitionary period from the old discipline regime to the new conduct regime. The Board concluded that such delays were expected in this period of transition. Accordingly, the Board concluded that the delay was not a mitigating factor in this case.

[43] The Board then identified the aggravating factors, as summarized by the ERC (Report, para 72):

- The Appellant's conduct came at a time when the Force was under scrutiny for allegations of sexual harassment and it tarnished the Force's reputation;
- The Appellant's conduct adversely impacted Ms. A;
- The relationship between the city and the Force cannot help but be negatively impacted by the situation;
- The trust of Canadians the RCMP serves has been impacted;
- The Appellant has a history of prior discipline for similar conduct.

[44] In the end, the Board ordered the Appellant to resign within 14 days or be dismissed. The written decision was served on the Appellant on December 27, 2018.

APPEAL

[45] The Appellant filed his Statement of Appeal on January 9, 2019, raising the following grounds of appeal, as summarized by the ERC (Report, para 75):

1. The Board failed to provide any remedy for the unreasonable delay;

2. the Board erred in determining that it did not need to make a finding on particulars of the Allegations (i.e., the position of authority, and the nature of the sexual contact);

3. the Board erred in its assessment of the credibility of Ms. A; and

4. the Board erred in relying on evidence that was not properly before it.

ANALYSIS

Preliminary issues

Standing and timeliness

[46] I am satisfied that there are no issues with respect to standing or timeliness.

Supporting documents submitted on appeal

[47] As part of his appeal submission, the CAR requested permission to file over 100 pages of supporting documentation. The Appellant's MR objected to this request, noting that she had drafted her submission so as to not surpass the 100-page limit as outlined in section 6.1.1.2 of *National Guidebook – Appeals Procedures*. An Adjudicator denied the CAR's request to surpass the page limit but nevertheless permitted the Parties to each file a book of authorities that would not count toward the limit on "supporting documents". The Adjudicator noted that this would be a "professional courtesy", as it would aid all parties in reading cited case law (Appeal, p 1510).

[48] The *National Guidebook-Appeals Procedure* delineates the requirements to be followed with respect to supplementing written submissions, at section 6.1.1:

> If a party supplements his or her written submission with supporting documentation, the party will:
>
> - refer to the supporting document in his or her submission;
> - append only relevant sections of the supporting document; and

> • provide the document's reference, which includes the title, author, section or page number (if applicable) and date, or web link.

[49] Moreover, the *CSO (Grievances and Appeals)* notes that the term "document" has the same meaning as provided for in section 40.1 of the *RCMP Act*. Section 40.1 defines "document" as 'any medium on which is recorded or marked anything that is capable of being read or understood by an individual or a computer system or other device". I agree with the ERC that this includes case law (Report, para 87).

[50] The ERC stated that the question of whether to allow the book of authorities is "a matter of fairness and consistency". The ERC recognized that parties in other cases were not provided with this same professional courtesy, and were required to limit their supporting documentation to 100 pages, including cited case law. Accordingly, the ERC determined that it would be unfair to consider the extraneous documents (Report, para 88).

[51] While I agree with the ERC that there is no expectation or requirement for parties to supplement their appeal submissions with an extraneous book of authorities, I find it problematic to say that I will not consider the book of authorities in this case. The book is merely a compilation of those cases cited by the Respondent in his appeal response submissions. As such, I am bound to consider those cases by whatever means I find most expedient.

[52] In short, I find that the Respondent should not have been permitted to file a separate book of authorities. Nevertheless, the book of authorities is in the Record and in my deliberations I have considered the cases relied on by the Parties.

Considerations on appeal

[53] The appeal process in conduct matters does not afford the appellant the opportunity to have their case reassessed *de novo* before a new decision maker. It is an opportunity to challenge a decision already made. In considering the appeal of a conduct decision, the adjudicator's role is governed by subsection 33(1) of the *CSO (Grievances and Appeals):*

> 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.

[54] *Administration Manual* (*AM*), Chapter II.3 "Grievances and Appeals", section 5.6.2, states that the adjudicator must consider the following documents in their decision-making process:

> 5. 6. 2. The adjudicator will consider the appeal form, the written decision being appealed, material relied upon and provided by the decision maker, submissions or other information submitted by the parties, and in those instances where an appeal was referred to the [ERC], the [ERC]'s report regarding the appeal.

[55] As I have noted, the Appellant indicated in his Statement of Appeal that the Board's decision was reached in violation of the applicable principles of procedural fairness, is based on errors of law, and is clearly unreasonable.

The Board failed to provide any remedy for the unreasonable delay

Standard of review

[56] The Appellant raises four primary grounds of appeal. In my view, three of the four grounds relate to the application of legal principles to the facts of this case. Questions of mixed fact and law attract significant deference under the clearly unreasonable standard denoted in subsection 33(1) of the *CSO (Grievances and Appeals).*

[57] The standard of review in consideration of unreasonable delays in administrative decisions was recently revisited by the Supreme Court of Canada (SCC) in *Law Society of Saskatchewan v Abrametz,* 2022 SCC 29 (*Abrametz*). In that case, the SCC confirmed that (*Abrametz,* headnote):

> [T]he standard of review is correctness for questions of law and palpable and overriding error for questions of fact and of mixed fact and law. Whether there has been an abuse of process is a question of law; thus, the applicable standard of review is correctness.

[58] Here, the Board confirmed that the delay constituted an abuse of process, but refused to grant a specific remedy in response to that abuse of process. It is this failure to grant a remedy that the Appellant appeals, not the issue of abuse of process, and so it attracts a higher differential standard otherwise referred to as clearly unreasonable in the *CSO (Grievances and Appeals)*.

[59] In *Kalkat v Canada (Attorney General)*, 2017 FC 794, at paragraph 62, the Federal Court defined the term "clearly unreasonable":

> [62] Therefore, given the express language that the decision must be "clearly unreasonable" and the French translation of' the term, I conclude that the Delegate did not err. Interpreting the "clearly unreasonable" standard as being equivalent to the "patently unreasonable" standard is reasonable in the context of the legislative and policy scheme. This means that the Delegate must defer to a finding of the Conduct Authority where he finds the evidence merely to be insufficient to support the finding (*British Columbia Workers Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25).

[60] In *Smith v Canada (Attorney General)*, 2019 FC 770, at paragraph 38, a similar finding was considered and adopted:

> The Adjudicator undertook an extensive analysis in order to arrive at the conclusion that the standard of patent unreasonableness applies to the Conduct Authority Decision. This analysis included a review of relevant case law, the meaning of the word "clearly", and the French text of subsection 33(1). The Adjudicator's conclusion that the applicable standard of review was patent unreasonableness is justifiable, transparent, and intelligible. The Court agrees that this was a reasonable conclusion.

[61] More recently, the Federal Court of Appeal reached the same conclusion in the ensuing *Smith* appeal, 2021 FCA 73.

[62] In *Canada (Director of Investigation and Research) v Southam Inc*, [1997] 1 SCR 748, at paragraph 57, the SCC explained that a decision is patently unreasonable if the "defect is apparent on the face of the tribunal's reasons", in other words, it is "openly, evidently, clearly" wrong. Later, the Court stated in *Law Society of New Brunswick v Ryan*, 2003 SCC 20, at paragraph 52, that a patently unreasonable decision is one that is "clearly irrational", "evidently not in accordance with reason", or "so flawed that no amount of curial deference can justify letting it stand."

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

[64] As a result, questions of fact or mixed law and fact are entitled to significant deference and only the presence of a manifest and determinative error would lead to a conclusion that the decision made by the Board is clearly unreasonable. A finding of fact based on merely *insufficient* evidence is not clearly unreasonable (see, for example, *Toronto Board of Education v OSSTF*, [1997] 1 SCR 487, para 44; *Speckling v British Columbia (Workers' Compensation Board)*, 2005 BCCA 80, para 37).

[65] In sum, I owe significant deterrence to the Board's conclusions as I consider three of the grounds of appeal raised by the Appellant, including whether the Board erred by refusing to provide a remedy for the inordinate delay. When assessing whether the Board's findings were clearly unreasonable, I must determine whether the Board committed a reviewable error in its application of the legal principles to the underlying facts.

Appellant submission

[66] The Appellant submits that the Board should have found a *Charter* breach given that the Board characterized the delay as unreasonable and as an abuse of process. The Appellant argues that the Board erred when it did not provide a remedy for this *Charter* "breach" (Appeal, p 366). While the Appellant is seeking a remedy, I note that he is no longer arguing that a stay of proceedings should have been granted.

Respondent submission

[67] The Respondent emphasizes that the Initial Board simply indicated that the delay *may* be considered later in the process. The MR chose to raise the delay to be considered as a mitigating factor, which the Board refused to do. The Respondent argues that the Initial Board left open the issue of remedy and the presiding Board properly exercised its discretion in determining that the delay did not constitute a mitigating factor, particularly not one that warranted a reduction from dismissal to a financial penalty.

Findings

[68] I agree with the ERC that this ground of appeal is without merit (Report, para 91). To begin, the Appellant erred when he classified the inordinate delay as a *Charter* breach. The Initial Board correctly characterized the delay as an abuse of process, not a *Charter* breach. As noted in *Blencoe*, a delay may be unreasonable without engaging the section 7 right to life, liberty and security of the person, particularly in an administrative setting (*Blencoe*, para 46). In *Blencoe*, the SCC stated that, in order to trigger the operation of section 7, the decision maker must first determine that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that the deprivation is contrary to the principles of fundamental justice. No such breach of section 7 was argued before the Board. Moreover, the Appellant recognized in his original submissions that paragraph 11(b) of the *Charter* is only applicable in "the context of the criminal justice system" (Material, p 2637). Accordingly, it is unclear what form of *Charter* breach the Appellant is alluding to; regardless, the characterization is incorrect.

[69] Since the Appellant has not explicitly raised as a ground of appeal that the Initial Board erred by not characterizing the delay as a *Charter* breach, I find this reference was likely made in error.

[70] Secondly, the Appellant has not demonstrated how the respective Boards erred by not issuing a remedy to the Appellant in response to the delay. While the Initial Board found that the Appellant suffered significant prejudice, it did not find that the delay rose to the level that would justify a stay of proceedings. Instead, it proposed that the delay *may* be remedied later in proceedings. The subsequent Board was in no way bound by this speculative suggestion.

[71] In response to the Initial Board's determination, the Appellant chose to subsequently argue that the delay constituted a mitigating factor. I note that in *Abrametz* the SCC stated, in the context of the revocation of a license to practice law (para 98):

> To convert a presumptive licence revocation into a lesser penalty requires a significant abuse of process, one at the high end of the spectrum. Moreover, under no circumstances should the adjustment of the penalty undermine the purposes of the disciplinary process, notably the protection of the public and

> its confidence in the administration of justice. For these reasons, a remedy that substitutes a licence revocation for a lesser penalty will generally be as difficult to receive as a stay. Both may equally undermine a professional body's responsibility to regulate the profession.
>
> [Emphasis added.]

[72] While the SCC decision in *Abrametz* was rendered after the Initial Board's decision, it does not change the regime for addressing administrative delays. Instead, it clarifies the subject, 20 years after *Blencoe*. Accordingly, I find that the SCC guidance on this matter informs my analysis of the respective Board decisions. If the inordinate delay amounted to an abuse of process, but was not so prejudicial as to warrant a stay, then neither would the delay warrant classification as a mitigating factor sufficient to justify reducing the Appellant's dismissal to a financial penalty.

[73] I therefore dismiss this ground of appeal.

The Board erred in determining that it did not need to make a finding on some particulars of the Allegations

Appellant submission

[74] The Appellant argues that the Board erred in law when it found that the Allegations were established without requiring all particulars of the Allegations to be established. While the Appellant characterizes this argument as an error of law, I agree with the ERC that this ground of appeal is in fact a question of mixed fact and law (Report, para 94). The Appellant states that (Appeal, p 356):

> [T]he Board ultimately opined that it was *not necessary* to find that the [Appellant] was "in a position of authority over Ms. A", nor that the [Appellant] "initiated and had unwanted sexual contact with her", to find that the [Appellant] engaged in discreditable conduct – thereby neglecting to require proof of the particulars.
>
> [Emphasis in original.]

[75] The Appellant insists it was crucial for the CAR to prove the particulars of the Allegations as they were drafted. As support, he contrasts the terminology of the two Allegations, noting that Allegation 1 alleged "unwanted sexual contact" while Allegation 2 alleged "an inappropriate

relationship of flirtatious and sexual nature with [Ms. A]". The Appellant cites the Federal Court decision in *Gill v Canada (Attorney General)*, 2006 FC 1106 (*Gill*), as support for the premise that all the particulars of an allegation must be proven in order to establish misconduct in the first instance, rather than being treated as aggravating factors that inform the conduct measures subsequent to the establishment of those allegations.

Respondent submission

[76] The Respondent argues subsection 43(4) of the *RCMP Act* mandates that (Appeal, p 466):

> [T]he statement of particulars contained in the notice is to contain sufficient details, including, if practicable, the place and date of each contravention alleged in the notice, to enable the member who is served with the notice to identify each contravention in order that the member may prepare a response and direct it to the occasion and events indicated in the notice.

[77] The Respondent argues that, based on the ERC findings in C-045, not all particulars must be proven in a given allegation. Rather, some particulars may serve to contextualise the acts or omissions at issue. Moreover, the Respondent contends that *Gill* is distinguishable. In *Gill*, the ERC, Federal Court, and Federal Court of Appeal all ruled that the allegation had not been established because the misconduct found by the adjudication board fell outside the four corners of the allegations listed in the Notice of Hearing. Here, the established particulars are listed in the Notice of Hearing.

[78] The Respondent adds that the Allegations were drafted such that the Appellant knew the case to meet. The Appellant had the time and opportunity to prepare his defense, as demonstrated by the fact that his MR was able to present documentary and witness evidence in response to the Allegations.

Findings

[79] I agree with the ERC that this ground of appeal cannot succeed (Report, para 99). In short, the Appellant is misapplying *Gill*, where the Federal Court of Appeal concluded that an adjudicator cannot find misconduct that was not described in the particulars because the subject member must receive adequate notice of the allegations they face. *Gill* does not affirm the notion that an

allegation must be established "as drafted" or that each enumerated particular must be proven. Moreover, *Gill* reaffirmed the principle set out in *Re Golomb and College of Physicians and Surgeons of Ontario* (1976), 12 OR (2d) 73 (ON Div Crt) (*Golomb)* regarding adequate notice. In *Golomb*, Galligan J. explained:

> In cases of this type, no one would suggest that an allegation of professional misconduct need have that degree of precision that is required in a criminal prosecution. But the charge must allege conduct which if proved could amount to professional misconduct and it must give the person charged reasonable notice of the allegations that are made against him so that he may fully and adequately defend himself.
>
> […]
>
> It follows from the requirement that the charge must be particularized to that extent that an accused must not be tried on a charge of which he has not been notified. It also follows that evidence ought to be confined to the charge against him. Evidence relating to other suggestions of misconduct should not be presented because it could have a very serious prejudicial effect upon the tribunal and it is evidence relating to conduct which he is not prepared to defend.
>
> I think that it is particularly important to remember these fundamental principles when considering a charge as broad as professional misconduct. Obviously, there can be a great range in the degree of seriousness of conduct which could amount to professional misconduct. And there can be a wide range in what would be the appropriate penalty depending upon the seriousness of the allegations made against a person accused of professional misconduct. It is therefore particularly important for a person accused of professional misconduct to know with reasonable certainty what conduct of his is alleged to amount to professional misconduct.

[80] In other words, the accused must receive "reasonable notice" of the case against them. Here, the particulars went beyond the Board's findings, not the other way around.

[81] In *Legal Aspects of Policing*, Paul Ceyssens states that the second principle of sufficiency of notice requires that, if particulars were removed, the allegation would still disclose a cause of action (Carswell, (loose-leaf, 2000), at pp 5-182). I note that the Board found, based on the Appellant's admission, that he participated in the inappropriate relationship described in both Allegations, there was sufficient evidence to establish discreditable conduct.

[82] Not surprisingly, the ERC has consistently recommended, to Commissioner agreement, that not all particulars must be established to make out an allegation (see ERC 2900-08-006 (D-123) (Commissioner, para 133); ERC C-2014-001 (C-006); ERC C-2019-026 (C-048)).

[83] In the result, the Board found the two Allegations established based on the following admissions, as summarized by the ERC (Report, para 103):

- [F]or Allegation 1-having sexual contact in the stairwell of the detachment (the Board had found that whether the contact was unwanted was irrelevant as the Appellant had admitted to having that contact); and

- [F]or Allegation 2-behaving inappropriately towards Ms. A in the workplace.

The Board erred in its assessment of the credibility of Ms. A

Appellant submission

[84] The Appellant disputes the Board's assessment of Ms. A's credibility. The Appellant argues that the following observations contradict the Board's decision to prefer Ms. A's version of events, as summarized by the ERC (Report, para 104):

- It was "troubling" that the Board found Ms. A more credible while stating that she was, in her interview with investigators, simply agreeing with what she was told;

- Although the Board found her more credible, it found the manner in which Ms. A was interviewed by investigators troubling;

- Ms. A could not, in her interview, remember details of the incident of October 10, like whether or not she had her cellular phone in hand;

- While the Board found that Ms. A told the Appellant that they should not engage in a physical relationship anymore, her interview shows that she never actually told him no;

- The Board did not make much of the fact that Ms. A refused to provide her cellular phone;

- Regarding Ms. A's text message saying, "Am I ever gonna be allowed to have fun?" addressed by the MR at the hearing, the Board found that it could not accept it as showing reciprocity without further context and evidence.

- Ms. A's interview with investigators did not support a lack of self-confidence;

- The fact that the investigator appears to be trying to bring out evidence was troubling; and

- The Board's finding that Ms. A was afraid of the Appellant and had no self-confidence is not supported by the evidence.

[85] The MR insists that these perceived errors trigger the *Morrissey* Principle. This principle was acknowledged in *R v Pearson*, 2012 ABCA 239, at paragraph 61, where the Alberta Court of Appeal noted that:

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation; and accordingly constitutes an error of law (*R. v Morrissey*, 1995 CanLII 3498 (ON CA)).

Respondent submission

[86] The Respondent argues that a credibility assessment must be based on the evidence reviewed as a whole, and adds, as summarized by the ERC (Report, para 106):

- The Board conceded that Ms. A's text messages were sexually charged in the beginning; however this matter was irrelevant because of what happened at the time of the incident.

- Although the Appellant argues that Ms. A's interview did not reveal a lack in self-confidence, the Board highlighted several factors from her live testimony to support its finding.

- Although the Appellant states that the Board found that Ms. A said no to the Appellant, the Respondent pointed out that the Board did not actually make that finding; rather, it found that she "verbally resisted".

[87] Moreover, the Respondent argues that while the Appellant criticizes Ms. A's interview with investigators, the MR nevertheless cross-examined Ms. A at the hearing and addressed the alleged inconsistencies in her statements. The Board in turn considered these points. The MR also had the opportunity to oppose the admissibility of Ms. A's statements in response to the investigator's conduct, but opted not to. Finally, the Respondent suggests that the *Morrissey* Principle is not applicable in this matter because it applies to circumstances where a jury has misapprehended evidence in a criminal trial and the reviewing court must assess the impact of the misapprehension on the trial. The Respondent argues that the Board did not misapprehend any of the evidence before it.

Findings

[88] I agree with the ERC that this ground of appeal cannot succeed (Report, para 108). The Appellant is asking me to re-weigh the evidence that was before the Board in order to render my own findings. Findings of credibility are owed considerable deference (*McDougall*, para 73). I am not permitted to substitute my own findings but for evidence that the Board made clearly wrong findings that are unsupported by evidence.

[89] As noted in *McDougall*, where a trial judge demonstrates that they are alive to the inconsistencies in witness evidence, but nevertheless concludes that the witness was credible, in the absence of a palpable and overriding error there is no basis to interfere with the decision on appeal. Moreover, in *R v Dinardo*, [2008] 1 SCR 788, the SCC noted, at paragraph 26, "[r]arely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal".

[90] In each of the examples provided by the Appellant, the Board had acknowledged the associated issues or inconsistencies. The Board recognized that Ms. A's position and recollections

were not "without blemish"; irrespective of that observation, it still found her version of events to be more credible than the Appellant's, which it characterized as self-serving (Material, p 190):

> I note that, throughout, the Subject Member chose his words very carefully. He tended to downplay his involvement in matters that were not overly favourable to him. The account of his involvement in both the prior disciplinary matters and the complaint of excessive text messaging with another Cell Guard are clear examples of this. Although there are discrepancies between what they provided in their statements and their oral testimony, these inconsistencies are either relatively minor in nature, relate to collateral matters or can be reasonably explained when considered with other evidence.

[91] The Appellant has not raised an error sufficient to permit a finding that the Board's decision is clearly unreasonable. For example, while the Appellant argues that there is no evidence that Ms. A lacked self-confidence, he testified that she was "self-denigrating" (Appeal, p 19; Material, p 1445). The Board also relied on Ms. A's testimony at the hearing to make this finding, where she frequently referred to her weight and her lack of coordination (Appeal, p 79; Material, pp 1263, 1270, 1274, 1296, 1328, 1355, 1691).

[92] The Appellant submits that Ms. A never actually told the Appellant "no", but Ms. A did testify that she told the Appellant she wanted to end their relationship because she had since begun a committed relationship with someone else (Material, p 1261). I agree with the ERC that this is consistent with saying "no" to the Appellant. Finally, I agree with the ERC that the issue of whether Ms. A had her cellular phone in hand, when she exited the stairwell on October 10, 2014, has no bearing on her overall credibility (Report, para 111). In summary, the Board was alive to issues with Ms. A's testimony but nevertheless found her more credible than the Appellant. Based on *McDougall*, the Board sufficiently justified its findings with respect to reliability and credibility. This ground of appeal is dismissed.

The Board erred in relying on evidence that was not properly before it

[93] When an appellant claims that a board's decision is in breach of the applicable principles of procedural fairness, they must demonstrate that the board did not follow adequate procedure in

reaching the impugned decision. The appellant must establish that one of the following rights have been breached:

- The right to a decision from the person who hears the case;
- The right to know what matter will be decided and the right to be given a fair opportunity to state their case on this matter;
- The right to a decision from an unbiased decision maker;
- The right to reasons for the decision.

Standard of review

[94] On appeal, procedural fairness is assessed with the strict standard of review of correctness as explained by the Federal Court in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321, at paragraph 48:

> On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond: see *Canadian Pacific Railway Company v Canada Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121 (Rennie, JA) ("CPR"), esp. at paras 49, 54 and 56; *Baker*, at para 28. In *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).

[95] The Appellant raises two distinct arguments with respect to matters of procedural fairness.

Appellant submission

[96] The Appellant argues that the Board erred when it found that the Appellant's conduct negatively impacted the relationship between the RCMP and the city. He also submits that the Board erred by relying on a previous investigation report; written statements of RCMP members;

and, statements from two other individuals, all involving other matters. The evidence is related to two incidents, as summarized by the ERC (Report, para 112):

> [O]ne related to excessive texting another female cell guard (dealt with informally) and one related to misuse of police databases and accusing another female co-worker of having sexual relations with two other RCMP members after their relationship ended (investigated and for which the Appellant received a reprimand).

[97] The Appellant argues that these statements were not properly admitted, nor were the individuals who made these statements cross-examined. Accordingly, he maintains that the inclusion of this evidence represents a breach of procedural fairness.

Respondent submission

[98] The Respondent emphasizes that the Board is a specialized administrative tribunal that is permitted to rely on its experience to draw logical inference, including regarding relationships between partner agencies. As for the issue of prior discipline and associated evidence, the Respondent argues that those materials were placed before the Board in response to the Appellant's request to address the "first disciplinary incident". The Appellant testified to the circumstances leading to the noted incidents. The MR indicated that she had no position regarding the admission of the documents. Accordingly, the Board did not err in accepting the evidence.

Findings

i) Impact on the relationship with the city

[99] I agree with the ERC that the Board erred by determining that the Appellant's behavior negatively impacted the relationship with the city without pointing to any supporting evidence. However, I also agree with the ERC that, in light of the other multiple aggravating factors that were properly relied upon, the error is not so egregious as to justify allowing this appeal (Report, para 115). These other aggravating factors include the Appellant's prior discipline record for incidents with some similarity; the impact the Appellant, who was in a position of authority, had on Ms. A; and, the fact that the RCMP is making a concerted effort to eliminate sexual harassment

in the workplace. Collectively, these factors are sufficient to justify the Board's conduct measure, even without a finding on the relationship between the RCMP and the city.

[100] In its decision the Board noted that (Material, p 206):

> Although there is no clear evidence in the Record to show how or if the relationship between the RCMP and its contracting partner, the [city], was adversely affected by the Subject Member's actions, I find it hard to believe that it was not.
>
> [Emphasis added.]

[101] Moreover, the CAR did not present evidence on this issue other than to assert that it should constitute an aggravating factor.

[102] A decision maker is permitted to rely on knowledge or expertise which an agency may acquire as a result of its specialized knowledge in a certain area; however, they are not permitted to rely on disputed facts that do not fall within the definitions of official or judicial notice. In other words, a decision maker can use their personal knowledge and expertise to assess evidence, but they cannot use their prior knowledge to introduce new evidence into the proceedings (see *Alassouli v Canada (Minister of Citizenship and Immigration)*, 2011 FC 998, para 35; *Ville de Montréal c Masdev,* 2015 QCCO 376).

[103] I may agree with the Board that an instance of inappropriate sexual behaviour between a senior RCMP officer and a city employee, in a municipal building, would *inevitably* negatively impact the relationship between the RCMP and the city. Nevertheless, it would be procedurally unfair to rely on an aggravating factor which the Board itself noted is supported by "no clear evidence". Consequently, I find the Board erred in classifying this observation as an aggravating factor without some modicum of evidence to support such a conclusion. Just the same, as I have explained, in my view, the Board's error does not fatally undermine its decision. As noted in *Laroche v Canada (Attorney General),* 2013 FC 797, at paragraph 62, "[w]e do not live in a perfect world, and cannot expect the reasons of a decision to be perfect either." In *Vavilov,* at paragraph 100, the SCC recognized this reality by confirming that, "[a]ny alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper

for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep."

ii) Similar fact evidence

[104] Issues of procedural fairness must be raised at the first opportunity *(Zündel v Canada (Canadian Human Rights Commission)*, [2000] 4 FC 255 (FCA); *Kamara v Canada (Citizenship and Immigration)*, 2007 FC 448, at para 26). The Appellant had a positive obligation to dispute the inclusion of the report and/or statements at first instance, or to request that the witnesses appear before the Board for cross-examination. The Appellant did neither at the hearing and so he is now precluded from raising these issues on appeal.

DISPOSITION

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

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

Steven Dunn, Adjudicator Date